

Chapter 7: Policing, justice and other miscellaneous issues

7.1 OVERVIEW

7.1.1 In this chapter we use the principles outlined in Chapter 3 to assess whether there should be changes in powers relating to policing and justice and the scope for change in a number of other miscellaneous areas.

7.2 POLICING

Current position

7.2.1 Policing is non-devolved. There are four police force areas in Wales: North Wales, Dyfed-Powys, Gwent and South Wales. Following the Police Reform and Social Responsibility Act 2011, each police force area now has a directly-elected Police and Crime Commissioner (PCC), who holds the police to account on behalf of the population of the area which they serve. The PCCs replaced Police Authorities, and they represent a substantial decentralisation from the Home Office, reversing a previous trend towards centralisation. The Home Secretary nevertheless retains wide powers and is responsible for the legislative framework, for funding and for setting the strategic policing requirement.

7.2.2 While policing is non-devolved, many areas of devolved policy influence levels of offending and criminality, including local government, health and education. There are also close links with the devolved emergency services (the ambulance and fire services). We understand that the four police forces in Wales work closely with their devolved partners. This has helped identify shared priorities and deliver efficient and citizen-focused services. An example of this cooperation is that police forces work alongside local authorities and Community Safety Partnerships to deliver Domestic Abuse and Substance Misuse strategies. The police forces are also involved in Local Service Boards in the local authorities in Wales, and in the Welsh Government-led Public Service Leadership Group, which provides leadership for collaborative work to improve public services.

7.2.3 Direct collaboration between the police forces in Wales and the Welsh Government has developed over time, with the four Chief Constables attending a meeting of the Welsh Government Cabinet in 2012. The introduction of elected Police and Crime Commissioners has presented an opportunity for further co-operative work and we understand that there are regular meetings between the PCCs and Welsh Ministers, as there are between senior police officers and officials of the Welsh Government.

7.2.4 Collaboration to date has delivered a number of jointly funded projects¹:

¹ Funding is considered further later

- 500 additional community support officers;
- Tarian, the Southern Wales Regional Organised Crime Unit, funded by the three forces in southern Wales, Home Office grants and the Welsh Government (£642 000 in 2012/13); and
- £2.5million funding from the Welsh Government for the All Wales Community Schools Liaison Core Programme (matching the UK Government's contribution).

Box 7.1: Evidence on Policing

Our Beaufort Research Opinion Poll showed that 63 per cent were in favour of the National Assembly for Wales and Welsh Government having responsibility for policing in Wales. A plurality of respondents (48 per cent) believed that policing was already devolved in Wales. In our questionnaires, around 58 per cent were in favour of devolution.

The UK Government said: *'Overall, the current arrangements work well. There are four key points to bear in mind in considering the devolution boundary for policing:*

...Policing is inextricably linked with the criminal justice system

...Existing governance and partnership arrangements provide a significant level of integration and autonomy

...There are cost and complexity issues with separating out national structures and arrangements

...The Strategic Policing Requirement and the management of national threats.'

The Welsh Government said *'We propose that the Assembly should have legislative responsibility for policing, by which we mean the governance and administration of the police service in Wales. We are also seeking legislative powers in relation to community safety and crime prevention, where there is extensive overlap with the functions of devolved services - notably local government, the NHS and the fire and rescue service.... we regard the Police as essentially a service working principally within the criminal justice system alongside other services devolved and non-devolved, and already organised very much on a territorial basis within Wales.'*

Winston Roddick QC, PCC for North Wales said *'For the people of Wales, who should be the central consideration for the commission on devolution, the benefits of devolving the police service would be overwhelmingly positive'*.

Ian Johnson, PCC for Gwent said that *'any proposals to change the current arrangements must evidence what the benefits for the people of Wales would be under any revised governance arrangements. Only if any new arrangements can be shown to add value to the current position should they be considered.'*

Christopher Salmon, PCC for Dyfed-Powys said *'creating divisions in this system would do nothing for justice and a great deal for criminals. If the decision was taken to devolve policing and criminal justice to Cardiff, all that would happen is that money would need to be re-routed via Cardiff, adding expense, confusion and complication in layers of bureaucracy.'*

Alun Michael, PCC for South Wales, said: *'I agree that it makes sense to devolve*

responsibility for policing. It will bring together the responsibilities that fit together and -enable a joined up approach to be taken to crime reduction and the building of healthy communities – two key purposes of -democratic government which ought to sit together.'

The Police Federation of England and Wales said that 'given the protracted evidence we have collated that devolving policing to Wales could be achieved. Should Government in Westminster and Cardiff agree to devolve policing powers to Wales, the Police Federation of England and Wales would fully support them to achieve this transition of governance to uphold the best traditions of British policing.'

The Association of Chief Police Officers (ACPO) Wales said 'there is a need to maintain cross border services relations and interoperability if devolution were to occur.' In their oral evidence they confirmed that they supported devolution of policing.

The former Chief Constable of Gwent Police said 'The transfer of policing from Parliament to the National Assembly for Wales should be supported subject to a full and robust option appraisal. The devolution of policing must result in added value and an improved service to the people of Wales.'

The Superintendents Association said: 'The key issue for us is whether the proposed devolution of power and control will provide an improved service and would it be fully funded?...For effective improvements, process re-engineering should examine the criminal justice system process from initial police involvement through to Courts proceedings and beyond...The short term devolution of policing would increase costs significantly – re-organisation of any kind is never without cost and in the current austerity climate this would be a challenging case to prove. In the medium to long term, the effective alignment of processes could potentially release efficiencies and save longer term policing costs.'

The WLGA said: 'It is believed that at some point in the future, the devolution of policing may be required to ensure that policing in Wales can develop in line with priorities set by the Welsh Government for police forces and other key public sector partners, the majority of which are already devolved, and with the overall aim of creating safer communities...Devolution of policing should not lead to increased costs however a full financial impact assessment would need to be carried out in identifying any financial implications and potential risks.'

Dr Timothy Brain, Senior Honorary Research Fellow, Universities' Police Science Institute Cardiff, said: 'While acknowledging the risks, the close alignment of policing and community safety under the Welsh Government would be a major advantage, while increased accountability and transparency would enhance public confidence in policing..... Devolution is not a panacea, but the principal advantage of devolving policing will be the closeness of political decision-makers to the issues, communities and service providers...There are risks associated with devolving policing, but there are with retaining the status quo. On balance, the benefits outweigh the risks.'

The Wales in a Changing Union project said: *'In general there was support for devolution of police powers to the Welsh Government from the majority of agencies and individuals interviewed as part of this research.'*

Box 7.2: Key facts on policing

Key crime and policing statistics for Wales compared to England are set out here (although it should be borne in mind that Wales is more rural than much of England):

- in 2011-12 recorded offences per 1000 population were 63 compared to 71 for England;
- the detection rate was 35 per cent compared to 28 per cent for England, and was up from 28 per cent in 2002-03; and
- in terms of fairness, 62 per cent think the criminal justice system in England is fair compared to 65 per cent in Wales; for effectiveness, the figures are 44 per cent and 45 per cent.

In terms of spending per head, the England/Scotland/Wales/Northern Ireland figures for 2011-12 are: £255/£247/£243/£488. So Wales has the least costly system, though the costs are similar to the devolved system in Scotland.

Police Funding

- 7.2.5 The police in Wales get their funding from three main sources – the UK Government, via the Home Office; the Welsh Government; and the police precept component of council tax. Through the Spending Review process, the Home Secretary determines the amount of UK Government funding to the police in Wales.
- 7.2.6 The Home Secretary decides the overall allocation of UK Government funding to Welsh police force areas according to the Police Allocation Formula and a Welsh Top-Up Grant to ensure broad consistency between forces. In 2011/12 and 2012/13, all police force areas in England and Wales had their UK Government funding reduced by the same percentage. The Welsh Government decides the allocation of Welsh Government funding between police force areas. The Home Office also provides ring-fenced funding to Welsh police force areas for counter terrorism policing.
- 7.2.7 In 2012-13, the Home Office provided £229m, the Welsh Government provided £151m and the police precept funding provided £221m. Whilst the Home Secretary determines the quantum, and in effect, the allocation of Central Government funding to Welsh police forces, the Welsh Local Government Minister has control over council tax policy in Wales, including whether to cap the precept.

