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THE NEXT STAGE OF DEVOLUTION? A (D)EVOLVING CRIMINAL JUSTICE SYSTEM FOR WALES

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Abstract:

The coalition government in Wales has committed itself to seriously consider devolving the criminal justice system for Wales. It is seen as the next possible step in the devolution process. To some extent many of the structures for a devolved criminal justice system are already being put in place to support devolved policy making and provision of criminal justice services in Wales. However, the *One Wales* agreement proposes to place the most emphasis on a devolved criminal justice system on youth justice and the prevention of re-offending. This is problematic in a number of ways explored in the paper, not least because the duties in the Welsh Constitution oblige the Welsh Assembly Government to ensure equality of opportunity for all and equality of treatment of both Welsh and English. Can a successful devolved fit-for-purpose criminal justice system for Wales be created?

Keywords: Wales, devolution, criminal justice system, local structures, feasibility, Welsh language

Introduction

Writing in 2006, Trench posited that:

There may be a desire to extend the Assembly's powers yet further (policing is an obvious candidate), for which Westminster legislation will also be needed. And there is speculation about the desirability of 'judicial' devolution, with Wales established as a separate legal jurisdiction with its own system of courts and own version of the civil and criminal law. Perhaps it is not premature to start thinking about [the next stage] of Welsh devolution.²

The legal, sociological and political questions and answers concerning the system of devolution in the United Kingdom are extremely complex because the asymmetrical system of devolution we have at present is unlike any other in the world. Devolution in Wales has

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² A Trench, 'The Government of Wales Act 2006: the next steps on devolution for Wales', *Public Law* 2006, Win, 687-696, at 696.

been described as 'a process not an event'.³ For historical reasons, what is happening in Wales is something different to Scotland and Northern Ireland. It is this particular history, alongside the actors directing the process now that make the prospect of further separation an interesting one to study from a legal jurisdiction point of view. The criminal law is not devolved, yet the provision of certain services which are an essential component of the criminal justice system is. Criminal laws are made at Westminster, but of course, are applied in and adjudicated on in all parts of the UK. There is a hunger in Wales for 'doing it differently' when it is believed there is another, better way. In the face of this, the Counsel General for Wales, Carwyn Jones AM, has questioned publicly whether 'it is sustainable for 'the single [legal] jurisdiction of England and Wales to be retained.' Jones added that the *One Wales* agreement⁴ between the governing coalition parties included the

'commitment to consider the evidence for the devolution of the criminal justice system. This is within the context of the devolution of funding and moves towards the establishment of a single administration of justice in Wales. A full debate with the legal community on the creation of a separate criminal justice system for Wales is inevitable if the National Assembly gains greater powers.'⁵

Just how a 'Welsh way' is developing in a partly devolved area of law is the subject matter of this article. Criminal justice examples drawn from the commitment contained within the *One Wales* programme and wider will be examined to critically assess whether there is a real development of an alternative way. Is there a distinctive 'Welshness' in some of the criminal justice institutions, policies and services? Is Wales ready for the next stage in devolution?

1 Historical Setting

There is no doubt that devolution has changed the legislative and policy landscapes in the UK. However, it is true to state that most people still talk in terms of a unified legal system for England and Wales. For example, Trench commented that "Wales remains part of the single jurisdiction of England and Wales, and the Assembly is not intended to have powers over civil or criminal law, or the courts,..."⁶ This view of the legal system in Wales can be seen as rather outdated. It certainly is not the case that it was always thus. For example, the famous codification of Welsh laws under Hywel Dda at the end of the first millennium.⁷ Untruths about Wales were evident even then. Archbishop Pecham, advising Edward I, stated that the

³ R Rawlings, *Delineating Wales: Constitutional, legal and administrative aspects of national devolution* (University of Wales Press, 2003), various pages.

⁴ *One Wales – A Progressive Agenda for the Government of Wales*, June 2007.

⁵ Carwyn Jones AM, speaking to the Law Society meeting on 21 September 2007, <http://new.wales.gov.uk/news/ThirdAssembly/OFM/2007/1753059/?lang=en>

⁶ A Trench, 'The Government of Wales Act 2006: the next steps on devolution for Wales', [2006] *Public Law* 687, at 693.

