# The Commission for Justice in Wales

## Submissions
## of
## Winston Roddick CB QC

## Section 1

## Introduction

1. I am grateful to the Commission for the invitation to submit submissions and I apologise for the lateness of them.

Background and experience

2. I have practiced as a barrister on the Wales and Chester circuit for over 50 years (Queen's Counsel 1986) in the the fields of public law, common law, Chancery (now business law), town and country planning and I have appeared as prosecuting and defence counsel in criminal cases. I was Leader of the Wales and Chester Circuit, Recorder (in criminal and civil cases), Honorary Recorder of Royal Town of Caernarfon, member of the Professional Conduct Committee of the Bar Council, and member of the Lord Chancellor's Standing Committee on the Welsh language. I was the first Counsel General to the National Assembly for Wales for five years to 2003 and the first Police and Crime Commissioner (PCC) for North Wales 2012 - 2016. Whilst serving as PCC, I became chair of the Association of PCCs for England and Wales, represented Wales on the Criminal justice Board for England and Wales under the chairmanship of the Minister of Justice, member of the All Wales Criminal Justice Board, member of the North Wales Criminal Justice Board and I was selected to be the first chair of the Police Reform and Transformation Board which represents the police service and PCCs but I retired as PCC before my term as chair began. Other public appointments have included member of the non-statutory Welsh Language Board established by the Secretary of State for Wales to consider whether there was a need for a Welsh Language Act. Its report lead to the passing of the 1993 Act.I was made a Companion of the Order of the Bath (CB) at the end of my term as Counsel General.

3. Based on that experience of the justice system of England and Wales, I am strongly of opinion that some of the parts of our justice system are in urgent need of reform. Of those, a number of them have particular application to Wales. I shall refer to those executive functions in more detail in the later sections of these submissions and against the background of these introductory submissions .

The constitutional case

4. The principal cause of the problems with our justice system here in Wales and the greatest barrier to improvement is constitutional. It is not the only barrier but it is the biggest and it can only be removed by devolving responsibility for the justice system to the Welsh Government.

5. I summarised the constitutional case for devolution of the justice system in the Ninth Annual Lecture of the Centre for Welsh Legal Affairs, University of Aberystwyth Wales Aberystwyth in November 2008 in an address titled "The Development of Devolution and Legal Wales". I also explained it in an article for the Bevan Foundation in the same year.[1] Although the Assembly has assumed further legislative authority since 2008, the position with regard to the administration of justice remains as it then was. Quoting from paragraph 43 of that address

> " …… In my opinion, the principal argument is that including responsibility for the administration of justice as part of a devolution settlement which devolves full law making powers 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? Secondly, it would be internally logical, consistent and coherent. Thirdly, it would make for consistency between the constitutions of Scotland, Northern Ireland and Wales and fourthly it would bring justice closer to the people for whom the laws are made".

6. In his submissions to the Welsh Government's inquiry into the establishment of a Welsh jurisdiction (January 2012), Professor R. Gwynedd Parry[2] referring to that paragraph from my address flatteringly described it as

> "…….. a mature argument for the creation of a separate jurisdiction because it is necessary if Wales is to operate in a way that is constitutionally valid, and consistent with the pattern generally found within the British state. Indeed, this pattern of having a legal jurisdiction and regional legislature is seen in devolved and federal countries throughout the world, such as Australia and Canada. I would call it the constitutional argument …….. possibly the most important argument" (paragraph 85) and ….. "[Its core] is that for democracy in Wales to mature and operate in accordance with democratic and constitutional standards seen in devolved regions and nations world-wide, Wales's own legal structures need to be consistent with those standards. The main role of the jurisdiction and its judges would be to allow the individual to hold the executive and legislature to account and provide remedies where the law is not upheld. The important constitutional role of the judiciary is to provide oversight of the actions of the legislature and government, in order to ensure that it behaves in accordance with international law and human rights standards. This has now become one of the most important constitutional roles of the judiciary within the British constitution" (paragraph 86).[69].

[1] I attach both with these submissions.

[2] Submissions to the Welsh Government's inquiry into the establishment of a separate Welsh Jurisdiction, January 2012 at paras 85 and 86.

Piecemeal reform

7. The alternative to devolution of the whole is piecemeal reform which is a very poor substitute. It creates the risk of fragmentation of the system and of it operating dysfunctionally. If the devolution of the whole is not to happen and the reforms of it will be piecemeal it is necessary that the reforms be seen in the context of their effect on the working of the system as a whole. See, for example my submission at Section 3, paragraphs 4, 6-8 with regard to the devolution of responsibility of policing separately from that of the prosecution service. Provided piecemeal reform of parts does not fragment the system as a whole or renders it dysfunctional or worse than it was, piecemeal reform, being better than no reform, has to be acceptable.

Too big a task?

8. Most of the executive functions in need of reform in Wales are also in need of reform in England and the responsibilities for them rests with HMG and its ministries. If the reforms have to wait on HMG, then having regard to the size of the task it is inevitable that Wales would be waiting a very long time on the reforms and even if HMG were to get on with some of them immediately, they might not be right for Wales. See for example MOJ's proposals for a super prison in south Wales (Section 4 Part I, paragraph 2 of these submissions).

9. What then is the answer to the largeness of the task? There are two. One is to devolve responsibility for the justice system and the making of the reforms to the Welsh Government - the constitutional case I summarised earlier. On a Wales only basis, the task is nowhere near as large and Wales would not need to wait on England. The second answer then lies in the saying "small is beautiful". It is associated with the British economist F. E. Schumacher who authored the well known book of that title but it came in fact from a phrase used by Schumacher's teacher, Leopold Kohr, who became a lecturer in political philosophy at the University of Wales Aberystwyth (as it then was). Schumacher acknowledged him as a major source of his ideas. Kohr's great work The Breakdown of Nations was printed and published here in Wales. As he once wrote:

> "The answer to bigness is smallness, not still larger units, just as the answer to the Deluge was the Ark of Noah, not the Titanic. His contemporaries called Noah a lunatic. Maybe he was. But it was from him that we descend. The experts all drowned."

His abiding idea was that when something is wrong, something is too big. He was always on the look out for things that were, as he put it, of an appropriate size or scale. He thought Wales, with its three million people, was the appropriate size for a nation, which was one reason why, later in life, he came to live here. That philosophy lives in the words of Lord Thomas of Cwmgiedd[3]

> "It is far easier to get things done in a small nation. You can get everyone interested round a small table and get a decision made quickly, as was shown when the Mercantile Court was established in Cardiff or all those interested in the Welsh Criminal Justice system were brought together. My experience with Westminster and Whitehall was that it was impossible to do the same; you can

[3] "Past and the Future of law in Wales" Pierhead Building, Cardiff, 27 October 2017

never have a small meeting. It is therefore possible in Wales quickly to take those bold decisions that make a nation a leader."

10. A more encouraging aspiration than making one's nation a leader is difficult to imagine. That approach explains in part at least why we had devolution in the first place. The unitary system which had been in place for centuries was perceived as over centralised and no longer capable of performing effectively in the latter half of the 20th century not to mention the 21st century. It was one of the reasons which drove devolution and it continues today to exert pressure for yet further reforms.

Local in character

11. This next point links well, I think, with the theme that smallness renders reform and effective management more achievable than largeness. Our system of justice is essentially local in character. See Alun Davies AM's statement which I quote in the first paragraph of Section 4 of these submissions. For centuries, much of the justice system of England and Wales, including the police service, the court system and the jury system - the bedrocks of the justice system - was administered locally and today judges, magistrates, police authorities, public prosecutors and leading counsel are appointed on a local basis[4]. Our court system once again is now reflecting that local character. The use of the Welsh language within the justice system in Wales is also very much a part of that local character. The custom on all the circuits of England Wales and of Scotland and Northern Ireland, of the CPS and other public bodies, in instructing 'local' counsel to represent them is consistent with that local character. When the National Assembly of Wales was first established it was an entirely new constitutional creature. Its constitutional setting was entirely novel. The legal professions of England and Wales had no knowledge or experience of it or anything resembling it. There was, therefore, no more of a reason for instructing London counsel than there was for instructing local counsel (barristers on the Wales and Chester Circuit). During its first five years of existence, in relation to every matter on which the Assembly needed external legal advice or representation it appointed local solicitors and instructed local counsel . They all rose to the challenge and succeeded on every matter which the Assembly initiated or on which it was challenged and the legal sector in Wales acquired skills and experience in specialised areas of law and practice. The Welsh Government in its submissions to the Commission accepts that essential to improvement of the justice system in Wales is the strengthening the legal services sector locally. The importance of this local character to the effectiveness of our justice system hardly needs emphasising.

[4] I do not imply that the appointing authorities are local.

## Section 2
## Policing
## Governance, local accountability and coordination and integration of services.

1. I realise that one of the Commission's members if not all of them will know much more about this subject than I do and has an infinitely wider experience than I have of it but I hope that these submissions will be of some assistance to the Commission in its work.

First submission

2. My first submission is that responsibility for policing Wales should be devolved to the Welsh Government. "Policing" in the sense I use it here refers to the Strategic Policing Requirement issued by the Secretary of State under section 37 A of the Police Act 1996 and to the statutory duties of the police set out in sections 1(5), (6) (b) of the 2011 Act and the objectives referred to in Section 7 (1) and (2) of that Act including preventing crime, providing an effective response, reducing harm and risk of harm.

