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**Inquiry into the establishment of a separate Welsh jurisdiction
Response from Mr Emyr Lewis and Professor Dan Wincott (Cardiff University)**

**MEMORANDUM TO THE CONSTITUTIONAL AND LEGISLATIVE AFFAIRS
COMMITTEE OF THE NATIONAL ASSEMBLY'S INQUIRY INTO THE
ESTABLISHMENT OF A SEPARATE WELSH JURISDICTION**

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Summary

- 1.1 Jurisdiction relates to the question of “Who has legal authority within a particular legal framework to do what in respect of what, whom and where?”
 - 1.2 Within the framework of the UK constitution, there already exist a distinct Welsh legislative and executive jurisdiction, and in certain limited areas, judicial jurisdiction through distinct tribunals and other fora for particular types of cases.
 - 1.3 The concept of jurisdiction within the UK is complex. Even the currently recognised jurisdictions can only be said to be “separate” up to a point.
 - 1.4 There already exists such a thing as a body of law which applies to Wales. The differences between this and the law which applies in England are likely to increase over time.
 - 1.5 It is essential that Courts in Wales decide cases on the basis of distinct Welsh Law and that Lawyers can advise and represent their clients on this basis.
 - 1.6 There is a need to plan now for the increasing divergence that appears to be an inevitable consequence of political reality.
 - 1.7 Whatever happens, lawyers advising clients in Wales and judges hearing cases in Wales must have the necessary knowledge of Welsh law.
 - 1.8 Jurisdiction over only devolved matters, as in a federal state, would not be in accordance with the UK model, and could create intractable problems.
 - 1.9 Detailed analysis is needed of how cross-border issues work between current UK jurisdictions, and how these might work for a Welsh jurisdiction and of the likely economic costs and benefits of a distinct Welsh jurisdiction.
 - 1.10 If there were to be a distinct Welsh jurisdiction, the Northern Ireland model seems a suitable precedent. This would have implications for the Supreme Court.
2. **The word “jurisdiction”**
 - 2.1 The word “jurisdiction” is capable of meaning several different things, and of being applied in several different contexts.
 - 2.2 For instance, at one end of the scale, in international law, jurisdiction is spoken of as an aspect of the sovereignty of states. States are said to have legislative, executive or judicial jurisdiction in respect of their territory and their people. This means that they have the legal authority within the framework of international law, to make, to implement and to enforce binding laws which apply at least within their territory, and may apply in respect of their people outside their territory. In this context, jurisdiction is described as an aspect of the sovereignty of the state.
 - 2.3 At the other end of the scale, in the context of Magistrates’ Courts “jurisdiction” is used to describe the extent of the powers of the courts to hear and determine cases etc. So, magistrates are said to have no jurisdiction to hear criminal cases of particular kinds, which must be heard in the Crown Court. Magistrates’ Courts in coastal areas have jurisdiction in respect of certain crimes committed on board ship. Before the law was changed in 2006, Magistrates’ Courts had jurisdiction to hear civil cases only in relation to their local area.
 - 2.4 If there is a general theme which runs through these uses of the word, it is the question “Who has legal authority within a particular legal framework to do what in respect of what, whom and where?”
 - 2.5 So, if we look at Wales today, we can say that:

- 2.5.1 the Welsh Assembly has legislative jurisdiction by having legal authority to make laws relating to the subjects in Schedule 7 of the Government of Wales Act 2006; which apply only in relation to Wales and which do not extend beyond England and Wales;
- 2.5.2 the Welsh Ministers have executive jurisdiction by having legal authority to take executive action within Wales in respect of the areas devolved to them.

