CHARITY LAW
ASSOCIATION

A SEPARATE LEGAL JURISDICTION FOR WALES
RESPONSE TO THE WELSH GOVERNMENT'S CONSULTATION DOCUMENT
NO. WG-15109

1. Introduction

1.1. The Charity Law Association (CLA) was established in 1992 with the aim of enabling those who advise on, or use, charity law, to meet together to exchange ideas and intelligence and to use their experience and expertise for the benefit of the charity sector. It currently has over 900 members, including many of the country's largest charities and most leading charity lawyers.

1.2. A full CLA Working Party was not established in relation this consultation but the CLA Executive Committee authorised the following members of the Executive Committee to prepare this response:-

Ann Phillips – Stone King LLP (Chair)
Nicola Evans – Bircham Dyson Bell LLP
Simon Mackintosh - Turcan Connell

1.3. We have also been assisted by comments sent to us by CLA member Christopher Williams of Morgan Cole LLP and his colleague Gareth Howells.

1.4. Those contributing to this response have done so in a personal capacity and the views expressed in the response should not be taken to be the formal opinion of the organisations they represent. Similarly, the views in this paper should not be seen as constituting the opinion of CLA members as a whole.

2. Scope of the response

2.1. The focus for this response to the consultation document is the implications of the issues raised for charity law and the operation of charities.

2.2. Many of the consultation questions relate to issues of constitutional /administrative law relating to the judiciary, the legal profession and the operation of the courts and tribunals system, not specific to the charity sector. We have not therefore responded to the individual consultation questions but are offering a general view in relation to charity law and charity operation, focussing on the consequences of establishing a separate legal jurisdiction. However, as a preliminary matter, we note the lack of clarity that exists as to the features of a separate legal jurisdiction for Wales. It will be appreciated that this makes difficult a full assessment of the consequences and the potential advantages and disadvantages. It is also not clear to us what difficulty in the current jurisdiction the creation of a separate Welsh jurisdiction will address.

2.3. Our observations cover the implications for charities, charity law and regulation of a new legal jurisdiction for Wales through a separate system of

courts and tribunals with exclusive competence in relation to the law in Wales. Before dealing with these issues we set out some information as to the charity sector in Wales by way of background.

3. The charity sector in Wales

3.1. The Charity Commission for England and Wales ("Charity Commission") published information as to the charity sector in Wales, *Snapshot of Charities in Wales*, January 2009, which is available on its website. For the purposes of the Snapshot, the Charity Commission treated any charity with a correspondent address in Wales as a "charity in Wales". The data was collected over the period July to December 2008, therefore before some exempt and excepted charities were added to the register. At that date there were approximately 190,000 registered charities in England and Wales, of which 5% were charities in Wales (9,006 main charities and 760 subsidiary charities). Of these approximately 90% worked exclusively in Wales and only 7% worked in England and Wales. (Many charities with a correspondent address in England also operate in Wales - we do not however have statistics available in relation to those organisations.) The number of small charities in Wales, those where income is under £1 million, was larger than the proportion of small charities across the Register as a whole. Wales also had a smaller proportion of larger charities i.e. those with incomes over £5 million than the Register as a whole.

3.2. There are currently approximately 162,000 charities on the Charity Commission register. We do not know how many of those are "charities in Wales" but we are not aware of any factors that would suggest that the proportion of charities in Wales would have changed. We therefore assume there are currently approximately 8,100 charities in Wales.

4. Implications of a new legal jurisdiction for Wales for charity law and regulation and for charities operating across UK jurisdictions

4.1. Charity law is currently not devolved, although it is not a specified exception. Our understanding is that there is currently no distinct body of charity law in Wales.

4.2. We assume that if there is to be a separate Welsh jurisdiction supported by a separate court system, the control exercised by the High Court in relation to relevant charities would be exercised by the High Court in the new Welsh jurisdiction. The consultation document raises the implications for the development of the law, both by the courts and by exercise of additional devolved powers to the Assembly.

4.3. Charity law has its foundations in the law of trusts and a complex body of case law has developed over several centuries. In some cases, for example the cy-pres jurisdiction, the case law has been supplemented by statute. As charity law is not devolved, this raises the unwelcome prospect of the same statutory provisions and case law being interpreted and applied differently in England and Wales between the two jurisdictions. There is also a concern that the expertise in specialist charity law matters that exists in the Courts and Tribunals Service should continue to be available across both England and Wales.

4.4. We consider that divergence in charity law in Wales and England would be undesirable. Charity law is a developed and complex area of law. Any divergence would add further complexity and this is particularly unhelpful in

a sector which relies very heavily on voluntary involvement. Divergence in the law applying to charities operating in the same charitable area of activity is also undesirable and creates confusion as charities frequently work across the national borders in England and Wales. We also note and agree the conclusion and recommendation in the Calman Commission report that it is highly undesirable that there should be different definitions of "charity" and "charitable purposes" across the UK jurisdictions and that a single definition should apply for all purposes (Serving Scotland Better: Scotland and the UK in the 21st Century - Final report, June 2009).

4.5. We have also considered how the development of a separate body of charity law in Wales would affect the regulatory role of the Charity Commission. The Charity Commission has concurrent jurisdiction with the High Court in charity proceedings for the purposes listed in section 69 Charities Act 2011. Requiring it to operate under two potentially different jurisdictions will add to its regulatory burden and the costs incurred in its performing its functions. We do not consider that these disadvantages are offset by any significant advantages, particularly bearing in mind the relatively small size of the charity sector in Wales and, specifically, of the charities likely to be within a new Welsh jurisdiction (see further below).

4.6. We have not considered the possibility of establishing a separate new charity regulator in Wales in place of the Charity Commission. This is outside the scope of the current consultation and it is unlikely that the costs of separate regulation could be justified. In principle, however, we would not support any additional regulation affecting charities also registered by the Charity Commission. Again we note and agree the observation made in the Calman Commission report in relation to charity matters in Scotland and England, that "concurrent regulation of UK charities by two regulators is unnecessary and potentially damaging both to the charities and their intended beneficiaries" (paragraph 5.62 of the Calman Commission report).

5. Application to charities of a new jurisdiction in Wales in relation to charity law matters

5.1. The current legal definition of "charity" under the law of England and Wales refers to the requirement for every charity to be under the control of the High Court. (This distinguishes the regulation of charities in England and Wales from that in Scotland for example and ensures that charities outside the jurisdiction are not required to be registered with the Charity Commission.) Under the Charities Act 2011, "charity" under the law of England and Wales is defined as, "an institution which - (a) is established for charitable purposes only, and (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities" (section 1(1)).

5.2. It is not clear, however, how a new Welsh jurisdiction would apply to charities, both existing and new. The Charity Commission's selection of charities in Wales (in the Snapshot) by reference to correspondent address would not be appropriate - the correspondent is an administrative post only and may not identify the charity's actual place of operation. The application of a new jurisdiction should presumably reflect the control of the High Court in relation to charities, which is in turn affected by the legal form adopted. Currently the most common forms are that of the company limited by guarantee and the trust. A new incorporated form, the charitable incorporated institution ("CIO") is expected to be introduced later this year. A CIO will be incorporated on registration with the Charity Commission. In

relation to the company limited by guarantee, and similarly the CIO, incorporated under the law of England and Wales, consideration would clearly have to be given to the determination of jurisdiction and whether the charity law of England or of Wales applied. In relation to trusts, the High Court's jurisdiction is determined according to the degree of connection with the jurisdiction concerned, having regard to factors such as the jurisdiction of residence of a majority of trustees. As a result a trust is capable of "migrating" across jurisdictions.

5.3. If a separate Welsh jurisdiction is established, therefore, detailed consideration would have to be given to how to apply that jurisdiction in relation to charity matters for existing and newly created charities, in particular existing charities incorporated under the law of England and Wales. This would have implications for the law relating to incorporation, under the Companies Acts and otherwise.

5.4. The costs of extending a new Welsh jurisdiction over charities, and the numbers of charities affected, need to be assessed.

19 June 2012

Consultation Response 45 – Conway Legal Services

Gwasanaethau Cyfreithiol / Legal Services
Pennaeth y Gyfraith a Llywodraethu / Head of Law and Governance
- *Delyth Jones, Cyfreithiwr / Solicitor*
Bodlondeb, CONWY, LL32 8DU

Gofynnwch am / Please ask for: Ceri Williams

Ein Cyf / Our Ref CRW/HL
Eich Cyf / Your Ref:
Dyddiad / Date: 18 June 2012

Dear Sirs

In response to the Consultation on a separate legal jurisdiction for Wales, I would like to make the following general observations on the proposal.

In relation to the meaning of Welsh jurisdiction the public perception may be confined to the land and water surrounding the country. However it is considered to include the increasing body of law applying only to Wales which in some instances is quite different in substance to the law in England.The courts judiciary and legal profession who are also part of the system.

In terms of possible barriers to the implementation of a separate legal jurisdiction for Wales the first is the fact that the courts are not currently devolved and if they were to become so this would have serious cost implications.

In addition to the cost implications there are questions as to whether this would be practical for the public and members of the legal profession who currently are able to practice in the single jurisdiction that is England and Wales.

The introduction of a separate jurisdiction would impact on individuals and businesses planning to relocate in Wales and would result in greater reliance on cross jurisdictional processes to resolve disputes. There would need to be careful consideration of the Welsh Courts' abilities to deal with disputes of this nature which are going to be more prevalent if this plan is implemented.

The common law jurisdiction and precedent currently applying within England and Wales will become more complex under a Welsh jurisdiction resulting in Welsh only precedents in certain areas of law and issues of which Court has jurisdiction to deal with an issue where the precedent has been set in a court from another jurisdiction.
There are currently no formalities regarding enforcement of judgments/orders from Wales in England but if these were separate jurisdictions this would require a procedure for cross border recognition which would be an additional practical difficulty.

The differences in legislation in Wales have highlighted the need for a dedicated service of Welsh legal materials as this is currently not available. A separate jurisdiction would make this more of a priority as systems diverge further and more training specifically dealing with the Welsh position would need to be provided.

In the event a separate legal jurisdiction or greater devolution this would result in greater likelihood of reform of the court system and legal profession as the variations became more prominent. In terms of the legal profession and judiciary there would be training issues and arguments as to lawyers transferability post qualification and training under only the Welsh jurisdiction.

In terms of the significance/influence of a Welsh jurisdiction should this be implemented it is likely this would follow the Northern Irish experience were the law was initially the same and even now does not deviate greatly from England and Wales unlike Scotland where the differences are marked.

In summary the introduction of a Welsh jurisdiction may be seen as legally complicated for the public/businesses and potentially costly in terms of the reforms to courts/legal profession should that be felt necessary. However as the Welsh legislation becomes more divergent and if the Assembly devolved powers are expanded the proposition becomes a more practical option although still likely to be costly in the short to medium term.

Yours faithfully

Ceri Williams
Legal Services Manager
Social Care/Education

Further to my recent response on the separate legal jurisdiction I have asked to raise two additional matters.

In the event that the separate jurisdiction is implemented and a welsh Court of Appeal and Supreme Court is created there could be issues in relation to the supply of appropriately qualified and experienced judiciary to sit in such Courts.

In addition currently a great many Lawyers in North Wales receive their training at Chester law school which is in England if the legal systems were separated this will impact upon the provision of training and development for lawyers in this area and there would be consequences in terms of cost and efficiency of delivering the same.

I would be grateful if these additional issues could be considered together with my original submission. Thank you for your assistance in this matter.

Regards

Ceri Williams
Rheolwraig Gwasanaethau Cyfreithiol (Gofal Cymdeithasol ac Addysg)
Legal Services Manager (Social Care and Education)
Cyngor Bwrdeistref Sirol CONWY County Borough Council

SKILLS for JUSTICE

Developing skills for safer communities

A Separate Legal Jurisdiction for Wales

Consultation Response

Skills for Justice is the Sector Skills Council (SSC) covering all employers, employees and volunteers working in the UK Justice System, Safer Communities, Legal Services and the Armed Forces. We work with key employers, the Governments of the UK and agencies within the skills system, to better equip workforces with the right skills now and for the future.

We provide the support necessary to enable the sector to identify its current and future learning needs, to engage more effectively with learning providers in order to meet these needs with high quality development programmes and to link the acquisition of learning to reputable and valued qualifications.

We welcome the opportunity to respond to the consultation on a separate legal jurisdiction for Wales. This response does not deal with each question in turn because we are mostly concerned with the section entitled 'Impact of possible separate legal jurisdiction on the legal professions'. We also make comment with regard to the impact on courts with particular reference to the effect of the proposals on the skills and qualifications of the workforce. Our experience of working with the devolved governments of Scotland and Northern Ireland means that we are well-placed to understand the implications of the proposals made in the consultation.

We broadly support the proposal to establish a separate legal jurisdiction for Wales. The progress outlined in the Ministerial foreword of the consultation, from devolution in 1999 to the 2011 Yes vote in the referendum, indicate a gradual move toward a legal system that places Welsh residents at the heart of decisions affecting their country.

Wales is the smallest of the six court regions of England and Wales, however, devolution has raised the profile of Wales in legal circles and the need to look at the practice and institutions from a Welsh perspective. It is becoming increasingly accepted that cases, at all levels, which arise in Wales should be litigated in Wales. Nevertheless, this

provides a challenge for the legal professions in Wales to develop the necessary skills to meet the demands of a changing constitutional and professional environment.

We would suggest that Wales would benefit from a service that is reasonably accessible wherever you live in Wales and which is available in either Welsh or English. Wales differs from England demographically, geographically and linguistically, and these factors should be taken into account when considering how the justice system operates. Whilst the current system may be suitable for England, it does not necessarily follow that it is appropriate for Wales. For example, many smaller courts in rural areas have been found to be unsustainable and therefore have either been partially or completely closed. This poses significant problems for people in these areas to access court services now only available in the larger cities such as Swansea and Cardiff. A system that is tailored to meet the needs of Wales and capable of providing employment and suitable career structures for those who work in justice and legal services would be welcome progress.

Such steps would have a significant impact upon the legal profession, courts service and the judiciary, as well as other areas of the justice sector in Wales. We believe that the relevant skills and career opportunities of the workforce would improve and the service-user would therefore be better served. This may be best illustrated by the linguistic make up of Wales which is fundamentally different to England. Court proceedings are routinely conducted in both Welsh and English which presents a very specific demand for skills that are not required in England. Judicial training is an essential element of an efficient system of justice, as it helps to ensure the competency of the judiciary. In an age that increasingly demands more judicial intervention to solve the increasingly complex and sensitive issues society leaves to be settled by litigation, the need for judicial training is greater than ever. The value of judicial training can be related to specific outcomes, such as better managed and less costly litigation, as well as greater public confidence in the judiciary. At its most basic level, training provides the information and tools needed to enable individuals to carry out their roles/jobs effectively.

In addition, employers that we work with in the legal profession in Wales have identified opportunities for growth in employment and the economy through the separation of the legal jurisdiction between England and Wales. Such a move would give rise to new

investment from the private sector, complementing economic development plans such as the proposed Central Business District for Cardiff. The Welsh Assembly recognise a need to attract investment from private industries such as the financial and legal sectors to support economic growth and this would be a positive move in that direction.

The recent devolution of justice in Northern Ireland has demonstrated that the fact that a country is relatively small to England does not mean that the change will not be successful. Indeed, our work with the Northern Ireland government has found that it can be hugely beneficial as Ministers are more easily and readily accessible, allowing for stronger links between government departments and with other organisations within the justice sector, such as Victim Support Northern Ireland. In terms of skills we are able to access information and in turn advise government of priority skills needs of the sector more quickly and easily.

Moreover, because policy on skills is a devolved responsibility of the Welsh Assembly, it is reasonable to foresee a more joined up approach between policy, implementation, workforce development and service provision.

Despite the court system being centred in London, many important aspects are already decentralised. Lay magistrates and all District Judges and Circuit Judges who sit in the Magistrates', County and Crown Courts of Wales are based in Wales. HMCS Wales has responsibility for their administration and cases are heard in courts within or as near as possible to the community from which the case comes.

We are conscious of the requirements of facilitating the sort of change proposed in this consultation. The introduction of the Administrative Court of Wales without provision of a physical office in Cardiff (until 2009) demonstrated that the omission of proper infrastructure and due regard for the workforce can hinder effective implementation of such changes. The absence of a proper office for this court was a major disincentive to commencing Judicial Review proceedings in Cardiff and to lawyers in Cardiff developing the expertise necessary to undertake the kind of cases which could be heard in the Administrative Court of Wales.

Overall, we would urge the Welsh Assembly to strongly consider the skills implications and development opportunities for those that work in the sector. Appropriate support for up-skilling must be identified and made available in the early stages and should consider those that would be directly and indirectly affected by the proposals. It is essential that the service-users (victims, survivors, witnesses and offenders) are at the centre of the final decision and the consequential changes.

Skills for Justice would be happy to discuss the proposals and our response further. For more information on the content provided in this statement and the work of Skills for Justice, please contact Colette Wymer, Partnership Development Officer

Robert David Jones

Cardiff University,

Cardiff,

Email:

19th June 2012,

To whom it may concern,

The following document contains evidence submitted by Robert David Jones to the Welsh Government's consultation on a separate legal Jurisdiction for Wales. Robert is a PhD student at Cardiff University. His research is looking at the experiences of Welsh adult males in the prison estate. In particular, his research intends to address prisoner views of imprisonment from a Welsh perspective whilst simultaneously addressing the role that the Welsh Government is currently playing in trying to help the Prison Service meet the needs of Welsh people in prisons in both England and Wales. For more information see the link below.

http://www.wiserd.ac.uk/about-us/staff/phd-students/robert-david-jones/

Yours Sincerely,

Robert David Jones

29. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed please tell us about them.

The following aims to provide evidence that will contribute towards debates and discussions around the formation of a separate legal jurisdiction for Wales. In particular, the evidence intends to outline the effects that a separate legal jurisdiction would have upon discussions around criminal justice in Wales and the inevitable questions which are likely to be raised around the suitability and sustainability of a single administration of justice (for England and Wales) if a separate legal system is established.

The wider context for the evidence contained within this submission can be traced back to 2007 and the then Coalition Government's outward commitment to;

> ...consider the evidence for the devolution of the criminal justice system. This is within the context of devolution of funding and moves towards the establishment of a single administration of justice in Wales. A full debate with the legal community on the creation of a separate criminal justice system for Wales is inevitable in the National Assembly gains greater powers.[1]

Following the outcome of the devolution referendum in March 2011 which granted the National Assembly primary law making powers, it will be argued that discussions (including this consultation) around a separate legal jurisdiction are likely to lead to increased calls for a devolved system of criminal justice.[2]

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[1] Welsh Government (2007) - One Wales – A Progressive Agenda for the Government of Wales, June 2007, pg. 29.

[2] This context may also be informed by developments that have taken place in Northern Ireland and the devolution of policing and criminal justice powers to Stormont in April 2010.

Welsh Criminal Justice

If the role of the criminal justice system is to maintain and uphold the rule of law and social customs of a given society then changes to the way in which such laws are made in Wales will ultimately impinge upon the performance and functioning of the justice system. For example, just as the law itself must remain open and responsive to social changes so too must the agencies that comprise the criminal justice system. These changes must also include those being made to the constitutional settlement.

At present, very little is known about criminal justice in Wales. Unlike the efforts that have been made to explore the rise of what some are calling 'new legal Wales'[3] (through academic research and teaching programmes)[4] efforts to research criminal justice are significantly under developed. Although it is currently under researched, the Welsh context of criminal justice might be understood and explained on two separate though mutually reinforcing levels.

i) The study of Welsh criminal justice issues at the level of those working within or alongside criminal justice services in Wales, and those who find themselves subject to the criminal justice process (e.g. police, courts, prison).
ii) The study of Welsh criminal justice at the level of governance. Within the era of devolution and increasing concerns with Welsh Governance (e.g. policy making, constitutional affairs).

[3] Jones, J (2008) - 'The Next Stage of Devolution: A (D)evolving Criminal Justice System for Wales', Crimes and Misdemeanours, 2, 1, pg.11.
[4] Cardiff University's LLB Law programme offers a module on 'Welsh Devolution' whilst its postgraduate programme has two modules available under a title of 'Governance and Devolution'.

If plans to establish a separate legal jurisdiction are successful, the Welsh Government must do more to ensure that greater attention is given to what will inevitably emerge as a consequence of a separate legal jurisdiction. That is the potential for powers of criminal justice to become a devolved area of policy.

From my own research which is still at the pilot stage, questions of a devolved criminal justice system have provided some quite interesting findings. Although such information was only obtained from a limited sample of Welsh people in the prison estate, there appears to be a certain level of support for services to be solely provided by the Welsh Government. This point becomes a particularly striking one when we consider what services the Welsh Government are currently helping to fund (part fund) or help provide for Welsh prisoners (e.g. Transitional Support Scheme, CAIS, Prison Link Cymru). In view of a separate legal jurisdiction in Wales, there must be increased efforts to explore the Welsh situation of justice in an attempt to not only identify what problems face people in Wales, but additionally, to establish how the Welsh Government might seek to respond to matters of criminal justice if powers are devolved.

Future questions: A single administration of justice?

Within the context of the criminal justice debate, the advantages of having a separate legal jurisdiction are that it would only serve to intensify the efforts currently being made to discover more about the situation of justice in Wales. As more and more attention is afforded to the issues that surround criminal justice in Wales, an increase in the level of research being conducted into the 'Welsh context' can help inform the trajectory of the Welsh Government's response to crime and justice. In an era in which Wales, relatively speaking, has achieved unprecedented levels of political and constitutional autonomy, the Welsh Government has an opportunity to provide a very different approach to criminal justice policy than those currently being made in Westminster.

This point is particularly salient when we consider the wider context in which policies around social justice are currently made in Wales, most notably youth justice.[5] Against the backdrop of what former First Minister Rhodri Morgan described as a 'clear red water' between the policies being drawn up by governments in Westminster and Cardiff [6], the Welsh Government may have the chance to oversee the introduction of unique and divergent approach to matters of criminal justice. As stated by Paul Tidball in 2006, the then President of the Prison Governors Association, "Wales has the opportunity to take an alternative approach, and to bring initiative and flair into noncustodial sentences"[7]. This capacity to bring 'initiative and flair' may of course be extended to all parts of the criminal justice system right across Wales.

Summary

- The establishment of a separate legal jurisdiction will lead to increasing concerns over the sustainability of a single administration of justice for both England and Wales.
- A separate legal jurisdiction would accelerate efforts to research the 'Welsh context' of criminal justice which at present remain largely undeveloped and under researched.
- Such research will be essential to the Welsh Government's attempts to provide 'evidence based' policy if matters of criminal justice become devolved.

One of the most significant consequences of a separate legal jurisdiction in Wales will be an increased concern over the suitability and sustainability of a single administration of justice for both England and Wales. Whatever the outcome of this consultation, with the legislative competency of the National

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[5] Drakeford, M (2010) - 'Devolution and youth justice in Wales', Criminology and Criminal Justice, 10, pp.137-154

[6] Speech given to the National Centre for Public Policy in Swansea University, 11th December 2002.

[7] Paul Tidball cited in Welsh Affairs Select Committee (2006) - Welsh Prisoners in the Prison Estate, Third Report of Session 2006-07, House of Commons, Welsh Affairs Committee, London, 16th May 2007, Evidence 133.

Assembly widening the appropriateness of a justice system which still receives its directives from Westminster will more than likely lead to a range of additional questions.

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Dear Sir/Madam

Please find herewith a response to the Welsh Government's consultation on a separate legal jurisdiction for Wales.

We are barristers in practice at 30 Park Place Chambers in Cardiff. This response is sent in the personal capacity of those whose names are included at the end of it, and should not be taken as a collective chambers response, nor as reflecting the views of persons whose name does not feature.

Yours faithfully

David Hughes

A Separate Legal Jurisdiction for Wales

Response to the Welsh Government's Consultation

Answers to specific questions in the Consultation Paper

1. Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?

Yes. The extent of the jurisdiction would need to be defined, so that the extent of the authority of the courts of the new jurisdictions would be clear. However, we do not consider that the issue presents a problem, as the extent of Wales is already sufficiently clear for the purposes of the Government of Wales Act 2006 for the Assembly and Government's authority to be clear.

1.1 What, for the purposes of a separate Welsh legal jurisdiction, might that territory be – "Wales" as defined in the Interpretation Act 1978 or as defined in the Government of Wales Act 2006?

Government of Wales Act 2006. The territorial extent of the Counties which make up the land mass of Wales is well understood by virtue of the provisions of section 20 of the Local Government Act 1972, as amended by Schedule 4 to the Local Government (Wales) Act 1994.

2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?

A distinct legal authority would be necessary to establish Wales as a jurisdiction separate from England. Thereafter, the law in Wales would be enforced in Welsh courts, as opposed to Anglo-Welsh courts that may or may not sit in Wales. The law that those Welsh courts enforce would be the law of Wales. That law need not, however, be distinct from the law in England. If it becomes so, it will be because of different political judgments made by the elected

representatives of those nations, or because of different approaches taken to interpreting akin statutes or to developing the common law taken by the appellate courts of the two new jurisdictions.

