

Commission on Justice in Wales
Oral Evidence Session
19 June 2019

Present	Commission members	Secretariat team
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Question area: Criminal justice

- Policing: FM** – I am not surprised and I am pleased that you have received evidence that policing policy and delivery should be determined in Wales. That has been the position of successive Welsh Governments. The interface between public policy challenges and the criminal justice system is so intertwined that we need to have them together to have a coherent policy. There are significant impacts either side of the divide between devolved and reserved policy areas. We need the ability to do things in one place. Criminal justice policy can be made without reference to our policies. Decisions about criminal justice policy can impact policy areas which are devolved; for example, if a decision was made not to sentence offenders to short periods in custody that would have an impact on matters devolved to the Assembly as there would be a bigger demand for devolved services. Conversely, if a future Welsh Government decided on a set of policies, for example on homelessness, it would impact on the criminal justice system which is reserved. The interface issue is true across a huge range of areas we discharge, with mental health being the biggest one. A criminal justice solution for someone with a mental health issue is nearly always going to be the wrong answer. Yet we know this happens on a regular basis, with lots of criminal justice resources being used on it. The alignment between public policy and criminal justice is the first case for the proposition of devolution. The second case is a policy alignment of the Wales we would like to see with the criminal justice system. We want a progressive justice system focused on prevention, early intervention and diversion from the formal criminal justice system. The criminal justice system should be aligned with those objectives. It would be difficult to manage this if, for example, the Ministry of Justice had a policy that prison works. This is why we would want criminal justice to come under the remit of the Welsh Government. I am very keen that the Commission tells us what you think is the correct distribution, which is coherent and practical, and comprehensible to the informed and interested Welsh citizen. You will need to consider whether your conclusions are administratively and financially achievable, not whether they are politically achievable which is for me and Jeremy. The real value of the Commission is in describing the what regarding public policy. I am not surprised questions have been raised about whether the finances for policing would follow the cost of policing. It is fundamentally important for me that the finances follow devolution. In the first decade of devolution, the Assembly was so anxious to try and make a success of its responsibilities and to fill gaps that we may have been seen as needy to Whitehall. We wanted things and the finances may not have followed the responsibilities. Our budget rose every year in the first decade. In the first Assembly it rose by 10% every year, in the second Assembly it rose by 5% every year and in the third Assembly there was real growth every year. If the budget is growing the ability to take on new responsibilities is possible even without the transfer of finances. The second decade was almost the mirror image, with enforced devolution at the same time as reducing resources. We were given responsibility for Council Tax Benefits which were cut by 10% in the year before they were devolved. There are other examples of where devolution was agreed such as the establishment of the Welsh Revenue Authority, but money for all the administration costs had to be found from the Welsh Government budget. No resources came with those responsibilities. In Scotland the welfare budget costs £64 million more to administer than came in the transfer of responsibilities.

We cannot take on new responsibilities unless we can be confident the resources to discharge those responsibilities will be transferred.

