CYMDEITHAS CYFREITHWYR CYMRY LLUNDAIN
(THE ASSOCIATION OF LONDON WELSH LAWYERS)
Inaugurated on the 17th February 2011 by the The Rt Hon The Lord Judge, Lord Chief Justice of England and Wales

Patron. The Rt Hon Lord Morris of Aberavon KG QC

The Response of the Association of London Welsh Lawyers to the Consultation of the Welsh Government on a Separate Legal Jurisdiction for Wales

The Association

1. The Association of London Welsh Lawyers ("**the Association**") has 125 members. Our membership includes judges, barristers, solicitors, legal executives and academics. The objects of the Association are as follows –

   a. to encourage and facilitate an understanding of the development of the law in Wales, of legal practice in Wales and of the constitutional developments of Wales;

   b. to encourage and assist professional relationships between members of the Association and other members of the legal profession who have connections with or who are interested in Wales;

   c. to assist the development of the legal profession in or relating to Wales by any appropriate means, including mutual exchanges, placement and training programmes, the supply of information and equipment, or holding lectures and seminars;

   d. to participate in consultation exercises and to respond to them if required to do so.

The consultation undertaken by the Association of its membership

2. The Association has widely consulted its membership in order to prepare this response. This consultation has included:

   a. Distributing the consultation paper to all the Association's membership and inviting written submissions from the membership;
   b. Hosting a debate held in a Committee Room in the House of Lords[1] which was addressed by:
      i. Hefin Rees FCIArb (Chairman and a Founding Member of the Association);
      ii. Rt Hon. Lord Morris of Aberavon, KG, QC (Patron of the Association);
      iii. Winston Roddick CB QC (a Founding Member of the Association and member of its Executive Committee);
      iv. Rt Hon. Elfyn Llwyd MP (a Member of the Association).
   c. Forming a sub-committee of the Association for the purposes of debating the issues raised in this consultation paper and for drafting this response. This sub-committee has met on 3 occasions, and has included the following people:
      i. Hefin Rees FCIArb (Chairman of the Association and a barrister at Thirty Nine Essex Street Chambers, London);
      ii. Winston Roddick CB QC (former Counsel General for the Welsh Assembly, former Leader of the Wales Circuit, and Honorary Recorder of Caernarfon);
      iii. Gerard Forlin QC (barrister at Cornerstone Chambers, London);
      iv. Carys Owen (barrister at 18 Red Lion Court Chambers, London and member of the Association's Executive Committee);
      v. Bleddyn Phillips (partner at Clifford Chance LLP, London);
      vi. Jonathan Haydn-Williams FCIArb (solicitor, Senior Counsel at Goodman Derrick LLP, London).
   d. Distributing a draft of this response to all of the Association's membership in order to seek everybody's views and to then incorporate those views into the final draft of the response.

[1] Please see the minutes of the meeting held in the House of Lords at **Appendix 2**, and the speech of Winston Roddick CB QC at **Appendix 3**, the speech of Rt Hon Lord Morris of Aberavon at **Appendix 4**.

Introduction

3. Wales' constitutional development is of the greatest importance to all Welsh men and women, no matter where they live for the time being. As an Association, we welcome the opportunity to contribute to this very important debate.

4. This consultation raises a number of interesting and challenging issues. It is inevitable that there will be a divergence of opinion in the membership of the Association to those issues. As a sub-committee drafting this response on behalf of the whole membership of the Association we are conscious of this fact and have sought to reflect the divergence of opinions.

5. Many of these diverse points of view were identified in the debate that was held by the Association in the House of Lords, and the minutes of that meeting which are attached at **Appendix 2** should be read in conjunction with this response in order to see the divergence of views of our membership.

6. We would wish to clarify that this response does not purport to represent the views of the judicial members of the Association[2], and there may be other members who would take a different view to that adopted in this response. That is to be expected in a consultation with such wide-ranging and important consequences.

The principal questions being asked in this consultation

7. We have endeavoured to answer each of the specific questions posed in the consultation document, and these answers can be found in **Appendix 1** to this response, but by way of introduction to those answers we here set out

[2] For these, see the response of the Council of Judges for Wales (the Council of Judges) to the Assembly's Constitutional Affairs Committee Inquiry

our views on what we perceive to be the three principal questions on which the Welsh Government is consulting, namely:

a. What is meant by the term separate Welsh legal jurisdiction;

b. Whether or not there should be a separate legal jurisdiction for Wales;

c. What might the likely consequences be of creating that jurisdiction[3].

A summary of the Association's position

8. The Association's approach to this consultation is on the basis that it is primarily concerned not with the substance of our laws but with the structures by which justice is administered in Wales.

9. The views of the Association's membership can be broadly categorised into 3 responses:

a. The first category includes those who are, in principle, in favour of a separate legal jurisdiction for Wales and believe that this should be delivered in the short to medium term, i.e. the next 3 to 5 years once there has been an analysis of the responses to the consultation, preparation of the Green Paper, consultation on the Green Paper, drawing up of the necessary legislative instruments, Parliamentary time for dealing with those instruments, setting up of the Welsh machinery of justice and the activation of it ("**the Today Group**");

b. The secondary category includes those who are, in principle, in favour of a separate legal jurisdiction for Wales, but believe that the timing is not yet right, and consider that this should be delivered in the medium to long term, i.e. in the next 10 years when there is a greater

[3] See the sixth paragraph of the Forward to the consultation Document and the four purposes of the consultation as described on pages 1and 2 of that document

divergence between Welsh law and the laws of England and Wales to justify such a significant constitutional step ("**the Tomorrow Group**");

c. The third category includes those who are, in principle, against the idea of a separate legal jurisdiction for Wales and do not think it should ever be brought into existence as it would be against the best interests of Wales ("**the Never Group**").

10. The difference between those who hold the views in sub-paragraphs (a) and (b) above is the timing for delivering this policy. What unites them is the principle that they believe it is a good idea. The majority in the Association fall into these first two categories.

11. Those members who are, in principle, in favour point to the fact that Wales already meets many of the characteristics of having its own legal jurisdiction – such as a defined territory, a distinct body of law, a legislature - and the only characteristic missing is for the administration of justice to be devolved. Those who take this view consider that there are genuine advantages for Wales to have its own separate legal jurisdiction. We have sought to identify what those advantages may be in paragraphs 33 - 38 of our response. We have also sought to identify what the potential consequences might be of a separate legal jurisdiction for Wales in paragraph 60 of our response.

12. Others in our membership take a contrary view and fall into the Never Group. They consider that the case for a separate legal jurisdiction for Wales is not made out. They point to the fact that the legal jurisdiction of England and Wales is internationally respected, and consider that Wales would be disadvantaged by not being a part of that wider jurisdiction. They point to the additional costs that would be involved in establishing a separate legal jurisdiction for Wales and consider that it would not be a good idea for the people of Wales or those practising law in Wales. We

have sought to identify what those disadvantages may be in paragraphs 39 - 59 of our response.

13. One member of the sub-committee has expressed the view that, instead of going the whole way to the devolution of the administration of justice to Wales, an alternative that merits consideration is to plan for a quasi-federal arrangement. This would involve the creation of separate courts to deal with devolved Welsh law and matters within the competence of the National Assembly for Wales. This proposal would be akin to the state courts in the USA or the court system in Canada. Matters of a non-devolved nature would remain within the competence of the "federal" courts – i.e. those of England and Wales. There may, of course, be many practical considerations to be taken into account before creating a separate court system to deal with devolved matters; but the drafting Sub-Committee nevertheless include this idea as one of many of the divergent views that have been received.

14. There are two things on which all the membership in the Association appear to be fully in agreement with, namely:

a. Even if a separate legal jurisdiction for Wales were to be implemented, there should be no barriers established to the legal professions which would act as an impediment to lawyers in Wales working in England, or vice versa. Any such barriers would, in our view, be damaging to the legal professions in both Wales and England and would not be in the public interest.

b. Measures should continue to be implemented to ensure that more cases with a devolved law element should be dealt with in Wales and cases with a close connection with Wales should also be dealt with in courts in Wales. The further steps for enhancing "legal Wales" described by the Lord Chief Justice in the WCJC submission to the Constitutional Affairs Committee are strongly supported by the Association and we

are strongly of the view that they should be implemented without delay.

The definition of Jurisdiction

15. Jurisdiction has been defined as the power or authority to interpret, apply and decide the law, and that there are three commonly accepted characteristics of a jurisdiction, namely:

    a. a defined territory,

    b. a distinct body of law, and

    c. a structure of courts and legal institutions[4].

16. As to the first characteristic, Wales already has a defined territory. This definition is contained within section 158 of the Government of Wales Act 2006. In the context of the functions and responsibilities of the Assembly and the Welsh Ministers, the definition of jurisdiction is the territory or sphere of activity over which their legal authority extends.

17. That said, in terms of defining what is meant by the term "jurisdiction", which is not a term of art, we do not consider it is a necessary pre-condition for the existence of a separate legal jurisdiction for the law in the territory to be wholly distinct from that in other jurisdictions. For instance, the separate states of the EU are separate legal jurisdictions which share a common body of EU law, and the states of the USA have their own state laws as well as sharing a common body of federal law.