We recognise that there would continue to be in force in Wales United Kingdom Acts, whether pre-split Acts on areas of devolved competence but not amended, or Acts (pre or post-split) on areas for which the UK Parliament remained competent. There would also be European legislation. Whether or not these are considered to form part of the Law of Wales, or some other law enforceable by the courts of Wales, is an academic question that we do not propose to answer.

2.1 When is a body of law distinct enough in this regard?

To await the development of distinct law before moving towards a separation is, in our view, to take the attitude that it is better to wait for a problem and then solve it, than to take action to prevent a foreseeable problem from arising.

The law in Wales already has significant differences from that in England, and the Assembly's ability to make primary legislation makes the difference liable to increase. It is surely likely and wise that the Assembly, as it goes on to exercise its legislative competence, will choose to learn from England, and model its legislation on that in force in England, with such modifications as it deems necessary to suit the needs of Wales. The advantages of this would include that the meaning of the English statute, as retained by Wales, is likely to have been the subject of judicial interpretation.

The risk of the current position is that an Anglo-Welsh court, used to the law in England and Wales being the same and possibly composed of judges who have little personal or professional knowledge of Wales, would interpret the provisions of the Welsh legislation *where the Assembly has chosen to differ from England*, to mean the same as the English legislation. We consider that this is a very real risk. If it transpired, it would undermine devolution.

The only law that is required to be distinct is that establishing the courts of Wales as separate from those of England. With that, the law would be distinct enough.

2.2 Does it matter whether the law in question is statute law or common law?

No, it may be either or both.

2.3 Does it matter what the nature of the subject-matter of the law is – e.g. criminal, civil, family?

No. Obviously, at present, the competence of the Assembly is limited. But we consider that both Acts of the UK Parliament and of the Assembly would be the Law of Wales, merely enacted by different bodies.

3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

We consider that what matters is the authority of the courts. In theory, the courts for each of the component jurisdictions of the UK could be administered from one location. This is unlikely, however, to be satisfactory. Indeed, the need to involve the judiciary in the administration of the courts suggests that the separation of responsibilities is, in practice, essential.

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

It is not. The courts of Wales will need to derive their authority from law applicable to Wales. They must be able to provide authoritative determinations on the meaning of all legal questions arising in Wales, subject only to the parties' ability to contract to arbitrate or settle disputes, and to the superior jurisdiction of the UK Supreme Court, the ECJ and the ECHR. We consider that the existence of a jurisdiction comes down to the authority of the courts. If the courts of England and Wales remain joined in a single system, we consider that it would be nonsensical to speak of a Welsh jurisdiction.

The UK Supreme Court is not appropriately considered part of the courts of England and Wales. The Anglo-Welsh courts have no authority in Scotland or Northern Ireland. The UK Supreme Court does. Whether it is considered to be a UK-wide court, or a court that forms part of the court systems of each of the component jurisdictions of the UK, is an academic question.

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

Although it would be possible, in theory, for judges to be appointed simultaneously to the courts of both England and Wales, this is unlikely to prove satisfactory. Indeed, one of the main advantages of a Welsh jurisdiction would be the avoidance of the risk referred to in our answer to question 2.1 above. This benefit would disappear if the judiciary were common to both jurisdictions.

The appointment of Welsh judges may well have to meet different needs from those in England. It may well be that, for example, there will be less need at first for particular specialisms, and that the Welsh courts will need the appointment of capable practitioners who have had a wide range of practice, rather than lawyers who have practised in narrow areas. Indeed, wide-ranging ability is likely to be particularly important, as we consider that a relatively small number of High Court and Appellate judges would be needed.

If the judiciaries are combined, who is to have the authority to direct which judges will sit in Wales? We consider that the head of the judiciary in Wales should be a Lord Chief Justice of Wales.

3.3 If there were a separate Welsh courts system, which courts would be affected?

All, save the UK Supreme Court. It is possible that some UK-wide tribunals would survive, but thought would need to be given to the appellate routes from them. It would be inappropriate for an English court to hear an appeal form a UK-wide tribunal sitting in Wales.

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

Yes, this would be essential.

3.5 Should Wales continue to share some courts with England, and if so, which ones?

Subject to any UK-wide tribunals, no, save for the UK Supreme Court.

3.6 If Wales and England continued to share some courts, what (if any) changes might be needed in the organisation of those courts?

Legislative change to ensure that there was Welsh representation on the UK Supreme Court would be very important, along the lines of the conventions concerning Scottish and Northern Irish representation. We foresee that a convention would develop that the Lord Chief Justice of Wales would, in time, be appointed to the UK Supreme Court. There should, however, be a legislative requirement that at least one member should be appointed, at the time the next vacancy arose, as a judge sitting in the Courts of Wales.

We think it important that a "Welsh judge" be understood to mean a judge who sits in the Courts of Wales, after having practised principally before the Courts of Wales, even if the person concerned was not born or raised in Wales.

4. To what extent (if at all) would it be necessary for the devolved legislature to have general legislative competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was devolved?

It would not be essential. However, there is a strong case for saying that criminal procedure should be devolved if the administration of justice were devolved (indeed, it may be argued that the administration of justice would include criminal procedure). It may be desirable to devolve substantive criminal law, but it would not be necessary to do so.

Extradition should also be mentioned. We consider that it would be inappropriate for an English court to determine questions of extradition from Wales. This would not impact on the UK government's ability to enter into extradition arrangements. It would simply be wrong for a Court that has no (other) jurisdiction in Wales to determine such matters in Wales.

4.1 Are there any other subjects of legislative competence that should be devolved in such a case?

The regulation of the legal professions and access thereto would need to be devolved. It would be inappropriate for English based or dominated bodies to regulate lawyers practising before Welsh courts. This is not an argument against close co-operation. There is no reason why joint legal education with England should not continue. Although there are some arguments in favour of a different approach, and although a different approach could only be taken if Wales does become a separate jurisdiction, it would not be a necessary consequence of a separate jurisdiction.

In a separate jurisdiction, access to justice should also form part of the Welsh Assembly's competence. The full benefit of a separate jurisdiction could best be obtained if Wales were free to make its own arrangements for access to justice. We have in mind the administration of public legal funding, for example by way of a Conditional Legal Aid Fund, which the Welsh Assembly may wish to consider introducing in Wales.

5. How might a unified England and Wales court system work if:

5.1 There were a separate Welsh legal jurisdiction and the Assembly's legislative competence:

a. **remained, as now, with the ability to expand incrementally, or**

b. **extended over all matters except for those expressly reserved to the UK Parliament?**

5.2 The current unified legal jurisdiction of England and Wales continued and the Assembly's legislative competence:

a. **remained, as now, with the ability to expand incrementally, or**

b. **extended over all matters except for those expressly reserved to the UK Parliament?**

We consider the idea of continuing a unified Anglo-Welsh system, with a partially-separate Welsh jurisdiction operating in tandem, to be a recipe for confusion and to be highly unsatisfactory. Where the Assembly decides to legislate at the edge of its competence (and it could not be criticised for seeking to be as active as its competence allows), the jurisdiction of the courts would be open to question. It is vitally important for the rule of law that the jurisdiction of the courts should be clear, and that the court hierarchy should be clear. Under this idea, neither would be clear. In the event of a challenge (based on competence) to Welsh Legislation, which court would have jurisdiction to determine the question? If a Welsh Court, would it then have to relinquish jurisdiction if it found that the Assembly or Welsh Government had exceeded their competence? Would any facts found in the process of arriving at that decision stand, or would the remaining Anglo-Welsh Court have to find the facts anew? Would there be a presumption in favour of one system having default jurisdiction?

What would the status of the Welsh Court be? Who would sit in it? If the same judges as in the courts of England & Wales, would this not be mere window-dressing? Who would practise before such courts? Which rules would they apply? This idea would result in Wales having two parallel court systems.

There is no problem, either in practice or in principle, with Welsh courts dealing with legislation from both the Welsh and the UK Governments. The Scottish and Northern Irish courts do so. This idea would cause confusion for the sake of solving a problem that would not exist.

6. When reference is made to a 'legal jurisdiction' in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?

6.1 In this context does legal jurisdiction just mean the territory over which the legislature (or executive) has power to legislate?

We consider that, in the context of the United Kingdom, a legal jurisdiction is an area that has its own ordinary court system. By this, we mean a court system competent to determine all civil and criminal disputes and to exercise appropriate judicial control over subordinate tribunals and (subject of course to the UK's constitutional arrangements) of other branches of government.

The answer is best illustrated by posing the following question; if one has a legal dispute in Scotland, even if it is with the UK government, to which court does one go? The answer is obvious; to a Scottish court. To suggest otherwise would be ridiculous.

7. Are there any other *essential* features of a separate legal jurisdiction?

No.

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

No. The risks inherent in having the same courts applying distinct primary legislation from two different sources within the same jurisdiction are obvious. Reference has been made elsewhere to the comparison with courts in the United States having to deal with both state and federal legislation, but we do not consider that this analogy is appropriate. The United States is a federal country, its lawyers and judges are 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 jurisidiction is, of course, not a federal one.

9. If you consider that the current legal jurisdiction is sustainable then are there any short-term or long-term changes that should be made to any of the following?

a. The administration of the courts and/or tribunals systems
b. The judiciary (including the magistracy)
c. The legal professions (including their regulation)
d. Education and training in law
e. Accessibility of legislation

We do o consider that the current joint legal jurisdiction is sustainable. As to the headings indicated, we would say the following:

We consider that the administration of the courts and tribunal systems would need to be done from Wales, and those administering them answerable to either a Welsh justice minister or (where appropriate) a Lord Chief Justice of Wales. The detail of the administration is outwith our field of expertise.

The judiciary should be appointed to the Welsh Courts by a Welsh Judicial Appointments body. Appointees should be people who have spent the greater part of their careers practising before the courts of Wales. It is self-evident that sufficient Welsh speakers should be appointed, but care should be taken to ensure that the non-Welsh speaking majority are not excluded.

The regulation of the legal professions should be done from Wales. Although it would not be essential to end common legal education with England, there are arguments in favour of so doing. The current arrangements for legal education lead to significant numbers of students studying for the bar or the solicitors' profession, with little if any prospect of being able to enter it. We understand the position in Northern Ireland to be different, and that would-be solicitors are required to have a training contract before stating the necessary post-graduate course.

We see a strong argument in favour of moving towards a system such as that which obtains in some Australian states, in which lawyers are admitted as barristers and solicitors (in effect, solicitors), with common training, from whose numbers those who wish to do so and have shown an aptitude for advocacy go on to the independent bar, after a short "bar readers'" course.

Against that, we note that Welsh barristers in particular continue to feel strong emotional links to their Inns of Court. The Inns give significant amounts of money in scholarships each year. Those funds have been accumulated as the Inns for both England and Wales, and it would be right that Welsh students continue to be able to benefit from them. We anticipate that arrangements could be made that Welsh barristers continue to be admitted to those Inns.

The debate about reform of legal education is a complex one. A separate Welsh jurisdiction would not compel any particular answer, but it would free up Wales to consider the solution that is appropriate for Wales.

Accessibility of legislation is a serious issue. We consider that there would be little that the Welsh Assembly or Welsh Government could do about problems with UK legislation that continued to be in force in Wales, at least insofar as concerned areas in which the UK government retained competence were concerned. However, we see much merit in the issuing of a bi-annual Consolidated Welsh Code, with supplements issued every six or twelve months. Entry into force of legislation could be combined with the issuing of the supplements. This would do much to increase the accessibility of legislation, and to enhance the rule of law.

10. If you consider that the current legal jurisdiction is sustainable then are there any other short-term or long-term changes that should be made?

We do not think that it is sustainable.

11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?

It would be recognised as Welsh law in those other jurisdictions. Presumably, if a question arose as to the interpretation of a Welsh statute, the court of the other jurisdiction would look to the interpretation given by the Welsh courts. This is what happens in relation to other jurisdictions.

12. Would such statute law be judicially noticed in those other jurisdictions?

We see no problem with statute law being judicially noticed, but this might pose a problem when it comes to the interpretation of the legislation. The experience in other jurisdictions, such as Northern Ireland or Gibraltar is that where Anglo-Welsh case law is cited, sometimes (in common-law questions) it is considered to be binding, but most often it is only persuasive (for example, where the common-law has been subjected to statutory modification in either jurisdiction), but in each case the court is determining its own national law, and not Anglo-Welsh law. We consider that the treatment given to Anglo-Welsh law in jurisdictions such as Scotland or Northern Ireland is likely to provide a satisfactory answer. In somewhere like Gibraltar where the relative lack of local precedent can cause practical difficulties, Anglo-Welsh case law is treated as a starting point, both for common law matters and when interpreting a similar statute.

13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

We have some difficulty seeing how this would arise. Welsh statute law would represent the law in Wales. Although parties to a contract may choose to have the controlling law as the law of Wales, but give the English courts exclusive jurisdiction, this seems unlikely, and in Judicial Review, it may be difficult to see how Welsh legislation could apply to facts in England.

14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrest, charge, prosecution, conviction and sentencing?

It would be objectionable in principle for Wales to purport to legislate on criminal activity in other UK jurisdictions. It would be equally objectionable for the courts of other UK jurisdictions to try alleged criminal conduct in Wales. Arrangements in respect of arrest already exist between the UK's component jurisdictions, and there is no reason why similar arrangements could not be made for Wales.

15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or "conflict of laws") between Wales and the rest of the UK?

We consider that similar arrangements to those that currently exist and are well understood between the UK's component jurisdictions could be brought into place for Wales.

16. In the event that Wales moved towards a 'reserved powers' form of devolution, like Scotland's, do you think a separate Welsh legal jurisdiction would be:

a. essential;
b. desirable;
c. undesirable; or
d. irrelevant?

We think that it is already inevitable. A move towards a 'reserved powers' form of devolution would only make the creation of a separate legal jurisdiction even more essential.

17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?

No.

18. If it would be sustainable, which areas of law would need to be reserved to the UK Parliament?

We do not think that it would be sustainable.

19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly's power that enables it in certain circumstances to make laws applying in England?

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power:

a. upon the basis that any provision made in relation to England would extend to and form part of the law of England?

b. otherwise, and if so how?

19.2 If you think that there would be such difficulties:

a. what are they?

b. would those difficulties be any different to the current situation where the Assembly already has the power to make provision applicable in England?

We do not consider that the switch to separate jurisdictions would require a change in this. It would be better to have a provision in the statute creating the two jurisdictions, so that the same statutory basis for the exercise of the power existed in both England & Wales.

20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?

20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions?
a. education and training;
b. qualification;
c. regulation.

We consider that a separate Welsh jurisdiction would require separate legal professions. This is because the legal professions must, ultimately, come under the control of the courts before which their members practice.

This is not an argument for an artificially restrictive approach to cross-border practice. Although separate practising certificates should be required in each jurisdiction, as that is what entitles lawyers to practice and that should be under the control of the Welsh courts, we anticipate that mutual recognition of, for example, CPD would be the norm. We anticipate that lawyers admitted in the post-separation jurisdictions could be admitted with minimal formality post-separation, as is currently the case with Northern Ireland.

There is no reason why joint training of lawyers should not continue. A separation would not require joint training to end. This is not to ignore the real issues that exist about legal professional training, especially the large numbers of students completing the BVTC/LPC but unable to enter practice due to lack of pupillage or training contracts. It is possible that Wales will, in future, decide to take a different approach to the organisation of its legal professions. But there is nothing in separation that would require this. We anticipate that common training would continue and any change would not threaten mutual recognition of qualifications.

Those lawyers currently in practice are, of course, admitted in both England and Wales. Whether a formal Welsh Inn of Court should be established is a question on which we do not have a view. We do think that a separate Welsh Law Society and Bar Council should be established. To retain unified institutions would be inconsistent with separate Welsh professions under the authority of Welsh courts. We recognise that barristers may wish to retain the link with the Inns of Court in London. This would be possible, if the Inns were to call students to the Bar if they satisfy the requirements that a Welsh Bar might require, and then those new barristers took out Welsh practising certificates.

We are of the view that barristers and solicitors admitted in one jurisdiction should be able to be admitted to practice in the other with a minimum of formality. They should be required to obtain a practising certificate, again as is currently the case with Northern Ireland.

We consider that a system of Welsh appointments to silk should follow the creation of a Welsh jurisdiction separate from England. Not to have a silk system would be tantamount to saying that Welsh-based lawyers are inferior to those based in England, Scotland or Northern Ireland. Silks appointed prior to separation would remain silks in both jurisdictions. Those appointed afterwards would be silks in either Wales or England. We consider that, if English silks are to be permitted to appear as silks in Welsh courts, Welsh silks should be permitted to appear as silks in English courts. In Northern Ireland, at present Anglo-Welsh silks called to the Northern Ireland bar appear as silks, but the reverse is not true. We consider this to be indefensible and should not be applied to the Welsh Bar.

The regulation of the legal professions in Wales would be a matter for Wales. At present, there is a good argument to be made that the legal professions are regulated by too many bodies – in addition to the Bar Standards Board and the Solicitors' Regulatory Authority, there is the Legal Ombudsman. We wonder whether the regulatory regime that operates in Northern Ireland, where we understand that the Law Society continues to act as solicitors' regulator, has shown itself to be less satisfactory, so as to require the continuance of multiple regulators.

21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

The common law as it exists at the date of separation would not be affected, on either side of the border. However, the common law would then be developed by separate courts (save for the Supreme Court). It would be contrary to principle that the decisions of Welsh Courts be binding (as opposed to persuasive) authority in English Courts, and vice versa. But it is right to recognise that, as the Welsh Courts may not have the same volume of business as the English Courts, they may find themselves faced with authority that remains binding on them, but which is no longer appropriate and which has been further developed in England. To prevent the law from being ossified in this way and the need for too many cases to go to the Supreme Court, we suggest that the Welsh Court of Appeal (at least) should be given statutory authority not to follow decisions of the pre-separation Court of Appeal, where it is inappropriate to do so.

We consider that this is unlikely to impact negatively on the need for legal certainty. The situation in Gibraltar, a much smaller jurisdiction, where the low volume of appeal cases means that binding authority is rare has not prevented there being sufficient legal certainty necessary for commerce and public life.

22. Would your answer be different if there was a separate court system in Wales?

We do not understand the question. We consider that to speak of a separate jurisdiction without a separate court system is meaningless.

23. Would your answer be different if the Assembly had legislative competence generally over all (or most of) the:

a criminal law;

b civil law; or

c any other area of law that you do not consider falls within (a) or (b)?

No. It is important to distinguish between areas in which the Assembly has or might have in future competence, and the common law. The Assembly could pass legislation within its areas of competence. A Welsh Court of Appeal would be free to develop the common law within its jurisdiction, whether or not the Assembly had power, because the Court's power would be full (unless two parallel court systems were created, which we think would be unsustainable). The Court's power would, of course, be subject to the UK Supreme Court.

24. Could there be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

24.1 Why would that be desirable, and how would it work in practice?

24.2 How difficult would that be?

It would be impossible to exclude the common law from the legislative competence of the Assembly, as the Assembly's areas of competence are subject based. Within each subject, there will be areas of both statute and common law. Statutory procedures will include common-law obligations on the exercise of power, for example the obligation to behave reasonably. We do not think that such a separation would be desirable, even if it were practicable.

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

Yes. We consider that the creation of a separate Welsh jurisdiction would enhance the civic culture of Wales. At present, able Welsh lawyers are faced with the choice between basing themselves in Wales or pursuing their careers in London. Every able lawyer who makes the latter choice is a loss not only to legal, but to economic life in Wales. Every socially-engaged lawyer who makes the choice is a loss to cultural, public and social life in Wales. However much such lawyers try to retain family and other links, the fact of no longer living in Wales means that they inevitably become distant from Wales, and can contribute with less legitimacy to public life and public debate here.

To create a Welsh jurisdiction would go some way to alleviating this dilemma. The choice would no longer be between what some may describe as an obscure backwater and the centre of the jurisdiction, but between practising between two different jurisdictions. We are aware that loss of legal talent to London is less of a problem at the Northern Ireland bar, or in Gibraltar.

The political ramifications beyond the enriching of the political culture of Wales, will depend on the political choices that the Welsh electorate makes. It should, of course, be clearly understood that the creation of a separate Welsh jurisdiction is a completely separate question from Wales' continuation within the United Kingdom. The economic ramifications will also depend on the Welsh electorate's political choices. Although much is made of the contribution of legal services to the economy of England and Wales, our experience suggests that little, if any, of this legal business comes to Wales. Wales would therefore have little to lose from becoming a separate jurisdiction.

What Wales would gain is the possibility of creating a legal environment more favourable to wealth creation. Two examples of what might be done will suffice. Wales could introduce a Conditional legal Aid Fund, which would reduce the cost of litigation to the community at the same time as increasing access to justice. Wales could also consider introducing a no-fault compensation scheme for personal injuries, similar to that which exists in New Zealand. We do not necessarily say that this should be done, but the creation of a Welsh jurisdiction would allow Wales to consider whether these or similar moves are right for Wales. Wales would be free to consider its own needs, which may well be different from those in England (or parts of England).

We are not persuaded that the creation of a separate jurisdiction would in itself have linguistic ramifications. The Assembly already has competence on matters related to the Welsh language. The need for Welsh-speaking judges already exists and is already acknowledged. There is a fear in some that the ability to speak Welsh would become a *sine qua non* for judicial appointment in a Welsh jurisdiction, but we think that the fact that the large majority of both the legal professions and the public do not speak Welsh is likely to be a sufficient safeguard against this being given importance above that which it merits.

26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

Confusion in identifying and accessing applicable law is an existing problem in England & Wales, touched upon by the late Lord Bingham in his book *The Rule of Law*. This is, in large part, a result of over-legislation, unclear legislative drafting, and the practice of bringing legislation into force piecemeal.

As stated. we would prefer to see Wales adopt the practice of issuing Consolidated Laws of Wales every few years, with an addendum in interim years, to allow the public and the legal professions access to legislation (primary and subordinate) enacted by the Assembly. The problem is likely to continue in those areas for which the UK Parliament retains competence, and there would seem to be little that the Assembly can do to remedy the UK Parliament's shortcomings.

27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?

No.

28. Would your answers to any of the questions in this consultation paper be different if the approach to the Assembly's legislative competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK Parliament?

No, save that, as already indicated, we consider that a move towards a 'reserved powers' form of devolution would only make the creation of a separate legal jurisdiction even more essential.

29. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed please tell us about them.

None

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19th June 2012

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A Separate Legal Jurisdiction for Wales

Welsh Government consultation 2012

Response of
The Trading Standards Institute

June 2012

trading standards institute
leading the trading standards profession

About The Trading Standards Institute

The Trading Standards Institute is the UK national professional body for the trading standards community working in both the private and public sectors.

Founded in 1881, TSI has a long and proud history of ensuring that the views of our broad church of Members are represented at the highest level of government, both nationally and internationally.

We campaign on behalf of the profession to obtain a better deal for both consumers and businesses.

We are also a forward-looking social enterprise delivering services and solutions to public, private and third sector organisations in the UK and in wider Europe.

We run events for both the trading standards profession and a growing number of external organisations. We also provide accredited courses on regulations and enforcement which deliver consistent curriculum, content, knowledge outcomes and evaluation procedures, with the flexibility to meet local authority, business and operational needs.

In compiling this response, TSI has canvassed the views of its Members and Advisers. The response has been composed by TSI Lead Officer for Civil Law David Sanders who has also been employed by Welsh authorities for some years. If you require clarification on any of the points raised in the response, please do not hesitate to contact David at email locivillaw@tsi.org.uk.

TSI does not regard this response to be confidential and is happy for it to be published.

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A Separate Legal Jurisdiction for Wales – Welsh Government consultation

Trading Standards Institute response – June 2012

The Trading Standards Institute is pleased to respond to this consultation from the Welsh Government on a separate legal jurisdiction for Wales. Trading Standards Institute Members predominantly work within local authorities, promoting fair trading and consumer protection. Many other Members work in the private sector, helping companies supplying goods and services to comply with the law.

It is very important to commercial enterprises that the rules under which they operate are clear and uniform. Having to comply with a host of different rules for different trading zones can add significant operational burdens to companies trading in different jurisdictions. Consumers too become more confident in the market place when they feel they understand their rights.

The European Union was founded upon principles of removing barriers to trade across borders and is at present considering a Common European Sales Law (CESL) aimed at enabling traders to expand across borders without encountering added legal complication. Whilst not without flaws, the CESL proposals will also add confidence to consumers trading across borders, particularly through the Internet, as the proposal by the EU is to make CESL part of the domestic law of each Member State and available as an option to govern a contract should the consumer so wish.

This background of continuous unification of the laws governing the supply of goods and services may provide cause for apprehension at any proposal that may result in the opposite. At present "Consumer Protection" in England and Wales is based upon European Directives that have done much to safeguard consumers since 1974.

