

Submission to the Commission on Justice in Wales

June 2018

1. About the Institute of Welsh Affairs (IWA)

- 1.1. The Institute of Welsh Affairs is an independent think tank. Our only interest is in seeing Wales flourish as a country in which to work and live. We are an independent charity with a broad membership base across the country. We aim to bring people together from across the spectrum in a safe space where ideas can collide and solutions can be forged in our five priority areas: the economy, education, governance, health and social care, and the media in Wales.

2. The IWA Governance Policy Group

- 2.1. The IWA Governance Policy Group guides and informs the IWA's governance policy priorities. Its members include practitioners, academics and policy professionals with expertise across a diverse range of governance platforms and issues. A list of members is available on request.
- 2.2. The purpose of the IWA Governance Policy Group is to provide ambitious, constructive and challenging ideas to improve the governance of Wales so that there is measurable improvement in people's lives.

3. Summary of key points

- 3.1. The present unified jurisdiction does not serve Wales well. It is fundamentally English and accommodates Wales and the Welsh language when it has to. Its institutions, policies and attitudes are based on a one-size-fits-all approach which is driven by the needs of large English conurbations.
- 3.2. Wales needs a justice system which reflects and is able to adapt to its rapidly changing constitutional position and which is tailored to Wales' demographic, geographic, socio-economic, societal and linguistic characteristics. We encourage the Commission to draft a blueprint for a justice system which responds to and meets the needs of the people and communities of Wales.
- 3.3. We acknowledge that the kind of justice system which Wales will need cannot be created overnight. However, elements of the justice system should be devolved/decentralised in the short term and should not await further constitutional change. The devolving/decentralising of other elements of the system should take place over a longer period but

we are convinced that in approximately ten years Wales will require its own judiciary up to Court of Appeal level with provision for a member of the Welsh judiciary to be a member of the UK Supreme Court.

4. The administration of justice in Wales

- 4.1. The administration of justice consists of a wide range of different but inter-related functions and institutions. These include policing, prosecution services, prisons, the probation service, responsibility for youth justice, courts and tribunals and their administration, judicial and quasi-judicial office holders and the processes for appointment to these offices, the law and the way law is made, the legal profession and legal education. This is not an exhaustive list and many of these functions and institutions interact with other agencies and services whose activities are connected to the justice system e.g. local authorities, health and education. Relevant to all is the provision of the Welsh Language Act 1993 that in the administration of justice the Welsh and English languages should be treated on a basis of equality.
- 4.2. In Scotland and Northern Ireland the administration of justice is, broadly speaking, a devolved matter. In Wales, it is not. However, the UK government has agreed proposals for the devolving responsibility for aspects of criminal justice and offender management to Greater Manchester Combined Authority (GMCA) and the Mayor/Police and Crime Commissioner. The 'devolved' areas include greater involvement in future plans for local courts together with aspects of Youth Justice and the prisons and probations services. The purpose of these proposals is said to be to allow GMCA to drive forward important improvements by more closely integrating health, education and accommodation, with police, Crown Prosecution Service, the courts, prisons, and probation services. The asymmetry of devolution within the UK, as exemplified by the different arrangements for the administration of justice in Scotland, Northern Ireland and Wales, will be further heightened if aspects of the administration of justice are devolved to English cities and mayors and the present arrangements, or a tweaked version of them, continue for Wales. The anomalous position of Wales will become more so.
- 4.3. In recent years, the administration of justice in Wales has developed something of a Welsh identity due to the progress of devolution. Examples of the changes referred to as manifestations of this developing Welsh identity include:
 - the creation of Welsh Committees of the Judges' Council and of the Judicial College;
 - the establishment of a Wales Judicial Circuit (formerly the Wales and Chester Judicial Circuit) and of the Association of Judges of Wales;

- sittings of both divisions of the Court of Appeal in Wales;
- the appointment of a president of Welsh Tribunals;
- the establishment of an office of the Administrative Court in Cardiff, and the issuing of a protocol to ensure the transfer of Welsh claims to the Administrative Court in Wales of all but exceptional cases;
- when NOMS in Wales was created the UK government said that its purpose was to make sure all organisations delivering services involving prisoners in Wales work closely together and that they would work with the Welsh Government to ensure that what they delivered was in line with the policies the Welsh Government creates for the people of Wales;
- the engagement of the Welsh judiciary in civic occasions such as the opening of a new Assembly.