18. As to the second characteristic, Wales has a distinct body of law. This constitutes a growing body of statute law, comprising Acts of the Welsh Assembly and Acts of the United Kingdom Parliament which apply only

[4] This is the definition provided by Professor Tim Jones and Jane Williams in "Wales as a Jurisdiction" PL2004 SPR 78

to Wales. The extent of this body of law is inevitably going to increase in the future. For instance, we understand that the First Minister for Wales has announced there will be 20 Bills in the legislative programme for this term of the Assembly. The distinctiveness of this Welsh law will be a reflection of the different political influences at work in the National Assembly for Wales, as opposed to in the Westminster Parliament.

19. As to the third characteristic, this is what we consider to be the principal focus of this consultation.

20. In the context of the question as to whether or not there should be a separate legal jurisdiction for Wales, the term jurisdiction can therefore be more narrowly defined as the responsibility for the administration of justice in Wales; which essentially is what the second principal question that is being asked in this consultation is all about (as set out in paragraph 7 hereinabove). That is the sense in which the expression "jurisdiction" is used from now on in this consultation response.

The administration of justice

21. The administration of justice is not currently a function of the Welsh Government. It, therefore, has no jurisdiction at present over the administration of justice.

22. As we see it, the main purpose of this consultation is to consider whether or not it is a good idea to have the administration of justice in Wales devolved to Wales.

23. The current powers over the administration of justice in Wales are vested in the Ministry of Justice, the Home Secretary and other Ministers of the UK Government

24. The aspects of the 'administration of justice' to which we refer when using that expression are:

a. the Crown Court;
b. the High Court;
c. the Criminal and Civil Divisions of the Court of Appeal;
d. the Prosecution Service;
e. the Probation Service;
f. all Tribunals;
g. the Magistrates Courts Service;
h. the Prison Service;
i. the civil service responsible for the administration of justice in Wales;
j. the Police Service;
k. We also include the authority to appoint judges subject, however, to the supervision of an independent judicial appointments commission[5].

25. In relation to this latter point, and the need for an independent judicial appointments commission, there are two cardinal constitutional principles that need to be given effect to, namely (i) the separation of powers and (ii) the rule of law, and it is of the utmost importance that if a separate Welsh jurisdiction is to be implemented these two constitutional principles are honoured. The appointment of judges at all levels should be independent of the executive. We would respectfully point out to the Assembly that its present system for appointing members to the Tribunals for which it is responsible is contrary to these principles.

26. The mechanism for transferring the powers for the administration of justice, and the estates and other assets which they comprise, is set out in sections 58, 95 and 109 and schedules 3, 4, 5 and 7 of the Government of Wales Act 2006.

27. If those functions were added to the Assembly's legislative competence, that would enable the Assembly/Welsh Ministers to have jurisdiction over the administration of justice in Wales, just as they have jurisdiction today over, for instance, health matters and planning and environmental matters.

[5] This is a wider definition than that adopted in the response of the Council of judges referred to in footnote 2 above

Wales would become a jurisdiction and the administration of justice in Wales would thereby cease to be part of a unified system with England.

Whether or not there should be a separate legal jurisdiction for Wales

28. Whilst there is a divergence of opinion amongst the membership of the Association, so far as we are able to assess we consider the majority are in favour of devolving the administration of justice in Wales to the Assembly.

29. As part of the background in assessing whether or not it is a good idea for there to be a separate legal jurisdiction for Wales, we have taken into account the significant constitutional changes which have occurred to the UK generally, and to Wales in particular, under the Blair Government. Those developments demonstrate that:

> "*…the break-up of the unitary political system brought about by the devolution statutes have been accompanied by at least a loosening of the unified legal system of England and Wales*"[6].

30. We accept that the re-emergence of Wales' distinct identity in matters of law and the administration of justice is not entirely attributable to devolution, in that the process of change began much earlier with the passing of the Welsh Courts Act 1942. Further advances came with the Welsh Language Acts of 1967 and 1993, and then most significantly the Government of Wales Acts of 1998 and 2006.

31. It is inevitable, we believe, that the differences will become more pronounced, and more significant constitutionally, as the process of devolution continues; especially now that the Assembly has acquired increased legislative competence.

[6] See "Wales as a Jurisdiction"

32. Even in 2004, on the basis of legislation made up to December 2002 (which is four years before the second devolution settlement and some ten years before it acquired full legislative competence) Wales was described as an "emerging jurisdiction"[7].

The arguments for jurisdictional devolution

33. Amongst the advantages it could bring to Wales are the following

a. The administration of justice in Wales and its institutions would become closer to the people of Wales.

b. It would make good constitutional sense if the institution which is responsible for making the laws were also to have the responsibility and the accountability for their administration. The following rhetorical question has been posed by many during the course of this debate:

> Is there an Assembly or Parliament enjoying full legislative competence which does not also have responsibility for the administration of justice within its territorial jurisdiction?

c. The organisation within Wales of court and tribunal sittings in Wales would in all likelihood add to the efficiency of those bodies and to the prompt disposal of work;

d. The economic benefits which flow from the existence of a legal system in society may become available within Wales. For example, employment in support industries, the generation of fee-earning work in related professions;

[7] See "Wales as a Jurisdiction" Professor Tim Jones and Jane Williams.

e. The existence of legal institutions within Wales would create work and career structures not presently available in Wales;

f. It would assist in the further development of expertise amongst the legal profession in Wales;

g. It would make for consistency between the constitutions of Scotland, Northern Ireland and Wales.

34. Professor Gwynedd Parry, Professor of Law and History at Swansea University, says of these arguments that they provide very strong support for jurisdictional devolution today.

35. As to the likely consequences of devolving the function of administering justice to the Assembly, those members of the Association who fall into the Today or Tomorrow Group are largely of the view that they do not consider that it would create a significant upheaval.

36. From their perspective, it could be done seamlessly, result in savings, be of benefit to the Welsh economy, and provide significant career opportunities within Wales. They would point to the fact that all the necessary experiences and qualifications in the administration of justice are already present. They argue it would require very little additional, if any, new office space and what it would require would be reflected in the saving of office space and expenses in England.

37. As devolving responsibility for administering justice - as we defined that expression earlier[8] - would not require further primary legislation those in the Today and Tomorrow Group say there would be no need to find time for it in Westminster's long legislative queue**.**

[8] See paragraph 12 above

38. In terms of the economic situation, those in favour of the idea say that the way the administration of justice is structured and run in Wales could be so arranged as to make a potential contribution to the Welsh economy. We do not know what the position is in the changed economic climate of this period, but until recently legal services (apart from administration of justice) in Wales contributed 1% to Wales' GDP. Agriculture contributes a little more (about 0.5% more), and those in favour of the idea of a separate legal jurisdiction for Wales consider there is considerable scope for increasing the contribution of the former.[9] There is, therefore, potentially more than just a constitutional case for devolving this function.

The arguments against jurisdictional devolution

39. A number of arguments have been advanced (not necessarily by members of the sub-committee) against devolving responsibility for the administration of justice to the Assembly, and these include the following:

a. The creation of a separate legal jurisdiction for Wales is appropriate if Wales became an independent state with a wholly devolved government and legislature. However, that is not on the horizon at present.

b. There would be additional costs, and these would need to be carefully estimated before any final decision was taken as to whether or not to proceed with implementing the devolution of the administration of justice to Wales.

c. The potential economic benefits for the Welsh economy are unclear and such benefits as may arise would only likely to arise in an increase in administrative jobs which would have to be funded out of the public purse.

[9] See the Report of the All Wales Convention which explains the vtal importance of legal services to the Welsh economy.

d. Wales would suffer by no longer being part of one of the leading legal jurisdictions in the world, namely that of England and Wales.

e. If Wales had an entirely separate court system, contracts with parties from England and Wales (or further afield) would be likely to specify that the English courts, rather than those of Wales, would have exclusive jurisdiction over any dispute arising.

"The too radical argument"

40. Some would say that devolving responsibility for the administration of justice is too radical a change at this time ("**the too radical argument**").

41. This argument needs to be measured against the fundamental changes to the British Constitution which have taken place very recently. The devolution statutes of 1998 created a Parliament for Scotland and Assemblies for Northern Ireland and Wales, each of which, to different extents, has power to exercise legislative and executive functions previously exercised by the Westminster Parliament. They made Britain quasi-federal and diluted one of our fundamental constitutional principles, the sovereignty of Parliament.

42. Other significant changes were (i) the Human Rights Act 1998, by which the European Convention on Human Rights became incorporated into the domestic law of the UK; (ii) Freedom of Information Act 2000, which aims to make government more open and less secretive; (iii) the reform of the House of Lords, which aims to reduce the number of hereditary peers as members of the second chamber; and (iv) the reforms in our system of voting which have been introduced for elections to some of our democratic institutions such as the Assemblies and the European Parliament.

43. Professors Jowell and Oliver describe these changes as 'hammer blows' to our established constitutional principles. The late Professor Sir David

Williams described the Welsh devolution settlements as having brought about "an astonishing burst of constitutionalism".

44. Not only were these changes recent, the extent and rapidity of them have been astonishing. Constitutional principles which had become established for a century "have come under pressure as constitutional arrangements in the UK respond to changing political, economic, social and international circumstances and to changing conceptions of the values and institutions which should support a modern constitutional democracy .... [and] even an established democracy needs constantly to be reviewed and renewed" (Jowell and Oliver).

