

**COMMISSION ON JUSTICE IN WALES
CALL FOR EVIDENCE**

SUBMISSION

By

STEPHEN WHALE
Llandybie
Carmarthenshire
SA18

StephenJTWhale@icloud.com

July 2018

1 INTRODUCTION

This submission of evidence to the Commission on Justice in Wales is by **Stephen Whale**. He was, until the 31st of March 2018, the Clerk to the Justices for the local justice areas throughout Wales; and was also the Secretary to the Lord Chancellor's Advisory Committees on Justices of the Peace throughout Wales.

Stephen Whale is qualified as a barrister, a member of Gray's Inn – justices' clerks have to be qualified as a barrister or solicitor of at least five year's standing. He also holds a Master in Business Administration (MBA [Birm.]) qualification.

He was first appointed to the office of Clerk to the Justices in 1988 for Brecknock and Radnorshire, and has since held Clerkships for Powys, Dyfed Powys, Gwent and South Wales and since February 2014 until the 31st of March 2018 was the *de facto* Clerk to the Justices and Secretary to the Advisory Committees for the whole of Wales. Before being appointed as a justices' clerk in 1988, he held various positions within magistrates' courts in Berkshire, Hampshire and West Sussex. He has worked and lived in Wales for over thirty years.

This submission will have a particular focus on magistrates' courts and the office of Clerk to the Justices, though it also touches on wider aspects of justice.

2 BACKGROUND TO ROLE WITHIN WALES

The role of Justices' Clerk in Wales involved line management and responsibility for all the legal advisers operating in magistrates' courts and family courts throughout Wales, and the standard of legal advice tendered to magistrates. The Justices' Clerk, through the Judicial College, was responsible for the delivery of training at all stages to justices of the peace, and for in-house training of legal advisers. The role also entailed supporting the eight Her Majesty's Lord Lieutenants and the Advisory Committees across Wales; providing advice and administration to the five Lord Chancellor's Advisory Committees on Justices of the Peace in Wales on judicial appointments and conduct matters.

Justices' Clerks have certain judicial powers that they may also delegate to assistant clerks (otherwise referred to as 'legal advisers').

Historically, Justices' Clerks had a high level of independence, for both the administration and the legal operations in magistrates' courts. The office evolved over hundreds of years, since 1361, to support lay magistrates without any formal legal training to deliver a system of justice, primarily in the criminal jurisdiction, but also with a civil jurisdiction.

Justices' Clerks were neither civil servants nor local government officers, retaining almost complete independence from the executive. Magistrates' Courts Committees (MCCs), comprised of representative justices of the peace from each local justice area in the MCC area, together with the Lord Lieutenant, and were responsible for the MCC administration. The area of an MCC in a rural area generally consisted of a county council area, although in more recent times and until their abolition in 2005, it was common to have a MCC operating

for a group of counties.¹ The MCC could not direct a justices' clerk in relation to his duties, nor could a justices' clerk be removed by an MCC, something which could only be done by the Lord Chancellor on grounds of bad behaviour; or otherwise with the payment of substantial compensation for loss of office. Funding was provided by central government (80%) and local government (20%) for the administration of the courts, and the allocation of the funding was the responsibility of MCCs.

Then, in 2005, magistrates' courts merged with the Crown and county courts to form HMCS (Her Majesty's Courts Service) and, more recently, the non-devolved Tribunals Service joined to form HMCTS. (Her Majesty's Courts and Tribunals Service), and justices' clerks became civil servants. From 2005, justices' clerks have been line-managed by (non-legally qualified) senior civil servants. There was much consideration given to whether it was appropriate for justices' clerks to be civil servants, or to be managed within the Civil Service. However, justices' clerks have retained their independence in some respects:

A justices' clerk exercising (a) any function exercisable by one or more justices of the peace; or (b) advisory functions on matters of law, practice and procedure is not subject to the direction of the Lord Chancellor or any other person.²

Similarly, assistants to justices' clerks³, in exercising these judicial and quasi-judicial duties, are not subject to the direction of any person other than a justices' clerk.