⁷ *Cyfraith Hywel*. See D Jenkins (ed. and transl.), *The Law of Hywel Dda. Law Texts from Medieval Wales* (Llandysul, 1986); TM Charles-Edwards, *The Welsh Laws* (Cardiff University Press, 1989); RC Stacey, *The Road to Judgment. From Custom to Court in Medieval Ireland and Wales* (University of Pennsylvania Press, 1994).

laws of Hywel Dda 'were irrational and came directly from the Devil,' and as a consequence the English system of counties, sheriffs and justices were imposed on Wales. Despite the fact that this process did not extend the jurisdiction of the English central courts to Wales, Edward did try to codify some of the principles of English law for use by Welsh officials.⁸ This partial codification slowly helped the laws and customs of the different areas of Wales being used less frequently as they began to be seen as outdated or inferior to English laws. Following the Acts of Union during the reign of Henry VIII the Welsh legal system can be said to have been truly on the way to being subsumed within the English one.⁹ At the time, the picture painted by some legal advisors to the King was one of a lawless land in need of the civilising influences of English [Empire's] laws and the need for the abolition of Welsh laws. Many commentators have said that the eventual demise of Welsh laws and customs was not mourned at the time.¹⁰ But maybe it is time to acknowledge their re-emergence.

2 Devolution and Law Making

The system of devolution in Wales is one where the Assembly has powers in relation to certain matters devolved to it by virtue of the Government of Wales Acts (GWA) 1998 and 2006.¹¹ This contrasts with the system in Scotland which has a general power to deal with

⁸ Statute of Rhuddlan [or, of Wales] 1284, 12 Edw. I. The statute did not apply to the Marcher lordships. JH Baker, *An Introduction to English Legal History* (Butterworths, 2002), p. 30.

⁹ Act for Law and Justice to be Ministered in Wales in like Form as it is in this Realm of 1535/6 and the Act for Certain Ordinances in the King's Dominion and Principality of Wales of 1542/3. See generally TG Watkin, *The Legal History of Wales* (University of Wales Press, 2007); P Williams, *The Later Tudors* (OUP, 1998), chapter 13, T Jones and J Williams, 'Wales as a Jurisdiction' [2004] *Public Law*, p. 78. For Scotland see J.D. Ford, 'The legal provisions in the Acts of Union,' (2007) *Cambridge Law Journal*, 66(1), pp. 106-141.

¹⁰ TG Watkin, *The Legal History of Wales* (University of Wales Press, 2007); JH Baker, *An Introduction to English Legal History* (Butterworths, 2002), p. 31; P Williams, *The Later Tudors* (OUP, 1998), chapter 13.