45. The momentum for fundamental reforms is a continuing one. The current Coalition Government's proposed reforms include (i) the introduction of fixed term parliaments, (ii) reforming the voting system, and (iii) further changes to the House of Lords. In this period in our history, it would appear that our constitution is in a near fluid state.

46. There were many reasons which drove devolution, but perhaps the strongest reason of all lies in the quality of democracy itself. The unitary system which had been in place for a number of centuries was perceived as no longer capable of performing effectively, or meeting the demands of democracy of the latter half of the 20th century, not to mention those of the 21st century.

47. Accordingly, devolution is but a part of a much wider process of change in the relationships between Westminster and each of the other home nations, between the state and the citizen, and between citizen and citizen.

48. Staying with the argument that it would be "too radical" to devolve the administration of justice, we need also to keep in mind that the administration of justice in the United Kingdom has never been administered centrally on either a British or UK basis. Both Scotland and

Northern Ireland have their own systems for administrating justice. It is the case that Scotland always did have its own distinct legal system, but Northern Ireland's separate justice system is the product of relatively recent legislation. Only Wales and England are administered jointly for these purposes, but that was not even always the case. For some three hundred years up to 1830, the administration of justice in Wales, civil and criminal, was administered by the Court of Great Sessions. It was the abolition of that court in 1830 which caused "Wales to be wholly absorbed into England in legal and administrative matters" (Professor John Davies, "A History of Wales").

"The quality argument"

49. Another argument against giving jurisdiction to Wales over the administration of justice is that the system of justice in England and Wales is very well respected internationally. Our judges are independent and of outstanding quality. The argument often developed is that unless a devolved justice system is at least as good in terms of quality as the justice system presently enjoyed in Wales, the case for change is not made out ("**the quality argument**").

50. In considering this argument, we think that devolving responsibility for the administration of justice would not dilute the quality of judges in Wales. The Judges would continue to be independent and they would continue to be appointed from the ranks of barristers, solicitors and legal executives. The central questions on which the Welsh Government are consulting are concerned only with the structures by which the administration of justice is administered; and there is no reason to believe that the quality of the judiciary would be in any way reduced in the event that the administration of justice were to be devolved to the National Assembly for Wales.

"The devolution by evolution argument"

51. A third argument is that we should leave devolution of the administration of justice to evolve and see where we get to. The proponents of this argument would point to the fact that evolutionary changes in the administration of justice in Wales have occurred even though justice is not a devolved field; and whilst it might be doubtful that they would have occurred to the extent they have, were it not for devolution, they have occurred without justice being a devolved field ("**the devolution by evolution argument"**).

52. However, the Richard Commission criticised devolution by evolution as devolution of a kind which did not follow any discernible or comprehensible policy. It is preferable, in our view, to have a policy which is well thought out, and upon which detailed consultation has been sought from all participants and interested parties in the administration of justice in Wales.

"The tomorrow, maybe, but not today argument"

53. Fourthly, it can be argued that the proposal to devolve jurisdictional responsibility for the administration of justice today confuses our present needs with what our needs might be in the future, if there were further evolutionary changes or "spontaneous adjustments"[10] in the field of the administration of justice. The argument is premised on the basis that we are confusing present needs with possible future needs ("**the tomorrow, maybe, but not today argument**").

54. We accept that the arguments for devolving the justice function will become stronger in the future as the effects of devolution continue to evolve; but we consider that the case we have described for doing so now

[10] See paragraph 12 above

in relation to devolution for the administration of justice is one that can be sustained at present.

"The piecemeal reform argument"

55. A fifth argument against is that the pragmatic approach of piecemeal reform in response to changing circumstances is to be preferred to comprehensive changes dictated by constitutional theory ("**the piecemeal reform argument**"*).*

56. The following academics provide persuasive arguments against piecemeal reform:

a. Vernon Bogdanor, Professor of Government at Oxford University, in his book *The New British Constitution* states: *"it is difficult to deny that .... devolution has led to a system of amazing untidiness .... a Kingdom of four parts, of three Secretaries of State, each with different powers, of two Assemblies and one Parliament, each different in composition and powers from the other"*.

b. Rodney Brazier, Professor of Constitutional Law at the University of Manchester, in his book *Constitutional Reform* states: *[The Labour Government's preference for allowing institutions to develop pragmatically may] "explain in part [its] disinclination to present its constitutional reform programme as a related whole, driven by constitutional theory"*.

c. Larry Siedentop, Emeritus Fellow at Keble College Oxford, in the Financial Times on 31 May 2010 stated: *"Asymmetrical devolution – different degrees of power devolved to Scotland and Wales – amounts to a parody of the assumption that piecemeal reform is always enough ..... This mindset grew out of a parliamentary tradition prizing*

piecemeal reform. For more than two centuries that was our political virtue. It is now in danger of becoming our vice"

"The laws in England are no different to the laws of England argument"

57. Finally, there is an argument that as the laws in Wales are the laws of England and Wales, there is no need or justification for the change (**"the laws in Wales are no different to the laws of England argument"**).

58. The differences or the absence of differences between the substantive laws applicable to Wales on the one hand and to England on the other is not as relevant as is the constitutional framework in which Wales has been placed as a consequence of the devolution statutes. It is this new constitutional framework which we consider gives rise to the question of whether jurisdiction over the administration of justice should be devolved to the Assembly, and not the difference between the substances of our laws when compared to those of England.

59. In any event, the argument is only partly correct. Since the devolution settlement of 1998 there has emerged a substantial body of law the territorial extent of which is limited to Wales and the content of which is different to the law in England. This is certain to increase following the referendum and the extended legislative competence now enjoyed by the Assembly. The rate of production is about to increase very substantially. The First Minister recently announced the Welsh Government's legislative programme of no less than 20 Bills during the next four/five years and Westminster will also continue to make Wales-only legislation in the non-devolved fields.

Conclusions

60. If it is decided to proceed further with the idea of a separate legal jurisdiction for Wales, we consider that it would be helpful to look in more detail at the need to implement a system for:

    a. Determining the choice of jurisdiction between England and Wales;

    b. Transferring cases between the two jurisdictions;

    c. Recognising and enforcing cross-border judgments;

    d. Establishing in respect of any separation of the criminal law and devolution of criminal justice, a criminal justice infrastructure, such as a separate Attorney General for Wales, a Crown Prosecution Service, a Sentencing Council, and a Prison Service;

    e. Establishing a new Court of Appeal Criminal and Civil Division for Wales;

    f. Establishing a new role for a representative from the Welsh judiciary to sit on the Supreme Court of England and Wales.

61. As an Association, we are strongly of the view that there should be no barriers to the free movement of the professions as between Wales and England, and vice versa. It is in the interests of the legal professions, and of the public at large, to ensure that there are no restrictions to the professions being able to operate in both jurisdictions.

62. We now turn to the specific questions that have been set out in the consultation paper, for which are answers are contained in **Appendix 1**.

HEFIN REES
CHAIRMAN OF THE ASSOCIATION OF LONDON WELSH LAWYERS
26 JUNE 2012

APPENDIX 1

The Association's responses to the specific questions raised in the consultation paper are as follows:

Response to Question 1

1.1 In the context of the question of whether a territory is a necessary element of a jurisdiction, Wales as a territory is precisely defined in the Government of Wales Act 2006.

1.2 Please see the responses provided in paragraphs 10 to 14 hereinabove.

Response to Question 2

2.1 We accept what is stated by Jones and Williams, which is that a characteristic of a jurisdiction (as they define it) is a distinct body of law. Jurisdiction in the sense used in this consultation is about responsibility for administering the function. See paragraphs 10 to 14 hereinabove.

2.2 In relation to Question 2.1, we consider that there is in Wales a sufficient body of law which is sufficiently distinct from the Laws of England to satisfy this requirement of jurisdiction. It comprises the laws made during the three periods described by Jones and Williams (1536 – 1868; 1868 – 1998; 1998 to the present day[11].

2.3 A body of law is distinct in this sense if it "is unique to Wales or where it parallels similar legislation passed in England, involves significant differences in drafting reflecting Welsh circumstances"[12].

2.4 What matters is the breadth of the legislation, and not whether it is primary or secondary. Under the unwritten constitution, the distinction between primary and secondary legislative powers can be illusory. Much of that which can be achieved by primary legislation can also be done by secondary legislation. It is purely a question of the breadth of the powers conferred upon the Assembly.

[11] Jones and Williams at pages 83 to 100

[12] See Jones and Williams page 90 quoting the Counsel General's evidence to the Richard Commission

2.6 The National Assembly is a legislature because it is empowered to make law applicable within Wales. The fact that this power was more circumscribed than that of the Scottish Parliament does not undermine this basic point.

2.7 As to Question 2.2, what matters is whether there is a distinct body of law and not what kind of law it is: statute or other law. It can even be procedural law. So long as it is distinct, and there is a requirement to follow it, that is sufficient.

2.8 As to Question 2.3, please see the answer above.

Response to Question 3

3.1 A separation of the responsibility for the administration of justice in Wales from that in England is necessary if the Assembly is to have jurisdiction over that function in Wales.

