

**Commission on Justice in Wales**

**Oral Evidence Session**

**21 March 2019**

<b>Present:</b>	<b>Commission members</b>	<b>Secretariat</b>
Elin Jones, Llywydd Manon Antoniazzi, Chief Executive (MA) Elisabeth Jones, Chief Legal Adviser (EJ)	Lord Thomas of Cwmgiedd Sir Wyn Williams Professor Richard Rawlings Dr Nerys Llewelyn Jones Professor Peter Vaughan Professor Elwen Evans QC Juliet Lyon CBE	Andrew Felton, Secretary to the Commission David Slade

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

Llywydd – The Assembly has no direct responsibility for justice and policing, but the Assembly is able to scrutinise and develop policy on matters that relate to Wales. Much work is done by committees on areas that overlap between devolved and reserved matters. For example, the Health Committee is currently carrying out an inquiry into mental health in policing and police custody and is taking evidence on devolved and reserved matters. Committees lead on these areas and bring forward ideas and recommendations to the Welsh Ministers, for them to respond to and make representations, including to Westminster Ministers where there is an overlap between devolved and reserved areas. There are many areas where Assembly committees and the Welsh Ministers look at policy where the relationship exists. Today the Education Minister made a written statement on work commissioned on improving education in prisons.

EJ – Education in prisons and secure accommodation for young people is one of the few areas in justice where there is direct devolved responsibility, but there is no restraint on committees looking at matters that are tangential or reserved.

Peter Vaughan asked if the Llywydd was frustrated about justice and policing policy not being

devolved and a lack of coherence across services.

Llywydd – Elin Jones the AM might well be frustrated, but the Llywydd needs to be more neutral, so I wouldn't comment on whether it is frustrating. There is an interesting inter-relationship and it may not be clear to the public and sometimes to the politicians who is responsible for what.

Lord Thomas asked what the Assembly's role is in scrutinising the very substantial sums of police funding, with a greater proportion of funding for policing in Wales now being from Welsh sources.

Llywydd – These are matters for the Welsh Government, such as its commitment to fund Police Community Support Officers (PCSOs). The role of the Assembly is to scrutinise Ministers on this budget making process and how the funding is put into action. The Welsh Ministers are answerable to the Assembly in plenary or in committees for their policy decisions, such as the increases in precepts.

Lord Thomas asked how the Assembly scrutinises the large sums of money for looked after children.

Llywydd – The Assembly will scrutinise all aspects of the Welsh budget, through committees. For example, PCSOs would be scrutinised by the Local Government Committee and the Finance Committee and ultimately by the Assembly in plenary.

Lord Thomas asked if there was a need for an Assembly committee to look at expenditure on justice together.

Llywydd – There is an argument for that, but expenditure on justice is linked to other matters in devolved competencies, too. Everything the Welsh Government is responsible for is mirrored in the Assembly committee structure. The Assembly's Standing Orders require that all areas of ministerial responsibility are scrutinised by a named committee. The Assembly scrutinises large areas of justice and significant areas of expenditure through different committees.

MA – The Public Accounts Committee has an overarching role on public expenditure.

Llywydd – The fact that policing is not devolved doesn't stop anything that can be done to improve

mental health and there is an important committee inquiry ongoing into mental health issues in custody.

EJ – A lot of work has been done on the care system and we will write to you on this. For example, it was announced that care leavers would be exempt from council tax and, if I recall correctly, that proposal came originally from an Assembly committee. The Assembly has also been concerned about support for those leaving the care system. We try not to be too segmented in the Assembly, so there is joint work by committees undertaking joint enquiries. Care is an area that crosses committee responsibilities.

Lord Thomas confirmed the Justice Commission was concerned about why more children were taken into care in Wales than in England and it is a significant area of devolved public expenditure.

Llywydd – We can provide more detail on what the Assembly has done on care and what the Welsh Ministers have been scrutinised on.

Rick Rawlings asked about the boundaries between the devolved and non-devolved and whether there were examples of UK Ministers with responsibility for justice and policing giving evidence to the Assembly?

Llywydd – I can't give examples, but many Assembly committees will have sought evidence and scrutiny from UK Ministers. Practice has been for them to decline, and sometimes to provide written evidence. The Health Committee in the previous Assembly sought evidence and information from Whitehall. The Assembly has had more engagement from Whitehall in the context of Brexit, with some departments willing to engage and others not. Welsh Ministers have given evidence in Westminster.

