Y Gwir Anrh/Rt Hon Carwyn Jones AC/AM
Prif Weinidog Cymru/First Minister of Wales

Llywodraeth Cymru
Welsh Government

David Melding AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay

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Dear David

Making Progress on the Wales Bill: A Welsh Legal Jurisdiction

As you will know, suggestions have been made that some of the difficulties identified with the draft Wales Bill could be effectively addressed by the creation of a distinct legal jurisdiction for Wales. The Welsh Government's Written Evidence, and my own Oral Evidence, to both the Welsh Affairs Committee and the Assembly's Constitutional and Legislative Affairs Committee (CLAC) expressed support for this view, and stimulated some interest among members of both Committees. I therefore thought it might be helpful to both Committees to set out in fuller detail our thinking on the issues, and so I enclose some Supplementary Written Evidence to CLAC, which we are also copying to David Davies MP as Chair of the Welsh Affairs Committee.

I hope your Committee finds this additional material of interest.

Yours sincerely

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THE DRAFT WALES BILL

Supplementary Written Evidence submitted to the Constitutional and Legislative Affairs Committee by the Welsh Government

Introduction

1. In the Welsh Government's earlier Written Evidence to the Committee about the draft Wales Bill, we said:

   "The Welsh Government considers that, as was agreed by the National Assembly on 7 October 2015, '*the creation of a Welsh legal jurisdiction would be the most desirable and effective legal framework to accompany the implementation of a reserved powers model for devolution*'. The retention of the existing England and Wales jurisdiction will result in a measure of complexity for the Welsh settlement which is incompatible with the Secretary of State's aspirations for clarity and workability".

2. The purpose of this Supplementary Evidence is to set out in further detail the Welsh Government's position on this important issue, in which both this Committee and the Welsh Affairs Committee took an interest during the First Minister's Oral Evidence. We will be forwarding a copy of this Supplementary Evidence to the Chair of the Welsh Affairs Committee, and we hope that it will be of assistance to both Committees.

3. The Welsh Government is of the view that the concept of a Welsh legal jurisdiction consists of (1) a distinct geographical area, in this case Wales[1], being the area of which the laws of Parliament and the Assembly form part[2] (i.e. their extent), (2) identifiably distinct Welsh courts whose jurisdiction broadly speaking correlates with the extent of the laws of that jurisdiction and (3) a body of distinctively Welsh law. We say more below about "identifiably distinct" Welsh courts. So far as "distinctively Welsh law" is concerned, we mean by this:

   - Acts of the UK Parliament (dating from both before and since devolution began) intended to apply in Wales and dealing with devolved or non-devolved matters;
   - Measures and Acts of the National Assembly;
   - Subordinate legislation made under or by virtue of UK Parliament Acts and Measures and Acts of the Assembly;
   - EU law having direct effect in the UK (i.e. in each of the UK's jurisdictions); and
   - the common law and equity previously developed within the jurisdiction of England and Wales.

[1] The Welsh Government considers that for this purpose the definition of "Wales" would be that set out in and under the Government of Wales Act 2006 rather than that set out in the Interpretation Act 1978. It would include the territorial waters adjacent to Wales. Consideration will also need to be given to the Welsh Zone.
[2] In the case of Parliament its laws may also, of course, so far as the United Kingdom is concerned extend to Scotland, Northern Ireland and/or (if the Welsh jurisdiction is created) England.

Rationale

4. In the Welsh Government's Written Evidence to the Silk Commission submitted in February 2013, we stated that while it remained our longer-term ambition to see the establishment of a separate legal jurisdiction for Wales, it was not something that could be contemplated at that time. The reason for this was our vision for the creation of a separate jurisdiction necessarily involved the devolving to the Welsh Government and the National Assembly responsibility for policing and the administration of criminal and civil justice. Our view was that whereas policing should and could be devolved relatively quickly, devolution of the administration of justice (and so the establishment of a separate legal jurisdiction) was a desirable but longer-term project.