3.2 As to Questions 3.1 to 3.6, please see the Association's response in paragraphs 10 to 14 hereinabove. We envisage very little change in the way courts would work if the Assembly had responsibility for their administration.

Response to Question 4

4.1 The issues are primarily to do with the machinery by which justice is administered, rather than the legislative competence of the Assembly. Please see page 7 of the consultation document for examples of the legislative competence in a field of law being reposed other than in the body exercising responsibility for the administration of justice.

4.2 As to Question 4.1, the functions which need to be devolved if the Assembly is to have jurisdiction over the 'administration of justice', as we define that expression, are described in paragraph 13 hereinabove. If those functions were transferred, the Assembly would have legislative competence in those fields of responsibility.

Response to Question 5

5.1 If 'jurisdiction' over the 'administration of justice', as we define those expressions in paragraph 13, were devolved to the Assembly, there would not be a 'unified' court system.

5.2 Furthermore, the Assembly's legislative competence would thereby include competence in the field of administration of justice. See the answer to question 4.1 above.

5.3 On page 8 of the consultation document the following sentences appears: "There appears to be no single method or process for the creation or emergence of a separate legal jurisdiction ……so that legislation extends to Wales". We do not accept that the assertions/views expressed in those sentences correctly state the law.

Response to Question 6

6.1 See paragraphs 10 to 14 hereinabove for our interpretation of the word "jurisdiction" in the context of this consultation. To answer the question raised here in relation to the present unified system, the definition provided in that paragraph in relation to Wales may be modified so that it reads:

. "In the context of the functions and responsibilities of the Minister of Justice and other Minsters of the Crown with responsibility for the administration of justices in England and Wales generally, the definition of jurisdiction is the territory and or sphere of activity over which their legal authority extends."

6.2 As to Question 6.1, please see paragraph 10 to 14 hereinabove and the last preceding answer.

Response to Question 7

7.1 We do not think so.

7.2 In the context of the present consultation and that of the three essential questions which we have identified in paragraph 4 of our main response, the essential element of the jurisdiction of the Assembly over the administration of justice is the statutory authority to exercise that jurisdiction in the territory defined in the Government of Wales Act 2006.

Response to Question 8

8.1 The laws are different today and there will be more laws in the future which will be different, but the case for devolving responsibility for the administration of justice to the Welsh Government at this time does not

depend simply on different laws. It depends also on the wider constitutional arguments summarised in paragraph 19 hereinabove.

Response to Question 9

9.1 This question is concerned with whether the present position with regard to the administration of justice in England and Wales is sustainable or not.

9.2 In our view, whether it is sustainable or not is not to the point.

9.3 The case for and against devolving that function to the Assembly depends primarily on (1) The fact that Wales already has two of the essential characteristics of a jurisdiction at present, (2) it is a legislature with primary legislative capacity, and (3) its continued tie to England for the purposes of the administration of justice is inconsistent with the constitutional settlement made for the other devolved nations of the UK.

Response to Question 10

10.1 Please see the response to Question 9.

Response to Question 15

15.1 Private International Law ("PIL") is concerned with cases with a "foreign" element. At present there are no PIL rules relating to cases that have features only concerning England and Wales.

15.2 Were England and Wales to become separate legal jurisdictions, PIL would be introduced, probably based on the PIL rules applicable to cases arising between the present three legal jurisdictions of the UK (which are "foreign" to each other for these purposes). This would add a layer of complexity to English-Welsh cases.

15.3 At present, in cases where both parties are in England and Wales, the claimant may exercise choice as to where in the jurisdiction to issue court proceedings and the defendant may then apply for a transfer to another court. E.g. to adopt the example on page 6 of the Consultation Document, if a claimant issued a claim in Norwich County Court over a walking accident on Snowdon's footpaths, the case could be transferred to a court in Wales if *"it would be more convenient or fair"* or due to *"the availability of a judge specialising in the type of claim in question"*[13]. Judicial specialisation in Welsh law can thus already be a reason to transfer a case to Wales.

[13] Civil Procedure Rules 30.3(2)(b) and (c).

It would take only some simple rule changes to add a presumption that cases with a significant element of devolved Welsh law should be heard in Welsh courts.

15.4 Going further, a specialist Welsh division of the High Court could be established to hear Welsh law cases. The challenge would not be drafting the rules/legislation (which would not involve any complexities of PIL), but providing the judicial, administrative and physical resources.

15.5 The creation of a Welsh legal jurisdiction would not ensure that cases with a Welsh law element would be dealt with by Welsh courts. The PIL jurisdiction rules currently applicable within the three UK jurisdictions would apply as between the four legal jurisdictions. The jurisdiction of a UK court in an intra-UK civil or commercial case is not determined by the issue of which country's law applies to the dispute. The jurisdiction rules[14] provide that a defendant in one of the UK legal jurisdictions shall be sued in that legal jurisdiction, subject to several exceptions which do not include the law applicable to the dispute. However, the court in which proceedings are commenced has a discretion to decline to deal with the case if there is another legal jurisdiction which has power under the PIL jurisdiction rules to hear the case and one of the factors which may be taken into account in exercising that discretion is the applicable law. E.g. if a walker from Norwich were sued in the courts of England for causing damage to footpaths on Snowdon, the English court could (but would not have to) decline to hear the case because (a) the case could have been commenced in Wales as the place where the harmful event occurred[15] and (b) the applicability of Welsh law would be a factor that the English court would be entitled to take into account.

15.6 Accordingly, in English-Welsh cases, the creation of a separate Welsh legal jurisdiction would not be likely to increase the chances of Welsh law cases being dealt with by Welsh courts and could even reduce it. Such an increase could be readily achieved within a short timeframe by rule changes well short of the creation of a separate legal jurisdiction for Wales.

15.7 In Welsh-Scottish or Welsh-Northern Irish cases, the creation of a separate Welsh jurisdiction would have no significant effect from the PIL angle.

15.8 Parties to a contract may specify that any dispute arising in the future shall be dealt with by the courts of a specified country and/or under the law of a specified country. Currently, in English-Welsh contracts there is no need to specify either matter, as the contract is wholly internal to England and Wales. However, if England and Wales became separate jurisdictions, parties would probably begin to do so, with an English

[14] Set out in Schedule 4 to the Civil Jurisdiction and Judgements Act 1982.
[15] One of the exceptions to the rule that a defendant must be sued in the place of domicile.

party wanting English law and English courts and the Welsh party wanting Welsh law and Welsh courts. Which party prevailed would depend on the negotiations, but one can see that often the negotiating power would lie on the English side and that international corporations with UK subsidiaries would be likely to be more comfortable with English law and courts than those of Wales. Thus, in this respect, the creation of a separate Welsh legal jurisdiction could result in more Welsh parties finding themselves subject to English law and the English courts.

15.9 Whilst courts will apply the procedural rules applicable in their jurisdiction, they will not in every case apply the substantive law of that jurisdiction. If parties to a contract have not specified which country's law is to apply to the contract, it will be determined at present in England and Wales by the Contracts (Applicable Law) Act 1990[16]. The presumption is that the law of the contract will be that of the country that is the residence of the party who is to effect the performance that is "characteristic" of the contract, which will usually be not the payment of money but the performance for which payment is due. Hence, if a Welsh purchaser of goods from an English supplier failed to pay on delivery, then, if a separate Welsh legal jurisdiction existed, the proceedings would have to be commenced in Wales, but the case would be decided according to English law.

15.10 In the case of negligence (one of the "torts" or civil wrongs), the applicable law is determined according to the Private International Law (Miscellaneous Provisions) Act 1995. The general rule is that the applicable law is that of the country in which the relevant events occurred, unless there are sufficient factors connecting the matter with another country. Thus, if a Welsh walker on Scafell Pike (England's highest mountain in Cumbria) negligently dislodged a rock which injured an English walker, who sued in the courts of a separate Welsh jurisdiction, the Welsh courts would probably apply English law, whereas if both walkers were Welsh, the Welsh court might apply Welsh law. Similarly, if two English walkers were on Snowdon and one injured the other, the action could be brought in Wales and the Welsh court would have to decide whether to apply Welsh or English law.

15.11 Paragraphs (vii) and (viii) are concerned with PIL "choice of law" rules, which would have to be applied if England and Wales became separate jurisdictions. Currently, under the unitary jurisdiction of England and Wales, courts are not concerned with such rules and will apply local laws and by-laws as necessary, for example just as there might be local laws as to footpaths on Snowdon, local authorities in Cumbria might have by-laws as to footpaths on Scafell Pike.

[16] Enacted in order to comply with the EEC Convention on the Law Applicable to Contractual Obligations ("the Rome Convention").

Response to Question 16:

16.1 None of the four options is an appropriate response.

16.2 Reserved powers devolution would not necessarily require an entirely separate legal jurisdiction. Assuming, for instance, that commercial law were reserved, the creation of an entirely separate Welsh legal jurisdiction would result in divergent case law. On the other hand, adequate provision would need to be made for specialist Welsh judicial decision making, e.g. a separate Welsh division of the High Court. In effect, one would be in a quasi-federal system, where state courts would decide on state law or matters and federal courts on UK law. Consideration of the delineation between the two sets of courts could usefully involve study of federal models such as USA and Germany.