¹¹ I refer to these two Acts as well as other components of the Constitution as the Constitution of Wales. Also see Schedule 2 of the 1998 Act and Schedule 5 of the 2006 Act. See also the White Paper to compare what was proposed and how far devolution has progressed. *A Voice for Wales: The Government's Proposals for a Welsh Assembly*, HMSO, Cm 3718, July 1997. For a fuller discussion and very rich literature on the subject see, N Bamforth and P Leyland, *Public Law in a Multi-Layered Constitution*, (Hart Publishing, 2003); V Bogdanor, *Devolution in the UK* (OUP, 1999); N Burrows, *Devolution* (Sweet & Maxwell, 2000); R Evans, 'Bilingual juries?' (2007) *Cambrian Law Review*, 38, pp. 145-170; R Hazell and R Rawlings, *Devolution, Law making and the Constitution* (Imprint Academic, 2005); R Hazell, *Constitutional Futures: A History of the Next Ten Years* (OUP, 1999); R Rawlings, *Delineating Wales, Constitutional, Legal and Administrative Aspects of National Devolution* (University of Wales Press, 2003); A Trench and R Hazell (eds.), *The State of the Nations* (Imprint Academic, 2000 - present), A Trench, *Devolution and power in the UK* (Manchester University Press, 2007); TG Watkin, *The Legal History of Wales* (University of Wales Press, 2007); W Ball and N Charles, 'Feminist social movements and policy change: Devolution, childcare and domestic violence policies in Wales,' (2006) 29 *Women's Studies International Forum*, p. 172; M Bird, 'The Welsh Language: Who needs it?,' *Tribunals Autumn 2007*, p. 18; K Bush, 'New Approaches to UK Legislative Drafting: The Welsh Perspective,' (2004) 25(2) *Statute Law Review*, p. 144; I Davies and L Mainwaring, 'Legal Services in the Regional Economy: Evidence from Wales,' (2007) 98(3) *Tijdschrift voor Economische en Sociale Geografie*, p. 373; G Day, 'Chasing the Dragon? Devolution and the ambiguities of civil society in Wales,' (2006) 26(3) *Critical Social Policy*, p. 642; CMG Himsworth, 'Devolution and its Jurisdictional Asymmetries,' (2007) 70(1) *Modern Law Review*, p. 31; C Huws, 'The Welsh Language Act 1993: A Measure of Success?,' (2006) 5 *Language Policy*, p. 141; T Jones and J Williams, 'Wales as a Jurisdiction' [2004] *Public Law*, p. 78; T Jones and J Williams, 'The Legislative Future of Wales,' (2005) 68(4) *Modern Law Review*, p. 642; T Jones, J Turnbull and J Williams, 'The Law of Wales or The Law of England and Wales,' (2005) 26(3) *Statute Law Review*, p. 135; Sir J Laws, 'Constitutional Guarantees,' (2008) 29(1) *Statute*

matters without having them listed in the Scotland Act 1998. The main devolved areas in Wales are: agriculture, forestry, fisheries and food, environmental and cultural matters, economic and industrial development, education and training, health, housing, local government, social services, sport and tourism, fire and rescue services, town and country planning, transport, water and flood defences, and the Welsh language. If there is a question as to whether or not a function is devolved, a legal challenge can ensue.¹² The Assembly has the right to be notified when such an issue arises in the courts of England and Wales, Scotland and Northern Ireland.¹³ The Welsh Assembly Government (WAG) may also require that a case be referred to the Judicial Committee of the Privy Council if it is a party to the proceedings.¹⁴ Possible disputes about devolved and non-devolved matters as well as possible future refusals to put measures before the Houses of Parliament can therefore be the subject matter of judicial review proceedings.¹⁵

Lord Morris of Aberavon QC, former Attorney General and Secretary of State for Wales, commented on the law-making performance of the National Assembly for Wales during its first year. He highlighted research which demonstrated that of the 200 Statutory Instruments (SIs) passed during the first year of the Assembly's life, only one or two differed from the Westminster draft. Lord Morris suggested that the Assembly could have been expected to have amended at least 10% of Westminster SIs. Winston Roddick QC, the then Counsel General, giving evidence to the Richard Commission commented that the 10% benchmark had been surpassed in the second year of the Assembly's life and marked the success of devolved legislation. This was a remarkable feat as the foot-and-mouth crisis of 2001 meant that a significant number of emergency measures had to be passed which halted the legislative programme. He stated that:

Law Review, p. 1; R Rawlings, 'Hastening Slowly: The Next Phase of Welsh Devolution' [2005] *Public Law*, p. 824; R Rawlings, 'The New Model Wales,' (1998) 25 *Journal of Law and Society*, p. 461; The Hon. Sir S Richards, 'The Court System in Wales: Challenge and Change,' (2001) 32 *Cambrian Law Review*, p. 89; A Trench, 'The Government of Wales Act 2006: the next steps on devolution for Wales' [2006] *Public Law*, p. 687; DGT Williams, 'Wales and Legislative Devolution,' (1975) 6 *Cambrian Law Review*, p. 80; Sir D Williams, 'Wales, the Law and Devolution,' (2000) 31 *Cambrian Law Review*, p. 51; J Williams, 'Law Making for Wales after the Richard Commission,' (2004) 3 *Wales Journal of Law and Policy*, p. 251 and many more.

¹² Section 149 GWA 2006 which refers to Schedule 9 Devolution Issues see Appendix One.

¹³ GWA, 1998, Schedule 8, Part II, para. 5(1), Schedule 8, Part III, para. 14(1) and Schedule 8, Part IV, para. 24(1). GWA 2006, Schedule 9, Parts II – IV.

