



Ministry
of Justice

Report of the Justice in Wales Working Group

Foreword

The Justice in Wales Working Group was established in the context of debates about the nature of justice devolution during the passage of the Wales Bill, and the terms of reference particularly emphasised the issue of diverging law between Wales and England.

The Working Group has not focused on big political questions about whether or not there should be further devolution (which was outside our terms of reference), but has rather looked at practical ways of improving the delivery of justice for the people of Wales – what the Lord Chief Justice referred to as “nuts and bolts issues”.

It also became clear during our work that while diverging law is an important issue, there are many other equally important issues that reflect the distinctive nature of Wales – for example in relation to the Welsh Language or the geography of the country. The Working Group was told about many ways these issues are *already* reflected in the way that England and Wales institutions provide services in Wales, but this reality is not always well communicated or understood. Equally, the Working Group identified numerous ways to build on this existing good practice.

Although the Working Group has not had the time or resources for a formal large-scale stakeholder engagement exercise, we have sought input from a wide range of people who are responsible for the day-to-day delivery of justice in Wales. It has been very striking how keen people have been to engage with the Working Group and to contribute positive ideas. It was also clear that there is real passion and commitment to work together to meet the distinctive needs of Wales, in particular recognising (as many people said to us) that Wales is ‘a small country’ where it is possible for local collaboration to take place very effectively.

From the start the Working Group has also sought to work with officials from the Welsh Government, and it was helpful that officials attended a small number of our meetings and stakeholder events. However, it became clear that the Welsh Government did not feel it was appropriate for them to fully engage with what was seen as a UK Government body. This was a real shame and illustrates one of the key areas where a significant improvement in relations would be beneficial.

The conclusions and recommendations of the Working Group need to be seen in the context of what we were asked to consider. They do not seek to provide answers to the big constitutional and political debates. But they are intended to enable a real step forward on a practical level and to help lay the foundations for further constructive engagement in future.

Finally, I would like to thank everyone who contributed to the Working Group and in particular to the team from MOJ who supported our work.

Scott McPherson
Chair of Justice in Wales Working Group
Ministry of Justice

Introduction

1. Since the National Assembly for Wales (NAW) was given primary legislative powers in 2011 it has increasingly created distinct, devolved laws that apply in Wales. Divergence between England and Wales can also result where new legislation is passed in the UK Parliament that applies only to England.
2. The UK Government currently has in place arrangements to identify and manage the impact of divergence on the justice system. However, during the development of the draft Wales Bill the Ministry of Justice and Wales Office recognised the need to establish a formal forum for considering the arrangements required to manage the issue of divergence. MoJ and Wales Office Ministers agreed to establish the Justice in Wales Working Group to consider improvements to the administrative arrangements and to report its recommendations to Ministers and the Lord Chief Justice (LCJ).
3. The purpose of the Working Group was therefore to consider the administrative and practical implications for the justice system of the emerging body of Welsh law made by the NAW and Welsh Ministers and recommend improvements in administrative arrangements and procedures to ensure NAW laws are fully embedded in the justice system.
4. The Working Group included representatives of MoJ, Wales Office, Home Office, Cabinet Office, the Attorney General's Office, the Judicial Office, and the Crown Prosecution Service.

Scope

5. More specifically, the Group was asked to consider:
 - i. the implications for justice in Wales of moving to the reserved powers model of devolution as set out in the Wales Bill
 - ii. the constitutional and practical implications of divergence of the law that applies in Wales, within the unified England and Wales justice system
 - iii. the need for distinctive justice arrangements to reflect the emerging body of law made by the NAW and Welsh Ministers
 - iv. the need for an inter-governmental protocol and effective stakeholder engagement
 - v. procedures for translating NAW legislation into systemic changes in the administration of justice

Wales Bill

6. The Wales Bill implements a clearer, stronger and more durable devolution settlement for Wales. The new settlement is underpinned by a reserved powers model of devolution, similar to that which operates in Scotland.
7. Justice and the single legal jurisdiction of England and Wales are reserved subjects in the new model. The NAW will continue to be able to modify the private law for a