Assessment

- 7.2.8 Some of the evidence we have received supports the view that the present system works well. The statistics on performance and cost per head seem to

support this view. In addition, many acknowledged the good co-operation between the police and the devolved authorities. We did not hear that the current arrangements are failing.

- 7.2.9 On the other hand, many have argued that devolution of policing would be an improvement on current arrangements. Arguments in favour of devolution came from the Welsh Government, key professional police bodies, and the Chief Constables, and only one of the four Police and Crime Commissioners was definitely opposed. In addition, in our opinion poll a clear majority of people supported the devolution of policing. The Police Federation of England and Wales agreed with the Welsh Government that policing could be devolved without devolving other parts of the criminal justice system.
- 7.2.10 The argument in favour of devolution was expressed succinctly by the Counsel General in a speech to the Society of Legal Scholars in November 2012:
“There are great advantages in having devolved responsibility for these services. Each part of the UK has its own unique challenges to face in relation to crime, and these are dictated by a number of factors; such as population density, terrain, cultural trends, the structure and organisation of police forces, and many others. By maintaining powers over policing and criminal justice at a more local level, it can be easier for devolved administrations to promote and encourage efficiencies through a restructuring of administrative services within their territorial boundaries while focusing on tackling the crimes which most greatly affect their communities”.
- 7.2.11 Policing is a public service that is of particular concern to citizens in their daily lives. In that way, it is like health, education and the fire service, all of which are devolved. Policing is in fact one of the few public services that is not devolved in Wales. It is devolved in Scotland and Northern Ireland and is either wholly or partly devolved in most federal systems. Devolution is thus in accordance with our principle of subsidiarity. It is also consistent with our principle of coherence, allowing crime and the causes of crime to be tackled holistically under the overall policy framework of the Welsh Government and National Assembly.
- 7.2.12 Accountability will also be improved by aligning funding and policy responsibility. As suggested by our opinion poll findings, the present arrangements are complex and not transparent. It is also unsatisfactory in accountability terms that much of policing is funded from devolved sources yet police policy is determined in Westminster.
- 7.2.13 We also heard that policing policy tends to be dominated by English metropolitan concerns and a devolved policy would better reflect Welsh policing circumstances. Devolution would also bring together responsibility

for the three emergency services in Wales and allow the development of synergies that might suit Welsh circumstances.

- 7.2.14 We note that the Welsh Government call was for the devolution of the governance and administration of the police. They did not suggest the devolution of police powers, such as those of arrest, stop and search and detention. We will consider later the issue of devolution of the criminal law. But unless and until the criminal law is devolved, devolution of legislative responsibility for policing might sensibly come with reservations so that basic principles on which police officers work in Wales and England would remain the same reflecting the fact that the legal system which the police enforce covers England and Wales. For example, the subject matter of the Police and Criminal Evidence Act 1984 (PACE) might be reserved.² This would ensure cases being brought before the England and Wales courts would be based on evidence obtained in the same way.
- 7.2.15 The need to ensure on-going co-operation between police forces, and the fact that crime did not observe borders, were often raised with us. We are aware that a large amount of current inter-force cooperation is essentially bilateral, without central government co-ordination. During our visit to Northern Ireland, we discussed the support available from forces in Great Britain for the disturbances in Belfast in 2012-13 and the security requirements of hosting the G8 summit. We were also told in Scotland of the excellent cross-border co-operation between Scottish and English police forces. We believe that devolution would do nothing to inhibit inter-force co-operation. It would patently be in the interests of both Governments and the communities they serve to ensure excellent co-operation and inter-operability.
- 7.2.16 We do not recommend devolution of matters dealt with at United Kingdom level by the National Crime Agency (NCA), which is responsible for tackling serious and organised crime, fraud, cyber crime, border protection and child exploitation. Co-operation between the police in Wales and the NCA should continue under devolution of policing.
- 7.2.17 In 2011, the UK Government published a Policing Protocol as a Statutory Instrument³ under the Police Reform and Social Responsibility Act 2011. This Protocol sets out the relationship between the Police and Crime Commissioners, Chief Constables and the Home Secretary. The Home Secretary retains powers to direct PCCs and Chief Constables as a last resort. If policing were devolved, we envisage that Welsh Ministers would have these powers in devolved areas of policing.

Box 7.3: What devolution of policing would mean for Wales

² The Police and Criminal Evidence Act 1984 (PACE) sets out the legislative framework for the powers of police officers to combat crime, and their code of practice. This mainly deals with powers of entry and search and the handling of evidence and witnesses or suspects of crime. Equivalent provision is made for Northern Ireland by the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341). As it is devolved in Scotland, the equivalent in Scottish law is the Criminal Procedure (Scotland) Act 2010.

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117474/policing-protocol-order.pdf

The National Assembly would have legislative responsibility for the governance and administration of the police service in Wales and in relation to community safety and crime prevention.

The National Assembly would in the future be able to take decisions on issues such as whether there should be Police and Crime Commissioners or a single Welsh police force.

The Welsh police forces would continue to have independent day to day operational responsibility; and interoperability with other police forces and emergency services would be maintained.

The police service's relationship with the criminal justice system, particularly the courts and Crown Prosecution Service, would also be maintained.

The Welsh Government would need to establish a policing team. The Welsh Government would fund Wales's police forces and determine both the overall amount and the allocation to police forces from within their block budget. The block grant would be adjusted, with a transfer of existing resources from the Home Office.

The Welsh Government would also need to ensure there were satisfactory oversight arrangements, both in terms of professional standards and conduct. It would be sensible for Her Majesty's Inspectorate of Constabulary and the Independent Police Complaints Commission to continue to undertake their roles, given their expertise and reputations, and arrangements for this should be agreed between the two Governments. We acknowledge that a Welsh Government could decide to handle these matters differently in the future.

7.2.18 We have considered the four concerns raised by the UK Government very carefully:

- *Is policing inextricably linked with the Criminal Justice System (CJS)?* While we agree that the links between the police and the remainder of the criminal justice system are strong, it is noteworthy that policing and justice responsibilities are held by separate UK Government departments. We will argue later in this chapter that other parts of the criminal justice system might be devolved in the future. But we believe that police devolution does not necessarily need, or imply, wider criminal justice devolution. We would, of course, expect efforts to achieve efficiency and effectiveness through greater interaction across the criminal justice system to continue (for example, co-ordinated IT systems).
- *Do the present arrangements provide a significant level of integration and autonomy?* These are desirable characteristics of the present system and should be sustained. Mutual aid and interoperability arrangements between forces are certainly vital. However, devolution would enable the Welsh Government to maintain existing levels of integration and to develop them further, especially with existing devolved services. Devolution would bring greater autonomy and the opportunity to adapt even better to local needs.

- *Are there cost and complexity issues?* The four police services are co-terminous with Wales. At its simplest, this means that devolution does not necessarily mean organisational change. However, there is currently, and will need to be in future, excellent co-operation across the Wales/England border. We would not advocate breaking up the United Kingdom-wide arrangements, for example, on organised crime. Where there are cross border economies of scale, such as on procurement, these arrangements should be maintained post devolution. There would be additional Welsh Government civil service costs but there may also be scope for savings, considered further below. Police pensions, the Police College and other areas such as police complaints and independent inspection of policing could continue on an England and Wales basis, and we envisage that an agreement would be reached between the two Governments which ensured continued access to these services on a charging basis, with no net additional cost.
- *Would devolution weaken the existing management of national threats such as organised crime, terrorism and cyber threats?* We see no reason why this should happen. Clearly the management of national threats would remain a top priority for both Governments and we are confident that both would wish to devise suitable cooperation, drawing on experience in Scotland and Northern Ireland. As we have already mentioned, we would want the existing functions of the National Crime Agency to continue.

