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Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA(P)/CG/2636/19

Lord Thomas of Cwmgiedd
Commission on Justice in Wales

26 July 2019

Dear Lord Thomas,

Further supplementary evidence to the Commission on Justice in Wales

I thought it would be helpful to offer further evidence following the oral evidence session on 19 June.

This arises primarily from the Rapid Review of the Legal Sector. I have now received the report and enclose it for your attention, together with a copy of the Written Statement to the National Assembly for Wales. The report is now being prepared for publication and my officials will liaise with your Secretariat over the handling of this.

My response to the report has been informed by the insight I obtained from the visits I have undertaken, at your suggestion, to Scotland and Northern Ireland to learn more about their jurisdictional arrangements and legal sectors. I have reflected on these in the enclosed further supplementary evidence.

I have also included a further statement of our position on the legal jurisdiction, in particular addressing the suggested alternative discussed during the evidence session.

I also comment on your Law Council proposal which, as I indicated in the oral evidence session, I believe has considerable potential.

I trust this further evidence is helpful and I would be happy to explore it further with the Commission.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

I am copying this letter to the First Minister and to the Deputy Minister and Chief Whip.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'JM', with a stylized flourish at the end.

Jeremy Miles AM

Y Cwnsler Cyffredinol a Gweinidog Brexit
Counsel General and Brexit Minister

Further supplementary evidence of the Welsh Government: developing the legal sector in Wales

The legal sector

Conscious of the interest the Commission has shown in the legal sectors that underpin the legal jurisdictions in Scotland and Northern Ireland, and appreciative of the need for a strong legal sector in Wales, I recently visited Edinburgh and Belfast to meet a number of prominent lawyers. The lawyers represented different parts of the legal professions and were active in various different roles notably in the private sector and the judiciary.

I was encouraged by the vitality of the legal sectors in Scotland and Northern Ireland, in particular the way in which both nations had managed to capture the benefits of being separate, small jurisdictions, while at the same time benefitting from, and adapting to, the proximity of the English legal jurisdiction. Perhaps for this reason those within the sectors were conscious of the need, for example, to collaborate, and on the whole managed to do so. Notably, despite the relatively small size of both jurisdictions, those I spoke did not consider there to be difficulties in maintaining judicial independence.

Both the Scottish and Northern Irish experiences are examples of why and how small jurisdictions can work to the advantage of citizens as well as the professions. There is much to be learned from them.

The key features of the legal systems in Scotland and Northern Ireland which I observed and would like to see replicated in Wales are:

- strong judicial leadership, especially from the respective Heads of Judiciary;
- a dynamic Bar (as part of a highly organised and proactive profession);
- a solicitors' profession that not only brings economic value through the commercial work undertaken by large firms but also the more localised services provided by smaller less specialist firms;
- innovative law schools who often collaborate;
- entrepreneurial approaches to securing inward investment; and
- effective co-operation between the professions, academia, and government.

The overall impression I formed from speaking to lawyers, academics and judges in Scotland and Northern Ireland was a sense of shared responsibility and ownership of their legal system. This is something that starts with ensuring that the lawyers and judges of the future are educated in a way which reflects the needs of the jurisdiction and the challenges and opportunities of the future. The ability to get the most influential figures in the law together, essentially to design and plan for their future, seems to be a very important advantage of having a smaller legal jurisdiction.

In my conversations with lawyers from commercial law firms especially in Edinburgh, I was reassured by a consistent view that it was possible to market a firm as having both expertise in the Scottish jurisdiction and outside Scotland. I spoke to a partner from one of the larger firms who was very clear in her view that they did not consider being Scottish, or being based in Scotland, as being a hurdle to obtaining work in England. It was also clear to me that multi-jurisdictional work is something that comes fairly naturally and choosing English law as the system of law for governing contracts is commonplace and not considered to be a significant issue. Many of the larger firms are also international in their focus and as well as having Scots lawyers, they routinely employ lawyers qualified to work in other jurisdictions (most notably the England and Wales jurisdiction).

I am pleased that the rapid review has given us a clear and well-evidenced steer on the direction of travel for developing the legal sector. The report's findings chime with my own impressions from my visits.

It is clear that indigenous firms do not place significant value on Welsh Government financial support, and that using Welsh public spending power as a lever can only have a limited effect. So we need to focus on other areas.

I am attracted to near-shoring of multi-disciplinary operations as recommended by the review. I appreciate that this won't necessarily contribute in a broad and integrated way to the resilience of the legal sector but I am convinced of the value of such inward investment in providing a more vibrant employment market with opportunity to retain more of our legal talent in Wales.

I was impressed by the entrepreneurial and indeed opportunistic approach that Invest NI – and, crucially, its partners – took to develop near-shoring following the Citi investment. I was also impressed by how what started out as low-value back office functions were able to move up the value chain. I hope we can achieve similar success in Wales.