4.4. These and other such developments are to be welcomed but many of them depend upon the presence in a position of influence of someone who is sensitive to the needs of Wales rather than being the result of an embedded understanding of those needs in the decision-making authorities in London. Relying on fortuitously well-disposed and informed personnel to deliver a justice system which responds to the needs of the Welsh people is a flimsy safety net wholly inappropriate to the role of a modern justice system. Fundamentally, the administration of justice in Wales is an English, London-based function which accommodates Wales and the Welsh language when it has to. Examples abound. By way of example only:

- Policies, ranging from those relating to court closures to crime prevention are based on the size and needs of large conurbations in England. Court closures in Wales have meant that some litigants and witnesses have to undertake three hour journeys by public transport to get to court while others have to travel the day before and stay in a bed-and-breakfast to ensure they are in court in time on the day of their hearing;
- There is no ability for Welsh policy-makers to tailor the system to the needs of the community that they understand, so making those policies more effective in terms of outcomes and of costs;
- The Ministry of Justice took advantage of a campaign to build in north Wales a multi-purpose prison to meet Welsh needs to site a large prison in Wrexham intended to replace the decaying prison estate in the north of England. The result is that the prison estate in Wales remains inadequate to accommodate all Welsh domiciled prisoners. There is still no prison accommodation in Wales for female prisoners. Welsh prisoners, who are treated as part of the

general prison population, are moved around the prison estate of England and Wales with little, if any, regard for community and family ties and their importance to rehabilitation;

- Wales is treated just as another circuit of England for the deployment of High Court Judges;
- Judges of all levels are able to sit in Wales without any prior knowledge of Wales or even a basic ability to pronounce the names of the places relevant to the case being tried or the names of the people appearing before them. Is it, for example, acceptable that a judge appointed to try family cases in Wales comes to Wales to do so without knowing that some families in Wales live their lives through the medium of Welsh, that some children are educated in Welsh medium schools and that when the family unit breaks down whether a child continuing in Welsh medium education can be regarded by one or other of the parents as an important issue?;
- Some Welsh cases, at first instance and on appeal, continue to be heard in London which means that employment, career structures and the broader economic benefit that would arise from a Wales based system for the administration of justice are lost to Wales;
- Half a century after the passing of the first Welsh Language Act and a generation after the 1993 Act's provision that in the administration of justice in Wales the two languages should be treated on the basis of equality, we still have a situation in which, for practical purposes, a person who wishes to use Welsh in the Crown Courts of Wales is treated like a foreigner and Welsh citizens having dealings with the court system are asked whether they wish to be communicated with in English or "bilingually".

5. The constitutional position of Wales

- 5.1. If one regards Wales as no more than a part of England few, if any, of the above issues are of great significance. Why should Wales be treated differently from other circuits of England? Parts of England are as rural as parts of Wales so why should Wales expect a different policy in relation to court closures from that which applies in England? Is the fact that Wales lacks the number and size of England's cities, has what is regarded as difficult geography and has a small minority which wishes to use a different language, enough to justify different treatment?
- 5.2. Few, publicly, express such views today. The days of "For Wales, see England" are gone. The constitutional position of Wales, if nothing else, requires that Wales is considered separately from England and,

where appropriate, receives different treatment fashioned specifically to meet the demographic, geographic, socio-economic, societal and linguistic characteristics of Wales rather than an application of “one size fits all” policies across the England and Wales jurisdiction.

- 5.3. Wales’ constitutional position is changing rapidly. The present form of devolution is but twenty years old and already we have had several fundamentally different constitutional “settlements”. Few in 1998 would have foreseen that within twenty years Wales would have progressed from an Assembly with little more by way of powers than those inherited from the Welsh Office to a primary law making body with tax raising powers and a government in Cardiff whose policy is to work towards the creation of a Welsh jurisdiction.

6. Aims for a justice system for Wales

- 6.1. Changes in the system for administering justice in Wales should have among its aims:

- allowing decisions on justice in Wales to be taken by institutions based in Wales that properly understand Welsh society and its needs;
- bringing the institutions of justice closer to the citizens of Wales to ensure easy access to justice;
- ensuring the justice system is able to develop to support and reflect Wales’ changing constitutional position in the United Kingdom;
- ensuring that the justice system develops in a way which maximises its contribution to Wales’ economy.

- 6.2. There are arguments for and against Wales developing a separate legal jurisdiction, a distinct legal jurisdiction or remaining an integral part of the present unified England and Wales jurisdiction with minor differences to acknowledge that Wales is Wales. It appears to us that the third option is where we are today and that this arrangement does not secure the four aims set out above. What is needed is a more radical approach but we realise that developing a justice system suitable for Wales cannot be done overnight. We, therefore, suggest that the Commission approaches its task by drafting a blueprint for a justice system in Wales which meets the above aims, is flexible enough to develop to reflect further constitutional changes and by setting a time table for the necessary devolutionary or decentralising changes in those parts of the system which need not await further constitutional change to be implemented.

