

Commission on Justice in Wales

Oral Evidence Session

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Present	Commission members	Secretariat
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1) How does the National Assembly for Wales currently scrutinise justice and policing in Wales?

DM – Justice and policing are discussed regularly in the scrutiny of local government finance matters. There are times that justice gets into general discussion in the Assembly, for example domestic violence, probation and the Berwyn super prison. It is an odd situation that there are not many quasi federal states that don't have justice devolved. It is a political decision. Should we follow Northern Ireland and Scotland regarding local policing? There is not a strong intellectual argument against devolving justice and policing.

DL – I agree. The simple answer is that the Assembly cannot formally scrutinise justice and

policing because they are not devolved, so we don't have a process. It is a difficulty. Every other 999 service is devolved and there is an overlap with numerous other services that are devolved, such as social care, education, housing, health, mental health and drugs. So when people raise concerns about a lack of co-ordination of services between reserved and devolved matters they are right and the Assembly can't fill the gaps.

NH – It is inevitable if the devolution process isn't reversed there will be a demand for increasing local decision making in relation to policing and justice. Wales is a small country, but as time goes on and as the devolved institutions become more embedded the call for more work to come here will continue and it will become difficult to solve. Where policing is local, there are very strong arguments for policing to be devolved. There are responsibilities, like specialist policing, that should remain shared with England. How can you design a structure that is different to that which exists? I see it as an evolutionary process, and deepen it, and I see strong cross party support.

MA – The non-devolved status of these matters means that scrutiny of them can be dysfunctional. There is not a particularly constructive mechanism for doing it because they are not devolved. There is no logical argument for not devolving policing. There are various arrangements between policing and local services at the local level, but there is an overall problem with the scrutiny of policing anywhere. Westminster looks only at the numbers and headline data. There is no local scrutiny of the community aspects of policing. The Welsh Government now funds 500 Police Community Safety Officers which have become a significant contribution to the picture as they have become a stop gap for very significant cuts. There are policy reasons and purposes for policing to be better integrated around achieving change. You need to start from the perspective of what do you want policing to do and how could you improve things and build up from this perspective. The logic is that policing should be devolved, but there needs to be a more detailed and clearer analysis about how you need to change and improve and how best you deliver it. You need to look at why you want to devolve it and solutions will then become more naturally apparent. Would it be best done in a non-devolved or a hybrid structure?

Lord Thomas referred to police funding through the Welsh Government and the local government precept now outstripping the funding provided by Westminster and asked how this was scrutinised.

MA – A finance report is put before the Assembly. Then there is a discussion and “political bunfight” in the chamber about the state of policing.

DL – Yes, there is a discussion in the chamber about funding. As most of the funding for policing in Wales comes from Wales, and policing is devolved in Northern Ireland, Jersey, London and Manchester, we should be able to scrutinise it.

DM – It would be worth asking the Assembly Audit Committee if it has ever looked at policing.

NH – The Assembly Finance Committee hasn’t looked at police priorities and outcomes. It is a wholly deficient system of scrutiny and there is a glaring gap that the Assembly scrutiny process ought to fill.

Lord Thomas asked who scrutinised local authorities regarding the numbers of children taken into care, with more children taken into care in Wales than elsewhere in the UK.

DM – The numbers of care cases are higher in Wales, but they are broadly the same as in England and Scotland. The numbers of children taken into care have doubled through the courts and local authorities since the Waterhouse report which will be 20 years ago next year. There is great interest in terms of the edge of care and taking children into care and how that happens and people are taking a different professional judgement. There have been a number of horrifying examples of children who were not taken into care and left in families where it resulted in homicide. Looking at the data, there is not much consistency in the practice between local authorities, even where there are similar socio economic conditions. The relationship between local authorities and the court is important. Lord Laming’s report is instructive. The agencies have been brought into the criminal justice

system. The way in which a court deals with children from the care population is different from the way it deals with children from the general population.

Lord Thomas referred to the rate of children taken into care in England being 64 per 10,000 population and in Wales 102 per 10,000 and asked what extent did the Assembly look at this.

DM – The Assembly looks at this quite a lot. The Public Accounts Committee is considering it. I chair an expert advisory group the Welsh Government has set up. It is shifting the model of care to more expertise at the edge of care. There are regular statements on it in the Assembly and a Public Accounts Committee report last November.

Wyn Williams asked what extent did the Assembly scrutinise the work of the devolved tribunals, where the Assembly has legislated in areas such as landlord and tenant that require dispute resolution and it has largely directed cases to the England and Wales court system rather than the tribunals.

MA – There is not much scrutiny of the Welsh tribunals, but there is scrutiny of the Welsh Language Commissioner and the Tribunal. We need a justice minister in the Welsh Government and in the law officer role and to reflect that in the Assembly committee structure. We now have more questions to the Counsel General in the public arena, but not specifically about justice.