¹ From early 2000 until the end of March 2005, there were four Magistrates' Courts Committees in Wales: Dyfed Powys, Gwent, North Wales and South Wales.

² Courts Act 2003, S29(1)

³ Known as 'legal advisers'

Since April 2018, seven heads of legal operations have been appointed – one for each region in England and Wales; and Wales continues to feature as one of those regions. It is expected that heads of legal operations will increasingly have oversight of delegated judicial duties in all of the judicial jurisdictions. Importantly, heads of legal operations at this stage retain all the powers, responsibilities and duties of justices’ clerks. Each head of legal operations continues to be line managed by a regional delivery director.

3 INDEPENDENCE OF THE JUDICIARY

As will be discussed (Section 5), it is submitted that there is a significant advantage, if not an absolute necessity, for the administration of justice to be devolved to Wales. However, in order for that to happen, it is submitted that there needs to be sufficient safeguards to enable justice to be delivered in a transparently independent manner. There is also a need to ensure that there is sufficient expertise within any Welsh devolved judicial system, enabling justice to be dispensed by judges with a sufficient depth of knowledge of the area of law within a particular jurisdiction to which they are assigned. The Welsh judiciary, taken as a whole, generally have the competence and experience to undertake court business in all the various jurisdictions, but insofar as there may be a concern it may be met by a system of ‘ticketing’ judges in England to sit in the Welsh courts, as and when needed, or perhaps on a more permanent basis. Any argument that Wales is of insufficient size (with a population of c. 3 million people) to warrant its own judicial system may easily be defeated: for example, Guernsey (population c.70,000) and Jersey (population c100,000) each have their own judicial systems. They have an appellate system⁴ that draws on expertise from

⁴ Court of Appeal (Guernsey) Law 1961; Court of Appeal (Jersey) Law 1961

beyond their jurisdictional boundaries, with senior legal figures from the UK sitting on appeals. There appears to be no reason why an independent judicial system could not be set up, drawing, if and when necessary, on the legal expertise of senior lawyers and judiciary based in England.

There is little doubt that, within Wales, there is a sufficient breadth of legal knowledge and expertise to operate an independent system, but the ability to draw on a wider pool of talent, if and when needed, would satisfy any concerns about independence and diversity.

There has in recent times been a move to have some of the appeal courts sit in Wales⁵. Having a discrete judicial system and judiciary in Wales would, it is submitted, have the beneficial consequence of increasing the legal expertise of legal practitioners in Wales. Currently, Welsh people obtaining a legal qualification and wanting to develop a specialist practise are likely to consider moving to large cities in England, but the development of a separate judicial system may serve to retain their services in Wales. If more Welsh speaking lawyers are retained in Wales, this would over time assist to increase the availability of Welsh speaking judiciary able to deliver judicial services through the medium of Welsh. If those who want or need to use the Welsh language are then able to do so before a Welsh speaking tribunal, a likely consequence is that more and more advocates and lawyers practising in Wales will be Welsh speakers, meeting the needs of Welsh residents.

There would have to be a body to replicate within Wales the functions currently undertaken for England and Wales by the Judicial Appointments Commission. There would, of course,

⁵ For example, the Administrative Court sits to hear judicial review proceedings in Wales, with a small complement of staff.

also need to be a head of the judiciary, who might be known as the Lord Chief Justice of Wales, or by some other title. For England and Wales, there is currently a Senior President of Tribunals, as well as a Lord Chief Justice, but, if justice were devolved to Wales, it is submitted that these roles could be combined with just one head of judiciary.

4 ACCESS TO JUSTICE

a. Court Closures

Since 2012, there has been a significant number of court closures across Wales and England; but there were also a substantial number of such closures in the preceding decades. Within Wales, some magistrates' courts were located in relatively small conurbations, some little bigger than villages. It is submitted that it was entirely right for such closures to take place. It cannot be a sustainable position to keep open under-utilised courts on the basis of maintaining a better service in terms of access than the health authorities do by way of provision for accident and emergency services. Despite reports that crime may be increasing, the simple fact is that fewer and fewer cases are currently being prosecuted before the courts. Most people have no need to attend a court more than once or twice in their life time; though, for many, hospital attendances are more regular, either as a patient or a visitor. It is submitted that there is a greater need and importance for all medical services to be delivered as close to the community as possible than applies to the judicial services. What, however, needs more