Consumer Protection as enforced in Wales by TSI Members is not a devolved function. However, some other legislation enforced by TSI Members in Wales, such as Animal Health and Welfare legislation, does contain statutory Instruments unique to Wales, although in substance identical to similar Orders for England.

Consideration of a separate legal jurisdiction for Wales is therefore of considerable interest where it might lead to differences in the laws and the interpretation of the laws between England and Wales. However, there is no fundamental objection to divergence, especially where the differences relate to matters lying entirely within the boundaries of Wales.

This leads into the Consultation itself in as much as the first question relates to a defined geographical area.

TSI believes that a defined geographical area is a feature of a legal jurisdiction such as it is for Scotland and Northern Ireland, distinguishing them from England and the United

Kingdom. It is likely that the definition of Wales would be that defined in the Government of Wales Act 2006 as that creates the power to legislate and should constitute a territory recognised by any superior legislature in matters of *vires*.

As regards question two (which asks to what extent (if any) is a distinct body of law as essential feature for a separate legal jurisdiction), Scotland can be seen to have a distinct body of law and thus a separate legal jurisdiction. Scottish law depends upon historic precedents and is substantially based upon Roman and European law principles rather than those of English law.

Wales may be starting from scratch at this point as common law is not distinct to Wales, but is "common" to England and Wales. The conclusion is thus that the Welsh body of law will be that distinct new law now passed by Welsh Government and will be confined to those statutes that it wishes to enact.

Whether this is civil, criminal, or family, would thus appear to depend upon those matters for which the Welsh Government is competent to legislate and for which, in fact, it does so legislate.

Assuming that the Government of Wales Act 2006 is the starting point, it is most likely that enacts will be based on principles of law already operating in England and Wales.

This body of law will initially be small, but, given that its foundations might be based on these existing principles, there should be no difficulty using the existing Court structures for rulings and interpretation until such time as the body of distinct Welsh law justifies a separate court system.

One fundamental problem with any distinct jurisdiction is access to Courts and at present it would be considered unrealistic to duplicate the present Court system for Welsh matters and having just one Court, maybe in the capital city, may prove insufficient in matters of access.

It would appear quite proper to select judges and court officers fully conversant with Welsh matters to sit in relation to Welsh cases, as happens in the High Court in relation to other matters.

What might happen in the future is difficult to predict. At present there is a separate jurisdiction for Scotland, and for Northern Ireland, and for England and Wales. Having to separate the jurisdiction of Wales from that of England would not appear to raise insurmountable difficulties.

However, whilst both countries remain within the EU and within the influence of global markets, there must remain limitations on the scope for a distinction of the new jurisdiction from that of its neighbours. It appears to be unnecessary, therefore, to answer all the questions posed in this consultation until such time as significant progress has been achieved in creating this body of law.

It is, of course, conceivable in the course of time that present unions end and Wales becomes totally independent. In that instance, what are at present routine legal matters could become vastly more complicated. For example, arrest warrants across the English-Welsh border may involve extradition, but that is an extreme position that, it is hoped, is never reached.

What is more pertinent is that political support is sought from other legal jurisdictions, especially those with superior legislative powers, to avoid conflicts with matters which under the Government of Wales 2006 Act is quite proper to legislate for. Examples of conflict of laws, particular in matters of Human Rights, show how complex and expensive matters become.

TSI sees it integral to the ambitions of Wales in Government and as a nation that it should attempt to create a separate Welsh jurisdiction.

Our expressed wish is that such ambitions do not in any way prejudice the competitiveness of Welsh business through additional legislative burdens, but serve to enhance Welsh standing in international markets.

The Trading Standards Institute does have a Welsh Branch serving the whole of Wales and Members of the Welsh Branch have a keener interest in this consultation than others. This Branch, and indeed this response, has been guided by the advice to the Branch of Huw Evans, Lecturer in Law at Cardiff Metropolitan University which currently runs a BSc course in Consumer Affairs and Trading Standards. That guidance is attached for your consideration at Appendix 1.

Trading Standards Institute – June 2012

Welsh Government Consultation
A Separate Legal Jurisdiction for Wales

Note to the Welsh Branch of the Trading Standards Institute

Introduction

The Welsh Government has published a consultation document[1] concerning a separate legal jurisdiction for Wales seeking views on:

> *what is meant by the term 'separate legal jurisdiction';*
> *whether there are any essential features for the existence of a separate legal jurisdiction and, if so, what they might be;*
> *what the consequences of having a separate Welsh legal jurisdiction might be; and*
> *what the potential advantages and disadvantages of a Welsh legal jurisdiction would be.*

In seeking views the consultation document sets out a number of specific questions. The Welsh Branch of the Trading Standards Institute is responding to the consultation. This note is submitted to assist in preparing that response. While the response will undoubtedly encompass the general subject area of the consultation, it is also assumed that there will be a specific focus on trading standards and related matters.

The note attempts to set out issues identified as relevant in a structured and thematic way, It does not attempt to go to each question and specifically answer it (although, of course, it may be possible that an answer can be inferred from what has been set out). This approach has been adopted as it seems sensible to first explore issues and be able to think clearly about the subject area. It is from that position that views can properly be formed and an informed response to the questions given.

Observations

Whatever 'separate legal jurisdiction' might mean, it is currently recognised that the UK comprises three legal jurisdictions: England and Wales, Scotland and Northern Ireland. Their existence can be explained historically and their recognition is conventionally reflected in Parliamentary Counsel drafting in Acts of Parliament under 'Extent' sections

[1] Welsh Government. *A SeparateL egal Jurisdiction for Wales.* (Consultation Document, March 2012). Available at: http://wales.gov.uk/consultations/finance/seplegaljurisdiction/?lang=en

eg '... this Act extends to England and Wales, Scotland and Northern Ireland'.[2] Associated with a legal jurisdiction is a uniform court and administrative structure as exists in each of England and Wales, Scotland and Northern Ireland. Within the England and Wales jurisdiction law that only has application to Wales is conventionally stated to 'apply' only to Wales but 'extend' to England and Wales (this is more specifically considered below).[3]

The functioning of those jurisdictions is coordinated through the role of Parliament as the chief UK legislature and the Supreme Court as the highest domestic court (and with the European Court of Justice having primacy in EU matters). Therefore although there are three separate jurisdictions there is an overarching structure; and the model functions in practice. Whether legal or structural, differences between jurisdictions are accommodated within the UK legal and constitutional framework. Based on evidence of current arrangements that position is likely to remain constant with Wales established as the fourth jurisdiction..

As a counterpoint to difference between the law of each jurisdiction much of it will be the same if it has UK application ie the same law has effect through the mechanism of three separate jurisdictions. Law might have UK application because it involves a non-devolved (reserved) matter, its origin is from the EU and there is an obligation on the UK as a member state to implement it or, if it involves a common devolved matter, there is agreement.[4] This consideration is particularly germane to trading standards. So:

- consumer protection is not (currently) a devolved function in Scotland but UK consumer protection law is administered in the Scottish courts within the separate Scotland legal jurisdiction.
- consumer protection is a devolved function in Northern Ireland but EU requirements mean that implementation of EU law is required at a UK level; and in

[2] Enterprise Act 2002, s 280(4). One notable exception to the convention is contained in the Local Government Act 1972, s 38, which states: 'This Part of this Act shall extend to Wales only.' It is assumed that this is a drafting 'glitch'.

[3] The same is also said of law that has application to England only or another area eg. London; for instance, the Greater London Authority Act 1999 established the Greater London Authority (and which comprises the Mayor of London and the London Assembly).

[4] Theoretically law might also have UK effect involving a non-devolved matter if imposed by the UK Parliament without the consent of he devolved legislatures. While constitutionally permissible, there are obvious political difficulties with adopting this approach to law-making.

consequence the capacity to be different in Northern Ireland is put in a legal straightjacket. The law is administered within the separate Northern Ireland legal jurisdiction.

Because of the EU dimension to trading standards law it can be argued that with Wales as a separate legal jurisdiction (and irrespective of whether consumer protection was devolved) it would not necessarily be the case that the law applied in Wales would be a different to that applied in the rest of UK. [5] Northern Ireland and Scotland have has already been mentioned and each can provide a good practical comparison reference point when considering the position for Wales.

Application and extent: the myth as it applies to Wales

As mentioned, within the England and Wales jurisdiction Wales only law is said to 'apply' to Wales but 'extend' to England and Wales. There is nothing inherently objectionable to legislation applying to part of the jurisdiction such as in the case of local legislation because the scheme of that legislation is consistent with the scheme of legislation that applies to the whole jurisdiction.

However an argument for objection does emerge where the scheme of legislation applying to part of a jurisdiction is not seen as consistent with the scheme of other legislation and *de facto* two distinct bodies of law emerge (because of the differential content) ie one applicable to England and one to Wales. That objection can comprise both theoretical and practical elements: theoretical because of the fact of two distinct bodies of law, practical because of a need for differential arrangements to give effect to the separate bodies of law. In light of devolution, law applicable only to Wales has increased significantly and will continue to do so (as will law applicable only to England). The point to make is that, in a differential sense, there are already distinct bodies of law for both England and Wales and that law has practical application to England or Wales (as the case may be) and not to England and Wales. In that sense to suggest otherwise is a legal fiction.

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[5] Eg Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices [2005] OJ L149/22 is implemented in the UK by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).

De facto Wales jurisdiction

Where does this conclusion lead? It can be argued that a *de facto* jurisdiction has been established. Furthermore, that this is an inevitable position following the acquisition of full law making powers by the National Assembly for Wales.[6] This is the position in Northern Ireland and Scotland and, *a fortiori*, it follows that it is the position in Wales. Self evidently, what is lacking is formal acknowledgement of that position.

The consultation document asks what is meant by 'separate legal jurisdiction' and what the essential characteristics might be. From the above analysis it includes a defined territory (ie Wales) and a distinct body of law. The consultation document asks if a characteristic of a separate legal jurisdiction includes a separate legal system and specifically refers to its features such as a legislature, courts, judiciary and legal professions. It is agreed that these are features of a separate legal jurisdiction but it is not agreed that there is a need for these to be separately constituted and exclusive to the jurisdiction (although these might be expected to be found). For example:

- Prior to implementation of the Scotland Act 1998 and the establishment of the Scottish Parliament it was recognised that Scotland was a separate jurisdiction yet there was no separate legislature ie there was only the UK Parliament.
- Although a uniform court system is a feature of a legal jurisdiction it is also conceptually possible for that system to cover more than one legal jurisdiction. The Supreme Court performs such a role. It follows then that within the unified court system of England and Wales the law of Wales can be applied in the Wales jurisdiction and the law of England in the England jurisdiction. As the All Wales Convention stated: 'the courts in England and Wales are fully competent to consider cases involving the laws of England and Wales..[and] the laws of Wales only...' [7]

Matters arising

If the above analysis that there is already a *de facto* separate jurisdiction is accepted this in one sense makes part of the consultation exercise redundant and it can facilitate focus away from diversionary academic debate about legal jurisdiction to concentration about how the current position can be best adapted to best meet stakeholder needs.

[6] Within its legislative competence an Act of the National Assembly for Wales may make any provision that could be made by an Act of Parliament (Government of Wales Act 2006, s 118(1)).
[7] All Wales Convention. *All Wales Convention Report.*(2009) para 3.9.22.

In looking at Scotland and Northern Ireland, it is also worthwhile making a distinction between the two jurisdictions. The law of Northern Ireland shares more in common with the law of England and Wales than it does with the law of Scotland. The law and legal practices of Northern Ireland are described in the consultation document as 'not so substantially distinct from that of England and Wales'. The same can be said of a fledgling Wales jurisdiction when comparing it with England and Northern Ireland.

In any event does the existence of a separate Scotland and Northern Ireland jurisdictions cause difficulty to business in cross jurisdiction trading activity? No evidence to suggest this can immediately be identified but an obvious reference point in considering this question might be trading standards colleagues in Scotland and Northern Ireland. Also, in light of the UK's membership of the EU and the establishment of the internal market, there will be increasing common legal ground.

How might matters be best adapted to meet stakeholder needs?

Law that applies in Wales needs to be readily accessible to practitioners and those affected by it. This is likely to improve following the acquisition of full law making powers given the complexity of the legal landscape that preceded it.

The court system needs to be organised in a way that is reflective of the needs and circumstances of Wales. Change has already occurred occurred within administration of the court system in Wales. As John Williams has said: 'Devolving the administration of justice must match the pace of devolution and the growth of a corpus of Welsh law.'[8]

Thus for administrative purposes England and Wales is now divided into 6 areas, one of which is Wales. Up until 2007 the administrative area covering Wales had been the Wales and Chester Circuit. This development was described by Mr Justice Roderick Evans, then Presiding Judge for the Wales Circuit, as 'a very significant event' as it:

> *has provided...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.*

[8] John Williams, 'The emerging need for a Welsh jurisdiction: Reforming Welsh law' (2010) 42 Agenda 40.

He also said 'spending criteria and administrative templates set in London for England and Wales may be suitable for England but not necessarily suitable for Wales'[9]. More particularly Sir Malcolm Pill, as a Lord Justice of Appeal, asked 'If a Welsh public body decides where hospitals are built in Wales, should not a Welsh public body decide where courts are built?'[10]

Other administrative developments reflecting the post-devolution settlement include the establishment of an Administrative Court and a Mercantile Court[11] in Wales and the Court of Appeal sitting in Wales hearing Welsh business. Included among the Administrative Court's business is the hearing of judicial review cases and there is an expectation that Welsh cases will now be heard in Wales.

These changes have potential impact as far as arrangements for trading standards are concerned. So, for instance, a local weights and measures authority in defending an application for judicial review will have the proceedings heard in Wales and not London. A similar outcome might arise with a case that goes to the Court of Appeal. On the face of it, this represents an improvement but as such events are likely to be occasional and not routine it is probably right to say the changes are of marginal effect in impacting on how local weights and measures authorities exercise functions.

The changes mentioned so far are related to devolutionary developments. Of course, there can be changes for other reasons, and these can impact on the Trading Standards. Thus, following a review of the court estate in England and Wales in 2010 it was announced that by the Ministry of Justice that 93 magistrates' Courts and 49 county courts were to be closed.[12] For Wales these amounted to 12 magistrates' courts and 4 county courts. With Mr Justice Roderick Evans in mind, this was not a decision made by a Welsh public body, and it could be argued was according to 'spending criteria and

[9]Mr Justice Roderick Evans. (2010, 19th February). *The Lord Callaghan Memorial Lecture 2010: Devolution and the Administration of Justice.* Lecture given at Swansea University. Accessible at: http://www.judiciary.gov.uk/media/speeches/speakers/mr-justice-roderick-evans

[10]Lord Justice Pill.(2009, 9th October) Speech given to Legal Wales Conference 2009 at Marriott Hotel, Cardiff. Accessible at: http://www.judiciary.gov.uk/media/speeches/2009/speech-pill-lj-09102009

[11]Both courts are contained within the Queen's Bench Division of the High Court.

[12]Ministry of Justice. *Court reform: delivering better justice.* (Press release, 14 December 2010). Accessible at: http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/news/newsrelease141210a.htm

administrative templates set in London for England and Wales [which] may be suitable for England but not necessarily suitable for Wales'. In the consultation stage leading up to the decision Lord Judge, referring to the proposed closures, said that five courts should remain open and a further six should be reviewed. He raised a number of concerns including those related to distance and expense of travel to alternative courts, and the ability of retained courts to absorb the business of closed courts.[13] Two courts proposed to be closed were retained following the consultation..

So, for example, one of the closed courts is Barry Magistrates' court. With its closure the Vale of Glamorgan is left without a magistrates' court. The loss of the local facility means that potential users need to access an alternative facility. Such a change has clear impact on how the Vale of Glamorgan County Borough Council in its capacity as a local weights and measures authority is able to exercise its functions. The most obvious is in its working arrangements eg visiting courts involving greater time and expense and working relationships with court officials changing. Another potential area of impact relates to access to justice eg greater use of resources in accessing the facility could conceivably act as a deterrent to taking court action or justices from outside the Vale of Glamorgan in carrying out Vale of Glamorgan court business may not be wholly familiar with local conditions.

These outcomes are not inevitable but they are possible. But if administration of the justice was a devolved function the question arises whether, as regards the Vale of Glamorgan, if a similar outcome would have been reached if a review of the Welsh estate had been carried out by the Welsh Government. Taking into account the Welsh Government's likely better awareness of local conditions than the Ministry of Justice, it is not difficult to conceive that a different decision may have been taken. Of course, this is an exercise in speculation, but it makes a point given local opposition to the closure[14]

[13] BBC. *Lord Chief Justice calls for Welsh courts reprieve* (21st October 2010) Accessible at: http://www.bbc.co.uk/news/uk-wales-11597507

[14] There was an unsuccessful application for judicial review of the closure decision by the Vale of Glamorgan County Borough Council: *Vale of Glamorgan Council v Lord Chancellor* [2011] EWHC 1532 (Admin) [2011] All ER (D) 119 (Jun). There is neat irony as in accordance with changed administrative arrangements the challenge to this London decision was heard in Cardiff.

and judicial concerns.[15] Whereas judicial review and Court of Appeal proceedings are likely to be occasional local weights and measures authority contact with a magistrates' court is going to be routine eg laying of informations, prosecuting cases and applying for search warrants. Therefore the location of, and accessibility to, that court is materially relevant to how trading standards functions are exercised.

With establishment of the *de facto* jurisdiction it must follow that administration of justice is also devolved. Over time that might mean establishing a separate Wales court system but such devolution could occur within the unified structure of England and Wales.

Conclusion

This note argues that the central debate about the establishment of Wales as a separate legal jurisdiction misses the point as following acquisition of full law making powers by the National Assembly for Wales a *de facto* legal jurisdiction has been established; there needs to be concentration on action to maximize the benefit obtainable from the change. In any event, given the uniform nature of UK trading standards law, it suggests that the practical effect of the establishment of Wales as separate jurisdiction will result in little substantive difference between the law of Wales and the law elsewhere in the UK. Scotland and Northern Ireland provide ready-made sources of reference.

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10th June 2012

[15] As 13. Lord Judge asked during the consultation period for the proposed closure to be reviewed as it was '[u]nclear whether Cardiff Magistrates' Court would be able to absorb the workload of this busy court'.

WELSH GOVERNMENT CONSULTATION

"A SEPARATE LEGAL JURISDICTION FOR WALES"

RESPONSE OF THE ASSOCIATION OF JUDGES OF WALES

1. The above association (the Association) was formed in 2008 after the administration of the courts in Wales was re-organised to recognise the National boundary, and membership is open to all members of the full time judiciary who sit in Wales, or did so before retirement. For a more detailed description please see paragraph 1 of the response (the CLAC response) of the Association to the Constitutional and Legislative Affairs Committee's recent inquiry on this subject, a copy of which response is attached hereto.

2. Responses to this consultation will be made by The Council of Her Majesty's Circuit Judges for England and Wales, The Association of Her Majesty's District Judges, and by the judicial members of the Welsh Tribunals Contact Group, amongst others. It is not intended in this response to focus upon the perspective of such associations, but rather to give an overview of those members of the judiciary who sit, or have sat, in Wales. That is no easy task, because of the range of views which are held, and because of the constitutional need for the judiciary to refrain from expressing views on matters of policy or of a political nature.

3. The independency of the judiciary of England of Wales is seen as essential by its members and is highly regarded by others. Whatever changes there may be in the administration of justice in Wales, that independence must be safeguarded.

4. It is not appropriate, or necessary, for the Association to respond to every question in this consultation in detail.

5. The essential position of the Association remains that set out in the CLAC response. Generally, the growing differences between the laws in England and the laws in Wales can be accommodated in the present administrative and judicial arrangements. Those arrangements have developed in a piecemeal and somewhat reactive manner, so far as the needs of the people of Wales are concerned. It is unlikely that this will be sustainable in the long term. As we set out in paragraph 7 of the CLAC response, we regard it of fundamental importance that such arrangements develop in a planned and proactive way to support future change. At paragraph 8 we then go on to set out examples of such piecemeal development and how this is often achieved with difficulty and sometimes opposition. At paragraph 9 we set out examples of developments which we regard as essential for the proper recognition of the administration of justice in Wales.

6. We now turn to those questions where it is felt appropriate to develop that essential position in a little more detail.

7. In respect of **question 1**, we do agree it would be essential to define the geographical area (to include territorial waters) of a separate Welsh legal jurisdiction. Welsh law can apply only to territory within GWA 2006. If there is a separate jurisdiction it must be limited to that territory under the current settlement. It is necessary to define the territory on the 2006 basis because of the Assembly's regulatory authority over such matters as fisheries.

8. **Question 3** has been dealt with above to some extent. We do not consider that a separate Welsh jurisdiction would necessitate a separate Court of Appeal, providing sittings of the Court of Appeal in Wales are strengthened. It is likely to necessitate the opening of an office of the Court of Appeal in Wales to administer appeals from Wales.

9. The position of the High Court is somewhat different however. At present, all High Court judges are based in London and travel to Wales to hear the most important or complex cases, whether in Crime, Family, Administrative, Chancery or Civil. This system often gives rise to difficult administrative and

listing challenges. In a separate Welsh Jurisdiction, there would be a constitutional and practical need for the judges trying the most important and complex cases in Wales to be based in Wales. The present HMCTS in Wales could be strengthened to accommodate the administration for such a system. It is already responsible for administering the sitting in Wales of High Court judges.

10. **Questions 8, 9, 20 and 26.** Please see paragraph 5 above. As indicated, we do not see why lawyers in England or Wales should not be able to continue to practice in either country, even if separate jurisdictions were created.

11. Whether they are or not, we believe that accessibility of legislation in Wales is already difficult and is likely to become more so unless funding is made available to increase such accessibility. The growing body of law in Wales needs to be made readily discoverable and available not only to lawyers, but also to the increasing number of litigants who do not have funding for representation, and of course to the judges who have to determine what the law is.

12. **Questions 21 and following** concerning the common law. The common law system remains the foundation of many different countries in the Commonwealth, adapted by legislation to meet the modern needs of different communities. There is no reason to suppose that a separate jurisdiction in Wales would give rise to unique difficulties.

13. **Question 25.** Please see paragraph 10 of the CLAC response. The ramification of a separate jurisdiction on the use of the Welsh language in the administration of justice is likely to be beneficial. Please see the difficulties encountered in the present structure set out in paragraphs 8 (a) and (b) of the CLAC response. It is to be recognised that there is an extra dimension to Welsh regulation and legislation as it is produced in both the English and Welsh languages. Interpretation of European legislation, produced in multiple languages demonstrates that it can be necessary to for the purposes of

construction to examine such materials in both languages. This is likely to be more efficiently managed in Wales.

~~TRIBUNALS~~
JUDICIARY

MISS E ARFON-JONES DL
VICE PRESIDENT - UPPER TRIBUNAL

Theodore Huckle QC
Counsel General
Welsh Government
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CF99 1NA

7 June 2012

Dear Theodore

As Senior Tribunals Liaison Judge for Wales and Chair of the Welsh Tribunals Contact Group (WTCG) I have pleasure in enclosing the WTCG's response to the Consultation on a separate Legal Jurisdiction for Wales. I support entirely the views expressed in that submission.

Additionally as a member of the Judges' Council which is, of course, chaired by the Lord Chief Justice of England and Wales, I endorse that response.

The paramount issues are safeguarding the independence of the judiciary and ensuring the Welsh Government's total commitment to the separation of powers and the Rule of Law.

Yours sincerely

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Awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru
A separate legal jurisdiction for Wales

Submission by the judicial members of the Welsh Tribunals Contact Group.

Summary:

The Welsh Tribunals Contact Group was established by the Welsh Government to bring together the judiciary and administrators of the tribunals that operate in Wales. It includes both the devolved tribunals for which the Welsh Government has legislative responsibility and those for which the United Kingdom government has legislative responsibility. Together, those tribunals deliver a major part of the justice system in Wales other than criminal justice. The Group is chaired by Upper Tribunal Judge Elisabeth Arfon-Jones, the Senior President of Tribunals' senior liaison judge for Wales.

The submission comments on the practical issues that arise for tribunals in the context of a separate legal jurisdiction for Wales. It does not seek to comment on any issues of criminal law, as tribunals are not directly concerned with this. Nor does it seek to comment on the operation of the High Court or local civil courts, as in practical terms most tribunals operate in a parallel system to the civil courts save for higher level appeals and some aspects of judicial review. Answers are confined to those questions of direct relevance to tribunals. We point out that for some purposes a separate Welsh tribunal jurisdiction already exists, while for others the relevant tribunal jurisdiction is the United Kingdom as a whole and cannot be divided. We draw attention to jurisdictional issues raised by this consultation that are issues currently confronted by tribunals in Wales. We comment on the scale of the delivery of justice by tribunals in Wales under the multiple jurisdictions currently operated.

A note attached to the response lists those tribunals currently administered in Wales by Her Majesty's Courts and Tribunals Service.