Costs

7.2.19 If policing were devolved, there would be a full transfer of the existing Home Office Police Grant and associated revenue and capital provision to the Welsh Government. A policing team would be needed within the Welsh Government to support Ministers in exercising their powers. The Welsh Government estimate that this would cost £2-3 million a year, a figure that accords with the Home Office's estimates. Equivalent existing Home Office administrative resources relating to policing and crime policy and analytical support would be transferred to the Welsh Government.

7.2.20 We would not envisage any change to the non-devolved status of the National Crime Agency. However, there are other costs for specialist and centralised services that the Home Office also meets centrally, notably for the Airwave digital communications system, but also for a number of other specialist services (national databases such as the Police National Computer for example). It is unlikely to be desirable or practical to try to set up separate arrangements for Wales. Where these and other services are provided on an England and Wales basis (including the Police College, HM Inspectorate of Constabulary and the Independent Police Complaints Commission) Welsh costs could be apportioned on a fair basis and there is no reason to suppose that extra costs of any substance would arise as a result of devolution.

- 7.2.21 The responsibility for police pay would be devolved, but the Welsh Government could, and might well, decide to [determine participate in pay negotiations](#) on an England and Wales basis. We do not, however, recommend the devolution of pension arrangements. There is no necessary extra cost as a result.
- 7.2.22 In subsequent spending reviews the Welsh Government would receive Barnett consequentials of changes in police spending in England. The Welsh Government would be responsible for allocating grant to its police forces. It might, of course, wish to develop a different formula from that currently used by the Home Office.
- 7.2.23 Given the pragmatic model of devolution that we propose, we do not expect there to be substantial additional costs. Existing annual Home Office policing costs in Wales would be transferred. At the margin, there may be some replication of Home Office costs and some costs of calculating the Welsh element of joint services, but these are likely to be minor. Of course, the Welsh Government could choose to spend more or less on policing after devolution.
- 7.2.24 Devolution of operational policing would fit well with our principles of coherence, subsidiarity and accountability. Provided the effectiveness of policing at the United Kingdom level is maintained, and provided devolution is carried out in a way that does not involve substantial additional costs, as we propose, we see police devolution as being in the interests of Wales and the United Kingdom.

Recommendations

- R.42 Policing and related areas of community safety and crime prevention should be devolved to the National Assembly;
- R.43 Existing levels of cross border police co-operation should be maintained;
- R.44 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 is devolved;
- R.45 Neither the National Crime Agency nor police pensions should be devolved; and
- R.46 The Police College, independent complaints and regulation bodies and common services such as Police National Computer system and, where appropriate, procurement arrangements should continue to operate on an England and Wales basis to ensure economies of scale, with charging systems and the terms of service being agreed by the two Governments.

7.3 JUSTICE

Current position

- 7.3.1 In this section we discuss the justice system in Wales. This is a shorthand term for something rather complex that includes the judiciary, courts, criminal prosecution, prisons, probation services, youth justice, sentencing guidelines, legal aid [as well as](#) ~~and~~ the criminal and civil law.
- 7.3.2 Justice is currently non-devolved. The judiciary is independent from government, while the Ministry of Justice is responsible for the administration and operation of most aspects of the justice system, though the Crown Prosecution Service (CPS) is answerable to the Attorney General.
- 7.3.3 The National Assembly exercises no legislative competence in terms of justice, and the Welsh Ministers have no executive powers directly in relation to the justice system. However, Acts of the Assembly can create offences or otherwise make the law in Wales different from that in England. Welsh Ministers also have executive powers in relation to devolved tribunals.
- 7.3.1 While justice is not devolved, the Welsh Government does play a role in the delivery of justice services in Wales. The Ministry of Justice's responsibilities interact to a degree with those of the Welsh Government, and there is a good deal of co-operation and good practice on the ground. In particular, responsibilities for offender management, youth justice and criminal, civil, family and administrative law and justice interrelate strongly with the Welsh Government's responsibilities in respect of education and training, health and health services, housing, local government and social welfare.

Box 7.4: Evidence on the justice system

Our Beaufort Research Opinion Poll showed that 35 per cent were in favour of the National Assembly for Wales and Welsh Government having responsibility for the courts and criminal justice system in Wales. In our questionnaires, 52 per cent were in favour of devolving the courts and prisons

The UK Government said: *'England and Wales share a single legal jurisdiction, which has continued to evolve over hundreds of years to meet the changing needs of British society. We support the continuation of the current unified system, which in our view works well whilst offering scope for close working between devolved and non-devolved partners in delivering justice services in Wales. We believe that a separate Welsh legal jurisdiction would offer questionable tangible practical benefits to people living in Wales and could complicate the system unnecessarily for those who need to use it.'*

The Welsh Government said: *'We believe that Policing and Justice (including criminal justice) should in principle be matters of devolved competence. But the potential costs and risks are such that we do not feel able to argue for transfer of criminal justice and administration of justice responsibilities at the present time; these should be matters to be devolved in longer time, without the need for new primary*

legislation. Devolution to the Assembly of responsibility for policing in Wales can and should be undertaken, however; and the Welsh Ministers should have executive responsibilities in relation to youth justice.'

Sir Roderick Evans, former High Court Judge, said: *'The creation of a Welsh jurisdiction would enable the development of a justice system tailor made to meet the needs of Wales, bring the administration of justice closer to the people of Wales and create jobs and career structures not presently available in Wales.'*

Professor John Williams, Department of Law and Criminology, Aberystwyth University, said: *'There is a strong case for fully devolving responsibility for the probation service. Again, the link with social services and housing (particularly when addressing the needs of former prisoners) are central to effective probation work. The future of probation under the Ministry of Justice is uncertain with the move towards privatisation. This could lead to a policy mismatch between, for example, probation and social services within Wales. Disjointed provision does not serve the needs of those using the probation service, or reduce the risk of reoffending. Reference should be made to three other areas of the criminal justice system. i. The criminal courts: the devolution of responsibility for the criminal courts is part of the broader debate on a Welsh jurisdiction discussed below. At present, the time is not right. ii. The prison service: the crisis within prisons, particularly overcrowding, makes devolving the Welsh prison service too complex. Given the need for a variety of prison accommodation, the existing prison estate in Wales may not yet be flexible enough to meet the needs of the Wales prison population. iii. Crown Prosecution Service: Logically if policing powers are devolved, there is a case for greater devolution of the CPS Wales functions, although the England and Wales CPS, and/or the Director of Public Prosecutions, should retain responsibility for areas such as terrorism and politically sensitive cases. Devolution of the CPS would follow the model of the Crown Office and Procurator Fiscal Service in Scotland, and the Public Prosecution Service in Northern Ireland.'*

Professor Thomas Glyn Watkin, retired academic and former Senior Civil Servant with the Welsh Assembly Government, said: *'Against this background, it is arguably time to recognize formally that cases involving the application of the law which relates only to Wales should as a general rule be heard in Wales, both at first instance and at appeal, with only final review to the Supreme Court requiring the litigation to leave the country.'*

The Welsh Committee of the Administrative Justice and Tribunals Council (WCAJTC) said: *'Regardless of whether there is to be a devolved judicial system, there are various means by which cohesion within current arrangements can be encouraged, in that there is greater scope for collaboration and coordination between arms of the UK and Welsh Governments responsible for administrative justice issues.'*

The Law Society said: *'The debate on a separate jurisdiction for Wales is progressing. The inquiry by the Constitutional and Legislative Affairs Committee of the Assembly*

("the Constitution Committee") and the Welsh Government's own call for evidence last year attracted much interest and reflected informed opinion. The Law Society's response to the Constitution Committee inquiry addressed the impact on solicitors and legal services.'

The Wales in a Changing Union project said: 'It seems to be common ground, even among those not previously disposed to devolution, that a distinct Welsh jurisdiction, or something very much like it, will emerge. That being so, we consider it necessary to plan ahead for that constitutional change, rather than let it emerge in a gradual, ad hoc and unmanaged manner. Our view is that any Act of Parliament establishing a reserved powers model should also make provision for establishing a Welsh legal jurisdiction.'