¹⁴ GWA 1998, Schedule 8, Part V, para. 30. See N Burrows, *Devolution* (Sweet and Maxwell, 2000) chapter 6. Or the Supreme Court once established. GWA 2006, Schedule 9, Part V.

¹⁵ For example, *R (on the application of South Wales Sea Fisheries) v National Assembly for Wales* ([2001] EWHC Admin 1162, [2002] RVR 134) where the court held the South Wales Sea Fisheries (Variation) Order 2001 (SI 2001/1338) was unlawfully made because it purported to curtail the body's discretionary powers. P Leyland, *The Constitution of the United Kingdom: A Contextual Approach* (Hart Publishing, 2007), p. 204. It would seem inevitable that the number of judicial review challenges will rise with a growing confidence in the devolved powers, especially post 2006 GWA. These types of disputes (what is within a state's power and what is a federal issue, especially in relation to funding) constitute a significant number of cases annually to most Supreme Courts around the world. Many disputes arise over funding. This type of case may well arise once different parties govern the UK to Wales.

where the Assembly uses its legislative powers to devise specifically Welsh solutions, the way in which it does so also goes beyond that anticipated by Lord Morris. Drawing, no doubt, on his experience in the Welsh Office during the 1970s he spoke of the Assembly “amending Westminster SIs.”¹⁶ In practice the Assembly often develops Welsh legislation in parallel with or even in advance of the corresponding English legislation. This is particularly so in those areas where the Assembly has been given, under Acts of Parliament passed post-devolution, powers to implement, in relation to Wales, important reforms to the law. Examples exist in the fields of education, transport, local government and access to the countryside. In such areas the Assembly does not merely react to initiatives emanating from Whitehall, but is required to adopt a pro-active approach and to develop the necessary secondary legislation in consultation with relevant bodies in Wales. Its ambitions, as demonstrated by the impressive body of “made in Wales” legislation drafted within the Office of the Counsel General, go far beyond merely amending a precedent set in London.¹⁷

Between its establishment on 1 July 1999 and 3 December 2002, the Welsh Assembly, acting within the functions devolved to it, made 562 General Statutory Instruments and 330 Local Statutory Instruments. In 2001, 31% of the Assembly’s legislation was either unique to Wales or involved significant differences in its content to its equivalents for England. As a comparison, in 1998, the Secretary of State for Wales made a total of 90 Statutory Instruments in respect of Wales alone, 66 General SIs and 24 Local SIs. In 2001, the National Assembly made a total of 331 SIs, an increase of 367% on the number of Wales-only SIs made by the Secretary of State for Wales in 1998.¹⁸ Between January and December 2002, the Office of the Counsel General produced 276 statutory instruments – an increase of several hundred per cent over what the Welsh Office produced in 1997.¹⁹ In 2004 Bush pointed out that the proportion of Assembly general legislation which was wholly (or to a significant degree) different from any English equivalent was running at about thirty per cent and rising.²⁰ Research in 2005 demonstrated that it was becoming ‘increasingly difficult to clearly ascertain what is the law which is now applicable to Wales.’ That was because the Westminster statutory instruments are divided some parts of which (i) apply to England only, (ii) other parts of the same SI to England and Wales and (iii) sometimes to Wales only. This led Lambert and Navarro to state ‘law in Wales is also becoming different

¹⁶ The reactionary nature of some of the legislation from Wales can be seen in the criminal justice arena. See below for fuller discussion.

¹⁷ Written evidence of Winston Roddick QC, Counsel General, to the Richard Commission, December 2002. Available at <http://www.richardcommission.gov.uk/content/evidence/written/councilgen/index.htm>

¹⁸ HMSO Archives 1998, quoted in the written evidence of Winston Roddick QC, Counsel General, to the Richard Commission, December 2002. Available at <http://www.richardcommission.gov.uk/content/evidence/written/councilgen/index.htm>

¹⁹ Written evidence of Winston Roddick QC, Counsel General, to the Richard Commission, December 2002. Available at <http://www.richardcommission.gov.uk/content/evidence/written/councilgen/index.htm>. See also K Patchett, ‘Principle or Pragmatism? Legislating for Wales by Westminster and Whitehall,’ and other chapters in R Hazell and R Rawlings, *Devolution, Law Making and the Constitution*.