1 This response is from the judicial members of the Welsh Tribunals Contact Group. It is a general response reflecting our views after thorough discussion of the consultation document. We agreed that individual tribunals make additional responses specific to their tribunals.

The new tribunal systems

2 This is not a full response to the questions in the consultation document. We agree that those questions raise issues of fundamental importance to the development of law in Wales. But we confine this response to those issues specific to the jurisdictions and operation of tribunals in Wales. While several tribunals are also courts, we confine ourselves here to their functions as tribunals.

3 Our tribunals deliver justice throughout Wales both as part of the reserved group of tribunals and as part of the devolved group of tribunals. We note with disappointment the limited attention given to this in the consultation document. Only one question mentions tribunals (**question 9a**). And only one specific tribunal group is mentioned (employment tribunals in **question 2**).

4 Alongside the constitutional and legal reforms identified in the consultation document there have been a series of legislative, executive and judicial measures that together have completely reshaped the role and nature of tribunals in the UK over the last decade. Most reserved tribunals are now, for the first time, part of a tribunal system that is an integrated part of the justice system. This has included judicialisation of the tribunals. The reserved tribunals operating in Wales are now run by tribunal judges who are subject to the judicial oath and to the overview of the Lord Chief Justice of England and Wales. All tribunal judges have their independence protected by law in the same way as court judges. They cooperate in training and development as part of the Judicial College and operate under common procedure rules drafted by the Tribunals Procedure Committee. All new judges of those tribunals are appointed by the Judicial Appointments Commission. Administration of most reserved tribunals has been transferred from individual sponsoring departments to the Ministry of Justice.

5 The Tribunals, Courts and Enforcement Act 2007 established the First-tier Tribunal and Upper Tribunal. Separately, as the consultation notes, administration of those tribunals, together with employment and other tribunals, was transferred to a common administrative structure managed by Her Majesty's Court and Tribunal Service. As that structure is still taking shape, we append a note outlining its scope.

Scope of this response

6 Tribunals have no competence in issues of criminal law in the narrower sense reflected in the jurisdiction of the criminal courts in the UK. The UK tradition is that criminal conduct is tested in specific courts with specific prosecution and justice procedures and not as part of the general jurisdiction of any court. Tribunals have competence over some civil and administrative penalties that are "criminal" for the purposes of Article 6 paragraph 3 of the European Convention on Human Rights. They also have functions related to the detention of mental health patients and other invasive measures. And the Upper Tribunal has the powers

of the High Court to impose and enforce tribunal functions, so can impose penalties for contempt. But they are not involved in any aspect of policing, prosecution, imprisonment and other sentencing measures, probation or any other area of the criminal process. This response therefore does not address **question 4, question 14, question 23(a)** or those aspects of other questions.

7 Nor does it comment on issues specific to the civil courts where those do not also affect tribunals. There is inevitably a practical overlap in subject matter and in judicial membership. But the response on those issues comes from those directly responsible.

8 We also confine our response to the existing situation and the issues that arise. We do not seek to speculate or comment on future developments in the division or devolution of powers nor to comment on matters that are for political decision. We have fully in mind the existing provisions under sections 107 and 108 of, read with Schedule 7 to, the Government of Wales Act 2006, and have no comment about changes to those provisions. We therefore do not reply to **questions 16 to 19.**

International and intra-national issues

9 We take into account active discussions in each of the four nations about future arrangements for tribunals. We note both the discussion paper published by the Northern Ireland Department of Justice in December 2011 on reform of the administration and structure of tribunals in Northern Ireland and the recent document issued by the Scottish government on *Consultations on the Scottish Government's Proposals for a new Tribunal System for Scotland*. It is central to aspects of the work of several chambers of both the Upper Tribunal and the First-tier Tribunal that we remain alert to both the common ground in the laws and procedures in the four nations and the evolving differences in those laws.

10 The issues raised by the Welsh government are at a more fundamental level than the issues raised in the NI and Scottish consultations. But they encompass those issues. They also reflect central concerns of international public law and international private law (or conflicts of laws) as seen against the background of the unique absence of a clear constitutional structure of the United Kingdom. The UK is not a unitary state like France (where overseas territories are part of France in the same way as the mainland) nor a federal state like Canada, nor a confederation like Switzerland. Nor (unusually) does the UK have a constitutional relationship that ensures that international treaties to which the UK is party form a direct part of our law. (For example, the Vienna Convention on Diplomatic Relations takes direct effect in many states without national enabling laws). Nor does the UK constitution formally define that relationship in any other way (as in the United States). So UK law is needed to ensure those treaties are observed throughout the four nations. At the same time, because the UK is a Member State of the European Union, EU laws apply directly throughout the four nations. In that sense, several legal systems currently operate in Wales: international, EU, UK, British, English and Welsh, Welsh.

11 This complex arrangement, which in part reflects international public law, is something that our tribunals must have in mind in their day to day workings. This must be reflected in our answers below. International private law, or conflicts of laws, is of more limited concern to tribunals in practice. The main concerns of most tribunals are disputes between individuals and public authorities or otherwise about statutory schemes. Those schemes normally identify their own jurisdictional limits. Although tribunals deal with disputes between individuals they are normally concerned only indirectly with issues such as

the proper law of a contract. Those issues can arise currently as between, for example, Scotland and England and Wales. They cause no major problems. We do not comment on question 15 as regards future issues.

The relevant law

12 **2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?**

2.1 When is a body of law distinct enough in this regard?

2.2 Does it matter whether the law in question is statute law or common law?

2.3 Does it matter what the nature of the subject-matter of the law is – e.g. criminal, civil, family?

This question is at the core of the approach taken by successive governments and parliaments in creating tribunals and the tribunal system in the UK. For example, the UK government in 1946 saw the new social security system as a separate and distinct body of law that it wished to see administered and adjudicated separately from existing officials and courts. Parliament agreed, and the result was a sort of parallel court system, headed by a National Insurance Commissioner (then for each of the four nations), responsible for overseeing the operation of social security law. It would be difficult to argue that that law was not a distinct body of law. It is an example of a complex body of law with its own justice system and in that sense might meet the test of being a "separate legal jurisdiction". However, we would not argue that that is "separate" in the sense intended here, though it is separated in practical terms in administrative and judicial delivery. Rather, this illustrates the value of specialist judicial bodies or, in usual British nomenclature, tribunals. The ever-growing complexity of law in the UK means that the emergence of bodies of law regarded as requiring separate delivery is likely to be a continuing development.

Jurisdiction

13 **6. When reference is made to a 'legal jurisdiction' in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?**

6.1 In this context does legal jurisdiction just mean the territory over which the legislature (or executive) has power to legislate?

7. Are there any other *essential* features of a separate legal jurisdiction?

The fundamental assumption behind both the consultation paper and this response is that governments, courts and tribunals operate within the rule of law. This is the principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated. There are in our view three aspects of jurisdiction the definition of which are essential to meet the requirements of the rule of law. To the extent that a body of law is sufficient to be regarded as involving a separate legal jurisdiction, it follows that these must be necessary to that jurisdiction. The three essential aspects are:

- A defined territorial extent: where does the law apply?
- A defined personal extent: to whom does the law apply?
- A defined enforcement and justice system: who administers and who adjudicates?

For a law to "bite" it must be clear that each of these conditions is either present or irrelevant.

14 ~~1. Do you agree that a defined geographical territory would be an essential~~ feature for a separate Welsh legal jurisdiction?

1.1 What, for the purposes of a separate Welsh legal jurisdiction, might that territory be – "Wales" as defined in the Interpretation Act as defined in the Government of Wales Act 2006?

This deals with the first of those aspects of jurisdiction. The territorial reach of any law must be defined. In reply to 1.1, we can see within current tribunal competences that issues could arise that might involve delineation of offshore borders. For example, an issue might arise concerning rigs or other offshore installations in the Irish Sea between Wales, England and the Isle of Man. In practice, in the areas of law of concern to tribunals, there is no one answer to this question. Some parts of the law we consider apply without differentiation to all parts of the United Kingdom, while other parts of their nature apply only to the land mass of each of the four nations. The answers are issue specific. We suggest, therefore, that there is no single answer to this question and that none is currently necessary.

15 There is equally no one answer to the issue of the personal extent of a law. In each case it is a question of identifying to whom a specific law applies. In some cases we are concerned with domicil or habitual residence of an individual, while in others presence is enough. Others are, to use the old phrase, jurisdictions in rem. It is the location of property that given the jurisdiction, not that of a specific person. Again, there must be a clear answer for each specific law but there is no single general answer.

16 We turn to **question 3.** As we are concerned only with tribunals, we have no separate comment on **question 5**, which we take to apply only to courts. Similarly, our comments on question 3 are confined to those aspects that apply to tribunals.

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?
3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?
3.3 If there were a separate Welsh courts system, which courts would be affected?
3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?
3.5 Should Wales continue to share some courts with England, and if so, which ones?
3.6 If Wales and England continued to share some courts, what (if any) changes might be needed in the organisation of those courts?

As we emphasise in this response, some chambers of the First-tier Tribunal and Upper Tribunal operate a United Kingdom jurisdiction for appeals (in the sense that the chamber has the judicial power and duty to decide appeals throughout the UK) while applying the national laws for each of the four national jurisdictions (in the sense of competence to legislate) whenever they are relevant to an individual appeal and working with the local tribunal service (the administrative jurisdictions of which are the subject of separate legislation) for the location of the specific tribunal hearing the appeal. Other tribunals and chambers do not have a full UK jurisdiction. In Wales, both reserved and devolved tribunals within the HMCTS umbrella operate separately from the courts save for a limited jurisdiction of the

Administrative Court to hear judicial review cases and second-level appeals to the Court of Appeal of England and Wales. Those tribunals would therefore be affected only to a limited extent by any changes to the court system. And the general effect would be formal rather than substantive. Tribunals operating in Wales follow decisions of the appeal courts in Scotland and Northern Ireland, as well as those of the Court of Appeal of England and Wales, where the substantive law is the same. For example, this applies to a decision about entitlement to a social security benefit or liability to a tax. At the same time, they apply separate Welsh substantive law and procedures where appropriate. For example, the Upper Tribunal will operate the rules allowing for child appellants in child support cases in Scotland and the rules allowing for child appellants in special educational needs cases in Wales although these rules do not apply throughout those jurisdictions of that tribunal. We see no problems of compatibility in practice. Nor is there any significant problem in operating with a single United Kingdom (or British) tribunals judiciary.

17 **8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?**

Tribunals take a pragmatic function-based view of this issue. There is no separate legal jurisdiction in England and Wales for tax matters, immigration matters, social welfare matters, employment matters and several other areas of law of direct importance to the entire population of the UK (or Britain). Tribunals take active measures to ensure that these areas of law are administered and adjudicated in the same way throughout the territorial and personal reaches of the laws. It is seen as fundamental that, for example, anyone entitled to claim a social welfare benefit anywhere in Britain should receive the same entitlement as anyone else anywhere else. This means that there must be, and is, regular contact by tribunal judges to ensure a common response to common problems.

18 At the same time, it is recognised that other aspects of the law of general importance vary within the four nations. Those differences must be factored into the operation of any other law that is associated with devolved laws. For example, the rules about payment of tax credit to someone claiming the childcare element of working tax credit (a law applying throughout the UK) must reflect the different laws applying in the four nations about whom may provide child care.

19 While there is increasing divergence, we see no fundamental issue here. There are important practical issues, as **questions 9 and 10** enquire. For example, tribunals involved in these areas have an ongoing requirement both for a collegiate approach and for judicial development and training supported by appropriate information systems. It is important, for example, that all relevant tribunals judiciary are made aware of impending changes to Welsh law so that those changes may be reflected promptly in adjudication. In many tribunals the judiciary cannot rely on representatives to keep them informed of such changes. As the example of childcare illustrates, that applies not only to the immediate direct effect of a change but all secondary effects as well. That is a partial answer to **question 12**. Subject to practical points about information, all relevant judges must, and do, take judicial notice of all four sets of childcare legislative rules and any other devolved legislation where necessary.

20 **11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?**
12. Would such statute law be judicially noticed in those other jurisdictions?

13. **Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions- e.g. for enforcement or through judicial review.**

Tribunals are not responsible for enforcement of their decisions. That apart, this currently presents no problems of which we are aware. It is for each tribunal judge to take note of and deal with whatever United Kingdom law is appropriate. It is only if the law is foreign (that is, non-UK and non-EU) that it is treated as a question of fact, not law. The Upper Tribunal has limited judicial review powers. We see no reason why that should be fettered by this issue.

Other issues

21 **20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?**

20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions?

a. education and training;
b. qualification;
c. regulation.

While we recognise the importance of these issues, we have no separate general comment. But it serves as a reminder of the specialist nature of much of the law applied by tribunals. This is also reflected in another aspect of the constitution of tribunals that separates them from the courts: the use of expert members. For example, the First-tier Tribunal Social Entitlement Chamber has full time medical members appointed by reference to their medical qualifications. Agricultural land tribunals cannot function without farmers or farm managers. As that suggests, other professions are of central importance to many areas of the law and questions of fact on which tribunals adjudicate. Other examples are chartered surveyors, chartered tax practitioners, and of course medical practitioners.

22 That emphasises the importance of continuing training and development of all those involved in delivering tribunal justice. We strongly recommend that the Welsh Government build into any exercise of its powers in this area the need to ensure a proper budget and system for training all those involved in delivering tribunal justice in Wales for whom it has responsibility.

23 **21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?**

22. Would your answer be different if there was a separate court system in Wales?

We have no direct comment, but the questions serve to highlight related issues of importance to tribunals. The most important is that there already is a separate set of tribunals in Wales. We strongly support the continuing moves of the Welsh Government to bring together the administration of Welsh tribunals into a single unit distinct from the original sponsoring departments of those tribunals. We welcome the reports of the Welsh Committee of the Administrative Justice and Tribunals Council, under the chairmanship of Sir Adrian Webb, to that effect. We are and must be concerned with the independence of tribunal justice and of

tribunal judiciary in Wales as anywhere in the UK. And we welcome the comments by the Counsel-General in his recent letter to the Lord Chancellor on this issue.

24 We, of course, welcome the creation of the Welsh Tribunals Contact Group by the Welsh Government as a way of bringing together all those exercising tribunal judicial and related administrative functions in Wales. Whether that should lead to the development of a separate Welsh tribunal *system* raises exactly the issues on which the NI Department and Scottish Government are now consulting. But in one sense, as the Scottish Government document notes, there is such a system in place once the administering and financing of devolved tribunals are transferred to a common administrative body.

25 We have no comment to make on the creation of common law (or equity or, so far as still extant, custom) as such. All tribunals must apply all law, whether statute-based or precedent-based. Most tribunals are concerned with the application of specific areas of statute law and with the proper interpretation of that law. But they must also apply those laws to particular cases in the context of any other relevant law. We see no difference between operating that law and operating statute law.

26 One aspect of this question deserves specific comment. Tribunals create their own precedents at Upper Tribunal and Employment Appeal Tribunal level. And much importance is placed in practice by both experts and general users on individual decisions from some first level areas of tribunal jurisdiction. This is true, for example, of tax, transport and freedom of information decisions. We anticipate that it will be true of key decisions of the Welsh Language Tribunal. It is a truism that justice must be seen to be done, but that is of particular importance about the decisions of a tribunal. There is a need for Welsh tribunals, as any other tribunals, to ensure that all important decisions are published and perhaps that some are reported. This is an important aspect of any answer to **question 26**.

27 We have no further comment on **questions 23 to 25**, the latter of which is plainly beyond the scope of this submission. Nor do we comment on **question 28.**

Access to tribunals

28 **26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?**

This question identifies a problem central to any tribunal system. Tribunals are part of the answer to the problem of providing a justice system to deal with complex areas of statute law. Any full answer takes us back to the Leggatt Report *(Tribunals for Users – One System, One service)* in 2001. That led to the Tribunals, Courts and Enforcement Act 2007. The title of the Leggatt Report emphasises the reasons why. For our part, we strive to ensure that all tribunals that operate in Wales, whether reserved or devolved, do their best to ensure that they are readily accessible to everyone. That involves administration and procedures as well as the operation of individual tribunal hearings. That is part of the effective operation that is the subject of **question 27**.

29 There are other areas also necessary to effective operation. The first is that the system is, and is seen to be, independent. As the Welsh Government is currently taking steps to transfer tribunals from sponsoring departments to a central department and as the Counsel

General has recently commented on judicial independence himself, we need do no more than register our continuing concern that those who administer justice through tribunals in Wales, (whether or not the enabling legislation allows them to be called judges) are given, and are seen to be given, independence in office and in judicial decision-making. That is, as we have stated, part of modern delivery of the rule of law. But that does and must involve proper steps to ensure that the appointment of judges, the terms and conditions under which they act, their security of tenure, any complaints procedures, and any necessary discipline or removal from office are all consistent with that independence.

30 Another issue is that of accessibility in individual cases. How easy is it for someone to appeal to a tribunal? How easy is it to find the necessary information? Are any relevant forms simple and available readily, for example, on the internet? Are the procedural rules straightforward or complex? What happens if the appellant does not know the law and cannot afford advice? The answer to the last point is that the tribunal judges should not need to be told the law in an expert tribunal. Another aspect of this is the extent to which tribunal judges are investigative and proactive. It is a strong tradition in what are now chambers of the Upper and First-tier Tribunals that deal with social entitlement and similar issues that judges do not simply rely on the parties for information about the relevant law. They will expect the relevant public authority to set out the position, but if necessary they will themselves raise and decide other issues of direct relevance. See the opinion of Baroness Hale in *Kerr -v- Department for Social Development* [2004] UKHL 23. That imposes requirements both that the judges are expert in their fields (including on-going training) and that they are able, within tribunal procedures, to ensure that any issue that is of concern is raised and dealt with. At the practical level, the hearings must be held in neutral locations that appellants can attend and, if necessary, transport arrangements made or funded.

31 Finally, we suggest that the significance of these issues is best seen in the context of the workload of tribunals. HMCTS statistics were most recently published by the Ministry of Justice in June 2011 for the year to 31 March 2011. These show a total of cases received in England and Wales by tribunals administered by HMCTS at 831,000 cases. Those tribunals sat for a total of 199,600 days in that year. If it is assumed that the proportion of Welsh cases to English cases is the same as that of the share of populations, then this represents 45,000 Welsh cases in that year requiring nearly 11,000 sitting days. The main devolved Welsh tribunals (Mental Health Review Tribunal, Special Educational Needs Tribunal and Residential Property Tribunal) have, on an annualised estimate from the latest figures, a caseload of at least 1,200 cases involving over 300 days of hearings. In addition, other non-devolved tribunals outside the HMCTS system, such as the Valuation Tribunal Wales and the Traffic Penalty Tribunal England and Wales, hold many hearings of Welsh cases.

32 Put at the practical level this means that there will normally be about 50 tribunal judges or adjudicators holding tribunal hearings every working day at tribunal or court venues somewhere in Wales and many will be doing so in public. That involves a significant administrative resource in support. Tribunals and their supporting administration deliver a major part of the judicial function for Wales. That, we suggest, requires full consideration as part of any study of a separate legal jurisdiction for Wales.

Tribunals within Her Majesty's Court and Tribunal Service:

First-tier Tribunal

The First–tier Tribunal comprises six chambers:

The General Regulatory Chamber

Alternative Business Structures

Charity [1]

Claims Management Services

Consumer Credit

Environment

Estate Agents

Gambling Appeals

Immigration Services

Information Rights

Local Government Standards (England)

Transport

Health, Education and Social Care Chamber

Care Standards

Mental Health

Special Educational Needs and 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

[1] Charity appeals go to the UT Tax and Chancery Chamber; all others to the UT Administrative Appeals Chamber

The Upper Tribunal

The Upper Tribunal comprises four chambers:

The Administrative Appeals Chamber

The Chamber considers appeals against most of the decisions of the following First-tier Tribunal Chambers:

- General Regulatory Chamber
- Health, Education and Social Care Chamber
- Social Entitlement Chamber
- War Pensions and Armed Forces Compensation

and the following other tribunals:

- Mental Health Review Tribunal for Wales
- Pensions Appeal Tribunal in Northern Ireland
- Pensions Appeal Tribunal Scotland
- Special Educational Needs Tribunal for Wales

For England and Wales the Chamber considers applications for judicial review in the following cases:

- Criminal Injuries Compensation
- Procedural decisions of the tribunals listed above where there is no right of appeal

Judicial review cases may also be transferred by the High Court in England and Wales, the Court of Session in Scotland and the High Court in Northern Ireland.

The Chamber also considers appeals against:

- The Independent Safeguarding Authority (England and Wales)
- Traffic Commissioners (England, Scotland, Wales)

The Immigration and Asylum Chamber

The Lands Chamber

The Chamber hears appeals from the following tribunals:

- Leasehold valuation tribunals
- Residential property tribunals
- Valuation tribunals

The Chamber also hears appeals about a range of property issues including:

- Compulsory purchase
- Land compensation
- Restrictive covenants

The Tax and Chancery Chamber

Other tribunals within the HMCTS administrative structure

The Employment Tribunals, and on appeal the Employment Appeal Tribunal

(These are in a separate, parallel, pillar to the First-tier Tribunal and Upper Tribunal)

Gangmasters Licensing Appeals Tribunal

Gender Recognition

Proscribed Organisations Appeal Commission

Reserve Forces Appeal Tribunal

Special Immigration Appeals Commission

and, until moved to the First-tier Tribunal:
Adjudicator to HM Land Registry (England and Wales)

Agricultural Land Tribunal for England

Residential Property Tribunal for England

Notes

1 The Upper Tribunal, the Employment Appeal Tribunal and the Special Immigration Appeals Commission are all tribunals for current purposes although they are all also courts of record.

2 The Ministry of Justice published in March 2012 a consultation document about the creation of a Property Chamber of the First-tier Tribunal and the transfer to it of the jurisdictions of the Adjudicator to the Land Registry (England and Wales) and a number of English tribunals with jurisdiction over land issues.

Welsh Government
Consultation Document WG- 15109

A Separate Legal Jurisdiction for Wales

Response by
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1. This submission deals with a specific matter, namely the impact of devolution and the development of the Welsh Jurisdiction on legal education and legal scholarship in Wales. It is of particular relevance to questions 20, 25, 26 and 27 of the consultation document.

2. In the Legal Wales Conference held in the Crown Court at Caernarfon in October 2010, I delivered a lecture on behalf of the Welsh Legal History Society (the Youard lecture) on the subject of "The Three Ages of Legal Scholarship in Wales". The lecture contained some observations on legal scholarship in Wales, past, present and future.

3. Its concluding argument was that if legal scholarship and education in Wales is to be compatible with the new constitutional and legal landscape, new national structures need to be established in order to guarantee compatibility. It suggested the creation of a Council of Legal Education in Wales as a vehicle to plan, regulate and support the development of Welsh legal education and scholarship.

4. Of course, since the lecture was given, the significant changes to the National Assembly's legislative powers following the referendum of March 2011 have occurred. These changes have only served to further validate the lecture's central argument.

5. What follows is a revised transcript of the lecture, which contextualises the argument (and especially its historical context) and explains why the creation of this new national body is necessary. It is not a detailed description of the specific issues that a Council of Legal Education in Wales might need to address, once established. Those, of course, might include the incorporation of Welsh law (laws which apply in Wales) within the curriculum, the

appropriate role of comparative, trans-jurisdictional and international studies, the role of Welsh legal education in the training of English/Northern Irish lawyers, provision of common vocational education which prepares students for careers in all branches of the legal profession, and research and publication on the laws of Wales.

6. The lecture, however, focuses on the fundamental question, which is why there is a need for a national body in Wales to oversee the development of Welsh legal scholarship. The lecture, put simply, is another case-study on why there is the need for Welsh institutions to manage Welsh issues. As legal education is so important for the training and preparation of tomorrow's lawyers, and because legal scholarship has a key role to play in promoting public understanding of law making in Wales, it is submitted that this development is necessary, above all, in the public interest.

R. Gwynedd Parry

Mehefin 2012

"The Three Ages of Legal Scholarship in Wales"

Professor R. Gwynedd Parry

Youard Lecture in Welsh Legal and Social History

Legal Wales Conference,

Caernarfon 8 October 2010

Biographical Note

R. Gwynedd Parry is Professor of Law and Legal History and Director of the Hywel Dda Research Institute at Swansea University. He was called to the Bar of Gray's Inn in 1993. He was elected Fellow of the Royal Historical Society in 2010.

The Three Ages of Legal Scholarship in Wales[1]

Introduction

May I begin by thanking the Welsh Legal History Society for granting me the privilege of giving this year's Youard lecture. I am grateful to Mr Richard Youard for his generosity in endowing this lecture and I am conscious of my personal responsibility, as this year's lecturer, to maintain the high standards set by my predecessors. It is also a privilege to be this year's lecturer for reasons which are personal. Here at the port of Caernarfon, many of my maternal ancestors laboured on the quays which exported the slate that my paternal ancestors had extracted in the Nantlle quarries. I wonder what they would make of this occasion chaired by no less distinguished a person than the Lord Chief Justice of Wales and England. Lord Judge, I am so grateful to you for your support today and for all that you have done and continue to do in the cause of Legal Wales.

