



Llywodraeth Cymru  
Welsh Government

# Commission on Justice in Wales:

**Supplementary evidence of the  
Welsh Government to the  
Commission on Justice in Wales**

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Mae'r ddogfen yma hefyd ar gael yn Gymraeg.  
This document is also available in Welsh.

# Law and the Constitution

1. This paper is supplementary to the Welsh Government's submission of 4 June 2018. It focusses specifically on the law and the legal jurisdiction and its impact on government in Wales. It also considers the potential impact of creating a Welsh legal jurisdiction and devolving the justice system on the legal professions in Wales.

2. The paper explores the incremental and piecemeal way in which Wales' current system of devolved government has developed. Doing so is intended to help demonstrate how the system is complicated and incoherent, and show how underlying problems in the division of power between London and Cardiff cause practical problems. It also examines the contrast between the Welsh devolution settlement and other decentralised systems across the common law world. The Welsh system is clearly a constitutional anomaly and very different to comparable systems elsewhere, which are long lasting and successful.

3. The focus is on the period from 2005 onwards, in particular, when decisions were taken about the nature of the new legislature created in Wales and on how it was to form part of the United Kingdom's broader constitutional arrangements. It examines the significance of the single legal jurisdiction of England and Wales, in particular its impact on the stability and coherence of the devolution settlement and on the accessibility of the law both in Wales and in England.

## History and evolution

4. History has had a major influence on the evolution of devolution of power to Wales. On many occasions the two prevailing factors in decision making have been compromise and that which has gone before. As a result, little emphasis has been put

on designing a system of government that is the most effective and produces the best outcomes for the people of Wales. Instead we have constitutional arrangements which are often complex, confusing and incoherent.

5. One of the key junctures came in 2005 with the proposal to create what was to become a fully fledged legislature for Wales. The advent of full law making powers was a seminal moment and with it came decisions as to the legal environment within which the National Assembly – in its new form – was to operate. Foremost among them was the question of the status of the primary laws to be made and whether the legislature should be accompanied by a corresponding legal jurisdiction – as has always happened elsewhere in similar circumstances across the common law world (most notably perhaps upon the creation of Northern Ireland by the Government of Ireland Act 1920).

6. Also under consideration was the model by which the powers of the new legislature were to be described i.e. by reference either to what **was** to be devolved (a “conferred powers” model) or what was **not** to be devolved (a “reserved powers model”) – an issue that dominated much of the subsequent debate about how Wales' system of government should be reformed.

7. In a joint memorandum issued in 2005, the Secretary of State for Wales and the First Minister stated as follows:

**“Under the approach of the Scotland Act 1998 changes to the law which are made by the Scottish Parliament are not limited to specific subjects. They can include changes to basic principles of law. For example, the Scottish Parliament has made changes in land law in Scotland, beginning with the Abolition of Feudal Tenure etc (Scotland) Act 2000).**

Scotland has its own distinct legal jurisdiction, with its own system of courts, judges, legal profession and provision for legal education. An ability on the part of its legislature to change basic principles of law and specific rules relating to subjects such as land law which have a general impact across almost all day-to-day activities is consistent with this situation.

Wales is different. It forms part of a single unified England and Wales jurisdiction with a common courts system, judges who can act throughout the two countries and lawyers who are educated and who practice in a way which does not distinguish between England and Wales. There is no intention to change this. The Assembly is to be able to make laws which apply in relation to activities in Wales but these will be part of the general law of the jurisdiction of England and Wales.

Lawyers who practice in Wales and judges who normally sit in Wales would inevitably be more familiar with laws which applied only to Wales than their colleagues in England but they would still be working within a single unified jurisdiction and if, in the course of a case being heard in England, it were relevant to consider something done in Wales to which an Assembly Act applied then the court would apply that Act in exactly the same way as it would apply an Act of Parliament.

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.

In order to avoid this result the simplest solution is to follow the Scotland Act 1978 model, limiting the legislative competence of the Assembly to specified subjects.

The other approach having, in principle, the same effect would be to transfer general law-making powers to the Assembly but then to reserve fundamental legal principles and basic legal rules to the UK Parliament. The view of Parliamentary Counsel is that such a reservation would be so complex and its effect so uncertain that the alternative of limiting devolved legislative competence to specific subjects would be by far the better approach.

There are further, subsidiary, reasons for adopting the Scotland Act 1978 approach in relation to Wales. Firstly, the list of reserved subjects which would apply in relation to Wales would be substantially longer and more complex than that in the Scotland Act 1998, in that it would need to include subjects such as criminal justice and the courts which are generally devolved in relation to Scotland but not in relation to Wales. Secondly, the task of formulating a list of devolved subjects in relation to Wales, which builds on the executive functions already devolved to the Assembly, is one which can develop out of the existing pattern of Welsh devolution and is therefore much easier to accomplish accurately and effectively than would be that of compiling an exhaustive list of subjects in relation to which the Assembly does not exercise executive functions."

8. Reading this statement with the benefit of the hindsight obtained by more than 10 years of seeking to make this system work leads us to make the following observations.

9. As indicated above, the policy is clearly dominated by what has gone before. In other words, acceptance of the principle that the National Assembly should have full making law powers was limited to those subjects that had already been devolved. The new legislature's legislative competence was to be based

only on the subject matter of the powers previously held by the National Assembly<sup>1</sup> in its original (GOWA 1998) guise as a single body corporate. Subject to the creation of a formal executive (the Welsh Government) there was to be no wider constitutional change. Little or no consideration was given to whether this was a sensible means of creating a new legislature; rather it was a decision dictated by practicalities of incremental change and the political compromise reached at the time.

10. One of the consequences of the policy approach taken was that an attempt was to be made to retrofit a new legislature into an existing legal infrastructure (the single England and Wales legal jurisdiction) rather than look at what legal infrastructure was required to accommodate the creation of a new legislature. So, in constitutional terms, the tail was to wag the dog. The existence of the single jurisdiction was also a reason given as to why devolution of justice related matters was not contemplated, despite the obvious synergies between justice and the powers that were to be devolved.

11. The means by which the new legislature was intended to fit into the wider legal and constitutional infrastructure merit further consideration. Here we saw the constitutionally unprecedented emergence of a second legislature making different law on the same subject matter as the UK Parliament, within the same jurisdiction. The solution touted to this problem was that “Fundamental legal principles” and “basic legal rules” were not to be allowed to be changed, thus (it must have been assumed) preserving the legal uniformity necessary to maintain a single legal jurisdiction. It is important to have regard here to the fact that in 2005 the focus

was very much on Part 3 of what was to become the Government of Wales Act 2006. This was the (later to be derided) “LCO”<sup>2</sup> system under which very limited competence to make primary laws was to be granted on a piecemeal basis to the National Assembly. During this period, therefore, the actions of the Assembly were to be closely overseen by the UK Government and Parliament, and could be confined. In fact, express permission was to be required before any change could be made to primary law.