3. **“Separate” Jurisdiction**

- 3.1 In the context of recent developments in Welsh law, the word “jurisdiction” has tended to be used in the context of a “separate” or “distinct” legal jurisdiction for Wales, referring to the creation (or possibly, more accurately, re-establishment) of a distinct system of courts for Wales.
- 3.2 In considering jurisdiction, it is useful to bear in mind, however, that jurisdiction in the sense of legal authority to do things can be quite a complex and many-layered phenomenon. For instance, jurisdiction may be exclusive or not exclusive, conditional or unconditional.
- 3.3 So, for instance, the Welsh Assembly’s legislative jurisdiction is not exclusive, since the UK Parliament retains concurrent power to legislate over all devolved areas (the requirement for Assembly consent if Parliament legislates is a matter of convention, not law). The Welsh Ministers’ executive jurisdiction is in some cases exclusive, in others concurrent with UK Ministers and in others conditional on Treasury consent.
- 3.4 In the case of judicial jurisdiction, there is also variety and complexity.
- 3.5 In the Court system, the Courts of England and Wales, of Scotland and of Northern Ireland have exclusive jurisdiction over most cases which arise in the respective territories, but they are all subject to the ultimate authority of the Supreme Court of the United Kingdom, and all these courts are subject to, and can be overruled by, the European Court of Justice in certain cases.
- 3.6 Outside the Court system, in some areas, it can be said that a distinct Welsh jurisdiction already exists. In many areas, there are distinct Welsh Tribunals or other fora, with jurisdiction over Welsh cases. Some of these are administered by the Welsh Government, some are not. One tribunal has been created by legislation of the Welsh Assembly, and has no counterpart outside Wales.¹ There is no reason why other tribunals (or indeed arguably courts) cannot be created by the Welsh Assembly to resolve cases relating to matters within its legislative competence.
- 3.7 So it is important to recognise (1) that a jurisdiction for Wales would only be separate up to a point; and (2) in respect of certain limited cases, there is already a distinct Welsh jurisdiction.

4. **A body of “Welsh law”**

- 4.1 Many of the most strongly articulated arguments for and against introducing a distinct jurisdiction (including some of those quoted in the Committee’s scoping paper) are based on principle. Our focus in the rest of this paper is largely on what appear to us to be practical aspects of the question. We consider it worthwhile nevertheless to address one argument of principle, namely that notwithstanding devolution there is only one law of England and Wales, and consequently there should be only one system of courts.

¹ See section 120 Welsh Language (Wales) Measure 2011

- 4.2 It is stated that in the UK there are three legal jurisdictions: (1) England and Wales, (2) Scotland and (3) Northern Ireland.² Each jurisdiction has its own body of law, and its own court system. In the case of Scotland, Scots law (and Courts) pre-dates the union, and differs in many fundamental respects from the law of England and Wales. In the case of Northern Ireland, there is less difference in substantive law. The separate Northern Ireland Courts have their origin in the Government of Ireland Act 1920, which effected the partition of Ireland. Previously there had been one system of courts in Ireland. Even after 1920, there remained an all-Ireland Court of Appeal.
- 4.3 A striking example of the way in which the twin issues (a discrete body of law and a separate court system) are brought together in discussions of a “separate” or “distinct” jurisdiction for Wales can be found in an extract from a joint Memorandum from the then Secretary of State for Wales and the then First Minister for Wales to the Welsh Affairs Committee, as quoted in paragraph 374 of the Explanatory Notes to the Government of Wales Act 2006. The extract (appended to this Note) explains that a “conferred powers” as opposed to a “reserved powers” model of legislative devolution is appropriate to Wales because England and Wales is (and implicitly should remain) a single jurisdiction. The link between separate laws and a separate jurisdiction is made explicit in the following passage:
- If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions.*
- 4.4 It is worth noting that the devolution dispensation in Wales has been subject to very rapid and far-reaching change since 1998 – and particularly since 2006. The evidence suggests that at the time of drafting the architects of the Government of Wales Act 2006 expected Part 3 to remain in force for a considerable period of time, as did many commentators. The Explanatory Notes might be read as referring to the highly original, and arguably idiosyncratic, systems of competence transfer and legislation created for Wales under Part 3 of the Government of Wales Act 2006 (at least in the early years of Schedule 5), but might be regarded as rather less persuasive in relation to Part 4. (Moreover, some commentary on the ‘jurisdiction’ question between 2006 and 2011 (and in particular the referendum on the switch from Part 3 to Part 4) may have been predicated on an assumption of Part 3 remaining in force for rather longer than it did.)
- 4.5 In the context of the present legislative powers of the National Assembly, the view expressed in the Explanatory Notes needs to be considered in the light of two significant aspects of Part 4 of the Government of Wales Act 2006 (which came into force after last year’s referendum);
- 4.5.1 The Assembly can legislate in respect of matters which **relate to** subjects under headings in Schedule 7
- 4.5.2 This applies unless Schedule 7 **expressly excludes** a particular matter, or another part of the 2006 Act **expressly restricts or prohibits** the Assembly from legislating.
- 4.6 This means that the *basic principles of law and rules of law of general application* to which the Explanatory Note refers, and which it appears to consider immutable, can themselves be changed by a provision of an Act of the Assembly, provided the enactment in question relates to a Schedule 7 subject, and the change is not excluded by Schedule 7 or otherwise restricted or prohibited.
- 4.7 An example is given by the law in relation to the smacking of children.
- 4.7.1 Parents (and others *in loco parentis*, such as teachers) can avoid conviction for certain types of assault against children if the court accepts that what was happening was reasonable

