

## Response to Call for Evidence by the Commission on Justice in Wales

1. I welcome this opportunity to respond to the Commission's call for evidence. In the interests of full disclosure and transparency: I am employed as Director of the Swansea Law Clinic by the Hillary Rodham Clinton School of Law at Swansea University; I am an External Examiner at Cardiff University and the University of Winchester; I am a member of the Law Society's Wales and Access to Justice committees; and I write articles from time to time for the Law Society's Gazette on emerging Welsh law and procedure. However, all views expressed are my own and do not represent the views of any body or institution with which I am or have been associated.
2. My area of interest in submitting this evidence is legal education in Wales. Consequently, the submission is mainly relevant to the *Legal and Vocational Education and Training* workstream of the Commission's work. However, particularly when discussing clinical legal education, my submission is also relevant to the *Access to Justice and other overarching issues* work stream.
3. I mainly seek to address the following questions, which have been put forward by the Commission as suggestions when preparing submissions:

To what extent do current university curriculum and vocational and professional development courses reflect the law in Wales and the need to deal with the digital revolution and how should they be further developed?

What is the current provision for the Welsh language within the justice system and legal education in Wales? How should Welsh language provision within the justice system and legal education in Wales be improved?

### *Some general observations*

4. The Legal Wales Foundation and its annual Legal Wales conference are important assets in the establishment of a robust and sustainable justice system in Wales as they bring together all relevant stakeholders including the judiciary, the legal profession and academia. This gives Wales an advantage as there is no comparable body bringing different stakeholders together at the England and Wales level. The conference identifies and discusses the Welsh legal agenda, and the bringing together of different stakeholders provides a forum where they can discuss their various needs.

### *The regulation of legal education in Wales*

5. The regulation of legal education whether for degrees or professional courses treats Welsh interests as a minority concern. This is due to the relative size of Wales - both in terms of population and size of legal profession - relative to England. It would be much better if regulators viewed it instead as a constituent part of the legal system of England and Wales where legal conditions differ in certain important respects.

6. The Quality Assurance Agency's Subject Benchmark Statement: Law (2015) forms part of the UK Quality Code for Higher Education (Quality Code) which sets out the Expectations that all providers of UK higher education reviewed by QAA are required to meet. Benchmark Statements 'describe the nature of study and the academic standards expected of graduates in specific subject areas, and in respect of particular qualifications. They provide a picture of what graduates in a particular subject might reasonably be expected to know, do and understand at the end of their programme of study.'<sup>1</sup> It refers to bachelors degrees with honours in law.
7. Paragraph 1.3 of the Statement provides: 'The study of law may focus on one or more jurisdictions. This Statement requires knowledge of the main features and principles of whichever legal system is (or systems are) being considered.' It is submitted that this does not provide sufficient safeguard to ensure that students who have obtained a bachelors honours degree in law, on a degree programme which has studied the jurisdiction of England and Wales, have sufficient knowledge of laws and the legal system when its territorial application is limited to Wales (Welsh law).
8. It is submitted that paragraph 1.3 should be rephrased as follows with suggested amendments in italics: 'The study of law may focus on one or more jurisdictions *and all of its constituent parts*. This Statement requires knowledge of the main features and principles of whichever legal system is (or systems are) being considered *and all of the constituent parts of the legal system (or systems) which are being studied where legal conditions differ in a systemic way.*'
9. If the Statement were amended as proposed, it would ensure that any student who has studied the law of England and Wales is not only aware of the principles of Welsh devolution but also aware of the main principles of Welsh law such as:
  - legislation is produced bilingually with both versions having equal status;
  - the duty on Welsh Ministers under section one of the Children and Young Persons (Wales) Measure 2011 to have 'due regard' to the rights under Part 1 of the UN Convention on the Rights of the Child and specified articles of its 1<sup>st</sup> and 2<sup>nd</sup> optional protocols;
  - section 7 of the Social Services Well-being (Wales) Act 2014 which requires any person exercising a function under the Act to have 'due regard' to the UN Principles for Older Persons and Part 1 of the UN Convention on the Rights of the Child;
  - section 7 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 which requires a relevant body exercising powers under Part 2 of the Act in relation to a child or young person to have 'due regard' to Part 1 of the UN Convention on the Rights of the Child and section 8 which requires any relevant body exercising functions in relation to a disabled child or young person under the Act to have 'due regard' to the UN Convention on the Right of Persons with Disabilities and its optional protocol adopted on 13 December 2006;

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<sup>1</sup>

Quality Assurance Agency QAA Subject Benchmark State: Law (2015) at p. 4

- and the ‘sustainable development principle’ under section five of the Well-being of Future Generations (Wales) Act 2015.