Lord Morris of Aberavon said: 'I am a late convert to the transfer of policing, although I would not be happy with one police force for Wales. Criminal Justice, depending on how it is defined, is more problematic and there are obvious difficulties here.'

Sir Stephen Laws, former First Parliamentary Counsel, said: 'The existence of separate rules of recognition would tend to suggest a need for separate courts systems. On the other hand, as things stand, there may be some areas of jurisdiction that would need to be exercised so infrequently that it would be organisationally and financially inefficient to have two wholly separate courts systems for England and Wales. Where that is the case, one court with one jurisdiction would need to be replaced by one court with two jurisdictions and the need to decide both which to exercise and how interactions between them are to be resolved. That would produce its own added complexity and inefficiencies.'

Professor Alan Trench, [School of Criminology, Politics and Social Policy](#), University of Ulster, said: 'There is no good reason, in my view, why a 'minimal' legal jurisdiction for Wales could not be established at least in the first instance. The key characteristics of a legal jurisdiction are a defined geographical area, and a defined (or identifiable) body of law that applies in that area. There is no reason why the body of law should be unique to that area, and there are plenty of reasons, in a Welsh context, for maintaining close connections with 'English' law.'

On the subject of a separate legal jurisdiction for Wales, the National Assembly's Constitutional and Legislative Affairs Committee Inquiry into a Separate Welsh Jurisdiction (December 2012) said the following:

'We note that many witnesses agreed that any future jurisdiction should be based on the following features:

- a defined territorial extent – for our purposes, Wales;*
- a body of law, which would include laws made by the National Assembly as well as inherited laws at the time any jurisdiction is introduced; and*
- a range of distinct legal institutions and a court system.*

'From the evidence received, we believe that a Welsh legal identity is getting

stronger, regardless of whether a separate jurisdiction is required or not. As a result, we believe that changes should be made within the current unified Wales and England model to ensure that it reflects and recognises this emerging legal identity... We accept that the case for a separate Welsh jurisdiction will be strengthened as divergence between laws in Wales and England increases.'

In its evidence to this inquiry, the Welsh Committee of the Judges' Council said the following about the possibility of a separate legal system for Wales: *'Undoubtedly the law in Wales is becoming different from that in England in some areas, particularly public law. That is not however the case with important parts of the body of the law such as criminal law (save in minor respects), consumer protection and employment law. Increased difference in laws increases the rationale for separately appointed judges and separately organised courts.'*

'The devolution of criminal justice would clearly be a major step. If the power to make criminal law remained with the UK Parliament, but its administration was devolved, tensions could develop. Commercial law could remain common between England and Wales. Consideration would need to be given to the administration of other specialist areas of law, for example, charities law. We would see no difficulty, if a separate jurisdiction were established, for Wales to remain a common law jurisdiction, as has Northern Ireland.'

Box 7.5: Key facts on justice

In terms of fairness 62 per cent thought the criminal justice system in England was fair compared to 65 per cent in Wales, for effectiveness the figures were 44 per cent and 45 per cent.

The Wales reoffending rate is 51.6 per cent compared to the England and Wales average of 46.4 per cent.

In terms of spending per head, the England/Scotland/Wales/Northern Ireland figures for 2011-12 for law courts are: £103/£95/£106/£161; and for prisons £64/£62/£70/£99.

Assessment

7.3.2 The overriding principle of our consideration is that access to justice is paramount and that therefore the justice system should be brought as close as possible to the community it serves (subsidiarity) while maintaining the quality of justice dispensed (effectiveness).

7.3.3 Criminal justice should be distinguished from civil justice. In criminal justice, there are a number of stages: the determination by the legislature of what is a crime; the deterrence and prevention of crime; the detection of offences; the prosecution of offenders; the determination of guilt; the imposition of penalties (ranging from on-the-spot fines to life imprisonment); the treatment of offenders; the system of appeals; and the treatment and rehabilitation of offenders.

- 7.3.4 Civil justice is the system under which disputes between people, businesses and other organisations are determined. It is governed by common law and statute, by legal concepts such as tort and by the rules of ~~the~~ court. Examples are family law and commercial law. There is also public law and administrative justice, governing the operation of way in which public bodies work.
- 7.3.5 Separate arrangements for Wales should not be established 'just to be different': giving responsibility for strategic direction to Welsh institutions does not preclude using mechanisms which operate on an England and Wales basis in order to take advantage of existing experience and benefit from economies of scale, provided this is consistent with the principle of local access to justice.
- 7.3.6 In relation to criminal justice, our starting principle is that the National Assembly for Wales should have responsibility in those areas that have the greatest impact on the community and the day-to-day lives of the citizens of Wales – reflecting the principles above.

Youth justice, prisons and probation

- 7.3.7 Currently, youth justice for England and Wales is overseen by the Youth Justice Board, a non-departmental public body, accountable to the Ministry of Justice. Board members are appointed by the Secretary of State for Justice. Offenders between 10 and 17 go through the youth justice system. The great majority are dealt with in the community, though if found guilty of a serious crime, there is an option of secure custody. In 2011-12, fewer than 100 young people from Wales were in custody.⁴
- 7.3.8 In his report of December 2009⁵ commissioned by the Welsh Government, Professor Rod Morgan found that the factors linked to youth offending were often related to devolved services, such as education and training, social services, and health, while youth offenders were dealt with through non-devolved services, such as the police, Youth Offending Teams and ~~the~~ youth courts. He concluded that the Welsh Government should also have administrative responsibility for youth justice, given the related responsibilities it already held. Policy might then be better integrated.
- 7.3.9 We agree with this conclusion and therefore believe that the administrative responsibility for the treatment and rehabilitation of youth offenders should be devolved to Welsh Ministers, particularly bearing in mind the close links that exist with services provided by local authorities. The small number of young offenders who are sent to secure custody cannot currently be accommodated in Wales, and there will need to be cross-border management of these offenders between England and Wales with an appropriate charging system.
- 7.3.10 There would be a small cost implication as a result of establishing a separate youth justice system in Wales of around £0.3million, according to the UK

⁴ Youth Justice Statistics 2011/12, Page 39

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218552/yjb-stats-2011-12.pdf

⁵ reference

Government. These costs include the administrative costs of placing young people in custody, costs relating to Board activity in Wales and executive management oversight of the Youth Justice Board Cymru.

- 7.3.11 Adult offenders who receive community or custodial sentences are the responsibility of the National Offender Management Service (NOMS). From April 2014, NOMS ~~will have~~ ~~has decided to appoint~~ a Director for Wales in order to acknowledge its relationship with the Welsh Government. The Director ~~for~~ Wales will have responsibility for probation services in Wales, (including direct responsibility for the probation of serious offenders) and for the four existing prisons in Wales. Probation services for less serious offenders will be provided by the private sector.
- 7.3.12 The provision of probation services in Wales is currently contracted to the Wales Probation Trust by the National Offender Management Service on behalf of the Secretary of State for Justice. The cost of probation services in Wales is around £56 million, according to UK Government evidence. No additional costs of devolution have been identified, although if contracts were separated out upon devolution, there might be costs associated with diseconomies of scale.
- 7.3.13 In principle, we believe that the treatment and rehabilitation of adult offenders in the community through the probation service should be devolved to the National Assembly for Wales. This would allow better integration with areas already devolved that are crucial for offender rehabilitation, including help to overcome substance misuse, housing, education and training. However we note the strong links between the prison and probation services in Wales, which may suggest that it would be undesirable to devolve one without the other.
- 7.3.14 There are arguments for and against devolution of prisons. Devolution of prisons would enable the Welsh Government to implement distinctively Welsh policies in areas such as tackling reoffending and reducing recidivism, by, for example, providing adult education service or training in prisons. Community prisons could be established in the places where offenders live, so making their re-integration into the community easier, as well as making visits easier for their families. There could be provision for female prisoners in Wales (there is none at present) and there could be greater sensitivity to the needs of Welsh-speaking prisoners. Scotland and Northern Ireland and many states in federal systems manage their own prison systems effectively.
- 7.3.15 On the other hand, the prison service is integrated between England and Wales in terms of planning and management. Furthermore, a self-contained Welsh prison estate could lack flexibility, with less ability to move prisoners between institutions and a greater need to predict the numbers and types of prison places required in the future. If self-contained, it would also be expensive, given that it would require the building of new accommodation for women and high security prisoners.
- 7.3.16 The UK Government suggested to us that, in a self sufficient devolution model, the additional costs of providing Category A and women's

accommodation, plus additional overhead costs of operating a devolved prison system, would be a one-off cost of [around](#) £101.5million, with additional annual running costs of around £22.5million. In the current financial climate we think additional costs of this order cannot be justified. However, these figures assume that a devolved Welsh prison service would house all Welsh prisoners, and that no English prisoners would be housed in Wales. A cross border charging system is also possible.

