

The submissions of Winston Roddick CB QC on a separate Welsh jurisdiction.  
June 2012

### **Introduction**

1. I congratulate the Committee on its decision to conduct this very timely inquiry into a matter of considerable importance to the people of Wales. I am grateful to the committee for inviting my submissions. You have asked me to provide a brief description of my involvement with the subject. I regularly broadcast on radio and TV in Wales and England on matters to do with the constitution of the UK, and Wales in particular, and about the administration of justice. I do so in Welsh and in English. My practice at the Bar is in the field of public and constitutional law. I have lectured extensively on constitutional matters including the Freedom of Information Act and the Government of Wales Acts 1998 and 2006. I have delivered addresses (as the Counsel General) in Dublin, Cork, Belfast, USA and Canada about the UK's changing constitution and that of Wales in particular. I addressed the Conference of the "Presidents of the Supreme Courts of the Member States of the EU and their Attorneys General" on this last subject in 2000. In 2008, I addressed the Franco-British lawyers Society Colloquium at Oxford on Wales's constitutional changes, delivered the Ninth Annual Lecture of the Centre for Welsh Legal Affairs on the subject of "The Development of Devolution and Legal Wales"<sup>1</sup> and the Lloyd George Memorial Lecture on the subject of "Devolving Justice" (previous speakers have included Roy Jenkins and Shirley Williams) In April of this year I addressed the London Glamorgan Society on the Changing Shape of Britain

### **Summary**

2. This submission defines the expressions "separate Welsh jurisdictions" and "administration of justice", summarises the constitutional and other arguments in favour of establishing a separate Welsh jurisdiction and the principal arguments against doing so and then focuses on the potential benefits to Wales, the barriers and the costs and the practical implications for the professions of devolving the function. My conclusion is that there is a sound case for creating the jurisdiction. References in this submission to the Act are to the Government of Wales Act 2006.

### **The four specific questions within the terms of reference**

The meaning of the term "separate Welsh Jurisdiction" (the first question)

3. As we are here concerned with the jurisdiction of the National Assembly for Wales (the Assembly) and not that of a court of law or a nation, the modified Oxford Dictionary definition<sup>2</sup> would be 'the territory or sphere of activity over which the legal authority of the Assembly extends'. As its territorial extent is defined by the Act that element of the definition requires no further definition. This inquiry is not concerned with **Wales as a jurisdiction**. It is concerned with the **Assembly having jurisdiction**. Assuming that to be correct, the second paragraph of Mr Melding's letter of 9 December 2011 inviting submissions makes clear that the central question with which this inquiry is concerned is

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<sup>1</sup> I attach my address to the Centre for Welsh Legal Affairs the paragraphs of which I have numbered to facilitate cross referencing.

<sup>2</sup> See footnote 2 on page 2 of the scoping paper

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. That being the central question, “jurisdiction” simply means responsibility for the administration of justice in Wales. That is the sense in which I use the expression in this submission and the sense in which I used it in the passage quoted at page 4 of the scoping paper. If that function were to be devolved, Wales through its Assembly would have jurisdiction over the administration of justice just as it has jurisdiction over health matters and environmental matters today and the administration of justice in Wales would thereby cease to be part of a unified system with England.

4. 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 subject, however, to the supervision of an independent judicial appointments commission.<sup>3</sup>

5. After the referendum, the Assembly’s legislative competence (or ‘fields of responsibilities’ as they were called), is to be ascertained by reference to section 108 and Schedule 7 Part 1. The Assembly may legislate in relation to the subjects listed under any of the headings in Part 1 of that Schedule. By section 109 (1), further headings may be added to that list by Order in Council<sup>4</sup>. The administration of justice in Wales is not a subject listed under any of the headings in part 1 of Schedule 7. That function is vested in Ministers of the Crown<sup>5</sup>. By section 58 and Schedule 3 Part 1 these may be transferred by Order in Council to Welsh Ministers. So the mechanism for devolving jurisdiction to the Assembly for the administration of justice in Wales is by a transfer of the function by Order in Council under section 58 and for the Assembly’s legislative competence to be enhanced by Order in Council under section 109 (1). The property, rights and liabilities of the Ministers of the Crown from whom the functions are transferred under section 58 to the Welsh Ministers will vest in the latter<sup>6</sup>.

6. That concludes my submission on the definition of ‘jurisdiction’ and ‘administration of justice’ and how the function may be transferred to the Assembly.