These cross-cutting duties mean that law is being done in a different, policy driven way with a distinctive approach to the implementation of certain international Treaties, and this potentially affects the legitimacy of all Welsh legislation. Consequently, they are an integral part of studying the legal system of England and Wales.

10. Law Schools in England and Wales are currently considering what steps they may need to take to respond to the introduction of the Solicitors Qualifying Examination (SQE). It is vitally important for a strong and sustainable legal sector in Wales that the SQE takes full account of the legal needs of Wales. This includes ensuring that all entrants into the legal profession in England and Wales are aware of the main principles under which Welsh law operates, which are indicated above in paragraph nine. Without this background, solicitors will not know how the legal system operates in Wales, which is a constituent part of the legal jurisdiction of England and Wales.
11. The SQE needs to be assessed in Wales and assessment in all parts of the SQE needs to be available in both the Welsh and English languages. This is needed not as a result of the numbers who are likely to be sitting the assessment in the Welsh language but as a result of Wales being a constituent element of the legal jurisdiction of England and Wales where there is a system of bilingual law making and legislation with both versions of the legislation having equal standing.
12. There is currently a shortage of tutors who can deliver modules in the Welsh language, which has affected provision in the Welsh language on the Legal Practice Course. Demand for Welsh language provision at the level of the Legal Practice Course will have also likely to have been adversely affected by the fact that it is not currently offered by Aberystwyth and Bangor universities. Demand for Welsh language modules on undergraduate courses has been greater than on the Legal Practice Course but it still needs to be grown further. However, if future generations are to be able to access the justice system in Wales in either the Welsh or English languages there will need to be access to legal professionals who are proficient in the Welsh language.
13. It is wrong in principle to see this as a numbers issue, numbers will always be very important, but this is primarily a rights issue. It will be costly to provide assessment on the SQE in the Welsh language. Initially at least, the numbers who will wish to be assessed in the Welsh language are likely to be relatively small. Although it is likely that numbers will be small at first, it will be necessary for candidates who sit the SQE to have the option to undertake it in the Welsh language if, in the future, people are to meaningfully access their right to use the courts in the Welsh language.

14. Legislation is produced bilingually with both versions having equal standing. When the wording is ambiguous it is prudent to check the wording in both languages and a plentiful supply of bilingual lawyers will assist with this.
15. The gestation of the SQE has been lengthy and remains an ongoing process. By contrast, the devolution settlement in Wales has developed rapidly and is making inroads into traditional core areas outside of public law, for example the Renting Homes (Wales) Act 2016 is an important area of property law in Wales. The Land Transaction Tax falls within an area that has traditionally been assessed on the Legal Practice Course. It would have been inconceivable even a few years ago for Welsh law to impact on core areas of undergraduate or professional training study outside of public law. Consequently, there is a need for the curriculum assessed by regulators to keep up with developments in Welsh law, in the future, to ensure that lawyers in England and Wales are competent in Welsh law, and the response might need to be quicker than a full-blown review process such as that for the SQE. Professor Gwynedd Parry called for a curriculum review body for the Welsh law curriculum at the Association of Law Teachers Conference held at Lady Margaret Hall, University of Oxford in 2012. It is submitted that this idea needs to be adopted so that if Welsh law makes further inroads into core areas there can be a fast-track curriculum review.

### *Curriculum content*

16. With developments in legal technology, law schools are preparing today's students for jobs which may not have been created yet, using technology which has not yet been invented, and solving problems which have not yet been identified. As a result, it is important that law students' creativity, critical thinking and collaborative skills are developed so that they can apply their skills and knowledge to new situations.
17. Law schools need to put a lot of effort into assisting students with the transition from further to higher education to achieve this. The Organisation for Economic Co-operation and Development's Programme for International Student Assessment (PISA) has said that the UK tops the league when it comes to prevalence of memorisation, rehearsal, routine exercises, drill and practice and/or repetition.<sup>2</sup> It is bottom of the league for critical thinking, intrinsic motivation and deep learning. There is also a gap between what British school teachers say and what they do presumably because the infrastructure does not allow them to prepare students in the way they feel is best for the students' life chances after school. 96% of British school teachers say their role is to facilitate student inquiry; 86% say that students learn best when finding things on their own; 74% say thinking and reasoning is more important than curriculum content and yet British schools come top of the PISA table when it comes to rote learning.<sup>3</sup> In other words, the UK comes top of the international league table for 'teaching to the test', which is not the best preparation for deep learning, higher education, and the 21<sup>st</sup> century. As the American