thought is how those services can be delivered in a better way than at present. Even before the recent rounds of court closures that commenced in 2010, victims, witnesses and defendants were routinely required to travel long distances; e.g. For Aberystwyth Crown Court cases, there was a need to travel two hours and over 72 miles by car to attend the Crown Court at Swansea, for cases that were not listed at Carmarthen. Similarly, the Care Centre for family cases from Aberystwyth is Swansea, and until relatively recently it was common for most child care cases to be listed at the Swansea Civil Justice Centre, although arrangements have now been made for some of these cases to be heard more locally by a district judge.

While it is accepted that there isn't a sufficient business case to maintain magistrates' courts (or any other type of court) in every conurbation, due to lack of sufficient work to make the provision viable, there needs to be an imaginative consideration about providing a viable alternative system for most types of case, particularly where one or more of the parties might find travel to court an impossibility.

b. Alternative Provision⁶

It is submitted that alternative provision or 'pop up' courts will have little practical application. It would only be viable to use such a provision where the victim, witnesses and defendant live in the same particular area; otherwise, it would be difficult, if not practically impossible, to provide a

⁶ 'Alternative Provision' (sometimes referred to as a 'pop up' court) is the concept discussed in recent times as or occasional use of a building used at other times for other purposes. It could also be the innovative use of IT technology. The use or technology is discussed later.

criteria that would fit the circumstances. Even then, the utilisation of such a provision would not be viable and would be resource intensive, since it is hardly likely that sufficient cases would be found to fill a court list for the day each time the provision were used. Any 'downtime' is a waste that can be avoided if there are other cases that may be transferred to a courtroom at short notice when cases settle on the day sooner than expected, but this is something that would not be as possible if a case being heard at an alternative provision settled early. Issues of health and safety and security need to be considered, and, although church halls and the suchlike were in some cases used as occasional magistrates' courts forty years or more ago, this would be a difficult position to revert to today, particularly at a time when fewer cases are being brought before the court. Indeed, cases coming to magistrates' courts emanating from remote and small conurbations have become fewer and fewer. If resources were diverted to provide 'alternative provision', there would be an impact on cases listed in the main centres, since the resources deployed to the alternative provision would be disproportionate to the number of cases that would be dealt with, which would create delays and inefficiencies in the delivery of justice and a backlog of cases in the main centres, which has not been a feature in magistrates' courts in Wales for some years, although it has been common to see long delays in some parts of England. Notwithstanding these considerations, any courts' system should be open to the possibility of operating a court other than in a designated court building, if in all the circumstances it is right to do so and suitable accommodation to fulfil the various needs can be identified.

c. Use of technology

Recently, there has been a significant investment in technology within HMCTS⁷, although it is submitted that there is still a long way to go; and there needs to be substantial improvement to the DMU (Digital Mark Up) system, to enable legal advisers responsible for inputting judicial decisions in real time to be left sufficiently free to ensure that they maintain a sufficient focus on advising magistrates and conducting the courts. The DMU concept is undoubtedly the way forward, and any devolvement of a judicial system to Wales is likely to need a close collaborative working relationship with the Ministry of Justice, to ensure that there is no unnecessary duplication of effort, leading to wasted costs and resources. The need to collaborate on the development of technology (with England, were there to be a devolvement to Wales of justice) is likely to become more important over time, particularly with plans for a Common Platform that joins all the main criminal justice agencies. However, it is important that Wales works with England on I.T., rather than implement packages developed in England without a sufficient oversight to ensure that they are fully Welsh language compliant.

The 'Single Justice Procedure' implemented has had a large measure of success, with suitable cases, such as driving with excess speed, being dealt with by a single justice, with the support of a legal adviser. The proceedings are dealt with more efficiently, due to the fact that the justice does not have

⁷ Her Majesty's Courts and Tribunal Services

to confer before making a decision, and the sentencing guidelines in place provide some assurance that the decisions are well reasoned and reasonable, with the option to have a case referred to a full court of three justices. In fact, this area of business is now quite routine, and it is submitted that there may be scope for delegating some of these functions to a legal adviser. However, the point here is that, with such proceedings, it is essential that they are conducted from beginning to end with the ability to make provision through the medium of Welsh. This invariably happens, and a Welsh judicial system could provide some assurance that it will continue to happen, without any thought or possibility of such cases being diverted over the English and Welsh boundaries in the future.