12. The move to Part 4 of the Act - under which the National Assembly would be considerably freer to legislate - was not something that was intended to happen “soon”<sup>3</sup>. As we understand it, the Schedule (Schedule 7) of the legislative competence the Assembly would hold following a successful referendum was developed at a late stage in the Bill’s development and was largely produced for illustrative purposes. Although it is clear from the content of the Schedule that the implications were not fully thought through, the fact that the legislative competence of the National Assembly was to be set out by reference to “specified subjects” was apparently considered sufficient to maintain the integrity of the single jurisdiction<sup>4</sup>.

13. This proved to be incorrect. It soon became apparent that although the legislative competence of the National Assembly was relatively limited, contending that it could not involve change to fundamental legal principles and basic legal rules was not credible. As pointed out by Professor Dan Wincott from Cardiff University and Emyr Lewis, Senior Partner of Blake Morgan, in evidence to the National Assembly’s Constitutional and Legislative Affairs Committee<sup>5</sup>:

<sup>1</sup> Government of Wales Act 1998, c.38

<sup>2</sup> Legislative Competence Orders, made under section 95 of GOWA 2006

<sup>3</sup> View expressed by the Secretary of state for Wales, Rt. Hon Peter Hain MP, to the House of Lords Select Committee on the constitution.

<sup>4</sup> Adopting a reserved powers model would have required a reservation to preserve the fundamental legal principles and basic legal rules – and it is notable that Parliamentary Counsel advised that such a reservation would be “so complex and its effect so uncertain” that the alternative of limiting devolved legislative competence to specific subjects would be by far the better approach. This advice appears to have forgotten or disregarded 10 years later when the draft Wales Bill sought to adopt a reserved powers model without any significant change to the Assembly’s legislative competence.

<sup>5</sup> Evidence to the Committee’s “Inquiry into the establishment of a separate Welsh legal jurisdiction”. The Commission is invited to also consider the other evidence submitted to the Committee and its report of December 2012.

“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...).

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.”

14. That the scope for divergence was significant (and perhaps greater than envisaged) was confirmed by the Supreme Court in the Agricultural Sector (Wales) Bill reference<sup>6</sup>. This made clear that in so far as a provision within an Assembly Act “fairly and realistically” related to one of the subjects then it was within the Assembly’s competence. The Attorney General’s submission to the contrary, the court concluded was:

“Not only...impermissible in principle, but... would in practice restrict the powers of the Assembly to legislate on subjects which were intended to be devolved to it”.

### **Problems operating Part 4 of the Government of Wales Act from 2011 onwards**

15. As alluded to above, the system of devolution adopted under Part 3 of GOWA 2006 had been highly complex and ineffective. Hopes that the move from Part 3 to Part 4 of GOWA 2006 would resolve all of these problems were, however, soon to be dashed. The first Bill passed by the National Assembly was referred to the Supreme Court and two more were to follow. Confusion was widespread about what was devolved and what was not, occasionally even among those government lawyers tasked with advising Ministers in London and Cardiff.

16. In addition to the complexity, legislating for Wales was impaired also by the limited number of subjects devolved. Although the change in the law possible in relation to each subject (and in consequence of that change) was extensive, the relatively small number of subjects devolved caused problems. To put this another way, the depth (or the extent of effect) of a change in the law could be considerable, but often the breadth could not. As an example the National Assembly could (and did) make wholesale changes to the law on residential landlord and tenant, while at the same time the UK Government would object to provisions enabling the police to sit on public service boards despite the key role they play on such boards<sup>7</sup>. Similarly there were significant constraints on what could be done in legislation to prevent violence against women, domestic abuse and sexual violence<sup>8</sup>. In legislating provision could only be made

<sup>6</sup> [2014] UKSC 43

<sup>7</sup> Public Service Boards were created by the Well-being of Future Generations (Wales) Act 2015 as a replacement for non-statutory local service boards, many of which were chaired by the police.

<sup>8</sup> See the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015.

in respect of the prevention services provided by devolved bodies (local authorities and local health service boards) and not the police. Despite seeking to tackle the same problem, competence issues meant that integrating the new strategy into existing statutory prevention strategies was not an option. This leads to fragmentation in the effort to tackle a fundamentally important social problem, one in which lives can be at risk.

17. There were also difficult questions to be addressed regularly before embarking on legislative projects. Is consent to organ donation about health or is it about criminal law, or even an ethical question about the rights of the deceased after death? Is putting a minimum price on alcohol about health, about licensing or even about anti-social behaviour? Is setting a minimum wage for agricultural workers about agriculture or is it about employment? In answering such questions one of the issues that came into focus was that deciding whether a subject was devolved could potentially be influenced by what was not devolved – or in other words by those so-called ‘silent’ subjects that were not written down under a conferred powers model.

18. Part 4 and Schedule 7 of GOWA 2006, therefore, became the subject of criticism very quickly. The problem, it was generally said, was the “conferred powers model” for devolving power, and in consequence a “reserved powers model” was promoted as the solution. In calling for a “reserved powers model”, however, it was not always clear what was meant. For the Welsh Government, the reserved powers model meant something akin to the system of power that has worked successfully in Scotland, and was generally shorthand for an expansion, and simplification, of devolution. Others, however, seemed to believe that a reserved powers model was superior in its own right and believed a mirror image of the conferred powers model would of itself bring an end to complexity and confusion. One of the reasons for this, it was said, was that

a reserved powers model would involve listing the ‘silent’ subjects that could often cause confusion (though if the reserved powers model was simply a mirror image of the conferred powers model then other, different, subjects would in future become ‘silent’ subjects). The reserved powers model eventually became something to which nearly all interested parties could apparently agree. But the fundamental problem is that they were not agreeing to the same thing.

19. The advice of Parliamentary Counsel on this issue referred to in the 2005 joint memorandum above, is very clear. The conferred powers model was adopted because there are fewer powers devolved to Wales, which meant that writing down what was devolved **was** a shorter and more straightforward task than writing down what **was not** devolved. Also clear is that, leaving aside any symbolic value arising from a comparison with the position elsewhere, the model adopted was merely a legislative drafting technique. It was the means to draw the line between what was devolved and what was not.