²⁰ K Bush, ‘New Approaches to UK Legislative Drafting: The Welsh Perspective,’ (2004) 25(2) *Statute Law Review*, p. 145.

to that applicable in England in so far as it is contained in SIs made by the Assembly or where central government had amended the pre-devolution law in relation to England only.²¹ In terms of confidence in the devolved government the WAG has demonstrated competence in its ability to 'crises manage' (foot and mouth, steel plant closures, fuel protests to name a few) and come up with some popular policies that demonstrate a commitment to 'progressive universalism' (free swimming for children during holidays, abolition of school league tables, establishing local health boards, free bus passes for the elderly, free prescriptions, scrapping parking charges at hospitals). So even though Wales had a rather shaky start to devolution, it now looks ready for more.²²

Following the recommendations of the Richard Commission,²³ the Assembly was given powers in section 93 GWA 2006 to make 'measures' – laws of the Assembly. The Assembly also has power to ask for competencies to be drawn from Westminster to Cardiff. In December 2007 Peter Hain, then Secretary of State for Wales, stated that 2007 was the:

...start of a new and exciting stage in devolution. Through the Government of Wales Act 2006, more powers are being devolved to the Assembly than ever before... The Welsh Assembly Government will be granted the authority to pass legislation in nine areas – nine times more than before the 2006 Act, when a single Welsh Bill would have been passed each year.²⁴

The GWA 2006 has given the Assembly the power to make laws under Orders in Councils, within 19 specified fields of policy (see above). The procedure for such Orders is that the Welsh Assembly Government and Assembly make a bid to the Secretary of State who then lays a draft before Parliament. The House of Lords and Commons committees look at justifications for making such an order, and, following a 90 minute debate in each House, the matter is laid before the Queen and Privy Council who then positively resolve it. Once approved, the Orders contain enabling provisions for the Welsh Assembly to make laws i.e. measures. Crucially for a devolved government's confidence and independence, these

²¹ *Devolution Briefings: The Nature and Scope of the Legislative Powers of the National Assembly for Wales*, Briefing No. 13, January 2005. See www.devolution.ac.uk. Navarro and Lambert (along with several others, for example, C Kirby) have often aired the fact that it is extremely difficult to obtain accurate information about the laws applicable in Wales. This has been made easier with the Cardiff Law School and Welsh Assembly sponsored website listing many laws for Wales. www.wales-legislation.org.uk. Problems, however, continue. The difficulties associated with trying to delineate the functions of the first GWA and consequently the practical difficulties with trying to perform devolved functions were the subject of a submission to the Welsh Affairs Committee by D Miers and D Lambert in 2003.

www.publications.parliament.uk/pa/cm200203/cmselect/cmwelaf/79/2102104.html Other problems were highlighted by R Rawlings, 'Hastening Slowly: The Next Phase of Welsh Devolution,' [2005] *Public Law* 824.

²² M Drakeford, 'progressive universalism,' *Agenda*, Winter 2007, p. 4. T Jones and J Williams, 'The Legislative Future of Wales,' (2005) 68(4) *Modern Law Review*, p. 642.

²³ *Report of the Richard Commission on the Powers and Electoral Arrangements of the National Assembly for Wales* (March 2004).

²⁴ <http://www.newswales.co.uk/?section=Politics&F=1&id=12857>

measures are not subject to any Parliamentary procedure and permit the Assembly to modify provisions of Acts of Parliament as they apply to Wales. Modification includes amending, repealing or extending Acts of Parliament as well as making entirely new provisions. This power of modification applies to Acts currently in force and also to any Acts which Parliament might make in the future within the specified fields.²⁵ The first Legislative Competence Order transferring law making powers to Wales received Royal approval from Queen Elizabeth II on 9 April 2008. It will permit the WAG to make Welsh laws (measures) on Special Educational Needs (SEN) provision. First Minister Rhodri Morgan said, "For the first time in 500 years the people of Wales are now able to create laws to help improve their day-to-day lives. That is what makes this such a historic day."²⁶