² Although Himsworth submits that ‘precise authority’ for this proposition is ‘difficult to cite’ and that ‘perhaps the most direct *statutory* reference is now to be found in s 41(1) of the Constitutional Reform Act 2005 (2007) MLR at 33

chastisement of the child. While the scope of the defence has been substantially restricted by Acts of Parliament, the defence still exists and can be said to be a *basic principle of law*, since it forms part of the Common Law of England and Wales.³

- 4.7.2 Under Heading 15 of Schedule 7 of the 2006 Act (Social Welfare), the Assembly has the power to make laws relating to “protection and well-being of children”.
- 4.7.3 If it be accepted that an Act removing the defence of reasonable chastisement in all cases would relate to the protection and well-being of Children, then unless there is an express exclusion, prohibition or restriction which would prevent the Assembly from passing such an Act, the Assembly can do so. There is no such exclusion, prohibition or restriction. Other examples could be given where it would be possible for the Assembly to change *basic principles of law and rules of law of general application*.
- 4.8 It is generally accepted that the law which applies in Wales is already different from that which applies in England, and all the signs are that the differences will increase. If our analysis above is correct, the scope for divergence is perhaps greater than the architects of the 2006 Act envisaged. The adoption of a conferred powers model, as opposed to a reserved powers model, does not decrease the likelihood of a body of law emerging in Wales which is significantly different from the law which applies in England.
- 4.9 It should also be borne in mind, of course, that divergence is not driven by legislation in Cardiff only. Increasingly the UK Government is bringing forward in Parliament England-only legislation in areas where Wales has not seen the need to change the law.⁴
- 4.10 In the light of these developments, it does not appear to us to be a sustainable point of view to say that there is no “Welsh law” and no “English law”, just one law of England and Wales that is substantively different either side of Offa’s Dyke. It may be, as some commentators have suggested, that there comes a “tipping point” at which the degree of difference is such that one can speak of “Welsh law”, and that the point has not yet been reached. That seems however to be more of a metaphysical than a practical approach to the question.
- 4.11 In our view, the practical question is not whether the law of England and Wales retains its mystic unity notwithstanding divergence, but whether there should be a distinct court system for Wales, and if so how should it operate. That, in our view, is what is meant by a distinct Welsh legal jurisdiction.