20. The real issue, however, is not **how** the line is drawn but **where** it is drawn.

21. Although not all subjects are equal in extent and significance, our estimate is that 21 subjects were devolved to Wales under Schedule 7, compared to approximately 58 subjects devolved at the time to Scotland and 83 to Northern Ireland. While the comparison isn’t clear cut as many of the larger subject areas are contained within the 21 subjects devolved to Wales, the difference is stark.

22. There were numerous consequences to this. The narrow field of subjects devolved made the system more complex and more confusing. Few people in Wales have a good understanding of what the devolved institutions are responsible for. In fact many don’t understand the difference between the National Assembly and the Welsh

Government, and will criticise or praise the former for the actions of the latter. It is hard to imagine the UK Parliament and Government being routinely confused in this way. This all undermines democratic accountability.

23. From a more practical perspective, the narrow field of subjects devolved has a significant impact on policy making and what can be included in law. An arbitrary line has been drawn between what can be legislated for and what can't. Again it is helpful to compare the position in Wales with elsewhere. As indicated above significantly fewer subjects have been devolved to Wales in comparison to Scotland and Northern Ireland, but this is not limited to the UK. We are not aware of any decentralised system in the common law world which is as limited. In other jurisdictions all or most "domestic" matters are devolved, which includes all public services and other matters that are not essential to be regulated or overseen at central level. Whether by design, or by custom and practice over time, a principle of subsidiarity applies. So, as examples, there are no reasons why the police, anti-social behaviour, alcohol licensing or criminal justice and related matters need be controlled centrally – so they are not. In consequence it is clear what other decentralised governments are responsible for and they can develop coherent and comprehensive joined-up policies and laws to tackle the problems they face. They are generally not constrained by complexity and an inability to control many of the levers required to provide public services that will improve people's lives.

24. In other jurisdictions the line between what is devolved and what is not is done in such a way as to rarely cut across inter-connected subject areas. This means that it is drawn in such a way as to confer coherent powers on institutions on both sides of the line, which they can generally exercise without recourse to the other. And this in turn also leads to more harmonious inter-governmental relations<sup>9</sup>.

25. So far as the Welsh Government is aware, every 'devolved' legislature in the common law world has an accompanying legal jurisdiction<sup>10</sup>, and every devolved legislature in the common law world has power to legislate on a coherent grouping of "domestic" powers. Random examples include New Mexico (USA), New Brunswick (Canada), Nagaland (India) and the Northern Territory in Australia (the criteria for selection in this list simply being that their names began with 'N' and their population in each case is less than that of Wales). Indeed by international comparison the Welsh legal jurisdiction would not be small. Northern Ireland has a population of 1.7m compared with Wales' 3.1m. Further afield, if Wales was an American state, of the US's 51 legal jurisdictions, 20 would be smaller in population. Between Australia and Canada, the combined population of which is less than the UK, there are 20 legal jurisdictions and in each country more than half of the jurisdictions serve populations that are smaller than Wales' (and in some cases they are smaller than Cardiff's). There are 29 state legislatures (and, therefore, jurisdictions) in India and, even there, in the world's second most populous country, 9 of them serve populations smaller than Wales<sup>11</sup>.

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<sup>9</sup> Maintaining good inter-governmental relations where two governments have to exercise different functions harmoniously in order to achieve a joint goal is very difficult, especially where the governments are made up of different political parties. Effective delivery generally requires autonomy in decision making not co-dependence.

<sup>10</sup> As stated by Lady Hale (in 2015) "The point has been made that it is rare indeed for provinces, states or territories within larger sovereign states to have their own legislatures but not also to have their own justice systems."

<sup>11</sup> This issue, and others, are considered in more detail in a speech given by the former Counsel General, Theodore Huckle QC, to the Institute of Advance Legal Studies (University of London) which can be found at Annex 1.



26. The UK Government responded to the calls for a fresh devolution settlement by establishing the “Silk” Commission on Devolution in Wales and eventually agreed to the creation of an undefined “reserved powers” model. Most saw this as a step forward for devolution consistent with opinion polls which by now routinely conclude that a significant majority of the people of Wales are in favour of more devolution<sup>12</sup>. The Silk Commission’s opinion poll of people in Wales, for example, showed that 63% were in favour of the National Assembly and Welsh Government having responsibility for policing in Wales – and, somewhat incredibly, 48% believed that policing was **already** devolved in Wales. Similarly an ICM/BBC poll in 2014 concluded that 60% either “strongly supported” or “supported” devolution of justice with only 28% against.

27. However, the UK Government viewed matters differently. It appeared to see the move to a reserved powers model not as a means to properly resolve issues that had not been addressed in GOWA 2006 but as an opportunity to reverse devolution – or, at the very least, to impose its own, narrow interpretation of what powers it thought Parliament had previously granted. In particular it wanted to protect the extensive reserved matters and authorities from any interference from the National Assembly or Welsh Government. This, however, was impractical in light of the breadth of what was reserved. Having drawn the line where it was, seeking to ring-fence reserved matters and bodies severely impinged upon those matters that were clearly devolved. This is the case in particular in respect of policing and justice – essential tools for

enforcing devolved laws and making them effective. This was confirmed by the publication of a Draft Wales Bill in October 2015 which inadvertently shone a bright light on the problems inherent to the Welsh devolution settlement.

### **Draft Wales Bill (2015)**

28. The UK Government published the Draft Wales Bill to much fanfare. It was a Draft Bill that was said to settle the question of devolution in Wales for a generation and more. In the words of then Secretary of State, the Rt. Hon Stephen Crabb MP, there were to be no more “fudges and fixes” and it was the time “to get devolution right”.

29. However, it quickly became apparent that far from settling matters for years to come, the Bill represented several steps backwards.

30. The means used to tackle issues inherent to the Welsh devolution settlement clarified what some of the problems really were, but without appropriately addressing them. In the words of a group of distinguished experts convened by the Wales Governance Centre:

**“The draft Wales Bill does not do what was promised. All too often, the Secretary of State’s fine policy objectives of a stronger, clearer, fairer and more robust devolution settlement are frustrated by provision that is constricting, clunky, inequitable and constitutionally short-sighted. At the heart of the difficulty is the triple squeeze on the devolved institutions of intrusive general restriction, over-occupation of legislative space, and blurry forms of executive veto. It does not have to be like this.”**<sup>13</sup>

<sup>12</sup> No text for this footnote?????

