

**Commission on Justice in Wales**  
**Oral Evidence Session**  
**15 March 2019**

Present:	Commission members	Secretariat team
Angharad Woodland, Woodland Davies (AW) Huw Williams, Geldards (HW) Emyr Jones, Francis Taylor Building (EJ) Fflur Jones, Darwin Gray (FJ)	Lord Thomas of Cwmgiedd, Chair Simon Davies Professor Elwen Evans QC Dr Nerys Llewelyn Jones Juliet Lyon Professor Rick Rawlings Sir Wyn Williams	Chris James Martin Wade
<b>Question area:</b> Is there a growing consensus how to grow and strengthen the legal sector in Wales		
<ul style="list-style-type: none"> <li>• HW: The starting point is to be clear about what we mean by the Welsh legal sector. I regard the sector as being a commercial construct that will develop if the business is there to support it. It follows that from a commercial law firm perspective, the sector will develop and grow if the Welsh economy grows and generates demand for legal services. More generally, the question is about whether the public funding in the system is directed in a way that will encourage the development of a sector that meets the needs of Wales. The sector may be more responsive if that money was spent in Wales. My practice is in Cardiff and work is across Wales and beyond. My view of the world is perhaps therefore different from practitioners working more locally in other areas of Wales. There is work out there in certain sectors but that is different from meeting the legal needs of the population as a whole.</li> <li>• AW: My view is at the coal face. In Wales we have the commercial and legal aid sides of the sector and in terms of the latter there is a huge advice desert where I work in Hay-on-Wye and Brecon. There is one duty solicitor aged under 50 and no succession. My firm covers diverse areas based on the diverse client base in Mid Wales, in terms of individuals and businesses. These clients deserve a thriving legal sector with appropriate specialism and skilled practitioners. The sector in Mid Wales faces competition from across the border from larger firms who drag the work of indigenous legal sector out of Wales. We are dealing with two sets of law as we operate cross border and this divergence is a strength in developing the sector in Wales. The sector needs to be attractive to retain talent and have that talent outside of the commercial centres.</li> <li>• FJ: Mae angen cyd-weithio o fewn y sector i wella gwasanaethau, yn enwedig mewn ffyrmiau llai. Mae'r llysoedd yn cau ac mae diffyg arian cyhoeddus. Gallwn gynnig cyfraddau is nag ym Mryste a gallwn ddenu gwaith oherwydd gallwn fod yn gystadleuol. Er mwyn gwella'r sector i sicrhau mwy o gryfder mewn niferoedd a'r iaith Gymraeg, rhaid i ni ddarparu gwasanaethau drwy gyfrwng y Gymraeg. Mae yna wefan ar gael i bobl ddod o hyd i ddarparwyr gwasanaethau cyfreithiol cyfrwng Cymraeg. Mae'r sector cyfreithiol yn drysor yn y goron, a gall Llywodraeth Cymru ein helpu. Mae'r Llywodraeth yn cynnig grant i agor swyddfeydd cefn yng Nghymru ond mae hynny'n golygu cymryd swyddi a fyddai wedi'u creu gan ffyrmiau lleol na allant wneud cais am yr arian, sy'n gwahaniaethu yn erbyn ffyrmiau yng Nghymru.</li> </ul> <p><i>There is a need for consolidation in the sector to improve services, particularly in smaller firms. Courts are closing and there is a lack of public funding. We can offer lower rates than in Bristol and we can attract in work because we can be competitive. To improve the sector for greater strength in numbers and the Welsh language, we must provide services through the medium of Welsh. There is a website for people to find Welsh medium legal services providers. The legal sector is a jewel in the crown, and the Welsh Government can help us. The Government offers grant to open back offices in Wales but that serves to take jobs that would have been created by local companies who can't apply for the funding, which discriminates against Welsh based firms.</i></p> <ul style="list-style-type: none"> <li>• EJ: There are two sources of work for the Welsh Bar: the work in Wales and what proportion of that Welsh work is retained in Wales; and work in England and London where there is an</li> </ul>		