It is technology that will provide the best possible answer to provide a system of justice that is more accessible. It is submitted that a Wales Justice system, devolved from England, would enable the best strategic decisions to be made. Any technological solution needs to be closely integrated with the Welsh language services⁸, which might need to be expanded over time, to ensure that the service is developed to be able to meet with any increased demand.

5 PROVISION OF JUDICIAL SERVICES THROUGH THE MEDIUM OF WELSH

⁸ Currently, Her Majesty's Courts and Tribunals Service operates a Welsh Language Unit based in Caernarfon.

The current position is that, in any legal proceedings in Wales, the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates' court to such prior notice as may be required by rules of court, and any necessary provision for interpretation shall be made accordingly.⁹

It is submitted that there should be no difference between the various courts and tribunals in terms of the provision of Welsh; and that, if Welsh and English are to be on a par in legal proceedings, there needs to be a system to enable either language to be used in all courts and tribunals without notice. It must however be recognised that for judiciary and staff in Wales all to be bilingual is at best an aspiration and in reality is something that is not achievable; and might serve to reduce the diversity of the personnel working in the courts in Wales.

The substantial point is that everyone connected with the courts and tribunals in Wales should have an embedded empathy in relation to the needs and requirements of providing a bilingual service. HMCTS within Wales is fully committed to delivering a bilingual service, and has developed an excellent Welsh Language Unit, based in Caernarfon. However, within an organisation that has its headquarters and most senior staff based in London, it is fair to say that not everyone in the organisation has the necessary understanding of the Welsh language legislation and the necessary empathy to ensure that Welsh in Wales is treated on a par with English. Without such a universal

⁹ Welsh Language Act 1993, S22

understanding, it is submitted that there will be a slowness and a lack of robustness to react to the increasing need to provide services in Wales through the medium of Welsh. The Welsh region of HMCTS has an excellent empathy for the Welsh language, but such empathy needs to be ingrained at every level of a judicial system for Wales, to ensure that policies and IT packages are developed with Welsh (as well as English) being at the heart, and Welsh does not at any stage become a 'bolt on'.

It is submitted that there needs to be a shift away from the position exemplified in a 1999 Court of Appeal decision¹⁰, upholding the decision of the Employment Appeals Tribunal, sitting in London, to refuse to allow the applicant to have proceedings conducted in Welsh, whereas the hearing at first instance before the Employment Tribunal had quite properly made such provision. The applicant's first language was Welsh, although he could of course speak English. This overlooks the position that a party to proceedings whose mother tongue is Welsh may be more likely to be able to communicate and express themselves better through the medium of Welsh, than in English, and in so doing would be in a better position to put their case to best effect, improving the quality of justice and decision making. Ensuring that cases at most, if not all, levels are heard within Wales, with a judicial system and judiciary with a greater empathy for the Welsh language would no doubt secure decisions with which Welsh speaking participants to.

To meet an increasing need to communicate and deliver services through the medium of Welsh, it is submitted that a Welsh language translation service should be accessible by every court at any time. Given that not everyone in a case where a party wants or needs

¹⁰ Williams v Cowell and another (t/a The Stables) Court of Appeal 20th July 1999.

to speak Welsh is likely to be able to speak Welsh, this, in practice, will need the development of a dial-in system, which may or may not include a video link facility.

6 WELSH LEGISLATION

The growing body of legislation enacted by the Welsh Government increasingly creates a need to have a judicial system that has the grounding and understanding of Welsh laws, and it is submitted that this may best be achieved by a system of justice operated within Wales, rather than one that is fully integrated with England. As more legislation is created by the Welsh government, it is likely that there will be a need to incorporate elements of Welsh law in the appointments and training provision.