<sup>13</sup> <https://sites.cardiff.ac.uk/wgc/files/2016/01/Challenge-and-Opportunity-The-Draft-Wales-Bill-2015.pdf> Challenge and Opportunity: the Draft Wales Bill 2015

31. Having committed to a reserved powers model, the UK Government had to address the problem that had been identified 10 years earlier; the absence of a Welsh legal jurisdiction. The devolution settlement had reached a fork in the road. Route 1 involved dividing the England and Wales legal jurisdiction in two and decisions being taken – on their merits – about what subjects, including policing and justice, were now appropriate to be devolved to Wales. Route 2 meant making express provision to preserve the single legal jurisdiction and, in consequence, putting in place restrictions to control or prevent divergence in the law between England and Wales.

32. Route 1 was consistent with the creation of the Welsh legislature in 2007 and with the result of the referendum of 2011, in which the people of Wales had overwhelmingly agreed to the National Assembly having “full law making powers”. Route 1 was constitutionally logical and coherent, and would best protect the rule of law. Route 1 was in line with public opinion and with the will of the National Assembly for Wales across all parties. Yet, with little or no explanation<sup>14</sup>, the UK Government chose the second route – to almost universal criticism.

33. Despite the rhetoric surrounding the Bill it became clear that the UK Government real intention was to preserve the status quo, or in fact it was to reverse devolution by preserving the status quo as they believed it to be prior to the two unanimous decisions of the Supreme Court clarifying the legislative competence of the National Assembly.

34. To preserve the status quo, the single legal jurisdiction had to be preserved. This necessitated restricting the National Assembly’s ability to legislate. In the words used in 2005, new provision was needed to ensure that “fundamental legal principles” and “basic legal rules” could not be changed.

35. The UK Government’s solution was to impose the reservations that 10 years earlier it had been advised would be “so complex” with “effect so uncertain”. This involved significant new restrictions on the National Assembly’s ability to modify the criminal law and private law for the purpose of providing “*a general level of protection for the unified legal system of England and Wales, whilst allowing the Assembly some latitude to modify these areas of law within the confines of the exceptions in those paragraphs.*”

36. These restrictions were unacceptable to the National Assembly and to the Welsh Government, and were the subject of widespread criticism by civic society in Wales. This is reflected in the words of the expert group convened by the Wales Governance Centre:

**“Assigning the National Assembly a modicum of legislative space (‘leeway’), bounded by general legal restriction especially as regards private law and criminal law (‘lock’), reflects a narrow, backward-looking view of the ‘integrity’ of the England and Wales legal system. This approach to the internal design of the reserved powers model is fundamentally flawed and self-defeating, whether statutorily expressed in terms of necessity-testing or otherwise. It invites constitutional and political difficulty because the seeming desire to protect every feature of a unified legal system generates provision that cuts deeply into the policy-making and legislative capabilities of the devolved institutions. It invites constitutional and legal difficulty because of the fresh uncertainties produced and the awkward demands placed on the judiciary.”**

37. The implications of the draft Bill, had it been passed in that form, were significant. Had that system applied this would have had an impact on

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<sup>14</sup> It was said, for example, by the Secretary of State that the “single legal jurisdiction had served us well for 500 years” – it did indeed, but this overlooks the fact that for nearly all of that period there wasn’t a Welsh legislature and there was no need, therefore, for a corresponding Welsh legal jurisdiction, especially during the period when there was a distinct Welsh court – the Court of Great Sessions.

25 of the Measures and Acts that had been passed up until then, either because provisions within them would have been outside competence, subject to a ‘necessity’ test or required the consent to the UK Government. Among these is the (already much praised) Renting Homes (Wales) Act 2016, which makes wholesale changes to the law on residential tenancies. The terms upon which an individual rents a home is of course a fundamental rule of private law which is being changed by the Act. The impact that restrictions on amending private law would have had on a subject like housing is substantial – potentially confining it to the activities of public bodies. As confirmed by the Supreme Court when considering the meaning of the word “agriculture”, the subject matter included in such terms is broad ranging:

**“The problem is to decide what Parliament meant by the subject of “Agriculture” in this specific context: in particular, in the context of the other subjects listed in the schedule. Each is intended to designate a subject-matter which is the object of legislative activity. In this context, it is clear to us that agriculture cannot be intended to refer solely to the cultivation of the soil or the rearing of livestock, but should be understood in a broader sense as designating the industry or economic activity of agriculture in all its aspects, including the business and other constituent elements of that industry, as it is to that broader subject matter that legislative activity is directed.”<sup>15</sup>**

### **Wales Act 2017**

38. What happened next, with the eventual publication and passing of the Wales Act 2017, is perhaps typical of the history of devolution in Wales. By the UK Government’s own logic either the restrictions included in the Draft Bill had to be

kept in place or the single legal jurisdiction could not be protected. If the single jurisdiction was to remain, therefore, so should the restrictions. Nevertheless the restrictions were eventually removed despite no change being made to the single jurisdiction. The fork in the road had been bypassed and a new dirt track created to enable this fiction of homogeneity across England and Wales to continue on its path.

39. More generally the Wales Act 2017 has added, not taken away, complexity. It contains 44 pages of reservations and restrictions, while by contrast the Scotland Act (as enacted) contained 20 equivalent pages. This difference is nearly all in consequence of the complexity caused by the desire to preserve the single jurisdiction, and the policy choice to reserve policing and justice related matters. By historic contrast, the reservations and restrictions on the Parliaments of Southern and Northern Ireland in the Government of Ireland Act 1920 were set out in fewer than four pages.

40. In addition, the Wales Act continues the artificial division between making law and administering and enforcing it. This ‘justice function’ is still not properly provided for. And as the extent of changes in the law become more apparent this is to the increasing concern of the judiciary and the legal professions in Wales. Perhaps the most obvious illustration of this in practice is the Renting Homes (Wales) Act 2016. It is one thing to develop and pass an Act of this significance, it is another to implement it and ensure that it operates and is enforced effectively. This involves changes to court procedures, court forms, training of judges and court staff and awareness raising among legal professions and the public. All of this straddles the divide between devolved and non-devolved, between two governments and between the executive more generally and the judiciary.

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<sup>15</sup> Judgment of Lord Kerr and Lord Thomas, paragraph 49 (Agricultural Sector (Wales) Bill - Reference by the Attorney General for England and Wales [2014] UKSC 43)

41. These are matters that were not fully thought through in 2005 and have not been properly provided for since. The system is entirely reliant on goodwill and does not take into account the tensions that inevitably arise between governments, particularly those of different political colour. Most fundamentally this is an issue that weakens accountability and democracy. A law may not be able to be used effectively because people can't access local justice services to do so, or because of systemic issues in the operation of the courts that inhibits the effect of the law. In such cases the divide between law making and ensuring law has effect becomes readily apparent – to the detriment of the Welsh people.