- 7.3.17 There is certainly a mismatch between the number of prison places in Wales and the number of Welsh prisoners. We understand that at present there are more Welsh prisoners in England than English prisoners in Wales. However this position will be reversed when the new prison in Wrexham enters service.
- 7.3.18 As we argue throughout this report, we do not believe devolution entails self-sufficiency. We recognise that there will need to be cross border co-operation, and that even under a devolved system there would be a case for some Welsh prisoners to be detained in England and vice versa. As in the case of the health service it should be possible to establish a suitable charging system agreed between the two Governments. While such a system would be cheaper and more practical than a fully self contained system, it would mean that a Welsh Government's policies to rehabilitate Welsh prisoners would apply only to those Welsh prisoners held in Welsh prisons. The same problem arises for English prisoners held in Wales.
- 7.3.19 So while we recognise there is a persuasive case in favour of devolution of prisons and probation in principle, we also recognise the practical difficulties in this area. We recommend that the two Governments should jointly carry out a feasibility assessment as a first step.
- 7.3.20 Irrespective of this, we believe that a formal mechanism should be established for Welsh Ministers to contribute to policy development on adult offender management. We welcome the commitment of the new Director of the National Offender Management Service, Wales to work with the Welsh Government on education, training and health care provided for prisoners in Wales.

The Crown Prosecution Service (CPS)

- 7.3.21 CPS Cymru Wales is one of 13 regional divisions of the CPS, and the CPS recognises Wales's "unique identity". Administratively CPS Cymru Wales is largely self-contained. However, there can be no difference in prosecution policy between Wales and England, and we accept that, so long as the criminal law is not devolved, there is little case for the devolution of prosecution policy. If criminal law is in future devolved, then the case for a separate prosecution service in Wales, as in Scotland and Northern Ireland, is a strong one.

The Court Service

Box 7.8: Administrative Devolution of Courts in Wales
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The operation of the Administrative Court in Wales is a good example of how the courts can be increasingly devolved in an administrative sense.

Until 1999, Administrative Court cases could only be issued and heard in London. In the last 10 years, active steps have been taken to ensure that Administrative Court claims can be issued, managed and heard out of London; and, in particular, that decisions affecting people in Wales are administered and heard in Wales.

In April 2009, a discrete Administrative Court office was established in Cardiff, with the facility for issuing and managing Administrative Court claims. The office is designed to enable all Administrative Court proceedings to be started, administered and heard in Wales, save for very narrow excepted classes of claim (e.g. terrorist, extradition and Proceeds of Crime Act proceedings).

In 2012 the then President of the Queen's Bench Division, issued a protocol for transfer to ensure that, as a matter of mechanics, Welsh claims would be transferred to the Administrative Court in Wales in all but exceptional circumstances. The practice direction and protocol are also complemented by policy guidance issued by the Administrative Court in Wales which provides that, in the absence of exceptional circumstances, claims with a connection with North Wales will be heard in North Wales. Unlike the English regions, although most Welsh cases are heard in Cardiff Civil Justice Centre, the Administrative Court in Wales is generally willing to sit away from its main centre, and hears cases at venues throughout Wales.

7.3.22 There is already a great deal of administrative devolution in the courts system. [The administration of the courts and cross-border \(i.e. non-devolved\) tribunals in Wales is the responsibility of Her Majesty's Courts and Tribunals Service \(HMCTS\) Wales. The administration of the devolved tribunals is the responsibility of the Welsh Government.](#)

7.3.23 Below the High Court, justice is **already** administered in Wales by Welsh courts with magistrates (who are appointed locally) and judges who are appointed to the Wales circuit. At the High Court level, several welcome initiatives have already happened, a good example of which is described in Box 7.8. [A Mercantile Court, a Chancery Court and an Administrative Court have been established in Wales. Both the Civil and Criminal Divisions of the Appeal Court sit on occasion in Wales-, as does the Upper Tribunal.](#)

7.3.24 While, in the absence of full devolution, we recognise that there will be cases of complexity or those involving specialist areas of law that will be heard in London, we believe that, in general, cases [at all levels](#) arising in Wales or involving Welsh parties [at all levels](#) should be able to be heard in Wales. There is a particular issue in cases involving laws that apply only in Wales:- ~~W~~[we](#) believe that they should be heard in Wales.⁶

7.3.25 Thus we believe that the various divisions of the High Court should sit in Wales on a regular basis to hear cases that arise in Wales. A High Court office might with benefit be established in Wales to co-ordinate High Court sittings

⁶ Technically laws passed by the National Assembly for Wales are part of the law of England and Wales, although generally speaking they only apply in Wales and so are known as Welsh laws.

in Wales. We also believe that High 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 Welsh law. Similarly, the divisions of the Appeal Court should continue to sit in Wales, [and do so on a regular basis](#), to hear cases that arise in Wales. 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 Welsh law. While the Supreme Court will normally sit in London, we understand that the Court that court is also willing to sit in Cardiff, and we very much welcome this.

7.3.26 [The Welsh Language Act 1993 provides that the Welsh language is treated on the basis of equality in the administration of justice in Wales, and practice directions and other guidance developed by judiciary in Wales ensure that Civil, Family and Criminal Courts apply the principles of the Act in practice. The Judicial College is working with HM Courts and Tribunal Service's Welsh Language Unit to provide training in Welsh so as to broaden the availability of appropriately trained Welsh-speaking judiciary. We believe that there should be further mechanisms to ensure that there are judges at all levels who are competent to hear cases in the Welsh language.](#)

7.3.27 In principle we [also](#) believe that Welsh-domiciled defendants, appellants or plaintiffs who wish to use the Welsh language in court proceedings transferred to England should be able to do so, as they already can for cases heard in Wales. We acknowledge that further consideration needs to be given to the details including where the parties do not all agree and the issue of cost effectiveness and availability of resources.

7.3.28 ~~There should also be mechanisms to ensure that there are judges at all levels who are competent to hear cases in the Welsh language.~~

7.3.29 Beyond administrative devolution we have also considered whether responsibility for the court system and judiciary should be devolved to the Welsh Government. We recognise that it is unusual for a devolved state or region that has legislative powers not to have a court system of its own where cases involving those laws are heard, though devolved courts do not have to deal exclusively with devolved laws: in the case of Scotland and Northern Ireland, there are devolved court systems that deal comfortably both with devolved law and non-devolved law.

7.3.30 There are two separate issues here. The first is whether the administration of the courts in Wales should be transferred to the Welsh Government. Though there would be clear advantages in devolution of courts administration, with the opportunity for court provision for example to reflect Welsh needs, there would be substantial costs. According to the UK Government, a devolved court service would cost [approximately](#) an additional £10m, largely consisting of IT system and support costs, on top of the existing [£70 million costs of HMCTS Wales of about £70million](#).

7.3.31 The second issue is whether Wales should have a separate judiciary and a separate legal profession. In terms of a devolved judiciary, the costs would be limited in routine day-to-day management terms. According to the UK

Government, the total additional cost of operating a separate ~~j~~Judicial ~~e~~Office would be around ~~£1.5million and that of separate~~ and judicial appointments and complaints functions would be ~~£1.5m and~~ around £0.5m ~~(JAC/JACO)~~ respectively.