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<sup>2</sup> Andreas Schleicher, 'Education Reform For Social Mobility' (Best in Class, The Sutton Trust Summit, New York, 19 April 2018) < <https://www.suttontrust.com/event/best-in-class-2018/> > accessed 15 June 2018 at 21 minutes

<sup>3</sup> N.2 at 20 minutes

philosopher and educator John Dewey once said, is that “if we teach students the same way as yesterday, we rob them of tomorrow.”

18. However, in Wales there is the opportunity to bridge the gap between what school teachers say and do when it comes to deep learning when the new curriculum for 3 – 16 year olds comes fully into force in 2022 as a result of the Donaldson review.<sup>4</sup> One of the aims is to give teachers more freedom to teach in ways they feel will have the best outcomes for their learners.
19. Furthermore, the stereotype of countries like China prioritising rote learning methods is not true. According to the most recent PISA tables, Shanghai-China and South Korea come out significantly higher than the United Kingdom in the prevalence of teaching strategies which use elaboration reasoning, deep learning, intrinsic motivation, critical thinking, creativity and non-routine problems. So, according to PISA tables, the emerging economies of the Far East, the countries which are likely to pose the most significant competitive challenge to Wales in the future, are better at preparing their schoolchildren for the 21<sup>st</sup> century world and the impact of technology.
20. If law schools are to prepare students so that their graduates’ ability to contribute to a strong and sustainable legal sector in Wales is maximised then there has to be recognition that the development of their critical thinking skills and creativity has to be prioritised, and they have to be assisted in the transition from further to higher education as the opportunities to develop their independent thinking to date on entry into university will have been restricted in some cases.
21. Creativity is not something which can be either easily defined, taught or assessed. However, law students can be shown what it means in that examples of creativity are protean, they can exist in any context, that they should be using their skills and knowledge to make new links and be able to extrapolate from their knowledge in new areas. However, law schools in Wales can create an environment which enhances and fosters creativity. This can be done by, for example, giving students greater autonomy over the content of the curriculum which makes sense in terms of their preparation for an unpredictable future such as project work, particularly collaborative project work.
22. The complexity of the problems students will face and new business models, such as Alternative Business Structures, mean that entrants into the legal profession will increasingly need to work collaboratively with professionals from other disciplines. This means that an interdisciplinary and/or collaborative element to law students’ education will help prepare them for the ways of working they are likely to encounter in the future. One obvious area where law students could fruitfully collaborate with another discipline is with students from computer science. Project

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<sup>4</sup> Graham Donaldson, *Successful Futures: Independent Review of Curriculum and Assessment Arrangements in Wales* (2015)

based learning with computer scientists will give students from both disciplines greater insight into the issues and challenges each face.

23. One vision of what 21<sup>st</sup> century higher education may look like to equip students for the unpredictability and complexity of the future is Black Mountains College.<sup>5</sup> This is a current proposal for a college in Talgarth, Powys which will combine higher and further education, as well as teacher training. The proposal has grown out of the public policy environment in Wales such as the Well-being of Future Generations (Wales) Act 2015 and is being designed to meet the challenges that future generations will face.<sup>6</sup> One of its principles will be that students work and volunteer within existing businesses and not just the classroom. The proposed College has no plans to offer law courses at the moment. The higher education offer will be modelled on US liberal arts universities with a broad interdisciplinary first year before an extended two-year real-world research project. SQE constrains the length of the research project as law schools will no doubt want to prepare students for that as part of a degree programme, but the idea of an extended real-world project, working closely with businesses and organisations, seems an innovative way of preparing students for the 21<sup>st</sup> unknowable jobs market by giving students more autonomy over their curriculum.
24. Digitisation does not mean that law students need to become computer scientists. It means they will need to work collaboratively with computer scientists and they also need to know how machines think. This means they need understanding of how Big Data is gathered, how it is used in machine learning and the biases which can be inherent within it.
25. The development of social and emotional skills is central to producing students who will make an optimal contribution to the development of a thriving legal sector for Wales. This is not some fluffy addition to student's legal education but something which is central to their needs if they are to succeed in their future careers and if Wales is to have a successful legal sector. Firstly, there is a good economic case to be made that the development of emotional skills will be of direct economic benefit to employers. There is a global trend in rising rates of depression, excessive stress, and anxiety amongst lawyers.<sup>7</sup> In Great Britain excessive work-related stress, depression or anxiety accounted for 40% of work-related ill health and 49% of working days lost in 2016/17.<sup>8</sup> If Wales has a legal workforce that is better able to promote its mental well-being then it will have a comparative competitive advantage over legal sectors located elsewhere through savings in fewer sick days, etc. Secondly, digitisation puts a greater premium on the development of soft skills.