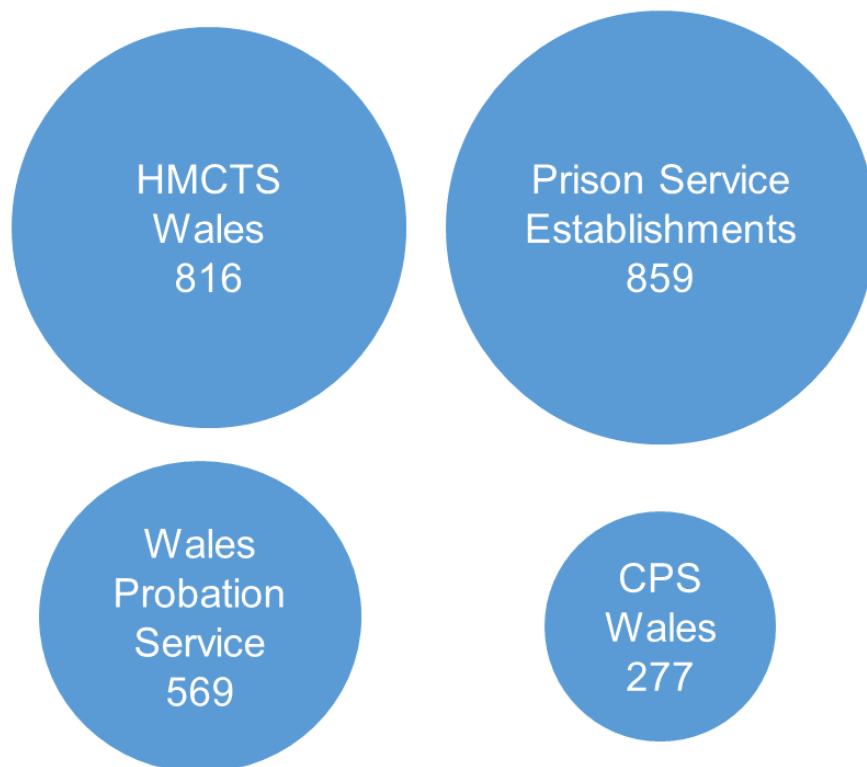
devolved purpose and enforce its legislation by creating or modifying offences and penalties for all but the most serious offences.

8. For the first time, the Bill also requires justice impact assessments to be published in relation to NAW Bills. The assessments will set out the potential impact of the NAW Bill's provisions on the justice system in England and Wales.
9. The Bill will complete its parliamentary passage in the New Year, and the reserved powers model will come into force on a day the Secretary of State appoints by regulations – “the principal appointed day”.

Justice system Wales partners

10. The justice system in Wales is delivered by a number of agencies with different reporting structures and accountability. Justice system partners include HMCTS Wales, NOMS in Wales, YJB Cymru, the Legal Aid Agency, Home Office and CPS Wales.

Figure 1: Justice system Wales partners, current headcount in Wales



11. Engagement with the Welsh Government and devolved bodies is good in certain areas, but inconsistent, and information flows do not function effectively. Early flagging of new legislation is vital so that all stakeholders can factor it into work plans and begin to consider downstream impacts.
12. The justice system partners have senior leadership in Wales, and already engage extensively both with the Welsh Government, devolved bodies and with each other through a variety of groups. There are a number of existing forums that allow

stakeholders to either feed into the development of NAW legislation, or discuss the downstream operational impacts of new legislation. These include:

- All Wales Criminal Justice Board (AWCJB)
- IOM Cymru Board (IOMCB)
- Wales Reducing Re-offending Pathways Group (WRRPG)
- Wales Home Office Advisory Group (HOAG)
- Wales Youth Justice Advisory Panel (WYJAP)
- YJB/Welsh Government Strategy Implementation Board (YJB/WG SIB)
- Lord Chancellor's Standing Committee on the Welsh Language
- Judicial College Wales Training Committee

13. The groups listed above are attended by the Welsh Government and a range of stakeholders. They have a range of purposes, but all provide scope to discuss the downstream, operational impacts of divergent legislation.
14. Stakeholders report that while the level of engagement on justice matters is already good, it should be built on in a way that rationalises communication chains, encourages early engagement and increases coordination, for example when it comes to responding to Welsh Government consultations.

Other stakeholders

15. Welsh justice stakeholders also include law firms, the Law Commission, the Law Society, the Bar Council and Law Schools. These stakeholders report a range of views on the question of how to manage diverging law. There is a broad consensus that the UK Government must be mindful of the distinctiveness of justice in Wales, and engage in a visible, coordinated way that takes this distinctiveness into account. In particular, the point was made that collaboration across the justice system in Wales is particularly strong, and that the UK Government needs to tap into this willingness to collaborate. The fact that there is no single point of contact for the justice system in Wales leads to a diffuse effect and limited engagement.
16. One common issue cited was the relative inaccessibility of devolved law, owing to the fact that legislation can be difficult to understand unless you have access to commercial databases.

Examples of existing processes

Government

17. The UK Government has in place a process for notifying relevant departments of NAW legislation which may have potential implications for them. At a formal level, on the Introduction of a Bill into the NAW, and again within two weeks of a Bill being passed, Wales Office lawyers undertake a competence analysis for the AGO's office and the

Wales Office writes at official level to all departments informing them of the Bill. Where it is anticipated that a specific department could be affected, the Wales Office will flag this as soon as possible to the relevant department, separately to the general write-round.