We will need to put in place a targeted marketing strategy, including senior partners in global law and accountancy firms.

I note that the review places emphasis on personal contact with the Welsh Government and I have asked senior officials to identify a lead civil servant to take on this role.

I recognise the importance of political leadership, too, and I will discuss this with my Ministerial colleagues.

The need for a separate Welsh jurisdiction

It was very apparent from my visits to Scotland and Northern Ireland is that there is a great deal of pride in their legal systems, and there is a generally held view that the separate jurisdictions should be protected. This is in part because of their long history and traditions but also because a separate legal jurisdiction has long been a part of their constitutional arrangements.

This was given renewed impetus by the re-establishment of the legislatures for Scotland and Northern Ireland, but it is important to bear in mind that the main reason for a separate jurisdiction is the law itself. The existence of a legislature, of itself, means future divergence in law, but the Scottish and Northern Irish legal jurisdictions were maintained simply because the law was already different.

Amongst all of the complexity of the UK's constitution we should not forget this simple notion: that difference in law necessitates distinct jurisdictional arrangements. And the existence of a legislature, by definition, will mean different law. The constitutional case for a separate Welsh legal jurisdiction is, therefore, important in its own right. This case starts with the law itself and the divergence in law between Wales and England.

Our policy, therefore, is that a formal body of Welsh law is needed. This would comprise all of the law (including the common law, legislation made by the National Assembly and the Welsh Ministers and legislation made by the UK Parliament and UK Ministers which applies to Wales. Like in Scotland and Northern Ireland this body of law would contain legislation on both devolved and reserved matters. This would signal that Welsh law is not the same as English law and properly differentiate truly English law on a devolved subject from the corresponding Welsh law. This is the conventional and right thing to do.

Beyond this a phased approach is possible. In our view the conventional and right approach is that a formal body of law should be administered by Welsh courts and Welsh judges. But at least over the short to medium term, this could largely be a matter of form, by which we mean that “Welsh Court” and “Welsh Judge” could to all intent and purposes be labels. This could even enable the same court to constitute itself as a Welsh Court to deal with a matter of Welsh law and then as an English Court to deal with a matter of English law. And a Welsh judge could also be an English judge and vice versa.

Under such a model the courts would initially continue to be the responsibility of the UK Government and Her Majesty’s Court Service. This would be an interim measure but one which would establish the important principle that we should have Welsh courts and Welsh judges. This is important for two reasons.

The first is that this is something that must be done anyway. Divergence in law brings about not only different laws to be applied differently, it brings about practical implications. Different laws on matters like rent arrears and tenancy evictions, for example, require different IT systems, forms and procedures for Wales. The more divergence, the more inefficient and impractical it is for the two bodies of laws to be administered by the same body.

And the second reason is that we must show confidence in the Welsh legal sector by establishing a distinctly Welsh system. This would demonstrate that there are new opportunities and career paths for lawyers in Wales.

The new Welsh Judiciary, while distinct, would not exist in isolation. We see no reason why a core of Wales based judges could not be supplemented by cross ticketing or loan arrangements enabling English judges to be used as necessary.

Alternatives that somehow seek to carve out a place for Wales within the existing England and Wales court system such as a Welsh Division of the High Court, would in our view have the opposite effect; essentially cementing Wales’ place as a subsidiary of the English courts and judiciary. It would also in our view be confusing. We are not sure whether the purpose of a Welsh Division of the High Court would be to deal with any case that relates to Wales (i.e. because one or more of the parties is in Wales, or because the issue being considered relates to Wales) or to deal with the narrower circumstances in which Welsh legislation applies to a case. Determining the role of the division would not be straightforward either way.

In any event, we think this could only be a partial solution to today’s problem, and does not take into account what will happen and what may happen in future. It is only a partial solution because it looks at the issue from the perspective of the courts and judiciary only rather than from the perspective of the law itself and of users of legislation. It also does not fully take into account the increasing divergence in law between England and Wales that is inevitable, nor would it anticipate the impact of the further devolution the Welsh Government is advocating. Our starting point is not the courts or the judiciary but the law itself. This is because ultimately the court is only there to administer the law - and that law needs to be accessible and made within the appropriate constitutional context. There are tried and tested systems for distinct judges and courts all across the common law world, and a large number of these jurisdictions are considerably smaller than Wales.

The ultimate devolution of justice and policing would involve a significant expansion of devolved legislative competence, which will be seen most obviously in further divergence in criminal law.

The proposal for a Law Council of Wales

Finally, I have been giving further consideration to your proposal to establish a Law Council for Wales, which I warmly welcome. A means of facilitating co-operation within the Welsh legal sector can only be a positive step.