- 7.3.32 The principal argument here is that there needs to be a devolved Welsh judiciary and legal profession because of the existence of separate Welsh laws. Divergence between the law in Wales and England is at present small. However as more Welsh laws are introduced and Westminster passes further laws that apply to England only, and as there is more administrative devolution of the courts, the case for a Welsh judiciary becomes stronger.
- 7.3.33 Although Scotland and Northern Ireland have their own judiciaries, it is also possible to share a judiciary: the Supreme Court is retained by some Commonwealth countries as their final court of appeal, and Judges from the United Kingdom sit in the higher courts of the Channel Islands, [for example](#). The advantages of a wider pool of expertise are clear. If our recommendations on administrative devolution of the courts are implemented, we see little immediate advantage in creating a separate Welsh judiciary.
- 7.3.34 As far as the legal profession is concerned, people will use lawyers who are experienced in the relevant area of law and are therefore likely to use lawyers with experience of Welsh law for relevant cases in Wales. There is no need to create a separate legal profession to achieve this. There would also be potential disadvantages for lawyers in Wales who represent clients in England if there were separate legal professions, even if many lawyers were qualified in both jurisdictions.
- 7.3.35 We are not therefore convinced of the case for devolving the court system or creating a Welsh judiciary and legal profession at present. We also recognise that there seems from our opinion poll to be limited public appetite for devolution in this area. However, a separate Welsh courts system and a separate Welsh judiciary is something that must be contemplated in the future, and we recommend that the two Governments review the case for this within the next ten years.

Sentencing policy

- 7.3.36 We do not recommend that there should be different sentencing policies or guidelines in Wales for the same offences as England until or unless the criminal law is fully devolved to Wales.

A separate criminal and civil law for Wales

- 7.3.37 Some laws created by the National Assembly under its devolved powers already carry criminal sanctions for breach, and the National Assembly should continue to be able to impose criminal sanctions in areas of devolved responsibility. In this context, it will be important to ensure that the reserved powers model does not inadvertently remove the ability of the National

Assembly to create criminal sanctions where it is necessary to support its wider devolved law making powers.

- 7.3.38 However there is a wider question as to whether the criminal law as a whole should be devolved, as it has been in Scotland and Northern Ireland. Devolution could mean, for example, the law of theft or of offences against the person could be different in England from Wales, or that penalties could differ between the two jurisdictions. While such devolution would meet our principle of subsidiarity, we recognise that devolving criminal law would be a very substantial change, for which there is currently no widespread support.
- 7.3.39 Similar arguments apply in respect of civil law and procedure. The National Assembly already has wide legislative powers in public law aspects of the civil law, and it will be important to ensure that the reserved powers model does not inadvertently remove powers from the National Assembly. Giving the National Assembly the power to make different commercial, matrimonial, inheritance and property law would be another very major change.
- 7.3.40 Devolution of full criminal and civil law powers would not mean that the UK Parliament would no longer legislate for the United Kingdom as a whole: it has frequently done so since devolution in criminal law areas in Scotland with the consent of the Scottish Parliament. Nor would it mean that there would necessarily be great divergence in the law: it is noticeable that law is very similar in Northern Ireland to England and Wales despite the powers that have existed since Northern Ireland came into existence for laws to differ (Scotland has always had a different Roman law model). No doubt a wider debate on these issues will emerge over time.

Other Justice issues

- 7.3.41 Scotland and Northern Ireland are each represented on the Supreme Court bench. We heard the argument that there should similarly be at least one judge on the Supreme Court with particular knowledge and understanding of the distinct requirements of Wales and Welsh law. We note that the President of the Supreme Court has already announced that [on any hearing appeal](#) involving Welsh devolution issues, the Supreme Court panel will, if possible, include a judge who has specifically Welsh experience and knowledge. We would like to go further, and therefore recommend that there should be a requirement that, [if feasible](#), one member of the Supreme Court should have experience and knowledge of the requirements of Wales. We have earlier welcomed the willingness of the Supreme Court to sit in Wales.
- 7.3.42 Tribunals provide an important form of redress of citizens against a government's decision. Welsh Ministers should continue to have executive competence on tribunals in devolved areas of policy and there is a case for considering legislative competence also. However there should be clarity and coherence in the relationship between devolved and non-devolved tribunals; and the process of appointment, training and terms and conditions of

employment should be consistent. It is important that tribunals are seen to be independent in Wales as elsewhere.

- 7.3.43 Some suggested in evidence that responsibility for Legal Aid should be devolved, as it is in Scotland and Northern Ireland. If legal aid were devolved, there would be a transfer of around £110m plus ~~an~~ additional costs of around £5m per annum from loss of economies of scale.
- 7.3.44 We believe it is important that people in Wales should have the same access to the law as in England, and therefore Legal Aid should not be devolved until such time as there ~~may be~~ is wider devolution of the legal system. However, the UK Government should fully consult the Welsh Government and other key stakeholders to ensure that the operation of the legal aid system reflects Welsh circumstances.
- 7.3.45 Currently, the Welsh Ministers are unable to propose law reform projects to the Law Commission in the hope of improving the effectiveness and coherence of the [laws that apply in Wales](#) ~~Welsh Statute book~~. We believe that ~~the~~ Welsh [Government Ministers](#) should be able to propose law reform projects to the Law Commission on a similar basis to UK Government Ministers.
- 7.3.46 A concern raised in a number of submissions to us related to the difficulty sometimes of establishing what the law is that applies in Wales. Laws for Wales have been made by Parliament and the National Assembly, and laws made by each have been amended by the other, with statutory instruments sometimes amending primary legislation to complicate the picture further. It is important that law should be accessible to practitioners and citizens. We recommend that a mechanism be sought to ensure the expeditious publication of up-to-date law applying in Wales, and that a programme of consolidation of law should be undertaken.
- 7.3.47 Another aspect of accessibility is that law should be as clear and simple as possible. The existence of primary powers in Wales is an opportunity for law to be drafted in a form that is readily understood.
- 7.3.48 As an example of the liaison we are suggesting elsewhere between UK Ministers and the National Assembly, there should be a periodic report by the UK Government, in consultation with the Welsh Government, to Parliament and the National Assembly on how access to justice is improving in Wales.
- 7.3.49 It would be helpful for there to be regular dialogue between the Lord Chief Justice of England and Wales and Welsh Ministers on the administration of justice in Wales.

Box: timetable for devolving the police and justice system

A suggested timetable for devolving policing and justice is:

2016: devolution of youth justice system

2017: devolution of the police

2019: review of devolution of prisons and probation

On-going: administrative devolution of the court system

By 2025: review of legislative devolution of the court system, judiciary and CPS.

The economic importance of the Welsh legal sector

7.3.50 The evidence presented to us emphasised the economic importance of developing a strong Welsh legal sector including: the opportunity which devolution brings to Welsh law schools; the need for a growing indigenous legal profession so that the courts become less dependent on advocates from outside Wales; the wider role which a strong Welsh legal profession plays in the development of the Welsh economic and civil polity; and the importance of an outward facing Welsh legal sector playing its full part in the United Kingdom and internationally.

Recommendations

R.47 The treatment and rehabilitation of youth offenders should be devolved to Welsh Ministers;

R.48 The case for devolution of responsibility for probation and prisons should be reviewed by the two Governments after policing is devolved. In the meantime, we propose that a formal mechanism be established for Welsh Ministers to contribute to policy development on adult offender management;

R.49 Once policing has been devolved, the case for devolving responsibility for other aspects of the prosecution of offenders should be considered, including the CPS;

R.50 There should be further administrative devolution of the court system, including:

a. the various divisions of the High Court should sit in Wales on a regular basis to hear cases that arise in Wales, other than highly specialist cases;

b. a High Court office should be established in Wales to coordinate High Court sittings in Wales;

c. the divisions of the Appeal Court should continue to sit in Wales on a regular basis to hear cases that arise in Wales; and

d. 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.