The new powers gained under the Government of Wales Act 2006 and the advent of Welsh laws means that the potential exists for much greater divergence to develop between the laws of Wales and England. Having said this, the Welsh Assembly and the Welsh Assembly Government are still 'in a trial period', where eyes are firmly focused on value for money and what this 'extra value' 'Welshness' can bring for the people of Wales. In other words, the Assembly still has to prove itself to the electorate before it can be given more powers. Being under the spotlight makes governments sit up and take notice of the public. And that test will be determinative of whether or not new powers will be transferred to Wales. In the latest ICM opinion poll published in February 2008 49% of people polled said they were in favour of creating a fully law-making Welsh Parliament, with 42% against and 9% undecided. That contrasts with a BBC poll of the previous year in which 47% of people polled were in favour of a full Welsh Parliament and 44% against. In addition, nearly 40% of those polled thought the Welsh Assembly Government *had* most influence over Wales, with 35% saying it was the Westminster government. That means, for the first time, more people said they believed the Assembly government had more influence over Wales than its UK counterpart. When asked 'which level of government do you think *should* have most influence over Wales?' 61% said it *should* be the WAG, with only 22% saying the Westminster government.²⁷ There is thus a growing acceptance and taste for more devolution. That includes 'Legal Wales' (the legal profession and associated organizations). If this is (or will be) the case, one has to question the continued and future utility *for Wales* of *some* of the laws from Westminster which do not speak to or for the people of Wales.

²⁵ Unless a particular Act contained a specific prohibition precluding use of the Assembly's modifying powers. M Navarro and D Lambert, Wales-on-line briefing. See also M Navarro and D Lambert, 'holding the reins,' *Agenda* Winter 2007, p. 16.

²⁶ See <http://new.wales.gov.uk/news/presreleasearchive/2133745/?lang=en>

²⁷ BBC News 28 February 2008. <http://news.bbc.co.uk/1/hi/wales/7269460.stm>

3 Special features of Welsh governance under the Welsh Constitution

The Constitution of Wales has some very special features: the combination of these unique duties sets it apart from other constitutions around the world. Here two of these features will be dealt with in some detail: equality of opportunity for all and the equality of treatment of the Welsh language with English. They will be placed within the context of criminal justice structures and policies in order to argue that the Welsh Constitution requires the government and people of Wales to do things the Welsh way – bringing all of its citizens along with it.

Equality of opportunity for all

The GWAs require the Welsh Assembly and WAG to fulfil certain duties in relation to equality of opportunity for all. Section 120 Government of Wales Act 1998 (GWA 1998), now re-affirmed in the same language in section 77 Government of Wales Act 2006 (GWA 2006),²⁸ requires Welsh ministers to ‘make appropriate arrangements with a view to securing that their functions are exercised with due regard to the principle that there should be equality of opportunity for all people.’ The type of equality of opportunity chosen by the Assembly is the mainstreaming of measurable equality of outcomes. This ‘absolute’ duty²⁹ is unique in the world. What it means in practical terms is the National Assembly putting in place structures that aid in the opportunity for individuals, groups and organizations in Wales (especially the voluntary sector) to use this provision to hold WAG accountable for its treatment of the most vulnerable members of Welsh society. So, there is an Equality of Opportunity Committee and an Equality Policy Unit which help in making sure that all Assembly policies are checked against the mainstreaming of equality agenda. Section 77, coupled with (again) the unique obligation in the Act of setting out a scheme for the achievement of sustainable development under section 79,³⁰ provide a real opportunity for Wales to lead the way in an ‘inclusive approach’ to governance. This ‘inclusive approach to exercise of functions’ is the sub-heading of the GWA 2006 covering the Partnership Council for Wales, Local Government Scheme, Equality of Opportunity, the Welsh Language³¹ and Sustainable Development.³² It is seen as a joint-up/integrated approach to governance.³³ Indeed, some argue that inclusivity ‘provided the essential foundation of the whole

²⁸ Section 77 Equality of opportunity see Appendix 2

²⁹ P Chaney and R Fevre, *An Absolute Duty: Equal Opportunities and the National Assembly for Wales* (2002), WAG.