We are living through a revival in Welsh law and in Welsh legal institutions. A process is ongoing, therefore, of creating distinct legal infrastructure for Wales. Some of this infrastructure, as well as being legal is also political and constitutional – the legislature, the executive and office of Counsel General. Some is specific to the law itself – Welsh laws that are made bilingually, distinct provision about how Welsh laws are to be interpreted, differing arrangements for organising and promulgating those laws, and separate engagement with the Law Commission. Some relates to the administration of the law – such as ongoing representation (we trust) on the Supreme Court, bespoke arrangements for training Welsh judges, Welsh tribunals, a President of Welsh tribunals, CAFCASS Cymru and the Lord Chancellor's Standing Committee on the Welsh language. And finally some of it forms part of wider civic society in Wales – for example Legal Wales, the proposed Law Council, the Justice Commission itself and some degree of organisational separation in so far as the Law Society, the Bar and the Circuit are concerned.

However, we clearly need to further develop this infrastructure for two reasons. The first is that if there is to be constitutional change, as we believe there should be, the legal sector needs to be prepared. And to be prepared the sector needs to be economically viable and prosperous, which the Welsh Government wishes to see regardless of constitutional change.

As you have observed, Wales' legal identity has in the past been under threat, and it has survived despite the absence at times perhaps of a plan or a widespread appreciation of its importance. I was particularly struck by your observation that developments in our legal history have *“relied on the spirit of the nation and on strong individuals. Moreover the developments have been piecemeal with no agreed long term strategy or goal”*.

Developing our legal infrastructure will take time and we are unlikely to be able to immediately replicate what exists in Scotland and Northern Ireland given Wales' very different history. As I have said above, however, I believe that we can draw confidence from the relative success of the legal sectors in Scotland and Northern Ireland and believe it is realistic for us to aspire to develop a comparable system, and institutions, over time.

I have provided some more detailed comments on behalf of the Welsh Government in the annex.

ANNEX:

LAW COUNCIL FOR WALES PROPOSAL: WELSH GOVERNMENT COMMENTS

Purpose

The most important comment that we wish to make is that it is vital that the proposed Law Council has clearly defined purposes. Full engagement of the legal professions, an effective secretariat and the eventual impact of the Council all depends on this.

In our view there should be two overarching purposes, both of which are inter-linked.

The first is as a forum to support the development of the justice system in Wales (ensuring that issues specific to Wales are properly addressed). This is partly a task, therefore, of considering how the existing system works for Wales and what should be improved within the confines of the current devolution settlement. This should include the accessibility of the law, legal education and training, the impact of emerging technologies, the Welsh language and more generally the extent to which the justice system adequately deals with divergence in law and other structural and governmental differences between Wales and England. But the Welsh Government's policy objective, which we hope will be supported by the Justice Commission, is that policing and justice should be devolved. So a further task should be to build upon the work currently being undertaken by the Commission in relation to this issue.

The second overarching purpose should, in our view, be as a focal point for co-operation with the aim of further developing the legal sector. As the Justice Commission is aware, the Welsh Government is reviewing how it supports the sector and how the sector might support its own future development in a time of great change. As indicated above, a flourishing legal sector is vital for the future effectiveness of a Welsh justice system – and this involves a number of related issues ranging from how future lawyers are taught in our schools and universities to ensuring that the sector has sufficient expertise, specialism and capacity.

Role of the Welsh Government

We accept that any collective effort to further develop Wales' legal infrastructure must involve the Welsh Government. Part of the role of the Law Council should be for its members to better understand each others' perspectives and to learn from each other – and the Welsh Government will seek to benefit from and contribute to this process.

Membership and working practices

We believe that the membership of the Council should, by necessity, be broad. Indeed within reason we are of the view that membership could be open in particular to law firms in addition to their collective representation through the Law Society alone.

A large Council with disparate interests would, however, bring its own difficulties and we suggest also that its work be divided into themes to be taken forward by specific groups or committees, whose membership is best suited to the theme. For example, we would like the accessibility of Welsh law to be one theme and would see that as an opportunity to gauge the views of, and work with, those most concerned with the issue.

Secretariat

With that collective spirit in mind, a committed and engaged secretariat is essential to the success of the Law Council. We support the idea of a rolling secretariat of Wales' law

schools, but naturally their support for such an initiative is imperative. It also implies that the law schools will have a key role to play in the future development of the legal sector and justice system in Wales, not only as the educators of our future lawyers. A better understanding of what law schools may be willing to contribute and of how the legal sector could better collaborate with them is, therefore, something that needs early consideration.

Role of Legal Wales

Finally, we are very conscious that there is potential for considerable overlap between the proposed Law Council and the role of the Legal Wales Foundation which we suggest may benefit from further reflections and discussions.

Legal Wales has played an important part in the development of the legal infrastructure referred to above. Its ability to bring together the most senior and influential members of the justice system is unsurpassed.

However given its composition (in particular perhaps the role of the judiciary), we understand that it is often not appropriate for it to agree upon a policy and make representations in support of that policy. This is almost inevitably going to be an issue also for the Law Council of Wales (for example because of the involvement of the Welsh Government) and this is also a matter that would require early consideration.