

SUBMISSIONS IN RELATION TO FAMILY LAW IN WALES

1. I have been asked to provide submissions to the Commission. In particular, I have been asked to consider the implications of devolution and the increasing divergence between the law of England and Wales as it impacts on family law in Wales. I make these submissions from my own knowledge and the opinions expressed are my own. I have no researched based evidence upon which I can rely.

The Relevant Legal Context

2. As those reading this document will know devolution in Wales has evolved over time. It is expected to continue to evolve in the future.
3. The 1997 devolution referendum in Wales paved the way for real change. Certain functions of the UK Government were transferred to the National Assembly for Wales. The Government of Wales Act 1998 (the GOWA 1998 Act) established the National Assembly as a single body corporate, but within which there was an executive (a Cabinet or 'Executive Committee' of Assembly Members to whom functions were delegated). The National Assembly was also a limited form of legislature; Assembly Members scrutinised those to whom functions had been delegated and, as a body, could make subordinate legislation using the powers that had been transferred. The functions transferred were functions that fell within 20 subject areas listed in Schedule 2 to GOWA 1998. Those included education and training, health and health services, housing, local government and social services.
4. The Government of Wales Act 2006 (GOWA 2006) came into force on 25th July 2006. It replaced the 1998 Act. It had 6 parts. Part 2 of the Act together with Schedule 3 established the Welsh Assembly Government as an entity separate from, but accountable to, the National Assembly for Wales. Part 3 and schedule 5 of the Act gave the National Assembly power to pass its own primary legislation – initially by 'Assembly Measure' under a system by which limited competence was conferred (either by a Legislative Competence Order or by an Act of Parliament) on a piecemeal basis. One such Measure is The Mental Health (Wales) Measure 2010. It is primary

Welsh legislation which sits alongside UK legislation, namely the Mental Health Acts 1983 and 2007 which remain in force in England and in Wales. Whilst the 1983 and 2007 Mental Health Acts are largely about compulsory powers, and admission to or discharge from hospital, the 2010 Measure is about the support that should be available for people with mental health problems in Wales wherever they may be living. The Measure became law in December 2010 but the main provisions only began to take effect between April and October 2012. The Measure is intended to ensure that where mental health services are delivered, they focus more appropriately on people's individual needs. It has four main Parts (Parts 5 and 6 are essentially about administrative issues), and each places new legal duties on Local Health Boards and Local Authorities in Wales to improve service delivery. The four Parts are as follows:

- Part 1 seeks to ensure more mental health services are available within primary care.
 - Part 2 gives all people who receive secondary mental health services the right to have a Care and Treatment Plan.
 - Part 3 gives all adults who are discharged from secondary mental health service the right to refer themselves back to those services.
 - Part 4 offers every in-patient access to the help of an independent mental health advocate.
5. The 2006 Act also provided a mechanism for conferring greater power on the Assembly. Part 4 and Schedules 6 and 7 of the 2006 Act provided a power for a referendum to be called and for further powers to be granted to the Assembly in the event of a favourable vote. That referendum was held on 3 March 2011. As a consequence of a vote in favour of greater legislative powers, on 5 May 2011 the Assembly Act provisions of the 2006 Act came into force subject to certain transitional provisions - S.106(2) and (3). The Assembly Act provisions are defined in S.158 of the 2006 Act as S.107, 108, 110-115 of the 2006 Act. S 108(4) of the 2006 Act provides the test for competence by reference to Schedule 7 of the Act. It enabled the passing of primary Welsh legislation (Welsh Acts) in relation to all devolved areas.