enormous amount of work compared to Wales. The Welsh Bar has had specialist work but most of that work is done in England. There are now examples of the Welsh Bar working in England, Civitas does personal injury work in England and criminal QC's do work in Birmingham. My perception is that the problem is keeping the Welsh work with the Welsh Bar. If there is going to be a Welsh jurisdiction or a divergence in the law that is a barrier to those from outside Wales wishing to come and practice in Wales. A separate jurisdiction would on balance help to promote the legal sector. There is a threat that those in Wales may be seen as Welsh lawyers but the reality is they will be dual qualified. I was surprised to learn about the number of High Court and Court of Appeal judges in Northern Ireland and the number of QC's doing civil work and how this meets the needs of consumers.

- HW: In Scotland leading commercial firms have been absorbed into London firms themselves then absorbed into international firms and this does not seem to be a problem in terms of incorporating Scottish law qualified lawyers into managerial structures. In Cardiff there are only two big firms that are headquartered in and managed from Cardiff. We should think about what can be done to show students there are interesting avenues to stay in Wales and be successful lawyers. We need to examine structures firms outside the main conurbations to see how they can be linked and networked. Modelling legal practice on this scale would help.

**Question area:** Should there be someone in the Welsh Government with responsibility for justice and policing – executive and legislative competence.

- EJ: It depends on whether you think there should be a Welsh jurisdiction and if there is you take control of the court system, police and so forth in Wales and if so you need a Minister with responsibility. It is therefore initially a political question as to whether those things should be devolved.
- AW: How is Wales represented to the UK Government if there's no one in the Welsh Government telling them about the Welsh legal system. Someone should be a conduit for information and opinion and representation for Wales.
- FJ: I echo both comments. Ministerial responsibility is part of a separate jurisdiction and because matters are not devolved it doesn't mean it shouldn't be part of a minister's portfolio. Wales needs a representative voice at a high level. The First Minister is interested which is good but he's busy.
- HW: The answer must be yes. Since the Wales Act 2017 there are areas relating to the justice system now under Welsh Government control, such as offender management. There are wider problems around the structure of the Welsh Government and how portfolios change. Given the special nature of policing and justice, clear structures are needed. The Counsel General is now responsible for Brexit as Brexit Minister so perhaps there is role for the Counsel General to be the minister responsible for the justice function to in the system we have now. If there is full devolution of policing and justice, further institutional reform will undoubtedly be required.

**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?

- AW: A separate judiciary is inevitable. Whether it is one that is dual qualified is another question. You need a judiciary that is Welsh qualified. To attract and retain talent the judiciary must be enabled to practice cross border. In terms of the jurisdictional issue, it's a difficult issue. I have talked to the Counsel General about codification access to Welsh law. This presents its own problem as there is Welsh law and English and Welsh law. The separation may happen organically. Imposing it, the work involved in achieving it and the cost of it would be prohibitive.
- FJ: It's not practical to get rid of the continuation of the law of England and Wales. We are heading towards the laws of England and Wales, the laws of Wales and the laws of England. The judiciary should be qualified in Welsh law so they are able to practice here but the size of the jurisdiction makes a separate judiciary impractical.
- HW: By the process of making Welsh legislation we will create a Welsh jurisdiction out of the functions of the England and Wales part of the UK. What we going to have is a law of England in the areas where Wales has legislated in relation to Wales and where the law has diverged. But in

areas like criminal and civil law, we have a federal England and Wales law. Essentially we have a three way division. I favour a differentiation of the courts in Wales, their nomenclature and how they are identified. Judges should be cross ticketed to sit in England and Wales. If we want talented judges they need the opportunity to exploit their talents.

