

Commission on Justice in Wales
Oral Evidence Session
7 March 2019

Present:	Commission members	Secretariat team
Sir Stephen Laws (SL) Professor Thomas Watkin (TW) Theodore Huckle QC (TH)	Lord Thomas of Cwmgiedd, Chair Simon Davies Professor Elwen Evans QC Professor Rick Rawlings	Andrew Felton, Secretary to the Commission David Slade Chris James Katherine Thomas Martin Wade Kate Cassidy
Question area: Should there be someone in the Welsh Government with responsibility for justice and policing – executive and legislative competence.		
<ul style="list-style-type: none"> TH: I have been away from Welsh Government for two years now and I'm not precisely aware of the current arrangements. In my tenure, there was a Welsh Minister with responsibility for justice as far as was considered to be relevant to the Welsh Government. I feel there should be a Minister of Justice for Wales in the context of there being legislative devolution of justice. I see the questions of legislative and executive devolution as being the same thing. Looking at things in the old way of firstly conferring executive and then legislative competence causes difficulties with which we are all familiar. Going forward, we should get constitutional arrangements in place around legislative power and executive powers should follow. <p><i>Lord Thomas referred to the devolution of policing functions under the mayoral model in London and Manchester</i></p> <ul style="list-style-type: none"> TH: I'm not interested in comparison with London and Manchester as they are cities. I am more interested in direct comparisons with Scotland and Northern Ireland. TW: I do not want to see a situation where there is a greater mismatch between executive and legislative competence. I wouldn't want to see one coming without the other and adding to the complexity. But it all depends about what you do with the court system and the extent to which you are prepared to construct something that reflects the current reality of Wales and then you need a commensurate amount of devolution and competence to fine tune the structure within Wales. Devolution should reflect the extent to which the structure put in place for Wales should be controlled from Cardiff. I look at the issue from the top down as a constitutional question rather than from the bottom up. SL: I don't have a view on what should and shouldn't be devolved. I agree with what has been said about the desirability of keeping executive and legislative competence in-line. I see the difficulty about the barrier between devolved and non-devolved criminal law because criminal law is a mechanism for enforcing so much else. In so far as having a minister in Welsh Government who is responsible for justice and policing policy, it is desirable that any executive should have somebody with a watching brief on legal policy issues. I don't know whether the current system with the Counsel General works well enough or requires something different. There should be someone in the Welsh Government who, when the Welsh Government is preparing legislation, has the job to say whether that legislation accords with Government thinking on legal policy. <p><i>Lord Thomas referred to a policing board for Wales which is within Welsh Government thinking.</i></p> <ul style="list-style-type: none"> SL: It is important to have a proper structure for the governance of the police. Public accountability is also essential. Police and Crime Commissioners (PCCS) were controversial in Wales but some form of public accountability for the police is essential. 		

- TH: I think both Thomas and I are concerned about divergence between executive and legislative competence. I'm in favour of there being a Minister of Justice for Wales but it very much depends on whether there is a portfolio to have. It's a decision ultimately of the First Minister as to what ministers there are, but it very much depends on what powers are available to ministers.

Professor Rawlings posed the scenario of the devolution of policing and asked whether there should be a Minister of Justice in the Welsh Government and what the relationship should be with the Counsel General.

- TH: I can't see any reason to have a different position in Wales to that which prevails elsewhere. Take Westminster, for example, where there is no difficulty in having a Minister of Justice on one hand and a Law Officer on the other and where they have distinct but complementary roles and obligations. If there was devolution of justice and of policing, then inevitably it would follow that there would need to be a Minister of Justice in Wales.

Professor Rawlings referred to the same scenario and asked about the matching institutional structures within the National Assembly for Wales (NAfW), such as a justice or policing committee.

- SL: There would need to be constitutional matching in the NAfW. On the point of the accountability of the police, one of the crucial questions is about how budgets are organised and accounted for. Policing budgets are not nation-wide in England and how you allocate funds to policing in Wales would need to be determined in a different way.
- TW: This takes me back 10 or 15 years to a sub committee of Legal Wales which looked at whether should be one police force for Wales. If we were to do that, there would be implications for the Crown Prosecution Service (CPS) and other allied institutions.

Lord Thomas referred to the argument pursued by the Government in Westminster that there should be a law of England and Wales rather than a law of England and a law of Wales.