The opportunity is appreciated even more because it coincides with the publication of my study of Sir David Hughes Parry.[2] And may I, in advance, thank members of this conference for buying their partners this eminently suitable Christmas present! I do not intend to use this lecture to provide a summary of the book or, even worse, to read extracts from it, as is often the fashion at book launches. Nevertheless, I do intend to address a subject which draws upon the dual themes of Hughes Parry's life, namely, his contributions to legal scholarship and to the public life of Wales. My subject, therefore, is legal scholarship in Wales.

My title, the three ages of legal scholarship in Wales, is inspired by Titian's painting, "The Three Ages of Man", which hangs at the National Gallery of Scotland in Edinburgh. This renaissance painting depicts the three stages of life: infancy, adulthood and old age. To the right of the painting, we see infancy represented by Cupid keeping watch over sleeping babies. Adulthood is portrayed by the young lovers to the left of the composition. Their short-lived summer will eventually be interrupted by the autumn of life, which is symbolized by two skulls and an old man in the background. In this painting, Titian invites us to meditate on the transience or passage of human life.

[1] Youard Lecture in Legal and Social History 2010.

[2] See R. Gwynedd Parry, *David Hughes Parry. A Jurist in Society* (Cardiff: University of Wales Press, 2010).

Borrowing the symbolism of Titan, I shall consider what I will be referring to as the three ages of legal scholarship in Wales. This is a lecture on Welsh legal and social history. It must look towards the past, obviously, but I also wish to consider the present and the future. I shall therefore meditate on the history of Welsh legal scholarship and its significance for society in contemporary Wales.

The Age of Endeavour

The first age of this paper, as in Titian's painting, is about infancy: here, of course, the infancy of Welsh legal scholarship. It was what I shall be describing as the age of endeavour, because this was an age when a new venture was beginning and the idea of university legal scholarship in Wales was becoming an accepted fact.

Of course, the genesis of legal scholarship in Wales was part of a wider movement during the late nineteenth century to establish law as a recognised university discipline. But, in Wales, there were also some local imperatives which inspired the development of university legal scholarship. The late Victorian period saw a national rebirth in Wales culminating in the creation of great national institutions, chief among which were the university colleges and the Federal University of Wales.[3] In addition, greater democratisation led to the growth in local government and thereby would-be clients for the lawyers of Wales.[4] Furthermore, the needs of commerce and industry generated a need for legal services on a hitherto unprecedented scale. The resulting expansion in the legal profession heralded greater professionalization, and with this came the recognition of the importance of education and training.

Demand for a Welsh law school found mounting support and a campaign was launched in the late 1890s to establish such a school. Lord Justice Vaughan Williams, whose family hailed from Carmarthenshire,[5] was one of the main orchestrators of the project, and saw to it that Aberystwyth became the base for the newly founded Welsh law school in

[3] The history of the development of university education in Wales has been well-chronicled. See, for example, D. Emrys Evans, *The University of Wales. A Historical Sketch* (Cardiff: University of Wales Press, 1953); J. G. Williams, *The University Movement in Wales.* (Cardiff: University of Wales Press, 1993); J. G. Williams, *The University of Wales 1893-1939*, (Cardiff: University of Wales Press, 1997); Prys Morgan, *The University of Wales 1939-1993*, (Cardiff: University of Wales Press, 1997).

[4] See Kenneth O. Morgan, *Rebirth of a Nation: A History of Modern Wales* (Oxford: Oxford University Press 1981), pp. 106-12.

[5] The Welsh origins of Sir Rowland Lomax Bowdler Vaughan Williams (1838-1916) are considered in *The Dictionary of Welsh Biography down to 1940* (London: Honourable Society of Cymmrodorion, 1959), at p. 1050.

1901.[6] The University College of Wales, Aberystwyth had a distinctive place in the national makeup, and, in the context of the north-south divide, its location gave it the egalitarian merit of mutual inconvenience.[7]

The Aberystwyth law department's founders were Thomas Levi and Jethro Brown, both of whom were awarded chairs upon the Department's launch.[8] Whereas Brown's tenure proved to be short, as he departed for a Chair at Adelaide in 1906,[9] Levi's proved to be enduring. Thomas Arthur Levi should be acknowledged as the founding father of Welsh legal scholarship.[10] A native of Aberystwyth and the son of a renowned Calvinistic Methodist minister, he had impressive scholarly credentials and had practised at the Bar at the Inner Temple before being appointed to Aberystwyth.[11] Levi was to remain in post for nearly forty years, and, thanks to a dry wit and a streak of eccentricity, became an integral part of the institution's folklore.[12]

For the first half century of its existence, the Aberystwyth Law School ran on a modest scale, with never more than a handful of teachers at any one time. This was typical of most of the provincial law schools during the first half of the twentieth century. However, in Aberystwyth's case, it was a case of quality if not quantity, and, for brief periods it would claim the services of legal scholars of the calibre of Geoffrey Cheshire, David Hughes Parry and Glanville Llewellyn Williams.[13]

Although the needs of legal practice had provided the impetus for the creation of the Welsh law school, the scholars who would inhabit it recognised the distinction between learning and training and between scholarship and preparation for trade.[14] Although it provided courses for practitioners and collaborated with local law societies and associations

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[6] See J. A. Andrews, 'A Century of Legal Education' 34 (2003) *Cambrian Law Review*, pp. 3-26.
[7] Its first hundred years was surveyed by E. L. Ellis, *The University College of Wales Aberystwyth 1872-1972*, (Cardiff: University of Wales Press, 1972).
[8] See, also, J.A. Andrews, 'The Aberystwyth Law School, 1901-1976', 7 (1976) *Cambrian Law Review*, pp. 7-10.
[9] See Richard Ireland, 'John Austin, H. L. A. Hart...Oh, and W. Jethro Brown', 34 (2003) *Cambrian Law Review*, pp. 27-56.
[10] See his entry in *The Dictionary of Welsh Biography 1941-1970* (London: Honourable Society of Cymmrodorion, 2001), at p. 155.
[11] Levi was the son of the Revered Thomas Levi [1825-1916], a renowned Calvinistic Methodist preacher and author, remembered as the editor of a successful journal for children, *Trysorfa'r Plant*, and author of popular Welsh hymns such as 'Rwyf innau'n filwr bychan' ; see the elder Levi's entry in *The Dictionary of Welsh Biography (down to 1940)*, at p. 543.
[12] See Lord Elwyn-Jones, *In My Time*, (London: Weidenfeld & Nicolson, 1983), at p. 23.
[13] See J. A. Andrews, 'The Aberystwyth Law School, 1901-1976', above.
[14] J. A. Andrews, 'A Century of Legal Education', above, at pp. 11-12.

in providing training for articled clerks, it was also wary of the 'trade school' label.[15] Hence, from the beginning, the curriculum included studies in subjects that had no immediate nexus with legal practice, such as jurisprudence and legal history. This need to have an intellectual identity was not lost on Levi, who in his inaugural lecture stated: 'the last function we would wish the present Faculty to fulfil is that of merely negotiating legal examinations'.[16]

Levi retired in 1940, and was succeeded by D. J. Llewelfryn Davies, who was a former student of Levi's in the 1920s.[17] Whereas Levi was only twenty seven when appointed to the chair in 1901, Llewelfryn was thirty seven and, obviously, more experienced, with periods of teaching at the LSE and on the continent behind him. Llewelfryn was probably the better scholar too, and his election as president of the Society of the Public Teachers of Law in 1955 was well-deserved recognition of his valued contribution to legal scholarship.[18]

Llewelfryn would devote the next thirty years of his life to the cause of the Aberystwyth law school, gently nurturing and developing its reputation. However, even by the end of Llewelfryn's tenure in 1970, the department of law at Aberystwyth remained relatively small-scale, with no more than half a dozen academics and less than a hundred students. Indeed, Llewelfryn remained the only professor in the department until a second chair in law was created in 1967.[19]

This age of endeavour, when legal scholarship was in its infancy in Wales, can be said to have been dominated by two major challenges: academic acceptance and professional standards. Academic acceptance was an issue because legal scholarship was struggling to find acceptance both within the academy and within the world of legal practice. The story of legal scholarship during the first half of the twentieth century was a struggle to establish law's credentials as a university discipline.[20] Internally, within the academy, legal scholarship

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[15] See E. L. Ellis, The University College of Wales, Aberystwyth, 1872-1972 (Cardiff: University of Wales Press, 1972), pp. 133-137.

[16] See Levi's inaugural lecture: T. A. Levi, *The Opportunities of a New Faculty of Law (The Opening Lecture of the Department of English Law, University College of Wales, Aberystwyth)*,(Coventry: Curtis and Beamish Printers, 1901), pp. 5-6.

[17] See Christopher Harding, 'Looking through Llewelfryn Davies' eyes: A Turn of the Century Retrospective of International Law in the Twentieth Century' 34 (2003) *Cambrian Law Review*, pp. 83-102.

[18] This society's contribution to the development and maintenance of university legal scholarship is recorded by Fiona Cownie and Raymond Cocks, *'A Great and Noble Occupation!' The History of the Society of Legal Scholars* (Oxford: Hart, 2009).

[19] Professor John A. Andrews was appointed to the chair and became head of the Law Department at Aberystwyth in 1970, where he remained until 1992.

[20] See, for example, David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining, (ed.), *Legal Theory and Common Law*, (Oxford: Basil Blackwell, 1986), pp. 26-61. See also, generally, William Twining, *Blackstone's Tower: The English Law School* (London: Sweet & Maxwell, 1994).

was considered to be peripheral and insignificant.[21] Externally, legal practitioners were suspicious of its validity as an academic discipline, believing it to be a trade to be learnt 'on the job' rather than a scholarly discipline in the true sense.[22] Legal study at university, if undertaken, was considered to be something of a rite of passage, a phase that had to be endured, before sailing out into the 'real world'.[23] The dilemma was thus encapsulated by Professor J. W. Bridge: 'many practising lawyers regard academic lawyers as so remote from reality as to be irrelevant; many academics regard academic lawyers as involved in vocational training and not with liberal education and scholarship'.[24]

The practitioner's scepticism towards the academic lawyer gave birth to a principle whereby the works of living authors would not be referred to by the courts.[25] This cemented the perception of the legal scholar as a marginal and inferior creature, of little use to the practitioner.[26] This was somewhat paradoxical as the law curriculum was often determined by

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[21] Anthony Bradney, *Conversations, Choices and Changes: The Liberal Law School in the Twenty-First Century* (Oxford: Hart, 2003), at pp. 2-9, and pp. 109-112.

[22] See also Fiona Cownie, *Legal Academics: Culture and Identities*, (Oxford: Hart, 2004), at p. 31.

[23] For the story of the establishing of law as a university discipline, see, further, J. H. Baker, 'The Inns of Court and Legal Doctrine' in T. M. Charles Edwards, M. E. Owen and D. B. Walters, (eds.), *Lawyers and Laymen*, (Cardiff: University of Wales Press, 1986), pp. 274-86; H. G. Hanbury, *The Vinerian Chair and Legal Education* (Oxford: Blackwell, 1958); F. H. Lawson, *The Oxford Law School 1850-1965*, (Oxford: Clarendon, 1968); Neil Duxbury, 'A Century of Legal Studies', in Cane, P., and Tushnet, M., (eds.) *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003), pp. 950-74; Ian Fletcher, 'An English Tragedy: The Academic Lawyer as Jurist' in T. M. Charles Edwards, M. E. Owen and D. B. Walters, (eds.), *Lawyers and Laymen*, ibid., pp. 316-335.

[24] See John W. Bridge, 'The Academic Lawyer: Mere Working Mason or Architect?' 91 (1975) L.Q.R., pp. 488-501, at p. 489.

[25] The reason for the development of this convention is considered in some detail by Neil Duxbury in *Jurists and Judges: an Essay on Influence* (Oxford: Hart, 2001), at pp. 66-73. Sir Robert Megarry expressed the principle in the case of *Cordell v Second Clanfield Properties* [1968] 3 All E.R. 746: '...the process of authorship is entirely different from that of judicial decision. The author has the benefit of a broad and comprehensive study of his chosen subject. But he is exposed to the perils to yielding to preconceptions, and he lacks the sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his idea without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case. I would therefore give credit to the words of any reputable author as expressing tenable and arguable ideas, as fertilisers of thought, and as conveniently expressing the fruits of research in print. But I would expose those views to the testing and refining process of argument'. However, this cynicism towards legal scholarship was not universally shared. Lord Denning took a more positive view of academic writing, and said that, "...textbooks are not digests of cases but repositories of principles. They are written by men who have studied the law as a science, with more detachment than is possible to men engaged in busy practice." 63 (1947) L.Q.R., 516. In more recent times, Lord Goff, sometime fellow of Lincoln College Oxford, and co-author of a leading textbook on the law of restitution, said in the case of *Spiliada Maritime Corporation v Cansulex Ltd*, that academic authors were, "... pilgrims with us on the endless world to unattainable perfection"; see [1987] A.C. 460.

[26] The thorny and, even to the present day, unsettled relationship between the jurist and the practitioner is memorably described by Peter Birks, 'The Academic and the Practitioner' 18(4) *Legal Studies* (1998), pp. 397-414.

the educational priorities of the Law Society, who paid many of the provincial universities to provide instruction for its professional examinations.[27]

If legal scholars were the victims of a lack of recognition and acceptance, perhaps they were themselves to blame for this rejection: professional standards for legal scholars were also in their infancy. Indeed, legal scholarship was a rather amateur activity, and many of the law teachers of this time invested very little effort in research and authorship. In many cases, the legal scholar had nothing more than a dilettante interest in his subject. For some, research and authorship was an unwarranted interference with other more pressing commitments: it was claimed that Professor J. D. Ivor Hughes of the University of Leeds's law school felt that his time was better spent fishing in North Wales.[28]

Then again, the vast majority of the university law teachers were part-timers who, out of necessity, were driven to supplement their incomes through practice. Legal scholarship was rarely taken seriously by the universities, and the law schools, particularly in the case of the provincial universities, were populated by fractional staff.[29] Furthermore, the law teacher had to shoulder a burden which entailed teaching across a broad range of different subjects.[30] The usual pattern was that of the lecturer teaching a great deal but doing little research. Even then, the teaching could often be uninspiring, with a technique which, according to one who had a brief period as law lecturer at Aberystwyth in the 1940s, amounted to no more than reading "old style, dictated points, to be written down and learnt by heart for reproduction, much welcomed by the idle".[31] An eminent Welsh lawyer and politician once told me how his tutor in Roman law at Aberystwyth in the 1950s gave the impression that the entire law had not changed much since Roman times.

The years after the Second World War would witness a drive to establish the university law school as a credible operation, where research and scholarship could flourish and law studied as an intellectual discipline.[32] Gradually, the descriptive and uncritical analysis of domestic cases made way for a broader, critical and more scholarly approach to legal study. Rather than being the hand-maid of the practitioner, legal scholars sought to

[27] See David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition', ibid., at pp. 50-52; also B. Abel-Smith, B., and R. Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750-1965*, (London: Heinemann, 1967), at pp. 182 and 373.
[28] See Neil Duxbury, *Jurists and Judges*, at p. 71.
[29] See B. Abel-Smith and R. Stevens, R., ibid., at p. 183. See also William Twining, '1836 and all that: laws in the University of London, 1836-1986', 40 (1987) *Current Legal Problems*, pp. 261-99, at pp. 275-276.
[30] See William Twining, '1836 and all that: laws in the University of London, 1836-1986', ibid., at p. 277.
[31] Recollections in a letter from the late Professor J. A. G. Griffith to R. Gwynedd Parry, 2 November 2004.
[32] See L. C. B. Gower, 'English Legal Training', 13 (1950) M.L.R., pp. 137-205, at p. 137.

establish their discipline as a genuinely intellectual activity within the academy.[33] Their ideas bore the obvious hallmarks of continental and American influences.[34] Their objective was to raise the status of law as a recognised academic discipline. Of course, Sir David Hughes Parry's great project, the Institute of Advanced Legal Studies, established in 1947, was an important milestone in this process of acquiring intellectual credibility.[35]

The Age of Expansion

Aberystwyth had enjoyed a monopoly on legal education in Wales for more than sixty years. However, by the 1960s and 1970s, the educational climate was changing, and two major reports heralded the dawn of a new age in legal scholarship in Wales. This was to be the age of expansion.

The first of these reports was the Robbins Report on higher education, published in 1963, which recommended the expansion of higher education in the United Kingdom.[36] The existing universities were to expand dramatically and new universities were created to meet the growing demand for higher education (although, interestingly, none of the new 'plate glass' universities were established in Wales). The second report came in 1971, authored by Mr. Justice Ormrod, which made recommendations as to the role and purpose of the law degree in the training of lawyers.[37] Although its recommendations were never fully implemented, the Ormrod Report provided a basis for a more formal working relationship between the law school and the legal profession.

This expansion in higher education generally, and the development of the concept of a 'qualifying law degree', gave incentive for the expansion of legal education. In Wales, Cardiff's status as the national capital city, with governmental, legal and administrative importance given a significant boost with the creation of the Welsh Office in 1964, meant that its university college became an obvious candidate for a new law school for Wales. Limited professional legal training had been offered by the Glamorgan Technical College in

[33] See, for example, Cyril Glasser, 'Radicals and Refugees: The Foundation of the Modern Law Review and English Legal Scholarship', 50 (1987) M.L.R., pp. 688-708.
[34] For the continental influence, see, further, J. Beatson and R. Zimmermann, (eds.), *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth Century Britain*, (Oxford: Oxford University Press, 2004).
[35] See R. Gwynedd Parry, *David Hughes Parry: A Jurist in Society*, above, chapter 5.
[36] *The Report of the Committee on Higher Education, chaired by Lord Robbins* Cmnd. 2154, (London: HMSO, 1963).
[37] See Mr Justice Ormrod, *Report of the Committee on Legal Education : presented to Parliament by the Lord Chancellor* (London: HMSO, 1971).

Pontypridd since 1949. However, its successor, the Polytechnic of Wales would not establish a law degree course until 1979, and a fully fledged law school would only be established in the 1980s.[38]

At Cardiff, in the meantime, the Cardiff Institute of Science and Technology had been tentatively running legal courses as part of its degrees in social science and economics in the early 1960s. It soon established a law department, a process that was made easier by the fact that, at that point, it was not a constituent member of the University of Wales, and so did not face objections from Aberystwyth. Soon thereafter, University College Cardiff followed suit by setting up a law department, and in 1971 a formal partnership was established between the two Cardiff law schools.[39] That partnership would turn to merger in 1988, when UWIST and University College, Cardiff were merged.

Expansion continued into the 1980s. Unsurprisingly, Swansea, the second city, saw a need to respond to consumer demand for legal education, and law degrees were offered by the Institute of Higher Education, initially, followed by the University College, where a law department was established in 1994. The founding of Bangor's law school in 2004 meant that all of the big five universities in Wales now had a law school. In the space of a generation, legal education had gone from being a one horse race to having a pervasive presence at universities throughout Wales

This period, from about 1965 to 1999, was thus an age of great expansion in legal education. Law became a popular subject within the UK university sector and in Wales the largest universities would develop law schools with an annual intake of between 150 and 200 students to the first year of study.[40] Indeed, by today, it is even arguable that, "the law degree (LLB) is possibly supplanting the Arts degree (BA) as the general degree of higher education".[41]

What were the features of this expansion in the specific Welsh context? In 1973, a law professor at Cardiff pondered on the purpose and mission of his newly established law school in an article in the Cambrian Law Review. Having delineated the school's ambitions, he then made these rather telling comments:

[38] Information provided by Professor Gerwyn Ll. H. Griffiths, School of Law, University of Glamorgan.
[39] See L. A. Sheridan, 'University Legal Education in Cardiff', 4 (1973) *Cambrian Law Review*, pp. 94-102.
[40] For data, see http://www.ucas.ac.uk
[41] See Benjamin J. Richardson, "Students as Stakeholders in Legal Education: Gaining Admission to Law School" in Fiona Cowine (ed.), *Stakeholders in the Law School* (Oxford: Hart, 2010), pp.127-155, at p. 127.

"It will be noticed that I have not said anything that gives a particularly Welsh flavour to the Cardiff Law School. That, I think, is an accurate impression. There is nothing particularly Welsh about the Law".[42]

His comment was nothing but an accurate expression of the plain truth about legal scholarship in Wales at that time: it was overwhelmingly English in focus and orientation. Furthermore, the expansion in academic personnel during the 1970s and 1980s was marked by an emphasis on imported talent. Most of the teachers in the Welsh law schools would be recruited from outside Wales (mostly from England).[43] Only studies in medieval Welsh laws, led by Professor Dafydd Jenkins of Aberystwyth, provided relief to this general trend of Anglo-centric legal studies.[44] Put simply, Welsh law schools were part and parcel of a network of English law schools.

The Age of Engagement

I now turn to my final age. Having considered the ages of endeavour and expansion, I had some difficulty coming up with a name for this final age (each age has begun with the letter 'e', and I was tempted to call this age, 'the age of exploitation', but feared that this might give rise to misinterpretation). Upon careful reflection, I have opted for the title, 'age of engagement': but engagement with what?

Without a doubt, the creation of the National Assembly for Wales in 1999 was a momentous event for Welsh democracy.[45] For the first time in history, the Welsh people had a national, elected, law-making body. Of course, the National Assembly is an evolving institution, and although it was initially the product of a somewhat clumsy political

[42] See L. A. Sheridan, 'University Legal Education in Cardiff', above, at p. 101.

[43] This is in contrast with Scotland, where the study of Scots Law had a well-established pedigree. Perhaps it is in the historical genesis that Welsh universities can be distinguished from those of Scotland. The Scottish universities, that is, the ancients of St. Andrews, Aberdeen, Glasgow and Edinburgh, were established in the fifteenth and sixteenth centuries, long before the union of the crowns of England and Scotland in 1601 and the union of the parliaments in 1707. They were products of an indigenous Scottish national movement and created to serve a nation with a stronger sense of national identity, an identity which had been secured on the field of Bannockburn in 1314. Although the linguistic element may not have been straightforward matter in the Scottish experience, Scottish universities have and continue to promote Scottish studies, including the laws and legal traditions of the country: see, further. Michael Lynch, *Scotland: A New History* (London: Pimlico, 1992), at pp. 102-126: also See Neil MacCormick, 'Law' in Paul H. Scott (ed.), *Scotland: A Concise Cultural History* (Edinburgh: Mainstream Publishing, 1993), at pp. 343-56.

[44] See Dafydd Jenkins, 'Legal History at Aberystwyth' 34 (2003) *Cambrian Law Review*, pp. 27-56.

[45] Its significance was the subject of a detailed study by Richard Rawlings, *Delineating Wales*, (Cardiff: University of Wales Press, 2003).

compromise,[46] it has organically and systematically normalised its practices and structures so that it now operates according to the standard model of a parliamentary democracy.[47] The maturing of the devolution process and the gradual but inevitable increase of legislative powers for the National Assembly for Wales have facilitated the emergence of indigenous, bilingual Welsh law as a distinctive and dynamic phenomena in contemporary Wales.

Devolution has become the catalyst for the development of "Legal Wales", an expression which captures a process whereby the legal system in Wales has acquired its own distinctive identity in response to constitutional change.[48] Legal Wales also promises the further evolution of an indigenous legal system to serve the needs of bilingual Wales.[49] Lawyers, therefore, form an important professional corps that is required increasingly to operate bilingually within the context of devolution.[50] Naturally, the sector needs the training in order to be able to operate effectively within this new constitutional settlement.[51]

In view of these significant developments, it is arguable that there has never been a better time to establish legal scholarship as a vibrant force within Welsh universities than the present.[52] There is an opportunity, indeed, a *need* for engagement with this process on the part of university law schools.[53] Law schools could be the main generators of intellectual debate and of research and learning on the Welsh constitution and its impact on Welsh society. This might pose a challenge of realignment for Welsh law schools. The old values and perspectives appear outdated: the nothing Welsh about the law remark now appears like an old fashioned remnant of a by-gone age.