6. Under the 2006 Act the following areas of law were amongst those fully devolved to Wales:-

- a. Education and training. Education, vocational, social and physical training and the careers service. Promotion of advancement and application of knowledge. Exception – research councils.
- b. Health and health services. Promotion of health. Prevention, treatment and alleviation of disease, illness, injury, disability and mental disorder. Control of disease. Family planning. Provision of health services, including medical, dental, ophthalmic, pharmaceutical and ancillary services and facilities. Clinical governance and standards of health care. Organisation and funding of National Health Service. Exceptions- abortion. Human genetics, human fertilisation, human embryology, surrogacy arrangements. Xenotransplantation. Regulation of health professionals. Poisons. Misuse of and dealing in drugs. Human medicines and medicinal products, including authorisations for use and regulation of prices. Standards for and testing of, biological substances. Vaccine damage payments. Welfare foods. Health and Safety Executive and Employment Medical Advisory Service and provisions made by health and safety regulations.
- c. Social Welfare. Social Welfare including social services. Protection and well-being of children (including adoption and fostering) and young adults. Care of children, young adults, vulnerable persons and older persons, include care standards. Badges for display on motor vehicles used by disabled persons. The following are, however, excepted:- Child support, Child trust funds subject to certain exceptions, Tax credits, Child benefit and guardian's allowance, Social security, Independent Living Funds, Motability, Intercountry adoption (apart from adoption agencies and their functions) and the functions of "the Central Authority" under the Hague Convention on Protection of Children and Co-operation in respect of Inter-Country Adoption, The Children's Commissioner (established under Children Act 2004), Family law and proceedings, apart from –
 - i. Welfare advice to courts, representation and provision of information, advice and other support to children ordinarily resident in wales and their families, and

ii. Welsh family proceedings officers.

7. The Wales Act 2017 came into force on 1st April 2018. It amends the GOWA 2006. It is significant in that it changes the basis of the legislative competence of the Assembly, moving from a conferred powers model to a reserved power model – Part 1, S3. The Act also includes provisions which set out the constitutional relationship of the Assembly and the Welsh Government within the UK's constitutional arrangements- Part 1, S1-2. The 2017 Act, however, does not amend this relationship.
8. The 2017 Act replaces Schedule 7 of the GOWA 2006 with two new schedules – Schedule 7A and 7B of GOWA 2006. Paragraph 8 of Schedule 7A preserves the single jurisdiction of the courts of England and Wales¹ with one notable exception the role of the Family Proceedings officer in Wales and the advice and support provided to children ordinarily resident in Wales in relation to Family Proceedings. Paragraph 8(3) of Schedule 7A specifically states that paragraph 8(1) does not reserve—
 - (a) Welfare advice to courts in respect of family proceedings in which the welfare of children ordinarily resident in Wales is or may be in question;
 - (b) Representation in respect of such proceedings;
 - (c) The provision of support (including information and advice), to children ordinarily resident in Wales and their families, in respect of such proceedings;
 - (d) Welsh family proceedings officers.
9. Under the 2017 Act health, education and social care in Wales continue to be devolved. However, there are exceptions to that general rule and, as is befitting of an Act which moves to a reserved power model it is simpler to set out the exceptions which fall within the scope of this paper.
10. Paragraph 146 of Schedule 7A reserves human genetics, human fertilisation, and human embryology and surrogacy arrangements. The Assembly will not be able to legislate in respect of any matter relating to human genetics; any surrogacy

¹ Paragraph 164-165 of Schedule 7A reserves to the UK parliament the legal profession, legal services and claims management services. Paragraph 166 reserves the responsibility for the provision of legal aid.

arrangements within the meaning of the Surrogacy Arrangements Act 1985 as amended or any matter falling within the scope of the Human Fertilisation and Embryology Act 1990 as amended.

11. The subject matter of the Mental Capacity Act including DoLs is reserved to the UK parliament by paragraph 169 of Schedule 7A. The Court of Protection and the Office of the Public Guardian, both established under the 2005 Act, are thus reserved.
12. Prisons and offender management remain reserved under the 2017 Act with the exceptions of (i) accommodation provided by on behalf of a local authority for the purpose of restricting liberty of children and young persons and (ii) the provision of health care, social care, education, training and libraries which in this context are devolved matters.
13. Family relationships and children are matters specifically reserved by reason of section L12 of Schedule 7A. Section L12 contains paragraphs 176-179 of the schedule. They reserve:
 - Marriage, civil partnership and cohabitation-para 176
 - Parenthood, parental responsibility, child arrangements and adoption-para 177. “Child arrangements” includes the subject matter of Part 2 of the Children Act 1989.
 - Proceedings and orders under Part4 or 5 of the Children Act 1989 or otherwise relating to the care and supervision of children-para 178
 - Civil remedies in respect of domestic violence, domestic abuse and female genital mutilation paragraph 179.

