

**Inquiry into the establishment of a separate Welsh jurisdiction  
Response from The Law Society**



Cymdeithas y Cyfreithwyr  
The Law Society

**Wales:  
Separate Jurisdiction**  
February 2012

cefnogi  
cyfreithwyr

supporting  
solicitors

The Law Society is the representative body for 150,128 solicitors in England and Wales<sup>1</sup>. The Society represents and supports solicitors, negotiates on behalf of the profession and lobbies regulators, government and others.

In Wales, The Law Society has a permanent office which is resourced to enable solicitors across England and Wales to respond to both law and policy consultations and to respond to current legal issues both stemming from the devolution of law-making and consequent upon a developing and distinct legal community.

## **A. Overview**

This inquiry by the Constitutional and Legislative Affairs Committee ("the Committee") is welcomed. Our interest in the development of law-making and the administration of justice in Wales is broad and is reflected in our work with the National Assembly for Wales, the Welsh Government, stakeholders in public life in Wales and in our annual lecture at the National Eisteddfod, which has provided a platform for the raising of issues related to the development of devolution.

Our members' views on a separate Welsh jurisdiction and, indeed, the separation of the Welsh jurisdiction from the jurisdiction of England and Wales vary and over the coming months we are undertaking our own work to raise the debate within the profession in order to ascertain these views. Our response to this inquiry is not intended to be a position statement on the principle of a separate jurisdiction for Wales but a response which aims to assist the Committee with its consideration of the nature and implications of a separate jurisdiction by outlining some of the key considerations and options that exist.

## **B. Response to the terms of reference**

### **B.1 the meaning of the term "separate Welsh jurisdiction"**

A legal jurisdiction in its simplest form is a justice system, it is the system for delivering justice and can be defined territorially. A "separate Welsh jurisdiction" would be geographically defined but how far would its legal remit extend?

The First Minister has claimed "criminal justice need not be devolved for there to be a Welsh jurisdiction"<sup>2</sup>. In Northern Ireland there was a separate court system with full law reform support falling under their Department for Finance and Personnel before the recent devolution of criminal justice which sits in the Northern Ireland Department

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<sup>1</sup> Total number of solicitors on the roll as of 31 July 2011 - Law Society Annual Statistical Report

<sup>2</sup> Law Society Annual Lecture National Eisteddfod of Wales Cardiff and District 2008  
Carwyn Jones AM, Counsel General Law in Wales: The Next Ten Years

for Justice. The two parts have yet to be joined together. Full devolution of a criminal justice system is likely to take time and, if there are to be significant differences in law and procedure between the two systems, is likely to carry significant implications for training and reform across the entire system in Wales. This is likely to be costly and over-ambitious at this stage. The devolution of criminal justice is not considered further in this response.

Looking at a separate Welsh jurisdiction in today's context, therefore, any separation from the jurisdiction of England and Wales will likely be limited to civil law. But, can there be a separation of the machinery of justice where there is a continuation of legal principle and vast areas of coterminous legislation? Although the areas of primary law-making in Wales extend across 20 subjects<sup>3</sup> which directly impact on the lives of people in Wales there is a wide body of law which continues to apply to England and Wales.

In its report the All Wales Convention noted that "the courts in England and Wales are fully competent to consider cases involving the laws of England and Wales, the laws of Wales only and relevant considerations from European Union or common law more generally"<sup>4</sup>. The Committee will be aware of changes within the courts and tribunals service which were usefully described by the Hon. Mr David Lloyd Jones in The Law Society Wales annual lecture of 2010<sup>5</sup>.

There are a number of elements to be considered, which lead to the following questions:

1. First, the substantive law. It is relatively simple for different law to be applied by the courts in a distinct territory, as has been demonstrated by the success in the devolved areas so far. However, a number of questions need to be resolved, particularly in the field of private law where agreements will have been entered into on the basis of a particular understanding of English law. How far will Welsh legislation overturn or amend this understanding? There is also the question of the extent to which Welsh courts are to have jurisdiction in developing a distinct approach to interpreting common law obligations. In principle, there is no reason why Welsh treatment of disputes should not diverge from the existing English and Welsh approach. However, there may need to be clarity over how individual disputes will be treated. Many agreements will have been entered into without any contemplation that a separate Welsh jurisprudence may develop and some provisions will be needed to establish how the courts will deal with disputes over such agreements brought to the Welsh courts by parties, one of which may not reside in Wales or neither of which may wish to be bound by Welsh jurisprudence. There will need to be clarity over the approach of the Welsh system to parties choosing their jurisdiction. It may well be that, as jurisprudence develops, Welsh law will become an attractive alternative to the law of England and Wales but equally parties may choose not have disputes resolved by Welsh law. In public law, these questions are less likely to arise provided there is clarity over which law will apply to which institutions.