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[46] For a critique, see Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford: Oxford University Press, 1999), at p.254: also Noreen Burrows. *Devolution* (London: Sweet & Maxwell, 2000), generally, and pp. 9-27.
[47] Especially following the Government of Wales Act 2006, which reformed its constitution and extended its law making capacity? For possible future developments, see *All Wales Convention, Report*, (Crown Copyright, 2009).
[48] See Sir John Thomas, "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: Welsh Legal History Society, 2001), pp. 113-165.
[49] See, for example, T. H. Jones and J. Williams, 'Wales as a Jurisdiction' [2004] Public Law 78; also, Sir Roderick Evans, "Legal Wales- Possibilities for the Future", Bangor University Law Lecture, 22 February 2008.
[50] See 'Legal Directions in Wales' *Directions in Legal Education* (UK Centre for Legal Education, March 2010), pp. 4-5.
[51] See Patricia Leighton et al., *Mapping Legal Education in Wales Project 2002/03: The Key Findings* (Pontypridd: University of Glamorgan, 2003); see also Patricia Leighton, "Is the Legal Education System in Wales Measuring up to Contemporary Challenges? Some Research Evidence from the MaLEW Project" (2003) 2 (4) *Wales Law Journal*, p. 386 at p. 388.
[52] See Thomas Watkin, *How the Law is Taught in Modern Wales*, Law Society Lecture, National Eisteddfod of Wales, Eryri a'r Cyffiniau, 2005.
[53] See Winston Roddick QC, '*The Role of the Law Schools of the University of Wales in the development of Legal Wales*', Aberystwyth University, 13 November 2000.

Yet, there exists the risk of disconnection between the Legal Wales agenda and the strategic priorities of Welsh universities and their law schools. What exactly are the threats to this vital engagement? Universities in Wales, as in the rest of the United Kingdom and beyond, are institutions which are fighting on several fronts. In the current financial and economic environment, some are fighting for their very survival and are busy putting out the fires of insolvency.[54] Because of precarious public finances, universities in the United Kingdom can expect less financial support from the government in the future. The Browne Review points firmly in the direction of a market-led and market-sustained sector.[55] Inexorably, universities will be required to fend for themselves financially and to become economically independent. A process of privatisation is unavoidable.[56] In such a world, only that which pays can endure.

Welsh universities are part of a higher education market that has become increasingly more globalised, with most universities engaging in intense international recruitment. International recruitment matters because it has economic repercussions: overseas students pay large fees for their university education.[57] Law schools participate, with great enthusiasm, in this international market: little wonder as one overseas student is worth three EU students in economic terms. Of course, the international market is volatile, and over-dependence on overseas students may turn out to be flawed short-termism. But it currently plays a major role in determining institutional strategy at most of the institutions.

The introduction of student fees has meant that home students in England and Wales must pay, to varying degrees, for their higher education. In a consumer-led market, universities must ensure that their provision is attractive to employers, placing the graduate-consumer in a strong position in the jobs-market. Further privatisation will inevitably lead to increase in fees, to ever greater consumerism, to fostering a more competitive relationship between institutions, and to less interest in any teaching or scholarly activity which might be regarded as altruistic.[58]

Consumerism also drives the research agenda. Universities concentrate on areas where there is likely to be financial investment by government, industry, business and the

[54] The cuts in government spending in the university sector in Wales were reported in *Times Higher Education*, 25-31 March 2010.
[55] See Securing a Sustainable Future for Higher Education: An Independent Review of Higher Education Funding and Student Finance, 12 October 2010: www.independent.gov.uk/browne-report
[56] See 'Another brick in the wall: private higher education is growing, often to the dismay of academics. Coming soon: the Lego university', *The Guardian*, 2 February 2010.
[57] See the article, "Overseas students 'are not cash cows'", *Times Higher Education*, 26 March 2010.
[58] See "Growing student consumerism is inevitable, says NUS", *Times Higher Education*, 15 June 2007.

private sector. Science, technology, engineering and mathematics (STEM), along with medicine are subject areas which are more likely to resonate with economic priorities than arts and humanities, whose traditional reliance on public investment is likely to become a source of weakness in future years.[59] The government's research assessment exercises[60] which have hitherto dominated institutional strategies on research, are also highly significant, although may now become less important if there is less money in the pot for the government to distribute at the end of the process.[61] Even so, university league tables, which take into account institutions' research prowess in research assessments, and which consequently influence market behaviour, means that institutions neglect their research capacity at their peril.

All of this has significance for Welsh law schools and their relationship with the Welsh agenda. Those running the business of higher education listen to what the market is telling them it wants. Nervousness, rightly or wrongly, surrounds any venture which appears to emphasise unduly the Welsh component at the expense of the international perspective. Moreover, the prospects for Welsh-medium legal scholarship must be evaluated in light of the fact that the international market is fuelled by a demand for English-medium higher education, where the financial stakes and rewards are high.[62] The economics of higher education dictate where money is spent and institutions invest where they believe they will find the highest returns.

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[59] http://news.bbc.co.uk/1/hi/education/7924765.stm

[60] The UK government's research assessment exercise (now termed 'research excellence framework') is a periodic review undertaken every five years or so on behalf of the four UK higher education funding councils in order to evaluate the quality of research undertaken by British higher education institutions. Submissions from each subject from each institution (or "unit of assessment") are given a grade by a subject specialist peer review panel. The rankings are used to inform the allocation of quality weighted research funding each higher education institution receives from their national funding council. The precise grading mechanism or criteria has been slightly altered over the years, but its essential function is the same, as it seeks to provide a rating for departments on the basis of their collective research output and research culture. The principal factor which dictates the grading which each academic school receives is the research output of individual academics. Normally, academics submit four publications which are individually graded and which then contribute to the overall grading of their academic school or department. The submissions and results of RAE 2001 and 2008 can be accessed on dedicated websites which, according to every institution and particular unit of assessment, give details of each individual academic's return in that particular assessment: see http://www.hero.ac.uk/rae.

[61] The influence of these assessment exercises on the culture of the contemporary law school is considered extensively in F. Cownie, *Legal Academics: Culture and Identities* (Oxford: Hart, 2004): see also, generally, A. Bradney, *Conversations, Choices and Changes: The Liberal Law School in the Twenty-First Century* (Oxford: Hart, 2003).

[62] Indeed, even official, majority state languages are facing pressures from this globalisation effect. For the position of Finnish within Finland's universities, and the demands of the international market, see Raili Seppanen, "Funding and flexibility: keys to the future", *Times Higher Education*, 1 December 2006.

Investment is therefore critical for any meaningful progress to occur. Let us take the case of bilingual legal education as an example. The absence of legal literature in the Welsh language is proving to be the major factor in determining the quality of the provision, and, in many cases, a significant barrier to the provision of modules through the medium of Welsh. Developing learning materials in the form of legal literature in Welsh is an essential but resource-intensive activity. Appointing staff with the necessary linguistic skills and aptitude to teach through the medium of Welsh may be an onerous investment. Indeed, allocating Welsh-speaking staff to teach through the medium of Welsh when they could be teaching on the financially lucrative masters in, say, international commercial law to overseas students, or supervising English-medium doctoral students or teaching core undergraduate modules to the English-speaking masses, may be seen as uneconomic and a wasteful deployment of valuable and scarce resources.

These are, of course, some of the economic preoccupations of the present which pose threats to academic engagement with Legal Wales. But that engagement may also be threatened by the legacy of history and, especially, that age of expansion to which I have referred. It is a fact that Welsh universities have an abnormal demography.[63] Wales still exports its talented young people to a very high degree, and the proportion of students studying in their home country is far lower in Wales than in the rest of the UK. More specifically, when we examine the demography of the Welsh law schools, we find that the majority of law professors at Welsh universities have come from outside Wales and do not speak Welsh.[64] In fact, a cursory review of each Welsh law school's website indicates that there are approximately 50 full law professors active at the Welsh law schools (discounting honorary professors or emeritus professors who are either retired or engaged primarily in another occupation). Of these, only two or three are Welsh-speaking and can teach through the medium of Welsh.

These, obviously, are the people who run the law schools of Wales. Of course, it would be absurd to suggest that Welsh universities should adopt isolationist policies by appointing Welsh or Welsh-speaking academics only to teach in their law schools. Like all the great universities throughout the world, Welsh universities benefit greatly from imported

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[63] Statistical data shows that Wales is a net importer of students because it imports more students from outside than it exports to external institutions. About 56 per cent of undergraduate and 67 per cent of postgraduate full-time UK enrolments at Welsh universities are Welsh domiciled: see *Statistics for Wales. Statistical Bulletin*, SB 13/2009, 26 February 2009: http://wales.gov.uk/docs/statistics/2009/090226sb132009en.pdf

[64] On the basis of a review in October 2010, it was found that the heads of the Welsh law schools were from Australia, New Zealand, Ireland, Northern Ireland and England. None were from Wales, and none spoke Welsh.

talent, which can bring fresh and innovative ideas and perspectives to academic life. New blood can bring about renewal. It is more a question of balance, and, at the moment, there is arguably an imbalance which, in turn, poses a risk of disconnection.

Compare this demography with that of the judiciary in Wales. The senior judiciary is dominated by home-grown talent with a keen understanding of the Welsh legal and linguistic context and who are ready to promote a legal culture which serves the distinctive interests of Wales. As the senior presiding judge of Wales was able to confirm recently in a lecture, no less than twelve circuit judges, ten district judges, fifteen deputy district judges and thirteen recorders are able to conduct hearings in Welsh.[65] In addition, there are some 350 Welsh-speaking magistrates serving in Welsh courts,[66] and several tribunal judges and chairpersons with competence in the Welsh language. Clearly, this demographic profile is in stark contrast to that of the university law schools, and it would be naive to think that the demography has no bearing on the way in which Welsh law schools engage with both Legal Wales generally and the Welsh language in particular.

According to the Irish historian, Professor Joseph Lee, Ireland faced similar demographic challenges in the fifty years which followed independence. Most of the Irish universities, like Welsh universities, were created in the nineteenth century, a time when Ireland was as firmly under English control as it had been for centuries.[67] On the matter of the balance between Irish and foreign academics at Irish universities, Professor Lee commented that, "Irish thinking has been dominated by imports", but warned that, "importing intellectual produce is a highly skilled activity. Ireland's experience is paradoxical in the extreme. It has imported much, but it has learned little'.[68]

The Irish experience, therefore, was that an excessive use of imported intellectuals had created a schism between universities and their society. There was a disconnection, the product of what was described as a "dependency syndrome", which caused a failure on the part of Irish universities to provide appropriate intellectual engagement with issues of national concern.[69] Surely, this experience serves as a cautionary tale as we today ponder on the academic engagement with Legal Wales.

[65] See Mr Justice David Lloyd Jones, "The Machinery of Justice in a Changing Wales" Law Society Lecture, National Eisteddfod of Wales, Blaenau Gwent, 2010, at p. 21.
[66] Ibid., at p. 22.
[67] See Alvin Jackson, *Ireland 1798-1998* (Oxford: Blackwell, 1999), at pp. 156-58.
[68] J. J. Lee, *Ireland 1912-1985, Politics and Society* (Cambridge: Cambridge University Press, 1989), p. 627.
[69] Why were the Irish universities so keen on imported talent and why was there a failure to promote and nurture the natural genius of the Irish people? Perhaps this extract from Professor Lee's book gives us a brief insight to

Conclusions

In Titian's painting, the third age was the age of mortality. Many reading this may be thinking that I am about to present a very bleak prognosis for the third age of legal scholarship in Wales. But there is nothing inevitable about this disengagement or disconnection between the law school and Welsh society. I am not pessimistic, but I do believe that well-informed and strategic intervention is needed in Wales as it was, in its time, necessary in Ireland.

We are already seeing how the government in Wales can intervene to prevent its educational priorities being trampled by market and other forces. Take for example the Welsh Assembly Government's initiative to develop Welsh-medium university scholarship, *Y Coleg Ffederal*.[70] Left to market forces, Welsh-medium scholarship had failed to achieve a real presence in Welsh universities.[71] The government's manifesto, *One Wales*, gave a commitment to the setting up of a Welsh-medium higher education network, that is, a federal Welsh-medium college.[72] A planning board was convened and chaired by Professor Robin Williams FRS, which met, deliberated and submitted its report to the Welsh Assembly Government minister in June 2009.[73]

The report recommended the creation of a federal institution, 'Y Coleg Ffederal'. It would be a new legal entity, but not a single geographical entity, as it would work with and through the existing higher education institutions in Wales. It would maintain, develop and oversee Welsh medium provision in higher education in Wales.[74] The Report hailed the Coleg Ffederal as a means of providing "unity of purpose, coherence and leadership" for

some of the fundamental causes: "The incapacity of the Irish mind to think through the implications of independence for national development derived largely from, and was itself a symbol of, the dependency syndrome that had wormed its way into the Irish psyche during the long centuries of foreign dominance. The Irish mind was enveloped in, and to some extent suffocated by, an English mental embrace. This was quite natural. A small occupied country, with an alien ruling class, culturally penetrated by the language and many of the thought processes of the coloniser was bound in large measure to imitate the example of the powerful and the prosperous", ibid., p. 627.

[70] The creation of a dedicated Welsh-medium federal college to promote Welsh-medium studies had been demanded by Welsh-language activists on a sporadic basis for many years: see, in particular, Dafydd Glyn Jones, *Problem Prifysgol a Phapurau Eraill* (Llanrwst: Gwasg Carreg Gwalch, 2003).

[71] See *Western Mail*, 29 June 2007.

[72] See *One Wales: A Progressive Agenda for the Government of Wales, An Agreement between the Labour and Plaid Cymru Groups in the National Assembly*, 27 June 2007, at p. 22.

[73] See Professor Robin Williams CBE, FRS, *Y Coleg Ffederal: Report to the Minister for Children, Education, Lifelong Learning and Skills*, (Cardiff: Welsh Assembly Government, June 2009).

[74] Ibid, pp. 6-7.

Welsh-medium scholarship, of ensuring "motivation and drive" and "a means of supporting and reinforcing national identity and promoting the national life of Wales".[75] It also set out the level of funding that is necessary to ensure the Coleg Ffederal's capacity to deliver change.

In response, in a strategy document for the university sector, the Welsh Assembly Government confirmed its commitment to implement the Williams Report's recommendation for the Coleg Ffederal.[76] Wheels were then put in motion, and a steering group was established to draw up the constitution of the Coleg, which will be up and running by 2011. Of course, there remain threats which may yet prove problematic. The Report, quite rightly, emphasizes the importance of 'buy-in, drive and ownership' by the universities.[77] At the moment, the *Coleg Cymraeg Cenedlaethol* (as it is now called) appears to be more of a politically driven initiative than an intellectual one, and there is a real risk that the *Coleg* becomes nothing other than an expensive bureaucracy on the sidelines of academia. But the example of *Y Coleg Cymraeg Cenedlaethol* demonstrates how the Welsh Government can and does intervene in order to arrest a process of disengagement through strategic and financial investment.

Perhaps there is also a need for a professional and academic partnership that expresses what legal scholarship, including legal scholarship in the Welsh language, means for Welsh democracy and justice. Such an initiative could inspire the development of Welsh legal scholarship so that it delivers economic, educational and cultural benefit to society in Wales. That partnership, supported by carefully directed investment, could herald a change of orientation and outlook.

How and in what form should the *partnership* in the cause of legal scholarship in Wales manifest itself? Perhaps our Celtic cousins can point us in the right direction. In Scotland there is a national Joint Standing Committee for Legal Education which acts as an independent consultative body to promote the interests of legal education, both at the level of academic training and in relation to legal professional training. This body has representatives

[75] Ibid, pp. 7-8.
[76] See *For Our Future: The 21st Century Higher Education Strategy and Plan for Wales, Department for Children, Education, Lifelong Learning and Skills, Welsh Assembly Government* (Crown Copyright, November 2009), at p. 14: 'The Coleg Ffederal will provide an independent oversight, management and development of Welsh medium higher education across Wales delivering the recommendations of Professor Williams' report. This will help deliver social justice for those who seek to learn through the medium of Welsh, but also carries potential economic benefit through wider access to workforce development, and business opportunities which exploit the potential offered by a bilingual environment.'
[77] See *Y Coleg Ffederal: Report to the Minister for Children, Education, Lifelong Learning and Skills*, p. 8.

from the Faculty of Advocates, the Law Society of Scotland, the Judicial Studies Committee and the Higher Education Institutions in Scotland that are involved in the education and training of lawyers. Similarly, in Northern Ireland, The Council of Legal Education is the governing body of The Institute of Professional Legal Studies at Queen's University, Belfast, which trains barristers and solicitors in the province. Its membership comprises representatives of the University, the Inn of Court and the Law Society.

Is it time for a Council of Legal Education in Wales (CLEW) to be established? I believe so. Such a body would obviously include representatives of the Bar, the Law Society, the Judiciary and the Law Schools in Wales. It might also have representation from the Higher Funding Council in Wales and the Office of the Counsel General. Its role would be to promote dialogue between the key stakeholders in order to develop a national agenda for legal education in Wales and ensure that the legal curriculum responds to the developing Welsh legal context through its regulation.

I have deliberately emphasised the word *partnership*. Let me explain why.

In his address to the Legal Wales conference at Caernarfon, the Lord Chief Justice, Lord Judge, reminded the delegates of the importance of judicial independence in a democratic society that lives by the rule of law. Judicial independence is one of the pillars of democracy and freedom, and judges must steer away from political controversy in order to preserve this independence. Of course, there are many other pillars which support freedom and democracy, such as trial by jury, once so memorably described by Lord Devlin as "the lamp that shows that freedom lives".[78]

Indeed, Lord Devlin, in his Hamlyn lectures, "Trial by Jury", speculated that a tyrant bent on destroying freedom would be eager to get rid of this little parliament:

"The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives."[79]

Whether or not a tyrant would see the jury as a threat and so orchestrate its demise, we shall, hopefully, never know. We do know, however, what tyrants do to intellectuals and academics who say things that they do not like to hear. In 1933, when Adolf Hitler was elected

[78] See Sir Patrick Devlin, *Trial by Jury* (London: Stevens & Sons Ltd., 1956), p. 164.
[79] Ibid.

Chancellor of Germany, he set upon those intellectuals whose views he did not share. He persecuted them or, if they were lucky, drove them out. Many came to Britain, among them jurists and lawyers, and their contributions to intellectual life in this country were to prove remarkable.[80]

History, therefore, teaches us that another of the great pillars of democracy is academic freedom. What exactly is academic freedom? Many definitions have been proposed which have sought to capture its meaning. I recently read an article by the philosopher Professor Simon Blackburn of the University of Cambridge, who suggested that, "universities should be about the attempt to see things that matter and see them as they are".[81] This definition nicely captures the importance of freedom in the pursuit of truth, of honesty and integrity in that pursuit, and of scepticism of momentary fads and distaste of the shallow nomenclature of that which is temporary or politically expedient.

If it is the legal academic's duty to seek out and examine the "things that matter", then surely the nature of democracy and justice in Wales is one of these things. But she must carry out her examination in the spirit of intellectual freedom, free to criticise and expose that which she feels is deficient without political interference or political pandering. In a small country like Wales, observing and maintaining these boundaries can be a challenge because politicians, lawyers and academics live in a 'cheek by jowl' society. Vigilance must therefore be a watchword.

It is our good fortune that, whatever the challenges ahead, the advent of devolution means that our fate as a people is now, more than ever, in our own hands. Devolution has empowered the Welsh people to shape their destiny. There are now the means whereby important issues can be discussed, problems confronted and solutions devised. The idea of Welsh national institutions providing tailor-made solutions to Welsh issues now appears uncontroversial and is, indeed, the norm. As I conclude my reflections on the history of legal scholarship in Wales, and if I have learnt anything from my study of the life of Sir David Hughes Parry, it is that we, today, are the fortunate beneficiaries of the labours of those whom, in the past, laid the foundations for democracy and justice in Wales:

"...eraill a llafuriasant, a chwithau a aethoch i mewn i'w llafur hwynt".[82]

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[80] Their experiences and life-stories are chronicled in J. Beatson and R. Zimmermann, (eds.), *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth Century Britain*, Oxford: Oxford University Press, 2004.
[81] See, *Times Higher Education*, 4-10 February 2010, at p. 36.
[82] St. John: 4, 38: "...other men laboured, and ye are entered into their labours."

Ymateb i Ymgynghoriad Llywodraeth Cymru am Awdurdodaeth Gyfreithiol ar wahân ar gyfer Cymru

Emyr Lewis

Uwch-gymrawd yng Nghanolfan Llywodraethiant Cymru, Prifysgol Caerdydd

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e-bost:

Rhagarweiniol

Yr wyf eisioes, ar y cyd gyda fy nghyd-weithiwr yng Nghanolfan Llywodraethiant Cymru yr Athro Dan Wincott, wedi rhoi tystiolaeth ysgrifenedig ac ar lafar am y pwnc hwn i Bwyllgor Materion Cyfansoddiadol a Deddfwriaethol Cynulliad Cendlaethol Cymru. Mae'r dystiolaeth honno yn mynd i'r afael â nifer o'r cwestiynau a godir yn yr ymgynghoriad presennol, a hoffwn fabwysiadu a chyflwyno'r dystiolaeth ysgrifenedig honno, a'r trawsgrifiad o fy nhystiolaeth lafar fel rhan o fy ymateb i'r ymgynghoriad hwn.

Mae'r ddogfen wedi ei hatodi i'r ymateb hwn, ac fe geir y trawsgrifiad o fy nhystiolaeth lafar ar wefan y Cynulliad Cenedlaethol.

Y man cychwyn

Mae'r ymgynghoriad presennol yn eang iawn ei rychwant, ac mae hynny i'w groesawu, er mwyn caniatáu ymateb mor drylwyr a chynhwysol ag sydd yn bosib.

Er mwyn gallu ymateb i'r ymgynghoriad mewn ffordd ymarferol ac er mwyn osgoi codi gormod o sgwarnogod damcaniaethol, yr wyf wedi mabwysiadu'r datganiad canlynol o'r Ddogfen Ymgynghori fel sylfaen ar gyfer ymateb i'r cwestiynau a godwyd:

...defnyddir y term 'awdurdodaeth gyfreithiol' i gyfeirio at y cysyniad o awdurdodaeth gyfreithiol genedlaethol yn yr ystyr bod yr Alban a Gogledd Iwerddon, ar hyn o bryd, yn awdurdodaethau cyfreithiol sydd ar wahân i'w gilydd ac ar wahân i awdurdodaeth gyfreithiol Cymru a Lloegr.

Yr wyf yn cyfeirio at osod Cymru ar yr un gwastad â Gogledd Iwerddon a'r Alban fel "pariti".

Cwestiwn 19

Nid wyf wedi ymateb i gwestiwn 19. Cymraf y byddai symud at awdurdodaeth ar wahân i Gymru yn golygu diwygio Deddf Llywodraeth Cymru 2006 i eithrio o gymhwysedd deddfwriaethol y Cynulliad Cenedlaethol unrhywbeth fyddai'n rhan o gyfraith tiriogaeth arall. Gw. er enghraifft Adran 6(2)(a) Deddf Gogledd Iwerddon 1998:

[a provision is outside the Northern Ireland Assembly's legislative competence if] it would form part of the law of a country or territory other than Northern Ireland, or confer or remove functions exercisable otherwise than in or as regards Northern Ireland

Rhestr Lawn o Gwestiynau'r Ymgynghoriad

1. A ydych yn cytuno y byddai tiriogaeth ddaearyddol ddiffiniedig yn nodwedd hanfodol ar gyfer awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru?

Ydw. Mae'n ddiystyr heb hynny.

1.1 Yn eich barn chi, at ddibenion awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru, pa diriogaeth ddylid ei dewis – "Cymru" yn ôl diffiniad Deddf Ddehongli 1978 neu yn ôl diffiniad Deddf Llywodraeth Cymru 2006?

Deddf llywodraeth Cymru 2006. Mae'n fwy cyfredol, ac mae'n cynnwys y môr o gwmpas Cymru. Byddai hefyd yn golygu bod ffiniau awdurdodaeth yr un rhai a ffiniau grym deddfu'r Cynulliad Cemedlaethol

2. Ydy corff neilltuol o gyfreithiau yn nodwedd hanfodol ar gyfer awdurdodaeth gyfreithiol ar wahân ac, os felly, i ba raddau?

Nac ydi. Gellir creu awdurdodaeth gyfreithiol ar wahân, ond bod yr un corff o gyfreithiau yn weithredol ynddynt. Er enghraifft, arferid cyfyngu awdurdodaeth llysoedd ynadon dros faterion troseddol gan ddibynu ar hyd ffiniau tiriogaethol, er mai'r un corff o gyfreithiau oedd yn weithredol.

Wedi dweud hynny, yng nghyd-destun yr ymgynghoriad hwn, y mae'n deg nodi bod cyrff o gyfreithiau ar wahân eisioes yn datblygu yng Nghymru ac yn Lloegr, a bod hynny'n debygol o gynyddu yn sgil deddfu pellach gan y Cynulliad Cenedlaethol a'r Senedd yn Llundain. Mae hynny wrth gwrs yn atgyfnerthu'r ddadl ymarferol dros awdurdodaeth ar wahân.

Yn y cyd-destun hwn dylid nodi fod Cymru a Lloegr yn un o nifer o awdurdodaethau y mae'r gyfraith gyffredin yn sail i'w cyfraith, megis Gogledd Iwerddon, Gweriniaeth Iwerddon, Awstralia, Malaysia a nifer o wledydd eraill. Maent oll yn rhan o "deulu'r gyfraith gyffredin". Wrth gwrs, wrth iddynt ddatblygu sefydlaiadau gweinyddol a deddfwriaethol annibynnol, mae'r gyfraith o fewn yr awdurdodaethau hyn wedi newid, ond yr un yw'r sail. Nid yw sefyllfa Cymru yn wahanol o ran ei hanfod.