Rick Rawlings asked if there were examples of joint working and inquiries between the Assembly and Westminster.

EJ – This has occurred between Assembly committees and the Welsh Affairs Committee. Assembly Committees have consistently expressed they are open to more such working and there have been some positive noises in Westminster, too (for example, in the Inter-Parliamentary Forum of Chairs of European-related Committees, and in various Select Committee reports). However, as I understand it, there is a barrier to joint working with other Parliaments in the Standing Orders of the House of

Commons, save in relation to the Welsh Affairs Committee. As far as I am aware, nothing concrete has yet happened to remove this or to facilitate joint working otherwise.

Wyn Williams asked who scrutinises the Welsh tribunals.

EJ – It will depend on the subject matter. The Special Educational Needs Tribunal would be the Children, Young People and Education Committee, the Mental Health Tribunal would be the Health and Social Care Committee and local authority functions would be the Equality, Communities and Local Government Committee.

Llywydd – The committees haven't raised the possibility of bringing scrutiny of the tribunals together. A piece of work could be done on this, to develop a model. I agree there hasn't been any scrutiny of the work of the tribunals, but this is something that could be done.

Wyn Williams confirmed that in his role of President of Welsh Tribunals he had agreed with the previous First Minister that one of the ways to encourage scrutiny was to produce an annual report, as a way of keeping AMs informed.

EJ – We were not aware of the annual report, as the Wales Act 2017 which establishes the President of Welsh Tribunals post doesn't impose a duty for laying a report before the Assembly, and it hasn't been communicated to us, but we are pleased to know it is coming and will make arrangements for the Llywydd to lay the report to ensure Members and committees are made aware of it.

Lord Thomas asked whether there should be an Assembly committee now that looks at justice, as there is currently no leadership on justice in Wales and this is a major issue. He asked the panel to consider whether the Assembly may want to consider doing something in this area now, such as a co-ordinating committee made up of Members co-opted from other relevant committees.

Llywydd – My instinctive response is that capacity, of Assembly Members, funding and staffing, may be an issue, and that if there was such a committee it would experience frustrations of not being able to do all that it would want to do, as with the work on mental health and policing and police custody. To set aside one committee where the levers are not devolved may be a misallocation of resources, but I can see the value of wanting to focus on justice.

2) Does the National Assembly for Wales have the scrutiny capacity and capability to take on responsibility for justice and policing?

Llywydd – I have been here since 1999 and there have been significant changes constitutionally and big areas devolved, such as the 2011 change in powers. In 2016 there was the devolution of taxation powers and a Welsh Treasury scrutinised by the Finance Committee and the Assembly, so yes, we can cope. We have done it before and could do it again, but the constraining factors are size, with 60 Assembly Members, and resources. Of the 60 Members, 14 are Members of the government, which is the maximum in statute, so there are therefore only 44 Members available to scrutinise [having taken out the Llywydd and Dirpwy Lywydd]. An expert panel on Assembly reform, using international comparisons and chaired by Laura McAllister, concluded that the number of Members is too few for the responsibilities of the Assembly, so it stands that extra devolution would make that more difficult again. We now have a responsibility to change the electoral system, which is a work in progress. There is a degree of political consensus regarding increasing the number of Members, but different views about how they are elected.

If there was devolution of justice, there would need to be a task and finish committee to look at arrangements for scrutiny and then a proper set up of a justice committee. Members currently sit on two or even three committees, and chairs of committees sit on other committees too, which are constraints, but we shouldn't dwell too much on those constraints. The timing of further devolution and an increase in Members could work together. Once an area is devolved, the Assembly Commission has a statutory responsibility to provide resources to the Members.

MA – We need to get the balance of resources right. We have a fairly sophisticated method of capacity planning. We have to deal with Brexit and potentially future areas being devolved. We have a lot of faith in the people we have in place and have developed. The organisation has grown out of all recognition in the last 20 years. If there were specific recommendations, we would look to get involved in discussions early to allow us to plan the required changes.

3) 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?

Llywydd – Yes, the working assumption has to be that there would be an Assembly committee and a Welsh Minister with responsibility for justice and policing, whether as part of other responsibilities given the limit on the number of Welsh Ministers. Depending on the recommendations and outcomes, I would need to discuss this with the political parties in advance of devolution and I would be looking to set up an interim committee to deal with transition and do the lead-in work.

4) What do you think would be the likely costs of the National Assembly for Wales taking on responsibilities for justice and policing?