5. However, the publication by the Secretary of State for Wales of the draft Wales Bill and its approach to maintaining the single legal jurisdiction of England and Wales, which involves an unprecedented row back on the Assembly's powers, together with the subsequent debate it has stimulated, has caused the Welsh Government to reconsider the question of the jurisdiction in order to address the more egregious impacts on the Assembly's competence that would be caused by this draft Bill.

6. The draft Bill proceeds on the (unstated but fundamental) assumption that the existing single jurisdiction of England and Wales should be maintained. The UK Government appears to believe that certain consequences flow from that, and these go to the heart of the issue about the workability and durability of the settlement the Secretary of State is now proposing. As our earlier Written Evidence explained,

> "At present, the National Assembly can modify the law of contract, common law and other areas of private law and criminal law wherever those modifications *relate to* a devolved subject. This might include, for instance, simplifying how contracts work in, or creating a criminal offence in relation to, areas of devolved life where that is appropriate to make Assembly legislation effective. **The draft Bill significantly curtails this ability, by limiting the National Assembly's power to modify the private law to provisions which are either '*necessary for* a devolved purpose' or 'ancillary' to another provision within competence, and limiting the National Assembly's power to modify the criminal law solely to provisions which are ancillary to another provision within competence.** In both cases, the provisions are further prohibited from having any greater effect on 'the general application [whatever that might mean] of the private or criminal law' than is *necessary*."

7. Why are these new limitations to be placed on the National Assembly's legislative competence? The answer is in paragraph 32 of the Explanatory Notes on the Draft Bill published by the UK Government:

> "The restriction in relation to the private law…, together with the restriction in relation to the criminal law…, are intended to provide a general level of protection for the unified legal system of England and Wales, whilst allowing the Assembly <u>some latitude</u> to modify these areas of law within the confines of the exceptions in those paragraphs". (emphasis added)

What this seems to mean is that, in order to "protect" the unified legal system of England and Wales, the extent of the permissible divergence of the substantive private law (which is defined very broadly) and criminal law so far as devolved matters are concerned between Wales and England, must be limited; the Assembly is only to be allowed "some latitude" to modify it in respect of Wales. So the UK Government's policy

objective (or assumption) of retention of the single legal jurisdiction apparently requires significant constraint on the Assembly's powers to modify the private and criminal law, even though the intention of modifying those areas of law is to achieve policy objectives in matters *wholly* of devolved competence in respect of which the Assembly is the principal primary legislature.

8. The First Minister has said in evidence that in essence the restrictions on competence reserve "the law" and that in those respects what the Bill provides is, in effect, a conferred powers model. This is because the restrictions on private and criminal law (which law underpins most policy objectives) are "general" and remove entirely the Assembly's competence in this respect that would otherwise exist; they then re-confer certain limited powers on the Assembly and hence can aptly be described in this important respect still as a conferred powers model.

9. In the Welsh Government's view, given the outcome of the Referendum held in 2011, these restrictions, among others proposed, are unacceptable and undemocratic. The Referendum Question, to which two-thirds of those voting gave a positive answer, was:

> Do you want the Assembly now to be able to make laws on **all** matters in the 20 subject areas it has powers for?

The emphasis on the word "all" was in the very question itself approved by the Electoral Commission. To make the obvious point, allowing the Assembly "some latitude" through the draft Wales Bill to modify the civil and criminal law is not in any way consistent with the mandate from the electorate, that the Assembly should be able to legislate on "all matters" within its areas of competence.

10. The Welsh Government considers that that democratic mandate should be recognised and respected as the underpinning principle of the model of legislative competence for which the draft Bill is intended to provide. We therefore conclude that the Assembly's powers to modify the civil and criminal law in matters of devolved competence should not be constrained in the ways proposed by the draft Bill, and that if that conclusion requires a move away from the unified legal system of England and Wales (as the UK Government appears to believe), the draft Bill should provide for that. This is consistent with our evidence and response to the Silk Commission and with established Welsh Government policy.