3. The police service in Wales is as central to the safety and well being of the people of Wales as any other agencies of government, local and national. This is acknowledged in the Crime and Disorder Act 1998, (the 1998 Act), the Police and and Social Responsibility Act 2011 (the 2011 Act) and the Well-being of Future Generations (Wales) Act 2015 (the 2015 Act). In performing that highly important role, it is necessary that it works cooperatively and closely with other bodies in Wales which are already devolved and which also have significant responsibilities for the safety and wellbeing of the people. So much of what the police service does on a daily basis requires the closest possible working relationship with the devolved agencies yet essential though more effective partnership working is between them, it is impeded by the fact that ultimate responsibility for the former lies to London and ultimate responsibility for the latter is to Cardiff. That division of responsibility is not conducive to good governance or to the effective provision of services.

The high importance of partnership working.

4. As the Police and Crime Commissioner for North Wales (2012-2016), I saw at first-hand the extent to which the police and the other local services including health, education, ambulance, fire and rescue and local authorities more generally depended on each other for the effective performance of their respective responsibilities. So essential to the effective policing of north Wales and particularly to the safety and wellbeing of the people did I come to regard working in partnership that I made it the principal strategic objective of my statutory police and crime plan. Doing so gave it priority over my other strategic objectives of preventing crime, delivering an effective response and reducing harm and the risk of harm. I made this change because effective partnership working better facilitates the achievement of those other important objectives, reduces demand on each of the partners and thereby increases the capacity of frontline staff, enables responses to be more effective and lasting in their benefit and, very importantly, it enabled public authorities to be effective despite the very challenging financial constraints with which they were endeavouring to cope.

5. In its report of 2015 "Reshaping policing for the public"[5] the National Debate Advisory Group states that the future of policing is highly challenging and is expected to become even more so over the course of the next five years …….(para 3.26). Its conclusion was that [if] the police service was to achieve its primary objectives of preventing crime and keeping the public safe it **" needs to ……. work much more closely with other public services involved in protecting the public from harm"** (emphasis is mine).

6. The high importance to the safety and well being of the people of Wales of partnership working is made particularly clear by three matters.

(i). The first is the very powerful and poignant photograph in the Merthyr Express on the 21 October 1966 of Constable Victor Jones carrying 12 year old Susan Maybank to safety the day of the Aberfan tragedy when 144 people, including 116 children, were killed.

(ii). The second is the 1998 Act, which places on all the "responsible authorities" listed in section 5 the strategies described in section 6. The responsible authorities include the local authority, the probation service, the chief constable, the police and crime commissioner, every fire and rescue authority and area health boards and the strategies which they are charged with developing jointly include the reduction of crime and disorder, misuse of drugs and alcohol and the reduction of reoffending within their area. Section 7 places responsibility for overseeing the formulation and implementation of the strategies created by section 6 on the police and crime commissioner who may require each responsible authority to submit to the commissioner a report on matters connected with the exercise of their functions under section 6. In effect, therefore, section 7 (even allowing for the exception of non-devolved functions created by sect 5 (8)) creates an accountability line between devolved authorities (responsible authorities) and non-devolved authorities (the Welsh police and crime commissioners). I return to that point in paragraph 9 below.

(iii). The third is the 2015 Act, a key piece of legislation aimed at the better governance of Wales. It is a strong manifestation of the importance placed by the Welsh Government on joined-up government and cooperative working between agencies concerned with the well being of the people of Wales. All the public bodies to which it applies are required to work together to improve the economic, social, environmental and cultural well-being of Wales and are accountable to the Government of Wales in the carrying out of those responsibilities. Those public bodies include many of the public services with which Welsh police forces work closely and need to work more closely including all the emergency services. I return to that last point in paragraph 10 below.

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The impediment.

7. As incidents arising out of mental ill-health, missing persons, homelessness, anti-social behaviour, domestic violence, child sexual exploitation, knife crime and other serious crimes are often much wider than just policing, an effective response can only be delivered in partnership with the other public agencies such as schools, health authorities, hospitals (especially A & E wards), the fire service, the ambulance service, probation service, criminal justice bodies[6] and the prison service. As the focus on those crimes and social problems continues to sharpen, the importance of partnership working will continue to grow. There can be no doubt as to its growing importance but making it effective is a much greater challenge when the accountability line of some partners is very different to that of the others. In Wales, ultimate authority and responsibility for schools, health agencies, fire and and ambulance services, for example, rests with the Welsh Government. The ultimate authority and responsibility for the police service in Wales, rests in Whitehall. That fact is a real impediment to effective partnership working of essential public services in Wales.

8. The 2015 report of the National Debate Advisory Group which I cited earlier (paragraph 5 of this section) acknowledges the high importance of closer working and makes clear that if the police service is to achieve its primary objectives it needs to work more closely with other public services involved in protecting the public from harm. However, for the very reasons I described in the last paragraph, those primary objectives are much more achievable in England than they are in Wales.

9. Section 7 of the 1998 Act (which I summarised in paragraph 6 (ii) of this section), even allowing for the exception of non-devolved functions created by sect 5 (8), creates an accountability line between the responsible authorities, which are devolved, and the police and crime commissioners, which are not devolved, but how, you may well ask, are police and crime commissioners in Wales to be effective in overseeing the working of these provisions and the performance of the responsible authorities' under section 5 and 7 of the Act when the accountability route of the authorities they are overseeing leads to the Welsh Government which has neither responsibility for nor authority over the police service?

10. The Wellbeing of Future Generations (Wales) Act 2015 illustrates vividly the problems caused by different accountability lines. The public bodies to which it applies include many of the public services and all the emergency services of Wales which need to work closely with the police forces of Wales in seeking to achieve the Acts objectives. Essential though the police service is to the attainment of those objectives and essential though those public bodies are to the achievement of the primary objectives of the police service of preventing crime and keeping the public safe, as the National Assembly does not have responsibility for the police forces the Act cannot be applied to them and consequently they are no more than mere invitees at meetings of the Public Service Boards.

11. The very recent surge in knife crime provides the strongest and most contemporary case for collaborative working between public bodies. The surge cannot be stemmed and the crime cannot

[6] Defined in sec 10 (5) f the 2011 Act

be crushed without effective collaboration.The surge is not limited to England. The increase right across Wales has been very substantial and it has included serious injuries. The latest figures from the Ministry of Justice show that in the year ending September 2018, in Wales there were 1,309 offences recorded by the police where a knife or sharp instrument was involved. This is an increase of 38% to September 2009 when there were 950 offences recorded. Over the same period the number of convictions or cautions for knife crime has gone down very substantially (39%). In north Wales the figure for actual bodily harm and grievous bodily harm with the knife in September 2018 was 199 which was 121% higher there in the year to September 2009. The corresponding figures for south Wales were 482 which was an increase of 54% over the year to September 2009. Superintendent Joanna Mall, South Wales police's lead for tackling knife crime said

> " ……. we cannot do this alone. We continually work with partner organisations such as Public Health Wales and education authorities to tackle these issues, and partnership operations with local authorities and Trading Standards departments are carried out to ensure that legislation is being adhered to in respect of the sale of knives to under-18s."

12. The best examples which are cited of cooperative working between relevant agencies in dealing with the sudden increase in this particular crime also illustrates that this is more easily achieved where there are unbroken lines of responsibility and accountability. The following appeared in the Times leading article on 6 March 2019

> " But the fear is that unless it is tackled it could become endemic, as it was in Glasgow before 2005. Then the city was described by the World Health Organisation as the"murder capital of Europe". The authorities in Glasgow looked around the world at cities that had successfully tackled similar problems, including Chicago, Los Angeles and Boston. They set up a Violence Reduction Unit which viewed violence as a kind of communicable disease that spread in certain conditions. If you could change the conditions - in the home, in schools, on the streets - then you could stop the disease. This has meant agencies working together in a concerted strategy. The number suggests that the approach works. The homicide rate has more than halved".

The responsibility and accountability of all the agencies and of the police forces involved in the strategies successful employed cooperatively in Glasgow and in America (and which are about to be deployed cooperatively in some cities of England), are to their respective governments. In Wales, responsibility is divided between the UK Government which has responsibility for policing and the National Assembly for Wales which has responsibility for most if not all of the other necessary agencies but not policing.

Conclusion of the first submission

13. However important closer and more effective co-operative working between between the police service and the devolved authorities with which it needs to work for preventing crime and keeping people safe, it is not likely to be achieved without the removal of that impediment.

The second submission.

14. In this I address the question, indeed the concerns, as to whether a devolved Welsh police service would have the specialist police capabilities which are necessary for dealing with today's crimes such as terrorism, organised crime, human slavery, human trafficking, illegal immigration,

cybercrime - typical cross border crimes. It is is an important question but the answer is that the existing provision of that capability would not be affected by the devolution of policing. It is certainly the case that many of the crimes of today such as those just mentioned do not respect national boundaries and require specialist capabilities which single forces cannot provide. However, the need for 'cross-boundary' arrangements between police forces for the provision of operational support in areas of specialist capabilities such as those within the Strategic Policing Requirement is already well understood and is in operation across all the forces of England and Wales and will continue to be provided on a cross-border basis. Devolving responsibility for policing need not affect it one bit. It is quite clear from the report of the National Debate Advisory Group 2015, Reshaping Policing for the Public[7], that all the forces of England and Wales are committed to working to these arrangements. Doing so will minimise the number of locations required for locating centres from which specialist support is provided, it will allow capabilities common to different forces to be deployed flexibly on a cross-border basis and it will preserve access to capabilities for all forces without losing the ability to deploy rapidly on the basis of threats, risk and harm. Increasing specialist capabilities through 'cross-border' arrangements and standardising functions where appropriate will enhance capabilities and provide value for money.

