

Independent Commission on the Constitutional Future of Wales: report of the justice sub-group

Summary

The evidence suggests that justice, and in particular criminal justice, is a major pressure point in the current settlement. The Thomas Commission made a strong case for devolution, and the sub-group has seen no counter evidence, apart from that from the UK Government in the letter from Lord Bellamy of 23 March 2023. That letter argued that the current system works well and that change would reduce efficiency and increase cost.

This goes against the weight of the evidence set out in the Thomas Commission report in 2019 and more recent research by the Wales Governance Centre. The latter has put the spotlight on high incarceration rates and friction where officials of both governments try to collaborate in spite of complex overlapping accountabilities.

The evidence provided to the group suggests that there could be significant gains in delivery of preventative and penological criminal justice policy through improved policy coordination, governance, transparency and accountability if justice responsibilities were devolved, as they are in Scotland and Northern Ireland.

In relation to those services most closely linked to devolved services, ie policing, probation and youth justice, devolution could be achieved with minimum disruption in the space of the next Parliament.

Devolving these services should form the first part of a staged programme of justice devolution over a 10 year period, to be delivered jointly by the UK and Welsh governments.

Structure

Part 1 of the paper sets out the group's approach, Part 2 its findings. The work of the group and evidence commissioned is set out in the Annex. The members of the sub-group are:

Commissioners: Laura McAllister, Leanne Wood, Lauren McEvatt, Kirsty Williams.
Expert Panel: Emyr Lewis, Hugh Rawlings

1. The sub-group's approach

The group was able to draw on the work of the Thomas Commission which reported in 2019 and provided a comprehensive set of recommendations, supported by a strong evidence base, from which to work.

The Thomas recommendations for the devolution of justice and policing rested on two arguments of principle:

- Constitution: Wales is an outlier (a ‘two-legged stool’) in having a legislature and executive but lacking a legal jurisdiction and justice powers.
- Policy and delivery: most of the service on which the justice system relies for prevention and rehabilitation (housing, health, education and training) are devolved, but justice agencies are accountable to the Home Office (for policing) and MoJ- creating complexity and incoherence.

The subgroup’s starting point was that Thomas had made a powerful case for the devolution of justice, based on constitutional and policy principles, but did not focus on the practicalities of implementation. The sub-group felt that it could best add value by focusing on this aspect, including timing and potential staging.

The UK Government does not accept the Thomas Commission recommendations and made the counter case in a letter of 23 March 2023 from Lord Bellamy, Parliamentary Under Secretary of State in the Ministry of Justice, in reply to a letter from the Co-Chairs seeking clarity on the UKG’s position.

In evidence to the Senedd Legislation, Justice and Constitution Committee in December 2022, Lord Bellamy said that the disruption entailed by devolution of justice would not be justified in the public interest. His letter defends the performance of the current system and argues that devolution would reduce efficiency and increase cost. His reply does not mention probation or youth offending, or comment on the responsiveness of prisons in Wales to the needs of Welsh prisoners.

The same case was made to the Commission by the Secretary of State for Wales. The Co-Chairs wrote to the Home Office minister for policing in March 2023 seeking views on devolution, but at the time of writing, no reply has been received.

The devolution of justice would entail conferring legislative and executive powers on the Senedd and Welsh Ministers, the former by removing the relevant reservations in GOWA 2006 as amended by the Wales Act 2017, and the latter by transferring the executive powers and budgets for justice services.

There are distinct considerations in relation to each part of the justice system: policing, probation, youth justice, prisons, courts and tribunals, CPS.

Our engagement suggests there may be concern that devolving responsibility for justice might lead to a significant divergence in criminal law as between Wales and England. We do not believe such divergence would be likely (although as with all devolved matters, that would be a choice for the elected Members of the Senedd and the Welsh Government to make). The argument for devolution of justice lies not in the room it might create for changes in substantive criminal law, but in the

possibility of more effective policies for prevention of offending and re-offending, and the management of offenders. At present the Senedd is prevented by provisions in the Government of Wales Act 2006 from legislating on the most serious crimes and the fundamental principles of criminal liability. There would be an option to retain such limitations under a scheme of devolving justice to Wales.

2. Findings from the evidence

How devolution could be achieved

The full devolution of responsibilities for justice and policing would be a substantial undertaking, needing an estimated 10 years to complete. It should be given effect through a joint programme of work, with an agreed long-term objective, between the Welsh Government and the UK Government, in partnership with workforce representatives. If properly planned, disruption could be kept to a minimum.

Devolution should be staged but not piecemeal. It should build on the capacity already in place, with flexibility for staff transfers and secondments to build up WG expertise. The staging should start with those services closest to devolved services and where the relevant operational units can most readily be transferred to the Welsh Government, these are policing, probation and youth justice.