<u>Some Implications</u>

11. In paragraph 3 above, we referred to "identifiably distinct system Welsh courts" as an essential feature of a Welsh legal jurisdiction. It is important however to stress that this does not necessarily mean the creation of a new set of courts for Wales. In his address to Legal Wales in October 2015, the Lord Chief Justice, Lord Thomas of Cwmgiedd noted that

> "there is no reason why a unified court system encompassing England and Wales cannot serve two legal jurisdictions".

12. Lord Thomas did not elaborate further, but in the Welsh Government's view this provides a means to address the difficulties caused by the draft Wales Bill without, initially at least, requiring devolution of the administration of justice. His view seems consistent with the Welsh Government's arguments for the immediate creation of a Welsh legal jurisdiction that is distinct, but not separate, from that of England – a jurisdiction supported by a single Courts system, and run by the Ministry of Justice with the same judiciary and administrative system, buildings, etc. as now.

13. We have attached some illustrative legislative drafting to explain this further (although we must stress that further consideration would need to be given to these drafts, and other important matters would need also to be addressed in the legislation). Under these proposals, Judges who hitherto would have been appointed to the High Court of England and Wales would now be appointed to the High Court of England, and simultaneously to the High Court of Wales, and would sit in the High Court appropriate to the cases before them (and in cases relating to the common law develop it for Wales as they develop it for England). The continued existence of a joint judiciary would provide an important level of protection for the consistency of the common law and equity as between the jurisdictions. (Although the judges and courts "of Wales" would be free to take a different path, this would be likely to be rare.) The Court of Appeal would similarly be the Court of Appeal for England or for Wales as the circumstances might require, and the Supreme Court would sit at the apex of the Welsh (and, separately, English) courts system in the same way as it currently does for the England and Wales, Northern Irish and (subject to certain limits) Scottish jurisdictions. Thus the Supreme Court would remain the overall supervisor of the fundamentals, and forward development, of the law and legal principle for England, for Wales, for Northern Ireland and (allowing for systemic differences) also for Scotland. Legal professionals would remain entirely free to practise in the courts of England on the one hand, and of Wales on the other, and would remain regulated as they currently are for practice across England and Wales.

14. The point of establishing these arrangements now (as opposed to the longer term aim of full devolution of the administration of justice and a 'separate' jurisdiction) would be to enable the Wales Bill to provide more satisfactorily for the National Assembly's legislative powers with respect to the civil and criminal law, in a way which properly reflects the 2011 Referendum mandate and the National Assembly's status as a fully-fledged primary legislature.

15. As we explained above, the limits proposed on the National Assembly's powers in the draft Bill appear to derive from a belief that maintenance of the existing single jurisdiction necessitates only a limited degree of divergence in the substantive private and criminal law applicable in each of England and Wales. Resisting divergence of laws in a jurisdiction which, uniquely, has two legislatures is ultimately futile, and seeking to do so fundamentally undermines the National Assembly. Without that policy constraint, it would be possible to address the question of the scope of the Assembly's legislative competence in respect of the civil and criminal law from a quite different standpoint. Changes to the law passed by the National Assembly for Wales would no longer extend to England and would no longer form part of the law of England – in other words they would now be confined to Wales, and to the Welsh legal jurisdiction – as is the case in each devolved or federal constitution everywhere else in the common law world.

16. That is not to argue that the National Assembly's powers to modify the civil or criminal law within the sphere of devolved competence should be unlimited. We recognise that in the sphere of criminal law, the devolution settlements for each of Scotland and Northern Ireland reserve for the UK Parliament's exclusive competence a number of specified offences and groups of offences, and a similar approach could well be taken in respect of Wales. And as we have commented elsewhere, in Written Evidence to the House of Lords Constitution Committee,

> "Given Wales' distinctive relationship and degree of socio-economic integration with England, the list of matters attributed to Westminster may, by agreement, include some which may more appropriately be dealt with on an England-and-Wales basis… There should … be no assumption that those matters for which Westminster is responsible in respect of Wales will be identical to those in respect of Scotland or Northern Ireland, although there will be very many common features in the lists".