R.51 The criminal law of England and Wales should not be devolved. But we expect that a wider debate on these issues will emerge over time. It will be important to ensure that the reserved powers model does not inadvertently remove existing criminal law powers from the National Assembly for Wales;

- R.52 It will be important to protect the single economic market by ensuring that commercial law remains the same in Wales as in England – this includes contract and tort. Other areas of civil and administrative law and procedure should remain the same as in England, including matrimonial, inheritance and property law. Again, it will be important to ensure that the reserved powers model does not inadvertently remove existing powers from the National Assembly;
- R.53 There should be at least one judge on the UK Supreme Court with particular knowledge and understanding of the distinct requirements of Wales;
- R.54 Welsh Ministers should continue to have competence on tribunals in devolved areas of policy; and there should be clarity and coherence in the relationship between devolved and non devolved tribunals; the process of appointment, training and terms and conditions of employment should be consistent, and tribunals should be seen to be independent of government;
- R.55 Legal aid should not be devolved, although the UK Government should fully consult the Welsh Government and other key stakeholders to ensure that the operation of the legal aid system reflects Welsh circumstances;
- R.56 Welsh Ministers should be able to propose law reform projects to the Law Commission on a similar basis to UK Government Ministers;
- R.57 There should be improved access to all legislation in areas of devolved powers through publication of a consolidated body of Welsh primary and secondary legislation;
- R.58 As an example of the liaison we are suggesting elsewhere between UK Ministers and the National Assembly for Wales, there should be a periodic report by the UK Government in consultation with the Welsh Government to Parliament and to the Assembly on how access to justice is improving in Wales. There should be regular dialogue between the Lord Chief Justice of England and Wales and Welsh Ministers on the administration of justice in Wales; and
- R.59 Since the courts will increasingly need to deal with laws made in Wales and applying only in Wales, the administrative form of a separate jurisdiction is likely to evolve. If there is sufficient support across Wales in the future, a legislatively devolved court service could be considered and we recommend that the two Governments review the case for this within the next ten years.

7.4 CIVIL CONTINGENCIES

Current position

- 7.4.1 Although civil protection and emergency powers are not [explicitly in themselves](#) devolved, the role of the Welsh Government in co-ordinating civil protection activity in Wales has evolved. For example, it now co-ordinates cross-cutting activities and the work undertaken by Local Resilience Forums.

Box 7.9: Evidence on Civil Contingencies

The UK Government said: 'The respective roles of devolved and non-devolved bodies in the response phase of an emergency may not always be clear in advance. Clarity of roles and responsibilities is important, as is the ability to work together in planning for emergencies and to build, as far as possible, on day-to-day arrangements in the response phase. While the Government believes that no major change is necessary, understanding of how these arrangements might work better in practice would be helpful.'

The Welsh Government said: 'The Welsh Government has very limited formal powers in respect of civil contingencies, although it exercises a de facto role of leadership and co-ordination. A recent Wales Audit Office report on 'Civil Emergencies in Wales' concluded that 'the Welsh Government's remit for routine leadership and coordination of civil contingencies is particularly unclear. In addition, the expectation that the Welsh Government will routinely provide some leadership to the organisations that are accountable for civil contingencies is also potentially confusing, because the Civil Contingencies Act 2004 does not appear to empower the Welsh Government in this way'. We believe that transfer of the Ministerial functions in Part 1 of the Civil Contingencies Act 2004, with full transfer of the necessary resources, would recognise the Welsh Ministers' de facto role and clarify accountability.'

Assessment

7.4.2 In the light of the evidence of the two Governments we suggest that the two Governments should ensure that there is a clear understanding of their respective roles, including any agreed transfer of executive powers if necessary to ensure effective resilience.

Recommendation

R.60 The two Governments should ensure that there is a clear understanding of their respective roles in relation to civil contingencies and emergencies, including any agreed transfer of executive powers if necessary to ensure effective resilience. These arrangements should be publicly available.

7.5 LORDS LIEUTENANT

Current position

7.5.1 Lords Lieutenant represent the Crown in each of the counties of the United Kingdom, and are important to civic life. ~~They are appointed by the monarch on the advice of the Prime Minister~~ The monarch on the advice of the Prime Minister appoints them. In Wales, the First Minister ~~conveys~~ decides a recommended the name of an individual ~~to and then asks~~ the Secretary of State for Wales ~~for recommendation to commend~~ to the Prime Minister (who

~~in turn make~~~~to make~~ the recommendation to the Queen).⁷ ~~{footnote to~~
~~[https://www.gov.uk/government/uploads/system/uploads/attachment_data/](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80177/Protocol_for_Appointment_Process_of_Lord-Lieutenants-July-09.pdf)~~
~~[file/80177/Protocol_for_Appointment_Process_of_Lord-Lieutenants-July-](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80177/Protocol_for_Appointment_Process_of_Lord-Lieutenants-July-09.pdf)~~
~~[09.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80177/Protocol_for_Appointment_Process_of_Lord-Lieutenants-July-09.pdf)~~

Box 7.10: Evidence on Lords Lieutenant

The Welsh Government said: ‘There is also the question of the responsibility for recommending the appointments of Lord Lieutenants. Currently, this is a UK Government function, although the administrative work in relation to these appointments, and to Lords Lieutenants’ budgets, is undertaken by Welsh Government officials. These arrangements appear to the Welsh Government to be outdated now that the First Minister of Wales is both a Crown appointee and Privy Counsellor, able to make recommendations to Her Majesty in his own right.’

Assessment

7.5.2 In Scotland, the First Minister’s recommendation is conveyed directly to the Prime Minister to make to the Queen. There seems to be no **clear** reason why Wales has an additional step.

7.5.3 We suggest there is a case for greater transparency in the appointment process, with recommendations for appointments being devolved while continuing to be agreed by the two Governments.

Recommendation

R.61 The First Minister should be able to ~~make commend any a~~ recommendation for a Lord Lieutenancy **directly** to the Prime Minister;

7.6 EQUAL OPPORTUNITIES

Current position

7.6.1 Equality of opportunity is **a subject which is** largely non-devolved. The Equality Act 2010 provides a comprehensive legal framework in relation to discrimination on the basis of specified protected characteristics. There are a few exceptions to the non-devolved nature of the Equality Act:

- the power for Welsh Ministers to prescribe specific equality duties for public bodies in Wales in devolved public services. The equality duty comprises a General Duty which applies **equally** across Great Britain, and specific duties ~~(regulations)~~ which apply to devolved services; and
- the socio-economic duty in the devolved public sector which requires public authorities to have due regard to reducing the inequalities of outcome **as a result of** ~~from~~ socio-economic disadvantage.

Box 7.11: Evidence on Equal Opportunities

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~~[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80177/Protocol_for](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80177/Protocol_for_Appointment_Process_of_Lord-Lieutenants-July-09.pdf)~~
~~[_Appointment_Process_of_Lord-Lieutenants-July-09.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80177/Protocol_for_Appointment_Process_of_Lord-Lieutenants-July-09.pdf)~~

[On the duty in relation to socio-economic disadvantage](#) tThe UK Government said: *'We have announced our intention to repeal this duty (which has never been commenced) in respect of GB-wide and English authorities. We are working with the Welsh Government to agree an approach which allows Wales to commence the duty for Welsh bodies (as specified in the Equality Act 2010).'*

The Welsh Government said: *'For purely pragmatic reasons, it is not possible for the Welsh Government to argue that the Assembly should have full legislative powers in relation to equalities issues. If equality were not reserved, it would require the Welsh Government and the National Assembly to take over the full range of responsibilities currently carried out at the UK level, including implementing all developments in EU equality legislation into law in Wales. This is impractical in resourcing terms. Devolved competence should however be strengthened or clarified, by way of appropriately drafted Exceptions to the Equality reservation.'*

The view of the Equal and Human Rights Commission was: *'Three recommendations are made for consideration by the Commission on Devolution. These are: The National Assembly should be given powers to build on equality and human rights legislation including the Equality Act 2010 and the Human Rights Act 1998. The National Assembly should be given full primary legislative competence in relation to the Public Sector Equality Duty. The National Assembly should be given competence to strengthen its relationship with the EHRC.'*

[The other Commissioners said:...]