Lord Thomas referred to the central costs of the Ministry of Justice being quite high and that it would be necessary to look to how it could be done in a proportionate way. Lord Thomas had been struck by what Latvia has done and asked whether it would be possible to establish a different model for a ministry with a few senior civil servants and access policy thinking and expertise when needed, such as by using universities.

Llywydd – The Welsh Government would be exercised in its discussions with the UK Government, with the Ministry of Justice and the Treasury, about the need for resources to be devolved along with the powers being transferred. In terms of modelling something in a different or more agile way, that has been done with the setting up of the Welsh Treasury and the Finance Committee has scrutinised it being set up. The Assembly would be interested in scrutinising how the Welsh Government would set up a ministry dealing with justice.

It would be necessary to look at how you bring in experts regarding advice and new ways of working. The ability to set up something new would excite people. They would want to be involved. We have a longstanding way of doing this.

MA – We have a framework agreement, for example to pay people to write papers. A lot of work has been done on Brexit in this way.

Llywydd – We have developed a fellowship programme with universities where people work with the

Assembly. Any Assembly committee doing any work is able to appoint any expert adviser to contribute to the development of policy. We are a small parliament, so we are open to doing this, to enable advice to be sought without employing new staff who may not be experts.

MA – We have close relationships with centres of academic excellence and we have PhD students in the Assembly research service.

EJ – We have brought experts in quickly when needed and we have five methods of doing so: the traditional method – of committees inviting evidence, through a general call or specific invitation; an expert adviser appointed for an inquiry; ad hoc pieces of advice commissioned either by committees or the research service; specifically for Brexit we set up a panel of experts through a procurement exercise, which allows for rapid turnaround of expert advice at very short notice; and a system of fellowships developed by the research service, which is free of charge.

The Llywydd left at this point to attend another engagement.

5) 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?

MA – The absence of a minister with responsibility for justice and policing does not constrain Assembly committees from scrutinising the issues and they can and do make recommendations to Welsh Ministers that they take issues up with UK Ministers.

EJ – It is for the committees to decide on their work and while they are not prevented from considering non-devolved issues, without a minister there isn't a flashing light in front of the committees to call their attention to justice issues, but they will be aware of what is happening.

Juliet Lyon asked how negotiations work in practice when devolution is recommended and then implemented.

EJ – I have worked on three Westminster Bills that have altered the devolution settlement. All were discussed – if you like, negotiated – between the UK Government and the Welsh Government, albeit to different degrees and with different amounts of notice from Whitehall. The Assembly has

had a seat at the table on at least the 2014 and 2017 Bills, i.e. the discussions have been tripartite: UK Government, Welsh Government and Assembly, on aspects of the Bill that directly affected the Assembly as a body or its legislative competence.

As officials at the table, we ensured that we had a political mandate from the Assembly Commission for what we negotiated on internal Assembly matters, but to get a political mandate as officials regarding what should be devolved, we would need the agreement of the political parties; we would set up an internal process to obtain this.

6) 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?

MA – Some of what has already been said is relevant. The committees allow legislative and policy scrutiny. We would need to evolve and respond to that, whether by a new committee or a delegated one. We would need to ensure support provision is available. The Business Committee is looking at the Assembly’s Standing Orders regarding consolidation bills. This is a matter for the Welsh Government, and transparency and scrutiny are important principles.

7) 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?

MA – The amounts in the Welsh Government budget would be scrutinised through the annual budget. Only the Welsh Government can move a budget motion so the wording is within the hands of the Government. The Assembly is asked to approve the total budget and the Welsh Government has the discretion to move around the funding in the budget and it only has to go back to the Assembly if it wants to exceed the agreed total.



The budget is broken down into illustrative areas, based on a protocol agreed between the Welsh Government and the Assembly. This wasn't always the case. Between 2006 and 2012, different budgets for different areas were ring-fenced and not just the total. There is no reason that a similar agreement couldn't be put back in place.

Peter Vaughan asked how they would they go about ensuring the right amount of resource came with a transfer of powers.

MA – It would be for the Welsh Government to negotiate. There would need to be a statutory consultation with the Assembly and a vote in plenary regarding the Assembly accepting the devolution of the powers and the resources in an area. The Assembly would want to be satisfied that the right amount was coming with it, but it would be for the Welsh Government to negotiate.

EJ – The Business Committee would want an Assembly Committee to prepare for it and that Committee would want to press the Welsh Government hard on what it was doing regarding the budget for the new functions. The budget motion isn't amendable.