Response to Question 17

Yes – please see our response to Question 16.

Response to Question 18

Without giving a complete list: company and commercial law, partnership, family, trusts and probate, land law (real property), chattels, intellectual property, ...

Response to Question 19

19. Yes.

19.1 and 2. It is hard to see why a Wales Assembly legislature, elected by Welsh electors, should have any power to make laws that take effect upon those outside Wales, who have not elected those law makers. That is so whether there is or is not a separate Welsh legal jurisdiction. The present position appears anomalous and unconstitutional, and it would be more so if there were a separate Welsh jurisdiction. In the example given, if English authorities were to have power to assist the enforcement in England of Welsh Assembly laws, that should be by legislation by the law makers elected by English voters. It might be said that where there is express delegation of law making powers to the Welsh Assembly, the English legislature has exercised the power by way of delegation. But when one moves to a reserved powers model, that argument does not hold much water. We should not seek to "have our cake and eat it", as the expression goes.

Response to Question 20

20.1 The short answer to 20 and 20.1 is that it depends on the answers to the other issues; but in essence in terms of education and training, qualification (including post-qualification accreditation) and regulation, even if Wales had a

separate legal jurisdiction, these issues should for the time being be left to the various Regulatory bodies to regulate.

20.2 For instance, the England and Wales Law Society and General Council of the Bar of England and Wales should retain responsibility for the issues relating to qualification and regulation. They would, of course, have to continue working alongside the various universities and legal professional providers.

20.3 There is no need for a separate call or admission to Wales at this stage. Many other jurisdictions, such as Australia, are moving towards a more harmonised system of admission and laws and this represents arguably a modern trend. In fact it may potentially have the effect of deterring international and national law firms setting up in Wales.

20.4 However, it can be envisaged that at a time when as more Welsh legal differences develop, for instance in planning and consumer law, the need for a separate examination on Law and, possibly, procedure will need to be organised. At the moment, there are already differences such as the Welsh Language Act 1993 and the Rights of Children and Young Persons (Wales) Measures 2011. As more divergence occurs, the argument for a complete new apparatus (including admission) becomes more relevant.

20.5 If one also looks at Question 25, depending on what is meant, there would initially be additional expense but in the middle and long term this does not necessarily need to be the case. For instance, the buildings, Judges, civil services etc are already in situ and no increased expense necessarily needs to be incurred. The short term could trigger higher expenditure, for instance in signage, letterheads, publicity, notification etc., but down the line, the additional expenditure would tend to fall way.

Response to Question 21

21.1 In essence it would have to be regulated but eventually previous England and Wales decisions would not be persuasive and the Welsh Court cases be made binding. This, of course, would require Legislative intervention.

21.2 The other issue would be whether the final Court of Appeal would continue to be the Supreme Court/Privy Council. If it were then this would create fewer logistical and legal problems. If, however, it was decided that there should be a Supreme Court of Wales, then in the early years this would arguably create

many difficult legal issues especially in relation to the issues of *stare decidis* and the entire system of common law precedents.

21.3 In relation to different types of Law this raises a dilemma. For instance, consumer protection legislation such as Health and Safety has similar laws across the UK but Scotland has different procedural rules. The same applies to Employment law. There is therefore no real long term problem with this if Wales was to have a separate jurisdiction. Interestingly, a leading case on "Risk", namely R v Porter [2003] ICR 1259 is a Welsh case, where the conviction was quashed by the English Court of Appeal.

21.4 In terms of criminal or family law, Scotland has its own legal system (and procedure) and applies its laws inside Scotland. There is, therefore, no reason why Wales could not devolve this in a similar way as Scotland.

Response to Question 25

25.1 There are several points to consider.

25.2 Before assessing any wider ramifications, there probably needs to be a concerted effort to ensure, through focused and effective communication (across all relevant media sources), an informed debate. Popular perceptions can often be misconceptions and the true benefits (or dis-benefits) misunderstood.

25.3 In a social context, for example, a separate Welsh legal jurisdiction might encourage a greater degree of national (Welsh) self-confidence and reinforce a (Welsh) sense of identity. Though in each case, one would hope, not in any extreme sense.

25.4 Politically, much the same could be said. A distinct political 'will' is likely to emanate from the knowledge that a separate and distinct machinery for the administration of justice exists in Wales. But one must guard against 'over-cooking' it.

25.5 The reinforcement and strengthening of the Welsh language should be a natural consequence - though here again one needs to guard against on 'over-emphasis' on the linguistic benefits which might risk alienating people from using or relying on any such machinery. In short a truly bilingual Ministry of Justice.

25.6 The economic impact is in some ways the most difficult to assess. On the one hand it could lead to a strengthening and Improvement in the Welsh economic landscape. On the other, if taken too far, it could militate against people using the newly established machinery in Wales and electing instead to go to e.g. London or another regional centre in England.

Response to Question 26

26.1 This has at least three elements to be considered:

26.2 Communication: Ensuring as widespread (and cost effective) communication as possible is achieved. This entails not only traditional means of disseminating information, but crucially of having up to date websites which are constructed in as user friendly a manner as possible. Such communication, once established, needs to underscore the benefits etc of using an independent legal framework in Wales.

26.3 Cost: offering any independent Welsh legal framework in as cost effective a manner as possible. There should be inherent economic advantages (in going to a local 'centre' rather than say London) but underlining this through a competitive pricing structure (e.g. the administrative cost of filing a claim) should also ensure a more readily accessible (and financially attractive) system.

26.4 Complexity (lack of!): As simple and straightforward a system as possible should encourage people to use it. Ensuring that people who may be intimidated by the prospect of pursuing claims or other matters in England by offering a very expeditious and locally based means of 'going to justice' really must be at the heart of ensuring accessibility.

Response to Question 27

27.1 Additional features for a separate legal jurisdiction to operate effectively - in a specifically Welsh context.

27.2 Structure: how regional/local should a separate legal jurisdiction go? Is it simply a question of having a central office or 'HQ' in say Cardiff (or Caernarfon?) with e.g. 7 'regional' centres in North Wales, Mid-Wales, South West Wales, South East Wales ('the Valleys') and each of the three major urban conurbations (Cardiff, Swansea and Newport)? Or should any administration be even more 'local'. There are clearly cost/efficiency questions tied in here also.

27.3 One might wish to look at the leading economic indicators for revenue generation in Wales. Tourism, for instance, and the influx of people from elsewhere in the UK and further afield, might present its own unique challenges in terms of addressing how best to respond to any legal issues arising (speed and simplicity of redress for (or against) 'host' entities (such as hotels). But there may undoubtedly be other areas (agriculture?) which again

might require special attention if only because, relative to Wales, they form such an important part of its economy.

Response to Question 28

Of course! The very fundamental premise is different and a totally different range of issues and questions arise.

Response to Question 29

29.1 One comes readily to mind - education.

29.2 If there is to be an independent MOJ for Wales and a distinct means of administering justice, how is that to be achieved? How will the 'administrators' themselves know what to do and how to do it? One is not talking here of course of distinct university courses specifically designed to teach the administration of justice in Wales! Rather, a more informal, but well structured, means of ensuring that to be administered in what will be its own unique way and manner, a cadre of civil servants will presumably want to understand precisely what it is they are administering - and how.

APPENDIX 2

CYMDEITHAS CYFREITHWYR CYMRY LLUNDAIN
(THE ASSOCIATION OF LONDON WELSH LAWYERS)

Inaugurated on the 17th February 2011 by the The Rt Hon The Lord Judge, Lord Chief Justice of England and Wales

Patron. The Rt Hon Lord Morris of Aberavon KG QC

Minutes of a Speakers Meeting
"A Separate Legal Jurisdiction for Wales"
Committee Room 3, House of Lords
23 May 2012

I. Introduction:

By Hefin Rees: The aim of the evening is to introduce the issues involved in this consultation paper and to hear the speakers address those issues and to invite comments and debate from the membership of the Association.

II. Expert panellists:

Rt Hon Lord Morris of Aberavon KG QC

Winston Roddick CB QC

Rt Hon Elfyn Llwyd MP

III. Winston Roddick CB QC (for full notes of address see **Appendix 3**)

Former Counsel General to the Welsh Assembly and Honorary Recorder of Caernarfon, with a practice at the Bar in public law and constitutional law (*inter alia*).

IV. The Rt Hon Lord Morris of Aberavon KG QC (for full notes of address see Appendix 4)

Former Attorney-General of England & Wales and Northern Ireland. Former Secretary of State for Wales.

V. Rt. Hon. Elfyn Llwyd PC

Barrister and Member of Parliament for Plaid Cymru since 1992; formerly representing Merionnydd Nant Conwy latterly, since 2010, Dwyfor Meirionydd.
Member of the Privy Council since 2011.