So, in terms of the draft Wales Bill, additional reservations relating to specific criminal offences might well be needed in the draft Schedule 7A, but the existing extremely complex Schedule 7B could and should be greatly simplified.

17. The approach described in this evidence would provide the National Assembly with a wider set of powers than is envisaged by the draft Bill, a set more appropriate to its status as a primary legislator. Conversely, the establishment of a distinct Welsh jurisdiction would reduce the National Assembly's legislative competence in at least one aspect, in that it would no longer be able to legislate "extra-territorially" in respect of parts of England, as is currently possible under section 108(5) of the Government of Wales Act 2006 (and would continue to be possible, under different conditions, through provision in the draft Wales Bill). Again, this may well be appropriate as a way of giving clarity to the territory for which the National Assembly has responsibility to legislate. Management of the cross-border legislative issues could however be undertaken in respect of England by the Secretary of State through use of the power already provided for in section 150 of the 2006 Act, which permits the Secretary of State by order to make such provision as is considered appropriate in consequence of Assembly Acts or Welsh Ministers' subordinate legislation. This is also the method used to deal with such issues under the Scottish settlement.

18. Finally, it is important to note one key difficulty with the draft Wales Bill that creation of a Welsh legal jurisdiction would <u>not</u> of itself address. At present, an Act of the Assembly cannot, save with UK Ministers' consent, remove or modify any function of a Minister of the Crown which was exercisable before 5 May 2011 (when Part 4 of the 2006 Act came into force), even if the function is within the sphere of devolved competence. This limitation is objectionable in itself, and the Welsh Government has pressed the Secretary of State to remove it, but paragraph 8 of Schedule 7B to the draft Bill significantly extends the circumstances when UK Ministers' consent would be required for the National Assembly to be able to legislate in wholly devolved areas. These restrictions, together with those caused by the apparent need to "protect" the England and Wales legal jurisdiction, are complex and prevent institutions in Wales governing freely within these devolved areas. The Welsh Government will continue to argue for a change of the position and for parity with Scotland and Northern Ireland

Conclusion

19. The Welsh Government's view, therefore, is that under current circumstances, a distinct legal jurisdiction would provide the best framework for a devolution settlement for Wales, providing legislative powers for the National Assembly which properly reflects the Referendum mandate of 2011. We note that that is also the view of a number of others who have given evidence to the Committee. We invite the Committee to conclude accordingly, and we hope that the Secretary of State, to whom we will also be copying this Supplementary Evidence, will give full and fair consideration to the consensus emerging in Wales on this issue.

20. In his oral evidence, the First Minister did make clear that the creation of a Welsh legal jurisdiction was not the only way in which the Bill could be amended to achieve necessary improvements and since then the Committee will have had time to consider the proposals from the Presiding Officer for amendments to the Bill which would bring it more closely into line with the Referendum mandate. In the Welsh Government's view, the Presiding Officer's arguments do not make redundant the case for a distinct legal jurisdiction (and that was not her stated intention), but her preferred alternative option ('Option A') could be explored if the UK Government is unwilling to accept the arguments we and others have made about the jurisdiction issue. We should stress, however, that we do not consider the proposed Options B and C to be viable solutions to this issue.

21. The Welsh Government hopes that this Supplementary Evidence is of assistance to the Committee, and we look forward to the Committee's Report on the draft Bill.

Welsh Government

November 2015

SEPARATION OF THE LEGAL JURISDICTION OF ENGLAND AND WALES

Introductory

1 New legal jurisdictions of England and of Wales

The legal jurisdiction of England and Wales becomes two separate legal jurisdictions, that of England and that of Wales.