- **Penal policy: FM** – Our approach with justice has been to maximise our impact. The history of youth justice in Wales in the last 20 years has been outstanding. We started the work during the first Assembly when Edwina Hart was the Minister. The work was agreed from the beginning with the Youth Justice Board, including the appointment of a Welsh member of the board and how policy should be navigated. It was stretching devolution because youth justice was right at the cusp of devolution where many of the key actors are devolved. By using that disposition of responsibilities we have been genuinely influential, in reducing first time entrants into the criminal justice system and increasing diversionary work. We have made the administration of youth justice in Wales different and consistent with our public policy. It is more difficult to make such inroads with regards to adult and women offenders as we have been constrained, but we still want to do more with what we have got, for example through the blueprints. My and colleagues' feeling is that we should not miss out on being influential within the current system. We should not wait while searching for the perfect to do what is possible.
- **Sentencing: FM** – We want to have a coherent system as we need to align the actions of all the actors with the Welsh Government's vision. Our current ambition is to have a system that is focused on prevention and rehabilitation, in a way which is about de-escalation. We want to have an approach based on crime reduction rather than on escalation intervention. This is currently compromised as not all the actors are lined up behind our ambition. If the system was all brought together it would make that easier.
- **FM** – As to how this could best be achieved and guaranteed, we are not attracted to the Manchester model which is delegation rather than devolution and it would not suit a legislature. I hope the Commission will help us to be clear regarding the destination and how things ought to be. We can then think of the route to it. My own view of the politics of it is that it will have to be incremental in order for us to make progress. I have read and I understand the arguments that for the reason of coherence the whole system should be transferred together. I see the intellectual case for wholesale devolution, but the decisions will rely on the Welsh Government's ability to persuade Westminster to transfer the powers. My experience over the whole of the 20 years is that we are more likely to succeed by identifying a series of milestones. My experience of other matters is that it is like a train over a hill. There is a need to get the train over the hill and going down the other side and the train can gather pace more quickly when it is over the hill. This happened with the 2006 Act. At a distance it can look like a long process, but primary powers came more quickly than expected in 2011. Once you make something happen you create momentum. The appropriate destination is a full model of devolution of criminal justice and policing, but I am interested in what you think the destination should be. It would be a challenge doing it incrementally, but the success in youth justice is an example where you can have a significant impact without every lever in your hand. At the start of devolution, youths were being sent to custody in Wales at the same rate as in England. We were able to take the system and achieve different outcomes in Wales by reducing the number of young people in the youth justice system control of sentencing or the youth justice estate. By mobilising the key people in the field we were able in a short period of time to change the climate. Having all the levers would have been easier, but we still managed to make inroads. The savings in youth justice did not come back to the Welsh Government, but resources were made available to the Youth Justice Board. We used our money to make savings in budgets in reserved areas which did not come back to us, but money was not our focus and we were investing in a preventative way to reduce harm and monies we would have to pay for devolved services responding to the youths who would have been in custody.

Question area: Civil legal aid and the third sector

- **FM:** Devolution of only the administration of civil legal aid would be unsatisfactory as we would need the policy powers, too. The cuts to legal aid have been absorbed by additional demands on other

public services. We are absorbing our share of the impacts of the cuts and we are putting our resources into advice services, diverting money to address things that are not devolved. I have always paused and thought hard before giving money from the devolved budget to responsibilities which are not devolved. We only do it where we are convinced it is necessary. We give £6 million a year to advice services in the absence of the administration and policy powers for legal aid as it is the right thing to do.

- **CG:** The availability of legal aid to both lawyers and the advice sector is part of a continuum and helps both areas. We need to look at both as it is important to see it as a whole. It is possible to look at access to tribunals and dispute resolution that puts less pressure on the legal aid budget. The Welsh Government has made available funding for advice and has co-ordinated this in a way to minimise duplication and gaps. A good example is the funding the Welsh Government and the Home Office have co-ordinated and made available for immigration advice. A more holistic approach would bring benefits. We participated in the post-implementation review of the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
- **FM:** In this area we would need legislative and executive devolution together. An incremental approach will not work.

Question area: Civil and public law disputes

- **FM:** We would want to re-affirm the independence of the Welsh tribunals and make this visible to the people of Wales. We are looking at different models on how to do this in the future. I need to think about ministerial accountability to the Assembly. When we are thinking of creating different models in the future we need to make sure ministers are properly accountable. We will be informed by the forthcoming Law Commission project and any recommendations that the Commission on Justice makes. We will begin by having a memorandum of understanding setting out the roles of the Welsh Government, the Welsh Tribunals Unit and the judiciary regarding judicial independence and to put it into the public domain to underline the independence of the tribunals.
- **CG:** I have been to Northern Ireland and Scotland to look at the administration of the courts there. It was evident in the conversations in Northern Ireland how important the memorandum of understanding was to highlight the paramount independence of the judiciary. The catalytic effect of the agreement reassured the public of the independence of the judiciary.
- **FM:** The memorandum of understanding will be for the tribunals for which we are currently responsible and there will be a meeting about this with the President of Welsh Tribunals. I have asked my officials to prepare a first draft for discussion. I am keen to make initial progress and it should be a platform for any further transfers of responsibilities.