- SL: I refer the Commission to my written evidence to the Silk Commission. The argument is what is the case for separating the law of Wales from the law of England and what would you achieve if you did this? It would create problems and a degree of uncertainty in the law that would be undesirable and incompatible with the rule of law. If you have a separate law what does it mean? It means that in Welsh courts Welsh law applies by default and vice versa in English courts. That requires rules made in advance about which jurisdiction people go to for their remedies. If there are different laws that apply and a person goes to a court in one country and there is an element of the facts before that court relating to the other country this will give rise in civil cases to issues of conflict of laws. These issues should be avoided and they are avoided if there is one system. People subject to law need to know which law applies when they are deciding how to act.
- TW: I live in Wales and what interests me is the law that applies to Wales. Part of that is in Welsh law and part of it is law common to England and Wales. The same point applies if you live in England. The legal system of England and Wales should recognise that there are three bodies of law: those that apply in Wales only; those that apply in England only; and those that apply in both countries. From the point of view of the citizen and administrations you just want to deal with two models: laws that apply in Wales; and laws that apply in England, part of which will be common. When a citizen goes to court, they will know which laws the court will apply. I don't want to see token separation where questions of what the law is in Wales or is in England are regarded as questions of foreign law to be solved by means of conflict of laws rules in either country. We should be more creative and recognise that if you were to develop a system for the UK, you would not develop what we currently have. Rather, you would design something that enables there to be solutions that are binding across the jurisdiction. To do that for Wales you could say there is a Welsh Chamber and an English Chamber of courts and certain cases go to each and this could be the structure for courts up to and including the Court of Appeal. There would be no need to separate the judiciary and there would be combined judiciary for England and Wales with ticketed

judges.

- TH: My starting point is that this is a bit of windmill tilting and a nomenclature issue. The courts currently constituted across England and Wales are called upon to apply law in different ways, affecting different issues and for different territories. As part of the corpus of the law of England and Wales, the courts already apply Welsh law. Looking at the UK, I've never heard anyone talk of the law of Northern Ireland or very much of the law of Scotland. Certain aspects of reserved matters like employment law have always been made by the Westminster Government for the UK. I don't think this has ever conflicted with there being a separate jurisdiction in Scotland, for example. I'm not sure what the practical problems are around describing a corpus of law as being the law of England and the law of Wales. On the supposition you had a separate or distinct jurisdiction in Wales, there will inevitably be overlap in terms of law that applied in Wales and law that applied across the border. Given the parallels with Scotland and Northern Ireland, I can't see the problem.

Lord Thomas asked about the meaning of a separate jurisdiction.

- TH: I tend to think about this in the way that it worked in Northern Ireland where the institutions were created in the two separate parts of the island. It is a thorny question how you define jurisdiction. My take is that whatever you discuss in terms of jurisdictional terms, and I think about it as a form of separation, I'm not sure why calling the law that emanates from the NAFW taken with UK applicable law "the law of Wales" as opposed to calling that law taken with the law that is applicable in England as well as the overall UK law "the law of England and Wales" actually makes a difference. What matters is the institutional framework for dispensing the law. My preferred arrangement is to have a designated judiciary for Wales and I can see no difficulty in those being judges who likewise operate as judges for England. In the early years this would be needed because of the resource implications. I would not want to lose the resource available to us from the High Court as it is constituted.
- SL: My difficulty is the concept of the law in Wales because that is an oversimplification. There will be situations where elements of events are in Wales and in England. From a drafting perspective why can't we just say this law extends to Wales? And the reason you can't is that it doesn't answer the question of what factors connected with Wales make it subject to Welsh law and not English law. In relation to the law created by the NAFW you can't simply say that extends to Wales only because of the NAFW's legislative competence as it has competence to deal with incidental matters that have effect across the border. Neither the Scottish Parliament nor the Northern Ireland Assembly has similar competence in relation to cross border incidental matters. It is confusing as to what the law in Wales is. The idea of a separate Welsh jurisdiction assumes you can draw that line clearly. You can draw that line in a broad sense but it becomes difficult to do so precisely.

Lord Thomas asked the importance of territory in the context of diverging law.

- SL: The simple solution is to deal with issues point by point and an answer found to them in turn. It's not necessarily a simple answer to assume that issues can be dealt with generically.