#### **Accessibility of the law in Wales (and England)**

42. The single jurisdiction has a negative effect on the accessibility of the law both in Wales and in England. One of the most fundamental roles of a Government is to uphold and promote the rule of law, and doing so involves ensuring that the law is accessible and understandable. A clear, certain and accessible statute book would be an economic asset. It would give those who wish to do business a stable and settled legal framework. This, in turn, would help investment and growth. Public sector bodies and other organisations would more easily understand the legal context within which they operate, and policy makers within Government would have a clearer basis from which to develop new ideas. For legislators scrutiny of laws would be easier, and in Wales it would make an enormous difference to those who may wish to use the law in the Welsh language.

43. First and foremost, however, accessibility is a question of social justice. Making the law accessible is vital to enable citizens to understand their rights and responsibilities under the law –

something that has become increasingly important since repeated cuts have been made to legal aid and to other services designed to advise those in need of assistance or representation.

44. When considering the accessibility of the law it is perhaps helpful to picture a 'statute book' within which all laws can be found. In the UK, however, there isn't one 'statute book', there are in fact three – one that contains the law of England and Wales, one that contains the law of Scotland and one that contains the law of Northern Ireland.

45. The single legal jurisdiction means that there is only one formal body of law for England and Wales, i.e. one 'statute book' that contains all of the law of England and Wales. Legislation in the UK has generally been divided by reference to its "extent<sup>16</sup>", or the legal jurisdiction within which the legislation has effect. A law that "extends" to Scotland becomes part of the law in Scotland, and a law that extends to Northern Ireland part of the law in Northern Ireland. But an Act passed by the National Assembly cannot extend to Wales only – but to England **and** Wales because of the single jurisdiction. Similarly an Act of the UK Parliament intended, say, to affect only local authorities in England must again extend to England and Wales.

46. There is now such a thing as "Welsh law". We know this because it was recognised by the UK Parliament in the Wales Act 2017. We know also that there is increasing recognition of purely "English" law, something highlighted by the debate on "English votes for English laws" within the UK Parliament. But the concept of "Welsh" or "English" law does not fit within our jurisdictional arrangements. One of the core purposes of distinct legal jurisdictions is to signify that in relation to a defined territory the law is different. Within that territory the law is different to the law outside the territory, but within that territory

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<sup>16</sup> The phrase 'extends to' is the conventional form for saying 'forms part of the law of'.

the law is also supposed to be homogenous. Subject to relatively minor local variances, the law should be the same. These principles are, in turn, the basis for the requisite knowledge and training of the judiciary and of the legal professions, as well as for the education of law students.

47. But in England and Wales there are three fundamental problems. The first is that the law that applies to Wales on the one hand, and the law that applies to England on the other, is becoming increasingly different. The second is the often obtuse way in which the differences in law are expressed and communicated. (The single legal jurisdiction, and the ensuing single body of law, has not been designed to deal with this divergence<sup>17</sup> – because divergence to this degree shouldn't exist.) And the third is the numerous sources and kinds of enactment that could be described as 'Welsh' (or at least 'devolved'). It is important to understand in particular that the laws that apply in relation to Wales within devolved areas will often have not been made in Wales. The following will all contain law that applies in relation to Wales and which is devolved:

- Acts and Measures of the National Assembly
- Acts of the United Kingdom Parliament, in relation to the provisions of such legislation that may be enacted in an Act of the National Assembly or made in subordinate legislation by the Welsh Government (some of which applies to Wales only though most does not)
- UK statutory instruments in relation to the provisions of such legislation that may be enacted in an Act of the National Assembly or made in subordinate legislation by the Welsh Ministers

- Welsh statutory instruments (subordinate legislation in the form of orders, regulations, rules, schemes etc made by the Welsh Government and which are required by the enabling Acts to be made by statutory instrument (and are, therefore, subject to the publication requirements of the Statutory Instruments Act 1946))
- other subordinate legislation made by the Welsh Ministers, the First Minister or Counsel General.

48. Laws made in Wales are clearly labelled as being "Welsh". They will have been made by the National Assembly for Wales or the Welsh Ministers, and the fact that they "apply in relation to Wales" will normally feature prominently. Importantly also, a provision explaining that these laws extend to England and Wales is not required<sup>18</sup> and is not included. The big problem that arises, however, is that many users of law will often simply not know that there are different laws that apply in relation to Wales. Knowing that the law may be different in Wales requires knowledge of the complex devolution settlement, an ability to expertly navigate the vast amount of legislation in force across the UK and an understanding of when laws passed by the UK Parliament apply to England only. Within the England and Wales legal jurisdiction, England dominates and Wales is largely forgotten or ignored<sup>19</sup> – something that is clear from legal textbooks, professional training and the education of students. As pointed out by the campaign group "Justice for Wales<sup>20</sup>", *"The legal legacy of 'England & Wales' should not be underestimated. Lawyers in England (and Wales) are used to the idea that the law in Wales is the same as in England, with few exceptions."*

<sup>17</sup> The method used to differentiate between Wales and England is based on that used for minor local variances, for example adjacent counties in England deciding to regulate public bathing differently through byelaws.

<sup>18</sup> This is because they can only extend to England and Wales.

<sup>19</sup> As indicated by an editorial to the Statute Law Review (Volume 3 of 2015): "...it is urgent to find a method of arranging national governance in general, and legislation in particular, so that each part of the United Kingdom feels itself to be as valued as the other parts and with equal powers of self-determination."

<sup>20</sup> "A gathering of lawyers, including supporters of all the main political parties in Wales, both Welsh speakers and non-Welsh speakers, who have come together in a non-partisan campaign to call for the re-establishment of a Welsh jurisdiction."



49. Laws passed by the UK Parliament for England only are not as easy to identify. They do not feature the word “England” in their short titles as you might expect (especially when you know that corresponding legislation in Scotland, Northern Ireland and Wales does), and confusingly they will feature an extent provision informing you that the law in question “extends to England and Wales”. The unwary will perhaps not look further and assume that the law is relevant to England and to Wales. But even if they do go on, an expert eye is sometimes needed to understand that this is not law that has practical effect in Wales. Often this is known only from a single definition of a term, a definition that may not even feature prominently.

50. This perhaps explains why even the Law Society of England and Wales recently promoted training on the Care Act 2014 by referring to the “most significant reform of care and support in more than 60 years... in England and Wales”. The Care Act 2014 is an Act of the UK Parliament. Like other Acts it offers no clue on its title that it may be restricted in its effect. Its penultimate section informs the reader that it “extends to England and Wales only”, but this is subject to exceptions said to extend to Scotland and Northern Ireland and provision made about the application of the Act to the Isles of Scilly. There are no exceptions relating to Wales. However, the following crucial provision may – or often may not – be found by the reader on page 2 of the Act:

“(4) “Local authority” means –

- (a) a county council in England
- (b) a district council for an area in England for which there is no county council
- (c) a London borough council – or
- (d) the Common Council of the City of London.