Question area: Family justice and children in care

- **FM:** I regard children in care as one of the major public policy challenges we face in Wales. I have been making myself unpopular on public platforms for the last five years, but I can't convince people that anything is wrong. I don't think it is complacency. There are very committed people who want to do their best for children and they say none of the children in care shouldn't have been placed in care. I don't believe that is correct, but I think they do it thinking they are doing the right thing. They still think there is no issue even when a neighbouring local authority with similar issues take a much lower rate of children into care and it is difficult to dislodge this way of thinking. In my manifesto for leader of the Labour Party in the Autumn this was the only area where I suggested setting targets. I am allergic to targets as they tend to distort behaviour, but they are necessary here. It has been so difficult to make inroads, so I was minded to set targets on the number of children placed in care outside Wales to be brought back to Wales, the number of children placed in care outside their county to be brought back into their county and the number of children in care who could be looked after with support in their

families. The money spent on this is so significant that it is affecting other services. We will agree with local authorities on 12, 24 and 36 months targets to make a difference in this area. If you asked local authorities, they would say it is the judiciary. I fear that when speaking to Directors of Social Services, they say it is what other people should do, not what they could do. Courts may make a care order despite the view of social services that a care order is unnecessary. I am reluctant to say critical things about the judiciary because I don't know enough. The inability to have a conversation with all the actors to ensure people have a common understanding of what needs to be done has an impact. The gap between England and Wales is growing. England is now at the level we were twenty years ago, while the number of children in Wales has continued to increase. We do not have a catalytic figure that can bring all the actors around the same table. Welfare intervention might be a motivation in Wales at the social worker and judicial levels because people are so concerned about what they have heard and want to be confident that something is done. From my experience in the youth court, I would see magistrates making a supervision order with welfare minded motivation that a criminal justice sanction is a price worth paying to ensure that something happens. We may not have a systematic approach in place to hear directly from people rather than intermediaries, but we are out speaking with people regularly. The way the Assembly was set up was to allow for a more direct interface with recipients and providers of services. One of the things that shocked me was meeting a group of parents who had their children removed because they have a learning difficulty. Efforts should have been made to help those parents. It is a rare week in my surgeries when I do not come across families who are not involved in the care system.

Question area: Legal sector in Wales

- **CG:** We have had the benefit of the Jomati review of the legal sector and the emerging picture is very clear. We are looking for your view on the support the Welsh Government can give and how the professions can make themselves more robust. The Welsh Government has two roles, as a purchaser of legal services, and as an economic development actor. The first is quite limited, as the economic impact of procurement is relatively small, but the signal effect of the decision to use the Welsh Bar can build confidence in the sector. Our focus needs to be on how we instruct the bar rather than solicitors. We are looking at the Counsel General's panel of counsel, to make it smaller and easier to apply for and to look for gaps in expertise. We need to look at how to develop the bar and send more work to the junior bar; and where we instruct barristers in London rather than Wales. I have asked for the National Procurement Service contract for the bar and solicitors to be paused to take into account any of the Commission on Justice's views and recommendations.
- In relation to our role as an economic development actor, the sector is not seeking more direct government support. I was struck by what I saw in the legal sector in Northern Ireland, how they fostered legal tech and attracted large firms. The large firms who have offices there did not seem integrated into the sector in Northern Ireland, but they provide more decently paid jobs and the work there has improved. A key aspect there is that as they have developed better relationships with the law schools and a better understanding, the work has moved up the value chain. I think much more can be done in Wales to establish collaboration between law schools and law firms and knowledge transfer. There needs to be a point of contact for law firms.
- **Commercial firms: CG** – There is a degree of resistance in the commercial firms for direct support from the Welsh Government. The Jomati review makes it evident that the firms have valued business development support from the Welsh Government and we are looking at identifying an individual who can provide a tailored offering to law firms. It is a challenge as there is not a culture of sector-wide leadership within the commercial firms and they are independent.
- **Rural and post-industrial firms: CG** – It is worrying regarding law firms in rural and post-industrial areas. Many practitioners are coming to the end of their professional lives. They are suffering from cuts to legal aid and there is a limit on how we can help businesses built on the legal aid model without having the powers. There needs to be technological innovation and we can encourage the

development of models of the firms working with other professional services in small towns in hubs. If the sector asked for business advice support that would be something we would do. They need to be open to that, but they don't appear to be at the moment.