Lord Thomas asked about where the exception to territoriality becomes important.

- TH: A prime example is the organ donation legislation where substantial legislative changes were made as incidental provisions because of the problem that organs were going into a joint pool across the UK and changes then had to be made to the criminal law across the piece to allow surgeons to use those organs. There will be practical problems where you designate different jurisdictions. I wonder how this question is approached by Scotland and Northern Ireland. The NAFW can alter the law of England and Wales as a whole but that follows from the fact that it is a single jurisdiction at the moment and it's a product of having two legislatures in that single jurisdiction.

- SL: In Scotland and Northern Ireland there is a power to make incidental provision outside of those jurisdictions by Orders in Council. This power is vested in UK Ministers. You could say the system is unsatisfactory as UK Ministers are generally interested in things other than legislative change consequential on legislation made in Scotland and Northern Ireland. Some cases are straight forward, for example ensuring a disqualification from sitting as a Member of Parliament applies across the UK and not just in Scotland. The power in the Government of Wales Act provides for enforcement powers across the border and I've always thought this needed some input from politicians in England where those provisions would apply.
- TW: There are two other issues here for having separate arrangements in Wales beyond the fact that there are some laws that apply only in Wales and some laws which apply only in England. First, the laws made by the NAFW and the Welsh Ministers are made in two languages and this creates a different scenario with regard to their application and use. Second, separate to the issue of devolution, since 1993 there is a right confined territorially to Wales to use the Welsh language when giving evidence in court and being tried in court. There is therefore a separation of law to some extent and the question of whether there should be different arrangements in the legal system needs to address all three issues. I accept territorial division would be a simple solution but even without that there is the question of what courts should administer a particular body of law in Wales.
- TH: There is a complexity associated with the power of the NAFW to make consequential provisions going beyond Wales. See for example the previous Order in Council arrangements under the Government of Wales Act (GoWA) 1998 and Part 3 of GoWA 2006 which are no longer required (subject to exceptional matters) because of the conferral of full legislative power under Part 4 of GoWA 2006.
- TW: I see two chambers of courts, whether sitting in Wales or England, and a Welsh chamber passing judgment on a point of law that arises in respect of the body of law which applies only in Wales.

Lord Thomas asked about different principles in Wales for decision making, for example under the Well-being of Future Generations (Wales) Act (WFG), and its impact on administrative law.

- TW: Inevitably, there needs to be due regard to the WFG. At a constitutional level it will inform the way in which other law should be applied and in a sense it is aspirational legislation and something not currently in the grasp of our legal system as the legislation is at the same level as other legislation made by the NAFW.
- SL: The question is very difficult to answer. If you are saying can the WFG affect the way an English and Welsh body makes a decision in relation to Welsh cases when it's outside the competence of the NAFW to affect how that body makes decisions in English cases, then you have different decision making process for England and Wales without having any legislative competence for changing that. Aren't people in England and Wales entitled to expect the same level of decision making to be made in both places based on the same criteria from a body that is subject to the law of England and Wales? The body is faced with having to consider whether it decides a decision in Wales in the same way that it decides the decision in England.

Lord Thomas referred to administrative law being a creation of common law and asked whether WFG principles will be a gloss on statutory interpretation or whether they will modify principles of administrative law in Wales contributing to a separate common law of Wales.

- SL: There will not be a separate common law of Wales in my view.
- TH: I say there will be a common law of Wales as inevitably legal development will follow the paths it follows. Judges applying the law in different circumstances will lead to different conclusions. There are parallels with the WFG, such as planning policies applying in different places, and therefore different factors that decision makers must take into account. There are different structural considerations but in the end the common law develops to meet the circumstances presented to it. If it develops slightly differently in Wales compared to England,

then so be it.

RR asked whether part of the issue is about national identity and the place of Wales in the great common law family and whether differentiating the law of Wales and the law of England helps to signal the fact that there is diversity.

