

National Assembly for Wales
Constitutional and Legislative
Affairs Committee

Inquiry into a Separate Welsh Jurisdiction

December 2012



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National Assembly for Wales
Constitutional and Legislative
Affairs Committee

Inquiry into a Separate Welsh Jurisdiction

December 2012



Constitutional and Legislative Affairs Committee

The Constitutional and Legislative Affairs Committee was established on 15 June 2011 with a remit to carry out the functions and exercise the powers of the responsible committee set out in Standing Orders. This includes being able to consider and report on any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

Current Committee membership



David Melding (Chair)
Deputy Presiding Officer
Welsh Conservatives
South Wales Central



Suzy Davies
Welsh Conservatives
South Wales West



Julie James
Welsh Labour
Swansea West



Eluned Parrott
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Mid and West Wales

The following Members participated in this inquiry as substitutes:



Mick Antoniw
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Pontypridd



Jocelyn Davies
Plaid Cymru
South Wales East



Mark Drakeford
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Welsh Labour
Cardiff South and Penarth

Contents

Chair's foreword	3
The Committee's conclusions and recommendations	4
1. The Committee's role and background to the inquiry	7
Committee's role	7
Background to the Inquiry.....	7
Terms of reference	8
2. Historical background	10
Wales' separate legal identity.....	10
The Assembly's new powers and the implications for a separate jurisdiction	11
3. What is a jurisdiction?	14
Access to justice.....	18
Our view	20
4. Divergence of laws and its implications	23
Divergence of Welsh law as a basis for a separate jurisdiction	23
Managing and monitoring divergence within the existing unified jurisdiction	27
Sufficient body of divergent Welsh law?	29
Our view	33
5. Implications for the legal profession in Wales	36
Our view	37
6. Cases in Welsh Courts	38
Our view	40
7. Comparisons with other small common law jurisdictions	42
Our view	42
8. Inclusion of criminal law in a Welsh jurisdiction	44
Meaning of criminal law.....	44
Existing ability of the National Assembly to create and amend some criminal offences	46
Devolution of criminal justice	47

Our view	53
9. Other issues	54
Legal education and qualifications	54
Our view	56
A Law Commission for Wales?	56
Our view	57
Laws made in Wales have equal standing in English and Welsh	58
Our view	58
Welsh legal commentary	59
Our view	59
Appointment of Welsh Judges to the Supreme Court.....	59
Our view	60
Costs.....	60
Our view	60
Public engagement	61
Our view	61
Witnesses	62
Annex 1: List of written evidence.....	65
Annex 2: Study visit to Northern Ireland; 20-21 June 2012	68
Annex 3: Issues raised in discussions: The Institute of Professional Legal Studies (Northern Ireland).....	71
Annex 4: Requirements of a separate legal jurisdiction; Rt. Hon the Lord Carswell.....	78
Annex 5: Research Service briefing: Law bodies and resources in Jersey, Guernsey and the Isle of Man	80
Annex 6: Research Service briefing: Canadian Legal System.....	84
Annex 7: Research Service briefing: Cost issues	97

Chair's foreword

It is a pleasure to provide the foreword to this Report which follows our Inquiry into a separate Welsh jurisdiction.

The aim of our Inquiry was to take expert evidence on the issue of a separate Welsh jurisdiction from leading practitioners in the legal and academic professions. We were heartened and pleased by the distinguished responses received, which has contributed to an informative, wide-ranging and constructive debate.

In light of the views expressed, it is clear that a Welsh legal identity with its accompanying characteristics is getting stronger. Regardless of whether a separate jurisdiction is required or not therefore, developing the existing unified England and Wales jurisdiction to support this emerging identity is crucial, and the recommendations included in this report are primarily intended to address such issues in the short term. This would have the added benefit of making a move to a separate jurisdiction easier in the future, if such a decision is made. We are also encouraged by the willingness of the legal profession to adapt to meet the legal needs of Wales.

We hope that our conclusions and recommendations provide a useful starting point in the debate that will contribute to future discussions. In particular, we hope our views will complement and inform the ongoing work of the Welsh Government and the Silk Commission on Devolution in Wales in this increasingly important area.

I would like to thank all those who gave evidence to the Committee during this inquiry. I hope that our conclusions and recommendations will lead to improvements in the current unified jurisdiction by allowing it to successfully respond and recognise an emerging Welsh legal identity. I also hope that the report will be seen as contributing to the next steps in the Welsh devolutionary process.

David Melding AM, December 2012

The Committee's conclusions and recommendations

The Committee's recommendations and conclusions are listed below, in the order that they appear in this Report. Please refer to the relevant pages of the report to see the supporting evidence:

Conclusion 1: We believe that bringing justice closer to the people of Wales in order to improve access to justice should be a guiding principle and that any decision regarding the establishment of a separate Welsh jurisdiction in the future should be done for the clear benefit of the Welsh people (page 21).

Conclusion 2: We received a range of views on what would constitute a separate jurisdiction. Although no single set of criteria was agreed by all, 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 (page 21).

Conclusion 3: 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.

Details of our suggested changes are set out in recommendations 1 (legal training for practitioners), 2 (changes to the civil procedure rules), 3 (law commission), 4 (dealing with bilingual laws) and 5 (appointment of Supreme Court judges) (page 21).

Conclusion 4: In our view, strengthening the existing system to support an emerging Welsh legal identity is a natural consequence of the move to Schedule 7 of the *Government of Wales Act 2006*. It would also have the advantage of making the move to a separate Welsh

jurisdiction easier, if a decision to establish one is made in the future (page 22).

Conclusion 5: We accept that the case for a separate Welsh jurisdiction will be strengthened as divergence between laws in Wales and England increases (page 34).

Conclusion 6: As with Conclusion 3, we believe that more should be done within the current structures to develop legal institutions in Wales to make the administration of justice more responsive to the needs of Wales, and to recognise and develop its emerging legal identity.

As we have previously stated, this work should include the immediate practical adaptations set out in recommendations 1 (legal training for practitioners), 2 (changes to the civil procedure rules), 3 (law commission), 4 (dealing with bilingual laws) and 5 (appointment of Supreme Court judges) (page 35).

Conclusion 7: Whether a separate Welsh jurisdiction should be established or not is ultimately a political decision and the precise details of how it should be established will be for future political debate and negotiation (page 35).

Recommendation 1: As a body of Welsh law evolves over time, we recommend that additional legal training is put in place to allow specialisms to develop, reflecting the legal traditions and emerging legal identity of Wales. This should include raising awareness in England of the growing divergence between the laws applicable in England and Wales (page 37).

Recommendation 2: We recommend that the Civil Procedure Rules are amended to ensure that public law cases which deal primarily with Welsh issues should generally be commenced or transferred to the administrative court in Cardiff (page 41).

Conclusion 8: We believe that any changes proposed to the administration of justice in England and Wales that impacts on the development of a Welsh legal identity must in future be subject to meaningful consultation (page 41).

Conclusion 9: We suggest that any preparatory work conducted ahead of the establishment of a future separate Welsh jurisdiction should look at the operation of other small common law jurisdictions, particularly Northern Ireland, the Isle of Man and the Channel Islands (page 43).

Conclusion 10: We believe that the creation of a separate legal jurisdiction would not be optimum without the accompanying devolution of aspects of the criminal justice system (page 53).

Conclusion 11: We also believe that the case for a separate Welsh jurisdiction is likely to be strengthened should aspects of the criminal justice system be devolved to Wales in the future (page 53).

Conclusion 12: Even in the absence of further devolution of aspects of the criminal justice system, we believe that work should be undertaken to adapt current arrangements within the England and Wales legal jurisdiction to take account of the emerging development of criminal law within devolved areas (page 53).

Recommendation 3: We recommend that a body should be entrusted with reviewing and assisting with the consolidation of Welsh law. Such a body could form part of the existing Law Commission for England and Wales or be a newly established body (page 57).

Recommendation 4: We recommend that a presumption should be established in favour of commencing and hearing in Welsh courts all cases relating to laws made bilingually in the English and Welsh languages (page 58).

Recommendation 5: We recommend that a senior judge with experience of Welsh devolution and Welsh law should be appointed to the Supreme Court (page 60).

Conclusion 13: We believe that any future proposals for establishing a separate jurisdiction should be properly and rigorously costed (page 60).

1. The Committee's role and background to the inquiry

Committee's role

1. The Constitutional and Legislative Affairs Committee's ("the Committee") remit is to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
3. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to Welsh Ministers, the First Minister or the Counsel General.

Background to the Inquiry

4. The Constitutional and Legislative Affairs Committee agreed as part of its initial forward work programme following the 2011 National Assembly elections on 14 July 2011 to conduct an inquiry into a separate Welsh jurisdiction.¹ Then, in October 2011, the First Minister announced that the Welsh Government would be initiating a "public debate" on this issue. He said:

"The Counsel General and I are agreed that this is not simply a matter for politicians and civil servants to discuss. The debate must be much wider than that and we need to obtain the broadest range of views possible, and not just from the legal community.

We must be clear about what we mean by a separate jurisdiction. What are the prerequisites for its existence? What flows from it? What might be the benefits for the people of Wales?

¹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 14 July 2012 [paragraphs 55-56] [accessed 5 December 2012]

Early next year the Welsh Government will initiate a public debate on this issue. We will start by inviting the widest possible views from within and outside Wales. The responses we receive will help to inform the Welsh Government's thinking in preparation for the work of the Commission on the Welsh devolution settlement which the Secretary of State for Wales has indicated she will shortly appoint. Assembly Members' views on the issues will be particularly welcome as the debate goes forward.”²

5. The Welsh Government subsequently issued a consultation document on “A Separate Legal Jurisdiction for Wales”³ on 27 March 2012. The closing date for submissions was 19 June 2012.

Terms of reference

6. The terms of reference for the Inquiry, which the Committee agreed on 28 November 2012,⁴ are as follows:

To contribute to the public debate on the need for a separate Welsh jurisdiction by taking expert evidence on:

- what is meant by the term “separate Welsh jurisdiction”;
- the potential benefits, barriers and costs of introducing a separate Welsh jurisdiction;
- the practical implications of a separate jurisdiction for the legal profession and the public;
- the operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system; and
- to report to the Assembly.

² Welsh Government, Carwyn Jones (First Minister), [Public Debate: Separate Legal Jurisdiction](#), Cabinet Written Statement, 7 October 2011 [accessed 5 December 2012]

³ Welsh Government, [Consultation on a Separate Legal Jurisdiction for Wales](#), 27 March 2012 [accessed 5 December 2012]

⁴ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 28 November 2011, paragraphs 46 to 81 [accessed 5 December 2012]

7. At its meeting on 28 November 2011, the Committee was also clear that the purpose of the Inquiry was not to come forward with specific recommendations for and against the establishment of a separate Welsh jurisdiction. Instead, the Inquiry's aim would be to distil the views expressed by respondents and to clarify issues relating to the viability of a separate jurisdiction in order to inform the on-going debate.⁵ The Committee also agreed that it did not wish to pre-empt the work conducted on the issue of a separate jurisdiction by the Welsh Government.⁶

8. The Committee issued a call for written evidence in January 2012. Submissions were received from a range of organisations and individuals, which have been published on our pages on the National Assembly's website. A list of those who provided written evidence is in Annex 1 at the end of this report.

9. We took oral evidence from a range of legal and constitutional experts as well as distinguished parliamentarians with legal expertise. A full list of those who gave evidence can be found at the end of this report and transcripts of their evidence can be found on the National Assembly's website.

⁵ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 28 November 2011, paragraphs 46 to 81 [accessed 5 December 2012]

⁶ Ibid, paragraph 46 [accessed 5 December 2012]

2. Historical background⁷

10. Although the Acts of Union of 1536 and 1543 made Wales subject to English laws, the administration of justice in Wales has only been fully unified since 1831. The 1543 Act created a separate system of courts for most of Wales. The new system of Welsh courts, the Courts of Great Sessions in Wales, were entirely distinct from the English courts and although they applied the same laws as those that applied in England, there were significant differences in how they did so.

11. The Court of Great Sessions in Wales was abolished by the *Administration of Justice Act 1830* and it was not until then that a single England and Wales jurisdiction, with a single system of courts, was finally created. The idea of a separate system of courts in Wales, taking account of Welsh circumstances, was therefore recognised by the Tudor constitutional settlement and the fusion of the courts of both countries into a single system is a relatively modern development.

Wales' separate legal identity

12. Although the administration of justice is not currently a devolved responsibility, it has been the subject of significant developments in Wales since 1999. These include:

- in 2007, the annexation of North Wales to Chester for the purpose of administration of justice came to an end by establishing Her Majesty's Court Services Wales (HMCS Wales). The administration of justice in Wales is now administered on an all Wales basis;
- the creation of a Mercantile Court for Wales;
- most judicial review cases involving decisions of Welsh public authorities including the National Assembly for Wales are heard in Wales;
- regular sittings of the Court of Appeal Civil Division in Cardiff;
- regular sittings in Cardiff of the Court of Appeal Criminal Division;
- establishment of the Administrative Court of Wales;

⁷ Thomas Glyn Watkin, *The Legal History of Wales*, University of Wales Press, 2007. P.145

- establishment of a Chancery Court in Wales;
- appointment of a High Court Judge whose fluency in Welsh enables trials to be conducted bilingually or entirely in Welsh, according to the wishes of the parties, without translation;
- the Employment Appeals Tribunal decided it would sit regularly in Wales.

The Assembly's new powers and the implications for a separate jurisdiction

13. The referendum of March 2011 established a new devolution settlement for Wales giving the National Assembly direct powers to make laws that can affect the lives of people in Wales in far-reaching and important ways.

14. As extensive as these powers are, the new settlement does not resolve all constitutional questions, which will continue to be the subject of debate. One of the implications of the new settlement is that England and Wales now has two legislatures, with a single statute book, making laws for a single jurisdiction with a single court system and legal profession. The First Minister pointed out soon after the 2011 referendum that this was somewhat anomalous:

“I am not aware of any other part of the world where two primary-law-making institutions exist within the same jurisdiction, passing laws in the same areas of responsibility.”⁸

15. This was echoed by the constitutional academic, Alan Trench, who told the Committee that:

“As far as I know, Wales’s position is unique in the common law world. In the civil law world, it would be quite usual, and the issues that we are discussing would probably puzzle many lawyers from a civilian tradition. In the common law world, I cannot think of anywhere that has a legislature with clear and extensive law-making powers such as the National Assembly now has but does not have a clear jurisdiction within which it operates.”⁹

⁸ National Assembly for Wales, [RoP: Committee for the Scrutiny of the First Minister](#), 22 March 2011. paragraph 11 [accessed 5 December 2012]

⁹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 9 July 2012, paragraph 15 [accessed 5 December 2012]

16. However, Professor John Williams of Aberystwyth University told the Committee:

“With regard to ... whether it is possible to have a legislature without a jurisdiction, under the great unwritten British constitution, it is probably possible to have whatever we want. That is certainly one of the problems. In the short term, there is scope for saying—and, indeed, this is very much the system that we have now—that we have the political devolution and the law-making devolution in place, but, for the moment, the question of jurisdiction drags behind a little. What we need in order to be able to establish a jurisdiction is for all, or most, of the building blocks to be in place. So, it is possible, but it is far from ideal, because we will, essentially, have judges from the England-and-Wales jurisdiction deciding on matters that are purely Welsh. If you look at some aspects of social care law and education law, you have to ask whether that feels right, and I do not think that it does, certainly not in the longer term.”¹⁰

17. There is broad agreement that there has been a clear trend in establishing a Welsh “legal identity” since devolution. Whether this identity can develop further, without a Welsh jurisdiction, is one of the questions that will need to be taken into account in determining whether a Welsh jurisdiction is needed.

18. The following issues are considered in this report:

- what is a jurisdiction (Chapter 3);
- the viability of a Welsh jurisdiction, in particular
 - the divergence of laws and its implications, including whether a sufficient body of Welsh law exists to sustain a separate jurisdiction (Chapter 4);
 - implications for the legal profession in Wales (Chapter 5);
 - implications for cases commenced in Welsh courts (Chapter 6);
- comparisons with other small common law jurisdictions (Chapter 7);

¹⁰ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 5 March 2012, paragraph 15 [accessed 5 December 2012]

- the inclusion of Criminal law in a Welsh jurisdiction (Chapter 8);
and
- other matters, such as legal education and qualifications; a Law Commission for Wales; Laws made in Wales having equal standing in English and Welsh; the structure of the Welsh Government; and the appointment of Welsh Judges to the Supreme Court (Chapter 9)

3. What is a jurisdiction?

19. The first question that the Committee sought to address is what constitutes a jurisdiction, whether they have any essential features and what those might be. The Committee received a range of evidence that showed that there are differing views on this matter. These included the view expressed by the Law Society¹¹ and others that it is already possible for Wales to be viewed as a separate jurisdiction.

20. The Welsh Committee of the Judges Council told the Committee that “‘Jurisdiction’ is not a term of art.”¹² They believed that the statement in the All Wales Convention Report that a “jurisdiction can be indicated by a defined territory, a distinct body of law, or a separate structure of courts and legal institutions”¹³ was an adequate definition on which to base their response.