Assessment

7.6.2 The recent Commission on a Bill of Rights noted the distinctive approach towards human rights taken by the National Assembly and Welsh Government, including the development of a system of rights protection in Wales noting: *'We would want strongly to support the right of the devolved administrations and legislatures, in their areas of competence, to introduce additional rights if, but only if, they thought it right to do so.'*

7.6.3 It also noted general levels of satisfaction with the Human Rights Act in Wales: *'In general, there was satisfaction with the Human Rights Act and the current system of rights protection developed by the Welsh Government and Assembly within its devolved competence under the Government of Wales Act 2006. This included legislation such as the Welsh Language (Wales) Measure 2011 and the Rights of Children and Young Persons (Wales) Measure 2011. As a result, it was suggested that these and other policy areas were now a matter for the devolved institutions in Wales and not issues which should figure in any discussion on a UK Bill of Rights. Concern was also expressed that if a UK Bill of Rights contained justiciable provisions that touched on devolved areas of competence, such as language, they could disturb the*

delicate balancing which had been achieved in Wales through instruments such as the Welsh Language Measure.'

- 7.6.4 In the light of the above evidence, we support the principle that the Welsh Government should have powers over rights in devolved areas of policy and the clarification of powers sought by the Welsh Government.

Recommendation

R.62 On equal opportunities:

- a. Welsh Ministers should continue to have powers over rights in devolved areas of policy, and consideration should be given to extending these executive powers to legislative competence in the context of a reserved powers model
- b. this should include the existing power to introduce specific equality duties for the Welsh devolved public sector; powers over the socio-economic duty in the devolved public sector which requires public authorities to have due regard to reducing the inequalities of outcome from socio-economic disadvantage; accountability for the Equality and Human Rights Commission in devolved areas; and powers over positive discrimination in the devolved public sector.

7.7 WELSH LANGUAGE

Current position

- 7.7.1 Legislative competence over the [use of the Welsh language](#) is devolved to the National Assembly. This means that the National Assembly can legislate in relation to the Welsh language, other than in the specific case of the use of the Welsh language in courts (or areas such as broadcasting that are exemptions from the Assembly's competence under the 2006 Act). ~~The Welsh Language Act 1993 sets out that the Welsh language is treated on the basis of equality in the administration of justice in Wales, and practice directions and other guidance developed by judiciary in Wales ensure that Civil, Family and Criminal Courts apply the principles of the Act in practice. The Judicial College is working with HM Courts and Tribunal Service's Welsh Language Unit to provide training in Welsh so as to broaden the availability of appropriately trained Welsh speaking judiciary.~~

Box 7.12: Evidence on the Welsh Language

The Welsh Language Commissioner said: *'The Welsh Language Commissioner is of the opinion that any further amendments to the Welsh constitution should contain a clear statement on the face of the legislation, confirming that Welsh is one of the official languages in Wales, and that it has official status. We request that the Commission on Devolution in Wales reviews the British Legislation which currently treats the Welsh language less favourably than the English language, and considers*

how the situation could be rectified to ensure justice for Welsh speakers.'

Assessment

7.7.2 In the light of the evidence we suggest that the UK Government and Welsh Government [systematically assess and should then](#) keep under review the way in which UK legislation treats the Welsh language as recommended by the Commissioner.

Recommendation

R.63 The Welsh devolution settlement should confirm that Welsh is one of the official languages in Wales. In general UK legislation should not treat the Welsh language less favourably than the English language-

7.8 ELECTIONS

Current position

7.8.1 General elections to the National Assembly for Wales are a reserved matter. Local authority elections are devolved with two [express](#) exceptions. These are the local government franchise, and electoral registration and administration.

7.8.2 In May 2012, the UK Government published a Green Paper on the future electoral arrangements of the National Assembly for Wales, following the Parliamentary Voting Systems and Constituencies Act. The paper put forward proposals in relation to Assembly constituencies, length of term of the National Assembly for Wales, standing as a constituency candidate and regional candidate and multiple mandates (sitting as an MP and AM). These issues are specifically outside the Commission's Terms of Reference and have therefore not been considered in this report.

Box 7.13: Evidence on elections

The UK Government said: '*National Assembly elections are regulated by secondary legislation which the Secretary of State makes under the GoWA. These provisions are framed so as to ensure that the law relating to Assembly elections is broadly similar to that which applies at Parliamentary and local elections.*

'The conduct of local government elections in Scotland has been devolved since the Scotland Act 1998. Scottish Ministers are responsible for making the rules on the conduct of Scottish local elections, but not for the franchise or electoral registration in relation to those elections. The Commission may wish to consider whether electoral administration in regard to local government elections in Wales, which would cover setting the rules for the conduct of the elections, should similarly be devolved to Welsh Ministers. We would expect the franchise and electoral registration to remain non-devolved.'

The Welsh Government said: *‘there should be no Reservation to the UK Parliament of powers in respect of elections to the Assembly, or to Welsh local authorities (save that the Exceptions to the Assembly’s existing legislative powers, in respect of the local government franchise and electoral registration, should be confirmed as matters Reserved).’*

The Parliament for Wales Campaign requested that election issues in Wales be placed in the hand of the Assembly Commission.

The Electoral Reform Society Wales said that the voting system for Assembly should be devolved, with a two-thirds threshold. It should remain unicameral and the dual candidacy ban should be ended.

The view of Wales Study Group of the Study of Parliament Group was the Presiding Officer ought to set the date of extraordinary elections (rather than the SoS), and there ought to be a longer post-election period before the Assembly must meet to appoint a Presiding Officer.

[Need to include The Presiding Officer’s evidence]

Assessment

7.8.3 Major changes, for example those discussed in the Wales Office’s Green Paper are beyond our terms of reference. However we suggest some detailed changes to Assembly elections, including devolving to the Welsh Government powers in relation to the conduct Order. We also suggest changes to local government elections, including devolving to the Welsh Government [their electoral](#) administration, including rules for [their conduct-of-elections](#). There is no substantial evidence to support the devolution of the electoral franchise.

Recommendation

R.65 Powers in relation to the conduct Order should be devolved to the Welsh Government, so aligning the administration of devolved elections with Scotland; and devolving to the Welsh Government local authority electoral administration including rules for the conduct of elections.

7.9 CONCLUSIONS

7.9.1 Most although not all of the evidence we received supported the devolution of policing in line with the devolution of other public services in Wales. Devolution would create a better alignment between policies for tackling crime and the causes of crime; would bring accountability for policy and funding into alignment; and would facilitate policing policies better attuned to the circumstances of Wales.

7.9.2 Policing should therefore be devolved although certain functions including those of the National Crime Agency should be excluded.

- 7.9.3 Provided devolution is carried out in a pragmatic and flexible way, we would not expect there to be substantial additional costs, and devolution would open up the potential for savings to be made and for policing priorities in Wales to be more closely aligned with the wishes of the Welsh public. We think that the additional costs, while not insignificant, should be manageable provided devolution is designed in a cost effective way.
- 7.9.4 There is no consensus at the present time for devolving the whole of the justice system.
- 7.9.5 However the youth justice system should be devolved. Following the devolution of policing, there is a case for reviewing whether to devolve probation and prison services.
- 7.9.6 There is also a case for the administrative devolution of the courts and judiciary. In the longer term, there may be a case for legislative devolution as the volume of Welsh law builds up if there is a consensus in favour.
- 7.9.7 We would expect a debate to develop about how far a distinctive Welsh legal system might develop over time.
- 7.9.8 We make a number of recommendations for improving the devolution settlement in relation to civil contingencies, appointment of Lords Lieutenant, equal opportunities, the Welsh language, and elections.
- 7.9.9 In the next chapter, we consider the role of the National Assembly and inter-parliamentary relations.