"Wales is maturing as a nation. Our development grows in confidence. The structure of our justice system must grow to encase that. Wales has a legislature but no jurisdiction of its own. There are few practical impediments to addressing this discrepancy, NI and Scotland have done so.
Theodore Huckle QC has insisted that separate jurisdictions can co-exist in UK.
The debate is impeded by the relatively weak devolution settlement in Wales, as compared with NI and Scotland.
The Welsh Government consultation is a testament to how essential and urgent this debate is becoming.
2010 – office opened in Cardiff dealing with Administrative cases. 9 out of 10 cases are now heard in Wales. We now have a registry in Wales.
2011 referendum – majority believe Cardiff not Westminster should be the centre of decisions governing Wales.
2007 Wales and Chester disbanded
LCJ – Eng and Wales – Bingham added Wales.
Family lawyers must have a thorough knowledge of corpus of Welsh law to practice in Wales.
What is required?
Jurisdiction - legal distinct body of law supported by own court structure and legal institutions.
Local Govt Act 1972 – Wales own defined territory. Has own body of law.
WA should base transfer of Scottish powers

Crime is not devolved but is evolving. Examples – fines on shop owners not charging for plastic bags, smoking areas etc.

Separate Welsh jurisdiction – precondition for greater legislative powers or does it provide enhanced legal powers?

Government of Wales Act 2006 should devolve the Administration of Justice to the Welsh Assembly. There should be a separating prosecuting service for Wales, separate Welsh judicial appointments system and welsh legal aid system

It is foolhardy to suggest that there are no barriers to overcome. Consensus will have to be reached regarding whether only Welsh qualification to practice in Wales would be permitted and whether a dualistic body of law could work. There's the question of cross-border practitioners to consider.

Refers to NI, where there are arrangements for qualification and rights of audience to practitioners from England and Wales. In NI there is no automatic right to practice in England.

The devolution of justice matters. Laws ought to be drafted to meet the priorities of the local population. Legal Wales will impact on the whole of society not just the Justice system.

VI. Questions from the floor

Q1. Gerard Forlin QC

Australia – moved from state by state into harmonised/federalised system

Could foreign law firms be put off by separate legal jurisdiction?

Q2. Jonathan Haydn-Williams

How would it assist Welsh business?

England and Welsh law is recognised globally – why would we wish to remove ourselves from the standard law for commerce?

Responses:

Lord Morris

We should look at the number of cases arising in Wales.

It would be helpful to business, lawyers and the public if there is a presumption of sending cases down to Cardiff.

JHW – that can be done without a separate legal jurisdiction.

WRQC – it would not be bad for business – it would be better for business. It would do a great deal for Wales.

The economic advantages are so obvious.

The question confuses the content of the law and the machinery by which the law is exercised.

Nobody is going to be removed from the body of law in England and Wales.

Contributions

Lord Elystan MORGAN

I think there are 2 ends of the telescope.

One is the inevitability of devolution began in 1964 with the appointment of 1st Minister of Wales

When one considers the developments of the last 15 years of Chancery Mercantile courts etc it points to a movement that is inevitable. It is utterly natural. There is no legislature that does not have it's own means of administering it.

Other end of the telescope…

We are not a region, we are a nation. A nation is a nation is a nation.

I don't take the point that the essential choice is a fully-fledged Welsh judiciary and an independent Wales. There is not going to be an independent Wales. It doesn't connote independence as such. A community to have faith in its future without that all-important institution of its own judicial institution.

There is one other factor

The police. 44 years ago I was Police Minster. Even then there was talk about reducing police forces from 43.

If that takes place there might well be a movement to have one police force for Wales and that would be very dangerous. It would raise an issue re the ID of Wales.

John Roberts (Goodman Derrick LLP)

Concentrating on the administration of justice rather more than the legal system generally.

I've been a lawyer for 40 years and never set foot inside a courtroom other than as a witness.

I come from a branch of the law where it has been a perceived benefit to harmonise laws. I am therefore sceptical about creating differences. I am a devolutionist

I heard it said it is to the benefit of lawyers in Wales.

What about the public interest?

Submissions have concentrated on the legal professions – not entirely synonymous with the public at large.

Is a separate legal jurisdiction for the benefit of commercial lawyers in Wales?

Internationally, contracts are governed by the Laws of England and Wales. It attracts a great deal of work to this country. London is not best and work can be done very well anywhere in the UK but we cannot immunise ourselves from competition. That would be a bad thing.

A New York businessman would be likely to chose the law of England rather than the law of Wales and England. That worries me as I deal a lot with Scottish banks.

The laws of Scotland have now changed; that has meant a drift of lawyers from Edinburgh to London.

I genuinely worry whether this will be a benefit to lawyers in Wales.

WRQC

There are two matters to consider:

1. There is a difference in the law in Wales. It is an inevitable consequence of devolution. Carwen Jones says his legislative programme consisting of 30 Bills in Westminster will make Wales-only Bills.

2 The public interest, the arguments place public interest much higher than the interest of lawyers. Concerns for lawyers in Cardiff have never driven the considerations before the Welsh Assembly. It is essentially a constitutional argument which brings law closer to the people. Many of the lawyers in Cardiff are against it.

Elfyn Llwyd

There is a broader economic point; we could harmonise laws in Wales and England.

Malcolm Bishop QC

I am concerned about the restricted practice of lawyers in Wales. There is a lack of self confidence in Wales. I regard it as a scandal that there has not been a Welsh Law Lord in the Supreme Court.

APPENDIX 3

Speaker's Notes provided by Winston Roddick CB QC

For a meeting of members of the

Association of London Welsh Lawyers

to discuss

"A Separate Legal Jurisdiction for Wales"

House of Lords, Wednesday 23 May 2012

1. The matter we are here to discuss is one of importance to all London Welshmen and women and especially those involved in the legal profession and the administration of justice. Wales' constitutional development is of the greatest importance to all Welshmen and women no matter where they live for the time being. The London Welsh community is in a position to observe Wales from a different perspective from that which I occupy. The First Minister will therefore be informed by your views. You may express those views personally but the Association would like you to do so through the Association for the obvious reason that they will be

perceived to be the views of the London Welsh community rather than those of individuals.

The question on which are views are sought

2. Despite the complicated nature of the consultation document, the real question on which the First Minister is consulting is what our views are about responsibility for the administration of justice being devolved to Wales. That is what he said at the Legal Wales Annual Conference last year he proposed to consult on. Since then we have had this rather complicated consultation document but if we start from an understanding that that is the central question, we will not be distracted by those unnecessary complications.

3. The consultation is concerned therefore not with the substance of our laws or the Assembly's legislative competence but with the structures by which justice is administered in Wales and only about that.

4. The two principal questions posed by the consultation document poses are "what is meant by the term 'separate Welsh legal jurisdiction' and "whether or not there should be a separate legal jurisdiction for Wales" [17]

5. In the context of this consultation, the meaning of "jurisdiction" is driven by the terms of that second question and by the answer to that second question. What that second question comes to in simple terms is whether responsibility for the administration of justice in Wales should be devolved to the National Assembly for Wales. That being the context in which we are asked to define jurisdiction, the definition of "jurisdiction" for these purposes therefore is 'the territory or sphere of activity over which the legal authority of the Assembly extends.' The administration of justice as a function is that of the Ministry of justice and it is administered by that department and Her Majesty's Courts and Tribunals Service. It is not a function of the Assembly and, it follows, it is not one of the Assembly's fields of responsibilities. The Assembly therefore has no jurisdiction over the administration of justice at

[17] See the Forward

present; that jurisdiction is vested in the Ministry of Justice. If however that function and field of responsibly were added to the Assembly's functions via its Ministers, the Assembly would have jurisdiction over the administration of justice in Wales just as it has jurisdiction today over health matters and planning and environmental matters.

6. However, the pursuit of a definition of "jurisdiction" or "separate jurisdiction" is in danger of overcomplicating the consultation and distracting its focus which in its essence is concerned with the question whether responsibility for administrating justice in Wales should be devolved to the Assembly. In that context, "jurisdiction" simply means 'responsibility for the administration of justice'. That is the sense in which I use the expression in this address. The question 'what is meant by separate Welsh Jurisdiction' adds nothing to the question should responsibility for the administrator of justice in Wales be devolved to the Assembly.

7. The aspects of the administration of justice to which I refer when using the expression administration of justice are the Crown Court, the High Court, the criminal and civil divisions of the Court of Appeal, the Prosecution Service, all Tribunals, the Magistrates Courts Service, the prison service, the Civil Service responsible for the administration of justice in Wales, and the police service. I also include the authority to appoint judges subject, however, to the supervision of an independent judicial appointments commission. Save for the last of those functions, they are all presently vested in the Ministry of Justice, the Home Secretary and other minsters of the UK Government. The mechanism for transferring them and the estates and other assets which they comprise is set out in sections 58, 95 and 109 and schedules 3, 4, 5 and 7 of the Government of Wales Act 2006.