7 LINKS WITH OTHER AGENCIES

To support the process of the delivery of an efficient and effective criminal justice system, strong links need to be in place and maintained with key criminal justice agencies, such as the Crown Prosecution Service and the Police, and also, amongst others, with the Probation Service and the Youth Offending Services. There is a strong case for co-terminosity, with all agencies having the same shared boundary, where practicable, and the boundary needs to encompass sufficient workload to ensure the viability of the service.

Criminal Justice areas have developed along the boundaries of the police forces¹¹. In recent times, for good operational reasons, the concept of a criminal justice area has

¹¹ The criminal justice areas in Wales are Dyfed Powys, Gwent, North Wales and South Wales.

become more difficult to manage. No doubt for good strategic and operational reasons, the Crown Prosecution Service areas for Wales are divided between the north and the south, and the north includes West Glamorgan, as well as North Wales and Dyfed Powys; and following the closure of the Brecon Court, there has been a merger of the Glamorgan Valleys Local Justice Area (in South Wales) and Brecknock and Radnorshire Local Justice Area (in the Dyfed Powys criminal justice area). Also, Welshpool, within Dyfed Powys is managed from North Wales within HMCTS. As indicated, there were very good and somewhat compelling reasons for these changes. However, if the monitoring of good performance depends on shared or coterminous boundaries, it is highly desirable, if not essential, for the unit of accountability amongst agencies to be similar. It would perhaps assist to bring about a better level of accountability if the criminal justice administration units within police forces came together as just one collaborative unit. Although the CPS is a national (England and Wales) organisation, Wales is a management unit for them.

It follows that a Welsh unit of accountability for performance might be the best model, with either encouragement or perhaps some direction for the Welsh police forces to collaborate on criminal justice matters.

It is submitted that the Utopian position might be to have a Ministry of Policing and Justice within Wales, responsible for criminal cases from end-to-end, which could be charged with responsibility for oversight of performance, except, of course, in relation to judicial decisions that should always remain accountable to higher courts only.

8 PERFORMANCE

The point has been made that the best way to maintain (and perhaps improve further) the excellent performance in Wales is to have shared agency boundaries, to facilitate and support a robust accountability structure to address any failures in service. In terms of the establishment of priorities, there is a clear need for these to be established and agreed by the judiciary. Focussing, for example, on improving the 'effective trial rate' would, it is submitted, be wrong in principle. Putting aside those cases where there is an arguable point of law or a factual dispute, the position otherwise is that either the defendant knows he is 'guilty' and should be pleading 'guilty' at the first hearing or the prosecution should be discontinuing a flawed case at the first hearing, if not before. However, in those cases adjourned for trial upon the entry of a 'not guilty' plea, there should be continued dialogue between the court, the prosecution and defence, with the aim of resolving issues to avoid a trial if at all possible. The public is likely to have a greater level of confidence in a system that prevents, wherever possible, the need for victims and witnesses to have the stress of giving evidence and being cross-examined. It would therefore be perverse to record as an achievement an increase in effective trials. It is therefore essential that those developing priorities for the courts have a thorough understanding of the criminal justice and judicial processes, and therefore these are best left to the judiciary, supported in the case of magistrates' courts by justices' clerks. A devolved judicial system within Wales would present an opportunity to develop appropriate priorities. When considering performance, it is important to go below headline figures, and establish the causes of failures and ensure that they are appropriately addressed. Unless challenged, there is a tendency for some agencies to

confirm that they are monitoring performance looking back on top line statistics relating to past failures, without a proper case-by-case examination in real time so that countermeasures can be put into place with immediate effect, with the aim of preventing a recurrence of the issues and the consequent adverse impacts on the parties and resources deployed for any further cases.