The exceptions to the above are (i) services and facilities relating to adoption, adoption agencies and their functions, other than functions of the Central Authority under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and (ii) parental discipline. “Parental discipline” includes the right to administer reasonable chastisement to a child and smacking. The Assembly has competence to ban smacking; an issue subject to recent public consultation in Wales.

Overview of the Effects of Devolution to date on Family Law in Wales

14. The effect of devolution on family law in Wales has thus been incremental. It is also often tangential or hidden.
15. Family law itself is NOT devolved. England and Wales retain a single legal jurisdiction with a common court system and common court procedures. Divorce, surrogacy and the Human Fertilisation and the Embryology Act are not devolved. The law in relation to Civil Partnership is the same. Issues concerning the distribution of matrimonial assets on separation and divorce are still governed by the Matrimonial Finance Act 1973 in England and Wales. Law common to both England and Wales continues to determine issues between cohabiting couples and the distribution of their assets and income. Domestic violence legislation is common to both England and Wales. However, the provision of services by local authorities to those who may be victims of such abuse may diverge over time as the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015 begins to bite. That Act aims to improve the Public Sector response in Wales to abuse and violence. The Act is intended, amongst other things, :
 - a. improve arrangements to promote awareness of, and prevent, protect and support victims of gender-based violence, domestic abuse and sexual violence
 - b. introduce a needs-based approach to developing strategies which will ensure strong strategic direction and strengthened accountability
 - c. ensure strategic level ownership, through the appointment of a Ministerial Adviser who will have a role in advising Welsh Ministers and improving joint working amongst agencies across this sector
 - d. improve consistency, quality and join-up of service provision in Wales
16. Although not strictly Family Law, it is worth commenting that the Court of Protection sits in England and Wales. The Mental Capacity Act 2005 (as amended 2007) applies in Wales as it does in England. A single statutory Code applies to England and Wales although there are some minor differences introduced by secondary legislation. Similarly the Mental Health Act 1983 (as amended) applies in both England and Wales. However separate statutory Codes have been issued under the Mental Health Act for England and Wales and there is, of course, the Welsh Mental Health Measure referenced in an earlier paragraph. The Mental Health Review Tribunal for Wales (MHRT for Wales) safeguards patients who have had their liberty restricted under the

Mental Health Act. It reviews the cases of patients who are detained in a hospital or living in the community subject to a conditional discharge, community treatment or guardianship order.

17. Education is now fully devolved in Wales. The Special Educational Needs Tribunal for Wales (SENTW) is an independent tribunal. They deal with appeals against certain decisions about a child or young person and their education. They also deal with discrimination claims of unfair treatment in school to do with a disability.
18. Health, too, is fully devolved to Wales. The geographical span of each of the LHBs is coterminous with the Regional Safeguarding Boards for Adults and Children established under the 2014 Act below. Both the Welsh health legislation and the 2014 permit health and social care to make arrangements to work in partnership and to co-operate for the future well-being of the citizens of Wales.
19. Whilst health, education and social care fall outside the definition of family law, they are relevant to it because they are the very areas of law that provide the day-to-day context of family life. They determine the provision of support and services that every family in Wales is entitled to and they inform that which they can expect. As Welsh policy making, at a National and Regional level, proceeds to be governed by primary Welsh statute such as the Future Generations Act, then this divergence is likely to become more marked and have a greater impact on family life in Wales.
20. It is because the provision of social care is devolved to Wales that divergence can now be seen in the public law in relation to children in Wales. Public and private law child cases continue to hear in the Family Court and the FPR 2010 apply to both England and Wales. With a few minor exceptions the Adoption and Children Act 2002 applies in Wales as it does in England. Again with one or two small exceptions all but Part 3 of the Children Act 1989 applies in Wales as it does in England. Thus the law in relation to public² and private law orders in relation to children, whether made under the Adoption and Children Act 2002 or the Children Act 1989 is the same in Wales as it is in England (see below for exception in relation to Special Guardianship Orders and Adoption).