- EJ: The question of the law of Wales or the law of England and Wales is one of substance as people use the word "jurisdiction" in different ways. The law of England and Wales in relation to a contract dispute will be the same in both countries whereas that in relation to planning or education matters will be different, but it's still formally the law of England and Wales. Having the law of Wales as I understand it would mean that Welsh courts would have exclusive jurisdiction over Welsh cases. I would be in favour of that and it wouldn't involve massive codification as that will take decades to effect. In terms of the common law, how would precedent work across jurisdictions? Would decisions in courts in either jurisdiction be binding or persuasive in the other? If the latter it may be a disadvantage as it would give rise to greater uncertainty. We have de facto a Welsh judiciary as judges are appointed and practice in Wales, although they do some work in London too. A separate judiciary may not be attractive to some candidates that want to work cross border. If you devolve justice presumably the Welsh Government will need to pay for the Welsh judges but this may be by proportionate funding of a shared judiciary who are authorised to sit in both jurisdictions.

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

*Answered elsewhere.*

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

*Answered elsewhere.*

**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?

- HW: In terms of regulation, the point at the moment is that we plug into a regulatory system that covers England and Wales. The first challenge is if there is complete jurisdictional separation the lawyers we have now will need to staff and fund a regulatory system and a compensation fund and the economics of this will need to be worked out. It is possible to have a combined regulatory system. But you must be careful not create a system that is so complicated the English based solicitors will perceive themselves as subsidising Welsh based solicitors that are exploiting the exclusivity of their Welsh jurisdiction. This would generate resentment. If you intend to retain a joint structure then the boundaries between the two qualifications will need to be porous. This works in Northern Ireland. The challenge is if separated you will end up with a very small jurisdictional entity and higher regulatory costs on practitioners remaining in Wales. Avoiding barriers on the movement of lawyers between England and Wales is important. Most lawyers in Wales would be pleased to say they are a Welsh lawyer admitted in the jurisdiction of Wales but they will also want to say they have the ticket for England as well as many practice on a cross border basis.
- FJ: A separate jurisdiction would have a positive impact on the profession and the key is confidence. I don't see there is an issue with being Welsh qualified and dual qualified to practice in both Wales and England. It would be a feather in our bow to say we are able to service both jurisdictions. There are plenty of examples of people who cross qualify. If there is a will to make it work, I can't see it will be an issue. In terms of regulatory considerations a fair finding deal will be needed to recognise Welsh qualified lawyers and to avoid gripes one way or the other. It would mean Welsh lawyers would be accountable to two regulatory bodies and clarity would be needed about which body we would be accountable to at any given point based on where work was being done. Concerns around cost of two regulators are not insurmountable. A Welsh regulatory body

would be small and can follow best practice. Cost has to be reflected in a proportionate way in terms of which jurisdiction a dual qualified lawyer may be serving.

- AW: There is so much we can do better than the current regulatory system. I see it as an opportunity. I'd be concerned not to remove parity that we have now and I wouldn't want the Welsh system to be seen as something of the poor relation. I do lots of diverse work as managing partner of my firm and the thought of doubling up the regulatory burden is a matter of concern. (In terms of regulation and representation, the Law Society Office in Wales has always been good but my representative is based in England. I want that to change. I want legal representation in Mid Wales for Mid Wales solicitors. We need pulling together and you can't do this by imposing more regulatory burden on people for no good reason. If we were to build something that was fit for purpose, fit for Wales and enables practitioners to work then that would be to the good.

*Professor Rick Rawlings asked about examples where we could do things better in terms of regulation*