The third submission - structure .

15. This third submission is that police forces of Wales should not be combined into a national force but should remain separate. There are very strong arguments against creating an all-Wales police service. The first, to nationalise the service would deprive the forces of their strong local character, a character which is essential to their quality and effectiveness; a character they have enjoyed throughout their history. The governance, accessibility and accountability of each force is local - locally elected police and crime commissioners and locally chosen police and crime panels. I doubt if there is a better contemporary example of smallness being better than largeness. The second relates to the physical geography of Wales and its very poor public transport and roads systems north to south. In 1970, the average time it took to travel by car between Caernarfon and Cardiff was four hours. Today, with wider and better roads and more powerful and more efficient motor vehicles the average time is still four hours. That geography and the roads systems present formidable obstacles to the efficient and effective operation of a single all-Wales police service. They render it highly unlikely that an all-Wales force would be as effective not to mention more effective than the present forces working together are today. Their effectiveness is measured regularly by Her Majesty's Inspector of Constabulary and by national crime statistics. It is also unlikely that the consequent savings in costs which amalgamation might arguably achieve would translate into value for money. The third is that it would be unacceptable to the people of north Wales if their police service were centred in Cardiff. It would create a sense of remoteness from the police service. It is not difficult imagine what the people of Wrexham or Bangor or Anglesey or Pwllheli might say if their police headquarters were to be located in Cardiff. As it is very unlikely that it would be situated in north Wales, it is unnecessary to consider what the people of south Wales might think of it being located there.

[7] https;//wwwjusticeinspectors.gov.uk…./wp/reshaping-policing-for-the-public.pdf.4June 2015

Fourth submission - governance.

16. The present model of governance for the police service in England and Wales was created as recently as 2011 by the Police Reform and Social Responsibility Act of that year. The history of how the police service was governed before the passing of the 2011 Act makes clear why that Act introduced the changes it did and why, in my view. the present model is infinitely better than the model it replaced.

17. Save for the Metropolitan Police the governance of all police forces was and still is essentially local. It has varied over the years from the local magistrates to Watch Committees to Police Authorities. What those bodies had in common was that they were neither elected nor accountable. Therefore, although the police service of England and Wales is and always has been central to our liberties, its local governance was neither open nor accountable. That last point is the principal reason for the passing of the 2011 Act. It introduced the most radical reforms in the history of policing. It abolished Police Authorities, which as I said were unelected, unseen and unaccountable, replaced them with directly elected police and crime commissioners who are accountable directly to the electorate and are scrutinised by Police and Crime Panels, (independent bodies created by Parliament and the membership of which are selected by locally elected representatives), it scrapped national targets, reformed pay and conditions, abolished bureaucracy and set up the National Crime Agency and the College of Policing. It created a statutory framework for effective policing which, in my view, is a model of its kind the great strength of which rests in the fact that essentially its governance is local, open and accountable.

18. The Act makes quite clear that operational responsibilities are entirely matters for the chief constables and that the role of the commissioners is to scrutinise chief constables in their performance of their operational roles. A very sensible division of functions. In the chapter on police and personal liberty in the latest edition of their work on constitutional and administrative law, Professors Bradley and Ewing say “It is difficult to exaggerate the central importance of personal liberty in a free and democratic society”. None of us would disagree with that statement, I am sure. But it can also be said, can it not, that how we are policed is also of central importance to our liberties And it can also be said can it not that how the police are scrutinised in the performance of those responsibilities is just as important as those two matters. The vehicle through which I excised that important function was the Strategic Executive Board which I set up on my election. It was my scrutinising forum. I was its chair. Its members included the deputy police and crime commissioner and my chief executive and finance officer, the chief constable, the deputy chief constable, the assistant chief constable and North Wales Police Director of Finance and Resources. We met monthly and I was presented at each meeting with a report from the chief constable addressing the measures set out in my Police and Crime Plan as to how I would measure the chief constables performance. It worked very successfully because North Wales Police embraced the changes and worked them to great success.

19. Another creation the 2011 Ac which is central to good governance of the police service are the Police and Crime Panels. Each force area has a panel the membership of which is made up of a

representative from each of the local authorities in the force area and two independent members. The panel's role is to scrutinise the commissioner's performance (not that of the chief constable) and to receive the commissioner's quarterly report on the commissioner's activities and his annual report on the force's performance. The panel has authority to veto the commissioner's selection of a chief constable and the commissioner's precept - that proportion of the local tax determined by the commissioner as an addition to the local tax for supplementing the grant provided to the commissioner by the Home Office. All meetings of the panel are public and are regularly attended by the press. Speaking from experience, the panel's scrutiny is real, public and effective.

## Section 3

## Devolution and reform of Crown Prosecution Service.

## Establishing a justice system which is clear, coherent and locally accountable

1. An efficient and effective police service and an efficient and effective prosecution service working closely together is essential to the effectiveness of each of them and to the effectiveness of the the criminal justice system generally. This is acknowledged in section 10 (3) and (5) of the Police Reform and Social Responsibility Act 2011 (the 2011 Act). They are inseperable legally and functionally. Separation of them in the sense of making one of them responsible to HMG and the other to the Welsh Government would undermine the effectiveness of both. Therefore, if responsibility for the police service were to be devolved to the Welsh Government then so also should responsibility for the prosecution service.

2. At paragraph 60 of its submissions to the Commission, the CPS' states -

> "it is confident that, notwithstanding any future devolved justice arrangements, the CPS could continue to function as an independent prosecutor in Wales".

3. The meaning of that statement is not clear. One interpretation is that notwithstanding devolution of the criminal justice system, responsibility for the prosecution of offences committed in Wales could remain with the CPS as it is. As it is, the accountability of the CPS for the conduct of that responsibility is to Parliament through the DPP and the Attorney General. The other interpretation is that if the justice system were to be devolved to Wales a Welsh prosecution service independent of the present service could be established.

4. If it were the former, it would mean that whilst the Welsh Government had responsibility for how crime is policed in Wales, a DPP appointed by the Attorney General who is accountable not to the National Assembly for Wales but to Westminster would be responsible for all decisions relating to the prosecution of criminal offences committed in Wales. It is difficult to imagine a more fragmented justice system than that. It is probably safe therefore to assume that so absurd a result was not intended and that the statement is to be understood in the other sense that if the criminal justice system is devolved, Wales could have its own independent prosecution service.

5. Policing in the sense that I use that expression in this section of my submissions refers to the strategic policing requirement issued by the Secretary of State under section 37A of the Police Act 1996 and to the statutory duties of the police set out at sections 1 (5), (6) (b) of the 2011 Act and the the objectives referred to in section 7 (1) and (2) of that Act including preventing crime, providing an effective response, reducing harm and the risk of harm.

6. It is clear from section 10 (3) and (5) of the 2011 Act that the relationship between the police service and the prosecution service is integral to the criminal justice system as a whole and especially to to the safety and well being of the public. Essential to the safety and well being of the

public is effective policing. Essential to effective policing is the effective prosecution of criminals. Essential to effective prosecution is an independent and effective prosecution service. I accept that the ultimate decision whether to prosecute or not or as to the appropriate charge rests with the CPS but there is a statutory relationship between them and a very real dependancy of the one service on the other. In functional terms, the two services are inseperable; the one cannot perform its role without the active support and participation of the other. Take disclosure for example. This is a bedrock of a fair and safe justice system in which both the police and the CPS have an inseperable role in seeing that it happens. For these many reasons, they are inseperable and the accountability and responsibility of each of them must of necessity be to the same parliament.

7. From the First Minister, Mr Carwyn Jones AM's oral submissions to the Commission on 15 December 2018, the aspiration of the Welsh Government would appear to be that responsibility for the police, CPS, prisons and probation services should one day be devolved to Wales but as for the timing of their devolution, he said -

> "Policing could be devolved separately but the rest of justice comes as a package. We cannot devolve prisons and probation, but not penal policy".

8. There can be no doubt about the strength of the latter part of that statement - that sentencing policy is an inseparable part of the criminal justice system and if responsibility for prisons and the probation service were to be devolved so should responsibility for sentencing policies. However, for the reasons set out earlier in this section, with respect to Mr Carwyn Jones, the statement that the police service is not part of the "package" and can be devolved separately from and without prejudice to the CPS, is plainly wrong.

9 Although effective sentencing and rehabilitation policies and an effective prison service are essential for preventing and reducing crime, there is not as much dependency or as essential or as close a working relationship between policing on the one hand and sentencing policy on the other as there is between policing crime and its prosecution. The courts can work quite independently of the police service and of the prosecution service and indeed must be independent of both when trying cases and in sentencing the guilty. The relationship must of necessity be more remote than that between the CPS and the police. So whilst ideally they should all be devolved together, separating policing from sentencing and from rehabilitation would not be as fragmentary in its effect or create anything as substantial an impediment to effective policing and the reduction of crime as separating police and the prosecution service.