Policing

Policing is the most straightforward candidate for devolution, on the following grounds:

- Devolution of policing is supported by the four Welsh Police and Crime Commissioners.
- Some 40% of Welsh police spending is funded by the UK Government with the remainder funded by the Welsh Government and local authorities (2023-24 estimates). The transfer of the UK Government element would need to be negotiated between the two governments, but with goodwill this should not be problematic.
- The Welsh Government supports many policing activities, including by funding Police and Community Support Officers since 2011.
- The four police services work closely in partnership with the Welsh Government and local authorities, including through the National Policing Board chaired by the First Minister; accountability for this work could be transferred to the devolved institutions with minimal disruption. Welsh police forces' relationship with the National Crime Agency, and UK wide collaboration on anti-terrorism and serious and organised crime could continue as now.
- The Welsh police services could continue to participate in England and Wales arrangements for police training and regulation; this should be straightforward to negotiate.

Probation

Like policing, the probation service works closely with devolved services and could be transferred to the Welsh Government with minimal disruption. Following agreement in principle between the two governments, work could begin on designing a governance and accountability structure for a Welsh probation service, building on work underway by the Welsh Centre for Crime and Social Justice.

In his foreword to the 2022-23 Annual Report of HM Inspectorate of Probation, the Chief Inspector makes a number of observations of relevance to devolution. He notes the challenges facing the service after the upheaval of four major structural reorganisation in 20 years, and expresses concern about the impact of the new, merged 'One HMPPS' structure for prisons and probation. He notes that:

'Past experience with the National Offender Management Service (NOMS) is that the day-to-day operational and political demands of the prison service can all too easily distract from the Probation Service and its particular (and very different) needs.'

'While I recognise that another reorganisation of the service, and any shift in this direction would have to be with the explicit agreement of local managers and staff, I think the time has come for an independent review of whether probation should move back to a more local form of governance and control, building on the highly successful lessons of youth justice services – 70 per cent of which we rated as 'good' or 'outstanding' last year.'

Devolution would be relatively straightforward in practice for the following reasons:

- a Welsh probation structure and budget already exists within the HMPPS and could readily be transferred to the Welsh Government.
- the preventative ethos of the probation service is closely aligned with the policies of the Welsh Government and the wider Welsh public service.
- there would be an opportunity to create a structure for a Welsh probation service, in collaboration with staff, to achieve the strong partnerships and operational flexibility advocated by the Chief Inspector, as discussed above.

Youth justice

Youth justice provision is closely aligned with devolved priorities and services such as education, training and young people's rights. Executive powers in relation to the Youth Justice Board and local youth offending teams could easily be transferred to the Welsh Government. The devolution (ie non-reservation) of legislative powers in relation to youth justice would need to be disentangled from the wider powers and the findings of work commissioned by the Welsh Government from Prof Jonathan Evans will help inform this aspect.

Courts and Tribunals

The Courts and Tribunals Service and judicial appointments are responsibilities where the linkages with the Welsh Government are less well developed. Devolution would enable policy and delivery to reflect the priorities and demography of Welsh communities, and to be aligned with Welsh Government support for enhancing information and advice services. The sub-group did not take evidence on this aspect,

which it sees as a candidate to follow policing, probation and youth justice in a staged programme. The timing of devolution could be linked with creation of a distinct legal jurisdiction for Wales, further discussed below.

Prisons

Devolution would enable policy and delivery on sentencing, rehabilitation, alternatives to incarceration and arrangements for discharge, to be developed holistically at the Wales level. But transferring this responsibility would present significant challenges and would probably need to be given effect towards the end of the staged process.

The management of the prison estate could be tailored to the needs of Welsh prisoners, and the practice of using Welsh prisons as an overspill facility for England, could cease. But this would require a period of transition, in partnership with the UK Government and HMPSS, and the necessary legislation and planning could not be achieved in one Parliamentary session. The funding transfer negotiations would need to take full account of the capital requirements of the Welsh estate, including the replacement of Cardiff and Swansea prisons.

Jurisdiction

Whether (and when) the devolution of justice should be accompanied by a formal legal designation, of a Welsh legal jurisdiction, distinct or separate from the English legal jurisdiction, is a matter of debate between experts and stakeholders.

At present, there is an England and Wales jurisdiction, with a single courts system, and the growing body of law produced by the devolved institutions forms part of the law of England and Wales (although it only applies in Wales).

Some experts argue that designating a Welsh jurisdiction is desirable on practical grounds to clarify the difference between English and Welsh law, and is essentially a technical matter, a necessary consequence of legislative devolution for Wales.

Others believe both that the England and Wales jurisdiction is an internationally recognised brand, of considerable value to Welsh law firms, and that creating a distinct or separate jurisdiction would have broader constitutional implications (although we did not receive evidence to this effect).