- AW: The regulator has no concept that Wales is different. The Land Transaction Tax taught me how good Wales could be. There was an opportunity with the new tax to draw a line and build something new. I would like to see that same confidence and clarity of thought applied to the role of the regulator. Engagement in Wales could be better. I see the SRA at events in Cardiff or Birmingham where I have little in common in terms of practice with other solicitors in the room. The SRA doesn't recognise divergence in the law or check that practitioners are keeping pace with it.
- FJ: The training element needs to be done better in areas of diverging law. The reality is that laws have changed in many areas and we are not up-skilling our lawyers enough. The Law Society should be running courses but I'm not aware of any courses it runs that are focussed on up-skilling practitioners on emerging Welsh law.
- EJ: I've been a barrister for 20 years. Initially, my practice was broad but I dropped areas such as employment and PI. I Chancery practitioner doing some public law work and planning. I did the M4 public inquiry and enjoyed that work and wanted to carry on doing that work, so I moved to London and specialised. The reality is there were only one or two of us in my old set doing such work and I would have had to do lots of marketing. In my new set, I have been surprised by the amount of marketing. It's not surprising therefore that work leaves Wales because there isn't a culture of self promotion in Wales. When I started as a pupil there was a plan to have a big set in Cardiff. You wouldn't choose the structure that we have but there's a lot of loyalty. However, it's not set up ideally to secure specialist work. I'm in favour of a Welsh jurisdiction and I don't see this as meaning you have to have a separate regulator. It seems the SRA regulation is quite onerous. It is a small jurisdiction. There are overheads and economies of scale and the same single regulator could regulate those dual qualified as well as those qualified just in Wales or just in England.
- HW: If we had a separate jurisdiction it is a chance to do something differently. Do we have a Welsh equivalent of the SRA, BSB and so forth or a single Welsh legal regulator covering all professions. One of the features of SRA regulation is a focus on consumer regulation designed to ensure consumers are protected but do you need to apply those standards when dealing with sophisticated purchasers of legal services such as many businesses or the public sector? A Welsh regulator could look at the balance of this. You could look at fusion between solicitors and barristers or innovations that do not go that far but create something distinct, for example a "Welsh faculty of advocates" bringing together higher rights advocates whether they come from the Inns of Court or are solicitor advocates.

**Question area:** How could Wales be better represented within current justice and policing bodies?

- AW: There is a problem and there is under representation. I am aware that the Law Society has considered replacing regional representation in favour of city representation. We are unrepresented now and there is a lack of understanding about legal practice in rural Wales. From my experience, there are similar issues with rural areas of England, such as Cumbria. We have to

have Welsh specialists and people who want to champion Wales as representatives for Wales.

- HW: The Law Society Wales Committee feeds in to other Law Society Committees but this is patchy rather than comprehensive. It seems to me that if there is a body dealing with a function where there is the potential for different provision in Wales then there has to be some explicit form of Welsh representation on that body.

*Professor Rick Rawlings referred to options for Welsh representation on Welsh bodies.*

- HW: There are a range of options. Reporting to the National Assembly for Wales is a useful tool provided the Assembly then scrutinises that report and this brings within scope the size and capacity of the Assembly. "Have regard" duties are another option. The Commission may want to say there is a tool kit of options and where a matter regarding Wales arises one or more of them should be deployed.
- FJ: We need to move away from the piecemeal manner in which representation works at the moment. We need a coherent system in place. I don't have enough of a handle on the extent of the problems but I feel underrepresented as a practitioner in Wales. My experience of the Law Society in Wales is that it does not represent the Welsh interest. I'd like to see a new institution take on that battle for practitioners in Wales.
- EJ: As regards the Bar Council my perception is that the Circuit Leaders meet and Wales's voice is heard. In terms of regulators, if there are two jurisdictions the Bar Standards Board should have a member representing the Welsh interest. In terms of judicial infrastructure I have experience of the planning inspectorate which is based in Bristol. My experience is that inspectors are equipped to deal with cases in Wales in terms of knowledge of Welsh policies and there are no complaints about how inquiries are conducted.
- HW: One of the other solutions to this is administrative devolution. In terms of publicly funded legal advice, for example, the Welsh interest can be secured by devolving the budget and the system to the administrative responsibility of the Welsh Government and the scrutiny of the National Assembly for Wales.

**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?

- EJ: Bydd awdurdodaeth Cymru yn fach ond nid yw hynny ohoni ei hun yn lleihau'r materion sy'n berthnasol. Mae pobl eisiau symud rhwng Cymru a Lloegr i ymarfer ac ni allaf weld pam y byddech am atal hynny.