The reform of the CPS

10. The need for reform of the present prosecution service is unquestionable. The problems experienced by it in recent times especially with regard to disclosure seriously damaged its reputation and the confidence of the courts and of the public in it. Also, the experiment of appointing the head of the service from within the service itself appears not to have been successful. The recent appointment of Max Hill QC suggests that the long-established practise of appointing advocates of appropriate experience and seniority from the independent Bar has been re-established.

If the Commission were to recommend the establishment of an independent public prosecution service for Wales, I would respectfully suggest it should also recommend that the head of that service be appointed from the ranks of experienced leading counsel from the independent Bar. History has proved the necessity and the durability and effectiveness of doing so.

11. For very obvious reasons, reforms and the manageability of a devolved service would be far easier than of a non-devolved service. The prosecution services of Scotland and Northern Ireland provide examples of effective devolved prosecution services which are independent of government and which could be easily adapted to Wales. Devolving the service to Wales would benefit Wales' prosecution service , its criminal justice system more generally, its people and its economy. It is an opportunity not to be missed.

# Section 4
# Prisons
## Part I
## Welsh Government's position and the looming battle

1. In a public statement in May 2018 when explaining Welsh Government's objection to super-prisons, Alun Davies, AM, then Cabinet Secretary for Local Government and Public Services, summarised the government's approach to criminal justice as being

> "rooted in locality, in family, in rehabilitation, in training, in support, in community" [8]

As there is very little explanation of the Welsh Government's position on prisons in its submissions to the Commission or indeed in Mr Davies' oral evidence to it I quote in full what he said on that occasion in May 2018. It provides a clear explanation of Welsh Government's present position and I invite the Commission to note it.

> "…….. it is in the interests of neither the Welsh Government nor the people of Wales to see further prison development in Wales until we have a policy, a criminal justice policy, which is agreed with the Ministry of Justice. I am not going to stand here and say that we do not want to see any development of secure accommodation in this country. That is simply not the case. And it would be wrong for me to either say that this afternoon or to make any commitments on that, because what we want to see is the removal of prisons. We do not want to see people in the old Victorian prisons. We want a development of the prison and the secure estate in Wales. We want to develop specific facilities for female offenders. We want specific facilities for youth offenders. We want to see an investment in rehabilitation. We want to see an investment in community support. We want to see investment in education. We want to see investment in how we rehabilitate young offenders. So, we want to see a great deal of investment in the secure estate in Wales. What we don't want to see are super-prisons imposed upon this country without a holistic criminal justice policy that underpins our ambitions and our vision for this area of policy. And I contend that most people would want to see that as well."

2. The Welsh Government agreed to sell its estate at Baglan Moor, Portalbot to MOJ for the building of a category C prison with a 1600 capacity but following the strong public objections and protests including objections by Stephen Kinnock MP to the Welsh Government it withdrew from the agreement. According to Wales on Line, quoting an MOJ spokesman, the MOJ

> "remained committed to building a prison in South Wales where there is a clear need for modern, category C prison places …… We continue ….. to work with the Welsh Government to look at other potential sites as our plans progress".

[8] Wales on Line 28 March 2019

However, the position of Welsh Government today is one of strong opposition to the MOJ's plans. In May 2018, it said[9] the prison should not go ahead anywhere in Wales and that it had

> "written to the Ministry of Justice to inform them we will not facilitate any further prison development without meaningful and thorough discussion about the future estate as part of a holistic approach to penal policy in Wales".

That approach is explained in the position statement of Mr Alun Davies which I have just quoted. It is now reasonably clear from that exchange that the Welsh Government is on the threshold of a major battle with the MOJ over what kind of prison provision best suits Wales. Welsh Government favours smallness; MOJ favour largeness.

3. Wrexham's Berwyn Prison with its capacity of 2,106 has very substantially increased Wales' prison capacity especially in north Wales which previously had no prison capacity at all and the intention of MOJ to build another super-prison in south Wales will increase the provision even more. It might therefore appear that the case for improvement of the prison service in Wales is being met. However, as is shown in the second part of this submission, the reality is that the prison service is in a mess and especially so in Wales where the case for reform continues to be cogent. Problems relating to prisons and reducing reoffending continue to be the biggest problems facing the criminal justice system in England and Wales today. Berwyn has not weakened the case for reform here in Wales but might in fact have strengthened it. Apart from problems caused by largeness and remoteness, through its policy for the running of Berwyn and its recently aborted plan for a super-prison at Baglan Moors, MOJ has confirmed that it continues to be its policy not to have a women's prison in Wales. It has also become clear, certainly since May 2018 when the Welsh Government withdrew from the Baglan Moor agreement that the Welsh Government's position with regard to the improvement of prison provision in Wales is very different in many respects from that of the MOJ's

4. Prisons have three main functions, punishment/deterrence, security of the public and rehabilitation. As the reduction of crime is the most important objective of our criminal justice system, deterrence and rehabilitation need to be recognised as the most important and be the objectives which influence our reform of the penal system. How else shall we address the need to reduce crime, address Wales' appalling prison statistics, the problems caused by the remoteness of prison from home and the dreadful consequences for children and young persons of imprisoning a parent. In drawing up a programme of reform, the reformers should keep in mind what Leopold Kohr said about largeness and what Lord Thomas said about how much easier it is to get things done in a small nation and to take those decisions that make a nation a leader.

5. I do not suggest that the remoteness of the prison from the prisoner's home is the main reason why our prison policies are failing and why rehabilitation is made more difficult than it need be. The circumstances within the prison itself including overcrowding, disorder, drug importation and shortness of the number of prison officers all have an unintended effect on the prisoners and on their prospects of rehabilitation but if the prison was located more locally, was more local in its

[9] Wales on Line 28 March 2019

character and more local in its purpose it would be much easier to manage and its objectives of reducing crime and rehabilitation, would be more easily achievable. According to Mr Alun Davies AM's statement, this too would appear to be the approach of the Welsh Government.

6. As responsibility for prisons in Wales is already split with four being run directly by HMG and one, Parc Prison in Bridgend, being run privately by G4S, a situation in which responsibility for a prison or some prisons in Wales rested with the Welsh Government and responsibility for the others continued to rest with MOJ and G4S would not be without precedent and there is no reason to think it would create difficulties of any significant kind. Having a womens prison in Wales for which the Welsh Government was responsible would be perfectly workable, would meet a very real need, would assist with the rehabilitation of women prisoners and would reduce problems caused by the imprisonment of parents (See Part II of this submission). There already exists a well established working relationship between the prisons in Wales and Welsh Government through the latter's responsibility for providing heath services to the prisons. As there is not at present a justice function within Welsh Government or in the National Assembly, that function including experience of the prison service and of its management would need to be imported ahead of the Government acquiring the justice function. It would not be the first time Welsh Government and the National Assembly has brought in new skills and experience from outside (see Section 7, paragraphs 2 and 3).

7. The high number of Welsh men and women sent to prison in comparison to England and the rest of Europe including Scotland and Northern Ireland (see Part II of this section, paragraph 15) is a very troubling situation indeed. If the MOJ addresses it at all, it will be as part of the England and Wales problem and even then it is likely to focus on England. In his oral evidence to the Commission on 15 November 2018, the First Minister, Mr Carwyn Jones said -

> "the most glaring example of the jagged edge is prison rehabilitation. The Secretary of State for Justice launched a pilot for mental health, but none of the five areas were in Wales. We have the wholly unnecessary jagged edge as most mental health services are devolved. The Secretary of State for justice often does not consult us on justice matters as justice is not devolved."

The Fist Minister's point is the obvious one - Wales is significantly affected by decisions of the MOJ irrespective of whether justice is devolved or not. That passage especially its final sentence paints a disgraceful picture and strongly supports the case for the devolution of responsibility for prisons in Wales and for the urgent consideration of these problems by the Welsh Government.

## Prisons
## Part II
## Promoting better outcomes and the proper integration of services

8. This submission focuses on three problems in particular - sentencing policies, prison policies and the consequences of imprisoning parents.

The general picture

9. The table below comes from the Children of Imprisoned Parents. European Perspectives on Good Practice. I would respectfully suggest that any consideration of the aspects of the Commission's work addressed in this submission and of the more general question of whether our justice system is in need of reform should begin with this table. Save for the Czech Republic and Romania, England and Wales has the highest prison population rates per 100,000 (148) of all 22 nations of Europe. It is substantially higher than that of Denmark, Finland, Netherlands, Norway, Slovenia, Sweden, Switzerland, Ireland, and Germany and, worst still, it has the highest number of children with an imprisoned father and the third highest number of children of imprisoned mothers.