Separation of the law

2 The law extending to England and Wales

(1) All of the law that extends to England and Wales—

(a) except in so far as it applies only in relation to Wales, is to extend to England, and

(b) except in so far as it applies only in relation to England, is to extend to Wales.

(2) In subsection (1) "law" includes—

(a) rules and principles of common law and equity,

(b) provision made by, or by an instrument made under, an Act of Parliament or an Act or Measure of the National Assembly for Wales, and

(c) provision made pursuant to the prerogative.

(3) Any provision of any enactment or instrument enacted or made, but not in force, when subsection (1) comes into force is to be treated for the purposes of that subsection as part of the law that extends to England and Wales (but this subsection does not affect provision made for its coming into force).

Separation of the Senior Courts

3 Separation of Senior Courts system

(1) The Senior Courts of England and Wales cease to exist (except for the purposes of section 6) and there are established in place of them—

(a) the Senior Courts of England, and

(b) the Senior Courts of Wales.

(2) The Senior Courts of England consist of—

(a) the Court of Appeal of England,

(b) the High Court of England, and

(c) the Crown Court of England,

each having the same jurisdiction in England as is exercised by the corresponding court in England and Wales immediately before subsection (1) comes into force.

(3) The Senior Courts of Wales consist of—

(a) the Court of Appeal of Wales,

(b) the High Court of Wales, and

(c) the Crown Court of Wales,

each having the same jurisdiction in Wales as is exercised by the corresponding court in England and Wales immediately before subsection (1) comes into force.

(4) For the purposes of this Part—

(a) Her Majesty's Court of Appeal in England is the court corresponding to the Court of Appeal of England and the Court of Appeal of Wales,

(b) Her Majesty's High Court of Justice in England is the court corresponding to the High Court of England and the High Court of Wales, and

(c) the Crown Court constituted by section 4 of the Courts Act 1971 is the court corresponding to the Crown Court of England and the Crown Court of Wales.

(5) Subject to section —

(a) references in enactments or instruments to the Senior Courts of England and Wales have effect (as the context requires) as references to the Senior Courts of England or the Senior Courts of Wales, or both; and

(b) references in enactments or instruments to Her Majesty's Court of Appeal in England, Her Majesty's High Court of Justice in England or the Crown Court constituted by section 4 of the Courts Act 1971 (however expressed) have effect (as the context requires) as references to either or both of the courts to which they correspond.

4 The judiciary and court officers

(1) All of the judges and other officers of Her Majesty's Court of Appeal in England or Her Majesty's High Court of Justice in England become judges or officers of both of the courts to which that court corresponds.

(2) The persons by whom the jurisdiction of the Crown Court constituted by section 4 of the Courts Act 1971 is exercisable become the persons by whom the jurisdiction of both of the courts to which that court corresponds is exercisable; but (despite section 8(2) of the Senior Courts Act 1981)—

(a) a justice of the peace assigned to a local justice area in Wales may not by virtue of this subsection exercise the jurisdiction of the Crown Court of England, and

(b) a justice of the peace assigned to a local justice area in England may not by virtue of this subsection exercise the jurisdiction of the Crown Court of Wales.

5 Division of business between courts of England and courts of Wales

(1) The Senior Courts of England, the county courts for districts in England and the justices for local justice areas in England have jurisdiction over matters relating to England; and (subject to the rules of private international law relating to the application of foreign law) the law that they are to apply is the law extending to England.

(2) The Senior Courts of Wales, the county courts for districts in Wales and the justices for local justice areas in Wales have jurisdiction over matters relating to Wales; and (subject to the rules of private international law relating to the application of foreign law) the law that they are to apply is the law extending to Wales.

6 Transfer of current proceedings

(1) All proceedings, whether civil or criminal, pending in any of the Senior Courts of England and Wales (including proceedings in which a judgment or order has been given or made but not enforced) shall be transferred by that court to whichever of the courts to which that court corresponds appears appropriate.

(2) The transferred proceedings are to continue as if the case had originated in, and the previous proceedings had been taken in, that other court.