² Except for secure accommodation orders

21. However, as heralded in a previous paragraph, Part 3 of the Children Act 1989 was repealed in Wales by the Social Services and Well-being (Wales) Act 2014 (referred to as the 2014 Act). The 2014 Act came into force³ in April 2016. The 2014 Act created a new statutory scheme which governs the provision of social care in Wales and the manner in which social services functions are delivered by Welsh local authorities. The statutory scheme created by the 2014 Act is to be read as a whole. Within that scheme there are specific provisions setting out the duties and powers that a Welsh local authority has in relation to looked after children and accommodated children. To the lay person those are the children who have been or are about to be taken into the care of a Welsh local authority. These duties and powers include the duty and power to accommodate a child (S76 & 78 of the 2014 Act), the manner in which a looked after child is to be placed by a Welsh local authority (S81 of the 2014 Act), the duties and powers a Welsh local authority has to care leavers (S103-115 of the 2014 Act) and the statutory requirements which need to be satisfied by a Welsh local authority before holding a child in secure accommodation (S119 of the 2014 Act and the secure accommodation (Wales) regulations 2015 as amended 2016 and 2018). The Family Court is thus most likely to note the divergence of the law in relation to children in England and Wales when considering care planning for a child in public law proceedings. Care planning, includes the need for and provision of secure accommodation. At present, most of the case law on the 2014 Act that has been reported on BAILII (the British and Irish Legal Information Institute) concerns S119 of the 2014 Act.

22. However, there are other differences in relation to child law in Wales. The provision of services and support under Special Guardianship orders is devolved as is the regulation of Adoption services and the provision and support for adoptive placements. In each instance whilst the primary statute governing the making of the order remains common to England and Wales, the secondary legislation and the statutory guidance and codes are purely devolved and differences of provision and approach exist.

³ Save for those matters covered by Commencement Orders 1 & 2

23. There is one final matter to bring to the reader's attention before turning to address the specific question asked of me. In contentious private law children cases, a Family Court reporter is appointed to report to the court on the child's welfare and in highly charged cases to represent the child's welfare interests before the court in private law proceedings. In public law cases, the subject child/children will have a Guardian. The Family Court Reporter and the Guardian are Family Proceedings Officers of CAFCASS. In Wales the function of CAFCASS is fully devolved and exercised by CAFCASS Cymru which sits in Welsh Government. As such the Rights of Children and Young Person (Wales) Measure 2011 apply to the exercise of its functions. This Measure, which is primary legislation, integrates the UN Convention on the Rights of the Child into Welsh law. This Measure is specific to Wales alone. The Measure has sparked a significant amount of academic interests as the Measure requires children's rights to be considered in relation to every policy decision a Welsh Minister makes. The academic writing is thus about Children's Rights and policy making. However, I am unaware of any study which considers this Measure in the context of its day-to-day use. This Measure is put into action day in day out throughout Wales every time a welfare report or Guardian's analysis is produced by a CAFCASS officer. It would be of interests to know if the Children's Rights approach in Wales has resulted in different recommendations for children in Wales when compared to those in England where there is no Children's Rights model, let alone one put into effect every day.

The Impact of Devolution on Family Law in Wales

24. I have previously described the impact as incremental and sometimes, tangential and hidden. However that makes the impact no less real and no less important. As devolution evolves, it will become even more marked. When it does, my first submission may become otiose but it is, as I perceive matters, a very real problem at the moment. Because of (1) the way devolution has evolved; (2) the difference often lies in the secondary legislation or Codes and (3) the divergence lies in a related topic which nevertheless impacts on the family (education, health, social care), the need to consider the potential of divergence between the laws in England and Wales is often overlooked. From my perspective, this is a result of a lack of awareness and publicity about the differences. There has, I know, been concern about access to law. However, in this field the law is published and easily accessible to lawyer and lay person alike. I write the Welsh Family Law Chapter for the Butterworth's Family Law Service and

the Welsh Supplement for the Red Book, the family lawyer's equivalent of the White book. Both are published by LexisNexis and are part of the standard work. Thus the Welsh law sections are simply included in the texts and distributed to practitioners in England and Wales alike. They come at no extra cost. There is also a host of free resources. The Law.Gov commentaries are free, are available on the internet and invaluable. Social Care Wales has a learning hub on their website which includes the 2014 statute, the secondary legislation and all the Codes and Statutory Guidance. There are others. In addition any search on the internet for Welsh Mental health etc will bring up the appropriate Welsh legislation. The problem I currently encounter is not that the resources are not there but that people, both in Wales and outside, in general do not appear to know, unless prompted, that they need to search for Welsh legislation etc in relation to health, social care, education etc. I have used the generic term people to cover both lawyers and lay parties. Whilst there are some specialist practitioners practising in the Administrative Court and the Family Court in Wales that will have the necessary awareness, their numbers are small. Family law in Wales would thus, in my opinion, be better served by a greater awareness of the differences in the law in relation to England and Wales as it currently impacts on family law and as it is likely to in the future.