TABLE

| Country | Prison population | Prison population rate per 100,000 | Number of children separated from an imprisoned father (extrapolation) | Number of children separated from an imprisoned mother (extrapolation) |
|---|---|---|---|---|
| Belgium | 12,126 | 108 | 15,763 | 545 |
| Croatia | 4,741 | 108 | 6,163 | 307 |
| Czech Republic | 1,6257 | 154 | 21,134 | 1,999 |
| Denmark | 4,091 | 73 | 5,318 | 232 |
| Finland | 3,134 | 58 | 4,074 | 296 |
| France | 62,443 | 98 | 81,175 | 3,134 |
| Germany | 64,379 | 79 | 8,3692 | 5,029 |
| Greece | 12,479 | 111 | 16,222 | 720 |
| Ireland | 4,068 | 88 | 5,288 | 204 |
| Italy | 64,835 | 106 | 84,285 | 3,650 |
| Luxembourg | 656 | 122 | 787 | 46 |
| Netherlands | 13,749 | 82 | 17,873 | 950 |
| Norway | 3,649 | 72 | 4,743 | 271 |
| Romania | 33,015 | 155 | 42,920 | 1,656 |
| Slovenia | 1,357 | 66 | 1,764 | 65 |
| Spain | 68,220 | 147 | 88,686 | 6,988 |
| Sweden | 6,364 | 67 | 8,273 | 507 |
| Switzerland | 6,599 | 82 | 8,578 | 421 |
| United Kingdom | | | | |
| England/Wales | 84,430 | 148 | 109,759 | 5,278 |
| Northern Ireland | 1,851 | 101 | 2,406 | 57 |
| Scotland | 7,855 | 147 | 10,211 | 583 |

"Source: Children of Prisoners Europe based on International Centre for Prison Studies data: World prison population list (10th edition 2013).

Note: The figures for the prison populations vary with the rate of imprisonment in each nation, and do not therefore correlate with the size of the population at large. Based on figures for the countries in table representing data for 2013 compared with data for 2005. http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/worldprison-population-list-2005.pdf".

The problems caused by the imprisonment of parents.

10. In 2007, a Ministry of Justice review into children affected by parental imprisonment reported

> "It is clear for multiple reasons that children of prisoners are at higher risk than the wider child population and are likely to require extensive support. Parental imprisonment thus presents an opportunity to identify children at risk of poor outcomes and to offer support to mitigate the effects of both parental imprisonment and circumstance"

11. In its report of 2008, the Social Care Institute for Excellence, stated that its research showed that in addition to the immediate impact on the child, parental imprisonment also impacts on a child's long-term outcomes. The research on which those conclusions are based and that published by Barnardo's Cymru on its website shows children of prisoners are approximately three times more likely to be involved in offending activity compared to their peers; twice as likely to experience mental health problems; more likely to be arrested and imprisoned as young adults; less likely to do well at school and more likely to be excluded. Young persons excluded from school have featured prominently in the spate of knife crimes reported in late 2018 and early 2019.It needs also to be born in mind that as very few children remain living in the family home when the mother is in prison, the child not only loses its mother but in many cases it also loses its home.

Exploitation

12. This cohort has been identified as one of the vulnerable groups targeted by Organised Criminal Gangs through 'County Lines'. 'County Lines' is the police term for urban gangs supplying drugs to suburban areas and market and coastal towns across England and Wales using dedicated mobile phone lines or "deal lines". It involves child criminal exploitation as gangs use children and vulnerable people to move drugs and money. Officers in the Violence and Vulnerability Unit of North Wales Police highlighted this threat in its article for the September 2018 edition of the FABI Newsletter (see para 19 of this section).

Coordinating and integrating services for rehabilitating offenders and preventing offending.

13. The loss of a parent to imprisonment has been likened to bereavement (Shaw, 1992), but the support offered to a bereaved child is far greater than that afforded to a child with an imprisoned parent. It hardly needs to be supported by research that if a child is left in particularly chaotic surroundings when the mother goes to prison it is likely to have a deleterious effect on the mother's mental health and make her effective resettlement more difficult. In 2008, the Ministry of Justice estimated that maintaining contact between prisoner and family reduces reoffending by 40 percent and if children are effectively supported whilst a parent is in prison the offender finds it much easier

to resettle upon release and is less likely to reoffend. The wider public interest in addressing these problems and the circumstances which cause them could not be clearer.

14. Coupling those views with the above table and the fact that it is now clear that imprisoning a parent can have significant long term consequences for the child, the family and society as a whole renders it imperative that local authorities, schools, the prison, courts', probation and police services have an agreed systematic approach for the identification of children affected by parental imprisonment, the support that the children and the family need and which of the agencies will provide it. Where such schemes do not already exist, they need to be developed. Knowing the scale of the problem and the identity of the affected families enables the need to be measured and assistance to be directed to those in need of it. In a 'no system' approach neither is known and the problem cannot be addressed. In 2009, the Scottish Commissioner for Children and Young People, commenting on the number of children affected by parental imprisonment admitted -

> 'the truth is we don't really know [how many]. The reason we don't know is we simply don't count them, and the reason we don't count them is because they are invisible'.

The Welsh perspective

15. As bad as is the picture presented by that combined England and Wales table (above), the separate imprisonment table for Wales which can be seen in the January 2019 report of Cardiff University's Wales Governance Centre paints an even worse picture. The position in Wales is worse not just because the prison population figure (154 per 100,000) is higher than that for England (141 per 100,000) but also because the absence of prisons across north and mid Wales means that many prisoners from Wales are imprisoned a considerable distance from their families and the support services which are vital to rehabilitation. This is particularly the case with regard to women prisoners from Wales. It is difficult to believe there is not one womens prison in Wales. A greater impediment to the well-being of imprisoned mothers and their families or to rehabilitation or anything more conducive to repeat offending and creating criminal behaviour amongst the children and young persons of Wales whose mothers are imprisoned so far from home is difficult to imagine. There could hardly be a more evident discrimination against women and families in Wales. For more particulars of the effects of this policy and for a compelling case for reform, see https://wwwcleanbreak.org.uk/news/blog-womens-prisons-wales. (19 September 2018).

16. During my period as the police and crime commissioner for north Wales (2012 - 2016), my team, as part of broadening its understanding of the causes of crime and identifying impediments to rehabilitation looked at the potential effects of imprisonment on the families of imprisoned parents and how those families are identified and supported. It became clear that there is an obvious Welsh perspective to the problems. Its prison provision is very poor and the prison population figure and the numbers of families affected by imprisonment of a parent are as high as they are. The exercise also identified the kind of problems caused by imprisoning parents, the size of the class affected by it and the high relevance to rehabilitation and reducing offending and reoffending of effective co-ordination between the police, the courts', prison and probation services, local authorities, and schools in identifying the affected children and in providing the families with guidance and support. It also demonstrated a strong causal connection between the poor prison provision in Wales and the

high crime figure for Wales and the relationship between these two on the one hand and reoffending and rehabilitation on the other.

17. In 2014, as part of the project I described in paragraph 16, my office enquired of the six local authorities of north Wales whether they routinely collated data regarding children of imprisoned parents. The response was that they did not. There was no consistent approach to identifying these children and therefore no automatic signposting towards appropriate existing services. What I was told was that there was "no legal obligation to collect and record such information", and that local authorities might only become aware of such information where a 'risk' factor regarding the welfare of the child/children become known. Is not the fact that a child's parent is in prison and especially if its the mother a 'risk' factor in itself?

An improving picture.

18. There have been some substantial improvements in Wales more recently. That we have the measure of the problem in the tables and reports referred to in paragraphs 9 and 15 of this section is one such improvement. In December 2014, Lesley Griffiths AM, the Minister for Environment, Energy and Rural Affairs, wrote to the chief executive of each of Wales' local authorities emphasising the fact that "children with a prisoner in the family are more likely to live in poverty and are at greater risk of poor emotional, social and educational outcomes" and that it was "essential for these families to receive appropriate support from local authorities". Although it did not touch on propensity to commit crime, antisocial behaviour, the difficulties of rehabilitation for the family or the wider public interest in the relationship between the imprisonment of a parent and its effects on crime figures, it did helpfully point to the need for Welsh local authorities to identify the children affected by the problem.

19. Since 2016, the North Wales Safer Communities Board (on which all the local authorities are represented) under the leadership of Cllr Huw Jones JP (Wrexham) and the support of the present police and crime commissioner, Arfon Jones, has a co-ordinated cross-agency approach to the identification of and provision of support for families affected by imprisonment (the FABI programme). North Wales Police and Crime Commissioner's web-site provides details of this good work. The programme's opening sentence summarises the case of these children perfectly -

> "It is believed that significant numbers of North Wales' children and families are affected by imprisonment. However, very often, their unique vulnerabilities and challenges are overlooked or hidden, and they end up serving a so-called 'hidden sentence' themselves"

20. For the reasons mentioned in paragraph 17 of this section and the good example provided by the North Wales Safer Communities Board, the answer to the Commission's question 6 is an emphatic 'yes'.

21. The statutory framework within which the North Wales safer Communities Board has created its scheme is section 6 of the Crime and Disorder Act 1998 as amended by the Police Reform and Social Responsibility Act 2011 which requires the authorities named in the Act to work in partnerships to implement strategies for reducing crime and disorder in the area, combat substance misuse in the area and reduce reoffending. As it is clear from all available evidence that the

imprisoning of a parent creates a real risk amongst members of the parent's family of causing criminal and disorderly behaviour, substance misuse and reoffending, all responsible authorities are required by section 6 to have strategies which address those risks. I do not know if such strategies exist in the other police areas of Wales but the legislation requires that they should.