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<sup>3</sup> Government of Wales Act 2006 Schedule 7

<sup>4</sup> All Wales Convention Report para 3.9.22

<sup>5</sup> The machinery of justice in a changing Wales the Hon. Mr Justice David Lloyd Jones Senior Presiding Judge, Wales Circuit

2. This leads to the question of the jurisdiction of individual courts. It is assumed that it is likely that Welsh courts will follow usual international practice in enforcing judgements from other jurisdictions. But, a decision will need to be made as to the extent to which courts in Wales will deal with disputes arising involving what will then be English law. It is not clear to what extent it will be necessary for individuals living in Wales to challenge public institutions governed by English law but, if they do, there will be a question as to whether proceedings should begin in Wales or England. However, it is inevitable that some private disputes involving individuals living in Wales will be governed by English law and there will need to be a view taken as to whether the Welsh courts will adjudicate on those disputes and, if they do, what appeal mechanisms will exist. Should there, for example, be a separate Court of Appeal dealing with Welsh law while cases decided under English law go to the Court of Appeal in London? How far should the Supreme Court continue to have jurisdiction?

3. There then follows the question of the procedures to be adopted by the courts. Even if some disputes are to be decided under what will then be English law, it does not necessarily follow that procedures for resolving such disputes will be the same or, arguably, the rules as to costs.

4. These considerations then lead to questions about the character of the judiciary in Wales (and, indeed, of the legal profession) and the extent to which a separation of qualification and appointments mechanisms are needed or whether existing ones can be adapted.

The changes which have led to the current arrangements accommodate the need to have access to justice according to the law in Wales, but a separation from the England and Wales structure would require the establishment of a number of bodies. The Justice department lists around 30 organisations within the justice system which are necessary to its operation in respect of civil law. The structure supporting the judiciary and the courts and tribunals service is extensive and a separate jurisdiction could require the creation and implementation of such a structure including responsibility for areas such as judicial appointments and conduct, and civil procedure and costs.

Wales would need a new department within the Welsh Government to have responsibility for the jurisdiction and to establish an independent judiciary. Speaking in 2009, the Rt Hon Sir Malcolm Pill noted "the judicial arm of the constitution of Wales must be integral to the settlement and not left merely to follow along and comply with it, whatever form it takes"<sup>6</sup>.

As well as the machinery of justice, a jurisdiction denotes the jurisprudence and there are responsibilities following this aspect of a jurisdiction. The growth of the body of law is central to this and the establishment of an organisation to review legislation and recommend reform in the way that the Law Commission does now for England and Wales is crucial to a fully rounded jurisdiction.

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<sup>6</sup> Rt Hon Sir Malcolm Pill Legal Wales Conference Marriott Hotel, Cardiff 9 October 2009

## **B.2 the potential benefits, barriers and costs of introducing a separate Welsh jurisdiction;**

The costs will depend upon the extent to which the Welsh jurisdiction is entirely separate (something that may be easier to achieve in the lower courts than in the county or High Court) or can use the existing mechanism and resources from the current jurisdiction. It may well be a gradual process. In Wales there are already a number of separate Welsh tribunals. These tribunals are demonstrating the pros and cons of a separate system, for example the Welsh policies developed in the areas in which the tribunals operate are readily applied to the hearing and resolution of cases. However, the small number of members of each tribunal does have an effect particularly on the costs e.g. the cost per head of training is likely to be higher. The evidence of the Chairmen of the Welsh tribunals might inform the Committee on the success or otherwise of the operation of these tribunals although the Wales only tribunals do not operate in a way that is directly similar to a Welsh courts and tribunals service<sup>7</sup>.