21. Professor Gwynedd Parry from the Hywel Dda Institute at Swansea University offered a very similar view and definition:

“It could be said that the concept of 'jurisdiction' is not something definite or uniform, and jurisdictions may vary depending on specific circumstances. However among the expected characteristics the following are said to be the most obvious: a defined territory; a body of native law; legal institutions and a courts system.”¹⁴

22. Retired Circuit Judge, Christopher Morton, thought a separate Welsh jurisdiction would have:

“a body of criminal and civil courts of first instance and an Appeal Court (Criminal and Civil) with exclusive jurisdiction in Wales and which mirrors those that now exist for England and Wales, subject to the Supreme Court which will (ignoring any Appeals to the European Court of Human Rights) remain the

¹¹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 12 March 2012, paragraph 23 [accessed 5 December 2012]

¹² National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ15 [accessed 5 December 2012]

¹³ All Wales Convention, [All Wales Convention Report](#), November 2009, paragraph 3.9.16 [accessed 5 December 2012]

¹⁴ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ14 [accessed 5 December 2012]

final domestic appeal court for each part of the UK, apart from appeals on Scottish criminal matters.”¹⁵

23. The Association of Judges of Wales noted however that defining a jurisdiction was not straightforward:

“It is, however, important to note that there is no rigid template for a jurisdiction: jurisdictions differ in nature, one from the other and that is so even in the case of the main jurisdictions in the United Kingdom – England and Wales, Northern Ireland and Scotland. If a separate jurisdiction were to be created for Wales it would not have to replicate any other jurisdiction; it could be tailor made to meet the needs of Wales and develop further if those needs change.”¹⁶

24. Winston Roddick CB QC, the first Counsel General of the Assembly as it was then constituted, saw the central question with which this inquiry is concerned as:

“... whether the Assembly should have authority or, more simply, responsibility over the administration of justice in Wales. In other words, should the administration of justice in Wales become a devolved function.”¹⁷

25. On that basis, he considered that “‘jurisdiction’ simply means responsibility for the administration of justice in Wales”.¹⁸

26. He also added:

“I include in the expression “administration of justice” the Crown Court, the High Court, the criminal and civil divisions of the Court of Appeal, the Prosecution Service, all Tribunals, the Magistrates Courts Service, the prison service, the Civil Service responsible for the administration of justice in Wales, and the police service. I also include the authority to appoint judges

¹⁵ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ13 [accessed 5 December 2012]

¹⁶ Ibid, WJ20

¹⁷ National Assembly for Wales, Constitutional and Constitutional and Legislative Affairs Committee, [Inquiry on the establishment of a separate Welsh jurisdiction: Additional response WJ – Winston Roddick CB QC](#), 11 June 2012 [accessed 5 December 2012]

¹⁸ Ibid

subject, however, to the supervision of an independent judicial appointments commission.”¹⁹

27. Professor Thomas Glyn Watkin noted that there was confusion between the terms “competence” and “jurisdiction”:

“By ‘jurisdiction’, what is meant in civil law countries is ... the function of a court in administering a particular body of law. ‘Competence’, on the other hand, addresses the question of how you share out, within a judicial system, particular roles. For instance, if you were to say that you have a body of criminal law and you must therefore have some mechanism for applying it, you could, theoretically—madly—have just one court dealing with all cases in one place. However, that would clearly be inefficient and would cause delays and so on, so you begin to make distinctions and say that the courts will be in several places and you give each territorial competence. You say that some will deal with minor offences and some with more serious crimes, so you have subject-matter competence. Some will deal with cases at first instance and some on appeal, so you have functional competence.”²⁰

28. In Professor Thomas Glyn Watkin’s view, the question of competence was a practical one while that of jurisdiction was a constitutional principle:

“The question of how you share the competence will largely be determined—not entirely, but predominantly—by practical issues: questions of convenience and of efficiency. The question about whether you should have jurisdiction is one of constitutional principle. If you do not distinguish between the two concepts, there is a danger—and this shows itself in current debates in Wales—of bringing to bear on the larger question issues of practical convenience, delay and efficiency as though those were the only matters to be addressed, and of losing sight of the fact that the larger question of whether one should have a jurisdiction at all is different. It is a question of

¹⁹ National Assembly for Wales, Constitutional and Constitutional and Legislative Affairs Committee, [Inquiry on the establishment of a separate Welsh jurisdiction: Additional response WJ – Winston Roddick CB QC](#), 11 June 2012 [accessed 5 December 2012]

²⁰ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 18 June, paragraph 19 [accessed 5 December 2012]

constitutional and legal principle, and that is what should predominate in answering it.”²¹

29. Lord Morris of Aberavon, in preparing his submission, consulted the Rt Hon the Lord Carswell, a former Lord of Appeal and Lord Chief Justice of Northern Ireland, who provided him with a note on his view of the requirements of a separate legal jurisdiction. Lord Carswell’s note is attached in full as Annex 4 to this report. It makes the point that there would need to be a process of negotiation about precise arrangements for any Welsh jurisdiction. However, the main issues to consider are seen as:

- a separate judiciary, both first instance and appellate;
- barristers, including qualification and appointment arrangements, rights of audience, training issues, complaints and disciplinary structures and governance arrangements;
- solicitors, with similar issues identified as for barristers;
- its own rules of court, with a rule making body;
- an organisation to run the courts and administer the judiciary;
- legal materials relating to the local body of law;
- a legal service headed by an attorney general, with a director of public prosecutions and associated services and regulatory functions;
- a Law Commission to make recommendations to the Assembly about the development of the law.

30. When asked whether he had come to a view on what he believed a jurisdiction to be, the Counsel General, Theodore Huckle QC, told us:

“The short answer is ‘no’. I think that there is a necessary reference to a defined territory, and I do not think, for my part, that there is a particular difficulty with that in relation to Wales. ... That is one aspect. My view is that, in context, it is sensible to look at whether there is a body of law specifically applicable to the territory in question. I say ‘in context’ because, for example, when the Northern Ireland jurisdiction was established there was no body of law specifically applicable to Northern Ireland, as compared with England and Wales, in

²¹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 18 June, paragraph 22 [accessed 5 December 2012]

particular. Therefore, it seems to me that it is not necessarily a requirement that, to create a jurisdiction, one already has a body of law. As it happens, it seems to me that we do already have a body of law that is applicable in Wales.”²²

Access to justice

31. In addition to the evidence received about what constitutes a jurisdiction, a number of witnesses raised access to justice issues with us.

32. The issues about access to justice take several different forms. This can be physical access to justice or access to justice in a more abstract sense in the context of the clarity of the legal system and how well it is understood by the public.

33. For example, Bangor University Law School were of the opinion

“At present there is a separate Welsh jurisdiction, however there are no courts or other legal institutions with exclusive competence over laws that apply only to Wales and over laws that apply both to England and Wales in respect of cases that relate predominantly to Wales. The lack of such competency does not deny the existence of a Welsh jurisdiction. However, its absence will increasingly hinder the efficient, effective and fair administration of justice in Wales.”²³

34. Michael Imperato of the Law Society however felt that the current unified jurisdiction raises practical issues about access to justice from a Welsh perspective, and in particular whether or not Welsh cases should be heard in Welsh courts:

“in theory, a civil case can be commenced anywhere in England and Wales, but the courts should consider which is the correct court to hear the case at the end of the day. You could have a case starting off in Birmingham but being transferred to south Wales if it was felt that that was best because of the parties or witnesses. That is a process within the court system at the moment. I have had experience recently of a judicial review

²² National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 16 July 2012, paragraph 17 [accessed 5 December 2012]

²³ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ24 [accessed 5 December 2012]

case with regard to a Welsh school closure. We were dealing with the interpretation of Welsh guidance, and the final part of that hearing was heard in the Royal Courts of Justice in London, but the majority of the case had been heard in Cardiff, and I think that that was right. We had QCs with a Welsh background. However, that was almost by way of coincidence—you could certainly have had London-based QCs and London-based lawyers involved in hearing that case. So, there is an issue with regard to how we deal with access to justice.”²⁴

35. Lord Carlile of Berriew also told us that there was scope for the current arrangements to be improved so that localised arrangements could be developed to allow better access for justice:

“I think that in a smaller jurisdiction it might be possible to provide different forms of access to justice, particularly in the civil process. I have not been an MP since 1997, so it is a long time ago now, but even before 1997 the performance of small claims courts in mid Wales was generally excellent. Provided that people were able to obtain advice from somebody who could tell them to put the word “contract” into their claim, and “damages” and such words that some of us around this table are familiar with, then, generally speaking, the small claims courts provided high-quality access to justice at very low cost.

I think, too, that, in the criminal setting, we could probably develop a much more flexible duty solicitor scheme, which would cover the rural courts. Its smallness of scale would enable one to be much more conceptual about how it was created. You could start with a clean sheet of paper, a sensible use of the internet, including Skype and such things, so that first advice could be given, by, say, a solicitor in his or her home. I have been in Newtown police station at 3 a.m. on a Saturday with an acquaintance of mine who is the duty solicitor arriving in his pyjama top and a pair of trousers. I think that there is a better way of dealing with cases such as that than the traditional way, although he handled the case extremely well. It

²⁴ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 12 March 2012, paragraph 64 [accessed on 5 December 2012]

would give scope for a much more imaginative approach and maybe enhance access to justice.”²⁵

36. Issues relating to access to justice were also considered during the Committee’s visit to Northern Ireland. In particular, we heard about the Northern Ireland Courts and Tribunals Service plans to change the system and the location of courts, with the emphasis being on the establishment of the combined offices, which would provide the administrative support and conduct the hearing of cases in one place. They believed that this will improve the access to justice in communities (especially rural communities) and provide an average travelling time to such offices of around half an hour.

37. We also heard that the distinction between the places where the civil and criminal cases are heard is to be removed in Northern Ireland, which will allow for large savings (Court Clerks will be available to clerk either cases). All local hearings are now to take place locally in so-called joint “Justice Centres”.

Our view

38. We received a wide range of views on what would constitute a separate Welsh jurisdiction. Although no single set of criteria was agreed by all, we note that many witnesses agreed that a 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;
- a range of distinct legal institutions and a courts system.

39. In somewhat more detail, Lord Carswell’s note at Annex 4 provides a digest of the issues that would need to be discussed when considering what would constitute a separate jurisdiction should it be decided to establish one in the future.

40. From the evidence received, we believe that a Welsh legal identity is getting stronger and that even if a separate jurisdiction is not established, changes are needed within the current England and Wales

²⁵ National Assembly for Wales, RoP: [Constitutional and Legislative Affairs Committee](#), 24 September 2012, paragraph 81 [accessed 5 December 2012]

model to ensure that it reflects constitutional realities and recognises legal developments in Wales.

41. In addition, we believe that the guiding principle behind establishing a separate jurisdiction should be to bring justice closer to the people of Wales in order to enable better access to justice for Welsh citizens. It is fundamentally important that any future changes are not just seen as a matter of convenience for the legal profession alone and that any establishment of a separate Welsh jurisdiction should be done for the clear benefit of the Welsh public.

42. However, beyond the issues identified above, we do not believe it is useful or helpful at this stage to set out a prescriptive and inflexible check list of matters that should constitute a Welsh jurisdiction.

Conclusion 1: We believe that bringing justice closer to the people of Wales in order to improve access to justice should be a guiding principle and that any decision regarding the establishment of a separate Welsh jurisdiction in the future should be done for the clear benefit of the Welsh people.

Conclusion 2: We received a range of views on what would constitute a separate jurisdiction. Although no single set of criteria was agreed by all, 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.

Conclusion 3: 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.

Details of our suggested changes are set out in recommendations 1 (legal training for practitioners), 2 (changes to the civil

procedure rules), 3 (law commission), 4 (dealing with bilingual laws) and 5 (appointment of Supreme Court judges).

Conclusion 4: In our view, strengthening the existing system to support an emerging Welsh legal identity is a natural consequence of the move to Schedule 7 of the *Government of Wales Act 2006*. It would also have the advantage of making the move to a separate Welsh jurisdiction easier, if a decision to establish one is made in the future.

4. Divergence of laws and its implications

43. The Committee received conflicting views about whether a Welsh Jurisdiction is currently viable or desirable. Much of the evidence the Committee received has drawn attention to the inevitable divergence of Welsh and English law, not only because of a growing body of Welsh law but also as a consequence of the UK Parliament continuing to legislate for England only now and in the future.

44. However, there was difference between those who felt the move towards a new jurisdiction was inevitable and those who considered that the status quo was well able to deal with divergence.

Divergence of Welsh law as a basis for a separate jurisdiction

45. A number of witnesses felt that the current situation, where two different legislatures are producing often divergent laws within the same unified jurisdiction, was unsustainable.

46. David Hughes, a barrister, reflected on his experience in Gibraltar:

“The most obvious benefit to my mind is that it [a separate jurisdiction] avoids the risks inherent in having the same courts applying distinct primary legislation from two different sources within the same jurisdiction.

.... My experience in Gibraltar was that it was sometimes difficult for retired Anglo-Welsh judges sitting in the Court of Appeal to adjust their thinking from one appropriate to applying Anglo-Welsh law to one appropriate to applying the Law of Gibraltar. Although this most often manifested itself in the course of argument before the court, an example can be seen in the case of *Rojas -v- Berllaque* [2001-02] Gib LR 252, when the majority of the court struggled with provisions of the Gibraltar Constitution that provided for remedies in the event of violations of constitutional rights, preferring instead an Anglo-Welsh approach. That this happened in a jurisdiction physically separate from England & Wales leads me to believe that, if a separate Welsh jurisdiction is not established, at some point in the future Welsh legislation drafted to be different

from that applying in England will be interpreted to mean the same as that applying in England.”²⁶

47. Emyr Lewis and Professor Dan Wincott, both from the Wales Governance Centre, stated in their joint submission that:

“It is generally accepted that the law which applies in Wales is already different from that which applies in England, and all the signs are that the differences will increase. If our analysis above is correct, the scope for divergence is perhaps greater than the architects of the 2006 Act envisaged. The adoption of a conferred powers model, as opposed to a reserved powers model, does not decrease the likelihood of a body of law emerging in Wales which is significantly different from the law which applies in England.”²⁷

48. When questioned, Professor Wincott made the point that the development of divergent laws between England and Wales does not rely solely on legislation made by the National Assembly, as the UK Parliament will increasingly make laws that apply to England alone:

“...the law of England and the law of Wales will diverge, even if nothing very much happens in Wales ... So, my sense is that there will be significant divergence and that it will probably happen sooner than we think, not least because the current Government in Westminster seems quite active and is moving in a direction that I think, in general, people do not expect the Government here would follow.”²⁸

49. In terms of the implications of this he said:

“We are fairly relaxed about gradualism, but we are very concerned about ad-hocery, so we would like to see gradualism taking place within a framework, not just in the medium term, but in the long term, so that we think through, and rethink as developments unfold, where it is we think we might be going. It is about making a distinction between just letting things happen and trying to think systematically about an approach

²⁶ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ7 [accessed 5 December 2012]

²⁷ Ibid, WJ28

²⁸ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 21 May 2012, paragraph 57 [accessed 5 December 2012]

that may well be gradual. I have some conceptual problems with imagining what it would mean to say ‘Today we have a separate jurisdiction; it is all bright and shiny and new and everything changes in a single moment’. We were trying to think through the implications of that divergence.”²⁹

50. He went on to say:

“For me, the question is ... really about whether the distinctive law of Wales is interpreted judicially, primarily through a framework that will become increasingly English—which I think is more or less the likely consequence of not grasping this nettle—or whether that body of law and policy will be interpreted in a way that treats its origins in and for Wales as primary.”³⁰

51. Lord Morris favoured a gradual approach to dealing with the implications of divergent law:

“To sum up, my approach is to build on developments; it is an incremental approach. I believe that the most practical proposal that you could make would be a presumption in the setting down of Welsh appeals or, as they say regarding administrative law ... of issuing cases that concern the administration of law in Wales. A presumption that they are set down is the machinery that unlocks that key. That would, first, help to develop the profession. Secondly, it would strengthen the case for appropriate court settings in Wales—the more cases that are set down, the more likely they are to be heard in Wales. Thirdly, it would bring justice closer to people more than anything else.”³¹

52. Winston Roddick CB QC however had a different view and told us that you could not have the devolution of the justice system “by evolution”. He added that:

“In order to have a logical and workable system, you have to devolve them all at the same time, because you have the

²⁹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 21 May 2012, paragraph 58 [accessed 5 December 2012]

³⁰ *Ibid*, paragraph 65

³¹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 25 June 2012, paragraph 31 [accessed 5 December 2012]

magistrates' court, the Crown Court, the High Court and the Court of Appeal. They function as a body of courts. In my view, you have to devolve them all at the same time.”³²

53. Mr Justice Roderick Evans stated in his written submission that a separate Welsh jurisdiction would become necessary if certain changes were made to the Welsh devolutionary settlement:

“One of the reasons frequently advanced for the distinction drawn between the nature of the devolution settlements in Scotland and Northern Ireland (a reserved powers model) and that in Wales (a transferred powers model) is that the former model is inappropriate for Wales as Wales does not have its own jurisdiction i.e. it does not have the necessary judicial structures to support such a devolutionary settlement. It follows from that argument that if Wales moves to a reserved powers model or intends to do so or gains a breadth of legislative competence which, for example, includes part of the justice system, a Welsh jurisdiction would be necessary.”³³

54. Alan Trench was of the view that a separate Welsh jurisdiction was not possible unless Wales moved to a “reserved powers” model such as in Scotland and Northern Ireland. He explained:

“... the reserved powers model of conferring powers on the National Assembly..... would have significant benefits, because it would again make it clear whether devolved legislation was within competence or not. To my mind, that would be probably the biggest advantage if you were to move towards even a stripped-down jurisdiction, in that it would open the door to getting to the model of legislative devolution that applies in Scotland and, in a slightly modified form, in Northern Ireland, where it is clearly understood. At the margins, it probably ensures that devolved legislation is within competence rather than not.”³⁴

³² National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 11 June 2012, paragraph 67 [accessed 5 December 2012]

³³ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ19 [accessed 5 December 2012]

³⁴ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 9 July 2012, paragraph 88 [accessed 5 December 2012]

Managing and monitoring divergence within the existing unified jurisdiction

55. We also received evidence suggesting that the current unified England and Wales jurisdiction was currently dealing with the differences between the laws of the two countries, and that the case had not yet been made for the establishment of a separate Welsh jurisdiction.

56. For example, 14 district judges stated in their written submission that:

“Whilst we of course accept that in certain areas, the law in Wales will differ from that in England, we are of the opinion such differences are already being dealt with by the Courts.”³⁵

57. The Magistrates Association was of the view that Wales “does not have a sufficiently well-developed infra-structure to support a fully devolved separate jurisdiction”.³⁶ They added that:

“The cost of developing a supportive infra-structure would be huge, even when times are good, and in the current climate of austerity beyond reach.”³⁷

58. The Institute of Chartered Accountants of England and Wales stated:

“We are ... not convinced that Wales requires a separate legal jurisdiction and believe more generally that the default position of the Welsh Government should be that legislative and regulatory frameworks which impact on businesses in Wales should only diverge from those in England where there is a clear and demonstrable benefit.”³⁸

59. Hugh James Solicitors stated that the divergence in law between England and Wales does not require the establishment of a separate jurisdiction, although they also noted that the situation could change in the future:

³⁵ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ6 [accessed 5 December 2012]

³⁶ Ibid, WJ5

³⁷ Ibid

³⁸ Ibid, WJ3

“The divergence between the law in England and the law in Wales brought about by devolution is increasing but, currently, it is not great. At present the extent of the divergence does not in itself require the setting up of a totally separate jurisdiction at this stage. However, given that the Assembly has now acquired the powers contained in Part IV of the 2006 Act and the possibility of further responsibilities and legislative competence, the legal arguments for a separate jurisdiction may strengthen. It is possible that before that point is reached the constitutional, social, democratic, economic and practical arguments will in any event have ensured a Welsh jurisdiction.”³⁹

60. The Association of Judges of Wales felt that the need for a separate jurisdiction should be monitored as the process of Welsh devolution continues:

“Increasing divergence between the law in England and Wales in the presently devolved fields will necessitate an on-going assessment of the need for a separate jurisdiction and if, as is often said, devolution is a process not an event, an on-going assessment will be made all the more necessary if the Assembly acquires legislative competence over matters beyond those set out in Part 4 of the Government of Wales Act 2006. One of the primary reasons given for limiting the devolution settlement in Wales to a conferred powers model rather than the reserved powers model which exists in Scotland and Northern Ireland is that Wales does not have its own jurisdiction. If Wales is to move to a reserved power model of devolution or to a degree of legislative competence which approximates to it, a separate Welsh jurisdiction is likely to be necessary. Similarly, if responsibility for significant parts of the justice system is transferred to the Welsh Government the creation of a Welsh jurisdiction would be a natural concomitant to such a development.”⁴⁰

61. The Association also commented about the implications of retaining a unified jurisdiction:

³⁹ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [*Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses*](#), March 2012, WJ25 [accessed 5 December 2012]

⁴⁰ *Ibid*, WJ20

“If Wales is to continue within the unified jurisdiction of England and Wales it is essential that adequate provision be made to develop legal institutions in Wales to make the administration of justice more responsive to the needs of Wales, to develop structures which will complement and underpin the evolving constitutional position of Wales and make adequate provision to recognise and develop Wales’ present and emerging legal personality and characteristics.”⁴¹

62. Lord Carlile also told us that administrative changes could be made within the current unified jurisdiction to better reflect Wales’ emerging legal identity:

“There is a strong argument and my preference has long been—and I have not changed my view—for a Wales division of the High Court of Justice in which, for all practical purposes, all cases started in Wales would be heard in Wales. That would enable cases to be held bilingually where appropriate because Wales is well ahead of almost everywhere in the world in respect of bilingual hearings ... I think that there is a lot to be said for having a chief justice of Wales who would not necessarily sit only in Wales. He or she might sit in the Court of Appeal in London as well.