18. It is not the responsibility of the Wales Office to undertake a full analysis of every Bill and how it impacts on UK Government departments. The policy expertise lies with the relevant departments and therefore those departments are best placed to identify unintended consequences, for example in the justice sphere whether the legislation creates any new offences.
19. Therefore it is, and always has been, each policy department's responsibility to review the bill and engage with the Wales Office at official and lawyer level to combine this into a UK Government position. Each department decides their own process for assessing NAW Bills once the Wales have informed them, as each will have their own ways of working/ministerial preferences.
20. Informally, however, the Wales Office – and MoJ – are sometimes notified of potential impacts during the policy development stage and prior to a Bill's introduction in the NAW. This will involve a member of the relevant policy team within the Welsh Government identifying the relevant policy lead within MoJ or its operational arms with a view to discussing consequential implications on the justice system.
21. Where this engagement has taken place, MoJ has been able to discuss downstream impacts and implications with the Welsh Government, and has discussed how best to integrate policy aims or mitigate any unintended or adverse impacts.
22. There are also processes in place to ensure that the MoJ and its operational arms provide information to the Welsh Government and devolved agencies as early into the policy development process as possible. The MoJ submissions template requires staff to consider and set out the devolution implications of policy and operational advice to ministers. The accompanying guidance prompts staff to speak to the Department's devolution team about potential impacts and how to engage devolved administrations in policy development. The new requirement for justice impact assessments to accompany Assembly Bills will provide useful additional information on the likely impact of Assembly legislation on the justice system.
23. The Department's intranet also provides guidance on devolution, including how best to engage the devolved administrations on UK Government policies and operational matters; senior leaders regularly cascade messaging on the importance of devolution as part of the decision making process; and the devolution team provides advice directly to policy and operational teams, including through learning and development seminars. The Department has produced a devolution engagement plan that details the measures in place to ensure that staff routinely consider devolution and engaging the devolved administrations early into policy development.

Judiciary

24. The LCJ and the First Minister have agreed a protocol to consult on matters of policy and legislation affecting the judiciary and the administration of the courts and tribunal system.
25. Under this agreement, the Welsh Government has put in place an internal process to enable early notification to the Lord Chief Justice of proposed policy and legislative changes that may affect the judiciary and the courts and tribunals system. In practice, under the legislative programme in the Fourth Assembly, notification of proposed bills

were sent to the Judicial Office (the LCJ's Office and the Judicial College) up to four months ahead of their introduction in the Assembly. The Judicial Office has worked closely with the Welsh Government to develop the process to enable engagement to commence at policy development stage, thus enabling early feedback to be provided on the likely impact and early planning of resulting changes, and for this engagement to be maintained through the development of the Assembly Bill and right through to the implementation phase.

26. In his 2015 Annual Report, the LCJ acknowledges the positive development of this protocol but stated that:

What is still needed is a dedicated justice function, whether provided by the Ministry of Justice or as a devolved function, with its focus on the necessary underpinning mechanisms to enable legislation to operate. This should be taken forward as a priority.

27. In particular, the judiciary deem it critical that arrangements are put in place to consider impact of legislative changes on procedural rules and judicial training.
28. The Judicial Office, through the Lord Chief Justice's Private Office, has monthly teleconferences with officials from the Welsh Government. In addition to discussing Welsh justice issues, the Welsh Government updates the Judicial Office on the Welsh Government's wider legislative programme.

CPS

29. Delivering a prosecution service in Wales presents the CPS with a unique set of challenges, such as the requirement to be able to provide Welsh-speaking prosecutors in courts and in CPS Wales' Victim Liaison Unit. As is the case for other CJS partners in Wales, geography also presents difficulties.
30. There are already some differences between English and Welsh law and the prospect of further divergence between the jurisdictions could complicate matters further, with lawyers required to understand where differences exist and make charging decisions accordingly. The CPS is a single agency and lawyers move between areas in England and Wales.
31. In order to minimise the complications associated with diverging bodies of law, the CPS has already been working to develop a closer relationship with the Welsh Government and partners involved in the Welsh criminal justice system. There are examples of joint work on subjects such as modern slavery and forced labour, hate crime and violence against women and girls, and a MoU between the CPS and the Welsh Government on violence against health officials. More collaboration and close working will be required going forwards, particularly when new offences are proposed to have effect only in Wales.