*A Welsh jurisdiction will be small but that of itself doesn't reduce the issues that are relevant. People want to move between England and Wales to practise and I can't see why you would want to stop that.*

- FJ: Dydw i ddim yn meddwl bod problem. Mae'n rhan o'n twf a'n hyder fel cenedl y gallwn weithio gyda'r newidiadau hyn. Mae'n berthnasol ein bod yn magu hyder. Er y byddai Cymru yn awdurdodaeth fach, nid yw'n golygu nad ydym mewn sefyllfa dda i sicrhau bod rheol annibyniaeth yn cael ei dilyn. Mae Cymru yn lle bach ac mae pobl yn adnabod ei gilydd ac os oedd plismona i gael ei ddatganoli yna mae'n amlwg bod angen corff ar wahân arnom i oruchwylio'r ffordd y mae'r heddlu'n gweithio a thros amser creu ffyrdd newydd o wneud pethau o gymharu â Lloegr.

*I don't think there is a problem. It's part of our growth and confidence as a nation that we can work with these changes. It is relevant that we are growing in confidence. Whilst Wales would be a small jurisdiction, it doesn't mean we are not well placed to ensure the rule of independence is observed. Wales is a small place and people know each other and if policing was to be devolved then it stands to reason we need a separate body to oversee the way in which the police work and over time create new ways of doing things compared to England.*

- AW: We are in a very similar position to the regulation of the profession generally with policing and

those types of bodies. In Wales, we are also lucky that we have the interface with the Welsh Government and Wales in that sense is more local with ease of access to talk to people who have the ability to influence policy. We are well represented in our own borders and there is a desire to listen to people in Wales. That said, there is a danger we can become inward looking and with important areas like policing there should be independent oversight to see that matters are operating correctly. I agree there is an organic evolution and if justice and policing is devolved inevitably there will be differences between England and Wales and as with the regulator for the solicitors profession in Wales, an element of that regulation for Wales needs to be specialist and Wales centric. Organic evolution may well answer this question for us.

- FJ: Yn ei ffurf bresennol mae Cynulliad Cenedlaethol Cymru yn gofyn am newidiadau pellgyrhaeddol o ran Aelodau Cynulliad ychwanegol i allu ymdopi gyda yunrhyw swyddogaethau Cyfiawnder ychwanegol. Yn yr un modd, rhaid cael niferoedd digonol o weision sifil i gyflawni'r Gwaith ond mae mwy o AC's yn rhagamodol i datganoli deddfwriaethol yn y maes cyfiawnder.

*The National Assembly for Wales in its current form requires far reaching changes in terms of additional Assembly Members for additional capacity to manage justice functions. Similarly there must be sufficient numbers of civil servants to deliver operationally but More AM's are an essential pre-condition of legislative devolution relating to justice.*

- HW: Daeth y Panel Arbenigol ar Ddiwygio Etholiadol y Cynulliad dan gadeiryddiaeth yr Athro Laura McAllister i'r casgliad bod angen Aelodau Cynulliad ychwanegol i adeiladu capasiti'r Cynulliad. Gwlad fechan yw Cymru ac mae yna lu o gyrrff. Mae yna, er enghraifft, tri awdurdod tân ac achub a phedwar lluoedd heddlu. Mae'n ymddangos i mi y dylai fod un llu heddlu. Nid yw model y Comisiynydd Heddlu a Throsedd yn gweithio yn y sefyllfa yng Nghymru ac mae'n ymddangos i mi fod ar Gymru angen model sydd rhwng Comisiynwyr yr Heddlu a Throsedd ac Awdurdodau'r Heddlu, gyda rhai aelodau wedi'u penodi'n ganolog a rhai wedi eu hethol i'r swydd. Efallai y bydd y Comisiwn hefyd am ystyried a ydym yn mynd i barhau â modelau trefniadaeth y Swyddfa Gartref a'r Weinyddiaeth Gyfiawnder yng Nghymru.

*The Expert Panel on Assembly Electoral Reform chaired by Professor Laura McAllister concluded that additional Assembly Members were needed to build the Assembly's capacity. Wales is a small country and there are a plethora of bodies. There are, for example three fire and rescue authorities and four police forces. It seems to me there should be one police force. The Police and Crime Commissioner model doesn't work in the Welsh circumstance and it seems to me Wales needs a model between Police and Crime Commissioners and Police Authorities, with some members appointed centrally and some being elected office holders. The Commission may also want to consider if we are going to continue with the Home Office and Ministry of Justice models of organisation in Wales.*