“I think that there is a very strong argument for having two or three regional peripatetic High Court judges who, as Welsh judges, would be able to deal with all the most serious civil cases in Wales and some of the most serious criminal cases in Wales. There is a great deal to be said for having a completely separate administration of the courts in Wales. Wales is both big enough and small enough for it to work really well.”⁴²

Sufficient body of divergent Welsh law?

63. The question of whether there is currently a sufficient body of distinct Welsh Law to sustain a separate Welsh jurisdiction was raised by a number of witnesses. Some of the evidence received stated that

⁴¹ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ20 [accessed 5 December 2012]

⁴² National Assembly for Wales, RoP: [Constitutional and Legislative Affairs Committee](#), 24 September 2012, paragraphs 30 to 31 [accessed 5 December 2012]

the current lack of a body of Welsh law weakened the argument for the creation of a separate jurisdiction.

64. His Honour Judge Wyn Rees noted in his written submission that:

“Currently, in the absence of a distinct body of law in Wales that has a significant impact upon the work of the courts in Wales, it is difficult, in my view, to argue for the establishment of a separate Welsh jurisdiction.”⁴³

65. However, he did not rule out the need for the creation of a separate jurisdiction should additional powers over criminal justice be devolved to the National Assembly in the future.⁴⁴

66. Richard Owen of the Law Society told us:

“At the moment, there is not the body of law to keep the administrative court going. The administrative court in Cardiff currently takes cases from the south-west of England. If we had a separated courts system, it would, presumably, no longer take those cases from the south-west of England. Its workload would, therefore, be quite small.”⁴⁵

67. Professor John Williams of Aberystwyth University in his written evidence, referring to the characteristics of a jurisdiction, said:

“...In addition, Wales has a distinct and growing body of law. Whether the body of Welsh law is yet sufficiently large enough to support an independent Welsh court structure and legal institutions is debatable. One obvious but important observation to make is that there must be enough work for the courts to undertake, and enough work to support a Welsh legal profession.”⁴⁶

68. He reiterated the point in his oral evidence:

⁴³ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ17 [accessed 5 December 2012]

⁴⁴ Ibid

⁴⁵ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 12 March 2012, paragraph 25 [accessed 5 December 2012]

⁴⁶ National Assembly for Wales, Constitutional and Constitutional and Legislative Affairs Committee, [Inquiry on the establishment of a separate Welsh jurisdiction: Additional response WJ – Professor John Williams](#), March 2012

“I think that there are additional aspects. One is a significant body of law in relation to which the jurisdiction can be exercised. One probably says that for mainly pragmatic reasons. Basically, there has to be enough work to keep the legal profession going and to keep the Welsh judiciary going. So, it is looking for the critical mass. If you look at the Isle of Man, for example, which is quite an interesting comparison, it is a very small country with a very small profession, but it has a significant corpus of law for which it is responsible. Otherwise, you get an occasional jurisdiction, as it were, where there is not enough work to keep it going. So, the points noted by Jones and Williams are prerequisites—population, territory, although perhaps territory is a bit iffy, and the legal infrastructure—but also, very importantly, you need a significant body of law that is subject to this jurisdiction.”⁴⁷

69. Others did not think that the current lack of Welsh laws would be a barrier to the creation of a separate jurisdiction, particularly over time.

70. Professor Thomas Glyn Watkin, when asked whether an effectively functioning legislature, if it did not have a sufficient body of law when it started, would soon generate one, told the Committee:

“Short of something totally unforeseeable happening, I think that we are on a one-way street towards reaching that point. The question is whether one prepares in advance to reach it, and has a solution that will be suitable, or waits until one collides with problems and has to produce something on the spur of the moment, which will not be best. That is why it is important that these issues are discussed fully at the present time.”⁴⁸

71. Professor Gwynedd Parry also picked up on the theme of advance planning and told the Committee:

“I do not think that we should say, ‘Until we reach that tipping point when Wales has such and such a number of divergent

⁴⁷ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 5 March 2012, paragraph 19 [accessed 5 December 2012]

⁴⁸ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 18 June 2012, paragraph 29 [accessed 5 December 2012]

laws, there is no case to be made for jurisdiction'. ... That is reactive planning, in my opinion, to the needs of Wales..."⁴⁹

72. Other witnesses however felt that there didn't need to be a body of Welsh law at all before a separate jurisdiction could be established.

73. Although Lord Morris of Aberavon did not think that there needed to be a body of law to create a jurisdiction, he nevertheless felt that a distinct body of law might make the case more persuasive:

"You could have a separate jurisdiction without a corpus of law. They are not dependent upon each other. However, the bigger the corpus of law perhaps the more persuasive is the case. That is why I perhaps keep my mind open about this, thinking that, perhaps in five or 10 years' time or at some other suitable time, the case will be even stronger. However, at the moment, it does not necessarily follow logically. You can set up an administration of justice on its own, up to a point, in Yorkshire, Lancashire or wherever or in Wales. It does not need it."⁵⁰

74. As we have already stated in the preceding chapter of this report (see paragraph 30), the Counsel General told us in his oral evidence that it is not necessarily a requirement to have a body of law before creating a separate jurisdiction but noted that "we do already have a body of law that is applicable in Wales."⁵¹

75. In assessing whether there is a distinct and sufficient body of Welsh Law it is also important to note that the law does not simply comprise primary legislation. Although, there has been separate subordinate legislation relating to Wales for many years, that process is likely to have accelerated since devolution in 1999. Winston Roddick CB QC drew our attention to research by Professor Tim Jones and Jane Williams of Swansea University that looked at the statistical position in December 2002:

"... You will see that there was a 367% increase over what the Welsh Office had published the year before the Assembly came

⁴⁹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 14 May 2012, paragraph 16 [accessed 5 December 2012]

⁵⁰ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 25 June 2012, paragraph 42 [accessed 5 December 2012]

⁵¹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 16 July 2012, paragraph 17 [accessed 5 December 2012]

into effect. So, the Assembly has been a prolific manufacturer of legislation, if I may say so. ...

“Dividing it up, you can see how the instruments have been passed in the specific fields of responsibility. ... the final column is the Orders with distinctly Welsh content as percentage of the total, which is 45%. ...

“Where have we gone in the 11 years since then? In measuring the extent to which the process of emergence has continued since Jones and Williams concluded on the basis of their 2002 statistics that it was an emerging jurisdiction, that was four years before the second devolution settlement and 11 years before the Assembly acquired full legislative competence. So, if you could draw that conclusion in 2002, you can see the strength of the conclusion that one can draw now.”⁵²

Our view

76. We acknowledge that distinct Welsh laws are emerging within the current unified jurisdiction and that divergence between laws that apply in England and Wales is likely to increase over time, particularly as different legislative solutions on similar subjects are developed and enacted.

77. We also note that divergence between English and Welsh laws does not rely solely on legislation made by the National Assembly, as the UK Parliament increasingly makes laws that apply to England only and which are different to those which apply in Wales. We also accept that the presence of divergence within a unified England and Wales jurisdiction will continue to place practical and administrative challenges on the current jurisdiction model as the legal characteristics and identity of Wales emerges over the coming years. As a result, although we believe that the creation of a separate jurisdiction is constitutionally viable, such practical difficulties can be dealt with at present within the current unified structure.

78. We believe however that the question of whether there should be a separate Welsh jurisdiction or not is ultimately a political one and the

⁵² National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 11 June 2012, paragraphs 31 and 32 [accessed 5 December 2012]

precise details of how it should be established will be for future political debate and negotiation.

79. Whilst we accept that practical issues will increase as divergence between English and Welsh law continues, such issues should not in themselves dictate whether a separate jurisdiction should be established or not. Rather, they could be a factor in informing the pace of change for the future.

80. In particular, we have sympathy with the written evidence received by the Association of Judges of Wales which states that, if Wales is to continue within a unified jurisdiction, consideration should be given to developing bespoke legal institutions in Wales to make the administration of justice more responsive to the needs of Wales, that would also recognise and develop its emerging legal identity and characteristic. We also note Lord Carlile's comments that this should involve a separate Wales division of the High Court of Justice to sit alongside the existing Family, Queen's Bench and Chancery High Court divisions.

81. In making the above observations, we accept the views of certain witnesses however who suggested that the case for the establishment of a separate jurisdiction would be considerably strengthened if Wales moved to a reserved powers model and gained significant additional legislative competence, particularly in relation to the justice system. Issues relating to the devolution of criminal justice are considered in detail in Chapter 8 of this report.

82. In relation to whether there is a sufficient body of divergent Welsh law to sustain a separate jurisdiction, we agree with the Counsel General that Wales already has a body of law and that such a body includes not only primary laws made by the Assembly since 2007 but also a separate body of Welsh subordinate legislation which has accelerated since devolution in 1999. We also see no reason why Wales would not inherit the current England and Wales body of law should a separate jurisdiction be created in the future.

Conclusion 5: We accept that the case for a separate Welsh jurisdiction will be strengthened as divergence between laws in Wales and England increases.

Conclusion 6: As with Conclusion 3, we believe that more should be done within the current structures to develop legal institutions in Wales to make the administration of justice more responsive to the needs of Wales, and to recognise and develop its emerging legal identity.

As we have previously stated, this work should include the immediate practical adaptations set out in recommendations 1 (legal training for practitioners), 2 (changes to the civil procedure rules), 3 (law commission), 4 (dealing with bilingual laws) and 5 (appointment of Supreme Court judges).

Conclusion 7: Whether a separate Welsh jurisdiction should be established or not is ultimately a political decision and the precise details of how it should be established will be for future political debate and negotiation.

5. Implications for the legal profession in Wales

83. The Committee asked for evidence on the impact on the legal profession in Wales if a separate jurisdiction was established.

84. Mr Justice Roderick Evans expressed the view that “the present jurisdiction is wholly London-centric. All its institutions are based in London and Wales is treated for practical purposes just as another circuit of England.”⁵³ This, he argued:

“...has inhibited the development of expertise in certain specialised areas of practice. For example, the fact that until comparatively recently all Judicial Review cases were heard in London meant that few practitioners in Wales developed or had the scope to develop a practice in that field. However, the opening of the Administrative Court in Cardiff and the possibility of doing this work in Wales has caused some practitioners to develop the necessary knowledge and expertise.”⁵⁴

85. Emyr Lewis and Professor Wincott thought there may have to be some sort of competence test for lawyers to appear in Welsh Courts⁵⁵ but several other witnesses saw no barriers to Welsh lawyers continuing to appear in English courts and vice-versa. For, example, The Hon. Mr Justice Evans stated that if:

“Wales and England were to have separate jurisdictions each would be a Common Law jurisdiction and the fundamental concepts of the law would be similar. There is no reason why Welsh lawyers should not continue to be able to practice in England and to have rights of audience in English courts or why English lawyers should not be in the same position in Wales.”⁵⁶

86. Lord Carlile stated:

“I would see a particular Welsh qualification as a requirement as being disadvantageous. I would not be against making

⁵³ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ19 [accessed 5 December 2012]

⁵⁴ Ibid

⁵⁵ Ibid, WJ28

⁵⁶ Ibid, WJ19

available a Welsh qualification as a bonus that would mark people out as perhaps being noted as specialised to qualify in Wales, and I would expect, certainly among the Bar, which I know about, almost every barrister practising in Wales to take it.”⁵⁷

87. Elfyn Llwyd MP said:

“If you are to deal adequately with Welsh laws, you will need people to be trained sufficiently. As the body of law increases, there will be a need for lawyers practising in Wales to be properly trained in Welsh law. If I may further add that I have been a member of the Bar for 14 years and, before that, for some 22 years, I was a solicitor. I practise mostly in family and criminal law, and if I did not know how the Welsh family laws have gone, particularly children’s law and so on, I could not practise now.”⁵⁸

88. During our visit to Northern Ireland we heard that a bespoke legal training provision has evolved which runs alongside general common law legal education. This allows Northern Ireland’s law schools to recruit students from outside the country.

Our view

89. We note the views of witnesses and firmly believe that the creation of a future separate jurisdiction should not place additional barriers on legal practitioners in Wales. We believe however that legal training should be developed further should a separate jurisdiction be created in order better to reflect the legal traditions and emerging legal identity of Wales. In particular, an additional qualification in Welsh law might be seen as desirable.

Recommendation 1: As a body of Welsh law evolves over time, we recommend that additional legal training is put in place to allow specialisms to develop, reflecting the legal traditions and emerging legal identity of Wales. This should include raising awareness in England of the growing divergence between the laws applicable in England and Wales.

⁵⁷ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 24 September 2012, paragraph 56 [accessed 5 December 2012]

⁵⁸ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 28 May 2012, paragraph 43 [accessed 5 December 2012]

6. Cases in Welsh Courts

90. Much of the evidence flagged up the establishment of an administrative court in Cardiff as an important development. However, some evidence noted that administrative cases with a link to Wales continue to be commenced and dealt with outside Wales, namely in London.

91. The Association of Judges of Wales stated:

“At present, those differences can be accommodated within the present judicial structures and, of themselves, do not require a Welsh jurisdiction, with one embryonic but growing exception: the Administrative Court in Wales where a significant proportion of the cases already involve the application of Welsh law. The situation in this court is made more difficult by the ability of litigants to commence Welsh proceedings in London where there is a lengthy delay – perhaps 9 months or so – before directions are given to transfer the case to Cardiff. This unsatisfactory state of affairs does need to be remedied: a means to do so might be an amendment to the Civil Procedure Rules requiring that Welsh cases be commenced and heard in Cardiff.”⁵⁹

92. Bangor University Law School has carried out research about the casework of the administrative court. It found:

“A high proportion of Welsh claimants and solicitors choose to issue their claims in London. There may be a number of reasons for this, i.e. the gravitas attached to litigating at the Royal Courts of Justice in London and concern for the quality and consistency of justice dispensed by judges outside London. Lack of awareness may be another factor. Approximately half of all claims involving a Welsh public authority or the Welsh Assembly Government are issued in London and the factor seemingly most influential in the choice of issue location is the

⁵⁹ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [*Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses*](#), March 2012, WJ20 [accessed 5 December 2012]

instruction by Welsh defendants of London-based specialist barristers.”⁶⁰

93. Richard Owen of the Law Society told the Committee that:

“At the moment, there is not the body of law to keep the administrative court going. The administrative court in Cardiff currently takes cases from the south-west of England. If we had a separated courts system, it would, presumably, no longer take those cases from the south-west of England. Its workload would, therefore, be quite small. You could do this in a number of ways. You could have a separate jurisdiction for the 20 devolved subject areas, while there would not be a separated jurisdiction for the England-and-Wales areas, which would probably create a greater body of work for the administrative court in Cardiff.”⁶¹

94. Mr Imperato, also of the Law Society suggested an immediate change to procedural rules:

“The court rules that govern how we deal with cases procedurally are called the civil procedure rules. They set out how you have to issue proceedings—how many days you have to do this, how many copies of this you have to file at court and so on. Some of it is very mechanical in its way. You could have what they call a practice direction. For example, the rules could say that, no matter where it was issued in the country, if a case—and I am talking about a commercial or personal injury claim, not an administrative law case—had a particular Welsh hue and dealt with Welsh law generated in Wales, it should be transferred to Wales and looked at by a Welsh judge who had a qualification or extra training to deal with such cases. You could also have some Welsh procedures attached to it—a provision for there to be translation or to include in court bundles reference to Welsh guidance and previous Welsh decisions on that area of law. That already exists in particular types of law. For example, with mercantile law, commercial law, there is a practice direction that says that you should issue it in

⁶⁰ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ24 [accessed 5 December 2012]

⁶¹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 12 March 2012, paragraph 25 [accessed 5 December 2012]

the mercantile courts and that it should be dealt with by a mercantile judge. That is a possible way forward so that, now, we could have Welsh-element cases looked at in the Welsh context. It would be a purely administrative measure to put into effect, and it would be very simple.”⁶²

95. Mr Imperato also expressed disappointment at recent administrative changes requiring all money claims in England and Wales to be issued from Salford county court, with Welsh language support provided in Caernarfon:

“On the issue of access to justice, on 19 March all money claims in England and Wales, namely personal injury claims, contract claims, and those types of civil claims—not administrative law or family law, but virtually everything else in the civil world; and personal injury is my speciality—must be issued out of Salford county court. I am also president of the Cardiff and District Law Society and, speaking on its behalf, it was disappointed with that position. One is concerned about Salford’s ability to deal with matters that are uniquely Welsh, particularly matters to do with the Welsh language. Therefore, it is not something that was widely consulted on or considered. It is a big issue, which is affecting us at this moment.”⁶³

Our view

96. We note the concerns raised by many witnesses that Welsh cases continue to be dealt with in London rather than in Cardiff, although the evidence on the whole was unclear why this is the case. We also agree with the evidence received by the Law Society and the Association of Judges of Wales that these issues could be remedied by making changes to the Civil Procedure Rules which govern how cases are procedurally dealt with in the courts of England and Wales.

97. We were also concerned to hear, in the course of taking evidence, that all money claims in England and Wales are now being processed through Salford County Court. As a result, we believe that any changes proposed to the administration of justice in England and Wales that

⁶² National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 12 March 2012, paragraph 67 [accessed 5 December 2012]

⁶³ *Ibid*, paragraph 63

impacts on the development of a Welsh legal identity must in future be subject to meaningful consultation.

Recommendation 2: We recommend that the Civil Procedure Rules are amended to ensure that public law cases which deal primarily with Welsh issues should generally be commenced or transferred to the administrative court in Cardiff.

Conclusion 8: We believe that any changes proposed to the administration of justice in England and Wales that impacts on the development of a Welsh legal identity must in future be subject to meaningful consultation.

7. Comparisons with other small common law jurisdictions

98. The terms of reference for the Inquiry included looking at the operation of other small jurisdictions, particularly common law jurisdictions. There are a number of these within the United Kingdom and British Isles, including the Isle of Man and the Channel Islands. A note prepared by the Research Service on law bodies and resources in Jersey, Guernsey and the Isle of Man is included as an Annex 5 to this report for information.

99. The Committee's attention was also drawn to small jurisdictions outside of the British Isles and we received oral evidence from Mr David Hughes a Barrister with direct experience of practicing in Gibraltar.⁶⁴

100. However, the most obvious parallel with the situation in Wales in terms of size, being a common law jurisdiction and political control being exercised through a devolved legislative Assembly, is Northern Ireland. The Committee visited Northern Ireland in June and a report of the visit and the discussions the Committee held are set out in Annexes 2 and 3 to this report.

101. As a former Attorney General for Northern Ireland, Lord Morris of Aberavon also offered his insights into the operation of the Northern Ireland jurisdiction in his written evidence to the Committee.⁶⁵

Our view

102. We believe that the existence of other small jurisdictions across the British Isles, most notably in Northern Ireland but also in the Isle of Man and in the Channel Islands, demonstrates that such structures can work in appropriate contexts.

103. We believe as a result that the insights provided by these examples into the operation of small jurisdictions in the British

⁶⁴ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ7 [accessed 5 December 2012]

⁶⁵ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry on the establishment of a separate Welsh jurisdiction: Additional response WJ - Rt Hon Lord Morris of Aberavon KG QC](#), March 2012

context, would be extremely valuable in the event of establishing a separate Welsh jurisdiction.