The second question in the terms of reference

7. Although this question is specifically concerned with the three elements of the potential benefits, barriers and costs of devolving the jurisdiction to the Assembly I take it to be concerned also with the arguments for and against the

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<sup>3</sup> This definition is wider than that adopted in the response of the Wales Council of judges

<sup>4</sup> See Explanatory Notes at para 411

<sup>5</sup> The Minister of Justice (who administers the function through HMCTS), the Home Secretary and other Ministers of the Crown respectively

<sup>6</sup> See section 88 and schedule 4

devolving of this responsibility (these being relevant to the assessment of the benefits). I deal with potential or perceived barriers in paragraphs 20, 21 and 23 below. I have taken as my background to the opinions I express in this part of my submissions the significant constitutional changes which the first Blair Government introduced to the UK generally and Wales in particular and the effects of these changes on the administration of justice and the practice and the teaching of law in Wales. I have described these in some detail in my address to the Centre for Welsh Legal Affairs, in particular at paragraphs 9 to 13, 31 to 41 (pages 3-5 and 11-15).

8. The arguments I have previously advanced in favour of devolving the function are quoted on page 4 of the committee's scoping paper. I would also adopt the arguments advanced in the submissions of the Legal Wales Standing Committee.

9. I come then to other arguments in favour.

10. In its consideration of the effects of further legislative powers for the Assembly upon the administration of justice in Wales, the All Wales Convention was primarily concerned with whether responsibility for administering justice was necessary as a precondition for operating part 4 of the Act. Its conclusion was that it was not but it also made the following findings based upon a very broad consultation. The emphases in the passages quoted below are mine.

- The evidence showed that “the people of Wales support for and acceptance of devolution is solid. Our polling results showed 72% favour the present devolution **or more**”<sup>7</sup>.
- “There was a general feeling that the differences in the settlements of Scotland and Northern Ireland on the one hand and Wales on the other are unfair.<sup>8</sup> *One member of the public stated “Wales should have an Assembly with powers comparable to Scotland and Northern Ireland. There is no reason for us to have a weaker form of devolution”.*
- Having noted the developments I refer to in paragraph 7 above, it stated that “Yet there is scope for **more change**”<sup>9</sup>.
- “As devolution progresses, more laws applicable only to Wales are created”<sup>10</sup>
- “The ..... legal community in Wales was aware of the need to adapt to devolution”<sup>11</sup>

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<sup>7</sup> See its executive summary at paragraph xxii

<sup>8</sup> Para 3.8.6

<sup>9</sup> See the report at paragraph 3.9.13. In the context of these findings, for “scope” read “need”?

<sup>10</sup> Para 3.9.4

<sup>11</sup> Para 3.9.6

- “Public servants should sufficiently understand the legal and constitutional framework within which they are working”<sup>12</sup>
- The changes in the administration of justice and the practice of the law in Wales since devolution were the products of initiatives by individuals rather than part of a coherent response to devolution<sup>13</sup>.
- Although Wales for the purposes of administration of justice was part of the England Wales combined jurisdiction “the system is London-centric, and Wales has tended to be treated as part of England”<sup>14</sup>
- “Devolution has brought opportunities to the legal profession in Wales, ... Capacity and skills need to be built up so that opportunities can be exploited. New avenues of work are opening up .... and there is no shortage of talent available in Wales and outside”
- “Having considered all the evidence, we conclude that there is a growing concept of Wales having more of its own legal personality. Certainly it needs appropriate legal institutions and systems to support the progress of devolution and the developing legislative competence of the National Assembly for Wales. A legal check is needed on the activity of both legislature and executive, preferably with adjudications and remedies more available in Wales”.

11. That last reference to recognising the needs of Wales to have its own legal institutions resonates with the words of Lord Bingham of Cornhill, the Lord Chief Justice of England and Wales, as he then was, who said on the occasion of the opening of the Mercantile Court in Cardiff

“This court represents the long overdue recognition of the need for the Principality of Wales to have its own indigenous institutions operating locally and meeting the needs of its citizens here.”

12. As to costs of further devolution, whenever there is discussion about enhancing the Assembly’s powers, concern is expressed about the costs of doing so especially in these times of economic difficulties. That was the experience of the All Wales Convention<sup>15</sup> but when it looked in detail at the cost of giving the Assembly the enhanced legislative powers contained in Part 4 of the Act it concluded that the extra cost was largely neutralised by savings.

“ .. evidence suggests that while costs are an important dimension, in particular for the public’s perceptions, the likely impact ..... of a move to Part 4 would be, broadly speaking, financially neutral .....”<sup>16</sup>

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<sup>12</sup> Para 3.9.8 The inference being they are ‘devolution blind’

<sup>13</sup> Para 3.9.10 See also the submissions of the Legal Wales Standing Committee for further arguments about piecemeal development and devolution by evolution.