22. In December 2015, the Scottish Parliament made it an express statutory requirement to identify the wellbeing needs of children and young people who have a parent sent to prison and, crucially, made links with the provisions in the Children and Young People (Scotland) Act 2014. As Scotland and Northern Ireland are responsible for prisons and for the criminal justice systems within their respective jurisdictions, such an enactment can be very effective in improving the support for the families of imprisoned parents. The position is very different in Wales where there is no women's prison and most Welsh male prisoners are imprisoned outside Wales. When those two facts are combined with the fact that the provisions made or which can be made under the Social Services and Wellbeing (Wales) Act 2014 (the 2014 Act) and the Wellbeing and Future Generations (Wales) Act 2015 (the 2015 Act) for supporting the wellbeing of imprisoned parents and their families run only in Wales and speak only to local authorities in Wales in which there is a prison means that the legislation can be of limited value to the families of male prisoners and of no value to the families of women prisoners.[10]

23. Under Part 11(eleven) of the 2014 Act, there is a duty on the local authorities where prisons are based to share information about prisoners' dependent children with the home local authorities. This is a positive improvement but as the Act runs only in Wales and the reporting responsibility applies only to local authorities in whose area a prison is situated, it is is of little vale when compared to the Scottish legislation.

Conclusions for Parts 1 and 2.

24. For the reason that the number of imprisoned people from Wales is higher than most nations of Europe including England and that the prisons to which most imprisoned men and all imprisoned women from Wales are sent are outside Wales with the obvious impediments to rehabilitation and to the reduction of repeat offending that this remoteness creates, Wales has problems of its own. The case for reform is strong and urgent. Wales cannot hope to achieve the position reached in Scotland and Northern Ireland with regard to addressing the problems of high imprisonment rates and the problems created by the imprisonment of parents and in the provision of support for them without that responsibility being devolved to it. Addressing the problems on an England and Wales basis is unlikely to happen in the foreseeable future and an England and Wales approach is most unlikely to address the problems which are peculiar to Wales. That is the approach which created Wales' problems in the first place.The best way of achieving effective reforms of these Welsh problems and of doing so within a reasonable time, is by devolving the responsibility for carrying them out to the Welsh Government. In support of this submission I pray in aid Mr Alun Davies' statement to the effect that the criminal justice system is "rooted in locality" and Lord Thomas' statement -

[10] Under part 11 of the 2014 Act, there's a duty on the local authorities where prisoners are based to share information about prisoners' dependent children with the home local authorities. This is a positive improvement but the Act runs only in Wales and the reporting responsibility applies only to local authorities in whose area a prison is situated.

“ It is far easier to get things done in a small nation. You can get everyone interested round a small table and get a decision made quickly ……. My experience with Westminster and Whitehall was that it was impossible to do the same; you can never have a small meeting. It is therefore possible in Wales quickly to take those bold decisions that make a nation a leader”.

## Section 5
## The Welsh legal services sector.
## Promoting its strength

1. The following are recent examples of what appears to be an increasing distance between Welsh Government, Welsh local authorities and other statutory authorities on the one hand and wales' legal sector on the other. It suggests a trend on the part of the Government and those authorities not to instruct the Welsh legal sector.

- In the recent very high profile case of R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 before the Supreme Court on the question of whether the approval of Parliament was necessary for the Article 50 process, the governments of the devolved nations as well as the Westminster government were represented. Northern Ireland was represented by the Bar of Northern Ireland, Scotland was represented by the Scottish Bar and Wales was represented by London Counsel (see the Law report).

- Regina (Forge Care Homes Ltd and others) v Cardiff and Vale University Health Board and others was an appeal to the Supreme Court on behalf of seven Welsh health boards and all Welsh local authorities save Cardiff. Of the five counsel, (two leading counsel and three junior counsel) none was from the Welsh Bar (See Times 24 August 2017 law report).

- Of the 19 firms of solicitors on the Welsh Government's framework, only 11 are based in Wales (see page 1 of the oral evidence of the Counsel General to the Commission)

- At a public inquiry held in Newtown, Powys in January 2019, by Natural Resources Wales into fishing on Wales' rivers and which lasted a number of weeks and touched and concerned many of Wales fishing associations, the Welsh Government instructed no less than nine external lawyers to represent it at the inquiry none of which had any professional association with Wales. Two were junior barristers from London and seven were solicitors from a firm of solicitors with offices in Cambridge, London, Reading and Southampton but not Wales.

- In the prosecution of Sarah Elizabeth Morris at Mold Crown Court in March 2019 for gross negligence manslaughter and child cruelty, the Complex Casework Unit, Cardiff instructed Oliver Saxby QC of the South Eastern Circuit to prosecute.

- In a Health and Safety Executive prosecution at Caernarfon Crown Court in October 2017, the prosecution and defence were represented by leading counsel from circuits other than Wales.

2. The high importance of the legal sector to the well being of the economy and of the justice system in Wales was emphasised by Lord Thomas in his Pier Head address on 27 October 2017, The past and the Future of Law in Wales -

> 'It is of central importance to the Welsh economy and the good governance of Wales that the profession in wales is strengthened and the best lawyers are able to achieve eminence and success whilst remaining in Wales …" (para19) and "as is evident from what I have so far said a successful legal profession - barristers, solicitors and legal executives - is essential for Wales." (para36)

and it is emphasised by the Welsh Government in the following passage from its submissions to the Commission.

> "The Welsh Government recognises the importance of the Welsh legal sector. A thriving legal sector brings important economic benefits and an accessible network of local legal practices is also **vital** if people are to be able to access justice effectively (page 7, The legal professions) and …… Legal services provide **vital** support for the economy, and **will remain a priority sector** in their own right under Welsh Government's economic strategy. We believe that creating a Welsh legal jurisdiction and devolving the justice system will not be detrimental to the sector and should indeed provide new opportunities that will benefit the sector" (page 14 'Conclusions and way ahead) (emphasis is mine).

3. Although it would appear from those passages that there is no question that the legal sector in Wales is other than of high importance to the nation's economy and its good governance or that there is any doubt about the Welsh Government's commitment to support it, paragraph 1 suggests that Welsh Government, Welsh local authorities and other statutory authorities with justice functions in Wales do not sufficiently acknowledge that importance in practice and are working inconsistently with it. There is a real danger, is there not, that without that essential support the sector generally will continue to weaken and reduce in size and influence to the detriment of the Welsh economy and the local justice system generally and, more particularly, specialisation, especially in the field of public law in Wales will become extinct. The position cannot be recovered without the confidence and support of Welsh Ministers, the Counsel General, Welsh Government's Director of Legal Services, local authorities and the principal civil law firms of Cardiff.

4. For understanding why the Welsh Government has adopted this centralising practice of instructing London counsel (barristers other than members of the Wales and Chester Circuit), members of the Commission might find it helpful to have before them the Counsel General's oral evidence to the Commission in which the explains why.

5. The explanations appear to relate only to what might be described as 'constitutional' cases requiring an application and an understanding of the "complex 2017 settlement". In his opening section of the evidence the Counsel General describes the 2017 settlement as complex and again in 'Question area', (also at page 1) he makes a similar point -

> "In the early years of devolution, the settlement was less complex …….. There was also less in-house expertise available. Instructions to the Bar went primarily to 1 QC who was a door tenant in Cardiff. There was no panel arrangement until 2007".

Understandably, as Mr Miles did not become an AM until May 2016 he has had to rely on information provided by others. I shall come back to that in a moment. There can be no doubt about the complexity of the 2017 settlement; most of the UK's devolution settlements are and have been complex. But the question here is, is it so complex as to be beyond the competence and skills of the Welsh Bar. My own opinion is that its complexity does not necessitate going off circuit even in the "constitutional" cases and certainly not in the other cases listed in paragraph 1.

6. The 1998 and 2007 settlement were also complex and, in my view, bearing in mind their unprecedented form and that they were not reserved models they were much more challenging than the 2017 settlement which is a reserved model, the kind which Wales wanted and the kind which is infinitely more straight forward and less complex than the 1998 and 2007 settlements. When the 1998 settlement came into effect, there was no experience of such a settlement in the UK (if indeed there was experience of it anywhere else in the world). By 2017, the UK had more than 20 years experience of the reserved model of devolution and the Bar in Scotland and Northern Ireland, had coped well with its complexities. I demonstrate below how well the Welsh legal sector coped with those earlier and more complex settlements. The Welsh Government can have confidence in it to cope with the 2017 settlement and I would support that statement with a brief comparison of the period I have just reflected on in paragraph 1 with the three periods referred to next. This will also correct the information given to Mr Miles.

7. The first of these is 1998 to 2003. As the Welsh Office ceased to be a department of the UK Government on the coming into effect of the Government of Wales Act 1998 the service and support of the Treasury Solicitor's Department and that of the Law Officers which had up to the date of the creation of the Assembly been available to the Welsh Office would not be available to the Assembly. That was the reason for my appointment as Counsel General from the senior ranks of the Bar to provide authoritative advice to the Assembly just as the Law Officers provide it to HM Government. Bearing in mind its severance from the Treasury Solicitor and the Law Officers and the consequent loss of the Attorney General's support and that of his external panel of counsel, the most immediate question for me was whether the Welsh Office as it was and the Assembly as it was about to become had the necessary breadth of legal expertise to provide an effective service to the Assembly in this new and challenging constitutional setting. Without implying any criticism of the excellent team of lawyers then at the Welsh Office, it plainly could not manage the new challenges without reinforcement and restructuring. Whatever the challenges of today (in which I include Brexit), they are certainly no steeper than those facing the Assembly lawyers during that early period. It was literally a period of unprecedented constitutional change.