Conclusion 9: We suggest that any preparatory work conducted ahead of the establishment of a future separate Welsh jurisdiction should look at the operation of other small common law jurisdictions, particularly Northern Ireland, the Isle of Man and the Channel Islands.

8. Inclusion of criminal law in a Welsh jurisdiction

Meaning of criminal law

104. During the inquiry, the Counsel General provided an outline of what he believed was meant by criminal law:

“I believe that when people use expressions like that (“criminal law”) they are talking about criminal justice and the running of the criminal courts.”⁶⁶

105. He added that “we are talking about and we are looking at the possibility of devolution of that area.”⁶⁷

106. In a later speech to the Society of Legal Scholars in Cardiff on 18 November 2012, the Counsel General elaborated on what the devolution of criminal law would entail in practice, stating that it would include the following:

“... policing, the Crown Prosecution Service, criminal courts and sentencing, the probation service, the prison service and youth justice.”⁶⁸

107. Alan Trench suggested however that there was no one definition of what could be devolved under criminal law and that the term, in a Welsh devolutionary context, was unclear and could refer to a variety of areas:

“When it comes to working out what criminal law is, again, it is far from clear to me what this means ...

So, is the National Assembly to have the power to enact legislation relating to the law of theft, or the law of assault on another person? ... Are you talking about the devolution of policing? Are you talking about the devolution of sentencing, or judicial appointments, or matters relating to the criminal court system generally? Are you talking about the devolution of the operation of prisons, and what we now call offender

⁶⁶ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 16 July 2012, paragraph 152 [accessed 5 December 2012]

⁶⁷ Ibid

⁶⁸ Click on Wales, [Wales, a Jurisdiction?](#) 18 November 2012

management, or probation? I think that you need to unpack the question of what ‘criminal justice’ means.”⁶⁹

108. The responsibility for most areas of criminal justice and criminal law is not devolved and remains a matter for the UK Government and Parliament. However, certain functions relating to criminal law are devolved to the Assembly and to Welsh Ministers. These include the power for the Assembly to create offences in relation to subjects in Schedule 7 of the Government of Wales Act 2006 and for Welsh Ministers to do so when they have been designated for the purposes of making regulations to implement and enforce EU law.

109. Professor Gwynedd Parry felt that as a result of these powers Welsh Ministers are already operating in some areas of the criminal justice system and that this:

“... includes the police, young offenders, drugs related crime, and health and education services for prisoners. There is a strong possibility that Welsh Ministers will take responsibility for policing and the Offender Management Service, including prisons.”⁷⁰

110. Elfyn Llwyd MP stated that “the actual mechanics of setting up a criminal law jurisdiction in Wales ... has already begun to a large degree”. He added:

“Consider the Crown Prosecution Service: there is a distinctly Welsh Crown Prosecution Service within the confines of Wales, albeit, of course, that the head office is in London. However, the main operational head office for Wales is in Wales. We have Welsh courts administration already. We would need a Welsh judicial appointments commission ... There is a Welsh Legal Services Commission. It is not quite there, but it can be easily achieved, in my view. The Law Society has an office in Cardiff to serve the various solicitors up and down Wales, and, as you know, since 1997, I think, there has been a distinct bar circuit for Wales, as opposed to the Wales and Chester circuit. I would

⁶⁹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 9 July 2012, paragraph 74 [accessed 5 December 2012]

⁷⁰ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ14 [accessed 5 December 2012]

add that the Wales Probation Trust is already in place, and we have four distinct Welsh police forces.”⁷¹

Existing ability of the National Assembly to create and amend some criminal offences

111. Under Part 4 of the *Government of Wales Act 2006*,⁷² the Assembly already has the ability to create and amend some criminal offences so long as they relate to at least one of the 20 Subjects outlined in Schedule 7 of that Act. Emyr Lewis explained that:

“The nature of the settlement provided by the 2006 Act means that the Assembly not only has the power to create offences, but also the power to legislate in the area of criminal justice, as long as that is related to one of the 20 devolved fields, such as child protection, as we mention in our paper.”⁷³

112. The Counsel General, Theodore Huckle QC, provided similar comments:

“I do not really understand this point that criminal law is not devolved, because the criminal law is devolved insofar as it falls within the purview of the subjects in Schedule 7.”⁷⁴

113. Alan Trench however added that while a statutory power to set criminal offences is included in Schedule 7 it “enables you to do it for enforcement purposes, but not otherwise.”⁷⁵

114. Nevertheless, Elfyn Llwyd MP stated that a body of Welsh criminal law was already being developed as a result of the Assembly exercising its legislative powers:

“There is a developing body of Welsh criminal law already, as you are well aware. I know that the corpus juris of Welsh law will undoubtedly entail some divergence on criminal matters. In my view, it can only be a matter of time before the build-up of

⁷¹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 28 May 2012, paragraph 52 [accessed 5 December 2012]

⁷² [Government of Wales Act 2006](#) (Chapter 32)

⁷³ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 21 May 2012, paragraph 48 [accessed 5 December 2012]

⁷⁴ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 16 July 2012, paragraph 150 [accessed 5 December 2012]

⁷⁵ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 9 July 2012, paragraph 74 [accessed 5 December 2012]

the number of Welsh criminal laws will make it inevitable that devolution of criminal law is necessary and vital.”⁷⁶

Devolution of criminal justice

115. In a speech in 2008, the then Counsel General and now First Minister, Carwyn Jones AM, indicated that a separate jurisdiction could be established without the devolution of criminal justice. He stated that “criminal justice need not be devolved for there to be a Welsh jurisdiction.”⁷⁷

116. A number of witnesses felt that creating a separate jurisdiction without devolving criminal law would be cumbersome and would lack constitutional rigour.

117. Professor John Williams felt that a separate jurisdiction without the devolution of criminal law:

“... would be inelegant, because one would like the full package, as it were. There are probably difficulties. It is more difficult to devolve criminal law than civil law. A starting point would be devolved policing ... devolving the police, which is part of the administration of justice in one sense, is to my mind essential.”⁷⁸

118. Elfyn Llwyd MP also felt that a separate Welsh jurisdiction and the devolution of criminal law should go hand in hand:

“I know that the First Minister has been quoted as saying that he thinks it is possible to have a separate legal system without devolving criminal law. I am not sure whether that is absolutely correct, to be perfectly honest. From a political point of view, I would argue that the administration of justice should be devolved. However, my view is that, if we are to move towards a distinct Welsh jurisdiction, it would be highly desirable for there to be devolution of criminal law as well.”⁷⁹

⁷⁶ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 28 May 2012, paragraph 51 [accessed 5 December 2012]

⁷⁷ Carwyn Jones AM, *Law in Wales: The Next Ten Years*, Law Society Annual Lecture, National Eisteddfod for Wales Cardiff and District, August 2008

⁷⁸ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 5 March 2012, paragraphs 158 to 160 [accessed 5 December 2012]

⁷⁹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 28 May 2012, paragraph 51 [accessed 5 December 2012]

119. The Law Society believed that a separate jurisdiction would be more coherent if criminal law was included.⁸⁰

120. Bangor University Law School told the Committee that the devolution of criminal justice:

“... would create a far more comprehensive jurisdiction. It is a matter of common sense, therefore, to have a jurisdiction that would also include criminal matters. From what we have heard today, that is not essential, but it would create a system that was far easier to administer, one that is better understood by the public and one that is more easily developed.”⁸¹

121. Professor Gwynedd Parry stated that:

“... it does not make sense to me that Wales has some sort of duplicate system if you like, that you have some devolved courts—the Welsh jurisdiction courts—dealing with certain matters, and then the criminal courts as some separate breed. I could not be sure as to what their status would be; would they be English courts or UK courts? No, because criminal justice, to a large extent, is devolved. Therefore, I see that as a cause of great confusion. That is, if you devolve the justice system, it is far better to devolve it all and have a system that works holistically rather than going about it in a piecemeal fashion and separating criminal justice from civil work or whatever else.”⁸²

122. Professor Thomas Glyn Watkin could not see any strong reason why both criminal and civil jurisdictions should not be devolved to Wales.⁸³

123. David Hughes believed that having two distinct jurisdictions covering different areas of law would cause confusion and uncertainty:

⁸⁰ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 12 March 2012, paragraph 31 [accessed 5 December 2012]

⁸¹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 26 March 2012, paragraph 159 [accessed 5 December 2012]

⁸² National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 14 May 2012, paragraph 22 [accessed 5 December 2012]

⁸³ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 18 June 2012, paragraph 44 [accessed 5 December 2012]

“... neat divisions ... are apt to create argument about where those divisions lie, and on which side of the division a particular case happens to be. For example, one would probably say that the bulk of the administrative court’s work is civil, but when the administrative court hears an appeal by way of case stated from a magistrates’ court, it is probably exercising a criminal jurisdiction, even though we would ordinarily think of it as being a civil court. If you say, ‘That case is easy—it is crime’, what about when the administrative court hears a judicial review of a criminal court’s decision? Is it then exercising a criminal jurisdiction or a civil jurisdiction?”⁸⁴

124. Winston Roddick CB QC told the Committee that developing a Welsh jurisdiction further without devolving powers relating to criminal law “would make for an impossible situation and would be wholly impracticable”. He added that:

“If you had the devolution of responsibility for some aspects of the justice system—for example, if you were responsible for the law of contract, for the administration of justice in areas involving contract, and you had administration of justice in areas involving injuries and accidents—you would have to have judges who were part of the Welsh jurisdiction dealing with the Welsh devolved matters and other judges dealing with the subjects that were not part of the Welsh jurisdiction. Sometimes, you can have cases that involve the devolved and the non-devolved and it would become simply impossible. You cannot separate the one part of the justice system from the other, because our courts and our judges have competence right across the board.”⁸⁵

125. Emyr Lewis from the Wales Governance Centre also stated that “in theory, it would be possible to separate the two systems”,⁸⁶ but added that:

“... it is unclear to me why one would choose to do that in practice, except, possibly, with regard to the superstructure

⁸⁴ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 2 July 2012, paragraph 70 [accessed 5 December 2012]

⁸⁵ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 11 June 2012, paragraph 55 [accessed 5 December 2012]

⁸⁶ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 21 May 2012, paragraph 43 [accessed 5 December 2012]

and the cost of the criminal justice system, where we are talking about such things as the police, prisons, the probation service, and so on, as part of the package. However, except for that reason, I do not see in principle why the two would be separated.”⁸⁷

126. Although supportive of the devolution of criminal law, some witnesses acknowledged that doing so in practice could be problematic. Professor Thomas Glyn Watkin acknowledged that devolving criminal justice to Wales would not be straightforward:

“The snag, possibly, with criminal justice being devolved, is that so many other things are necessarily linked to it, which is not quite the same with regard to civil justice. I am thinking of things like the police, the Crown Prosecution Service, the prison service, the probation service, and so on. That seems a much bigger undertaking.”⁸⁸

127. The Law Society also believed that the devolution of criminal justice would include a number of different elements:

“... if you were to have a criminal jurisdiction, the prison service would, presumably, have to be devolved, as would the probation and prosecution services and responsibility for policing; there would be a political judgment to make in that regard.”⁸⁹

128. Judge Wyn Rees stated a similar argument in a different way, by suggesting that “if a significant part of the justice system were to be devolved, the creation of a separate Welsh jurisdiction would then become necessary.”⁹⁰

129. Other respondents however did not see an issue with creating a separate jurisdiction without the devolution of criminal justice.

⁸⁷ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 21 May 2012, paragraph 43 [accessed 5 December 2012]

⁸⁸ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 18 June 2012, paragraph 44 [accessed 5 December 2012]

⁸⁹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 12 March 2012, paragraph 31 [accessed 5 December 2012]

⁹⁰ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ17 [accessed 5 December 2012]

130. Alan Trench stated that establishing a separate Welsh jurisdiction “need not go hand in hand” with the devolution of criminal justice and that “a separate Welsh jurisdiction need not necessarily involve the devolution of criminal justice.”⁹¹ He stated that:

“You could have a relatively stripped, bare-bones form of a legal jurisdiction, which would deal with the tangled question of deciding what the legal as well as geographic boundary of Wales is. That need not involve the devolution of matters relating to the criminal law. In other words, there is an argument for a legal jurisdiction, and there is then another argument about the devolution of criminal law. The two are not the same. You can then, in the course of deciding whether you want to devolve criminal law, reach a conclusion about that, but the existence of a legal jurisdiction need not drive the devolution of criminal law.”⁹²

131. In supporting his views, Alan Trench provided details of the situation in Canada, where different jurisdictions exist in relation to criminal law and civil law:

“What the [Canadian] constitution provides in section 91 is that:

‘The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in Criminal Matters’, is a federal matter. Section 92 provides that:

‘The Administration of Justice in the Province, including the Constitution, Maintenance and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts’, is a provincial matter.

So, you have a clear division there with the substantive criminal law, which is a federal matter, but you have the same federal law applying, with certain exceptions, because, again, there is similar provision in Canada for enforcement offences...

You then get certain further distinctions—for example, there is a distinction between penitentiaries, which are federally run,

⁹¹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 9 July 2012, paragraph 93 [accessed 5 December 2012]

⁹² *Ibid*, paragraph 73

and prisons, which are provincially run. Essentially, if you are sentenced to more than two years, you are in a penitentiary, and therefore you are federal, and if it is less than two years it is a prison, and you are provincial. That is the sort of difference in practical terms that you get being drawn within Canada. You can have appreciable differences in criminal justice policy from province to province even though the criminal law remains a federal matter.”⁹³

132. A note prepared by the Research Service on the Canadian Legal System is included as Annex 6 to this report.

133. These sentiments reflect the initial views of the Counsel General, Theodore Huckle QC:

“I do not see that you must have criminal law devolved or not, but I should enter my immediate caveat, which is that I am in the camp that does not accept that criminal law is not already devolved.”⁹⁴

134. He added that:

“... one could take what one wanted. It is not an all-or-nothing situation, as far as I am concerned. I do not see any requirement to devolve criminal justice or not to devolve it. It is a question of what the political will and imperatives are on both sides.”⁹⁵

135. In a later speech to the Society of Legal Scholars in Cardiff on 18 November 2012 however, the Counsel General’s position on the issue had developed further:

“If, for whatever reason, the Welsh Government cannot at present move forward with proposals for taking on Policing and Justice responsibilities, the case for a separate legal jurisdiction may be considerably weakened. It would be of limited or even dubious worth pursuing a separate legal jurisdiction ‘in principle’ if Welsh Ministers and the Assembly did not also obtain a reasonably full set of powers in relation to Justice;

⁹³ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 9 July 2012, paragraphs 77 to 83 [accessed 5 December 2012]

⁹⁴ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 16 July 2012, paragraph 150 [accessed 5 December 2012]

⁹⁵ *Ibid*, paragraph 152

crucial aspects of the supposedly separate jurisdiction would still be the responsibility of the Ministry of Justice. Thus, arguably, establishing a separate jurisdiction without transferring the relevant responsibilities to Welsh Ministers and the Assembly would simply amount to asking the Ministry of Justice to run two parallel systems, one for England and one (albeit to perhaps lesser extent) for Wales. They would not be likely to agree to this, and even if they did, it is not obvious why the inherent confusion would be of benefit to people in Wales.”⁹⁶

Our view

136. We note the opinions expressed by many witnesses that the creation of a separate jurisdiction without the devolution of criminal justice would be inelegant, cumbersome and may give rise to confusion.

137. We believe as a result that a separate Welsh jurisdiction would best be established in parallel with the devolution of aspects of the criminal justice system.

138. However, unless a significant element of the criminal justice system is devolved, the current unified jurisdiction should be adjusted to take account of developments in the criminal law of Wales in devolved areas.

Conclusion 10: We believe that the creation of a separate legal jurisdiction would not be optimum without the accompanying devolution of aspects of the criminal justice system.

Conclusion 11: We also believe that the case for a separate Welsh jurisdiction is likely to be strengthened should aspects of the criminal justice system be devolved to Wales in the future.

Conclusion 12: Even in the absence of further devolution of aspects of the criminal justice system, we believe that work should be undertaken to adapt current arrangements within the England and Wales legal jurisdiction to take account of the emerging development of criminal law within devolved areas.

⁹⁶ Click on Wales, [Wales, a Jurisdiction?](#) 18 November 2012

9. Other issues

Legal education and qualifications

139. We asked academic witnesses about the extent to which they currently taught Welsh law. Most replied that devolution would normally be taught as a component of public or constitutional law courses and offered options that specialise in Welsh law.

140. Emyr Lewis was of the view that:

“... it should be essential for all lawyers in England and Wales to learn some elements of Welsh law, because, as long as we have a single England and Wales jurisdiction, the law in Wales will be part of the law of England and Wales. Therefore, learning about the nature of the National Assembly for Wales and the Welsh Government should be an essential part of the foundation course, as should knowledge of the important cases that have involved them, such as the AXA case and the Brynmawr Foundation School case. It should be ensured that each law student knows these cases as a fundamental part of a legal education.”⁹⁷

141. Professor John Williams said that:

“We want to get some movement between the different components of the UK. At the moment, particularly with Scotland, that can be difficult in terms of the type of degree that people come out with. I think Dundee is alone in having a degree that is transferrable to England, Wales and Northern Ireland; that is very rare. There is a challenge there for the law schools and the professional bodies to look at that.”⁹⁸

142. A significant issue for the law schools was where they recruited their students from. A substantial number of students are recruited from England and outside the EU, raising concerns that a separate Welsh jurisdiction would make Welsh law schools less attractive. Ms Nason of Bangor University Law School stated:

⁹⁷ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 21 May 2012, paragraph 91 [accessed 5 December 2012]

⁹⁸ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 5 March 2012, paragraph 128 [accessed 5 December 2012]

“on average, about 38% of our undergraduate student body in the law school comes from Wales, around 45% comes from England and, every year, we tend to get 1%, which equates to two or three students, from Scotland and Northern Ireland. In our undergraduate programme, our biggest growth area, which may be a point of relevance, although not so much for the UK, has been international students coming from beyond the European Union. So, we have students from Canada, India and Nigeria and—we had a discussion about this among ourselves—the nature of the academic law degree is very much to grasp central legal concepts, which means that, having done your law degree in Wales, you can go on to your professional training in places such as India and Canada, so, especially in Commonwealth countries that have a similar common law system, and it is at that professional qualification and on-the-job training stage that the major differences become evident”.⁹⁹

143. Professor Wincott was asked whether it will be more difficult to recruit English students. He replied:

“I have heard that kind of concern being articulated. If it becomes a real concern, that would have more to do with a slightly misguided sense of the mood music than to do with the character or quality of the undergraduate education.

I mentioned before that we have a lot of students from Malaysia. Losing them would do considerable damage to the financial viability of the law school. Indeed, they are a significant export for Wales and bring consumption into the Cardiff area on a significant scale as well. However, given the realities of a legal education, for reasons of a commonality of philosophy, approach and so on, I see no reason why the basic undergraduate legal education should become anything other than a good background for someone, whether they want to practise in England, Wales, England and Wales, Malaysia, India or wherever”.¹⁰⁰

⁹⁹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 26 March 2012, paragraph 124 [accessed 5 December 2012]

¹⁰⁰ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 21 May 2012, paragraphs 104 to 105 [accessed 5 December 2012]

Our view

144. We note that law schools in Wales currently recruit heavily from England and overseas and fully accept that a future separate jurisdiction must not make Welsh law schools less attractive to prospective students.