2.1 Pryd y gellir dweud bod corff o gyfreithiau yn ddigon 'neilltuol' yn hyn o beth?
2.2 A oes ots ai'r gyfraith statud ynteu'r gyfraith gyffredin yw'r gyfraith dan sylw?
2.3 A oes ots beth yw natur pwnc y cyfreithiau, er enghraifft troseddol, sifil, teulu?

Gan mai fy mhrif bwynt yw nad yw corff o gyfreithiau ar wahân yn hanfod, nid yw'r cwestiynau hyn yn codi.

Wedi dweud hynny, os ystyriwn y cwestiwn o ran y cysyniad o pariti, a chymryd mai'r maen prawf yw Gogledd Iwerddon, ymddengys nad yw'r trothwy ar gyfer bod yn "neilltuol" yn arbennig o uchel.

At hyn, credaf fod perygl yn y cysyniad o ystyried fod yno ryw drothwy cyfriniol, ac nad oes angen gwneud dim llawer cyn cyrraedd yno. Y mae angen cynllunio nawr, yn lle bo agwedd Micawberaidd yn ennill y dydd.

3. Ydy gwahanu cyfrifoldebau ym maes gweinyddu cyfiawnder (h.y. gwahanu cyfrifoldebau Cymru oddi wrth rai Lloegr) yn nodwedd hanfodol ar gyfer awdurdodaeth gyfreithiol ar wahân ac, os felly, i ba raddau?

Mae'n debyg y gallesid parhau â threfniadau o'r fath yng nghyd-destun awdurdodaeth gyfreithiol ar wahân. Yn wir, dyma oedd y sefyllfa mewn perthynas â gweinyddu cyfiawnder ym maes cyfraith droseddol yng Ngogledd Iwerddon hyd nes yn gymharol ddiweddar. Roedd y gwasanaeth llysoedd yno yn atebol i'r Arglwydd Ganghellor yn Llundain.

Mae pariti fodd bynnag yn awgrymu nad oes angen gwneud hyn, a gallasi datganoli grymoedd ym maes gweinyddu cyfiawnder fod yn ffordd o sicrhau bod gwariant ar y gyfundrefn yn adlewyrchu blaenoriaethau ymarferol Cymru yn y maes hwn drwy ganolbwyntio adnoddau lle mae eu hangen mewn cyd-destun Cymreig, ee cynyddu mynediad i gyfiawnder.

Fe all fod dadleuon ymarferol o blaid cadw'r gyfundrefn fel y mae, ond byddai angen llawer mwy o "lais Cymreig" o fewn yr Adran Gyfiawnder yn Llundain pe gwnaed hynny.

3.1 Ydy awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru yn gydnaws â system lysoedd unedig ar gyfer Cymru a Lloegr ac, os felly, i ba raddau?

Os mai ystyr hyn yw a oes angen system gweinyddu ar wahân, dan reolaeth Gymreig, gweler yr ateb blaenorol.

Fel arall, nac ydi. Mae'n hanfod mai llysoedd o fewn y diriogaeth sydd â'r awdurdodaeth unigryw dros achosion a gyfyd o fewn y diriogaeth honno.

3.2 Ydy awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru yn gydnaws â barnwriaeth unedig ar gyfer Cymru a Lloegr ac, os felly, i ba raddau?

Yn ffurfiol, byddai barnwr sydd yn eistedd mewn llys Cymreig yn farnwr Cymreig, a byddai hynny'n swyddogaeth ar wahân. Felly yn hynny o beth, yr ateb yw nac ydi, ac mae hynny'n gydnaws efo pariti.

Serch hynny, nid oes unrhyw reswm, o leiaf yn y byr dymor, pam na allasai barnwyr eistedd fel barnwyr Cymreig yng Nghymru a barnwyr Seisnig yn Lloegr. Mae traddodiad o farnwyr Cymru a Lloegr yn yn cael eu penodi yn farnwyr mewn awdurdodaethau eraill. Yn wir, buaswn yn dadlau y byddai'n fanteisiol, pe bai awdurdodaeth ar wahân yn bodoli, fod barnwyr mewn meysydd arbenigol, megis eiddo deallusol, yn gallu cael eu "benthyca" o un awdurdodaeth i'r llall.

3.3 Pe bai gan Gymru system lysoedd ar wahân, pa lysoedd y byddai hyn yn effeithio arnynt?

Mae pariti'n awgrymu pob llys.

3.4 A fyddai angen Uchel Lys a/neu Lys Apêl ar wahân ar Gymru?

Mae pariti'n awgrymu byddai.

3.5 A ddylai Cymru barhau i rannu rhai llysoedd â Lloegr ac, os felly, pa rai?

Mae pariti'n awgrymu na ddylai, ac eithrio'r Goruchaf Lys.

3.6 Pe bai Cymru a Lloegr yn dal i rannu rhai llysoedd, a ellid bod angen gwneud newidiadau i drefniadaeth y llysoedd hynny ac, os felly, pa newidiadau?

Byddai angen *o leiaf* sicrhau bod pob achos Cymreig yn cael ei glywed o fewn tiriogaeth Cymru, am sawl rheswm, ond gan gynnwys sicrhau'r hawl i ddefnyddio'r Gymraeg yn y llys. Gallesid cyflawni hyn drwy gyfeireb ymarfer (practice direction) neu rywbeth tebyg, ond ni fyddai gan honno'r un statws sefydledig ag awdurdodaeth ar wahân. Byddai hyn yn arbennig o bwysig ym maes cyfraith gyhoeddus, lle mae'r gwahaniaeth yn y gyfraith rhwng Cymru a Lloegr wedi cynyddu'n aruthrol.

4. Pe bai'r cyfrifoldeb dros weinyddu cyfiawnder yn cael ei ddatganoli, a fyddai angen i'r ddeddfwrfa ddatganoledig gael cymhwysedd deddfwriaethol cyffredinol dros y gyfraith droseddol fel maes datganoledig ar wahân ac, os felly, i ba raddau?

Mae pariti'n awgrymu y byddai.

4.1 A oes rhyw feysydd cymhwysedd deddfwriaethol eraill y dylid eu datganoli mewn achos felly?

Yr wyf o'r farn fod angen symud at fodel pwerau wedi cadw. Ac eithrio mai dyma mae pariti yn ei olygu, mae'r model presennol yn ddiffygiol mewn sawl ffordd.

5. Sut, yn eich barn chi, allai system lysoedd unedig ar gyfer Cymru a Lloegr weithio:

5.1 pe bai gan Gymru awdurdodaeth gyfreithiol ar wahân a bod cymhwysedd deddfwriaethol y Cynulliad:

a. yn aros fel y mae ar hyn o bryd, gyda'r gallu i ehangu gam wrth gam,neu
b. yn cael ei ehangu i gynnwys pob mater heblaw'r rhai a gedwir yn benodol gan Senedd y Deyrnas Unedig?

Mewn ymateb i a a b, gw atebion i 3.2 a 3.6 uchod. Byddai hefyd angen sicrhau bod cyfreithwyr sydd yn ymarfer gerbron llysoedd yng Nghymru, a barnwyr sy'n clywed achosion yng Nghymru, yn hyddysg yng nghyfraith Cymru (ac yn Lloegr yng nghyfraith Lloegr). Mewn rhai meysydd, byddai angen cael prawf cymwysedd cyn gallu gwneud hyn, er mwyn diogelu buddiannau gorau cleientiaid a chwsmwriaid.

5.2 Pe bai awdurdodaeth gyfreithiol unedig gyfredol Cymru a Lloegr yn parhau a bod cymhwysedd deddfwriaethol y Cynulliad:

a. yn dal fel y mae ar hyn o bryd, gyda'r gallu i ehangu gam wrth gam, neu
b. yn cael ei ehangu i gynnwys pob mater heblaw'r rhai a gedwir yn benodol gan Senedd y Deyrnas Unedig?

Gw. ymateb i 5.1 uchod. Credaf fodd bynnag y byddai hyn yn anodd iawn ei gynnal yn wyneb amrywiaeth pellach yn y gyfraith.

6. Pan gyfeirir at 'awdurdodaeth gyfreithiol' yn yr ystyr bod Cymru a Lloegr yn awdurdodaeth gyfreithiol ar wahân i, er enghraifft, yr Alban, beth mae hyn yn ei olygu ar ei symlaf?

Ar ei symlaf, mai llysoedd o fewn y diriogaeth honno sydd yn gyfrifol dros farnu ar achosion sy'n codi o fewn y dirigaeth honno, neu sy'n ymwneud â'r diriogaeth honno.

6.1 Yn y cyd-destun hwn, ydy awdurdodaeth gyfreithiol yn golygu dim ond y diriogaeth y mae gan y ddeddfwrfa (neu'r weithrediaeth) bŵer i ddeddfu drosti?

Cymraf fod y cwestiwn yn ymwneud â pha awdurdodaeth fyddai gan lysoedd oddi mewn i Gymru i farnu ar faterion sy'n digwydd y tu hwnt i'w ffiniau. Gall awdurdodaeth llys estyn y tu hwnt i ffiniau daearyddol ei ddeddfwrfa. Cwestiwn ymarferol yw hwn, sy'n dibynu ar y rheolau sydd mewn lle er mwyn sicrhau pa lysoedd sy'n clywed pa achosion. Er enghraifft, byddai pariti yn awgrymu y byddai Cymru yn dod yn "wlad" at ddibenion cyfraith sifil, fel Gogledd iwerddon a'r Alban, ac felly byddai'r rheolau sy'n penderfynu pa lysoedd sy'n clywed pa achosion yn weithredol.

7. A oes gan awdurdodaeth gyfreithiol ar wahân unrhyw nodweddion *hanfodol* eraill?

Yn fy marn i, nac oes.

8. Ydy awdurdodaeth gyfreithiol Cymru a Lloegr yn gynaliadwy yn y tymor hir o ystyried y posibilrwydd y bydd y cyfreithiau sy'n gymwys yng Nghymru yn ymwahanu fwyfwy wrth y rheini sy'n gymwys yn Lloegr a gweddill y Deyrnas Unedig?

Yr wyf yn tueddu i gredu nad ydyw. Mae'r ymwahanu'n digwydd nid yn unig oherwydd bod y Cynulliad Cenedlaethol yn deddfu yng Nghymru, ond hefyd oherwydd bod Senedd Llundain fwyfwy yn deddfu dros Loegr yn unig, mewn meysydd sydd wedi eu datganoli i Gymru. Tra gellid dadlau bod modd cynnal dwy diriogaeth gyda chyfreithiau gwahanol o fewn un awdurdodaeth, y mae hynny'n ymddangos yn fwyfwy artiffisial wrth i'r momentwm deddfu gynyddu i'r ddau gyfeiriad.

9. Os ydych o'r farn bod yr awdurdodaeth gyfreithiol gyfredol yn gynaliadwy, a

oes newidiadau tymor byr neu rai hirdymor y dylid eu gwneud i un neu fwy o'r elfennau isod?

a. Trefniadau gweinyddu systemau'r llysoedd a/neu'r tribiwnlysoedd.
b. Y farnwriaeth (gan gynnwys yr ynadaeth).
c. Y proffesiynau cyfreithiol (gan gynnwys eu system reoleiddio).
ch. Addysg a hyfforddiant yn y gyfraith.
d. Hygyrchedd deddfwriaeth.

10. Os ydych o'r farn bod yr awdurdodaeth gyfreithiol gyfredol yn gynaliadwy, a oes rhyw newidiadau eraill tymor byr neu hirdymor y dylid eu gwneud?

Nid wyf o'r farn bod yr awdurdodaeth gyfreithiol gyfredol yn gynaliadwy, ond carwn serch hynny ymateb fel a ganlyn:

9(b) ac (c) – gw sylwadau ar 5.1 uchod

9(ch) – os mai un awdurdodaeth gyfreithiol sydd, yna mae'r gyfraith a wneir am a gan y Cymulliad Cenedlaethol a Llywodraeth Cymru yn rhan o gyfraith Cymru a Lloegr.

Mae angen sicrhau bod pob cwrs Prifysgol yng Nghymru a Lloegr yn cynnwys o fewn y modiwl cyfraith gyfansoddiadol hanfodion y setliad datganoli Cymreig, a'r achosion llys hynny sy'n egluro ei nodweddion.

Byddai angen i hyfforddiant pob cyfreithiwr a bar-gyfreithiwr sicrhau bod ymwybyddiaeth na ellir cymryd yn ganiataol mai'r un gyfraith sydd yng Nghymru a Lloegr, ac na ddylid mentro i ddelio ag achosion o rai mathau yng Nghymru heb sicrhau yn gyntaf a yw'r gyfraith yng Nghymru yn wahganol.

9(d) – credaf fod hyn yn her beth bynnag fydd yn digwydd. Mae angen buddoddiad sylweddol er mwyn sicrhau fod cyfraith Cymru (boed fel rhan o gyfraith Cymru a Lloegr neu fel arall) yn wybyddus ac yn hygyrch, nid yn unig i ymarferwyr drwy gyhoeddwyr arlein, ond i'r cyhoedd yn gyffredinol.

11. A fyddai cyfraith statud sy'n rhychwantu dim mwy nag awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru yn cael ei chydnabod yn gyfraith yn awdurdodaethau eraill y Deyrnas Unedig?

12. A fyddai'r awdurdodaethau eraill hynny yn cymryd sylw barnwrol o gyfraith statud felly?

13. A fyddai modd i gyfraith statud felly fod yn destun achos sifil yn yr awdurdodaethau eraill hynny – er enghraifft ar gyfer gorfodi neu trwy adolygiad barnwrol?

14. A fyddai modd i gyfraith statud felly fod yn destun achos troseddol yn yr awdurdodaethau eraill hynny – er enghraifft arestio, cyhuddo, erlyn, barnu'n euog a dedfrydu?

15. Beth yw goblygiadau posibl awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru o ran cyfraith ryngwladol breifat (neu "wrthdaro cyfreithiau") rhwng Cymru a gweddill y Deyrnas Unedig?

Tybiaf y byddai'r trefniadau sydd eisioes yn bodoli gyda golwg ar yr Alban a Gogledd Iwerddon mewn perthynas â'r materion hyn hefyd yn weithredol gyda golwg ar Gymru.

16. Pe bai Cymru'n symud tuag at fath o ddatganoli gyda 'phwerau wedi'u cadw', fel yn yr Alban, a fyddai awdurdodaeth ar wahân ar gyfer Cymru, yn eich barn chi, yn:
a. hanfodol;
b. dymunol;
c. annymunol; neu
ch. amherthnasol?

Yn fy marn i, hanfodol. Mae pariti yn golygu hynny.

17. A fyddai awdurdodaeth ar y cyd rhwng Cymru a Lloegr yn gynaliadwy pe bai datganoli'n cael ei ehangu yng Nghymru?

18. Pe bai'n gynaliadwy, pa feysydd o'r gyfraith y byddai angen i Senedd y Deyrnas Unedig eu cadw?

Gw ateb i gwestiwn 8.

20. Ydi'r syniad o awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru yn gydnaws â phroffesiynau cyfreithiol unedig ar gyfer Cymru a Lloegr ac, os ydyw, i ba raddau?

Mae pariti'n golygu nad yw. Fe allesid, mae'n debyg, cynnal proffesiynau unedig, ond gweler y sylwadau uchod (5.1) mewn perthynas â chymwysedd i wneud rhai mathau o waith gerbron llysoedd Cymreig.

20.1 A fyddai awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru yn effeithio ar yr agweddau isod ar y proffesiynau cyfreithiol ac, os felly, beth fyddai'r effeithiau posibl?

a. addysg a hyfforddiant;
b. cymwysterau;

Gw. 5.1 uchod. Atgyfnerthir y dadleuon hynny lle bo awdurdodaeth ar wahân, gan y byddai rheolau llysoedd (symlach gobeithio) yn datblygu hefyd mewn sefyllfa o'r fath, a byddai angen i ymarferwyr eu gwybod.

c. rheoleiddio

Gan fod cymwysedd i ymarfer yn rhan o reoleiddio, byddai.

21. A fyddai creu awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru'n effeithio ar y gyfraith gyffredin sydd wedi datblygu fel rhan o awdurdodaeth gyfreithiol unedig Cymru a Lloegr?

Fe allasai'r gyfraith gyffredin ddatblygu yng Nghymru drwy benderfyniad llysoedd yng Nghymru lle mae pwyntiau newydd o gyfraith yn codi. Fe allasai barnwr yn Lloegr wrthod derbyn hynny fel cynsail (er y byddai'n awdurdod sy'n dwyn perswâd). Yn y pen draw, Goruchaf Lys y Deyrnas Gyfunol fyddai'n penderfynu beth yw'r gyfraith gyffredin am unrhyw fater, fel y gwna ar hyn o bryd.

Serch hynny, credaf fod y newidiadau mwyaf trawiadol i'r gyfraith gyffredinol yn fwy tebygol o ddigwydd yn sgil deddfu drwy'r Cynulliad Cenedlaethol.

22. A fyddai'ch ateb yn wahanol pe bai system lysoedd ar wahân yng Nghymru?

Rwy'n cymryd yn ganiataol y byddai awdurdodaeth ar wahân yn golygu llysoedd ar wahân.

23. A fyddai'ch ateb yn wahanol pe bai gan y Cynulliad gymhwysedd deddfwriaethol cyffredinol dros y canlynol i gyd, neu'r rhan fwyaf ohonynt:
a. y gyfraith trosedd;
b. y gyfraith sifil; neu
c. unrhyw faes arall o'r gyfraith nad ydych o'r farn ei fod yn perthyn i (a) na (b)?

Na fyddai. Mae'r gyfraith gyffredin yn newid o hyd drwy ddeddfau newyd a threy gynseiliau newydd sy'n codi o benderfyniadau mewn llysoedd barn. Yr unig gwestiwn perthnasol yna yw sut mae delio gydag amrywiaeth rhwng Cymru ac awdurdodaeth arall o fewn y Deyrnas Gyfunol, y mae'r gyfraith gyffredin yn sail iddi. Mae'r trefniadau gyda golwg ar Ogledd Iwerddon eisioes yn gwneud hynny.

24. A ellid cael eithriadau datganedig yn eithrio'r gyfraith gyffredin (a luniwyd gan farnwyr) o gymhwysedd deddfwriaethol y Cynulliad?
24.1 Pam y byddai hynny'n ddymunol, a sut y byddai'n gweithio'n ymarferol?
24.2 Pa mor anodd fyddai hynny?

Byddai modd gwneud hyn, mae'n siwr, ond rhai gofyn beth fyddai diben hynny? Llawer gwell yw eithrio meysydd polisi, gydag eithriadau i'r eithriadau, fel y gwneir yn yr Alban, ac a wneir (i raddau) nawr yng Nghymru. Er enghraifft, eithrir cyfraith teulu o gymhwysedd y Cynulliad Cenedlaethol nawr. Mae hynny'n eithrio nid yn unig ddeddfau yn y maes hwn, ond hefyd y gyfraith gyffredin.

Byddai eithrio "y gyfraith gyffredin" fel y cyfryw yn ffwlbri. Byddai'n gosod y farnwriaeth uwchlaw penderfyniadau cynrychiolwyr etholedig pobl Cymru, ac yn parlysu gallu deddfu'r Cynulliad Cenedlaethol.

25. A oes goblygiadau ehangach – economaidd (gan gynnwys adnoddau),

cyfreithiol, gwleidyddol, ieithyddol neu gymdeithasol – i gael awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru?

Oes wrth reswm. Mae angen deall beth fyddai costau sefydlu a chostau rhedeg cyfundrefn gyfreithiol yng Nghymru. Yn anffodus, ychydig iawn o wybodaeth sydd gennym i ddeall beth yw'r gost ar hyn o bryd o wasanaethu anghenion Cymru ym maes gweinyddu cyfiawnder. Er enghraifft: I ba raddau y mae Cymru'n elwa o brosiectau drudfawr i ganoli prosesau ym maes cyfreitha sifil? Beth fyddai gwir angen Cymru o ran personél barnwrol?

26. Gan y gall y gyfraith sy'n gymwys yng Nghymru ddeillio o nifer o wahanol ffynonellau, pa systemau fyddai'n angenrheidiol er mwyn sicrhau bod cyfraith awdurdodaeth gyfreithiol ar wahân ar gyfer Cymru ar gael yn hwylus i bobl Cymru ac eraill sydd â diddordeb yn y mater.

Yn ddelfrydol, mae angen un adnodd ar-lein sy'n hygyrch i bawb ac sy'n gyfredol, sy'n cynnwys / yn arwain at:

(a) y brif ddeddfwriaeth o San Steffan sy'n berthnasol i Gyrmu;
(b) holl Fesurau ac Actau'r Cynulliad Cenedlaethol;
(c) holl is-ddeddfwriaeth Gweinidogion Cymru;

(Oll yn eu ffurfiau cyfredol lle maent wedi eu diwygio)

a hefyd:

(ch) achosion llys perthnasol
(d) cyfraith "feddal" megis canllawiau ayyb
(dd) sylwebaeth ar gyfraith Cymru

Mae hon yn dasg enfawr. Mae peth gwaith wedi ei wneud gan Legislation.gov.uk ar (a) hyd (c), ond nid yw'r testunau ar y cyfan yn gyfredol, lle bo diwygio mwedi digwydd. Mae'r cyhoeddwyr preifat (ee Lexis) yn llenwi'r bwlch yma, ond nid yw rhain yn hygyrch i'r cyhoedd yn gyffredinol.

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 "jurisdicton" 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.[1] 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.

4.2 It is stated that in the UK there are three legal jurisdictions: (1) England and Wales, (2) Scotland and (3) Northern Ireland.[2] 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

[1] See section 120 Welsh Language (Wales) Measure 2011

[2] 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

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 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.[3]

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[3] e.g. *R v Griffin* (1869) 11 Cox CC 402

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.*

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.[4]

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 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

[4] 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.

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.[5]

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[5] Indeed, in the case of Scotland, Himsworth 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.

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 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 rasing 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.

RESPONSE TO CONSULTATION
BY
THE ASSOCIATION OF HER MAJESTY'S DISTRICT JUDGES
TO THE
WELSH GOVERNMENT – CONSULTATION DOCUMENT
ENTITLED
"A SEPARATE LEGAL JURISDICTION FOR WALES"

The Association welcomes the opportunity to respond to the consultation paper issued by the Welsh Government on 27th March 2012 concerning whether or not there should be a separate legal jurisdiction for Wales.

At the end of March 2012, the Association boasted a membership of 477 District Judges exercising civil, family and the non-criminal specialist jurisdictions embracing Bankruptcy, Chancery, Costs Judges, the Principal Registry of the Family Division and the Court of Protection in the courts of England and Wales and Northern Ireland.

Of the entire membership of the Association, 26 district judges are presently assigned to the Wales Region of Her Majesty's Courts and Tribunal Service (HMCTS) and sit almost exclusively in the District Registries of the High Court and the County Courts located in Wales. All of the district judges serving in Wales were invited to express their views in relation to this consultation and the answers to the consultation questions appearing below represent the views of the at least the vast majority of those members and are submitted on behalf of the National Association in response to the consultation document.

As members of the judiciary of England and Wales we cherish our independence from Government and the views expressed below are apolitical and are not intended, or do, in any way enter into the political arena. Where a response to any question raised calls for the expression, expressly or impliedly, of a political view we decline a view. We are concerned only with the practicalities of the consultation as serving members of Her Majesty's Judges and submit our response purely on that basis.

Our overall view is that we do not consider it either necessary or justified for a separate jurisdiction to be established for Wales. We consider that the current legal jurisdiction, exercised throughout the courts of England and Wales, has shown itself to be sufficiently robust and dynamic to absorb and accommodate the laws passed by the Welsh Government under its devolved powers and believe that will continue to be the position for the foreseeable future. Our response to the consultation questions are predicated on that basis.

We set out below a complete list of the consultation questions followed by our responses to each.

1. Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?

Yes, to avoid a conflict of laws it is essential to be able to define the geographical territory within which the jurisdiction is exercisable and where that territory includes

coastland the jurisdiction should embrace the territorial waters adjacent to the coastland as defined under International law.

1.1 What, for the purposes of a separate Welsh legal jurisdiction, might that territory be – "Wales" as defined in the Interpretation Act 1978 or as defined in the Government of Wales Act 2006?

We rely upon the answer to question 1 above.

2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?

The exercise of any legal jurisdiction relies upon the people and the judiciary being able to define and interpret the extent of the jurisdiction. In order to do so a distinct body of law is an essential feature.

2.1 When is a body of law distinct enough in this regard?

When it enables the people and the judiciary to address all social and economic interactions within the jurisdiction without any reliance upon the law of another jurisdiction save for international law or as an autonomous member of an international union such as the European Union.

