CHANGING SOCIETY, CHANGING LAW

It is a pleasure and a privilege to have been asked to speak here today. I have always enjoyed coming to this beautiful town, and I value very much the association I have had with the University.

I fear I am something of a fraud – I am not a criminologist or a lawyer, and it is therefore daunting to have been asked to speak at a conference of experts such as you. I hope only that I will not disappoint you too grievously.

I am here because of the Commission on Devolution to Wales – a Commission I was privileged to chair from 2011 till 2014. I hope that by telling you how the Commission went about its work; what it recommended; how its recommendations have been progressed; and how legal concepts are changing in consequence, will be an interesting example of a way legal change has been brought about to reflect a changing Welsh society.

Our Commission was a consequence of Liberal Democrat pressure to include consideration of further Welsh devolution in the Coalition Agreement after the 2010 General Election. Its establishment was supported by all four political parties in the National Assembly, who all nominated members to it. That was an enormous strength.

A Commission depends on all its members, and on its staff. In this, we were extremely lucky. We had brilliant and committed staff from the Welsh and UK Governments, and an excellent set of members: Nick Bourne former Leader of the Party from the Conservatives, Rob Humphreys from the Liberal Democrats and Eurfyl ap Gwilym from Plaid Cymru, and from Labour, Jane Davidson succeeded Sue Essex. Non-political nominees were Noel Lloyd, the distinguished former Vice-Chancellor of this University and current member of the Judicial Appointments Commission, Dyfrig John, former Chief Executive of HSBC for the first part of our work, and Helen Molyneux, founder of New Law in Cardiff, and retired industrialist and former Lord Lieutenant of Clwyd, Trefor Jones, for the second part of our work.

The Commission sought to be evidence based and to listen to views across Wales and beyond; to base recommendations on principles, and to take full account of international evidence. We all recognised that if the recommendations we made were unanimously agreed, that

would make them politically much more persuasive. All our recommendations were unanimous.

The Commission's work was divided into two Parts. First we were:

> *To review the case for the devolution of fiscal powers to the National Assembly for Wales and to recommend a package of powers that would improve the financial accountability of the Assembly, which are consistent with the United Kingdom's fiscal objectives and are likely to have a wide degree of support*

We published our first report in November 2012. We argued that the anomaly of Wales having legislative and spending powers but no tax and borrowing powers should end.

A suite of smaller taxes should properly be within the Assembly's control, but a significant tax should also be within that control in order to achieve real increased financial accountability. So the income tax base should be shared between the governments in Cardiff and London, with the Welsh Government free to alter each rate of tax independently, enjoying – or suffering – the consequences of any variation they made.

All four parties in the Assembly endorsed our recommendations. We had to wait a long time for the UK Government's formal response but a Wales Bill was eventually published, and became the Wales Act 2014. It takes on almost all our recommendations.

We called our Report "Empowerment and Responsibility: Financial Powers to strengthen Wales". We felt that having to make fiscal choices would bring a deeper accountability to Welsh political life and would enrich the political process. That is happening as we see party policies for May's election unveiled.

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The remit for Part 2 of our work was

> *To review the powers of the National Assembly for Wales in the light of experience and to recommend modifications to the present constitutional arrangements that would enable the*

United Kingdom Parliament and the National Assembly for Wales to better serve the people of Wales.

Our fundamental purpose was to try to establish an intellectually coherent rationale for what our terms of reference called the "constitutional arrangements" of Wales.

As in Part I we adopted a set of principles against which we could judge the many contested issues that we had to consider. These principles were: accountability, clarity, coherence, collaboration, efficiency, equity, stability and subsidiarity. These principles for good governance are hardly startling in their originality, but their clear enunciation and their adoption as the foundation for our recommendations, was enormously helpful.

Our conclusion was that the Welsh devolution settlement was unduly complex. There was broad support for further devolution, though there were concerns throughout Wales about the performance of the Welsh Government, and a sense of frustration that grew the further one moved away from Cardiff. There was also a general feeling that Welsh and UK Governments and institutions should work together better.

Our principal recommendation to clarify the settlement was that Wales should move to a legislative model based on reserved powers. The debate on reserved/conferred powers was the single issue on which we received most evidence. Many of you will be familiar with the issue, but in case any are not, it is a simple concept. In Wales powers are held by Westminster unless conferred upon the National Assembly. The powers of the legislatures and executives in Scotland and Northern Ireland are limited only by what is reserved to Westminster.