³⁰ Section 79 Sustainable development see Appendix 2

³¹ Section 78 The Welsh language see Appendix 2

³² Sections 72 – 79 GWA 2006.

³³ For example, see the importance of partnership working in *Making the Connections: Delivering Better Services for Wales* WAG, (October 2004) and the recently published *The Third Dimension, A Strategy Action Plan for the Voluntary Sector Scheme* (WAG, January 2008) which describes the importance of this sector.

devolution enterprise.³⁴ In addition, of growing importance is the duty of WAG to ensure its legislation is compatible with the Human Rights Act 1998. Where there is a compatibility question a case may be brought by someone eligible under Article 34 of the Convention or the Counsel General.³⁵ All of these technical provisions should ensure that, through consultation, Assembly policies have mainstreamed equality of opportunity. That duty includes policies which impact on all in the criminal justice system. One obvious target group is persons wishing to speak Welsh in court proceedings.

Equal treatment of the Welsh language in court proceedings

In an historical perspective, 'the language clause' in the Acts of Union permitting the English language as the only one to be used in legal proceedings and requiring speaking English a prerequisite for holding public office was not looked upon favourably.³⁶ However, the use of Welsh did not die out in the courts. Watkin points out that there is evidence of Welsh being used in the local courts as well as the Quarter Sessions and the Great Sessions.³⁷ But with the abolition of the Great Sessions in the 1830s the full procedural assimilation of England and Wales into one unified jurisdiction was complete.³⁸ In fact, the speaking of Welsh in court was officially forbidden until 1942, when, as Jones and Williams argue, Welsh was given the status of other 'foreign' languages within the court system of Wales.³⁹ It did not receive equality of status with English until the Welsh Language Acts of 1967 and 1993. The 1993 Act is rather onerous and reaches many, if not quite all, of the parts of the legal system, including criminal cases. It also requires a Welsh Language Scheme to be in place for all public fora, includes tribunals.⁴⁰ There are many cases where this has happened. Since 1998 there has been a growing list of courts with protocols on the use of Welsh: the Crown courts in Wales (1998), the civil courts in Wales (1999), and recently a protocol for the Magistrates courts (2007).⁴¹ That list is confined to courts in Wales and does not obligate

³⁴ G Day, 'Chasing the Dragon? Devolution and the ambiguities of civil society,' (2006) 26 *Critical Social Studies*, p. 646, quoting Davies and Chaney and Fevre.

³⁵ Section 107 GWA 1998, Section 81 GWA 2006. See below for further discussion and implications.

³⁶ TG Watkin, *The Legal History of Wales* (University of Wales Press, 2007), p. 134; R Rawlings, *Delineating Wales, Constitutional, Legal and Administrative Aspects of National Devolution* (University of Wales Press, 2003), p. 461. In addition, the 1543 Act transferred power to the King to legislate for Wales without the consent of Parliament. The so-called 'Henry VIII clause.'

³⁷ TG Watkin, *The Legal History of Wales* (University of Wales Press, 2007), p. 145.

³⁸ JH Baker, *An Introduction to English Legal History* (Butterworths, 2002), p. 31. See CMG Himsworth, 'Devolution and its Jurisdictional Asymmetries,' (2007) 70(1) *Modern Law Review*, p. 31 for further discussion concerning the debate over whether Wales is a separate jurisdiction to England.

³⁹ According to Jones and Williams, 'this was the restrictive interpretation given to the Act in *R. v Merthyr Tydfil Justices Ex p. Jenkins* [1967] 1 All E.R. 636. According to the concurring judgment of Widgery J., the effect of the 1942 Act was to put a Welsh-speaking defendant, in a court in Wales, in the same position as a Polish defendant at the Central Criminal Court.' T Jones and J Williams, 'Wales as a Jurisdiction' [2004] *Public Law*, p. 96.

⁴⁰ See M Bird, 'The Welsh Language: Who needs it?,' *Tribunals*, Autumn 2007, p. 18.