The sub-group discussed this with former Supreme Court Judge, Lord Neuberger, who said that creating a Welsh jurisdiction would present no major problems for the judiciary. The barristers we spoke to argued that a Welsh jurisdiction would create new opportunities to strengthen the legal profession in Wales and create more incentives for ambitious practitioners to stay in or return to practice here. The Law Society took the view that devolution would enable a practical problem-solving approach to the justice system. Regulatory regimes for the legal professions could continue to operate on an England and Wales basis.

The sub-group's view is that a de facto Welsh jurisdiction is developing organically but will need in due time need formally to be created by statute as part of the staged programme of devolution we advocate. It is not such a high priority on accountability and delivery grounds as the services highlighted above and could be achieved in the

latter part of the staged programme. If Commissioners agree, our final Report should make clear that a new Welsh jurisdiction would be based on common law principles and traditions; the analogy would be with the Northern Irish jurisdiction rather than that of Scotland, which has a different heritage.

Funding

There should be agreement between the two governments that the funding transfers required in relation to each service will be demonstrably fair to both parties, with provision for independent arbitration if needed, and scrutiny by the Senedd.

Data

The sub-group received evidence that the paucity of data on the performance of the justice system in Wales is a significant barrier to improvement and to accountability. Currently research relies on Fol requests to access data on a Wales basis- This should be addressed by publishing the key indicators on a regular basis.

Capacity and capability

The Welsh Government has expanded its capacity in response to the Thomas report, and there are significant building blocks in place. But serious planning can begin only when the UK Government agrees to the principle of devolution. Legislation to that effect should be presented in the first session of the next Parliament, with provision for staged implementation based on inter-governmental agreement on the time and process needed for effective delivery.

Conclusions

The conclusions of the sub-group are as follows:

There are grounds for concern about the performance of the justice system in Wales (as documented by the Thomas Commission in 2019 and by Prof Richard Wyn Jones and Dr Robert Jones in 'Justice at the Jagged Edge' October 2022). But the case for devolution does not rest only on those problems. The election of a new UK government with different policies and priorities would not necessarily secure significantly better outcomes for Wales.

The case for devolution rests on weaknesses in governance, policy coherence and accountability at the Welsh level. These would persist whichever party formed a government in Westminster. Personal commitment by individuals in devolved and reserved services can only mitigate the consequences of structural failings which result from incoherence in the allocation of statutory responsibilities between the two governments. Furthermore, the England and Wales justice system faces major challenges, of funding and leadership, and in tackling these, Wales will always be a relatively low priority for the UK Government. With devolution, there would be scope for innovation and reform, building on the expertise of the justice workforce and national and local stakeholders such as local authorities and health boards.

The group received no convincing evidence to counter the conclusions of the Thomas Commission that justice and policing should be devolved to the Senedd and Welsh Government.

Devolution of all the component services would be a substantial medium term project, but with careful planning and preparation, jointly by the two governments, could be achieved with minimum disruption to services on the ground. The most straightforward candidates for early devolution would be policing, probation and youth justice.

Devolution would entail the transfer of existing services to the Welsh Government, together with the creation of capacity in the Senedd and the Welsh Government to exercise the new responsibilities. This would not be cost-neutral, and there would be pressures on the Welsh Government to enhance what are recognised to be significant gaps at present.

But the plans being developed for an enhanced Senedd make provision for the additional scrutiny required, and policy capacity would build on that already in place in the Welsh Government. In the medium to long term, devolution would enable savings from more coherent, preventative and locally responsive policies, accountable to the people of Wales.

The two governments should agree a joint project to publish Wales specific data on a regular basis, to inform scrutiny and performance improvement.

Annex

Evidence

The evidence underpinning the sub-group's findings includes that received by the sub-group and by the full Commission in 2023, and evidence from Lord Thomas, Dr Rob Jones and Gordon Brown and Jim Gallagher in 2022.

The sub-group held evidence sessions on 23 March, 27 April; and 25 May, covering the following topics:

Sub-group 23 March

Legal Services Commission – implications of devolution for solicitors' training and regulation

Welsh Government officials – progress on devolved aspects of Thomas, preparedness for further devolution

Justice Unions (Probation Officers' Association, Police Federation, Prison Officers' Association, Public and Commercial Services Union) – workforce views on devolution.

Sub-group 27 April

Lord Neuberger- constitutional aspects of justice devolution

Rhodri Williams KC and David Hughes- implications for the Bar

Sub-group 25 May

Law Society

Dafydd Llywelyn, PCC Dyfed Powys

Evidence to the full Commission on justice and policing

25 April: PCCs

6 June: Counsel General

6 June: Lord Bellamy.