25. Linked to the above is my second submission. Awareness of the divergence of the laws of England and Wales would be promoted in part if the Family Court judgments that are impacted by it are published. By way of example, shortly after the Special Guardianship Wales regulations and Welsh Code 2005 came into force, District Judge Godwin had to give judgment on a number of cases where children had been placed by English authorities with Special Guardians living in Welsh local authority areas. He had to determine whether after a specific period those children became the responsibility, including financial responsibility, of the host Welsh authority or remained the responsibility of the placing English authority. Applying the English guidance which governed the English authorities' responsibility would be transferred. Applying the Welsh code it would not transfer. For the Welsh local authorities involved the financial responsibility for each child if transferred would be in the region of £200,000 per annum per child as the children had special needs. The cases were heard by District Judge Godwin in Aberystwyth and Haverfordwest. Conflict of laws was argued and the Welsh law applied. The English authorities did not appeal. I

know of these cases because I was in them; instructed to represent the Welsh local authorities. They are not reported. That is a shame but probably a sign, at least in part, of the lack of transparency in the Family Court then. However there is now far greater transparency in the Family Court and in my opinion it would be helpful if it could be used to promote awareness of devolution and its impact on Family Law.

26. My third submission relates to the extra work involved in arguing a point of law which is devolved, especially in the appellate courts. What the court should expect from a practitioner when faced with a devolved area of law was addressed by Munby LJ (as he then was) in *Re X (children) (serious case review: publication)*⁴. He stated it would be of great assistance if, in such cases and as a matter of practice, advocates brought to the court's attention the fact that there was such a difference and were able to both identify the corresponding provisions applicable in the other country and, at least, in summary, to indicate the nature of the differences between the two regimes, namely between the law applicable in Wales and that applicable in England. This practice, he said, was not intended to encourage judges to make pronouncements obiter dicta on legislation which is not before them, but he considered it may facilitate understanding of legislation which is under scrutiny. Importantly, it will alert practitioners reading a law report of such a case that the law with which they are concerned may not be the same as that in the reported case they are considering⁵. Pill LJ in *Re X* agreed with Munby LJ's view adding that practitioners also needed to be aware that primary and secondary legislation in Wales are enacted both in English and Welsh and that those languages are treated as having equal standing. Whilst the need for comparison in practice may be rare, there is a possibility that cannot be excluded in all cases that Welsh words will throw a light on the proper construction of the English words, and vice versa.

27. The effect of the above case law is that if you are arguing a devolved point of law in relation to a Welsh case, the work load is greater than in relation to a non-devolved area. I have attached a schedule to this document which sets out the English and Welsh provision relevant to the point under consideration in a recent case I conducted

⁴ [\[2012\] EWCA Civ 1500](#) [\[2013\] 2 FLR 628](#) at [66]–[67].

⁵ See also Ryder LJ in *Re W (a child) (care proceedings: court's function)* [\[2013\] EWCA Civ 1227](#); [\[2014\] 1 WLR 1611](#) [29].

before the Court of Appeal in relation to S25 Children Act 1989 and S119 of the 2014 Act. Such schedules take hours, sometimes days. This contributes to the costs of the proceedings. In reality devolved areas involve local authorities and public law cases. The cost of preparing the schedule is thus either borne by the local authority or the Legal Aid Agency (LAA) if the other litigant(s) are legally aided. Often the cost is absorbed by the legal practitioner especially if they are representing a legally aided party as the LAA is reluctant to fund such work. It would thus be useful if the LAA would recognise the extra work involved and agree to fund the work.

28. This leads me to my fourth and final submission, the legal aid deserts in Wales. I have not dwelt on this submission because I know this area has been admirably covered by others. The short point is that such deserts result in citizens not having access to the law when they need it. Often these are the most vulnerable in our society and they are the very people to whom the devolved laws of education, social care and health apply. They need, perhaps, more than most specialist assistance in these areas from practitioners who are skilled and knowledgeable in those very areas. Legal Aid deserts militate against meeting that need.

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