Background

8. Significant developments within Wales's legal landscape have taken place already in the wake of devolution. One such development was the creation of 'Legal Wales' or 'Cymru'r Gyfraith'. The Government of Wales Act 1998 had ushered in significant constitutional changes and it was of the highest importance that Wales' legal 'constituencies' should come together to form a civic society to engage with the new order and that is what Legal Wales is, a new civic society. It has a representative

committee the members of which are drawn from every constituency of law in Wales including barristers, solicitors, judges, the law schools of the universities of Wales, lawyers in local government, Assembly lawyers, the Institute of Legal Executives, the tribunals and the specialist law associations of Wales.[18] In 2000, the Mercantile Court for Wales was established in Cardiff. The Court of Appeal Civil Division now sits regularly in Cardiff as does the Court of Appeal Criminal Division. In 2008, there was established the Administrative Court for Wales. Most judicial review cases involving decisions of Welsh public authorities including the National Assembly for Wales are now heard in Wales; Employment Appeals Tribunals now sit regularly in Wales. There has been a Chancery Court in Wales exercising High Court Jurisdiction for a number of years before devolution. A significant post-devolution change was the rearrangement in April 2007 of the boundaries for the administration of justice in Wales. The administrative region ceased to be Wales and Cheshire and became HMCS Wales. Henceforth, the court services in Wales will be administered on an all Wales basis. As recently as 2010, there was established the Association of the Judges of Wales which is an association of District Judges, and judges of the Circuit Bench, High Court, Court of Appeal and House of Lords and the Supreme Court. And in April 2010, there was established the Wales Bench Chairmen's Forum.

9. Specialization, too, is strong in South Wales. It has been so since the early seventies but is now in an expansive phase. It is developing, hand in hand, with the specialist courts which have been established in Wales in recent years and with the National Assembly's expanding responsibilities. With specialization and devolution of government came opportunities and challenges. The legal profession in Wales is up to the challenge and has seized the opportunities. Since devolution, there have been established four specialist associations – the Wales Public Law and Human Rights Association, the Wales Commercial Law Association, the Wales Personal Injuries Law Association and the Wales Parliamentary Bar Association

10. These developments were spontaneous responses to devolution. They are the signs of Wales' emerging legal jurisdiction. "Wales is emerging as a separate jurisdiction which needs to be separately recognised" (Professor Tim Jones and Jane

[18] See footnote 1

Williams 'Wales as a Jurisdiction'). They are the evidence of what Lord Carlile QC described as 'the evolution of devolution'.

11. As these examples demonstrate, the break-up of the unitary political system brought about by the devolution statutes has been accompanied by at least a loosening of the unified legal system of England and Wales. The differences are likely to become more pronounced and more significant constitutionally as the process of devolution continues and especially now that the Assembly has acquired increased legislative competence. The description of Wales as an "emerging jurisdiction" exudes energy and promise.

The arguments for jurisdictional devolution

12. It should not be thought that the re-emergence of Wales' distinct identity in matters of law and the administration of justice is to be attributed entirely to devolution. The process of change began much earlier. It has been taking place albeit very gradually for about 63 years. The Welsh Courts Act, 1942 might have been the smallest possible step forward but it began a process of change to which momentum was added by the Welsh Language Acts of 1967 and 1993 and the pace of which quickened following the passing of the Government of Wales Act 1998. Since 1942, therefore, the scope for doing it differently in the practice and the teaching of the law and the administration of justice in Wales in Wales has increased.

13. But those are the historical arguments. What are the constitutional arguments of today for devolving to the Assembly the function of administering justice in Wales? The principal arguments, I believe, are (i) that it would be internally logical, consistent and coherent, (ii) it would make for consistency between the constitutions of Scotland, Northern Ireland and Wales,(iii) it would bring justice closer to the people for whom the laws were made and (iv) it makes good constitutional sense if the institution which is responsible for making the laws were also to have the responsibility and the accountability for their administration. Is there an Assembly or Parliament enjoying full legislative competence which does not also have responsibility for the administration of justice within its territorial jurisdiction? Professor Gwynedd Parry (FRHistS) Professor of Law and History at Swansea

University, says of these argument that they provide very strong support for jurisdictional devolution

The arguments against jurisdictional devolution

14. A number of substantial arguments have been advanced against devolving responsibility for the administration of justice to the Assembly. I have selected those which are advanced most often. Not in any order of strength, they are as follows

15. Firstly, that devolving responsibility for the administration of justice would be too radical a change at this time (the too radical argument.).

16. This argument needs to be measured against the fundamental changes to the British Constitution which have taken place very recently. The devolution statutes of 1998 created a Parliament for Scotland and Assemblies for Northern Ireland and Wales each of which, to different extents, has power to exercise legislative and executive functions previously exercised by the Westminster Parliament. They made Britain quasi-federal and diluted one of our fundamental constitutional principles, the sovereignty of Parliament. Those changes did not happen alone. Other significant changes were the Human Rights Act 1998 by which the European Convention on Human Rights became incorporated into the domestic law of the UK; Freedom of Information Act 2000 which aims to make government more open and less secretive; the reform of the House of Lords, which aims to reduce the number of hereditary peers as members of the second chamber and the reforms in our system of voting which have been introduced for elections to some of our democratic institutions such as the Assemblies and the European parliament. Professors Jowell and Oliver have described these changes as hammer blows to our established constitutional principles. The late Professor Sir David Williams described the Welsh devolution settlements as having brought about "an astonishing burst of constitutionalism". Not only were these changes recent, the extent and rapidity of them have been astonishing. Constitutional principles which had become established for a century "have come under pressure as constitutional arrangements in the UK respond to changing political, economic, social and international circumstances and to changing conceptions of the values and institutions which should support a modern constitutional democracy .... even an

established democracy needs constantly to be reviewed and renewed" (Jowell and Oliver).

17. The momentum for fundamental reforms is a continuing one. The Coalition Government's proposed reforms include the introduction of fixed term parliaments, reforming the voting system and further changes to the House of Lords. In this period in our history, it would appear that our constitution is in a near fluid state. There were many reasons which drove devolution but perhaps the strongest reason of all lies in the quality of democracy itself. The unitary system which had been in place for a number of centuries was perceived as no longer capable of performing effectively or meeting the demands of democracy of the latter half of the 20th century not to mention those of the 21st century. Devolution is but a part of a much wider process of change in the relationships between Westminster and each of the other home countries; between the state and the citizen and between citizen and citizen.

18. Staying with the argument that t would be too radical, we need also to keep in mind that the administration of justice in the United Kingdom has never been administered centrally on either a British or UK basis. Both Scotland and Northern Ireland have their own systems for administrating justice. It is the case that Scotland always did have its own distinct legal system but Northern Ireland's separate justice system is the product of recent legislation. Only Wales and England are administered jointly for these purposes but that was not always the case. For some three hundred years up to 1830, the administration of justice in Wales, civil and criminal, was administered by the Court of Great Sessions. It was the abolition of that court in 1830 which caused "Wales to be wholly absorbed into England in legal and administrative matters".(Professor John Davies, A History of Wales).

19. There are sound constitutional reasons why the judiciary cannot involve themselves with the question of whether responsibility for the administration of justice in Wales should be devolved or not; that is a political matter. Nevertheless, the judiciary at every level including the magistracy and HMCTS Wales, the HM Government Department responsible for administrating Justice in Wales, have demonstrated a strong awareness and understanding of Wales' developing distinct identity in legal matters and of the importance of the Welsh language in the

Administration of Justice in Wales. When opening the Mercantile Court in Cardiff, Lord Bingham as Lord Chief Justice of England and Wales, said

> "This court represents the long overdue recognition of the need for the Principality of Wales to have its own indigenous institutions operating locally and meeting the needs of its citizens here. This court is another step towards recognising Wales as a proud, distinctive and successful nation."

20. The second argument against is that the system of justice in the UK is the envy of the whole civilised world. Our judges are independent, of outstanding quality and are devolution aware. Unless a devolved justice system is at least as good in terms of quality as the justice system presently enjoyed in Wales, the case for change is not made out (the quality argument).

21. Devolving responsibility for the administration of justice would not dilute these strengths one bit. The Judges would continue to be independent and they would continue to be appointed from the ranks of barristers, solicitors and legal executives. The question is concerned only with the structures by which the administration of justice is administered.

22 A third argument is that we should leave devolution to evolve and see where we get to. The evolutionary changes in the administration of justice in Wales (which I described earlier when describing the background against which this consultation is taking place (in paragraphs 8, 9 and 10) have occurred even though justice is not a devolved field and whilst it might be doubtful that they would have occurred to the extent they have were it not for devolution they have occurred without justice being a devolved field (devolution by evolution argument).

23. This is an aspect of the argument described by Lord Carlisle QC as devolution by evolution. The Richard Commission criticised it as devolution of a kind which did not follow any discernible or comprehensible policy.

24. Fourthly, it can be argued that the proposal to devolve jurisdictional responsibility today confuses our present needs with what our needs might be in the future if there were further evolutionary changes or "spontaneous adjustments"[19] in the field of administration of justice. The case for change cannot be sustained at present. (the argument that we are confusing present needs with possible future needs*)* Tomorrow, maybe, but not today

25. I have sought to draw a clear distinction between the past and present on the one hand (paragraphs 12 and 13 above) and the future on the other (paragraph 11 above). You will recall that I said earlier that the arguments for change will strengthen in the future. And you will recall what Professor Gwynedd Parry's said as to the strength of the present constitutional arguments for devolving justice. That is a case that can be sustained at present.

26. A fifth argument against is that the pragmatic approach of piecemeal reform in response to changing circumstances is to be preferred to comprehensive changes dictated by constitutional theory (the piecemeal reform argument*).*

27. Let me cite some very persuasive authorities on this piecemeal argument.

Vernon Bogdanor, Professor of Government, Oxford University in his book The New British Constitution

> *"it is difficult to deny that .....devolution has led to a system of amazing untidiness.... a Kingdom of four parts, of three Secretaries of State, each with different powers, of two Assemblies and one Parliament, each different in composition and powers from the other".*

Rodney Brazier, Professor of Constitutional Law, University of Manchester
in his book, Constitutional Reform.