The evidence was virtually unanimous in favour of reserved powers, and we concluded unequivocally that the reserved powers model would be better for Wales.

It would be clearer for the public, for the institutions and for civil society – not to mention the legal profession - to understand that the National Assembly is responsible for everything unless Parliament has reserved it. That would encourage more confident, effective government, and it would allow the public to better understand who

needs to be held to account. It might even free up a little time in the Supreme Court.

In many ways, moving to the reserved powers model is not a major change at all, and is certainly not the panacea to solve all the issues that were raised with us. In itself it does not change the powers that Wales has. But we assumed that the process of deciding where powers sit would involve discussions of principle. It would be a much needed, therapeutic cleaning of the Welsh legislative stables.

I will skip by some of the other important recommendations that we made about altering and rationalising the devolution boundary in areas like transport, broadcasting, water and energy. We also made recommendations about increasing the Assembly's autonomy, improving its scrutiny and increasing its size; and recommendations about better working together between London and Cardiff; the establishment of a Welsh Intergovernmental Ministerial Committee, and a better grip on cross-border issues, where we called for both Governments to put the citizen's needs at the centre of their thinking.

But, because of this audience, I will speak a little more about Policing and Justice – subjects we debated at length.

We were persuaded by the argument that policing is intimately linked with areas already devolved. For example, dealing with substance abuse involves education, health and social services – all devolved – as well as policing. We therefore concluded that policing and related areas of community safety and crime prevention should be devolved, as of course they are in Northern Ireland and Scotland.

This was subject to some important caveats: existing levels of cross-border police cooperation should be maintained; police powers in respect of arrest, interrogation and charging of suspects, and the general powers of constables, should not be devolved unless and until criminal law was devolved; and the National Crime Agency should not be devolved.

In essence, our recommendations would have done nothing to compromise either the safety or the rights of the citizen, but they would ensure that the political responsibility for the safety of Welsh communities rested in Wales, not in London, and thus that Welsh policing was done in a way that suits the needs of Wales.

On justice, we decided to look at each aspect of the system independently, and to make recommendations that would help to bring justice as close as possible to the community, with a presumption that the National Assembly should have responsibility in those areas that have the greatest impact on the community and the day-to-day lives of the citizen in Wales.

Because of its close link with already devolved services, we first recommended that the treatment and rehabilitation of youth offenders – matters that are overwhelmingly dealt with in the community – should be devolved.

We then turned to the rather trickier issue of the devolution of the treatment and rehabilitation of adult offenders and thus of the probation and prison services.

The way that adult offenders are dealt with should be an integrated whole, with those responsible for disposals in the community and those responsible for custodial disposals working closely together. This is recognised through the creation of the National Offender Management Service. But these services also need to work closely with the devolved housing, education, health and social services in the case of adult offenders as much as they do with youth offenders. There is a strong case therefore for devolution of the service for adults as well as that for youths.

But there are real practical difficulties in calling for devolution of prisons. At present Wales exports prisoners, and has no provision for female or for Category A offenders. When the new prison in Wrexham is operational, Wales will import prisoners domiciled in England. A self-contained Welsh prison estate might lack flexibility and might cost more.

These practical issues of the prison estate are not insuperable: devolution does not necessarily mean self-sufficiency in this or any other field. As Belgium exports its prisoners to the Netherlands or as Hawaii and Vermont do to Arizona, so arrangements could easily be made within the United Kingdom.

Here I might depart for a moment from what the Commission said and express a personal opinion. The reason why the Netherlands has the capacity to accommodate prisoners from Belgium and possibly

Norway is because the Netherlands has adopted policies that make a presumption against custodial disposals.

I personally would like to see a Welsh Government empowered to make a similar choice and to diverge from the rather vindictive criminal justice policies that have seen prisoner numbers increase in England and Wales from under 40000 in 1985 to around 90000 at the latest count. There are currently around 148 persons imprisoned per 100000 population in England and Wales, compared with 78 in Germany. If a different penal policy were able to be adopted in Wales, a possible future is therefore quite conceivable where Wales will have a more than adequate custodial provision – perhaps with smaller, local prisons more widely distributed.