145. We agree therefore with the evidence received that an undergraduate law degree from Welsh universities should remain transferable and that any change to a separate jurisdiction in the future must not present a barrier to students from outside Wales.

A Law Commission for Wales?

146. We heard evidence about having a Law Commission for Wales. Most witnesses were broadly in favour of some body to review Welsh law. Professor John Williams said:

“I do not think that we should move away from the idea of having a Law Commission for England and Wales, because there will be non-devolved matters that still need to be discussed, although it is important that, in such cases, Wales makes its voice heard.”¹⁰¹

147. However, he thought that there should be Welsh body to review law:

“So, it would be a standing body—it need not be a commission; I am sure that there are many different ways that this could be done—that could advise the Government and the Assembly on areas that it considers appropriate. The Government and the Assembly could also say, ‘We’re quite interested in reforming the law on such and such. So, why don’t you go away, have a look at it and come back with a report or a consultation paper and we will go from there?’ That adds capacity to the law reform movement in Wales.”¹⁰²

148. Lord Carlile stated:

“I believe that a Welsh law commission, particularly a part-time one, perhaps with fairly frequently changing personnel

¹⁰¹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 5 March 2012, paragraph 89 [accessed 5 December 2012]

¹⁰² *Ibid*, paragraph 91

consisting of a mixture of academics and practitioners, could produce a turnover of recommendations, most of which would be at least considered properly by the Assembly in early course.”¹⁰³

149. Dr Mawhinney of Bangor Law School told us about the establishment of the Northern Ireland Commission in 2007:

“it has four part-time commissioners—there is a solicitor, a barrister, a layperson and an academic—a small staff and a chief executive. It works principally on about two to three law reform projects a year ...

... it tends to take a thematic approach.

... It initially drew quite heavily on legal academics. There were secondments, for example, from the School of Law in Queen’s University Belfast. That happens to a lesser degree now; that was part of the set-up process.”¹⁰⁴

150. We were able to visit the Northern Ireland Law Commission ourselves and a note of the meeting can be seen in Annexes 2 and 3.

Our view

151. Most witnesses were supportive of having a body to review Welsh law and that its membership should be flexible and draw on expertise in the law schools and the profession.

Recommendation 3: We recommend that a body should be entrusted with reviewing and assisting with the consolidation of Welsh law. Such a body could form part of the existing Law Commission for England and Wales or be a newly established body.

¹⁰³ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 24 September 2012, paragraph 105 [accessed 5 December 2012]

¹⁰⁴ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 26 March 2012, paragraphs 93, 95 and 97 [accessed 5 December 2012]

Laws made in Wales have equal standing in English and Welsh

152. Professor Thomas Glyn Watkin submitted that:

“If courts throughout England and Wales have jurisdiction over this body of law, then courts in Newcastle or Penzance, as much as Cardiff or Caernarfon, must be expected to deal with this bilingual legislation with equal ability. If that cannot be done, then the notion that they can have legal authority over this sphere of their activity is compromised. Given that courts sitting in England as opposed to those sitting in Wales are not expected to try cases or hear litigants in the Welsh language, they can hardly be expected to declare and interpret laws which have been made in that language as well as in English if both versions are, as statute requires, to be treated as of equal standing. At the very least, therefore, a rule of competence is needed by which, as with Welsh language or bilingual hearings, hearings which could involve laws made bilingually must be heard in Wales.

Given that such laws can only exist in relation to the subjects listed under the twenty headings of the National Assembly’s current legislative competence, in effect hearings with regard to the devolved subjects should fall to be heard in Wales. Only courts in Wales would be competent to hear such cases so that, in effect, with the exception of the Supreme Court, only courts in Wales would have jurisdiction over that body of law.”¹⁰⁵

Our view

153. Professor Thomas Glyn Watkin made a strong argument that laws made in the twenty devolved areas should be heard in Wales as English courts were not competent to deal with bilingual legislation. He recommended a rule of competence that all such laws should be heard in Wales.

Recommendation 4: We recommend that a presumption should be established in favour of commencing and hearing in Welsh courts all cases relating to laws made bilingually in the English and Welsh languages.

¹⁰⁵ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ16 [accessed 5 December 2012]

Welsh legal commentary

Our view

154. We heard plenty of evidence about the lack of commentary on Welsh law. We welcome the steps being taken by the Counsel General to develop an “encyclopaedia of Welsh law” as outlined in his statement to Plenary on 26 June 2012.¹⁰⁶

Appointment of Welsh Judges to the Supreme Court

155. The Counsel General had been widely reported as calling for a Supreme Court Judge from Wales. He explained his view to us:

“I take the view that the way that the Constitutional Reform Act 2005 refers to membership of the panel of judges in the Supreme Court as reflecting every part of the UK—I am summarising—means that Wales should be recognised as a separate part of the UK. The counter argument is that it relates only to the strict definition of legal jurisdictions and therefore England and Wales is the relevant part. However, I think that we are right not to be particularly happy with that.”¹⁰⁷

156. He added:

“I personally would like to see it as a requirement that there was somebody with a clear link to Wales on the panel of the Supreme Court justices, but it is not something that is currently required under the constitutional structure.”¹⁰⁸

157. Lord Carlile stated:

“I think that it is extraordinary that there is a Northern Ireland judge in the Supreme Court, a Scots judge in the Supreme Court, but no Welsh judge in the Supreme Court, other than by chance.”¹⁰⁹

¹⁰⁶ National Assembly for Wales, [RoP: Plenary](#), 26 June 2012, pages 54 to 58 [accessed 5 December 2012]

¹⁰⁷ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 16 July 2012, paragraph 27 [accessed 5 December 2012]

¹⁰⁸ *Ibid*, paragraph 42

¹⁰⁹ National Assembly for Wales, [RoP: Constitutional and Legislative Affairs Committee](#), 24 September 2012, paragraph 55 [accessed 5 December 2012]

Our view

158. We concur with the view of the Counsel General that the wording in the *Constitutional Reform Act 2005*¹¹⁰ should be interpreted as including Wales as a “separate part of the UK” and that a judge with a clear link with Wales should be on the Supreme Court.

Recommendation 5: We recommend that a senior judge with experience of Welsh devolution and Welsh law should be appointed to the Supreme Court.

Costs

159. In the evidence received we heard differing views of what constituted a jurisdiction. This makes determining the relevant costs difficult. There is no one source of information which summarises the actual costs of what the legal jurisdiction in Wales would be as the costs are incurred in a variety of places including the Welsh Government, Welsh local authorities and departments of the UK Government.

160. Many witnesses suggested there would be cost implications but no figures were provided. Some initial work was undertaken by the Research Service (which is included in Annex 7) which found that it is difficult to make comparisons with other UK areas, as the level to which jurisdiction is devolved varies between countries within the UK. Also, the way in which expenditure is recorded against providing these functions is not consistent between countries.

Our view

161. We believe that more work needs to be done to establish the cost implications of a separate Welsh jurisdiction based on the different models.

Conclusion 13: We believe that any future proposals for establishing a separate jurisdiction should be properly and rigorously costed.

¹¹⁰ [Constitutional Reform Act 2005](#) (Chapter 4)

Public engagement

Our view

162. As stated in Conclusion 1 of this report, we believe that it is fundamentally important that any changes to the current unified jurisdiction are not seen as a matter of convenience for the legal profession alone and that any consideration of whether to establish a separate jurisdiction in the future should be done for the clear benefit of the Welsh people.

163. In particular, we believe that the Welsh and UK Governments should actively engage the public in the debate surrounding this issue. This is an important area of public policy that will grow in interest as the Welsh devolutionary process continues and as a distinctive body of Welsh law continues to emerge over the coming years.

164. We also consider that such a debate should be informed by empirical data, which should include detailed costs of such a development. We believe that this would enable a fuller case to be made if a move to separate Welsh jurisdiction was considered appropriate in the future.

165. We therefore welcome the initial approach of the Welsh Government in its consultation on “A Separate Legal Jurisdiction for Wales”¹¹¹ which was issued on 27 March 2012, and look forward to hearing its response to the evidence we have received. We also hope that the Welsh Government’s own findings on the issue will be presented in a public report which also sets out its plans on how to proceed.

166. Regardless of whether a separate Welsh jurisdiction is established or not, we hope that the Welsh Government takes the initiative in considering our conclusions and in ensuring that our recommendations are put into effect.

¹¹¹ Welsh Government, [Consultation on a Separate Legal Jurisdiction for Wales](#), 27 March 2012 [accessed 5 December 2012]

Witnesses

The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed in full at www.assemblywales.org

<i>Date</i>	<i>Witness</i>	<i>Organisation and Role</i>
5 March 2012	Prof John Williams	Professor of Law, Department of Law and Criminology, Aberystwyth University
12 March 2012	<u>The Law Society</u> Kay Powell LLM Michael Imperato Richard Owen	Policy Adviser NewLaw Solicitors, Member of the Wales Committee Deputy Head of the School of Law, Accounting and Finance, University of Glamorgan, Member of the Wales Committee
26 March 2012	<u>Bangor University Law School</u> Dr Alison Mawhinney Ms Sarah Nason Mr Huw Pritchard	Lecturer in Law Lecturer in Law Doctoral candidate

14 May 2012	Professor R Gwynedd Parry	Professor of Law and Legal History, Director of the Hywel Dda Institute, Swansea University
21 May 2012	<u>Wales Governance Centre, Cardiff University Law School</u>	
	Emyr Lewis	Partner, Morgan Cole Solicitors; Senior Fellow in Welsh Law, Wales Governance Centre
	Professor Dan Wincott	Blackwell Professor of Law and Society at Cardiff Law School; Co-Chair of the Wales Governance Centre
28 May 2012	Elfyn Llwyd MP	Group Leader, Plaid Cymru, House of Commons
11 June 2012	Mr Winston Roddick CB QC	
18 June 2012	Professor Thomas Glyn Watkin	
25 June 2012	Lord Morris of Aberavon PC KG QC	
2 July 2012	Mr David Hughes	
9 July 2012	Alan Trench	Honorary Fellow, School of Social and Political

Science, University
of Edinburgh

16 July 2012

Theodore Huckle
QC

Counsel General,
Welsh Government

24 September
2012

Lord Carlile of
Berriew QC

Annex 1: List of written evidence

The following people and organisations provided written evidence to the Committee. All written evidence can be viewed in full at www.assemblywales.org

<i>Organisation</i>	<i>Reference</i>
WJ 1 - Personal Response (Dr. Peter Freeman)	CLA(4)-05-12(p1)
WJ 2 - Personal response (Mr Gwyn Hopkins)	CLA(4)-05-12(p1)
WJ 3 - Institute of Chartered Accountants	CLA(4)-05-12(p1)
WJ 4 - Personal Response (Dr Dominic De Saulles)	CLA(4)-05-12(p1)
WJ 5 - Response from the Welsh representatives of the National Council of the Magistrates' Association	CLA(4)-05-12(p1)
WJ 6 - 14 District Judges based at various Courts throughout Wales	CLA(4)-05-12(p1)
WJ7 - Personal Response (David Hughes)	CLA(4)-05-12(p1)
WJ 8 - Response from Administrative Justice and Tribunals Council	CLA(4)-05-12(p1)
WJ 9 - Response from Public Services Ombudsman for Wales (PSOW)	CLA(4)-05-12(p1)
WJ 10 - Personal response (Professor Gerry Maher QC)	CLA(4)-05-12(p1)
WJ 11 - Response from The Magistrates' Association for England and Wales	CLA(4)-05-12(p1)
WJ 12 - Personal Response (David Williams, Judge of the United Kingdom Upper Tribunal)	CLA(4)-05-12(p1)
WJ13 - Personal response (Christopher Morton, Circuit Judge)	CLA(4)-05-12(p1)
WJ 14 - Personal Response (Professor R. Gwynedd Parry, LLB, PhD, FRHistS, Barrister)	CLA(4)-05-12(p1)
WJ 15 - Response from the Welsh Committee of Judges' Council, Judiciary of England and Wales	CLA(4)-05-12(p1)
WJ 16 - Personal response (Professor Thomas Glyn Watkin)	CLA(4)-05-12(p1)

WJ 17 - Personal response (His Honour Judge Wyn Rees)	CLA(4)-05-12(p1)
WJ 18 - Personal response (Rhys ab Owen Thomas)	CLA(4)-05-12(p1)
WJ 19 - Personal Response (The Hon. Mr Justice Roderick Evans)	CLA(4)-05-12(p1)
WJ 20 - Response from The Association of Judges' of Wales	CLA(4)-05-12(p1)
WJ 20 - Response from The Association of Judges' of Wales	CLA(4)-05-12(p1)
WJ 21 - Response from the Law Society	CLA(4)-05-12(p1)
WJ 22 - Personal response (Serving District Judge)	CLA(4)-05-12(p1)
WJ 23 - Personal Response	CLA(4)-05-12(p1)
WJ 24 - Response from the Bangor Law School, Bangor University and an Annex to the Response	CLA(4)-05-12(p1)
WJ 25 - Response from Hugh James (Law Firm)	CLA(4)-05-12(p1)
WJ 26 - Response from Legal Services Board	CLA(4)-05-12(p1)
WJ 27 - Response from the Central Government and Justice Unit, Welsh Language Board	CLA(4)-05-12(p1)
CLA WJ 28 - Response from Mr Emyr Lewis and Professor Dan Wincott (Cardiff University)	CLA(4)-05-12(p1)
CLA WJ 29 - Response from Legal Wales Standing Committee	CLA(4)-05-12(p1)
CLA WJ 30 - Response from Law Commission	CLA(4)-05-12(p1)

Additional Responses

Organisation

Additional Responses WJ - Mr Roddick, CB, QC: "The submissions of Winston Roddick CB QC on a separate Welsh jurisdiction. June 2012"

Additional Responses WJ - Mr Roddick, CB, QC: Ninth Annual Lecture of the Centre for Welsh Legal Affairs; 28 November 2008; "The

Reference

CLA(4)-13-12(p1)

CLA(4)-13-12(p1)

development of devolution and Legal Wales”	
Additional Responses WJ – Mr Roddick, CB, QC (Annex): “Supplement to Evidence of Winston Roddick: Distinct Laws”	CLA(4)-13-12(p1)
Additional Responses WJ - Lord Carlile of Berriew C.B.E., Q.C. – Press release	CLA(4)-17-12(p3)
Additional Responses WJ - Lord Carlile of Berriew C.B.E., Q.C - Lord Richard Commission	CLA(4)-19-12(p2)
Additional Responses WJ – Lord Morris of Aberavon KG QC	CLA(4)-15-12(p1)
Additional Responses WJ – Professor Thomas Glyn Watkin	CLA(4)-14-12(p1)
Additional Responses WJ – Mr Alan Trench, Honorary Fellow, School of Social and Political Science, University of Edinburgh.pdf	CLA(4)-17-12(p1)

Annex 2: Study visit to Northern Ireland; 20-21 June 2012

Constitutional and Legislative Affairs Committee of the National Assembly for Wales (“CLA Committee”) is conducting an Inquiry into the establishment of a separate Welsh jurisdiction.

Several witnesses told us in their evidence that as a small jurisdiction, Northern Ireland would provide a useful comparator for Wales. Therefore, as part of its inquiry on a separate jurisdiction for Wales, the Committee visited Northern Ireland.

Delegation

The following CLA Committee Members took part in the Study Visit:

David Melding AM (Chair)
Suzy Davies AM
Simon Thomas AM
Eluned Parrott AM
Julie James AM

The Members were accompanied by Olga Lewis (Deputy Clerk).

List of Witnesses

The Members met with the following witnesses:

Wednesday 20.06.12

Dr Gordon Anthony, School of Law, The Queen’s University of Belfast

Professor Rick Wilford, School of Politics, The Queen’s University of Belfast

Thursday 21.06.12

Mrs Anne Fenton, Director, Institute of Professional Legal Studies

Mr Justice McCloskey, Chairman, Northern Ireland Law Commission

Mr David A Lavery CB, Administrative Court Service

Ms Jacqui Durkin, Head of Business, Administrative Court Service

Ms Geraldine Fee, Head of Criminal and Coroners Policy

Mr Danny Kinahan, Ulster Unionist Party, South Antrim – Member of the Northern Ireland Assembly Committee of the Office of the First Minister and Deputy First Minister

Mr Raymond McCartney, Sinn Féin, Foyle - Member of the Northern Ireland Assembly Committee for Justice

Mr Gordon Nabney, Examiner of Statutory Rules, Northern Ireland Assembly

Mr Hugh Widdis, Director of Legal Services, Northern Ireland Assembly

Mr Alan Esdale, Second Legislative Counsel, Northern Ireland Assembly

Observations:

1. While the system of Jurisdiction in Northern Ireland presents a useful comparison for Wales (particularly the practical aspect of it), it is necessary to have a better understanding of the reasons why it has been formed as it is (Courts of Appeal in particular). The historical factors are significant.
2. While the Northern Ireland's current emphasis on access to justice is important (the concept of "Justice Centres"), consideration must be given to the issue of the division/lack of it between the criminal and civil case hearings.
3. At the moment Wales has reached the point where work needs to be done to accommodate the results of the legislative divergence thus far and to provide for the increase of this divergence in the future. Consequently, when considering the establishment of a separate jurisdiction, the following questions must be answered: (1) What need is being sought to fulfil? and (2) What issues are being resolved?

4. It is crucial to establish a Law Commission function with a wide enough remit and ensure that there is a Statute Book and sufficient commentary.
5. The overriding purpose of reform must be to improve access to justice.
6. Although a small jurisdiction, Northern Ireland operates an effective system of justice and has no great difficulty, for instance, in operating Higher Courts.
7. Northern Ireland has evolved bespoke legal training provision which runs alongside general common law legal education. This allows Northern Ireland's law schools to recruit students from outside the country, although they are the minority.

Annex 3: Issues raised in discussions: The Institute of Professional Legal Studies (Northern Ireland)

The following issues have been raised in discussion:

- The “internationally recognised” and “unique” postgraduate course.
- Recruitment.
- Legal education resources.
- Availability of case law and commentary.

The Institute of Professional Legal Studies (“The Institute”) was established in 1977 at Queen's University Belfast. It provides an “internationally recognised and unique one-year postgraduate course for trainee barristers and trainee solicitors who study together.” Its website states:

Committed to excellence since its inception, the Institute continually monitors and adjusts its performance, its courses and services to ensure its trainees receive the utmost quality. Over the years the Institute has modified the course to allow for greater and more structured integration of direct field experience. Today, the Institute's course is a central component of the overall training programme for lawyers. This programme comprises training in a vocational law school and supervised in-practice training.

Although the Institute is part of the University, it has links with the two bodies which control the legal profession in Northern Ireland, namely the Honourable Society of the Inn of Court of Northern Ireland and the Law Society of Northern Ireland. These bodies are responsible for the training and admission of barristers and solicitors respectively but have delegated part of that responsibility to the Institute. The Institute is therefore accountable to the professions as well as to the University. The cross-flow of information and discussion between the Institute and the legal

profession is vital to the Institute's work and to the validation of the Institute's qualification.

The links between the two professional bodies, the University and the Institute are given a formal structure and forum in the Institute's governing body, the Council of Legal Education. Under the Chairmanship of Mr Justice Weir, it is made up of representatives of the University, the Inn of Court, the Law Society and the Institute. At its meetings the Council ensures that the Institute is informed of the ever evolving needs and views of the profession it serves.