9 THE OFFICE OF JUSTICES' CLERK

The statutory office of Clerk to the Justices remains. When the writer was first appointed as a justices' clerk, there were hundreds of such positions across England and Wales. There was a justices' clerk for practically every town, no matter how large or small the conurbation. There has been a dramatic reduction in the numbers: in 2012, there were just 25 justices' clerks in England and Wales, and from the 1st of April 2018 the number was reduced still further to seven. The seven justices' clerks now have the title of Head of Operations, though at this time they retain their statutory roles, and Justices' Clerks have a high level of independence when undertaking any judicial or advice-giving role, and in the writer's experience HMCTS has always respected the role and the independent responsibilities of the Justices' Clerk. However, were justice to be devolved in Wales, there would be an opportunity to review the model. It is submitted that, with fewer justices' clerks, the accountability to the Civil Service should, if at all possible, be reduced still further; and that the independence of justices' clerks / heads of legal operations should be more transparent. While in the writer's experience the Civil Service has respected the independence of justices' clerks, it is suggested that a clearer line to the judiciary would be preferable, so that the public could have more confidence in the system and the independence of the judiciary. In having a clearer line

to the judiciary, this might be something less than line management, since many senior judges in their careers may not have had much experience of managing a significant number of people. The future head of legal operations or justices' clerk in Wales might be recruited by or on behalf of the First Minister and by or on behalf of the most senior member of the judiciary in Wales. Removal of the Justices' Clerk on grounds of poor performance or bad behaviour might then take place by a petition to the senior member of the Welsh judiciary and the First Minister, which would need to be subject to the HR policies and procedures, and the offices of the Welsh Government HR department could be consulted for advice, when needed.

It is currently intended that the role of Head of Legal Operations should be developed to include the carrying out of delegated judicial duties and that similarly legal advisers working to the Head of Legal Operations should also have increased delegation.

It therefore makes good sense that the future selection of Justices' Clerks or Heads of Legal Operations should also encompass testing of judicial competence. A clearer and more distinct line of accountability to the most senior member of the judiciary is therefore desirable. It is important that any accountability to the most senior member of the judiciary should not be delegated to individual judges, since that would in itself dilute the independence of justices' clerks; and each justices' clerk / head of legal operations would be in the untenable position of serving several masters within Wales (or his or her region).

10 CONCLUSION

Within the body of this submission, there are a number of suggestions supported by some evidence. Most of the suggestions are set out in the next section. Should clarification or amplification be required, the writer would be pleased to assist.

11 SUMMARY OF RECOMMENDATIONS OR SUGGESTIONS

- (a)** That the judicial administration currently undertaken by Her Majesty's Courts and Tribunals Service for England and Wales be devolved to Wales;
- (b)** That there be a presumption for the future that all cases in all jurisdictions should begin and end in Wales, and that any appellate system be Welsh based;
- (c)** That access to justice be improved within Wales using technology, in such a way that the particular needs to facilitate the use of the Welsh language are addressed at every point with victims, witnesses and defendants.
- (d)** That parties to proceedings be given the right to speak and communicate in Welsh without notice. That facilitation of this right be achieved by a more extensive translation service that may be accessed by telephone or a video link, as and when required. That parties be requested to indicate their language of choice in all proceedings, and that in trials a Welsh speaking tribunal should, where practicable, be the usual expectation in all courts.

- (e)** That a judicial and legal training provision be put into place, to deal with any Welsh Government legislation. Examination should take place to establish the viability of whether some legal and judicial training might be outsourced, perhaps to universities.
- (e)** That there should be some encouragement, direction or, perhaps, legislation, to establish a Wales wide responsibility for agencies in respect of their accountability for criminal justice matters and case handling. There should be one Wales wide voice for all agencies, with a firm responsibility to provide accounts for failures and details of measures put into place to address them.
- (f)** It would not be appropriate for judicial decisions to receive scrutiny other than through the courts. However, in respect of other performance issues before the courts, e.g. the throughput and listing of cases, the judicial spokesperson should generally be the Clerk to the Justices / Head of Legal Operations. HMCTS or any devolved court administration service should not have responsibility or accountability for any listing or case throughput decisions. Any staff undertaking such decisions should come under the direction of the Justices' Clerk / Head of Legal Operations.
- (b)** That justices' clerks / heads of legal operations should be managed with more transparent independency than is currently the case. Appointments

and removals of justices' clerks should be the joint responsibility of the First Minister and the Lord Chief Justice in Wales.

Stephen Whale

Llandybie, Carmarthenshire

stephenjtwhale@icloud.com

July 2018