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<sup>5</sup> Black Mountains College < <http://blackmountainscollege.uk/>> accessed on 17 June 2018

<sup>6</sup> Black Mountains College Director, Ben Rawlence, speaking at the Hay Festival on 30 May 2018

<sup>7</sup> In the US a study by John Hopkins University found lawyers 3.6 times more likely to be depressed than general population: W W Eaton and others, 'Occupations and the Prevalence of Major Depressive Disorder,' 32 *Journal of Occupational Medicine* 1079 (1990). Surveys have shown one in three Australian lawyers have depression: Christopher Kendall, *Report on Psychological Distress and Depression in the Legal Profession* (The Council of the Law Society of Western Australia, 2011).

<sup>8</sup> Health and Safety Executive, *Work-related stress, depression and anxiety statistics in Great Britain 2017*

Humans will not outpace machines in the areas where machines excel. One area where humans have an advantage over machines is in their ability to read their own emotions and the emotions of others. Thirdly, the idea that a lawyer is someone who is separated from their emotions is not only inimical to lawyers' emotional well-being but also leads to poor decision making as our emotions impact upon the decisions we make so we need to be aware of them.

26. I have been involved in two research projects looking at legal education in Wales. The first was funded by the UK Centre for Legal Education, which was part of the Higher Education Academy (now known as HE Advance) and was called Mapping Legal Education in Wales (MaLEW). The Principal Investigator was Professor Pat Leighton and it took place in the period of 2002/3. I was Principal Investigator for a follow-up small-scale project funded by the Legal Education Research Network (LERN), so called MaLEW 2, in 2014/15. This surveyed lecturers in the five Welsh law schools in 2014 and students in 2015.

27. MaLew 2 had a 7.2% response rate amongst lecturers and the main findings were as follows:

- 93% of respondents thought there was a need to set up a body to set an agenda for legal education in Wales and keep the curriculum under review.
- 71% of respondents would not be confident in teaching modules through the medium of the Welsh language.
- 64% of respondents did not plan delivering modules differently as a result of the Welsh Assembly acquiring primary law powers.
- 56% of respondents felt there were insufficient secondary materials to support students when it came to devolved subjects.
- 44% of respondents did not teach devolved subjects either because it would limit the module's appeal or would adversely affect students' employability.
- 22% do not cover devolved subjects as it would add too much material to the module.

This survey was conducted at a time when there was a conferred powers model of devolution in Wales so some of the 64% who did not plan on doing anything differently as a result of the Assembly acquiring primary law-making powers would have been teaching outside of the twenty-one devolved subject areas. The 56% of lecturers who thought there were insufficient secondary materials in Welsh law to support students was in contrast to students where 25% said their attitude towards studying Welsh law was influenced by a lack of secondary materials; however, the difference may be explained by tutors writing material for them.

28. As can be seen, 44% of respondents were concerned about teaching Welsh law either because it would limit the module's appeal or because they felt it would adversely affect students' employability. However, there is some evidence that worries about students lacking interest in Welsh law modules may be overstated as 100% of students surveyed who intend to pursue a career in Wales and 77% of students who intend pursuing a career outside Wales stated an interest in learning

about Welsh law. Interestingly, 80% of non-UK/EU students wanted to be taught about the implications of Welsh devolution law.