<sup>14</sup> Para 3.9.11

<sup>15</sup> Para 3.2.1

<sup>16</sup> See its summary at para 3.2.9

13. The Convention made clear findings as to the economic impact on Wales of its emerging jurisdiction over the administration of justice in Wales<sup>17</sup>. These were

- Legal services in Wales represent a significant contribution to economic activity, **vital** to the economic and social development of the nation<sup>18</sup>
- A strong legal profession is needed to service the developments in the administration of justice which have occurred in the wake of devolution
- A growing number of lawyers in Wales are specialising in ‘Welsh’ public law
- There is a need for growth in the number of lawyers in Wales to cope with the changing demands and there is a corresponding need for growth in the educational and training opportunities to ensure that the young lawyers of Wales “have the essential skills necessary to service [Wales’] 21<sup>st</sup> century economy”<sup>19</sup>
- There is a real and pressing need in the public sector for more young people trained as lawyers in the new devolved fields of responsibilities.
- “To date, the needs of the profession in Wales are not fully met. There remains a skills deficiency, particularly in commercial activity and the complex, high value specialist work ..... Meeting these requirements is important for devolution, **economic transformation**, and developing a modern profession, tailored to the needs of the modern Wales”<sup>20</sup>

14. It is remarkable, is it not, that in this period of severe economic austerity when central government is being criticised for failing to identify opportunities for growth in the economy, Wales is identifying demand and opportunities for growth and career opportunity essential to the Nation’s well being. In my opinion, these economic impact arguments would assume far greater force if the question were should the assembly be given responsibility for the administration of justice in Wales rather than that this development be left to evolve over time.

15. The expression ‘Legal Wales’ has become part of Wales’ everyday language since devolution. It simply means the development of the legal institutions in Wales in a way that is consistent with devolution. As the findings of the All Wales Convention show, there is considerable support for its further development across all the legal ‘constituencies’ of Wales. Andrew Davies, the former Economics Minister in the Welsh Government was convinced that the economic advantages of its development could be very significant.

16. Devolving the function of administering justice to the Assembly would not create an upheaval. It could be seamless, cost very little, result in substantial savings, boost the Welsh economy and provide significant career opportunities. All the necessary experiences and qualifications in the administration of justice are already present. It would require very little additional, if any, new office space and what it would require would be reflected in the saving of office space and expenses in England. As devolving responsibility for administering justice as I

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<sup>17</sup> See paras, 3.9.4 to 3.9.10

<sup>18</sup> Paras 3.9.4 See also paragraph

<sup>19</sup> See para 3.9.8 per Jane Williams of Swansea University

<sup>20</sup> Para 3.9.10

defined that expression earlier<sup>21</sup> would not require further primary legislation<sup>22</sup> there would be no need to find time for it in Westminster's long legislative queue.

17. The way the administration of justice is structured and run in Wales could be so arranged as to make a very significant contribution to the Welsh economy. I am not aware what the position is in the changed economic climate of this period but until recently legal services (apart from administration of justice) in Wales contributed 1% to Wales' GDP. Agriculture contributes a little more (about 0.5% more) but there is considerable scope for increasing the contribution of the former. There is therefore much more than just a constitutional case for devolving this function. Amongst the advantages it would bring to Wales are

- the administration of justice in Wales and its institutions would become closer to the people of Wales;
- the organisation within Wales of court and tribunal sittings in Wales is likely to add to the efficiency of those bodies and to the prompt disposal of work;
- the economic benefits which flow from the existence of a legal system in society would become available within Wales. For example, employment in support industries, the generation of fee-earning work in related professions, construction of new courts and offices to manage the system from Wales.
- the existence of legal institutions within Wales would create work and career structures not presently available in Wales.
- the development of expertise amongst the legal profession in Wales.
- access to the courts in Wales by solicitors, barristers and other eligible advocates would not become restricted<sup>23</sup>

#### Arguments against devolving the responsibility

18. A number of substantial arguments have been advanced against devolving responsibility for the administration of justice to the Assembly. I would refer the committee to those arguments which are summarised in the submission of the Legal Wales Standing Committee and I adopt its responses to those arguments

19. There are two other contrary arguments I should like to deal with. These are set out on page 5 of the committee's scoping paper. The paper draws from the report of the All Welsh Convention "a general consensus that a separate jurisdiction is not required at this time". That interpretation of the report's findings is mistaken. The consensus it found was that devolving justice is not necessary to "support a move to give the National Assembly for Wales's powers to pass Acts under Part 4 of the 2006 Act"<sup>24</sup>. That it is not necessary for that purpose is quite obvious and I have not heard or seen any argument to the contrary. The basic purpose of the All Welsh Convention was to increase understanding of how the National Assembly worked at that time and to ask the

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<sup>21</sup> See paragraph 4 above

<sup>22</sup> See paragraph 5 above and the statutory provisions there referred to.