51. It is only by virtue of this definition of “local authority”, and an understanding of the impact that particular definition has on the remainder of the Act, that the reader can know that this law applies to England only. That this was not understood by the Law Society, and that the law relevant to Wales is the Social Services and Well-being (Wales) Act 2014, is not particularly surprising given the complexity of our arrangements – but it is very worrying nonetheless.

52. The single jurisdiction is only one reason why the law in England and Wales is becoming increasingly inaccessible – there are many more – but in trying to find and understand Welsh law, the fact that it does not formally exist is not the best of starts. The existence of a single jurisdiction across England and Wales is a signal that the law is the same across that territory - and all efforts to signify difference within the territory run contrary to that signal. It is a mixed and confusing message.

### **Government and Laws in Wales Bill**

53. In response to the debate about the Draft Wales Bill and the modified Bill that was eventually introduced, the Welsh Government took the unusual step of producing its own alternative. This was done in order to demonstrate that the system called for by the Welsh Government, the majority of civic society and across the political spectrum in Wales, could be achieved and what it would look like.

54. In drafting this alternative ‘Government and Laws in Wales Bill’ (see Annex 2), the guiding principles were:

- subsidiarity: legislative and ministerial responsibility for matters in Wales should be devolved unless there is good reason to retain power at UK or England-and-Wales level
- clarity: the draft sets out the devolution settlement in a logical way that is more accessible to the lay person. It provides the

clarity and certainty that is needed to minimise the risk of legal challenge, and consolidates existing legislation in one place (as had been recommended by the National Assembly's Constitutional and Legislative Affairs Committee)

- ensuring that it is a lasting settlement: in providing for a distinct Welsh jurisdiction, the draft recognises the divergence of the law which is the natural consequence of the creation of a Welsh legislature. In providing for the long term devolution of justice, the Bill enables a stable, coherent workable and long term devolution settlement in line with Scotland and Northern Ireland.

55. These principles, and the rationale for the alternative Bill, are further explored in the presentation included at Annex 3.

56. In the Bill (among other matters) the National Assembly is re-named the Welsh Parliament; and both it and the Welsh Government are confirmed as permanent parts of the UK's constitutional arrangements. Legislative power is conferred on the Welsh Parliament by a reserved powers model – reserved matters include the Crown and constitution, foreign affairs, immigration, economic and fiscal policy, social security benefits, consumer protection, employment rights and duties, and other matters crucial to the UK's integrity, internal market and common citizenship. Powers in relation to the justice system (police, courts, prisons, the administration of justice, criminal and family law) are to be “deferred matters”. These deferred matters are to be devolved with effect from 1 March 2026 (or such later date as may be determined with the agreement of both the Welsh Parliament and UK Parliament). The existing legal jurisdiction of England and Wales is divided into two distinct jurisdictions, one for each country. A formal body of Welsh law (and of English law) is created, and the senior courts and the family and county courts split into separate courts for Wales and for England respectively (to

initially be served by a common judiciary and courts service until 2026).

57. Despite justice related matters being deferred the Welsh Parliament is able to legislate on such matters before 2026 for the purposes of enforcement of provisions that are not reserved or deferred, or otherwise to make them effective; to make incidental or consequential etc provision; or if a Bill containing more substantive provisions relating to deferred matters has not been disapproved by the UK Parliament.

58. Defining those subjects to be reserved on the basis of principle would give the devolved institutions a coherent set of responsibilities, based on the Welsh Government's vision for Wales within the UK. The reservations proposed included those matters essential to the UK's political, economic and social union. Thus provisions supporting the UK's “internal market”, or those relating to human rights, immigration, defence and foreign policy which underpin our common citizenship of the UK, are to be reserved matters. By taking this principled approach, the number of reservations was kept to an essential minimum.

59. The draft Bill provides also for the immediate creation of a distinct Welsh legal jurisdiction, separating the laws of England from the laws of Wales. This was to reflect the existing reality of diverging Welsh law – the natural consequence of having separate legislatures and governments within England and Wales. As an interim step, however, justice related matters would remain temporarily reserved, to enable transition to the creation of a fully “separate” legal jurisdiction similar to the position in Scotland.

60. The Welsh Government had first initiated the debate about the Welsh jurisdiction in 2011, at which point it was concluded that the jurisdiction should develop organically over time. But the detailed assessment of the Wales Bill and

developing a fully worked up vision for a reserved powers model for Wales made clear that creating such a model within a single jurisdiction would lead to new complexity and uncertainty. Establishing, as a first step, a ‘distinct’ Welsh jurisdiction would reflect the reality of the growing divergence in law, while involving very little change in the practical operation of the courts. It would give the Welsh Parliament the scope to legislate effectively, as a body with primary law-making responsibilities must have.

61. In view of the body of Welsh law that already exists, the different demands on courts in Wales (different laws and a different language<sup>21</sup>), the move to a reserved powers model of devolution, the need to make arrangements which better serve people in Wales and the essential requirement not to constrain the Welsh legislature, the creation of a distinct Welsh jurisdiction is essential.

62. Accordingly, Part 5 of the Draft Bill divides the existing England and Wales jurisdiction, creating two parallel jurisdictions, a legal jurisdiction of England and a legal jurisdiction of Wales. Identifiably distinct court systems for England and for Wales would be created but initially the administration of both would remain a responsibility of the UK Government. A common judiciary would also be retained initially to serve both court systems interchangeably.

63. Clause 79 of the Draft Bill separates the Senior Courts of England and Wales to create the Senior Courts of England and the Senior Courts of Wales. This sees the creation of the Court of Appeal of Wales, the High Court of Wales and the Crown Court of Wales. The county court and family court are also separated by clause 80 to create a county court of

Wales and the family court of Wales. Corresponding Senior Courts, county and family courts are created for England. Each Court will be able to exercise all of the same functions as were exercisable by the corresponding court prior to the provision coming into force. Provision is made by clause 83 for transfer of proceedings pending in any court at the point of division of the jurisdiction to the appropriate court in the jurisdiction for which the case is relevant.

64. Judges who hitherto would have been appointed to the Court of Appeal or High Court of England and Wales would under the Draft bill, by virtue of clause 81, be appointed to the Court of Appeal or High Court of England, and simultaneously to the Court of Appeal or High Court of Wales; and will sit in the Court appropriate to the cases before them.