5. Divergent laws and a jurisdiction

- 5.1 What might the implications of a distinct body of Welsh Law be for the legal system? Whether it be called a separate Welsh jurisdiction or in the words of Jack Straw “organic development of greater autonomy of the Welsh system” at a minimum, it is essential that Courts in Wales decide cases on the basis of distinct Welsh Law – and that Lawyers can advise and represent their clients on this basis as well. From the perspective of individual citizens of or visitors to Wales, it must be the case that they are entitled to expect that the lawyers who advise them and the judges who hear their cases are well versed in the law which applies.
- 5.2 In principle, this might happen within a single ‘England and Wales’ jurisdiction. However, even within this system – and before the shift to Part 4 of Government of Wales Act 2006 – a series of changes to the organisation/administration of the Courts has delineated Wales increasingly clearly as a distinct territory (the changes are described nicely in the call for evidence). Furthermore, in terms of the day-to-day lives of many legal practitioners and their clients, there is already a material difference in many

³ e.g. *R v Griffin* (1869) 11 Cox CC 402

⁴ The legal consequences may be felt in unanticipated areas, which have nothing to do with devolved legislative competence. For instance, it is arguable that recent and proposed reforms in the health system in England are turning health service bodies into economic operators who compete in a market place, with potentially far-reaching consequences for how the law of public procurement and state aid affects them and the NHS in England generally.

areas between what happens in Wales and what happens in England. Legislative momentum and/or inertia in Cardiff and London are likely to increase the difference.

- 5.3 The possibility exists that some elements of a Welsh Judiciary might emerge as judges working within these territorially delineated Courts decide on matters of distinctive Welsh Law. Should this happen in a gradual, ad hoc and unmanaged manner, that is unlikely to be satisfactory. In our view it is preferable to plan now for the increasing divergence that appears to be an inevitable consequence of political reality.

6. Legal Training, Education and the Professions

- 6.1 Regardless of whether a distinct court system is developed, lawyers advising clients in Wales, and judges hearing cases in Wales will need to be able to show that they are competent to do so.
- 6.2 If the concepts of a unified jurisdiction and single law of England and Wales hold sway, it seems to follow that the law which applies in Wales (and how it applies) should be as much part of the training of all professional lawyers in England and Wales as is the law which applies in England (and how that applies).
- 6.3 Should the unified jurisdiction of England and Wales be maintained, there will be nonetheless a need to ensure that lawyers practicing in Wales can demonstrate competence in the law which applies in Wales, including primary law, and have access to appropriate legal training and education. This need will grow as and when the substance of the laws applying in Wales and those applying in England diverge. A test of competence to practice as a lawyer in Wales might become necessary. Similar considerations will apply to the need for special training for judges sitting in Wales
- 6.4 If there were to be established a distinct Welsh jurisdiction, all lawyers qualified in England and Wales at the time of its creation could continue to work in both jurisdictions, and similarly all England and Wales judges might sit in Wales.
- 6.5 The creation of a distinct jurisdiction for Wales would raise questions about the qualifications required to practice as a lawyer within it. There would also be a question about whether lawyers could normally continue to practice on both sides of Offa's Dyke after the creation of a distinct jurisdiction in Wales. Similar considerations would apply to the appointment of judges.
- 6.6 As far as the academic stage of legal education is concerned, there is no reason why the arrangements which currently exist in respect of Northern Ireland should not apply to Wales. This academic stage of the qualifying law degree is basically the same. Students with degrees from law schools in England and Wales are qualified to enter the professional stage of legal education in Northern Ireland (although they must have studied the Law of Evidence, a criterion which would not apply in respect of Wales). The implications of a distinct jurisdiction in Wales for the professional stage of legal education require further consideration.