DM – We have the third reading of the Tenants' Fees Bill this week. A big part of the political debate was around what you do where an illegal payment is extracted. The current legislation can result in criminal proceedings and a fixed penalty of £1,000 but it doesn't require the tenant to be repaid. The tenant can seek repayment through a civil claim, which seems an odd way of doing it. A tribunal route was not considered.

DL – I agree. We don't have the structure to scrutinise and consider these issues. We need a minister and a committee dealing with justice.

NH – Ease of access to justice is vital. I was struck by a statement made by Lord Thomas in a lecture he gave in 2017, prior to the Commission beginning its work, that you can get things done in a small country and the UK system is designed to create trade offs. It is an area well worth exploring for the future. I have been involved in tribunals and done pro bono work for constituents. It is a cumbersome system and I am struck that the convenience of lawyers has got in the way of the convenience of clients. Removing the formality of proceedings could help a great deal and you could devise rules to govern the workings of tribunals.

MA – Tribunals can still be very adversarial in many ways, and the better off may get better lawyers, in spite of efforts for them to be inquisitorial. One party will always be better advised than another. The Welsh Government does get involved in aspects of justice. For example, it has just passed regulations which effectively disbar the ability to imprison someone for non-payment of council tax, but that was actually action taken by the Finance Minister. It would be desirable to have more co-ordination of justice issues.

MA – The default position in making legislation where offences are created is to decide between having a civil or a criminal sanction. No other route is considered. In fact, the committee I chair scrutinised a piece of legislation where the only method of dispute resolution was judicial review which is clearly not a proper access to justice.

2) If there was devolution of justice and policing,

- a. Should there be a justice and policing committee in the National Assembly?
- b. Should there be a Minister in the Welsh Government with responsibility for justice and policing?

DL – Yes and yes.

DM – Yes, you would need a minister and a department of justice and an Assembly committee. The Scottish Parliament’s Justice Committee does impressive work.

MA – Yes, the minister being put in place would kick start the rest of the system and would lead to a committee being set up. The real issues relate to capacity and expertise to scrutinise. It is very unfamiliar in the current set up and there are enormous pressures. It needs to be done on a proper, principled basis. It also needs to be clear that the independence of judicial functions is important.

NH – If political responsibility for justice is to be widely distributed, it needs to be co-ordinated in a centralised way in government, to remedy the defaults that arise. You need to decide on policy responsibility devolved to the government first and then Assembly scrutiny function follows. To create functions within the legislature before something is devolved would be to put the cart before the horse.

Rick Rawlings asked if there should be a separate law officer role.

NH – Yes, regarding the Counsel General operating in a discrete way different than a justice minister.

DM – I agree and statute requires that the law officer role as Counsel General is separate and it is essential that it remains so.

MA – With a growing and developing parliament, it is easy to go down a road where there is a blurring of the functions regarding justice, and where a small number of people, and 60 is a small number, are involved in the different roles it is difficult to maintain independence and the rule of law. It needs thinking through very carefully. This isn’t an issue just in Wales. There is a blurring of the lines in Westminster too for the law officer role.

3) What are the practical implications for Wales of there being two legislatures in the

current England and Wales jurisdiction, but there being no Welsh Minister / National Assembly committee with any justice function?

DL – It is a completely unique situation to have two legislatures in a single jurisdiction. We are just expected to cope with it, where we are making new laws bilingually, in English and in Welsh, and there are then further problems. It is not just a case of translation into Welsh as in some circumstances law will be made in Welsh so there is a need for translation both ways. There should be a Welsh jurisdiction.

DM – A jurisdiction should follow a legislature. Over time it will get more convoluted. You need to invent a series of paradoxes to cope with it intellectually. You can't deny there is a Welsh body of law even if it is embedded in an England and Wales jurisdiction. We do get constituents who ask about law extending to England and Wales, but not applying to Wales. It is very complicated for even the interested layman. Functionally no matter what you call it we already have a distinct jurisdiction to some extent and it is growing. And it is because of what Westminster is doing as well as us. It is curious that we ended up in this position. I agree with Dai's nationalist view even as a high Tory. Everywhere else a jurisdiction was created. When Northern Ireland was created, they took the existing law and added to it. For some reason, we are not deemed fit to have this in Wales. It is not conducive to good governance.

Rick Rawlings asked if there was any Welsh representation on the Sentencing Council and any line of accountability from the Sentencing Council to the Assembly.

MA – No, there isn't a structured process to it. The Wales Act debate showed that the jurisdiction of England and Wales has taken on a mythical status far beyond its importance.

DL – The data on rates of imprisonment in the recent report of the Wales Governance Centre shows that imprisonment rates are much higher for men, and especially black men, and women in Wales and this is a valid reason for having responsibility for prisons devolved

to Wales. None of it is in the ambit of the Assembly. It should be.