The continued existence of a common judiciary is likely to lead to consistency of the common law and equity as between the jurisdictions.

The Supreme Court will sit at the apex of the Welsh (and, separately, English) courts system in the same way as it currently does for the England and Wales, Northern Irish and (subject to certain limits) Scottish jurisdictions. Thus, the Supreme Court will continue to act as the overall supervisor of the fundamentals of the law and legal principle for England, for Wales, for Northern Ireland and (allowing for systemic differences) for Scotland.

65. Legal professionals who are now able to practise in and from Wales or England will continue to be able to do so under a distinct Welsh legal jurisdiction. As that is already the case in relation to Northern Ireland there is no reason why that shouldn't also be the case for Wales. The Welsh Government proposes that all existing legal practitioners will

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<sup>21</sup> As to which Professor Thomas Watkin (formerly First Legislative Counsel to the Welsh Government) wrote in the Statute Law Review, referring to a case in which the court was required to consider the French language version of a treaty: “Many judges today might feel similarly challenged if confronted with a bilingual text in English and Welsh. However, in the case of bilingual English and Welsh legislation, the language will not be a foreign language, but one expressly stated by the United Kingdom parliament to have equal standing for all purposes with regard to any piece of legislation enacted or made bilingually, and a language which has, according to the law of England and Wales “official status in Wales”. Moreover, if a judge in such a situation could not rely on his or her own knowledge of both languages, but required evidence as to the meanings of words or phrases in one but not the other, it is questionable whether the versions could properly be said to have been treated as of equal validity for the purpose of the interpretation”. Bilingual Legislation: Awareness, Ambiguity, and Attitudes (Statute Law Review, Volume 37, Issue 2, 1 June 2016).



automatically qualify to practise both in England and in Wales. Although this would need to be kept under review as further divergence develops, automatic cross-jurisdiction qualification should also apply to future practitioners.

66. The consequence of creating a new legal jurisdiction for Wales is that the Welsh Parliament's legislation will not only apply to Wales but also extend only to Wales; the "extra-territorial" effect of Welsh legislation (outside Wales) will cease to be possible. Provision is made in clause 82 for the courts of Wales to apply the law extending to Wales (i.e. Welsh law), and equivalent provision is made for application of the law extending to England by the courts of England (i.e. English law). The law itself is divided by clause 78, so that the law of England and Wales becomes the law of Wales and the law of England.

### **Implications of creating a Welsh legal jurisdiction**

67. What is proposed clearly has wide ranging implications but it is important not to overstate the impact and to keep it in perspective. It involves, for example, the creation of Welsh courts, Welsh judges and Welsh laws – as well as devolved police forces. However, these courts, judges, laws and police officers already exist in Wales. So too does the vast majority of the associated infrastructure and support services.

68. Similarly, although we clearly need mechanisms to properly deal with the divergence in law that has already happened and will continue to happen, much of the law will still stay the same for generations to come. This is clear from consideration of practices in common law jurisdictions across the world. There are over a hundred separate legal jurisdictions, within which there is considerable scope for variance in law. The variance can arise by statute or by developments and divergence in the

common law, especially since the role of the Judicial Committee of the Privy Council has become more limited. The law in these jurisdictions is different but they remain recognisably based on the common law, and most fundamental legal principles are similar. There would be little or no incentive to change areas of common law such as those relating to contracts. With relatively few exceptions, such as New Zealand's 'no fault' accidental injury scheme, common law principles have remained largely the same across the common law world.

69. In any event, the scope for significant variance is considerably less within the UK. This is because not all power is devolved and because of the role of the Supreme Court in overseeing developments in the common law. So in so far as Wales and England are concerned proper mechanisms would apply to differentiate the law of Wales on the one hand from the law of England on the other, but in practice all of non-devolved law will be the same or almost exactly the same and most of the common law within devolved subjects will also remain the same. This is either because there may be little incentive for the National Assembly to legislate to change the law in some areas (for example, contract law) or because judge made law will follow the same path. Scope for divergence, in particular in respect of matters relating to the "internal market", is also limited by European law – a regulatory alignment that the Welsh Government believes should continue after withdrawal from the European Union.

70. Formal distinctions would in future be required within the machinery of justice, to determine what is a 'Welsh' case and what is an 'English' case, and whether the applicable law is the law of Wales or of England (i.e. choice of forum or conflict of laws in civil cases, the enforcement of judgments, warrants or orders across the border and bringing persons in England accused of crimes in Wales before the

court and vice versa). Here rules that already apply between the current territorial jurisdictions within the UK (and beyond) will apply between England and Wales. As submitted by Professor Gerry Maher QC from the University of Edinburgh, a specialist in the rules of international private law (the means for addressing conflict of laws), the “*solution to these issues is not difficult and is really a question of adapting existing rules which apply to the current country*”<sup>22</sup> of ‘England and Wales’<sup>23</sup>.

71. Given the similarities that will exist, especially early on, it is likely also that more could be done to simplify or streamline the rules in the case of England and Wales. Questions about choice of law will need to be addressed but this is required informally in any event because of the divergence in law that is happening. This, again, is a logical and inevitable consequence of the creation of a new legislature.

72. A Welsh jurisdiction would also mean that only Welsh courts would decide cases relating to Wales, just as cases in Scotland and Northern Ireland are decided before those countries’ courts. This in the Welsh Government’s view can only be a good thing. Today the shared court system of England and Wales means that cases involving issues solely relating to Wales are routinely decided by courts in England and by judges with little or no connection to, or experience of, Wales or the bilingual law created by the National Assembly. They will also involve practitioners who similarly will have little experience of Wales or its different laws. As pointed out by Justice for Wales: “*In no other country in the common law world, does a territory with primary law making powers, share a court system in the way that Wales does with England... At present, a court sitting in Sheffield or Luton is as competent to determine*

*the meaning of Welsh legislation as one sitting in Swansea or Llangefni.*”

73. Once the justice system is fully devolved, specialist judges may be needed to assist the Welsh courts, especially in the short term, but again this should not prove to be difficult – cross ticketing or loan arrangements are already commonplace. Having the same judges able to hear Welsh or English cases would enable the same court to reconstitute itself as a court of England (or Wales) if necessary, and hear a case without having to remit it to another place because the wrong forum had been chosen.

74. A separate jurisdiction has the potential to provide greater clarity for its practitioners. It would also make for consistency between the constitutions of Scotland, Northern Ireland and Wales. However some of these benefits will only be realised if the distinctions between Welsh and English law are clear and accessible. The Welsh Government’s commitment to make Welsh law accessible, especially by consolidating and codifying existing law, will be key to this. Further devolution must be accompanied by better access to justice and to the law itself – the commitment to reduce complexity in this way must be fulfilled. The potential for duplication of cost and confusion is significant if Welsh law is not made accessible. In this regard the Welsh Government is setting the agenda and taking steps to tackle a UK wide problem. It remains to be seen if others will follow.