2.2 Does it matter whether the law in question is statute law or common law?

The nature of the law is unimportant in the sense that some jurisdictions are based on a civil code whilst others, for instance, the jurisdiction exercised in England and Wales is made up of parliamentary legislation and common law. The essential feature of any body of laws exercised within any jurisdiction is that it meets the criteria set out in our answer to question 2.1 above.

2.3 Does it matter what the nature of the subject-matter of the law is – e.g. criminal, civil, family?

In creating a separate legal jurisdiction it is desirable to embrace all subject matter to meet the needs of the people within the jurisdiction and those from outside dealing with those within.

3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

It would be expected that any separate jurisdiction would be responsible to administer its own justice. Creating two separate legal jurisdictions out of one existing competent jurisdiction can only ever be justified by necessity. In the context of the existing jurisdiction of England and Wales we see no necessity or justification in creating a separate jurisdiction for Wales.

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

The court system operating in England and Wales is the envy of the world and recent innovations such as the creation of a Mercantile Court for Wales, an Administrative Court for Wales and the arrangements now made for sittings of the Courts of Appeal in Wales reflect the robust and flexible nature of the current system. We believe that such developments provide sound evidence for retaining the existing courts system and that it will continue to accommodate laws passed in Wales.

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

The independent judiciary of England and Wales evolved over hundreds of years and, again, is the envy of the world. Replicating the higher judicial offices currently held in order to create a totally separate judiciary for Wales would be enormously expensive and unnecessary and likely to reduce the availability of expertise to the detriment of Wales.

3.3 If there were a separate Welsh courts system, which courts would be affected?

All the courts would be affected as most judiciary exercise more than one jurisdiction within the courts of England and Wales at the present time.

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

This question is postulated on the assumption that a separate jurisdiction for Wales is created. We consider that the existing jurisdiction is robust and dynamic enough to serve Wales for the foreseeable future.

3.5 Should Wales continue to share some courts with England, and if so, which ones?

We refer to our answer to question 3.4 above.

3.6 If Wales and England continued to share some courts, what (if any) changes might be needed in the organisation of those courts?

This is crystal ball gazing. The courts system of England and Wales has adapted to devolution in Wales in the ways referred to in our answer to question 3.1 above in recent years. We believe those changes demonstrate the adaptability of the current

system and we are confident that the current system is dynamic enough to continue to meet the changes brought about by devolution.

4. To what extent (if at all) would it be necessary for the devolved legislature to have general legislative competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was devolved?

We do not believe it necessary from a legal point of view. The question of whether the administration of justice should be devolved is a political issue upon which we have no view.

4.1 Are there any other subjects of legislative competence that should be devolved in such a case?

This is a political issue upon which we have no view.

5. How might a unified England and Wales court system work if:
5.1 There were a separate Welsh legal jurisdiction and the Assembly's legislative competence:
a. remained, as now, with the ability to expand incrementally, or
b. extended over all matters except for those expressly reserved to the UK Parliament?
5.2 The current unified legal jurisdiction of England and Wales continued and the Assembly's legislative competence:
a remained, as now, with the ability to expand incrementally, or
b extended over all matters except for those expressly reserved to the UK Parliament?

Our response to questions 5.1 and 5.2 is that the system could continue to work in the same way as it does at the present time; evolving to meet any changes in the laws to be applied as and when necessary.

As the body of law passed by the Welsh Government increases there is no doubt that the law to be applied in Wales will become distinctly different, in many respects, to that to be applied in England. Recognition of that fact will in itself create a different jurisdiction though not a separate jurisdiction; in some respects akin to the Federal and State laws of the United States of America. We recognise that to be a possible long term development thus creating a distinct jurisdiction within the present unified system.

6. When reference is made to a 'legal jurisdiction' in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?

That the legal affairs of its people and their dealings with other peoples of the world are ordered by a body of laws to be applied which are capable of being defined, interpreted, modified and changed to meet the needs of society by it legislature and judiciary.

6.1 In this context does legal jurisdiction just mean the territory over which the legislature (or executive) has power to legislate?

No, the existence of a defined territory is but part of legal jurisdiction.

7. Are there any other essential features of a separate legal jurisdiction?

It is an amalgam of different features that together meet the objective set out in our answer to question 6 above.

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

We believe it is sustainable because of its ability to evolve as illustrated in our reply to question 3.1 above.

9. If you consider that the current legal jurisdiction is sustainable then are there any short-term or long-term changes that should be made to any of the following?
a. The administration of the courts and/or tribunals systems
b. The judiciary (including the magistracy)
c. The legal professions (including their regulation)
d. Education and training in law
e. Accessibility of legislation

It will be essential for the primary and secondary legislation passed by the Welsh Government to be made known as widely as possible. There is a need for the equivalent of "What's in Force" to be prepared and updated by Government and made easily accessible to the general public, the legal profession and the judiciary throughout England and Wales. We believe that the Welsh Government should issue briefing documents to the legal professions and the Judicial College for dissemination to its members. In so far as legislation proposed in Wales is to differ from the law otherwise applicable in England and Wales the legislative process needs to include a stage during which such conflicts of law are addressed in advance of laws being passed to seek, wherever possible, to avoid conflicts of law arising.

Where the law to be applied in Wales or in relation to, for instance, contracts involving a party in Wales differs from the law hitherto to be applied in England and Wales then steps should be taken to amend any existing primary or secondary legislation to incorporate the Welsh dimension; both in legislation made at Westminster and that made in Cardiff Bay. In so doing such differences would be immediately apparent to all.

We consider it to be essential that there is representation for Wales at the highest level on all Commissions (for instance the Law Commission and the Judicial Appointments Commission), Training and Professional bodies and Procedure Committees involved in the law making and implementation process in order to recognise the existence of any Welsh dimension and to ensure that dimension is immediately taken fully into account to enable the existing system to evolve to meet the pace of changes being

introduced. We believe that such evolution is not only practically possible but essential and preferable to any attempt to create a separate jurisdiction for Wales.

At present expertise in virtually every aspect of life exists within the jurisdiction of the courts of England and Wales. We do not refer only to expertise in the legal professions but also to the myriad of areas in which legal disputes arise where expert evidence in a subject is required to assist the parties and the judiciary to resolve disputes. Most experts are familiar with the law and procedure applied in the current jurisdiction and may shy away from providing their expertise to a new jurisdiction with which they are unfamiliar.

The creation of a distinct body of law for Wales is, as yet, in its infancy and is best allowed to evolve within the existing legal jurisdiction with the two legislatures finding ways in which to assimilate and accommodate new law with the assistance of the judiciary, HMCTS and the training and regulatory bodies. We believe those institutions to be robust and dynamic enough to work and evolve together in partnership. We believe that the creation of a separate jurisdiction for Wales at the present time would have the potential to be divisive, confusing, unnecessarily complicating for everyone and extremely expensive.

10. If you consider that the current legal jurisdiction is sustainable then are there any other short-term or long-term changes that should be made?

We refer to our answer to 9 above.

11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?

This is a political issue upon which we have no view.

12. Would such statute law be judicially noticed in those other jurisdictions?

This is a political issue upon which we have no view.

13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

This is a political issue upon which we have no view.

14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrest, charge, prosecution, conviction and sentencing?

This is a political issue upon which we have no view.

15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or "conflict of laws") between Wales and the rest of the UK?

As stated, we do not consider a separate jurisdiction for Wales necessary or justified. We refer to our answer to question 9 in relation to any conflict of laws arising as between the law passed in Westminster and that passed in Cardiff Bay.

16. In the event that Wales moved towards a 'reserved powers' form of devolution, like Scotland's, do you think a separate Welsh legal jurisdiction would be:
a. essential;
b. desirable;
c. undesirable; or
d. irrelevant?

This is a political issue upon which we have no view.

17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?

Yes we believe so for the reasons expressed in answer to other questions above by reason of the robust and dynamic nature of the existing legal system operating in England and Wales.

18. If it would be sustainable, which areas of law would need to be reserved to the UK Parliament?

This is a political issue upon which we have no view.

19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly's power that enables it in certain circumstances to make laws applying in England?

This is a political issue upon which we have no view.

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power?
a. upon the basis that any provision made in relation to England would extend to and from part of the law of England?
b. Otherwise, and if so how?

This is a political issue. We refer to the answer we give to question 9 above.

19.2 If you think that there would be such difficulties:
a. what are they?
b. would those difficulties be any different to the current situation where the Assembly already has the power to make provision applicable in England?

We repeat the answer to question 19.1 above.

20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction

compatible with the unified England and Wales legal professions?

This depends upon how the word "separate" is defined. In the sense that a distinct body of laws applicable in Wales will evolve then such evolution would not be incompatible with the unified England and Wales legal professions continuing as at present. If a totally new body of laws were to be introduced in Wales that differed wholly or very significantly from the laws applicable in England then re-training would be required and it would be necessary to recognise a separate qualification or dual qualification. If any changes in the law evolved gradually, as at present, then the situation could be met as suggested in answer to question 9 above.

20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions?
a. education and training;
b. qualification;
c. regulation.

If a separate Welsh legal jurisdiction were to be created it would have a very significant impact upon all three aspects referred to in the question. At the present time, the institutions involved in teaching law and preparing post-graduate students for entry into the legal professions provide their services to students from throughout England and Wales and beyond who desire to qualify and/or practice law in England and Wales. It is questionable that such teaching could continue economically and that fewer institutions would be financially viable, because of the numbers involved, in the training of entrants into a purely Welsh legal profession; such would be to the general detriment of legal teaching in Wales.
Creating a separate qualification for lawyers practicing in Wales and a separate Regulatory Authority would be disproportionately expensive and result in all lawyers practising in Wales having to attain the qualification at added expense. It is also likely that many lawyers would favour training and qualifying in England as the career prospects in a much larger jurisdiction would be an attraction to many. It might also impact upon the quality of lawyers practising in Wales which would ultimately impact upon the quality of the jurisprudence potentially to its detriment.
The Solicitors Regulation Authority and the Bar Council regulate the two main branches of the legal professions to the highest of standards and attempting to create duplicates in Wales would be an expensive and somewhat futile exercise. The current system serves the professions well and provided the Welsh Government, The Law Society, the Bar Council and the Judicial College recognise the need for the dissemination and teaching imperatives surrounding the creation of a distinct body of law in Wales we consider that those can be assimilated into the framework and governance of the current legal jurisdiction without the dramatic wholesale change that would accompany the creation of a separate legal jurisdiction for Wales.

21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

This is a political issue upon which we have no view. If the common law was to be abandoned then some form of codified law would be required to take its place that

would bring with it a totally different legal system that would then necessitate a separate legal jurisdiction.

22. Would your answer be different if there was a separate court system in Wales?

No.

23. Would your answer be different if the Assembly had legislative competence generally over:
a. criminal law;
b. civil law; or
c. any other area of law?

No.

24. Could there need to be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

Common law supplements primary and secondary legislation. The supremacy of Parliament enables it to change the common law by the legislative process; accordingly, the common law is regularly changed by legislation making such express reservations unnecessary. In the foregoing, the point of this question is not clear?

24.1 Why would that be desirable, and how would it work in practice?

24.2 How difficult would that be?

We have nothing to add to the answer given to question 24 above.

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

We make no comment upon any political or social ramifications of a move to a separate Welsh legal jurisdiction. Financially, the cost implications would be massive and unaffordable in the current international economic climate. We are confident that the current legal system can continue to assimilate and accommodate the laws being passed in Cardiff Bay without the need to create a separate jurisdiction for Wales.

26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

We refer to our reply to question 9 above.

27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?

We do not support the creation of a separate Welsh legal jurisdiction and decline to comment in response to this question.

28. Would your answers to any of the questions in this consultation paper be different if the approach to the Assembly's legislative competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK Parliament?

No.

29. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed please tell us about them.

Within the last year there have been significant changes in civil procedure with all claims issued under Part 7 of the Civil Procedure Rules (being the vast majority) now being issued centrally, in Salford, for the whole of England and Wales. The same have been true in relation to the issue of claims by bulk users for some years. They issue out of Northampton County Court. There are now proposals to introduce a Single County Court for the whole of England and Wales and that change together with very significant changes in Family law (following the Family Law Review) are going to be introduced in the next year or so. Those changes , once implemented would prove difficult and expensive to undo to create a separate court system in Wales.

Consultation Response Form on behalf of:
The Association of Her Majesty's District Judges

Your name: District Judge Harold Godwin
Senior Vice-President of The Association of Her Majesty's District Judges
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Cymdeithas Frenhinol Atal Creulondeb i Anifeiliaid
Royal Society for the Prevention of Cruelty to Animals

19th June 2012

Consultation on a Separate Legal Jurisdiction for Wales

The RSPCA welcomes the opportunity to respond to the consultation on a separate legal jurisdiction for Wales. The RSPCA is a charity registered in England and Wales, whose charitable objects - as set out in the 1932 Royal Society for the Prevention of Cruelty to Animals Act - are "to promote kindness and to prevent or suppress cruelty to animals and to do all such lawful acts as the Society may consider to be conducive or incidental to the attainment of those objects."

The RSPCA has a network of 165 Branches (each a separately registered charity) covering the whole of England and Wales as well as Regional Animal Centres in both England and Wales. The Society also has 26,043 members.

Across the whole of the RSPCA there are in excess of 400 uniformed Inspectors, Animal Welfare Officers and Animal Collection Officers who provide advice on animal care, help find homes for unwanted animals, rescue animals in distress, collect unwanted animals and investigate reported complaints of animal cruelty. In 2011 the RSPCA answered 1,314,795 calls from members of the public to its cruelty line and the Inspectorate investigated 159,759 cruelty complaints. As a last resort, our Inspectors will bring a private prosecution in relation to an alleged animal cruelty offence in England and in Wales and in 2011 there were 3,114 prosecutions. As a result the RSPCA is the main enforcer of animal welfare legislation in both England and Wales.

In Wales the Society has 28 Inspectors, five animal collection officers, five animal welfare officers and two animal centres. Our fourteen local branches, RSPCA shops and one Branch animals centre - all of which are run by volunteers - work tirelessly to provide advice, rehome and rehabilitate animals and provide microchipping, subsidised neutering and promote the welfare of animals in Wales. We receive approximately 60,000 calls originating from Wales which equates to about one in 50 people calling the RSPCA for help each year. Our prosecutions in Wales in 2011 saw a 26% rise in the number of convictions secured in magistrates courts (to 217) and a 38% rise in the number of people convicted for cruelty and neglect (to 88), with an additional 58 offenders cautioned.

In addition to this front line animal welfare work, the RSPCA has a long history of campaigning for changes and improvements in animal welfare, including campaigns to support new legislation. More recently the Society, along with others, has played a role in achieving a number of substantial improvements to animal welfare law including the Animal Welfare Act 2006 and in Wales The Docking of Working Dogs' Tails (Wales) Regulations 2007, various Codes of

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Noddwr Ei Mawrhydi Y Frenhines

Patron HM The Queen

Is-noddwr Ei Ras Archesgob Caergaint

Vice Patron His Grace The Archbishop of Canterbury

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Practice for Dogs, Cats, Equines and Rabbits and the current draft Animal Welfare (Breeding of Dogs) (Wales) Regulations 2012.

Thus, our response to the consultation is in relation to the possible operational impact on the RSPCA's animal welfare work as set out in the preceding paragraphs.

The RSPCA would welcome the opportunity to engage with the Welsh Government to consider the implications and impact of a separate legal jurisdiction on the Society's operations and activities, for now we have confined our answers below to our initial conclusions.

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Consultation Questions

3.6. If Wales and England continued to share some courts, what (if any) changes might be needed in the organisation of those courts?

- **There are a number of options being considered in relation to the court system in Wales. In respect of the criminal justice system, if a separate structure improves the criminal trial process by allowing for better policies and practices in ensuring a more consistent approach to criminal cases and various issues are properly addressed, for example how warrants will be executed if issued in England, then this may be seen as a positive move.**

- **A smaller circuit of district and circuit judges/magistrates may allow for greater training and understanding of animal welfare issues.**

- **In relation to a separate court system whereby Wales would have its own High Court and Court or Supreme Court, one observation would be whether a separate High Court or Supreme Court in Wales would consider the volume and range of cases that the higher courts sitting in England and Wales currently do.**

4.1. Are there any other subjects of legislative competence that should be devolved in such a case?

- **In relation to animal welfare law, the Animal Welfare Act 2006 provided a mechanism (the making of Codes of Practice and Regulations) for making criminal legislation and since the 2011 referendum, all animal welfare legislation has been devolved (with the current exceptions of hunting, animals used in experiments and some aspects of animal movements import/exports). The Animal**

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Welfare Act continues to provide opportunities to make regulations in Wales and indeed there are currently proposals to introduce new regulations to govern dog breeding. The RSPCA is also given to understand that the proposed Environment Bill may include an overhaul and consolidation of the plethora of legislation governing the protection of wildlife, some of which dates back hundreds of years and we are also hopeful that the Welsh Government will shortly introduce primary legislation in respect of the control of dogs.

- In terms of private prosecutions, given the RSPCA's prominent role, we would advocate that the current system is maintained (there is no such tradition in Scotland for instance).

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

- RSPCA Inspectors carry a very large legal handbook with them at all times. In 2008 we worked with Cardiff Law School on a project to determine which of the many hundreds of pieces of legislation were pertinent to England, or to Wales, or to both, so that the Welsh legislation could be colour-coded and easily reference-able for those Inspectors operating in Wales. The project exposed the difficult nature of determining the jurisdiction of each piece of legislation. This is compounded by the lack of a Welsh statute database. Since this project was conducted there has also been a divergence in legislation from England which is set to continue following the referendum and further powers in animal welfare being devolved. We would certainly welcome any simplification or improvements in this area for our work.

13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

- The work of the RSPCA incorporates civil cases including that of judicial review of public bodies and as such we would be interested to see how such a proposal would impact this area of work.

29. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed please tell us about them.

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- The RSPCA is grateful for the opportunity to respond to this consultation and would, as an organisation, be confident that we can adapt in terms of the prosecutions that we bring and civil claims that we bring or defend. Should there be consideration of reviewing the process of prosecuting, then the RSPCA would wish to engage with the Welsh Government directly in relation to it.

- One other aspect which may need to be considered by the Welsh Government is in relation to whether charities currently registered with the Charity Commission would need to be separately registered with a Welsh independent equivalent. The Charity Commission registers and regulates charities in England and Wales and if there is to be a separate jurisdiction in Wales, then this issue will need to be addressed.

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Rt Hon Elfyn Llwyd MP - Plaid Cymru Westminster leader

Response to the Welsh Government consultation:

A Separate Legal Jurisdiction for Wales

2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?

Obviously this is linked, though not essential. Certainly it is not a prerequisite: during the centuries between the Act of Union and the establishment of the Scottish Parliament, for example, the substantive differences in Scottish law were comparatively slight. But a distinct body of Welsh law is undeniably developing which is different from that of England. Lawyers who practice inter alia in environmental, criminal, family and obviously administrative law must have a thorough knowledge of the corpus of Welsh law if they are to practice in Wales.

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

A separate courts system is not essential, but as time passes the need will grow greater for the developing corpus of Welsh law to be supported by its own court structure and legal institutions.

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

As the corpus of Welsh law grows, a consensus will have to be reached on whether appointment procedures for the judiciary should reflect the needs of what will be a more dualistic body of law.

In the event of a separate legal jurisdiction being established in Wales, I would argue that a Welsh Judicial Appointments Commission should be tasked with

selecting the judiciary, magistrates and members of tribunals operating in Wales.

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

Comparisons can be drawn with the situation in Northern Ireland, where the UK Supreme Court is the final appellate tribunal. As with cases from other UK jurisdictions, the Supreme Court only deals with matters which raise points of law of general public importance.

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

In all likelihood not. Divergence is inevitable as devolution matures and the Welsh Assembly grows in confidence in its own abilities to legislate. Logic points towards a separate jurisdiction.

Furthermore, priorities in Wales may well differ from those in England and consequently there will be times when English legislation would not be followed in Wales and vice versa.

11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?

Yes, in the same way as the corpus of Scottish law which is by now quite extensive is recognised beyond the Scottish borders.

12. Would such statute law be judicially noticed in those other jurisdictions?

Such statute law would be judicially noticed in those other jurisdictions because it is common practice for courts to refer to existing law within other jurisdictions in assisting in the process of interpreting the law.

For example, in the area of the laws of tort in England and Wales the courts

have frequently looked at Canadian, Australian and New Zealand authorities as well as to other common law jurisdictions. It is argued that these references often created the laws of tort as they currently apply in England and Wales.

13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

Statute law would be judicially reviewable within its own jurisdiction. I do not foresee a specifically Welsh provision being the subject of a review in the law courts in London. Already there is an Administrative Court registry and office in Cardiff. Any person aggrieved by such application of the law would register his/her action in the registry in Cardiff and it should be dealt with at all stages in Wales from the first registration and issue through to final judgement in Wales.

As for enforcement it is commonplace for jurisdictions to have cross-jurisdictional protocols and memoranda which allow for judgements in one jurisdiction to be mutually enforceable in another.

14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrest, charge, prosecution, conviction and sentencing?

It would have to depend on the seriousness of the offence. Again, there are cross jurisdictional arrangements in place and of course the so-called European Arrest Warrant would/could come in to play.

15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or "conflict of laws") between Wales and the rest of the UK?

At this stage I believe that the consideration of private international law and the "conflict of laws" scenario is almost a red herring.

18. If it would be sustainable, which areas of law would need to be reserved to the

UK Parliament?

Possibly areas to do with defence and other state-wide services requiring criminal legislation.

19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly's power that enables it in certain circumstances to make laws applying in England?

Not necessarily. Those defined and specific areas would remain but generally all legislation emanating from the Welsh Assembly would otherwise apply within the territory of Wales alone.

As regards retaining the power in those defined and specific areas I see no difficulty.

20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?

Already those practising environmental, criminal, administrative and family law in Wales must have a thorough knowledge of the corpus of Welsh law, and thought must be given to whether wholly separate university courses covering Welsh law will need to be offered by a university in Wales whether acting alone or in partnership with another university.

The implications that the establishment of a separate Welsh legal jurisdiction could have for cross-border practitioners would be significant. Some have suggested that it might be attractive to develop a system similar to that which exists between lawyers in England, Wales and the Republic of Ireland, where the qualifications of each profession are mutually recognised, as opposed to the system operating in Scotland with the qualified lawyer transfer tests (QLTTs). But thought should also be given to the practicality of adopting the QLTT system in the event of separate qualifications developing.

21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

To some extent yes – since the nature of the common law is that it evolves over time. Separate laws and jurisdictions together with the different social and cultural backgrounds of the two nations would mean that the context in which the evolution takes place would differ as between Wales and England.

22. Would your answer be different if there was a separate court system in Wales?

A different court system would heighten the points above.

23. Would your answer be different if the Assembly had legislative competence generally over:
a. criminal law;
b. civil law; or
c. any other area of law?

All above points would be heightened.

24. Could there need to be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

Provided the Welsh legal system develops along a common law type of route e.g. Australia, Canada, New Zealand then there would be no need to differentiate. What would happen is that the Welsh Government would legislate and the Welsh judiciary interpret.

24.1 Why would that be desirable, and how would it work in practice?

It would not be desirable, nor indeed necessary. I believe that it would be in danger of creating an anomalous, over complicated system with no tangible benefit.

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

Financially, the Assembly would need to obtain additional provisions to cover the costs of the court system and the administration of justice.

Another way in which a move to a separate legal jurisdiction will have a significant impact on society will be the uniform right to use Welsh in court. Currently, the right to use Welsh in court is limited to the territory of Wales and dependant on where proceedings are held. In the event of a separate Welsh legal jurisdiction being established, cases arising in Wales could only be tried by courts in Wales, with the result that persons in court would have the right to use Welsh should they so choose. Welsh is routinely used in the courts of Wales and also the criminal courts of Wales. There would be a need to put right a long standing problem, viz, ensure by statute that any defendant in Wales would be entitled to have a bilingual jury empanelled to hear his/her case.

26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

The Law Society has called for a single database for all legislation applicable for Wales to be compiled as a public service – this would certainly be a positive idea.

By means of comparison, since 1980, Queen's University in Belfast has run the Servicing the Legal System Programme which produces publications relating to the law of the region. Its staff is relatively small and the programme is funded by the Northern Ireland Court and Tribunal service and the Bar Council. A similar publication for Welsh law would be an undeniable asset.

29. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed please tell us about them.

The devolution of justice matters to Wales would have a significant impact on policy formation, allowing the government to consult with relevant organisations and stakeholders so that laws are drafted which meet the

priorities of the local population. Thought should therefore be given to how such working relationships could work. A decision should also be reached on whether a course for Welsh civil servants should be established by a university in Wales whether going it alone or in partnership with another. Initially, it is undoubted that one department should suffice but I believe that the nurturing of a fully trained, highly professional cadre of civil servants in Wales is a prerequisite to the continued positive devolution of governance in Wales.

19th June 2012