> *[The Labour Government's preference for allowing institutions to develop pragmatically may] "explain in part [its] disinclination to present its constitutional reform programme as a related whole, driven by constitutional theory"*

[19] See paragraph 10 above

Larry Siedentop, emeritus fellow, Keble College Oxford, Financial Times, 31 May 2010.

> *"Asymmetrical devolution – different degrees of power devolved to Scotland and Wales – amounts to a parody of the assumption that piecemeal reform is always enough ..... This mindset grew out of a parliamentary tradition prizing piecemeal reform. For more than two centuries that was our political virtue. It is now in danger of becoming our vice"*

28. Finally, there is an argument that as the laws in Wales are the laws of England and Wales, there is no need or justification for the change (the laws in Wales are no different to the laws of England argument)

29. The differences or the absence of differences between the substantive laws applicable to Wales on the one hand and to England on the other is not as relevant as is the constitutional framework in which Wales has been placed as a consequence of the devolution statutes. It is this new constitutional framework which gives rise to the question of whether jurisdiction over the administration of justice should be devolved to the Assembly and not the difference between the substances of our laws when compared to those of England. *[have set out constitutional arguments for the change in paragraphs 12 and 13 above.]*

30. In any event, the argument is only partly correct. Since the devolution settlement of 1998 there has emerged a substantial body of law the territorial extent of which is limited to Wales. This is certain to increase following the referendum and the extended legislative competence now enjoyed by the Assembly. The rate of production is about to increase very substantially. The First Minister recently announced the Welsh Government's legislative programme of no less than 20 Bills during the next four/five years and Westminster will continue to make Wales only legislation in the non-devolved fields.

Winston Roddick

APPENDIX 4

1. I am grateful for the opportunity to make my observations to the Constitutional and Legislative Affairs Committee of the Welsh Assembly.

2. My starting point is that I am a devolutionist which, short of considerable argumentation, means that I wish to bring government closer to the people in Wales. At first blush a separate Welsh (legal) jurisdiction is not a governmental activity, although one of the consequences of the considerable development in powers for the Welsh Assembly since my first proposals in 1976 is that there is a new corpus of law emanating from the Assembly, both before and after the new powers recently granted to it.

3. I would say in passing that in any negotiation between the Assembly and the Westminster Government for further powers there are matters of governmental activity which should have a high priority, such as accountability for Welsh broadcasting, the police, aspects of energy production and perhaps a re-appraisal of how to achieve greater democratic accountability, possibly jointly, of the responsibilities of the Environmental Agency in Wales. I deliberately do not traverse what might be termed "the financial relationship with Westminster", a re-appraisal of which is long overdue.

4. The Secretary of State for Wales had few powers in the beginning. Under governments of both persuasions, those powers were substantially increased, particularly during the period of my stewardship of the office from 1974-79. The driving force for the negotiation for new powers, which occurred simultaneously with the presentation of devolution proposals, was the need to create administrative experience in the Welsh Office in new fields which could serve as the building blocks for the powers of the future Assembly. Without such acquisition the new Assembly would have an even steeper learning curve. I deal with this aspect of my work in some detail in my book *"Fifty Years in Politics and the Law"* chapters 16 and 17.

5. I mention these matters since politics is "the art of the possible". Wise politicians might wish to prioritise more transfers of political decision making, which this proposal is not, however desirable it may be.

6. Let me welcome the administrative decisions which have been taken by a wise judiciary to ensure that the sittings of various important courts now take place in Wales. As enumerated none of these, I surmise, would have unintended political devolutionary consequences.

7. Not having practised as a lawyer in Wales since my very young days I have no experience of the consequences of devolution on practitioners in Wales. I surmise that a lawyer in the civil – possibly criminal field, advising a client on matters in Wales would have to ensure that he checked both the effect of Westminster laws, and laws emanating from Cardiff, both before and after the granting recently of "law-making" powers to the National Assembly. These matters might have to be judicially determined wherever the case was set down.

8. I am, however, unclear as to what a separate jurisdiction entails. I am not alone in this as the first question the Committee asks is the meaning of the term "Separate Welsh Jurisdiction". Short of Wales becoming an independent state nothing can really be wholly

separate. Even the devolution proposals which I proposed and now adopted in subsequent legislation envisaged the judicial determination of disputes between the Assembly and Westminster by the Supreme Court in London.

At least we have a clear answer to one part of the question. A "Separate Welsh Jurisdiction" cannot mean the undermining of this.

9. On the assumption that a more limited "Separate Welsh Jurisdiction" is contemplated in the question it must mean higher and lower courts operating separately from the courts of England. Judges, I presume, would be appointed specifically to the courts in Wales. This hearkens back to the courts of the Great Session in Wales (abolished in 1830) to which judges were specifically appointed and I think I am right in my recollection, could still practice as counsel in the courts at Westminster nonetheless.

10. In one of the arguments that used to be put to me when I was working out my proposals for devolution was that Wales, unlike Scotland, did not have a separate legal system with its legal corpus quite distinct from the English Common Law. My reply was "so be it; what does it matter?" The repatriation of democratic decision-making was a different issue and independent of a legal jurisdiction and was no bar to devolution, in our case in Wales.

11. I note that in civil matters there is an appeal from the Scottish Courts direct to the Supreme Court and I surmise if Scotland achieved independence this would be discontinued.

12. However, it is for the proposers of a "Separate Welsh Jurisdiction" to set out what they mean by it, and not for consultees to guess. Does it mean a separate court of appeal in Wales?

13. I have, however, a limited experience of the courts in Northern Ireland as I held the office of Attorney General there, concurrent with being the A.G. for England and Wales. My main responsibilities were for the criminal law with my own Director of Public Prosecutions for the Province whom I supervised and discussed cases of difficulty. The A.G's responsibilities were, of course, wider. In addition, and it is not an exhaustive list but the Attorney was the guardian of the public interest. I had a responsibility for commencing contempt cases, for charities and determining whether a Nolle should be entered in prosecutions. This is not an exhaustive list. I have no recollection of any difficulty arising from the fact that Northern Ireland had a separate jurisdiction. I had appropriate relations with the judiciary in the course of my regular visits. I was honoured to be called to the Bar of Northern Ireland.

14. My most onerous responsibility was taking decisions on a very frequent basis, though not as frequent as some of my predecessors, as to whether a defendant should have a jury trial for an indictable offence, or be tried by "The Diplock Courts" without a jury. As a life-long jury man in criminal trials and one of its defenders, I admired the stewardship of the judiciary in their exercise of their probably unwelcome jurisdiction.

15. I understood, because of the small size of the judiciary, both of the High Court and the Court of Appeal, there could be practical difficulties in ensuring that the availability of judges who had not already been "contaminated" by previous knowledge of other stages of a case. My understanding was that any such problems could be and were overcome.

16. This leads me to a conclusion that before the Committee proceeds any further it might wish to canvass the practical implications of whatever is on the table by taking advice from judges, lawyers and others experienced in the work of the Courts of both Northern Ireland and Scotland.

17. Since preparing my evidence I have had the advantage of consulting with the Rt Hon the Lord Carswell, a former Lord of Appeal in Ordinary and Lord Chief Justice of Northern Ireland. I have, with his consent, attached his analysis in a separate and independent factual note.

18. It is not at this stage possible to estimate the cost of creating an "independent jurisdiction". I surmise they would be considerable. The Committee might want to consider this as a priority.

19. It is self-evident that the pool for the appointment of Chief Justice and judges of the Court of Appeal in Wales would be small if it were decided that promotions would only be made from within the Welsh Judiciary. If, as is likely, a separate Attorney General for Wales were to be appointed, his relationship with the Attorney General for England and Wales would have to be decided. In Northern Ireland the England & Wales Attorney General is still the Advocate General I believe.

20. I am told that in Dublin the model adopted is a judge-led system, which must be demanding on judicial time. In Northern Ireland there is a Director of the Court Service who consults where appropriate with the Lord Chief Justice. If this were the model adopted for Wales, a Director of the Court Service would be required. Other issues to be determined would be family courts and responsibility for magistracy.

21. It may be that it would be more fruitful for the Committee to inquire how the recent developments of court sittings in Wales might be extended and consolidated. I do not know what proportion of Welsh court work is involved in the "Regular Sittings" of the Court of Appeal Division, or indeed the other courts. A presumption that "Welsh work" should be set down for hearing in Wales I surmise would be welcomed.

It may be that a way forward is to delineate that part of the Ministry of Justice and the administrative machinery of the courts further to Wales. It would mean a recognition of the need for special provision for Wales given that the Assembly has law-making powers, as opposed to the present unitary jurisdiction. I am not competent to advise on such policies. If the political will is there some practical progress could be achieved without incurring significant expenditure.

22. I do not think there is any further assistance I can give.

Note:
The acknowledged legal historian for Northern Ireland is Sir Anthony Hart, a retired High Court Judge and Professor Desmond Greer has written extensively and authoritatively in this field.

Note on "Requirements of a Legal Jurisdiction" is attached.

Lord Morris of Aberavon
27/3/2012