75. The separation of the single legal jurisdiction would have implications for the qualification rights of Welsh lawyers. Under the Welsh Government’s proposals all current legal practitioners eligible to practise in England and Wales would be eligible to practice in Wales and in England. Like the case

<sup>22</sup> Professor Maher refers to “England and “Wales” as a ‘country’ for conflicts of laws purposes. The concept of “England and Wales”, however, exists for no other significant purpose within the constitution.

<sup>23</sup> Evidence given the Constitutional and Legislative Affairs Committee Inquiry into the creation of a legal jurisdiction for Wales.

elsewhere (for example in relation to Northern Ireland) there is no reason why this principle cannot apply to those who qualify in future also.

76. The existence of new or expanded legal institutions within Wales would create work and career structures not presently available. However, the Welsh Government is conscious that the larger commercially focussed law firms in Wales derive an increasingly large percentage of their work and revenue from England and beyond. The Welsh Government agrees with the Confederation of British Industry's view that *"devolution should not undermine one of the UK's biggest strengths: a single, internal market enabling firms to do business to a common set of business tax... employment and business law and financial regulation"*. Creating a Welsh legal jurisdiction need not, however, be a barrier to this market and we see no reasons why the large Welsh law firms – like those in Scotland – cannot market themselves as having expertise in their own jurisdiction, in England's and beyond.

77. The Welsh Government's vision for the Welsh legal system and sector is one of distinction in both senses of the word – a just, efficient, system fit for Welsh purpose. Where required, or where in Wales' best interests, things should be done differently and better, however there is no need for change for the sake of change. Wales would inherit the strengths of the England and Wales legal jurisdiction, which should be preserved. But that does not mean that improvements cannot be made to tackle existing difficulties. A smaller jurisdiction would be less complex and potentially, therefore, less costly to administer<sup>24</sup>. It could be more efficient and cheaper to use. Like elsewhere across the world, the parties to contracts could still choose to apply English law

and choose the English courts as their forum for dispute. However, the goal should be to develop a system that has the strengths of the existing system with fewer weaknesses. As an example, following recent increases in court fees of up to 600%, a claimant commencing proceedings in England or Wales for £150,000 faces up-front fees of £7,500. By contrast, raising proceedings in the Scottish Court of Session costs £202 no matter what the value of the claim. In such circumstances, the many Scottish lawyers who use English law and the English courts are likely to think again.

78. The new legal system should also be open, acknowledge the similarities that will continue to exist between English law and Welsh law and acknowledge what will be the continued prominence of the English legal jurisdiction both as a choice of law and forum for dispute resolution. The future focus, therefore, should be not just on Welsh law but also on English law. Dual focussed education, dual qualification, dual focussed expertise and dual experience. Future Welsh lawyers should be adept not only in matters concerning Wales and the Welsh legal system but will also English lawyers capable of serving their clients interest on both sides of the border. In achieving this much focus, in so far as education and professional development in Wales is concerned will be in understanding where the law and practice is the same in Wales as in England and where it is not. This would clearly work to Welsh law firms' advantage, the largest of which will of course continue to be cross border firms operating successfully across markets not only within the UK but also beyond. It will be important to ensure that this change does not lead to insularity or barriers, something recognised by the Scots, for example through the recent development of their "Scottish Legal International" initiative<sup>25</sup>.

<sup>24</sup> Highly centralised systems are less able to respond to local variance and the potential for economies of scale in larger organisations is not infinite. The law of diminishing returns applies as managerial problems, complexity, bureaucracy and declining motivation of staff cause inefficiencies. Crucially also the wider justice system would be fully integrated with other, already devolved, services. This would make the system more efficient and effective. At present the system is often dysfunctional because of the lack of integration caused by the nature of the devolution settlement.

<sup>25</sup> <https://www.lawscot.org.uk/research-and-policy/international-work/scottish-legal-international/>

79. There is no reason why Wales' large law firms – which contribute much to the Welsh economy – should not continue to be successful. For Welsh commercial lawyers little will change in practice. Such lawyers will, as now, need to be aware of developments in Welsh law that may be relevant to their clients (for example the changes in the law on residential landlord and tenant or planning). But for the most part those areas of laws with which they are most concerned will not change. Company law, insolvency law, intellectual property law and employment law, for example, will remain reserved. Welsh law and English law will, therefore be the same in this regard. On the other hand the law in devolved areas will continue to change apace, but Wales' lawyers will be uniquely placed to understand the differences and the impact on those doing business in Wales. In that respect, therefore, a separate jurisdiction would provide a marketing opportunity for Welsh firms, for example to provide specialist advice to non-Welsh businesses looking to invest in Wales.

### **Conclusion**

80. The devolution debate has to date been a political one. It has in the past been emotive – strong feelings having been expressed on both sides. But it is clear now that devolution is the settled will of the Welsh people. It is clear that the Welsh people desire a fully functioning, effective Parliament and Government whose purpose is to act in their best interests. The political debate should, therefore, stop and the focus should be a practical one. A focus on ensuring that our system of government – Wales' constitutional arrangement – is fit for purpose. Few if anybody could argue credibly that the current system meets that description. It remains an anomaly. As Stephen Crabb MP, quoted above, admitted after the Wales Act 2017 was passed:

“It is not the end of the story.”

81. But the story must come to an end, and it must come to an end by putting a coherent, stable and long lasting settlement in place. What is needed is to consider what works, what is constitutionally and practically coherent, and what ensures that the rule of law is central. In many respects these are technical questions for which an in-depth understanding of policy making, the constitution and the law is required. Addressing the question from that perspective leads to only two logical outcomes: no devolution at all or devolution that is fit for purpose and that works – that means devolution that is consistent with that in place in Scotland and Northern Ireland and the rest of the world.

82. It is time, therefore, for the creation of a Welsh legal jurisdiction and a formal body of Welsh law. It is time also to design a new system of government in Wales which incorporates policing and justice and the development of Welsh courts. These changes are inevitable; it is a case of “when” and not “if”, and the “when” must happen soon. We in Wales must be confident in our ability to put this in place and all those with an interest – lawyers, judges, politicians and other members of civic society, as well as those they serve – must work together to design a system that will work for Wales.

83. It is time to end the debate about what powers are devolved and to focus all our energies on how to best use those powers to serve the people of Wales. They deserve nothing less.

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5 July 2018