To get their places in the Institute the applicants must have a recognised law degree and pass a competitive admissions test. In addition solicitor trainees must have secured an apprenticeship before they can take up a place at the Institute. In the Institute solicitors and barristers study together and specialise later. In Northern Ireland (same as elsewhere in the UK) the gap between the roles of barristers and solicitors is narrowing: more and more "solicitor advocates" (i.e., solicitors with the right to argue their cases in court) are recruited. The Institute unites training for solicitors and barristers and avoids unnecessary duplication of resources in doing so as well. Joint training has additional benefits including allowing each side of the profession to have an insight into the work of the other and the promotion of the ethos of acting as a team for the benefit of the client.

Some of the professionals the Institute trains will proceed to work in the judiciary. The trainees are mainly from Northern Ireland. No matter where in the UK they graduate from, the Institute will enrol them to do the Postgraduate Diploma in Professional Legal Studies. At the moment the Institute recognises the majority of law degrees across the UK. All must contain eight core subjects – Contract, Tort, Criminal law, Constitutional Law, EU, Evidence, Equity and Land Law. The Law Society proposes that Land Law of Northern Ireland should replace Land Law as a core subject. Most of the undergraduate and graduate law students at Queen's University are from Northern Ireland. They graduate and build their working careers in Northern Ireland. Even if they work for a time in some of the top leading UK-headquartered law firms, they tend to return to Northern Ireland afterwards.

In Wales, however, the situation is different - there is more transference between Wales and England, which should be taken into account. The sources of recruitment into the law profession both at undergraduate and graduate levels should be considered when the legal education system compliant with a separate jurisdiction is set up. Generally, in Wales there is a greater diversity of law schools than in Northern Ireland: as much recruitment comes from England and elsewhere, the law schools need to stay generic.

Although many areas of law in Northern Ireland differ from those in England and Wales (e.g., High Court, Family Law and County Court procedures), Irish criminal and land law in particular require the Institute to produce a lot of materials for students. These publications must be refreshed on an annual basis. Most of the materials are now available online. Although the Irish law is different, the materials regarding the majority of legal issues in England and Wales still remain highly relevant.

Northern Ireland Law Commission

The following issues have been raised in discussion:

- The constitution of the Northern Ireland Law Commission.
- How its programme of work is determined.
- How it carries out its work.
- What work it has carried out since its creation in 2007.

The Northern Ireland Law Commission (the Commission) was established in 2007 following the recommendations of the Criminal Justice Review Group. The Commission is established under the Justice (Northern Ireland) Act 2002 (as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010). Its main task is to review areas of the law and to make recommendations for reform. A number of specific types of reform are covered by the provisions in the 2002 Act (as amended):

- Simplification and modernisation
- Codification

- The elimination of anomalies
- Repeal of legislation which is no longer of practical utility
- Reduction of the number of separate legislative provisions.

In addition the Act requires the Commission to consider any proposals for the reform of law of Northern Ireland referred to it. The Commission must submit to the Northern Ireland Department of Justice, programmes for the examination of different branches of the law with a view to reform. The NI Department of Justice must consult the Attorney General for Northern Ireland before approving any programme submitted by the Commission.

The NI Department of Justice must consult with the Secretary of State for Northern Ireland before approving any programme prepared by the Commission which includes examination of any branch of law relating in whole or in part to a reserved or excepted matter or the consolidation or repeal of any legislation which relates in whole or in part to a reserved or excepted matter.

The Commission consists of five part-time Commissioners. The Chairman (who is included as one of the five Commissioners) is appointed from Northern Ireland's High Court Bench. Of the other four Commissioners one must be drawn from the solicitor's profession, one from the Northern Ireland Bar, one from legal academia and one must be a person from outside the legal professions.

Northern Ireland Courts and Tribunal Service

The following issues have been raised in discussion:

- The Northern Ireland Courts and Tribunal Service is a new body
 - how has its role changed?
- Further information about the Enforcement of Judgements Office.
- Further information about the Northern Ireland Legal Services Commission

The Northern Ireland Courts and Tribunals Service (NICTS) is an agency under the Access to Justice Directorate of the Department of Justice for Northern Ireland. Before the devolution of policing and justice it was the Lord Chancellor's Department in Northern Ireland. Its role is to:

- provide administrative support to the Northern Ireland courts, i.e. the Court of Appeal, High Court, Crown Court, County Courts, Magistrates' Courts and Coroners' Courts;
- provide administrative support for tribunals;
- enforce civil court judgments through the Enforcement of Judgments Office; and
- sponsor the work of the Northern Ireland Legal Services Commission.

In 1978 all court administration has been unified and in 1979 NICTS was established by the Judicature (Northern Ireland) Act 1978, as a separate civil service in Northern Ireland. Prior to that, the courts system in Northern Ireland had a very patchwork character. NICTS' rules and responsibilities changed significantly. Following the devolution of policing and justice to the NI Assembly in April 2010 the Northern Ireland Court Service was rebranded as the Northern Ireland Courts and Tribunals Service, establishing a new unified administration for courts and tribunals - it became an agency of the Department of Justice. NICTS runs the courts and tribunals. The NICTS agency sits within the Access to Justice Directorate of the Northern Ireland Department of Justice, which also comprises five policy divisions plus the Lord Chief Justice's Office.

Devolution has been a good opportunity to take on the enacting of laws that impact on the community. This allows policies to be tailored to the specific needs of Northern Ireland. An example of this is legal aid reform where Northern Ireland is adopting different policies to those being introduced in England.

The Access to Justice Directorate of the DOJ sponsors the work of the Northern Ireland Legal Services Commission. Every year since the Commission was established in 2003, its budget has been

exceeded, requiring almost £150 million in additional funding. By 2013-14 the Commission is expected to generate efficiency savings of almost £30 million, of which £18 million is expected to be generated by the new remuneration Rules which came into operation in April 2011.

Historically, most of the legal aid budget has been spent on the criminal cases; the majority of NICTS work is connected with it. From now on much greater emphasis will be on helping people to access the appropriate legal advice. Jurisdiction of the County Courts will be increased in Northern Ireland.

Currently, NICTS is looking to change the system and the location of courts, with the emphasis being on the establishment of the combined offices, which would provide the administrative support and conduct the hearing of cases in one place. This will improve the access to justice in communities (especially rural communities) and provide an average travelling time to such offices of around half an hour.

In Northern Ireland the distinction between the places where the civil and criminal are heard is to be removed, which will allow for large savings (Court Clerks will be available to clerk either cases). Northern Ireland invested in re-qualification of Clerks to enable them to run these combined offices. It is advisable that Wales should have the same joint hearing facilities, which would allow for all local hearings to take place locally in so-called joint "Justice Centres". These centres should be able to combine the provision of good working environment for staff and service to the public.

Currently Northern Ireland has different court divisions defined by boundaries. The aim is to remove these boundaries. It is advised that Wales should install as much flexibility in its court system as possible from the beginning – it is important to centralise the system so that it would be possible to hear a case anywhere (if necessary, via a videolink etc). This will provide the population with the high quality access to justice.

Thus far, in Northern Ireland the tribunals have been run by the Government departments. Now NICTS is taking them over. However, unlike Wales and England, Northern Ireland does not have

1st tier and Upper tier tribunals. There is an opinion among the judiciary that First-tier Tribunals are enough, without an automatic right of access to the Higher tier.

Northern Ireland has many small rural solicitors practices and if the legal aid is reduced, the cash flow will suffer. Also, politically people believe that it is necessary to have a choice of their own representatives rather than being assigned a representative. Thus, it is advisable that Wales, while maintaining the duty solicitors system, bears this in mind.

Annex 4: Requirements of a separate legal jurisdiction; Rt. Hon the Lord Carswell

1. Judiciary

A separate judiciary, both first instance and appellate. Matters requiring consideration include:

Appointment – a judicial appointments commission, or some other mechanism; the question then arises who has the final say in the appointment, Lord Chancellor or First Minister or some other person (appointments made by The Queen are made on the recommendation of a minister), and whether that person can refuse the appointments commissioner's recommendation or only refer it back for reconsideration;

Qualification for appointment – would it be only members of the local Bar, or would members of the English bar be eligible?

2. Matters requiring consideration include:

Qualification for call to the Bar;

Queen's Counsel or equivalent, and who appoints or recommends for appointment;

Rights of audience of other Bars (bearing in mind the EU requirements), and rights of such persons to be called to the Bar of Wales;

Training facilities, both pre and post call;

A complaints and discipline structure;

An equivalent of the Bar Council to govern the Bar;

An inn of court or other corporate body.

3. Solicitors

Similar considerations relating to those relating to barristers, a corporate body such as the Law Society, requirements for admission, training, complaints and discipline.

4. Rules of court

A separate legal system would require its own rules of court, with a rule-making body.

5. Court administration

A self-contained organisation, funded and appointed locally, to run the courts and administer the judiciary (the court service now in place may or may not be sufficient).

6. Local legal materials

Text books relating to the local corpus of law and statute books would be required in the course of time.

7. Crown and prosecution service

An attorney general to head the Crown legal service, a director of public prosecutions and a public prosecutions departments, a Crown Office to handle government legal matters, a youth justice service and various ombudsmen or inspectors to oversee and regulate different aspects of the law and the legal profession.

8. Law commission

A body to consider the development of the law and make recommendations to the Assembly is likely to be required.

All this would have to be negotiated in the light of issues of removal of jurisdiction of English courts and professional bodies and the extent of jurisdiction of Parliament over Welsh legal affairs. That would require primary legislation in Parliament.

Sources in Northern Ireland include the *Government of Ireland Act 1920*, the *Judicature (Northern Ireland) Act 1978*, the *Justice (Northern Ireland) Act 2002* and such text books as those of Sir Arthur Quekett and Harry Calvert.

Annex 5: Research Service briefing: Law bodies and resources in Jersey, Guernsey and the Isle of Man

This note includes information for members of the Constitutional and Legislative Affairs Committee about the various law bodies that exist and the law resources available in each of the UK's Crown Dependencies (Jersey, Guernsey and the Isle of Man).

Jersey

Jersey Law Commission

The [Jersey Law Commission](#) was set up by a proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996. The Commission consists of six members.

Although the Commission works in close consultation with the Legislation Advisory Panel, which also organised its funding and acts as its channel of communication with the States, it is an independent body.

The role of the Commission is defined in its terms of reference:

“It shall be the duty of the Commission to identify aspects of Jersey law which it considers should be examined with a view to their development and reform, including in particular the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of law, and to those ends:

- (a) To receive and consider any proposals for the reform of the law which may be made or referred to them;
- (b) To prepare and submit to the Legislation Advisory Panel from time to time programmes for the examination of different branches of the law with a view to reform; and
- (c) To undertake, pursuant to any such recommendations approved by the Legislation Advisory Panel, the examination of particular branches of the law, such consultation thereon as the Commission shall think fit, and the formulation by

means of draft bills or otherwise of proposals for such reform”.¹¹²

Jersey Legal Information Board

Jersey also has a [Legal Information Board](#) which is the repository of all laws and judgments for the Island of Jersey. Its website includes an open section containing access to Jersey’s legislation, judgments as handed down by the Island’s court, information on Jersey’s court system, details of Jersey law firms, guidance on mediation processes, general legal advice and guidance for citizens and access to the Jersey and Guernsey Law Review.

The website in addition includes a closed section where subscribers and other registered users have access to further areas, including the Annotated Laws, linking case law to statute, the official Jersey Law Reports; a Legal Library of Jersey Texts, Books and Commentaries. According to the website, the site is “presented to the legal and related professions as well as to the public generally so as to maximise access to legal information and services”.¹¹³

The Law Society of Jersey

[The Law Society of Jersey](#) is the governing body of lawyers practising as Advocates and Solicitors of the Royal Court of Jersey. All members are governed by the Jersey Law Society's Code of Conduct and the *Advocates and Solicitors (Jersey) Law 1997*, as amended.

Jersey and Guernsey Law Review

The Jersey Law Review was founded in 1997 but changed its name in January 2007 to the Jersey and Guernsey Law Review. According to the Jersey Legal Information Board’s website:

“The change was brought about by the desire of many lawyers in both Jersey and Guernsey to work more closely together and to emphasize the common elements of the jurisprudence of both bailiwicks”.¹¹⁴

The first issue of the revised title was published in February 2007. Its aims are to “promote the development of the laws of Jersey and

¹¹² Jersey Law Commission, [Annual Report for 2009](#), Annex B

¹¹³ Jersey Legal Information Board, [Home Page](#)

¹¹⁴ Jersey Legal Information Board, [Jersey and Guernsey Law Review](#)

Guernsey and the encouragement of interest therein”.¹¹⁵The website also provides some background information about the development of Jersey and Guernsey’s judicial independence:

The story of the political autonomy and judicial independence of both Jersey and Guernsey begins in 1204. In that year King John of England lost the duchy of Normandy (which at that time included the Channel Islands) to the French King Philippe Auguste. King John, seeking to preserve the loyalty of the Islanders to their King/Duke, conferred a number of constitutional privileges. He established separate administrations for each bailiwick and decreed that they would continue to be governed by their own laws, essentially the customary law of Normandy. From that time the legal systems of both Islands have developed from those appropriate for insular agricultural economies to systems adapted to the needs of thriving international financial centres.

From this common root of Norman customary law, therefore, the jurisprudence of the two bailiwicks of Jersey and Guernsey has developed. The bailiwick of Guernsey includes the two smaller Islands of Alderney and Sark, each of which has its own autonomy in certain respects. It is at first blush extraordinary that in the small area covered by the Channel Islands two distinct judicial systems and two corpora juris (four, if one takes account of the different rules for the smaller islands) should have survived for over 800 years.¹¹⁶

Guernsey

Unlike Jersey, Guernsey does not have its own Law Reform Commission. Information about Guernsey Law and the profession of a Guernsey Advocate however can be found through the website of the [Guernsey Bar](#). The website also sets out details of members of the Bar and details of all the current Guernsey Law firms.

Guernsey Legal Resources

A comprehensive collection of Guernsey’s legal material can also be found on the [Guernsey Legal Resources website](#). The website includes:

¹¹⁵ Jersey Legal Information Board, [Jersey and Guernsey Law Review](#)

¹¹⁶ Ibid

- Guernsey, Alderney, Sark and Bailiwick Laws enacted and published since 1950 as well as some key earlier items.
- Guernsey, Alderney, Sark and Bailiwick, Ordinances enacted and published since 1950 as well as some key earlier items.
- Guernsey and Bailiwick Statutory Instruments enacted and published since 1974
- Unofficial consolidated versions of Laws from 1950 and Ordinances from 1950
- Orders of the Royal Court from 1949 onwards.
- Practice Directions of the Royal Court from 2000 onwards.
- Unreported Judgments of the Guernsey courts from 2004 onwards and of the Court of Appeal from 1964 to 1989.
- The Guernsey Law Journals from 1985 until its last publication in 2000, including the text of Court of Appeal Judgments from 1989 to 2000.
- A link to the Jersey and Guernsey Law Review.

The website is a joint initiative of the Royal Court of Guernsey and the Law Officers of the Crown. According to the website, its aim reflects the commitment of the Royal Court and the Law Officers “to improving the administration of justice in the Island by providing easy access to some of its most frequently used legal material”.¹¹⁷

Isle of Man

The Isle of Man does not have a Law Reform Commission or a dedicated website which provides information about Manx law. Information about the Manx legal system is however available on the [Isle of Man Government's](#) website.

Isle of Man Law Society

The [Isle of Man Law Society](#) was established in 1859 by the *Law Society Act 1859*. In 2008, the Society consisted of 171 practising Advocates, 17 non-practising Advocates, 4 associate members and 32 student members.¹¹⁸

¹¹⁷ Guernsey Legal Resources, [Home Page](#)

¹¹⁸ Isle of Man Law Society, [History & Structure](#)

Annex 6: Research Service briefing: Canadian Legal System

The Federal System¹¹⁹

Canadian federalism has two constitutionally recognised levels of government: federal and provincial. The country also has two further forms of government, territorial and local, which are not constitutionally recognised.

Federal Level of Government

The first constitutionally recognised level of government is the federal or national government. This level is responsible for enacting and implementing laws for the whole country. In doing so, the federal government is provided with its own constitutional powers and jurisdictions, which it may exercise independently from the provincial level of government.

Canada's **national Parliament** located in Ottawa, the nation's capital, is the premier institution of the federal government. It consists of the Monarchy (and his/her federal representative, the Governor General) and two legislative chambers, the House of Commons and the Senate.

The head of state for the federal government is the Monarchy; however, his/her role is primarily ceremonial under Canada's contemporary system of government. The bulk of federal power lies with the Prime Minister and Cabinet, as well as the elected legislative chamber, the House of Commons. The second federal legislature, the Senate, is an appointed body and exercises considerably less power relative to the elected House of Commons.

Provincial Level of Government

Provincial governments form the second constitutionally recognised level of government in Canada. There are ten provinces in Canada, each with their own provincial government: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland

¹¹⁹ Mapleleafweb, [Federal Government in Canada: Organization, Institutions & Issues](#), 2009 [accessed 5 December 2012]

and Labrador, Nova Scotia, New Brunswick, and Prince Edward Island. These provincial governments enact and implement laws within their particular provincial territory, and are provided with their own constitutionally recognised powers, which they may exercise independently from the federal government, and from each other.

Each provincial government has its own legislative assembly, which is located in its respective provincial capital. Each province has a **Premier and Cabinets**.

Territorial Governments

Canada also has three territories, each with their own governments: the Yukon, the Northwest Territories, and Nunavut. Like their provincial counterparts, these are regional governments, which are responsible for enacting and implementing laws within their particular territorial area. Unlike the provinces, however, territories are not constitutionally recognised entities, with their own autonomous powers and jurisdictions. Instead, the territories fall under the legislative jurisdiction of the federal government, which is responsible for creating territories and setting out their basic framework.

In practice, territories are usually accorded many of the privileges associated with being a province. Each has its own legislative assembly, which has the power to enact laws within its own territory. Each has its own **Premier and Cabinet**.

As territories are not constitutionally recognized as autonomous governments, their status within Canadian federalism is technically inferior. As such, territories do not have a legal say in constitutional amendments regarding the separation of powers between the federal and provincial levels of government. Nevertheless, it is common practice to include territorial governments in inter-governmental meetings and decision-making processes.

Local Governments

The final type of government in Canada is local government, which includes municipal, county/parish, and semi-regional councils, boards, and agencies. Local governments fall under the jurisdiction

of the provinces and territories, which are responsible for creating local governments and setting out their basic frameworks.

The division of powers

The fundamentals of Canadian federalism were first provided at the time of Confederation via the 1867 *British North America Act* (which, in 1982, was renamed the *Constitution Act, 1867*). This Act set out the jurisdictional powers of both the federal and provincial levels of government.

In regard to the provinces, **Section 92 of the Act** granted each province 16 enumerated powers. This includes legislative control over such things as hospitals, asylums, charities, municipal institutions, prisons, and property and civil rights, just to name a few. Section 92 granted the provinces sole jurisdiction in these areas, meaning that only they, and not the federal government, could constitutionally legislate in them.

Section 93 of the Act grants the provinces exclusive jurisdiction over education, allowing provincial governments to structure and manage their own education systems.