Another body which gives a useful example of the operation of a separate justice organisation within Wales is CAF/CASS Cymru the family courts service. This is the responsibility of the Welsh Government and knowledge of the experience of running this service may usefully be gleaned by the Committee.

A separate jurisdiction would raise the question of whether there needed to be a separate regulatory system for legal services providers and a different system for qualification. In the context of a smaller legal profession, the costs of this might well be considerable, particularly if a number of its members wished also to practise in England and were to face a double regulatory cost. It might, however, be possible to adapt the existing structures that work for both England and Wales, at least in the first instance, to apply to both jurisdictions. There would be an impact on legal education: would all courses in Wales offer only Welsh legal qualifications? The teaching of a bilingual approach to law-making and the use of Welsh in providing legal services and in representing persons through the courts and tribunals would receive renewed attention.<sup>8</sup>

The Law Society promotes the benefits of the jurisdiction of England and Wales on a global stage. The law in England and Wales is transparent, predictable, flexible and supports the needs of modern commerce; in addition English is the language of international business. These features make England and Wales a highly attractive jurisdiction in which to resolve disputes. By creating a "separate Welsh jurisdiction" the benefits of this might be lost and Wales could be perceived as a difficult place to do business. Conversely, economic and social advantages may flow from developing the legal profession in Wales and in the development of law that is suited to the particular situation in Wales.

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<sup>7</sup> The Hon. Mr Roderick Evans The Lord Callaghan Memorial Lecture 2010 Devolution and the Administration of Justice Swansea University 19th February 2010

<sup>8</sup> See below B3

### **B.3 the practical implications of a separate jurisdiction for the legal profession and the public**

An immediate issue is how solicitors qualified in England and Wales would qualify to practise in the new jurisdiction. Legal services are not within the devolved subjects and any changes would require new legislation on regulation of legal services for the Welsh jurisdiction. This is an area in which the Law Society has particular interest and is under active consideration currently.

Would a separate Welsh jurisdiction create a need for a separate regulatory infrastructure in Wales for the legal profession, e.g. the equivalent of the Solicitors Regulation Authority or could practitioners in Wales remain within the current regulatory system? Regulation of legal services includes record keeping, disciplinary proceedings, supervising legal education providers and dealing with the transfer of lawyers into the jurisdiction. This is of central importance because of concerns regarding the ability of practitioners to move across the border between Wales and England to practise in future.

The relationship between Northern Ireland and England and Wales has been held up as an example of mutual recognition of legal qualification however a practitioner from Northern Ireland cannot automatically practise in England and Wales. The Solicitors Regulation Authority require application through its Qualified Lawyers Transfer Scheme as for lawyers coming from any other jurisdiction. In the case of Northern Ireland academic qualifications are recognised but a period of training is often required. There would be a need to arrange agreements for recognition of rights of audience so that practitioners in England and Wales could be heard in courts and tribunals in the other country.

Would the legislation on the provision of legal services more generally and the opening up of new markets continue to apply to Wales?

For some time we have advocated "a single database for all legislation applicable for Wales to be compiled and maintained as a public service"<sup>9</sup>. The UK Statute Law Database is held up as an example of such a single portal but it is not well maintained. On many of its pages there are warnings that there have been amendments without the relevant provisions being added. This is not an adequate service. It is apparent that maintaining information on legislation for Wales is not commercially viable and so the task must fall to public provision. There is a need for a comprehensive Welsh Statute Book.

In addition, there is a dearth of practitioners' texts with many commercial publications failing to maintain commentary on Welsh legislation and cases. As time moves on and the body of law increases through new legislation and court decisions, this gap will become more significant.

Devolution is progressing and public awareness increasing but a move to a separate Welsh jurisdiction will require careful explanation. Public access to justice will be changed at its roots although a Welsh legal service is likely to follow the traditions of the jurisdiction of England and Wales it will be separate, it will be new.

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<sup>9</sup> The Law Society Wales Response to the All Wales Convention February 2009

**B.4 The operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system**

We are the Law Society of England and Wales and do not operate within the other devolved legislatures. However, we have links with our colleagues in Scotland and Northern Ireland and it may be of interest for the committee to direct questions to these representative bodies.

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