Other

32. The Welsh Government Legal Services has agreed to send along a representative to meetings of the Wales Training Committee when requested by the Chairman. A similar arrangement exists with the devolved tribunal services.
33. HMCTS will plug into areas of Welsh Government policy that directly affect court operations. Areas such as family law, housing and social services have been of interest

to court operations and HMCTS Wales has linked in to the relevant policy areas where required. However, there is no single forum that provides this engagement.

34. On an area such as sentencing policy there is no formal consultation process. An example of where more engagement is necessary is on sentencing guidelines, which will need to take into account any differences in sentencing in Wales and consider whether the impact of the guidelines in Wales may be different to that in England.

Conclusions and Recommendations

MOJ's strategic approach to Wales

35. The Ministry of Justice has a significant presence in Wales and there are many examples of how this works effectively in practice. However, there is a risk that the overall picture achieves less than the sum of its parts and it would be beneficial for the department to take a more strategic approach to how it considers the needs of Wales.
- i. **The Secretary of State could consider whether there would be benefit in giving an MOJ Minister specific responsibility for considering how MOJ services are delivered in Wales (in addition to the existing Ministerial role in relation to devolution generally).**
 - ii. **The Ministry of Justice Board should consider having (at least) an annual discussion of how the department as a whole is meeting the distinctive needs of Wales. The discussion should be informed by the work of the Expert Advisory Committee (recommendation X). The Board should consider holding this meeting (or others) in Wales.**
 - iii. **The Ministry of Justice Executive Committee should consider holding a discussion with the MOJ senior managers responsible for Wales from each of main operational bodies to discuss how they are working together (and with others) to most effectively deliver services in Wales.**

Intergovernmental relations

36. There are numerous examples of effective working relationships between devolved institutions and those operating on an England & Wales or UK basis. There are also good relationships between the Welsh Government, the judiciary and various organisations that are part of the justice system. However, the relationship between the Welsh Government and the Ministry of Justice could be significantly improved. In particular, justice impacts can arise in relation to all areas of the Welsh Assembly's competence, however levels of engagement differ depending on the relevant ministerial portfolio. It is also often not clear which Welsh Government Department should be engaged on more general justice issues so it would be helpful to have ownership of cross-cutting issues at a more senior level. It is also notable that there is no concordat between MOJ and the Welsh Government despite work that was started in 2012. This would be beneficial, in particular, in relation to early sharing of information on legislative proposals (whether in Parliament or the NAW) that will impact on the justice system.
- iv. **MOJ Ministers should actively engage Ministers from the Welsh Government on the conclusions of the Working Group, in particular seeking agreement on the need to finalise a concordat.**

- v. **The MOJ Executive Committee should consider meeting jointly with its counterpart from the Welsh Government to discuss how MOJ can work with devolved bodies on shared objectives. Consideration should be given to whether this should be done on an annual basis.**
- vi. **The Ministry of Justice should establish clear mechanisms for ensuring that (a) the distinctive needs of Wales are fully considered in the development and implementation of policy, and the Welsh Government is involved where appropriate; and (b) information from the Welsh Government and NAW (for example about upcoming legislative changes) is effectively communicated to all relevant parts of the justice system.**

Reflecting the distinctiveness of Wales

37. The distinctive nature of Wales is already reflected in the various way by the many part of the justice system, including in relation to the use of Welsh language and the way in which organisations are structure. However this existing work could be better communicated and developed further.

- vii. **The Ministry of Justice should consider the creation of a single point of contact to lead the overall co-ordination of its work in Wales, working closely with partners in other organisations and the Welsh Government. This could be one of the existing senior managers from NOMS Wales or HMCTS Wales, with some additional support for their new role.**
- viii. **The Ministry of Justice should undertake a review of how its data collection and publishing practices reflect the distinctiveness of Wales, where possible disaggregating data to give a clear picture of how justice in Wales functions.**
- ix. **The Ministry of Justice should consider the way in which information is presented on its website, in order that information about Wales is easily accessible.**

Ongoing review of justice in Wales

38. The Justice in Wales Working Group was established to carry out a specific task and was never intended to have a long term role. However, there was widespread support from the people we met for there to be some form of ongoing expert review of the way in which the justice system is working in Wales. This issue has also been debated in Parliament during the passage of Wales Bill and, as agreed by MoJ Ministers, Lord Bourne gave a commitment during Lords Report that the Government would establish a non-statutory committee to undertake an ongoing review.

- x. **The UK Government should work with the Welsh Government to establish a non-statutory expert advisory committee to keep under review the operation of the justice system in Wales. The membership should draw on expertise from the justice sector and its chair should be independent of MoJ, Wales Office or the Welsh Government.**
39. These recommendations are MoJ-focused. It is expected that partners will make their own changes in the context of the new structures and processes we recommend.