Question area: Judiciary

- **CG:** We have spoken to Scottish law firms who practise Scottish and English law, so there are ways of the professions being able to practise across England and Wales. We need to broadly define Welsh law, to include not simply law passed by the National Assembly and made by the Welsh Ministers, but also law passed for Wales in reserved areas and made by Parliament and UK Ministers. This will help eliminate some of the jagged edges. There is no question that practitioners will still be able to practise across England and Wales. There is a way to navigate any issues. With the judiciary and the courts, we have the law of the Assembly and we feel the rational approach would be to recognise that Welsh law is more than just Assembly law but all the laws that apply in Wales, as happens in Northern Ireland. If that is the starting point, the sensible way to administer that would be to have Welsh courts. Initially, a court could sit as a Welsh court or an English court with judges continuing to sit in England and Wales, but with potential greater divergence over time. If there was further devolution of the justice system, there would be further powers in criminal justice. This would give greater weight for a clearer definition of Welsh law and there would be a higher premium on having Welsh courts. Judges could initially be designated as judges of England and Wales. If over time we decide to set up different kind of courts and tribunals, the designation and separation may become clearer. I was struck in Scotland and Northern Ireland with the strong judicial leadership and the capacity to bring the system together, with Lord Carloway and Lord Chief Justice Murphy at the heart of very collaborative systems. We would want to get to the point where there is a senior judicial leadership figure in Wales with the capacity to convene and to bring people together.
- **HR:** Regarding the inter-relationship with the Welsh Government, I am aware that Permanent Secretaries met Lord Chief Justices on an annual basis. It would be unclear to most officials because of the current devolution settlement what the purpose of meetings with the Presiding Judge of Wales would be and it is difficult to see what business would routinely be discussed. It comes back to the question whether there should be a Justice Minister in the Welsh Government. It almost confuses matters if the Welsh Government has a minister for justice when justice is not devolved. If the Welsh Government attended meetings with the judiciary, the UK Government's response is likely to be why is the Welsh Government involved?

Question area: Capacity and capability

- **Justice leadership: FM** – The capacity of the Assembly is allied with the question whether there needs to be a justice minister. The criticism of devolution in Wales has always been that we could not cope, but that has not been the case. The ability of the Assembly to take on responsibilities has been one of the success stories of devolution. I think we would have the capability to deal with the extra responsibilities. We would be able to build it up if the powers were transferred. I am not certain until we have further responsibilities that we need a justice minister. Welsh Ministers have regular meetings with people in the criminal justice system such as the Police Chief Constables, the Police and Crime Commissioners, probation services and the Law Society. I can't think of an equivalent business meeting, with papers, with the judiciary. I don't believe that not having a justice minister has held us back. If the powers were transferred, it would be right to have a justice minister.
- **The need to keep the best and brightest students in Wales: CG** – We are exporting law graduates as we are producing too many for the jobs available. There isn't a highly collaborative approach institutionally between universities and law firms in Wales, which is clear in Scotland and Northern Ireland. The Commission's proposal for a Law Council of Wales, with a secretariat, would address the need for greater collaboration in Wales.

- **The need to keep the best and the brightest in the professions in Wales: CG** – We are very near to a large job market in England which it is easy to get to from Wales. If the legal infrastructure in Wales was clear and more established with a clear way from the professions to the judiciary, it would build the confidence to practise for more practitioners to see additional opportunities within the legal sector in Wales. In Northern Ireland the support centres of large practices have managed to bring in work and that will have an important role to play in providing more decently paid law jobs, and legal talent in Wales. There is a modest, but important, role for government and the wider public service in Wales to play.