In addition to these areas of sole jurisdiction, **Section 95 of the Act** provided for two **concurrent powers** in agriculture and immigration. The term “concurrent powers” here means that both levels of governments are constitutionally permitted to legislate in these areas. In other words, it is a shared area of jurisdiction in which the federal government and provinces may both enact laws. In the context of financial powers, the provinces were given only limited **powers of taxation**. Section 92 of the Act confined the provinces to only “direct taxation” in order to raise revenue for provincial purposes. The question of what counts as “direct taxation” for the purposes of the Act has been a major issue in Canadian federalism, and has been reviewed numerous times by the Canadian judiciary. Currently, most provinces charge an income and corporate tax, a sales tax on the exchange of goods and services, as well as raise revenues through licensing and other fees.

Section 91 of the Act deals with federal powers, and has two parts. First, the **Peace Order, and Good Government clause** (commonly referred to as the “POGG clause”) says that all powers not given to

the province in Section 92 are left with the federal government. Only the federal government, and not the provinces, could constitutionally legislate in these areas.

Section 91 of the Act goes on further to list 29 examples of federal powers. These include the regulation of trade and commerce, postal service, census and statistics, the military, navigation and shipping, sea coast and inland fisheries, Indians and reserve land, and the criminal law, just to name a few. Finally, **Section 132 of the Act** provided the federal government with the power to implement international treaties.

Unlike the provinces, the federal government was granted very wide taxing powers. Section 91 of the Act states the federal government may raise revenues by any mode or system of taxation. This may include forms of direct taxation, such as income or corporate taxes, as well as indirect taxation, such as duties and fees.

Since Confederation there have been several constitutional amendments related to the division of powers between the federal and provincial governments.

The bulk of these amendments dealt with federal-provincial control over social benefits, and resulted in an expansion of federal power. In 1940, power over **unemployment insurance** was added to the list of exclusive federal powers under Section 91 of the Act. Previously, the courts had ruled that unemployment insurance fell under provincial jurisdiction. In 1951, **old-age pensions** were made a concurrent power, meaning that both levels of government were permitted to legislate in this area. Previously, control over pensions had been a solely provincial power under Section 92 of the Act. Federal powers over pensions were further extended in 1964, when it was permitted to legislate in the areas of widows' and survivors' benefits and disability pensions.

Another important area of constitutional change centres on the process of constitutional amendments themselves. In 1949, the federal Parliament was allowed to amend the Constitution unilaterally in areas of purely federal concern. This power had been previously held by the British Parliament. The amendment, however, was repealed in 1982 when the federal government and the

provinces adopted new **constitutional amending formulas**. These new formulas are significant in the context of federalism, as they stipulate the rights of each level of government when it comes to changing the Constitution. Any change to the Constitution that impacts one or more provinces, for example, now explicitly requires some level of consent from those provinces affected.

In addition to the new amending formulas, the 1982 constitutional reforms also impacted Canadian federalism in the areas of natural resources and regional disparities. Under those reforms, provincial powers over their **natural resources** were expanded, although, the federal government still maintained some power in this field. Furthermore, Section 36 of the *Constitution Act, 1982* included a commitment by both levels of government to reducing economic disparities and unequal access to public services between regions in Canada. Moreover, the Act also included a commitment on the part of the federal government to the principle of making **equalisation payments** to ensure provincial governments have sufficient revenues to provide comparable levels of public services.

Common Law and Civil Law Traditions¹²⁰

The common-law tradition

Canada's legal system derives from various European systems brought to North America in the 17th and 18th centuries by explorers and colonists. After the Battle of Quebec in 1759, the country fell almost exclusively under English law. Except for Quebec, where the civil law is based on the French Code Napoléon, Canada's criminal and civil law has its basis in English common and statutory law.

The civil-law tradition

Quebec's Civil Code, first enacted in 1866 just before Confederation and amended periodically, was recently thoroughly revised. Like all civil codes, such as the Code Napoléon in France, it contains a comprehensive statement of rules, many of which are framed as broad, general principles, to deal with any dispute that may arise. Unlike common-law courts, courts in a civil-law system

¹²⁰ Government of Canada, [Ministry of Justice, Canada's System of Justice](#) [accessed 5 December 2012]

first look to the Code, and then refer to previous decisions for consistency.

The term “civil law” is used to mean two quite different things. Sometimes the term is used in contrast to “common law” to refer to the legal system that is based on a civil code, such as the Justinian Code or the Civil Code of Quebec. In its other sense, civil law refers to matters of private law as opposed to public law, and particularly criminal law, which is concerned with harm to society at large. It is usually clear from the context which type of civil law is intended.

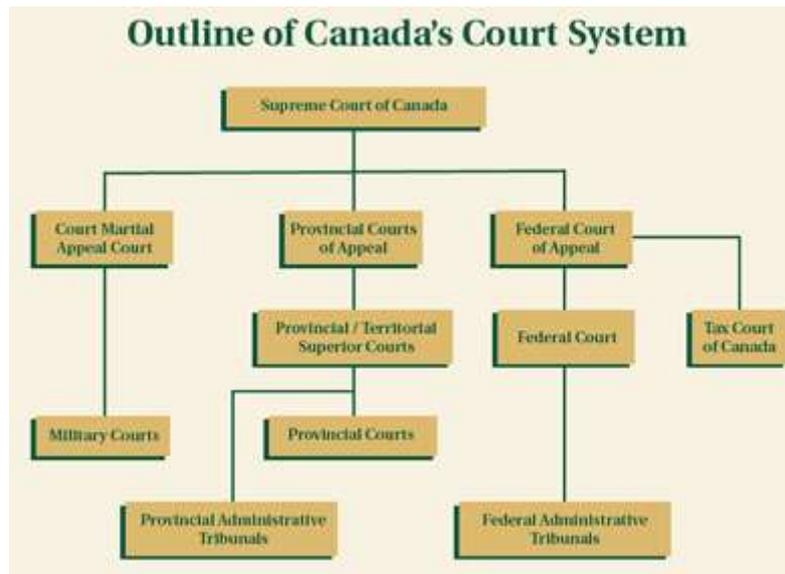
The *Quebec Act* of 1774 made Canada a “bijural” country, one with two types of law. The *Quebec Act* stated that common law was to be applied outside Quebec in matters of private law, while similar matters in Quebec were to be dealt with under Civil Code law. For public law, on the other hand, the common law was to be used in and outside Quebec.

The Judicial Structure

How the courts are organised

Constitutional authority for the judicial system in Canada is divided between the federal and provincial governments in this way:

- The federal government has the exclusive authority to appoint and pay the judges of the superior or upper-level courts in the provinces. Parliament also has the authority to establish a general court of appeal and courts for the better administration of the laws of Canada. It has used this authority to create the Supreme Court of Canada, the Federal Court and the Federal Court of Appeal, as well as the Tax Court. In addition, as part of its criminal-law power, Parliament has exclusive authority over the procedure in criminal courts. Federal authority for criminal law and procedure ensures fair and consistent treatment of criminal behaviour across the country.
- The provinces have jurisdiction over the administration of justice in the provinces, including the organization and maintenance of the civil and criminal provincial courts and civil procedure in those courts.



Source: Canadian Ministry of Justice

What do the federal courts do?

The *Constitution Act* of 1867 authorised Parliament to establish a general court of appeal for Canada, as well as any additional courts for better administration of the laws of Canada.

The Supreme Court of Canada serves as the final court of appeal in Canada. Its nine judges represent the five major regions of the country, but three of them must be from Quebec, in recognition of the civil law system. As the country's highest court, it hears appeals from decisions of the appeal courts in all the provinces and territories, as well as from the Federal Court of Appeal. Supreme Court judgments are final.

Ordinarily, parties must apply to the judges of the Supreme Court for permission (or leave) to appeal. In certain criminal cases, the right to an appeal is assured.

The second function of the Supreme Court is to decide important questions concerning the Constitution and controversial or complicated areas of private and public law. The government can also ask the Supreme Court for its opinion on important legal questions.

The federal government also established the **Federal Court**, the **Federal Court of Appeal**, and the **Tax Court**. The Federal Court specialises in areas such as intellectual property and maritime law and federal-provincial disputes, while the Tax Court specialises in

tax cases. The Federal Court of Appeal reviews decisions of both these courts, as well as federally appointed administrative tribunals such as the Immigration Appeal Board and the National Parole Board.

Provincial and territorial courts

Although the names of the courts are not identical in each province, the court system is roughly the same across Canada. There are two levels: provincial courts and superior courts.

Provincial courts

Provincial courts try most criminal offences and, in some provinces, civil cases involving small amounts of money. Provincial courts may also include specialised courts, such as youth courts, family courts and small claims court. The provincial governments appoint the judges for provincial courts.

Superior court

Superior courts, the highest level in a province, have power to review the decisions of the provincial or lower courts. The federal government appoints the judges to these courts, and their salaries are set by Parliament.

Superior courts are divided into trial level and appeal level. The trial level hears civil and criminal cases and has authority to grant divorces. The appeal level hears civil and criminal appeals from the superior trial court. These levels may be arranged as two separate courts: the trial court named the Supreme Court or the Court of Queen's Bench and the appeal court called the Court of Appeal. In some provinces there is a single court, generally called a Supreme Court, with a trial division and an appeal division.

Canadian courts deal with both civil and criminal cases. In civil or private cases involving breach of contract or other claims of harm (torts), the courts apply common-law principles in nine provinces and the territories. In Quebec, courts apply the *Quebec Civil Code*. In criminal, or public cases, on the other hand, the common law is applied throughout Canada.

Bilingual Judicial System¹²¹

Federal courts interpret laws that are conceived, drafted and adopted in both official languages. Both language versions are equally authoritative. As seen above, the Canadian legal system is based on two legal traditions: the civil law tradition, which applies in Quebec, and the common law tradition, which applies in the rest of Canada. While the Federal Court and the Federal Court of Appeal hear only cases that are subject to federal legislation, the Supreme Court can be called on to interpret legislation from either of these two legal traditions. Most federal legislation is drafted in parallel, not written in one language and then translated into the other.

The Use of Official Languages

The use of official languages in the justice system depends on the type of court and the nature of the case. As Vanessa Gruben of the University of Ottawa says:

“The Right to Use English or French

“The right for everyone to use his or her language of choice before federal courts extends to litigants, lawyers, witnesses, judges and other officers of the court. The federal government has the authority to regulate the language used before “federal courts” and in relation to “criminal procedure” ... Parliament also has the authority to legislate language usage in certain administrative tribunals”.¹²²

In federal courts, the right to use English or French is decided based on various factors and extends to all the participants in the justice system, depending on the circumstances.

Verbal and Written Communication

Language requirements apply to **all written submissions** (e.g., summons) as well as submissions of the parties, oral submissions, statements and briefs. They do not apply to evidence. Verbal and written communication in federal courts can be in English or French. Section 133 of the Constitution enshrines the right to use

¹²¹ Canadian House of Commons, [Library of Parliament, Bilingualism in the Federal Courts](#), 30 November 2011 [accessed 5 December 2012]

¹²² Vanessa Gruben, “Bilingualism and the Judicial System,” in *Language Rights in Canada*, ed. Michel Bastarache, 2nd ed., Les Éditions Yvon Blais, Cowansville, 2004, p. 150

either language in any pleading or process. This requirement is repeated in the Charter of Rights and Freedoms (“the Charter”), which alludes to the right to use English and French in cases and proceedings, as well as in the *Official Languages Act 1988* (“OLA”).

Translation and simultaneous interpretation services are offered under certain conditions to ensure that language rights are respected. The right to the assistance of an interpreter during proceedings is guaranteed by the Charter. However, a distinction must be made between the language rights of the accused (i.e., the right to express oneself in one’s own language) and the right to a fair trial (i.e., the right to understand and be understood). In 1999, the Supreme Court of Canada summarized this distinction in the *Beaulac* case:

“The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English”.¹²³

The OLA and the Criminal Code (“the Code”) provide for translation services on request for court documents, indictments and criminal information. The provisions regarding simultaneous interpretation are mainly to allow witnesses to express themselves and to be heard without prejudice in the language of their choice.

According to the Code, an accused has the right to be tried in his or her official language of choice, regardless of where in Canada the trial may take place. The accused must be informed of this right.

Institutional Bilingualism

Federal Courts, as institutions, must meet the obligations set out in the OLA. Their administration must **ensure that a case can be heard in either of the official languages**. It is not necessary for every person sitting on the bench to be bilingual. If the request is filed within the proper timeline, it is automatically granted. If the time limit is exceeded, the court can still grant the request, in the interest of justice. **All the criminal courts of Canada are subject**

¹²³ *R. v. Beaulac*, [1999] 1 S.C.R. 768, para. 41

to the language requirements outlined in the Code. The Supreme Court of Canada ruled on the application of these provisions in the *Beaulac* case:

Section 530(1) creates an absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own. The courts called upon to deal with criminal matters are therefore required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada.¹²⁴

A criminal trial can therefore be conducted entirely in one language, which requires federal courts to be institutionally bilingual.

For civil cases, the OLA requires federal institutions to use the official language chosen by the other parties, or the one that makes the most sense in the circumstances.

In general, the judgment in a trial is delivered and issued in the language in which the trial was conducted. A translation of the judgment must be made available to the public as soon as possible. A decision delivered in one language alone is not considered invalid as long as it respects the provisions of the OLA.

Federal judgments are published simultaneously in both official languages if they determine a question of law of general public interest or importance, if the proceedings were conducted in both official languages, or if the proceedings were written in both languages. The same standards apply to decisions published in the official reporters or online.

The Supreme Court, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada establish their own rules regarding the use of either of the official languages. These rules of procedure must be bilingual. Section 17 of the OLA grants the Governor in Council the authority to establish such rules for the other courts, but this authority has never been used.

¹²⁴ *R. v. Beaulac*, [1999] 1 S.C.R. 768, para. 41

Appointing Bilingual Judges

The federal government is responsible for appointing judges to the bench in federal courts as well as in the superior courts and courts of appeal in the provinces and territories.

Because the judges who are appointed to federal courts do not undergo oral or written language testing, it is difficult to determine how many of them are bilingual. Year after year, stakeholders have called for the federal government to appoint a sufficient number of bilingual judges, especially to courts administered by the provinces.

When the OLA was enacted in 1988, the government imposed on federal courts (with the exception of the Supreme Court) a requirement for judges to understand the official languages without the assistance of an interpreter. A unilingual judge can hear a case if he or she understands the language chosen by the parties. When the case is heard in both languages, the designated judge must be bilingual. A five-year grace period was given before this requirement came into force. Federal courts have had to meet this requirement since 1993 and ensure that there are enough judges qualified to hear cases in either of the official languages.

In March 2011, the Provincial Court of Alberta made a ruling in the *Pooran* case that stated the following:

“If litigants are entitled to use either English or French in oral representations before the courts yet are not entitled to be understood except through an interpreter, their language rights are hollow indeed. Such a narrow interpretation of the right to use either English or French is illogical, akin to the sound of one hand clapping, and has been emphatically overruled by *Beaulac*”.¹²⁵

A Canadian House of Commons paper states:

“The lack of lawyers and judges who have a sufficient understanding of French and English is one of the primary obstacles to accessing justice in one’s own language. Other difficulties include institutional obstacles such as a lack of bilingual legal staff, a lack of bilingual legal or administrative resources, and the delays associated with choosing to proceed

¹²⁵ *R. v. Pooran*, 2011 ABPC 77, para. 21

in one language rather than another. Despite the legislative and constitutional requirements in place, there are still limitations to accessing the courts in one's language of choice. While many of the provinces and territories have legislative provisions that promote access to justice in both official languages, work remains to be done to ensure that everyone has equal access to justice in both languages across the country".¹²⁶

The Supreme Court

The Supreme Court of Canada was created in 1875. It is governed by the *Supreme Court Act (SCA)*, **which does not have any provisions on official languages**. While the OLA applies to all federal courts, the Supreme Court is not subject to sections 16 and 17 of the Act. These sections outline the duty federal courts have to ensure that judges understand the proceedings without an interpreter and the authority to make implementing rules.

The Supreme Court is exempt from these requirements for various geographic and administrative reasons. Section 6 of the SCA outlines certain conditions regarding Quebec representation: at least three judges must be from Quebec. Convention has it that, of the remaining six judges, three come from Ontario, one from the Atlantic provinces and two from the Western provinces. The nine Supreme Court judges hold office until they reach the age of 75, but are removable by the Governor General. They sit three times a year.

The *Rules of the Supreme Court of Canada* state that a party may use either English or French in any oral or written communication with the Court, and that simultaneous interpretation services must be provided during the hearing of every proceeding. Since May 2008, six private members bills have been tabled in the Canadian House of Commons aiming to require Supreme Court justices to understand both official languages but they have all fallen.

¹²⁶ Canadian House of Commons, [Library of Parliament, Bilingualism in the Federal Courts](#), 30 November 2011 [accessed 5 December 2012]

Annex 7: Research Service briefing: Cost issues

As part of its inquiry into the establishment of a separate Welsh jurisdiction, the Constitutional and Legislative Affairs Committee (CLAC) have expressed an interest in understanding what the potential cost would be of setting up a separate Welsh jurisdiction.

The cost of a Welsh jurisdiction

Financial data

The meaning of the term ‘Welsh jurisdiction’ has yet to be formally defined and a wide variety of definitions were included in the consultation responses¹²⁷ and in the oral evidence received during the committee’s inquiry. They highlighted that a Welsh jurisdiction could include total devolution, greater autonomy within a common jurisdiction or any other alternative. The responses also highlighted the options as to whether jurisdiction would be limited to civil and/or criminal law; which levels of the judiciary would be included and whether areas such as the prison service, police service and immigration would be included in any said jurisdiction. As a result **there is no one source of information which summarises what the actual costs of a separate Welsh jurisdiction would be.** In addition, the likely costs involved would be incurred in a variety of places including the Welsh Government, Welsh local authorities and departments of the UK Government.

It is difficult to make comparisons with other UK areas, as the level to which jurisdiction is devolved varies between countries within the UK; also the way in which expenditure is recorded against providing these functions is not consistent between countries. Whilst the majority of costs can be identified as limited to England and Wales a few areas such as the Supreme Court cover the whole of the UK.

Headline financial data from the following sources are included below:

- CAFCASS Cymru funded by the Welsh Government with a budget of approx. £9.6 million for 2012-13.

¹²⁷ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [*Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses*](#), March 2012, WJ17 [accessed 5 December 2012]

- The Ministry of Justice (“Moj”) funded by the UK Government with a 2011-12 Department Expenditure Limit (DEL) outturn of £9.2 billion of which HM Courts and Tribunals is £1.1 billion.
- The Law Commission of England and Wales is funded by the UK Government with expenditure of £3.5 million as compared to £1.6 million for Scotland and £1.0 million for NI.
- In the PESA country data for 2010-11, Welsh law courts are identified as incurring expenditure of about £300 million compared to £500 million for Scotland, £300 million for NI and £5.4 billion for England.
- NI Department of Justice had a 2011-12 budget of £1.3 billion including the police and prison service.
- The Scottish Justice department had a 2011-12 budget of £1.3 billion excluding funding for policing and criminal justice social work.
- Supreme Court 2011-12 DEL outturn of £6.0 million.

More detailed analysis could be provided if more clarification were given on what responsibilities a Welsh jurisdiction would include.