<sup>23</sup> See the answers to questions [X] and [Y] below

<sup>24</sup> See the All Wales Convention Report at para 3.9.18

people of Wales what they thought about the Assembly having increased legislative powers<sup>25</sup>. It had, therefore, just two broad roles, - to prepare the ground for a possible referendum on full law-making powers for the assembly (majority support for which would bring Part 4 of the Act into force) and to explain the then system of powers available to the assembly. It explained that the question about full law making powers was limited to the 20 fields of responsibilities already devolved<sup>26</sup>. It was not concerned with the devolution of further functions and fields of responsibilities to the Assembly (eg the administration of justice in Wales) save only if they were necessary for activating Part 4.

20. The other arguments on page 5 of the scoping paper are those of The Rt Hon Jack Straw MP QC. His “strong advice” was against any move to devolve this function. In support of this advice he said that there were overwhelming arguments against such a move. He said that it was likely to create enormous practical implications. He did not specify what the arguments were nor what those implications were likely to be other than by postulating four questions to which he did not provide any answers. The four questions were

- Would decisions of the English courts be merely persuasive in Welsh courts rather than binding
- Would a separate legal profession need to develop, with its own systems of professional regulation
- Could Welsh judgements be enforced against English defendants, or Welsh proceedings served in England.

In the second paragraph quoted from his address he advances the argument that the administration of justice in Wales should be allowed to evolve. – devolution by evolution

21. With respect to Mr Straw, these arguments so called are hardly persuasive. The ‘binding’ nature of high court decisions on lower courts is based mainly on the accepted authority of the higher courts over lower courts and I cannot imagine the lower courts treating the decisions of higher courts, whether they are in England or Wales as having any less authority than they have at the present time. As for the authority of the Court of Appeal over the High Court, the argument assumes that the High Court of Wales would not treat decisions of the Court of Appeal in England as binding. Why should the Assembly wish to legislate to that effect when to do so adds uncertainty to the laws of Wales? The answer to his third question is yes. If England and Wales were to become separate jurisdictions in the sense which I have understood that expression, PIL (Public International Law) rules would be introduced probably based on the PIL rules applicable to cases arising between the three legal jurisdictions of the UK which are foreign to each other for these purposes. There are well worked out mechanisms within existing rules to deal with Mr. Straw’s third question. I have addressed the second question in paragraph 23 below. As for the arguments in his second paragraph, I would respectfully adopt what the Standing Committee of Legal Wales states about the devolution by evolution argument.

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<sup>25</sup> See the report at para 1.1.6

<sup>26</sup> See its executive summary

The third question in the terms of reference

22. This is concerned with the practical implications for the legal profession and the public. So far as the Welsh public are concerned, the benefits are overwhelmingly positive. The quality of justice will not be diluted one bit. The rule of law would remain the strongest of our constitutional principles. Justice would be no less accessible than it is at present and is likely to become more accessible. Our judges would be chosen from the same pool as they are chosen at present. The separation of powers would be as stringent as it is today. The judiciary would be no less independent than they are today. Justice and its administration would become closer to the people for whom the laws and our courts exist and the economic benefits for Wales would be substantial. See also paragraphs 7 and 13 to 17 above

23. As for the implications for the professions and their members, the form of the question especially its use of the words “separate” might cause them (especially those outside Wales and those not as familiar with devolution and what the inquiry is really about as others are) to wonder what exactly the Assembly has in mind if responsibility for administration of justice were to be devolved to it. The word “separate” might cause them to think that the Assembly has in mind a measure of separation from or discrimination against those who do not live or practice habitually in Wales. If that were the impression they obtain, it would be a consequence of the form of the question rather than what the committee really has in mind. The professions have nothing to fear from devolution. It creates more and not less opportunities. The regulation of the professions, including matters involving competence and control, is a matter for the professions and the statutory regulators and not of the ministries I described in paragraph 5 above. The regulators and the judges and to a lesser extent the professions have authority over rights of audience. These are not functions that are under consideration for devolving to the Assembly. Whether the administration of justice is devolved or not, the need for advocates who are familiar with the differences in the substance of the laws applicable to Wales and, in some more limited circumstances, the ability to represent clients through the medium of the Welsh language, will be precisely the same whether the function is devolved or not. The regulators will stipulate what the basic competencies of advocates should be. This inquiry is about the machinery by which justice is administered and not about how the professions are to be regulated or about the substance of our laws.

Winston Roddick QC

7<sup>th</sup> June 2012