- TW: Definitely. The identity of Wales and the way in which devolution has been accommodated in, for example, legal education and literature has suffered as a result of that identity not being clear. There is a tendency to regard the law of Wales in textbooks as a footnote to the law of England. Some will see that as a slur on the nation but I see it as detrimental to the citizen. The fact that the law of Wales is seen as the law of England with some differences has undermined developing a separate jurisdiction. A separate arrangement for the law's administration will signal differences in law and will act as a spur to having education that recognises Welsh law.
- SL: It's the only argument for having a separate jurisdiction. I say the price is not worth paying in terms of clarity and uncertainty for the person subject to the law. That's the issue, is the price worth paying? It probably means moving to the Northern Ireland system and for the NAW to give up the incidental power in terms of its competence.
- TH: I agree that legal text books often do not recognise differences in Wales compared to the position in England and I have direct experience of this as an Editor, having to ensure my publication is updated to reflect properly the Welsh position in Health for example. I prefer not to see this as an issue of the assertion of national identity, rather I see it as a question of democratic fairness. The way devolution works in conferring rights, entitlements and responsibilities to a citizen in Wales should work in the same way as it does in granting rights in other parts of the UK. The complications we have are in part derived from the failure of the devolution project which initially was seen as a means of devolving powers to the three nations and to the English regions. This has got us into the asymmetry problem because rather than being a project that delegated a general level of legislative control to citizens across the Union it changed its complexion into the unsystematic approach we have now.

Question area: Do you think there should be a law of England and a law of Wales, or a continuation of the law of England and Wales? How would you see the arrangements working?

Already addressed in discussion.

Question area: Do you think there should be a separate judiciary for Wales? How would you see the arrangements working?

- TH: I do think there should be a separate judiciary for Wales. I would be in favour of it being a shared judiciary with England as an early transitional arrangement. We already have to an extent a separate judiciary in Wales that do not sit elsewhere. From the High Court up Wales relies on the pool of England and Wales judges and many of our circuit judges do go to England to sit, so there is pooling and sharing. I don't see an issue with designating judges as "Judges of Wales" and "Judges of England" and conceptually I am in favour of them being designated separately. In terms of justice and policing bodies, if there's full devolution of justice this must include policing and I think we should have a single constabulary, like Scotland. We would require a CPS Wales. If justice is devolved the questions of other bodies will follow and can be considered on a pragmatic basis.
- TW: My approach is two chambers in the overall court structure. I agree with designating judges to sit in one or other or both chambers.
- SL: Separation will reduce flexibility and impact on the allocation of resources. Judges should have experience and training to be able to do work in law that applies in Wales and in England and Wales.

Lord Thomas asked about protecting the independence of police, prosecutorial and other similar functions in a small jurisdiction.

- SL: There is a serious problem about deciding what is the best way to ensure the police have independence but are also accountable. I don't think we've solved this in the country as a whole. It is more of a problem in a small jurisdiction but it is equally a problem in a police authority area coinciding with one or very few local government areas. It was addressed before when police authorities covered more than one local government area and the Chief Constable was not beholden to one controlling political party. It has not been solved by PCCs, partly because the way in which elections have been organised. Police do need to be accountable in terms of their use of resources. The bigger the area the less prone the police will be to be influenced by local interests.
- TH: I can see the argument that in a smaller community there is more scope to be held to account, although I can also see an argument the opposite way. The population in Wales is nearly twice that of Northern Ireland and I wonder how they deal with these issues. Wales is a small nation but by no means the smallest and these are common problems about accountability.
- SL: In terms of Northern Ireland, historically its capacity to achieve acceptance from the whole community has not been successful. These issues have been addressed by legislation and interference from outside with the appointment of the Chief Constable and so forth.
- TW: There are several concerns. In terms of resource issues and accounting for expenditure, a police force must be accountable to the people providing the resource. I can't see why a small nation can't deal with that as well as a larger nation. In terms of discriminating, say against one community rather than another, those elements are common to probity across nations I don't see you need to do this internally and it could be done on a wider, possibly UK, basis to ensure standards of probity are maintained.

Question area: Do you think there should be a separate legal sector in Wales? How would you see the arrangements working?