So, on prisons and probation, we concluded that there was a persuasive case for devolution, though we also recognised the difficulties of implementation. We said that the two Governments should jointly carry out and publish a study of the feasibility of implementation. In the meantime, we proposed that a formal mechanism be established for Welsh Ministers to contribute to policy development on adult offender management.

On the court system, we concluded that there should be further administrative devolution and we suggested a number of means by which this could be achieved: the various divisions of the High Court should sit in Wales on a regular basis to hear cases that arise in Wales; High Court and Appeal Court judges should be allocated to sit in Wales only if they satisfy the Lord Chief Justice that they understand the distinct requirements of Wales; and there should be at least one Supreme Court justice with particular knowledge and understanding of the distinct requirements of Wales.

As far as other parts of the justice system are concerned, we recommended a review within ten years of the case for devolving legislative responsibility for the court service, sentencing, legal aid, the CPS and the judiciary to the National Assembly.

Our Second Report was published in March 2014.

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One of the fears of Commissions like mine is that their recommendations will be shelved. I think we were lucky that the rather headlong constitutional response to the Scottish referendum

obliged political leaders to do something for Wales (and, indeed, England as well). Our Report was conveniently at hand.

So the Coalition Government convened meetings of the four political parties in their London manifestations to see what could be agreed by them all in relation to our recommendations. This resulted in the publication on St David's Day 2015 of the White Paper *Powers for a Purpose.* Unfortunately, this set out the lowest common denominator of what was acceptable to the Westminster parties – any one of which had a veto.

Many of our recommendations – on energy, transport, the autonomy of the Assembly and, most importantly, on reserved powers were agreed. But most of our recommendations on policing and justice were the victims of the veto. Unfortunately, some people in the Labour Party and more people in the Conservative Party needed persuading that any aspects of policing or justice were ready for devolution.

There were four principal arguments made against the devolution of policing: that policing is inextricably linked to the criminal justice system and that one cannot be devolved without the other; that the present arrangements provide a sufficient level of integration and autonomy; that there were cost and complexity issues; and that devolution would weaken the existing management of national threats.

Our proposals either met these arguments or controverted them. But elements within the institutionally conservative Home Office resisted change, despite the support of the Welsh Government and also of police professionals. And a recent ICM opinion poll suggested that 60% of people in Wales want policing to be devolved.

On justice, while administrative changes could be made, there was also a fundamental objection to further devolution from the Ministry of Justice based on three concerns – cost, paternalism and the preservation of the single legal jurisdiction of England and Wales.

So the response to our second Report was patchy. The reluctance to devolve policing and justice was disappointing, but the move to reserved powers, as well as the many other areas where our recommendations were accepted, was gratifying.

The election of a Conservative Government at Westminster in May last year put paid to any lingering hopes that justice and policing might be devolved in this Parliament. However, the Conservatives had pledged to implement the St David's Day Agreement, and Stephen Crabb has been determined to see that through and, in his words, to produce a fair and lasting settlement for Wales.

Thus in October last year, the Westminster Government published a draft Wales Bill for pre-legislative scrutiny. This was a brave move by the Secretary of State. Essentially he was putting a target on his back. And there was quite a lot at which to fire in the draft Bill he produced.

The Assembly's Constitutional and Legislative Affairs Committee were the first to give an overall negative verdict, and last month they were followed by the Commons Welsh Affairs Committee.

Earlier in February, I was one of the authors of a Report from the Wales Governance Centre in Cardiff University and the Constitution Unit at UCL which contained a comprehensive critical analysis of the draft Bill together with recommendations for its improvement.

Our report welcomed the Secretary of State's wish to produce a fair settlement that would stand the test of time but argued that changes needed to be made to the draft Bill if it was to be workable and sustainable.

Echoing the words of the Lord Chief Justice, we said that constitutional amendment must be rooted in principle; that workability and clarity were key; and that while the National Assembly should not legislate in a way that affects England, it should not be hampered when it legislates for Wales on devolved matters.

We also criticised the lengthy list of reservations contained in the draft Bill – from hovercraft to pedlars and Sunday trading. We believed there had been no process of principled rationalisation aimed at ensuring a coherent and consistent package; and that consultation with the Welsh Government had been insufficient.