7. Implementing a justice system for Wales

- 7.1. Arguments about changes to the justice system in Wales – whether jurisdictional, devolutionary or decentralising – often focus on the present or foreseeable divergence between the laws which apply in England and Wales. While this is undoubtedly an important consideration and might in the future make fundamental jurisdictional change inevitable, we do not regard this as the sole driver for change now. Access to justice, control over the siting of courts and tribunals, structures which maximise the chances of preventing crime and rehabilitating offenders and developing the economic contribution of the legal sector are amongst drivers of equal importance.
- 7.2. Changes which could be implemented in the very short to short term are possible in a number of areas. For example:
- There should be an acceptance at all levels of the court and tribunal system of England and Wales that, save in exceptional circumstances, Welsh cases should be heard in Wales and offices to administer and list these cases should be established in Wales where they do not already exist. We note that the Supreme Court of the United Kingdom has expressed its willingness to sit in Wales but we also note that when it has heard cases involving Welsh devolution issues of importance to the citizens of Wales it has failed to do so;
 - No judicial office holder should be deployed to sit in Wales – even on a visiting basis such as a High Court Judge on Circuit or a member of the Court of Appeal on an occasional visit – without having undertaken training by the Judicial College in matters relating to Wales such as constitutional developments, language and pronunciation and divergence of law;
 - Devolution to the Welsh Government of responsibility for policing is a topic that has been much discussed and upon which there is a large measure of agreement. (See, for example, the second report of the [Commission on Devolution in Wales 2014](#), Chapter 10.) We see no reason why the recommendation of that Commission as to the future of policing in Wales should not be implemented in the short term;
 - Whether responsibility for Youth Justice should be devolved to the Welsh Government is also a topic which has been much discussed and upon which there is wide agreement. (See: [Report to the Welsh Government on the Question of Devolution of Youth Justice Responsibilities](#) (Morgan 2009) and the [second report of the Commission on Devolution in Wales 2014](#), Chapter 10.) Again we see no reason why responsibility for Youth Justice should not be devolved to the

Welsh Government in the short term; this is an area where linkages with already devolved services are particularly strong;

- A small country like Wales should be able to create efficient and responsive structures for treating and dealing with offenders in a way which reduces recidivism and promotes rehabilitation. A probation service which, although 'regionalised', is part of an England and Wales body which includes prisons is not conducive to either aim. The probation service works closely with other agencies including the police, education, health and housing authorities. All, save the police, are devolved and in this submission we suggest the police should also be. Devolution of the probation service to the Welsh Government would promote an integrated approach to the treatment and rehabilitation of offenders and this, too, could be achieved in the short term;
- The probation service also works closely with prisons but we see no reason why a devolved probation service could not continue to interact closely with a non-devolved prison service. However, a prison service which is designed to meet the needs of Wales by, for example, creating a prison estate of community prisons able to foster community links and to accommodate women as well as men, would be an important element in promoting rehabilitation and the devolution of prisons should be the aim. It might be that until the Welsh prison estate creates accommodation for Category A prisoners, such prisoners, or some of them, might have to be housed in prisons in England. That, however, should not be an argument against devolving responsibility for prisons. Financial cross-border arrangements could be made to accommodate this in the way that they are made in respect of patients from Wales who are treated in hospitals in England. In the meantime, large prisons to provide answers to the deficiencies in the English prison estate should not be built in Wales and the Welsh Government should be enabled to play a greater part in strategic policy making relating to prisons;
- Responsibility for all aspects of the Welsh language is devolved except for the Welsh language in the courts. This means that matters such as the Welsh versions of oaths and affirmations used in court have to be determined in London whereas expertise in producing such versions lies in Wales. Of more significance is the fact that under Westminster legislation, Welsh, one of the two official languages of Wales under Welsh legislation, is placed in an inferior position to English when it come to selecting juries to try cases in Wales in which the Welsh language is used. The transfer to the Welsh Government of responsibility for the language in the

courts would be a significant step in developing a justice system suitable for a bilingual country.

- 7.3. In the short term an increased Welsh identity and provision for the needs of Wales within the present jurisdiction as suggested above might be sufficient, but we foresee that the pace of devolution and constitutional change will mean that within a period of, say, ten years Wales will require a jurisdiction of its own. Whether that is described as 'separate' or 'distinct' or in some other way is, perhaps, less important than the substance of the arrangements put in place. A Welsh jurisdiction would not need to be self-sufficient or water-tight in the sense that there would be no cross-border or inter-jurisdictional cooperation and we regard it as important that practitioners from one jurisdiction be able to practise in the other. However, as Wales' constitutional position develops Wales will require its own judiciary up to Court of Appeal level and provision will need to be made for the appointment of a member of the Welsh judiciary to the UK Supreme Court.

8. Contact details

Thank you for your consideration of our response.

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