- TW: We are moving in the direction of saying that to practise in Wales you need some additional expertise including knowledge of the constitutional position in Wales. I'm not wedded to the notion of having separate regulators. They just need to be aware of the differences between the needs of the two nations. The recent experience of the SRA and the SQE is a classic example of how it should not be done, where the needs of England and Wales as a whole have been considered but not the needs of Wales as regards the Welsh language.
- SL: I'm not in a position to comment. The impact on legal education needs to be recognised in England and Wales and there should be more content on devolution.
- TH: The regulatory position for the legal professions as currently constituted is quite complex. Regulation follows the way that the law works in practice, so barristers called to the Bar in England and Wales are regulated, subject to any ABS arrangement, by the Bar Standards Board. If you also want to work in Northern Ireland you are called to the Bar there and regulated by the regulator there. There are of course resource implications if a form of separation is put in place and separate regulation takes effect. I'm not sure this is necessary as it will impact on practice and there is scope now for those versed in Welsh law to have a competitive advantage in Wales. Legal practice has become much more nationally orientated rather than locally orientated. There will always be a need for people facing work at a local level, such as criminal and family law, but in civil law many firms work across England and Wales, the wider UK and beyond. There are implications but from a Welsh perspective they should be positive ones and Welsh lawyers should be able to market themselves in the law that applies in Wales as well as the law of England and Wales. The law of England is the law of choice for the commercial world internationally and I can't see why we can't position ourselves in the market and make ourselves more attractive to business. There are many lawyers that practice across jurisdictions without difficulty.

Question area: What impact do you think a separate legal system in Wales would have on the regulation of the professions and legal practice across England and Wales?

Already addressed in discussion.
Question area: How could Wales be better represented within current justice and policing bodies?
<ul style="list-style-type: none"> • TH: I have an indistinct idea about the types of bodies we are talking about. In terms of policing, my assumption is that the four forces in Wales have the same level of representation at the national level as other police forces. Policing should be devolved, as for example it has been for Manchester. I was on the panel that appointed the Welsh Interest Member to the Board of the Civil Justice Council (CJC). Wales would have most control if it created its own bodies but that creates a big resource issue. The more Wales represents itself as distinct from England and Wales, the more likely it is bodies will want Welsh representation, as has been the case with the CJC. It is likely to be a natural organic development. <p><i>Professor Rawlings referred to legal techniques for ensuring that Wales could be better represented.</i></p> <ul style="list-style-type: none"> • TH: In general terms, I would be in favour of encouraging or directing that better representation for Wales was put in place. The obvious example is membership of the Supreme Court and the issues there which have been assuaged by the presence of Lord Lloyd-Jones as one of the Justices. There is the technical issue about what “part of the UK” (i.e. to be represented on the panel) means in the Constitutional Reform Act, and that is currently interpreted as “jurisdiction”. Changes would follow naturally with any jurisdictional changes. In general terms, wherever there is a Welsh interest which relates to different structural arrangements as between Wales and rest of the UK and there are bodies overseeing activity in relation to that, as a matter of fairness there should be appropriate representation for Wales. • SL: I think it is important to avoid tokenism. Most of these bodies produce annual reports and requiring them to explain how they have taken things into account in Wales in the exercise of their functions would be a useful way as would a requirement to deliver the report to the NAFW. Perhaps a “have regard to” duty comes first and then a requirement to report on it. • TW: There is a danger of tokenism. One needs greater understanding of what the needs of Wales are. • TH: Chief Constables report to the Welsh Government and the Home Office because of the nature of overlapping responsibilities and the bodies with whom the police have to work in Wales. One needs to avoid tokenism and I prefer the organic route with requirements to report to the relevant executives or legislatures which then requires the body to have people with knowledge and expertise of Wales. I think “have regard to” duties are good but breach of them is very difficult to challenge. • SL: I agree that breaches of such duties are hard to challenge but they can have an inhibiting effect on the way that organisations operate.
Question area: Do you think any current justice and policing bodies should be set up on a separate Wales basis? Within a smaller jurisdiction how do you think the independence of the police, prosecution and the judiciary should be protected?
<ul style="list-style-type: none"> • SL: There is a tension in that across the UK you do not want a diversity of approaches to the work of the various inspectorates. Rather, you want a coordinated approach that raises standards to the highest level that they can be in all of the jurisdictions. There may be something to be said to applying those standards in different ways because there are different considerations, but having diverse standards would be a bad idea. • TW: I think back to a NAFW enquiry into a separate jurisdiction some eight years ago when consideration was given to a Welsh Law Commission. We shouldn’t ask those questions in terms of bodies, we should consider the functions being performed and ask questions about how they can be performed in the future in a way that suits the needs of Wales. This may be having a body identical to an existing body, a new body or in continuing with existing arrangements. It needs to be looked at functionally, not institutionally.