8. I reinforced the internal team by bringing in Elisabeth Jones, an expert in European and Human Rights law, from Brussels, Jane Williams (now Professor Jane Williams) from the Treasury Solicitor's office in London, Keith Bush (now professor Keith Bush QC) from the independent bar in Cardiff and the bilingual Nerys Arch (now Senior Lawyer Welsh Government) from Evershed's Solicitors Cardiff. [11]Because of the requirement to draft Assembly legislation including secondary legislation bilingually and because there was no experience of bilingual drafting in the UK, I became the grateful recipient of the assistance of the Canadian Embassy in London and of the Office of the First Legislative Counsel, Ontario, Canada who very generously provided the first Welsh Assembly with experienced bilingual draftspersons. Internally, therefore, the Assembly was well 'stocked' with very competent lawyers who were able to cope well with the new constitutional setting in which they found themselves. Mr miles' information to the contrary is not correct.

9. As to the provision of external support via a panel of counsel, I adopted the well established practice employed by all central government departments of appointing a panel made up of counsel from the independent Bar. The question for me was whether the independent legal sector in Wales, solicitors and barristers, was up to the job or was it necessary to broaden the net. At my invitation, I was assisted in the selection process by a senior member of the Treasury Solicitor's Office. All counsel appointed to the panel were members of the Wales and Chester Circuit and the firm of solicitors appointed to it was based in Cardiff and had a bilingual capacity. As the National Assembly was an entirely new constitutional creature there was no experience of it amongst the legal professions (England or Wales) but the solicitors and counsel who were empanelled following that process rose to the challenge and succeeded on every matter on which they were retained or instructed. I will not name the counsel on that first panel but what I do say about them will inform the Commission of their quality and that of the Welsh legal sector which was their background. Evidently, the panel comprised a number of barristers. One became a judge of the Supreme Court, one was appointed Lord Justice of Appeal, two (including the latter) became Senior Presiding Judges of the Wales Circuit, one became the Specialist Chancery Judge for Wales and a judge of the High Court in the Queen's Bench Division, Administrative Court and an Upper Tribunal Judge and some of the junior counsel became Queen's Counsel. None of them had represented a devolved government. The Welsh constitutional scene was knew to all of them. What expertise they required, they acquired.

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10. That then brings me to 2008. The passage I am about to quote is from my address to the Centre for Welsh Legal Affairs that year. I was reflecting on my actual experience of the strength of the legal profession in Wales during the period 1998 to 2008 based in part on my own experience as Counsel General during those formative years of the Welsh Assembly.

> "Those of you who are judges or solicitors will have discovered for yourselves that the strength of the Bar in Wales is very considerable in terms of breadth and depth of experience especially in crime, family and common law fields. Specialisation too is strong. 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

[11] Apologies to anyone whose name I have omitted to mention.

which have been established in Wales in recent years and with the National Assembly's expanding responsibilities. With specialisation and devolution of government came opportunities and challenges. The legal profession in Wales is up to the challenge and has seized the opportunities. Since we have had devolution, there have been established three specialist associations – the Wales Public Law and Human Rights Association, the Wales Commercial Law Association and the Wales Personal Injuries Law Association and a fourth is about to be formed namely the Wales Parliamentary Bar Association of which Graham Walters is to be Chairman, Keith Bush[12]the Treasurer and Emyr Jones the Secretary. It was born out of the fact that those three members of the circuit including myself have been presenting a matter to the Assembly's equivalent of a Parliamentary Committee during the past couple of months. A new need creating new opportunities"

21st October 1966.

11 I include the events of this day because they provides another example of the local Bar coping with an unprecedented situation in the handling of which there was no experience either amongst its judge or amongst its counsel. What they had was what the lawyers in the first office of the Counsel General had, what members of that first Assembly panel of counsel had and what the barristers of this circuit have today - skill and good judgement and the ability to understand and master new challenges.

12. The Aberfan disaster of that day was without precedent. It resulted in the death of 144 people, 116 of them children, a substantial proportion of the residents of the village. The public inquiry sat for 76 days. It was the the longest inquiry of its type in British history up to that date. 36 witnesses gave evidence, 300 exhibits examined and 2,500,000 words heard. Evidence was given on everything from the history of mining in the area to the region's geological conditions. Witnesses varied from schoolboys to university professors. It was chaired by Mr Justice Edmund Davies as he then was, a former leader of the Wales and Chester Circuit who became a judge of the Supreme Court (as it is now called). Sir Elwyn Jones, the Attorney General, was Counsel to the Inquiry. He lead Tasker Watkins VC QC, a Cardiff barrister who became leader of the Circuit, its Senior Presiding Judge and Deputy Lord Chief Justice of England and Wales. He lead Ronald Waterhouse then a junior barrister on the Circuit. The National Coal Board was represented by Phillip Wien QC, a Cardiff barrister, also a former leader of the Circuit who became its Senior Presiding Judge and later a Lord Justice of Appeal. Geoffrey Howe QC appeared on behalf of the colliery managers. He practised in Wales, and was one of the highest earners in his branch of the profession. He became deputy chairman of Glamorgan Quarter Sessions, chaired an inquiry into alleged abuse of mental patients at Ely Hospital, Cardiff, in 1969 and was appointed Solicitor General in 1970 and later became the Foreign Secretary. Sir Ronald Waterhouse, became leader of the Circuit and a High Court Judge, chaired the Waterhouse Inquiry into the sexual abuse of Children at a residential home

[12] Now Keith Bush QC

in north Wales and was the author of the outstanding report, Lost In Care. A number of other junior barristers from the circuit appeared at the inquiry.

Retaining a close working relationship between Wales' legal sector and Welsh Government.

13. Another indication of an increasing distance between Welsh Government and the Wales' legal sector was the First Minister's letter of 1st march 2017 to the then Chair of the Legal Wales Foundation, HH Judge Milwyn Jarman QC. In that letter the First Minister said he accepted it was essential that the Counsel General work closely with the judiciary and the wider legal community if Wales is to develop workable and robust arrangements for the operation of justice in Wales and that there needs to be regular meetings between the Counsel General and the Foundation (a clear acknowledgement of the statutory responsibility of the Counsel General to do so). It then went on to say it would no longer be appropriate for the Counsel General to continue as a member of the Foundation and gives three reasons why he should not. (1) He is bound by collective responsibility of ministers, (2) the Welsh Government was developing its own justice agenda and (3) his remaining a member would create a risk of a conflict of interests.

14. It is difficult to imagine a body more representative of the sector than the Legal Wales Foundation (or the Law Council for Wales if that comes into being). It was created by the first Counsel General and other members of the legal sector very shortly after the first devolution settlement of 1998 and for the reason that the settlement had created a new constitutional arrangement for Wales. It was created for the very purpose of bringing together round the table and at conferences all of the sector's separate constituencies including the Wales and Chester Circuit, the Law Society, Ilex, the law schools of the Universities of Wales, the judiciary and the Counsel General, to discuss matters of common interst to the sector. It is the only representative body of its kind in Wales and it has met regularly on a quarterly basis and annually at its conferences since its creation. The parts of the legal sector represented on it are the very bodies the Counsel General is obliged to meet with to discuss the kind of matters members discuss at the Foundation's meetings and conferences. It is implicit in the responsibilities as expressed in the legislation that the Counsel General will meet members of the sector on the occasions on which they meet together. Another and probably the most practical reason for his meeting with them on those occasions is that it would render unnecessary his having to meet them separately. The common interest is clear. The letter does not give any indication of how the responsibilities are to be fulfilled in the future nor does it identify the possible conflict (it does not claim there is an existing conflict). It is unlikely to be the Welsh Government's justice agenda referred to for that has existed for a number of years and is being developed in discussions with the legal sector.

15 Having regard to these matters, the First Minister's decision to withdraw the Counsel General from the Foundation is difficult to understand.

Conclusion

16. In the context of the proposed reforms of the justice system in Wales, it is essential that Wales should have a strong independent legal sector. It is very much in the public interst that it should. The Welsh Government and its Counsel General and the local authorities of Wales have a critical role to play in the achievement of that objective. The Counsel General will readily understand this

as he will just how important the circuit system is to maintaining the essential local character of the justice system of England and Wales.

17. The examples I have cited tend to the conclusion that the standing and reputation of the independent legal sector in Wales has weakened amongst the Government of Wales and Welsh local authorities but that the cause is recent and rectifiable. The evidence demonstrates that it cannot be said that Wales does not have the skills and talents to represent the Welsh Government and Welsh local authorities at all levels and in all but very exceptional areas of practice. It is for the Welsh Government to have confidence in it and to harness it and to provide the opportunities for its development. If it did so, Wales' economy and its justice system would be all the stronger for it. If does not do so a Welsh devolved justice system would be bereft of what Lord Thomas described as essential support.

## Section 6
## A Welsh Government Justice function

1. If Welsh Government is to assume responsibility for the justice system or parts of it in Wales , is the absence of any government justice function within Wales a serious obstacle to that reform. Lord Thomas referred to this in paragraphs 17 and 21 of his Pierhead address. It is essential that that vacuum be filled if the Welsh Government is to have any justice function and most certainly if the whole justice function is to be devolved to it and, needless to say, it will need to be filled well ahead of the the Welsh Government assuming that responsibility. If those are the possibilities under consideration, Wales will need to move upwards in its justice capability and place itself on a par with the other legislatures of the UK which have responsibility for their respective justice systems.