7. Distinct Jurisdiction over devolved areas only?

- 7.1 Most Federal States within the common law family (the US, Canada, Australia) have both Federal and State jurisdictions and there are Courts of each of these jurisdictions that operate within every State.
- 7.2 The system of jurisdictions in operation within the UK is different, in that (aside from the Supreme Court of the United Kingdom – and previously the Appellate Committee of the House of Lords and, for some purposes, the Judicial Committee of the Privy Council) each of these jurisdictions in effect deals with all matters of law within its defined territory (whether or not legislative competence over that issue has been devolved. Indeed, in the recent era, the jurisdictions have existed without any devolution of legislative competence).
- 7.3 A possible objection to the creation of a distinct jurisdiction (in the sense of a Court system) in Wales might be that it would not be appropriate for issues over which the National Assembly did not have legislative competence – i.e. non-devolved issues – potentially to be decided differently in the Welsh

courts and in the English ones. On the other hand, precisely that possibility exists at the moment in both Scotland and Northern Ireland.⁵

7.4 Furthermore the prospect of squabbles over which court should have jurisdiction seems more likely where jurisdiction is thematically rather than territorially defined. This is even more so given that the conferred powers model of legislative devolution means that it is by no means clear what is excluded from the Assembly's legislative competence.

7.5 It is also conceivable that there could exist separate exclusive jurisdiction in respect of certain types of cases. It could be argued for instance that, even if nothing else happens, the Administrative Court in Wales should have exclusive jurisdiction over judicial review cases in Wales. The current arrangements require cases which relate to Wales but are issued in London to be transferred to Wales, but it can take a disproportionately long time before the papers reach a judge who makes a decision on the transfer.

8. **Barriers and Costs - the need for detailed analysis**

8.1 In order to understand properly the implications of a distinct Welsh jurisdiction, there is a lot of detailed work that needs to be done. In our view, the two areas which require the closest attention are cross-border issues and costs.

8.2 Jack Straw, as quoted in the Committee's scoping paper, has spoken of "enormous practical implications" of a move to a separate Welsh jurisdiction. The issues he raises are largely technical matters relating to the relationship between the courts in England (where, of course, a new jurisdiction will also be created) and those in Wales. He is undoubtedly right in raising the issues. Once more, however, there are precedents. There is no reason in principle why cross-border issues between Wales and other jurisdictions within the UK should not be treated in the same way as those between the three existing jurisdictions. We need to understand how these work, and whether and to what extent they would need to apply differently to Wales, bearing in mind for instance that Wales' land border with England is longer and more densely populated than Scotland's.

8.3 In relation to costs, there is a need for a detailed analysis of the current economics of the administration of justice in England and Wales. Suitable methods for allocating current expenditure equitably between England and Wales would need to be considered in order to determine how much better or worse off Wales might be if it had its own court system with its own budget. To what extent might savings in London overheads be outweighed by loss of economies of scale? To what extent might it be possible to direct funding to issues such as ensuring access to justice to people in remote and deprived communities?

9. **The possible components of a Welsh jurisdiction and the impact on the Supreme Court**

9.1 If the Northern Ireland model were to be followed, there would be a Welsh Lord Chief Justice and Court of Appeal, mirroring the position in England and Wales. Equity suggests, and we would agree, that Wales should have the same model, but it need not necessarily be so. We consider, however that a Welsh Law Commission would be essential, in that it would be able to prioritise consideration of those issues which are important for the people of Wales.

9.2 A further set of questions is raised about The Supreme Court of the UK. There is some debate in Scotland about whether this Court (particularly in bringing together roles played by the House of Lords and the Judicial Committee of the Privy Council) is (or is becoming) a UK Court, as its name might suggest (whereas the House of Lords was understood to sit as a Scots Law court in relation to Scottish cases). At present the membership of the Supreme Court is usually understood to include members representing each of the three jurisdictions (one Northern Ireland and two Scots as well as the "England and Wales" judges). Should a Welsh jurisdiction be created, there might be a presumption that there

⁵ Indeed, in the case of Scotland, Himsworth makes a powerful argument that the jurisdictional difference as between 'Scotland' and 'England and Wales' has generated instances in which different forms of citizenship rights have emerged from the same non-devolved law on either side of Hadrian's Wall.

should also be a Welsh judge on the Supreme Court. It could also be argued that the existence, and over time the growing significance, of a distinct body of Welsh primary law might suggest that there should in any event be a judge with expertise in Welsh law on the Supreme Court.