In our view, the existential concern to protect the unified legal system of England and Wales also brought unwelcome consequences, especially the onerous tests of 'necessity' that would add complexity and uncertainty and provoke legal challenge, with decisions on

whether legislation is necessary taken by judges rather than parliamentarians. We also pointed to proposed requirements for UK ministerial consent and the prospect of democratically legitimated Welsh legislative policy being overridden by UK executive power.

There were positive aspects of the draft Bill. Additional powers of direct relevance to people's lives were to be devolved. The National Assembly was to be made permanent and the convention that Parliament should not legislate on devolved matters without the Assembly's consent was to become statutory. The Assembly was to be given control of its own elections, and would receive greater internal autonomy. Following progress on establishing a Barnett "funding floor" for Wales, the requirement for a referendum before the income tax powers in the Wales Act 2014 can be brought into effect would be removed.

Our report, and those of the Assembly and Commons Committees, all caused for a pause in the process.

Very commendably, the Secretary of State took much of the criticism on board. On 29 February, he announced that the Bill would be paused; the list of reservations pruned; the necessity tests scrapped; and the general restriction on modifying Minister of the Crown powers removed.

One week later, on March 7th, the Welsh Government produced its own draft Bill. This is a comprehensive document. Among other things, it sets out a reserved powers model that reserved many fewer matters; and it provides that powers in relation to the justice system (police, courts, prisons, the administration of justice, criminal and family law) are to be "deferred matters" to be devolved with effect from 1 March 2026. Of course, these are matters on which London, not Cardiff, legislates and so the draft Bill is more illustrative of possibility that a statement of legislative intent.

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This brings me finally to the question of a separate Welsh jurisdiction – an issue whose salience has risen as the consequences of a reserved powers model become more apparent.

The normal defining features of a jurisdiction are territory, distinct laws applying there, and a distinct legal system. There is clearly a territory called Wales, and there is a legislature that is able to legislate for that territory alone. But we have no distinct legal system – and there are legitimate concerns about cost and the effect on legal businesses, and on universities, that might follow from the creation of a separate system.

The Silk Commission essentially recommended that Wales and England should adopt a shared legal system, with common courts and professions but with Welsh manifestations of those courts and professions.

We saw a Welsh jurisdiction as something that is growing gradually and naturally. It was possible that legislation might be needed to facilitate new stages of that growth, but there was no need for any sort of jurisdictional UDI.

The Secretary of State also recognises that there is a growing body of distinct Welsh law. However, because this makes up only a tiny fraction of the overall body of law for England and Wales, he does not believe that there is a case at present for dividing the single jurisdiction of England and Wales.

But, as he announced a couple of weeks ago, "there is a clear need to look at the delivery of justice in Wales to take account of the distinct and growing body of Welsh law". So he has established a working group with the Ministry of Justice, the Lord Chief Justice's office, and the Welsh Government, to consider what distinct arrangements are required to recognise Wales's needs within the England and Wales jurisdiction when the reserved powers model is implemented.

Others would go further. Under the Welsh Government's Bill, the existing legal jurisdiction of England and Wales would be divided into two distinct jurisdictions, one for each country, and a law of Wales (and a law of England) would be created, with the senior courts and the family and county courts split into separate courts for Wales and for England respectively (but served by a common judiciary and courts service).

This is all interesting stuff.

Establishing a properly constituted model of reserved powers for Wales requires something different in terms of territory and jurisdiction. Possible approaches range from territorial rules for

applying Welsh law but within the single legal jurisdiction of England and Wales, through what could be called a distinct but not separate legal jurisdiction for Wales, right up to a wholly separate system of justice here in Wales. We are particularly fortunate to have a deep-thinking committed Welshman as Lord Chief Justice at this time. I am sure that his counsels will be very valuable. Watch this space.

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I hope the description of process has not been too dull. I shall be very interested in listening to more scholarly discussions during today's proceedings.

A long time ago, I studied Greek philosophy. You may know Heraclitus's famous phrase "everything is in flux, nothing is stable". That applies to society and it applies to law. Changing societies require changed laws. How much law is a mirror of change or a driver of change is something that you will understand much better than me.

What I hope I have illustrated is the process of legal change to reflect the needs of the modern Welsh polity yet has some way to go – and, for constitutional aficionados like me, is going to remain endlessly exciting.