Financing devolved powers and the Barnett Formula

Responsibility for fiscal and macroeconomic policy and public expenditure allocation across the UK lies with HM Treasury. The resources for Wales are provided to the Wales Office following a vote by the UK Parliament. The Secretary of State for Wales retains funding for the Wales Office’s operations and the balance is transferred to Wales. Funding is allocated to the Welsh Government, Assembly Commission, the Wales Audit Office and the Public Services Ombudsman by the National Assembly for Wales. The overall amount of funding available to the National Assembly is set through UK Government spending reviews, which set the available funding for UK Government departments and devolved administrations. Adjustments to the Welsh budget are determined through the Barnett Formula¹²⁸ and applied to the Welsh baseline budget. The Formula reflects changes that the UK Government makes and applies them to comparable budgets in Wales.

¹²⁸ National Assembly for Wales, Research Service, [Quick Guide: Budget Series 1: Financing the Welsh budget: the Barnett formula](#), August 2012 [accessed 5 December 2012]

The Barnett formula determines changes to the block grant, but does not determine its overall size and therefore the Barnett formula is not the tool customarily used when determining the transfer of powers. In practice, this is a matter of negotiation between the UK Government and the Welsh Government. Carwyn Jones the then Counsel General and Leader of the House explained the difference of obtaining funding of devolved powers between those that are ‘imposed’ on the Welsh Government to those that are ‘requested’. The details of the oral evidence session are below.

The scale of the setting up of a ‘Welsh jurisdiction’ would be a new scenario for which there is no precedent set, however if transfers were made on the basis of a Barnett formula it may lead to less funding than the actual cost. As a hypothetical example taking the Law Commission budget below, Wales would receive £0.2 million as compared to a budget of £1.0 million in NI and £1.6 million in Scotland:

$$\begin{array}{c} \boxed{\begin{array}{c} \text{Law} \\ \text{Commission} \\ \text{England \& Wales} \\ \text{Budget of } \pounds 3.5 \\ \text{million} \end{array}} \times \boxed{\begin{array}{c} \text{Assumed} \\ 100\% \\ \text{comparability} \end{array}} \times \boxed{\begin{array}{c} 5.92 \% \text{ (population} \\ \text{of Wales as a} \\ \text{proportion of} \\ \text{England \& Wales)} \end{array}} =
 \end{array}$$

In the Finance Committee evidence session on Financial Implications for Wales Resulting from UK Bills in 2009 Carwyn Jones the then Counsel General and Leader of the House stated:

“What I can do, however, is to inform the committee regarding the approach that is taken generally when powers are devolved via not just Bills, but transfer of functions Orders.

“Generally, the financial arrangements governing devolved administrations when it comes to transfers of functions are dealt with in the Treasury’s 2007 statement of funding policy.

“The exact details regarding whether we get any money or not depends on what sort of power is being transferred. For example, where a Bill transfers responsibility for existing functions from the UK Government to the Welsh Assembly Government—one example I can offer is the Fire and Rescue Services Act 2004; another example would be the devolution of animal health powers—then the budget transfer for those

functions is a matter for negotiation between the Assembly Government and the UK Government. There is not a Barnett consequential as a result. So, there would be negotiation as to what sum should be transferred.

“If a Bill introduced a new responsibility for the Assembly Government and the UK Government and, as a result of the introduction of that responsibility, a UK Government department received extra funding from the Treasury, then we would normally expect to get a share—a Barnett consequential—of any money that was given to a UK Government department. In the unlikely event of a UK Bill imposing duties on the Assembly Government without the Assembly Government’s consent, then that would again come back to the statement of funding policy in terms of what moneys would then need to be transferred from the UK Government to the Welsh Assembly Government. However, I am not aware of any situation where there has been the direct imposition of a duty on the Assembly Government without the consent of the Assembly Government and included in a UK Bill.”¹²⁹

In response to further questioning on the matter by Joyce Watson AM, Carwyn Jones went on to say:

“The devolution of building regulations was requested by the Assembly Government, not imposed on it. It was known that the transfer of powers requested would have financial consequences. However, building regulations are an example of a transfer that does not represent a cost saving for a UK Government department. We are setting up a department to deal with building regulations here, but there is no obvious cost saving for the UK Government, which has transferred those regulations. Therefore, from the Assembly Government’s point of view, we sought these powers knowing that we would have to finance them, but that was negotiated and known at the time of the discussions with the UK Government.”¹³⁰

The Leader of the House also stated:

¹²⁹ National Assembly for Wales, [RoP: Finance Committee](#), 12 October 2009 paragraphs 88 to 105 [accessed 5 December 2012]

¹³⁰ National Assembly for Wales, [RoP: Finance Committee](#), 12 October 2009 paragraphs 92 [accessed 5 December 2012]

“Any responsible Government would examine the costs of taking on a power before deciding whether to take it on. I do not think that any responsible Government could say that it was in the business of acquiring as many powers as possible without examining the financial costs, particularly given the financial situation in which we find ourselves. So, whenever there is a proposal to acquire new powers, the cost of exercising those powers weighs heavily on the mind of the Assembly Government.”¹³¹

Consultation responses

The National Assembly for Wales’ Constitutional and Legislative Affairs Committee (CLA) completed a consultation exercise as part of its inquiry into the establishment of a separate Welsh jurisdiction¹³². The consultation closed in Feb 2012. As part of the consultation the CLA asked for views on the potential benefits, barriers and costs of introducing a separate Welsh jurisdiction. All responses can be found on the Assembly’s website but below is a summary of some key points highlighting the difficulties in costing such a system:

The Institute of Chartered Accountants in England and Wales stated:

“ICAEW Wales believes that it is critically important to make the operating environment for businesses in Wales simpler, rather than more complex. Businesses seeking to operate in more than local markets need fewer, not more, barriers to streamlining their operations and it is essential that they are not deterred from investing in Wales by the opportunity costs of meeting a different set of legislative requirements than in England.”¹³³

The National Council of Magistrates stated:

¹³¹ Ibid, paragraph 105

¹³² National Assembly for Wales, [Constitutional and Legislative Affairs Committee: Inquiry into the establishment of a Welsh jurisdiction](#), March 2012 [accessed 5 December 2012]

¹³³ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ3 [accessed 5 December 2012]

“The All Wales Convention Report in 2010 concluded that “a separate Welsh jurisdiction is not a precondition for the development of increased legislative competence, even if the Assembly were to acquire the substantial powers of the Scottish model”. As Magistrates serving in Wales we are not yet convinced there is a strong enough case made for such a change and moreover, **in terms of time and cost alone, we doubt if the case is yet strong enough to necessitate a new inquiry.**

“A separate jurisdiction would become responsible for training and sentencing guidelines which would require a Judicial College for Wales and a Sentencing Council (Wales). This would have implications for consistency of approach and outcome.

“Currently Wales does not have a sufficiently well developed infra-structure to support a fully devolved separate jurisdiction. The issue of prisons is paramount; there is no prison facility in north Wales. **The cost of developing a supportive infra-structure would be huge**, even when times are good, and in the current climate of austerity beyond reach.

“There is much change currently underway in the HMCTS organisational structure and a proposal to initiate a separation of the jurisdiction will only result in a further lengthy and costly examination of issues and requirements (and undoubtedly a further lowering of morale for staff and users within the current court system) **that we remain unconvinced that a proposal for a separate jurisdiction would be affordable, cost-effective or in the bests interest of the communities.**”¹³⁴

Rt. Hon Lord Morris of Aberavon, KG, QC stated:

“It is not possible to estimate the cost of creating an “independent jurisdiction”. **I surmise they would be considerable.**

“It may be that a way forward is to delineate that part of the Ministry of Justice and the administrative machinery of the courts further to Wales. It would mean a recognition of the need for special provision for Wales given that the Assembly

¹³⁴ Ibid, WJ5 [accessed 5 December 2012]

has law-making powers, as opposed to the present unitary jurisdiction. I am not competent to advise on such policies. **If the political will is there some practical progress could be achieved without incurring significant expenditure.**¹³⁵

Response from 14 District Judges across Wales:

“The cost implications of having a separate jurisdiction would in our view be considerable.”¹³⁶

Dr Dominic De Saulles (Solicitor Advocate) raised a number of cost questions including:

“What extra costs will be imposed on legal professionals who need to be fluent in two different sets of rules?”¹³⁷

Dr Peter Freeman (personal response) stated:

“There is also the question of cost in a climate where every bit of expenditure should come under scrutiny and be questioned as to its necessity.”¹³⁸

David Hughes (personal response – Barrister in Cardiff) stated:

“It is hard to see how the creation of our own jurisdiction could not bring with it control of the funding of access to justice. Some might want to use this to introduce, for example, a Conditional Legal Aid Fund as used in Hong Kong and some Australian states. Others might want to reform personal injury law by introducing a New Zealand style no-fault compensation scheme and thereby abolishing personal injury litigation. However, some benefits are easily identifiable.”¹³⁹

David Williams (personal response – Circuit Judge):

“The Committee may wish to explore with those who preside over and administer those systems the benefits, barriers, and

¹³⁵ National Assembly for Wales, Constitutional and Constitutional and Legislative Affairs Committee, [Inquiry on the establishment of a separate Welsh jurisdiction: Additional response WJ – Rt Hon Lord Morris of Aberavon KG QC](#)

¹³⁶ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ6 [accessed 5 December 2012]

¹³⁷ Ibid, WJ4

¹³⁸ Ibid, WJ1

¹³⁹ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses](#), March 2012, WJ7 [accessed 5 December 2012]

costs that they as judges and administrators see as arising from this mesh of provision.”¹⁴⁰

Christopher Morton (personal response – Circuit Judge) stated:

“I have no expertise in this field. I simply make these possibly superficial points. The personnel, administration and buildings for all courts of first instance already exist. Is this a basis for arguing that a separate jurisdiction would not of itself increase cost at this level?

“A Welsh Court of Appeal would be new creature. Its creation must involve expenditure. Could a reduction in the workload of the English Court of Appeal due to no longer having to handle Welsh appeals lead to a financial saving? If so it could properly be set off against the cost creating a Welsh court of Appeal. Would cross border sitting by judges at this level be acceptable and if so could that be used to reduce cost?”¹⁴¹

Professor R. Gwynedd Parry, (personal response - Barrister)

“The development of a Welsh jurisdiction could therefore be regarded as an economic opportunity for the legal profession. It would challenge the profession to develop expertise in new areas based on Welsh legislation.⁷⁶ The economic opportunity is key to the debate, and, as has been noted, **„the contribution to the economy of Wales which a fully developed legal system would make would be substantial.**”¹⁴²

His Honour Judge Wyn Rees (personal response)

“No doubt costs, which would need to be the subject of a detailed assessment, would be incurred in establishing a separate Welsh jurisdiction. The main benefit of doing so would be to bring the justice system closer to the people of Wales and to make it more accountable to them. A further benefit would

¹⁴⁰ Ibid, WJ12

¹⁴¹ Ibid, WJ13

¹⁴² Ibid, WJ14

be the creation of employment in Wales to perform functions that are currently undertaken outside Wales.”¹⁴³

Hon Mr Justice Roderick Evans (personal response)

“There would be a cost to the creation of a jurisdiction but I am unable to comment on that save to say that many of the necessary functions are already being carried out in London and transferring them to Wales would be unlikely to incur more than start up costs. Also to be considered are the benefits from new jobs and career structures, the ability to offer our young people the opportunity of employment in fields or at levels in those fields previously unavailable in Wales and the tailoring of a legal system to the specific demographic, geographic and linguistic needs of Wales.

“The arguments referred to in the Scoping Paper advanced by Jack Straw MP against creating a Welsh jurisdiction are exaggerated and unpersuasive. The matters to which he refers are readily accommodated in relation to other jurisdictions – for example Northern Ireland – and could be equally well accommodated in relation to a Welsh jurisdiction.”¹⁴⁴

The Association of Judges’ Wales stated:

“We are unable to comment on the costs of creating a Welsh jurisdiction or the cost of strengthening legal institutions in Wales were Wales to remain within the present jurisdiction. Either option is likely to have cost implications but there are positive matters which would offset any such costs. Firstly, bringing the administration of justice closer to the people of Wales and the creation of jobs and career structures in Wales would have important socio-economic benefits. Secondly, the development of improved structures for the administration of justice would have wider economic advantages, not only to the legal profession, but to those industries which support the administration of justice. Thirdly, there is an inevitable cost of administering and hearing Welsh cases in London and hearing and administering those cases in Wales is unlikely to increase

¹⁴³ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [*Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses*](#), March 2012, WJ12 [accessed 5 December 2012]

¹⁴⁴ *Ibid*, WJ19

the basic costs although there would be start-up costs for the offices, for example, of the High Court and Court of Appeal.

“We do not regard the arguments against creating a separate Welsh jurisdiction referred to by Jack Straw MP and quoted in paragraph 6 of the Scoping Paper to be “overwhelming”. Indeed, the matters raised by him have all been dealt with in the context of other jurisdictions in the UK.”¹⁴⁵

Law Society stated:

“The costs will depend upon the extent to which the Welsh jurisdiction is entirely separate (something that may be easier to achieve in the lower courts than in the county or High Court) or can use the existing mechanism and resources from the current jurisdiction. It may well be a gradual process. In Wales there are already a number of separate Welsh tribunals. These tribunals are demonstrating the pros and cons of a separate system, for example the Welsh policies developed in the areas in which the tribunals operate are readily applied to the hearing and resolution of cases. However, the small number of members of each tribunal does have an effect particularly on the costs e.g. the cost per head of training is likely to be higher. The evidence of the Chairmen of the Welsh tribunals might inform the Committee on the success or otherwise of the operation of these tribunals although the Wales only tribunals do not operate in a way that is directly similar to a Welsh courts and tribunals’ service.

“Another body which gives a useful example of the operation of a separate justice organisation within Wales is CAF/CASS Cymru the family courts service. This is the responsibility of the Welsh Government and knowledge of the experience of running this service may usefully be gleaned by the Committee.

“A separate jurisdiction would raise the question of whether there needed to be a separate regulatory system for legal services providers and a different system for qualification. In the context of a smaller legal profession, the costs of this might well be considerable, particularly if a number of its

¹⁴⁵ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [*Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses*](#), March 2012, WJ20 [accessed 5 December 2012]

members wished also to practise in England and were to face a double regulatory cost. It might, however, be possible to adapt the existing structures that work for both England and Wales, at least in the first instance, to apply to both jurisdictions.

“There would be an impact on legal education: would all courses in Wales offer only Welsh legal qualifications? The teaching of a bilingual approach to law-making and the use of Welsh in providing legal services and in representing persons through the courts and tribunals would receive renewed attention.

“The Law Society promotes the benefits of the jurisdiction of England and Wales on a global stage. The law in England and Wales is transparent, predictable, flexible and supports the needs of modern commerce; in addition English is the language of international business. These features make England and Wales a highly attractive jurisdiction in which to resolve disputes. By creating a "separate Welsh jurisdiction" the benefits of this might be lost and Wales could be perceived as a difficult place to do business. Conversely, economic and social advantages may flow from developing the legal profession in Wales and in the development of law that is suited to the particular situation in Wales.”¹⁴⁶

Bangor University Law School stated:

“A high proportion of Welsh claimants and solicitors choose to issue their claims in London. There may be a number of reasons for this, i.e. the gravitas attached to litigating at the Royal Courts of Justice in London and concern for the quality and consistency of justice dispensed by judges outside London. Lack of awareness may be another factor. Approximately half of all claims involving a Welsh public authority or the Welsh Assembly Government are issued in London and the factor seemingly most influential in the choice of issue location is the instruction by Welsh defendants of London-based specialist barristers.

¹⁴⁶ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [*Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses*](#), March 2012, WJ21 [accessed 5 December 2012]

“Approximately half the Cardiff Court’s current caseload stems from outside Wales. To an extent this work, originating in England, is subsidising access to justice in Wales by ensuring a large enough caseload for the Cardiff Court to remain a going concern. If the Cardiff were to lose its competence with respect to cases under the law of England or the law of England and Wales pertaining mainly to England, Cardiff would lose this work. Similarly public law practitioners in Wales would be less inclined to advise English clients losing out on business.

“At present approximately five claims per-annum originate in North Wales and most of these are issued in Manchester due to geographical convenience, though hearings take place in North Wales. Were Cardiff to have exclusive competence over Welsh claims this might reduce access to justice for claimants and legal advisers based in North Wales.”¹⁴⁷

Mr Emyr Lewis and Professor Dan Winton (Cardiff University) stated:

“Detailed analysis is needed of how cross-border issues work between current UK jurisdictions, and how these might work for a Welsh jurisdiction and of the likely economic costs and benefits of a distinct Welsh jurisdiction.

“If there were to be a distinct Welsh jurisdiction, the Northern Ireland model seems a suitable precedent. This would have implications for the Supreme Court.

“In order to understand properly the implications of a distinct Welsh jurisdiction, there is a lot of detailed work that needs to be done. In our view, the two areas which require the closest attention are cross border issues and costs.

“Jack Straw, as quoted in the Committee’s scoping paper, has spoken of “enormous practical implications” of a move to a separate Welsh jurisdiction. The issues he raises are largely technical matters relating to the relationship between the courts in England (where, of course, a new jurisdiction will also be created) and those in Wales. He is undoubtedly right in raising the issues. Once more, however, there are precedents.

¹⁴⁷ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [*Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses*](#), March 2012, WJ24 [accessed 5 December 2012]

There is no reason in principle why cross-border issues between Wales and other jurisdictions within the UK should not be treated in the same way as those between the three existing jurisdictions. We need to understand how these work, and whether and to what extent they would need to apply differently to Wales, bearing in mind for instance that Wales' land border with England is longer and more densely populated than Scotland's.

"In relation to costs, there is a need for a detailed analysis of the current economics of the administration of justice in England and Wales. Suitable methods for allocating current expenditure equitably between England and Wales would need to be considered in order to determine how much better or worse off Wales might be if it had its own court system with its own budget. To what extent might savings in London overheads be outweighed by loss of economies of scale? To what extent might it be possible to direct funding to issues such as ensuring access to justice to people in remote and deprived communities?"¹⁴⁸

Recent developments

The 'UK's Changing Union' Project has been established by Cardiff University's Wales Governance Centre, the Institute of Welsh Affairs and Cymru Yfory/Tomorrow's Wales. The Legal Aspects Working Group which is part of the UK's Changing Union Project is focusing on the work of the Silk Commission and has made an invitation to tender to commission papers on the following areas:

- Reserved Powers and Legislative Consent
- Understanding the scope and cost of a distinct legal jurisdiction for Wales

The commissioned papers were due for submission by 31st October 2012.

The UK's Changing Union Project has also commissioned a research project by the Working Group on Capacity, Accountability and Powers. The project report will outline ways in which European law,

¹⁴⁸ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [*Inquiry into the establishment of a separate Welsh jurisdiction: Consultation Responses*](#), March 2012, WJ28 [accessed 5 December 2012]

policy, and institutional relationships between Europe and Wales, impact upon devolved governance and are applied to Wales. The report is due for submission by 31st November 2012.

Conclusion

Until such time as a 'Welsh jurisdiction' is defined it is not possible to estimate what the cost of such a jurisdiction would be. The consultation responses as summarised in section 4 highlight some of the additional challenges in determining what the cost and benefits would be and Annex B provides detailed financial data on areas that could be included in such a jurisdiction and financial data for Scotland and NI where this exists, although this data is not necessarily comparable.