

Rt Hon Elfyn Llwyd MP – Written Submission

Wales is undoubtedly maturing as a nation. As our means of policy shaping and law making develop and Cardiff Bay grows in confidence, the structure of our justice system must develop to encase it. It is remarkable to consider that Wales is the only country in the world that has a legislature, but no legal jurisdiction of its own.

Certainly, there are few practical impediments to addressing this discrepancy. Northern Ireland and Scotland, after all, operate successful systems without being tied to England, and Wales' General Counsel himself, Theodore Huckle QC, has insisted that separate jurisdictions can exist within the United Kingdom.

Indeed, it is arguable that debates surrounding the development of Wales as a jurisdiction have hitherto been impeded by the comparatively weak devolution settlement obtained by Wales, as compared with those of Northern Ireland and Scotland. But the burgeoning maturity of our justice system cannot be ignored. Truly, the fact that the Welsh Government is holding this consultation on a separate justice system for Wales is testament to how central – perhaps urgent – this debate is becoming.

In recent years, more and more people have joined the ranks of those experts and academics, among them Professor R Gwynedd Parry from the Institute of Hywel Dda, the solicitor Fflur Jones, Winston Roddick QC and His Honour Philip Richards, calling for a just and comprehensive legal system fit for the modern Wales.

Moreover, a comprehensive victory in the 2011 Referendum showed that the majority of Welsh voters believe that Cardiff, not Westminster, should be the home of the decisions which affect their day to day lives.

Much has been written about the gradual establishment of 'Legal Wales'. In 2007, the Wales and Chester Circuit was disbanded and Wales became a separate circuit, and both divisions of the Court of Appeal (criminal and civil), as well as the Administrative Court sit in Cardiff. There is now a Lord Chief Justice of England and Wales following Lord Bingham's decision to add 'Wales' to his title.

Already law applying in Wales is diverging from that of England. Lawyers who practice environmental, criminal, family and obviously administrative law must have a thorough knowledge of the corpus of Welsh law if they are to practice in Wales.

A question which must be addressed is whether a separate Welsh jurisdiction is a precondition of greater legislative powers for the Assembly, or whether this would be a product of enhanced powers. The Assembly must urgently tackle this issue.

This feeds in to the wider question of what is required in order to establish a separate jurisdiction. The criteria usually employed is that the jurisdiction should operate in a defined territory, that the jurisdiction should have a distinct body of law, and that it should be supported by its own court structure and legal institutions.

Since the Local Government Act 1972, Wales has been a defined territory. Wales also has a distinct and growing body of law (whether this is large enough is a debatable issue). In a sense, Wales already has its own jurisdiction, since laws passed by the Assembly pertain only to Wales. Although criminal law has yet to be devolved, any new Act passed by the Assembly may contain a new or amended criminal offence. Examples are fines imposed on shop owners who do not charge for plastic bags used, as well as those smoking in prohibited areas. But a separate courts structure to support this budding jurisdiction would undoubtedly facilitate the process.

I would agree with Fflur Jones who has argued that the Assembly should focus on establishing the minimum amount of distinctive Welsh jurisdiction which is compatible with transferring powers on the Scottish model. By this I mean that, if our aspiration is to move to the reserved powers model, the appropriate administrative systems must be established for Wales to be able to cope with those powers.

In order to do this, Schedule 7 of the Government of Wales Act 2006 should be amended to include the administration of justice. Further to this, an independent prosecution service should be set up in Wales, and Wales should assume responsibility for further administration of the courts. A Welsh Judicial Appointments Commission should be tasked with selecting the judiciary, magistrates and members of tribunals operating in Wales. In the longer term, and following a new Government of Wales Act, Wales should look towards devolving the Crime Prosecution Service; responsibilities for the probation service, prisons and policing; a separate social security system; a legal aid system administered on a Wales-only basis; and perhaps separate qualifications for a Welsh legal profession. A consensus will also have to be reached on whether appointment procedures for the judiciary should reflect the needs of what will be a more dualistic body of law.

In all of this, the Assembly would need to obtain additional financial provisions to cover the costs of the court system and the administration of justice.

The implications these developments could have for cross-border practitioners will be significant. Some have suggested that it might be attractive to develop a system similar to that which exists between lawyers in England, Wales and the Republic of Ireland, where the qualifications of each profession are mutually recognised, as opposed to the system operating in Scotland with the qualified lawyer transfer tests (QLTTs). But thought should also be given to the practicality of adopting the QLTT system in the event of separate qualifications developing.

But it is perhaps from Northern Ireland that Wales can learn most in respect to developing a separate legal jurisdiction. Alongside introducing major reform initiatives for specific programmes including the criminal legal aid system, prisons, youth justice and community safety, devolution has allowed the relevant departments and bodies in Northern Ireland to bring about a qualitative change in the justice system's relationship with the public it serves. Commitments have been given to improving the support of victims, tackling delay and developing better protection for older people.

The devolution of justice matters to the region has also a real impact on policy formation, allowing the government to consult with relevant organisations and stakeholders so that laws are drafted which meet the priorities of the local population. In the event of the devolution of the justice system to Wales, there would be a great need for engagement with the public and third sector when developing policy. The emergence of 'legal Wales' will have a holistic impact on the whole of society – not just the justice system itself.

Finally, when we consider that the justice system in Northern Ireland employs roughly 16,000 people, including police and prison officers, probation staff, youth justice and courts services, it is clear to see how the Welsh economy and jobs market could benefit from the establishment of a separate jurisdiction.

The fact that the Welsh Assembly is currently holding a consultation on the emergence of a separate Welsh jurisdiction speaks volumes about how central this issue will become in the months and years ahead. There will be significant challenges, both practical and constitutional, for the legal system in Wales to face, but they are challenges which I believe we are more than capable of meeting.