MA – There are various means of bringing forward a motion. The budget as a whole is voted upon and once passed the Welsh Government is free to move funds between expenditure areas. It hasn't always been this way. In the past the rules required Governments to seek Assembly approval to transfer funds across expenditure groups. We will write to you further regarding the budget arrangements that were in place between 2006 and 2012.

EJ – Under the Government of Wales Act 2006, budget motions need to set out services and purposes (also known as "ambits", following Westminster terminology) and must state the amount of resources that the Assembly allocates to each. The Welsh Government can move money around within the purposes, but not between them without bringing a supplementary budget motion. Therefore, the significant thing is how narrowly or widely the budget motion defines each service/purpose. The change referred to by the CEO, under which each service/purpose was defined much more widely than previously, was a choice of the Assembly. The Assembly now has the legislative competence to change its processes around budgets, as well as being able to make some changes non-legislatively, as it did in 2012.

8) What steps is the National Assembly for Wales taking to make legislation more easily accessible?

MA – This is a difficult question to answer as the Welsh Government has been leading on this, but the Senedd would be supportive. There was funding some years ago to do some work on developing a portal for legislation. We are working on a consolidation bill to make legislation more accessible. Further steps could be taken if there was a political mandate to do so.

EJ – The Assembly is supportive of the Welsh Government’s programme of consolidation and codification. Codification was also recommended by the Law Commission in its report on the form and accessibility of the law in Wales, and my personal view is that codification would be an even better way forward than consolidation and it shouldn’t take significantly more work than consolidation to maintain, although it would to set up. It would be better for the public and for transparency and this is a very important value for Members and the Llywydd. It would need its own programme of work and changes to the Assembly’s Standing Orders. The first step the Welsh Government has taken on this is introducing the Legislation (Wales) Bill, which places a duty on the Counsel General to have and publish a programme to make the law more accessible. We need to see what this will be. The Welsh Government has good intentions in this regard and is in the lead, but if a future Assembly Commission felt that it wasn’t going well it might want to take leadership.

Lord Thomas asked whether the Assembly had one piece of legislation on a subject which you amend and change only the bits you need to allowing you to maintain a one stop shop for the user, or does it make a piece of amending legislation each time it wishes to amend it in the same way they do in Westminster.

EJ – We generally follow the arcane Westminster model and make amending, legislation, but the Welsh Government has made progress on the Law Commission’s report, by bringing forward, or announcing that they will be bringing forward, consolidated legislation on planning and on the historic environment. The difficulty is that it is quicker and cheaper to do it in an amending form rather than a consolidation or codification form, and that governments typically wish to use legislative time to implement their new policy ideas, especially manifesto commitments, rather than rationalise the statute book.

Lord Thomas asked what the time scale was for amending the title of the Assembly to Parliament.

MA – It will be by the end of the calendar year.

Lord Thomas referred to the brain drain to London in the legal sector and asked if the Assembly had this problem.

MA – We have a lot of people who spend a lot of their time outside Wales during their career. We don't have difficulty in attracting high calibre staff. We do our best to be a good employer and we are externally recognised for this. It is a good place to live and the work is exciting. We often need to train our people, for example in law and translation, to ensure they reach the standards for the institution we require.

EJ – People come to work here with a strong personal commitment to Welsh devolution and others to public service more generally. There is anecdotal evidence of this. The terms and conditions are excellent, the legal work is interesting and there are good ways of working for families and those with other caring responsibilities. I have been in post six years and the Legal Service has recruited every year, and only failed to recruit a suitable calibre once. We keep advertising more widely and more innovatively and we are advertising in universities outside Wales.

Rick Rawlings asked if there were arrangements for secondments around the legislatures of the UK.

MA – We are a small organisation and open to secondments in both directions.

Lord Thomas asked if the Assembly worked with the Welsh universities to recruit.

EJ – It has been very patchy. In the Welsh Government, where I was responsible for some recruitment in legal services, we wrote to the heads of the law schools and the careers service and the student law societies to publicise the opportunity, and offered to visit. On average we received one response a year. It varied from year to year which university it came from. Whether or not we got a response seemed to be whether there was a keen individual member of staff or student, but the contact would disappear if that person left. In the Assembly Commission we have held open evenings for trainee recruitment in the Senedd and people have travelled from far in Wales and England. We would want to hold open evenings in the future in North Wales and West Wales, too, because it is a long way for people to travel.

MA – It is not easy at the moment for lawyers because of Brexit and that is where the framework agreement came in. There is a very interesting career path for young lawyers here.