29. In the free comments section of the student survey, interest in Welsh law seemed greatest in areas when there had been some innovation in law or procedure in Wales such as differences in child protection procedures. However, the survey, particularly of students, was small scale (84 respondents from the five Welsh law schools) and further research is needed, but there is some reason for thinking that fears that study of Welsh law topics limits appeal may be overstated or can be assuaged, to some extent, when it is presented as innovation in law and/or policy.
30. The study of Welsh law can add something to students' legal education as a comparative study of the law as it applies in Wales as compared to the law as it applies in England can be introduced. Comparative legal skills will be of value in an increasingly globalising world, which will require comparisons between legal systems.

#### *Clinical legal education*

31. The primary purpose of clinical legal education is pedagogical: to enhance students' legal education. Duties to clients need to be discharged with utmost professionalism and efficiency, but duties to clients are ancillary and are acquired as a result of activity's main purpose which is to enhance law students' education. Also, the UK government's policy has consistently been for *pro bono* legal advice to complement and not replace legal aid provision. Many, if not all, law schools in Wales would subscribe to this position. For these reasons, the ability of university law clinics to address unmet legal need and improve access to justice is limited, as they will be constrained by the numbers of clients and type of work they can take on, and, on principle, do not wish to take work away from the legal profession. However, the SQE may see a shift to more experiential learning in Welsh law schools which could increase client capacity.
32. Wales has led in certain clinical legal education developments. At one time, a law clinic, in conjunction with local solicitors' firms, was run by Cardiff and the Vale College and it is the only example I am aware of globally, which has supported the legal education of further education students through clinical legal education. The opportunities for potential legal administrative and paralegal staff to gain practical experience whilst studying is a prototype for further education law courses. If this idea were to be revisited it could make a contribution to Wales being a competitive place for law firms, such as 'Magic Circle' firms, to relocate parts of their business as there would be a pool of skilled, trained people available.
33. Something that could be considered which would be to the benefit of law students, enhance access to justice, and would not harm the development of the legal profession in Wales could be a student right of audience before courts in Wales. There has been such a right of audience in the State of Victoria in Australia. The key components are:

- students appear only for clients who had no access to qualified representation (other than a legal aid Duty Lawyer);
  - students appear only in unopposed matters in the Magistrates Court and the Family Court;
  - students' appearances are 'supervised' in court by a qualified practitioner (who takes over if needed)
34. When a 'Student Appearance program' was operated by Monash University in the State of Victoria they found that there was little need for supervisors to intervene and they took responsibility for assessing students' competence to appear with no expectation that every student would be ready to appear.<sup>9</sup>
35. Another area where university law clinics can work for the benefit of their students, their clients and the local profession, as well as enhancing access to justice, is in legal aid exceptional case funding applications. Swansea Law Clinic, with the support of the Public Law Project, has already assisted in a few of these cases. As solicitors are not paid for making exceptional case funding applications they can refer cases to university law clinics who can assist a client draft an application and, if it is successful, the client can then be referred back to the solicitors' firm.
36. One area where university law clinics could make a contribution to regenerating the legal profession in Wales is in rural areas. There are large advice deserts in Wales and rural areas have a large number of sole practitioners sometimes with no succession planning as to who will take over when that sole practitioner retires. The Rural Summer Legal Corps, which runs in the United States, could be a model for rejuvenating legal advice provision, including solicitors' firms, in rural Wales ensuring greater access to face to face legal advice for future generations. The programme operates between May and August each year. Participants receive a US\$5,000 stipend in return for performing 300 hours of service in the legal advice sector in rural areas.

#### *Collaboration between Welsh law schools*

37. There is scope for Welsh law schools to come together to discuss the agenda for research into legal education in Wales. The most obvious form for this is the Legal Education Research Network (LERN) who have already held one event in Wales, which I co-ordinated, and was hosted by the Law Society Wales Office in April 2016.
38. LawWorks Cymru has held a forum for *pro bono* advice providers, which includes, but is not limited to, university law clinics and is an opportunity to discuss a Welsh agenda for *pro bono* advice.
39. If there were to be a student right of audience on the model of the State of Victoria then Welsh law schools should follow the example of Monash University and take responsibility for the quality of students who appear. They could co-operate

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<sup>9</sup> Susan Campbell, 'A student right of audience? Implications of law students appearing in court' (2004) Vol. 4 International Journal of Clinical Legal Education 22, 30

together, possibly through the Legal Wales Foundation, to agree quality standards for student appearances.

Richard Owen  
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