NH – I am in favour of a devolutionary approach, to provide support for the development of law in Wales. There will come a time, sooner or later, when this question will have to be addressed. I am not sure now is the time, but the more the law diverges the more it will be necessary.

DM – Thomas Watkins' book The Legal History of Wales shows we have been making law for a long time, since Hywel Dda.

4) What steps are necessary to build capability and capacity in Wales to provide adequate support for the development of the law of Wales where it develops in a different way to the law of England?

DL – If we put the structures in place it would develop in an evolutionary way and naturally.

DM – It is a myth our lawyers are not up to it. There are lawyers practising every day in Wales. We wouldn't be building new courts, we would take on existing court premises and staff. The Welsh Government and the Assembly would need to change. We can learn from other smaller jurisdictions regarding the appellate courts. It is a matter of how you organise these things. You would need to rearrange existing activities. It doesn't make much sense to have a single jurisdiction without criminal law and penal policy.

NH – We have a heavily London centric judicial and legal system, but we are chipping away through the Mercantile Court in Cardiff and we have seen Manchester develop as an alternative. I don't see any of these things as insuperable problems for Wales. The question is when is it right to do it? It is a case of seeing how things work out, the more we see things like the Mercantile Court developed in Cardiff, but there are geographical challenges. Access to justice is important and the geography of Wales must be borne in mind.

MA – Youth justice is the most glaring area, where it ties in so closely with all the devolved services that it should be devolved. We must not create barriers and we need the flows of practitioners between England and Wales and the best legal system that operates and it needs to be properly resourced, which is a big problem. When considering devolving anything the biggest issue is the resource to deliver it. We need to look at it in a structured way and consider what are the most important things that can be devolved? We need to win the policy argument about why it would be better to do that, and then we would need to win the political argument.

Wyn Williams asked Mick Antoniw about his previous experience working in a law firm that worked across England and Wales and Scotland.

MA – In the end we decided that the Scottish part of the firm needed to operate independently from the rest of the firm. It was the same when we expanded into Northern Ireland. It was far easier to operate in this way and it was about delivering things in the best way.

NH – On what basis would any funding that comes with the functions be calculated? We don't have a needs based formula and Wales does badly. It must be predicated on having a discrete funding deal.

- 5) In the event policing and justice were devolved to the Welsh Government and the National Assembly for Wales, and the Welsh Government had a Minister for justice and policing and the National Assembly had a committee for justice and policing,
 - a. What steps do you think should be taken to safeguard the funding of justice and policing?
 - b. What would be needed to enable the Welsh Government and the National Assembly to develop policy for justice and policing in Wales in different ways to the Ministry of Justice and the Home Office?

DM – These questions would be determined by the Assembly, as happens in Westminster. It is not possible to give reassurance as budgets cannot be ring fenced. There would be judgements about which aspects of policing are working well and which aren't. For criminal justice, the prison population has doubled since the mid 1980s and there would be judgements about those things, too, with the possibility for a different approach to be taken. Citizens and their representatives would have their views addressed. There is no difficulty regarding the quality of the work that would need to be done in this area. If it was devolved, I would expect justice would be afforded a high level of priority in the Assembly.

MA – There may be arguments for using the EU Fund or the Prosperity Fund, but it undermines the devolution process to try to ring fence or argue that we should spend monies in a predetermined way. We would need a consequential analysis, for example of the proportion of central funding, using the Barnett formula, with pressure to apply money to the same purpose. It has to be for the Assembly to determine.

NH – The budget is overwhelmingly dominated by health. There is a strong argument for making differences where decisions are made more locally with no hypothecation of any money. I am not in favour of ring fencing the policing budget. It is easier to decide on priorities in Wales and there are better results out of money than is possible at Westminster. The Barnett formula has a detrimental impact on Wales. The Assembly would be well placed to consider balancing priorities and it would be possible to have proper political debates about priorities. I think prisons are a colossal waste of money and we could have a more rational debate on this in Wales than you can in Westminster where the areas of responsibility are so much wider. Where the debate is more localised, you can give more attention to the devolved areas and how justice and the penal system work. For example, a Welsh prison system could solve some of the problems that exist currently, for example Styal women's prison in my old constituency. The Assembly would potentially be a more effective way of making decisions than in Westminster.

DM – A minister for justice would be seen as an important role and there would be

significant interest amongst backbenchers to serve on a justice committee in the Assembly and there would be high attendance. The political investment would be there.

DL – It is important that we co-ordinate all these services, such as probation services, which is part of the rehabilitation of the prisoner. If everything was devolved the ability to rehabilitate would be better, with the £7 billion we spend annually on health. I chair the Assembly's Health Committee and if we could co-ordinate health better with prisons and probation services and the police. We can't link health, mental health and education and training services directly with prisons and the police where they are not devolved.