2. How is it to be filled? Initially it will need to be done by importing the skills and experience from elsewhere. There must be a number of other jurisdictions that acquired a justice function recently and for the first time who can be consulted as to how they went about it. Norther Ireland is such an example and there must be others who would be willing to assist. It will not be the first time the Welsh Government and the National Assembly for Wales has had to import skills and experience from outside. On my appointment in 1998 to the role of Counsel General to the National Assembly for Wales, I was acutely aware that there was no experience within the Welsh Office of such a role or of its responsibilities but with the strong encouragement and support of the Permanent Secretary to the Welsh Office, the Treasury Solicitor, Sir Anthony Hammond and the Attorney General, John Morris (now Lord Morris of Aberafon), I spent much of the six months preceding the Assembly becoming operational in Whitehall identifying the necessary skills and supporting roles

and in creating those roles within my office. In this, I also had the excellent support of the chief legal adviser to the Treasury Solicitor and the chief legal advisor to the Attorney General and I enjoyed their support for the whole of my period as Council General. I have already referred to some of the individuals from outside the Welsh Office I brought in to supplement and support the existing skills provision (See Section 5, paragraphs 9 and 10).

3. There was also a skills problem arising from the obligation on the National Assembly to draft its measures/secondary legislation bilingually. There was no experience of that process but in Cathays Park or Whitehall. For assistance with that problem, I turned to the Canadian Embassy in London and the office of the Canadian Legislative Counsel in Canada and it was with their invaluable support, delivered in Cathays Park as well as in Canada, the civil servants in Cathays Park and the Bay mastered the process of co-drafting legislation bilingually along the lines of the Canadian model (known as co-drafting). This involves the simultaneous drafting in both languages as opposed to drafting in one language and then translating to the other. If it had been done in that latter way, the primary instrument for interpretation would the English instrument and the Welsh version which was simply a translation could not have any relevance to the ascertainment of the meaning and effect of the instrument.

## Section 7
## Law reform commission

1. As the amount of Wales only legislation is bound to increase quite substantially it is necessary that there be a law reform commission (or some such body) for Wales. A glance at the Assembly's legislative programme coupled with the safe assumption that the number of Wales-only laws and the rate of its production is likely to increase makes an unanswerable case for a law commission. The quality of our laws depend on it. What better reason is there for the present England and Wales Law Commission? It is imperative that the legislature understands the need for the preposed legislation and is well informed as to the need for the proposed legislation and understands how it might best satisfy that need. Similar considerations apply when the legislature is proposing to repeal, amend or replace existing laws; the lawmaker needs to understand the reasons for repealing, amending or replacing it. The commission's role is to demonstrate and explain that need. The commission is an independent and objective observer of the need.

2. If similar needs arise in England and Wales an Act applicable to both countries would be likely to satisfy those needs, that is true, but the Welsh legislature has been given the authority to make Wales-only laws for addressing the needs and circumstances and the priorities of Wales. The need for a particular law in Wales may be more pressing and relevant to the needs and circumstances of Wales than they are for the wider territory. It is for the Welsh legislature to determine the priority of law reform. It is for the Welsh legislature to identify the needs and circumstances of Wales which need to be addressed by legislation and when and in what order that legislation is to be introduced. The effective and efficient performance of those responsibilities would be considerably facilitated by a law reform commission for Wales. The National Assembly for Wales and the Welsh

Government would welcome and value such important support for its most important function. Creating it would also bring about better symmetry between the Welsh devolution settlement and those of Scotland and Northern Ireland.

## Section 8
## The treatment of the English and Welsh languages on the basis of equality. The Welsh language in jury trials[13]

1. I make four submissions with regard to the use of the Welsh language in jury trials in Wales. (1) It demonstrates significant inequality of status and treatment of the Welsh language in Wales when compared to the status and treatment of the English language in Wales. (2) That it is not permitted is creating injustice for defendants and parties in criminal trials. (3) The 'legal' arguments advanced in support of not permitting its use in the selection of juries in Wales are not sound. (4). A system permitting selection from the panel on basis of ability to understand Walsh can be introduced quite easily

2. According to the Justice Minister, Claire Ward, in her statement in March 2010, the principle that juries should be chosen at random from the community as a whole is more important than choosing a bilingual jury for some trials in Wales. The burden of the statement is that choosing jurors at random is a principal which is more important than giving the Welsh-speaking defendants the right to have a bilingual jury to conduct their cases. For that reason, the Minister will not exercise the powers under section 5 of the Juries Act 1974 to change the process of selecting jury panels in Wales.

3. By statute, the Welsh language is one of the national languages of Wales and Wales is a bilingual nation. Around half a million of its citizens, which is about 19% of the population, speak Welsh and its use within the justice system is in an expansive phase. The Lord Chief Justice's annual report for 2017, states there were 570 cases heard in Welsh in 2015-16, including one judicial review, and this was expected to rise to 600-700 by the end of 2017. A third of all circuit judges, a third of district judges and just under half of magistrates' courts district judges are now able to conduct cases in Welsh. According to HMCTS (Wales), processes have been adapted to recruit judges to posts requiring Welsh language skills and these appointments allow Welsh to be used both in the formal setting of a courtroom and more generally in the administration of justice. Plainly, therefore, there is a growing use of the language in court by parties and witnesses, an increased use is anticipated and being prepared for and, statistically, it is possible to have all-Welsh juries. The report underlines the local character of our justice system. That all-Welsh juries are not permitted undermines it.

4. There are four points I would make about the Minister's statement.

> (1). The decision not to grant the right to defendants or prosecutors in criminal trials is a substantial obstruction to the fulfilment of the important principle that in the conduct of public business and in the administration of justice in Wales the Welsh language shall be of equal status to that of the English language, a principle acknowledged in the introductory words of the Welsh Language Act 1993.

[13] This submission follows closely the text of my article in Golwg on 14 March 2010.

(2). This is concerned with the unfairness to the witnesses and the parties themselves. Some witnesses in criminal trials, particularly children, are under disadvantage in English. As counsel and Recorder, I have experienced this at first hand a number of times amongst adults and children. It is far more important that the jury hears and sees a witness rather than the translator and do so without delay between the question and answer.

(3). The use of juries in serious criminal cases and choosing them at random are cornerstones of the administration of justice but that the Minister appears not to have understood the point brings me to my third point. Blackstone is the authority on the this. He wrote his essays on the laws of England from 1785 onwards. His reference to the random selection of juries, which became known as a palladium of our liberties, was to their random selection **from the panel** not to the random selection **of the panel.** Quite the opposite in fact. He was quite effusive in his praise of the fact that there was not a random selection of panels. His opinion was that the selection from and not to the panel was key to the effective working of the jury system. It was the Morris Report which lead to the Juries Act 1974 and the creation of the single qualification for selection of jury panels namely registration on the electoral register. Prior to that change, eligibility for selection to the panel was dependent on much narrower qualifications than the electoral list. Ownership of property was one such qualification. There was therefore nothing random about selection to the panel and there is nothing in any Act which stipulates that all on the electoral list shall have a right to sit on a jury; the 1974 Act simply extended eligibility to do so to a wider class than was the case prior to the passing of that Act.

(4). Changing the law to facilitate the selection of bilingual juries is a simple matter which does not require primary legislation. By section 5 of the 1974 Act, the Minister of Justice may list language qualifications, including the ability to understand Welsh, of jurors to the panel or part of the panel [see sec 11(1)] from which Welsh speaking jurors may be selected for trials where the need for such a jury is made out. Doing so would not offend against any principle of random selection for that principle is concerned with selection from and not to the panel or part of the panel under section 11(1). Therefore, there is no reason why part of the panel should not include persons able to understand Welsh and then from a panel so composed make a random selection of jurors under section 11 (1). I said earlier, these principles reflect what has always been the law. There could be no practical difficulties in operating a system of electing members of the public with the ability to speak Welsh to a jury panel as must be obvious from the many precedents in other parts of the world of which Canada and Switzerland come immediately to mind.

## Section 9

## Conclusions

1. Some of the problems described in these submissions are caused by the constitutional arrangements for the administration of the justice system in Wales. For examples, see Sections 1 - 4 and 9 of these submissions. For the alleviation of those problems, Wales is at the mercy of HMG and it can do only two things - put forward the case for the devolution of the responsibility and ask for piecemeal reforms in the meantime. If it is not devolved or until it is devolved, Wales' best hope is of piecemeal reforms but there is no certainty that HMG will agree with Welsh Government as to the best or the most appropriate reforms. See for example section 4 of these submissions. The case for the devolution of the responsibility is meritorious and is based on good evidence as to the benefits it has produced elsewhere. Northern Ireland and Scotland are good examples. I quote but without being able to cite the source,

> " It is from Northern Ireland that that Wales can learn most in respect to developing a separate legal jurisdiction. Alongside introducing major reform initiatives for specific programmes including the criminal legal aid system, prisons, youth justice and community safety, devolution has allowed the relevant departments and bodies in Northern Ireland to bring about a qualitative change in the justice system's relationship with the public it serves. Commitments have been given to improving the support of victims, tackling delay and developing better protection for older people. …….. Northern Ireland's justice system is a major employer. It employs about 16,000 people, including police and prison officers, probation staff, youth justice and courts services. It is clear to see how the Welsh economy and jobs market could benefit from the establishment of a separate jurisdiction."

2. Some of the problems are of our own making. For examples, see Sections 5 of these submissions.

Winston Roddick CB QC