Available at http://www.jsboard.co.uk/downloads/tribunals_autumn_2007.pdf

⁴¹ Practice Direction Relating to the use of the Welsh Language in Cases in the Civil Courts in Wales (May 1999) <http://www.hmcourts-service.gov.uk/cms/1730.htm>; Magistrates' Courts Protocol for Listing Cases where the Welsh Language is used (Nov 2007) <http://www.hmcourts-service.gov.uk/cms/13170.htm>; Protocol for Listing

higher courts to use Welsh; clearly this is unsatisfactory and arguably breaches Article 6 of the European Convention of Human Rights (ECHR) right to a fair and speedy trial.

In order to facilitate court proceedings taking place in Welsh, there is a need for a bilingual judiciary:

Given the equality of status of the two languages within the court system⁴² and the emergence of bilingual legislation - the need for some Welsh-speaking judges is self-evident. Within the National Assembly, there is a bilingual executive and legislature. A monolingual judiciary would not be consistent with the modern government of Wales.⁴³

For example, the Court of Appeal criminal and civil division now sit in Cardiff when it chooses to, especially if there is a devolution issue. Should it not use Welsh in its proceedings? If England and Wales is still a single jurisdiction, then surely it must, regardless of where it sits.⁴⁴ The Judicial Studies Board Annual Report 2006-2007⁴⁵ states that there are about 30 judges and several hundred magistrates who routinely hear cases in Welsh. In North West Wales where the Welsh-speaking population is high, all the court staff are Welsh-speaking and some 90% of magistrates.⁴⁶ However, there is a question as to the possibility of requiring an all-Welsh understanding jury. This stems from two issues: there is no right to be understood in Welsh, only to be able to speak Welsh, and the principle of random jury selection as per section 10 Juries Act 1974.⁴⁷ A Bill was put before Parliament in the 2006-07 session that would have inserted into section 10 'or in Wales, where a party, witness or other person may use Welsh in the course of the hearing, insufficient

Cases where the Welsh Language is used (Dec 2005) <http://www.hmcourts-service.gov.uk/cms/7707.htm>; *The Use of the Welsh Language in Cases in the Crown Court in Wales* (Oct 1998) <http://www.hmcourts-service.gov.uk/cms/1730.htm>. For other practice directions that relate to Wales see <http://www.hmcourts-service.gov.uk/cms/1293.htm>.

⁴² The description of criminal matters as 'devolution issues' has caused some concern in Scotland, especially with the creation of a Supreme Court for the UK as has the debate as to whether or not Wales is a separate jurisdiction. See CMG Himsworth, 'Devolution and its Jurisdictional Asymmetries,' (2007) 70(1) *Modern Law Review*, pp. 38-39 and T Jones, J Turnbull and J Williams, 'The Law of Wales or The Law of England and Wales,' (2005) 26(3) *Statute Law Review*, pp. 142-144.

⁴³ T Jones and J Williams, 'Wales as a Jurisdiction' [2004] *Public Law*, p. 90.

⁴⁴ Quite literally those who insist that this is the case cannot have their cake and eat it. Do the human rights of Welsh people stop at the Severn Bridge? If yes, then that line of argument obviously supports a separation of jurisdictions, with a Welsh criminal justice system and a totally devolved court structures, among other things.

⁴⁵ *Judicial Studies Board Annual Report 2006-2007*, p. 38. It holds training in Welsh, including a one-day Welsh language improvement course in Cardiff in January 2007 and a two day seminar in March 2007 for Welsh-speaking judges in Llangammarch Wells. The training was aided by academics from the University of Bangor where the emphasis is clearly on development of a bilingual Legal Wales. In addition, the *One Wales Delivery Plan* outlines the proposals for the establishment of a Welsh-medium Higher Education Network (the Federal College) ensuring the provision of Welsh medium teaching in universities. But it will take some time to make a real difference in the courts.

Available at http://www.jsboard.co.uk/downloads/JSB_Annual_Report_2007_web%20new%2045.pdf

⁴⁶ CF Huws, 'The Welsh Language Act 1993: a Measure of success?' *Language Policy* (2006) 5: 141-160, at 154.

⁴⁷ See, RG Parry, 'Random Selection, Language Rights and Jury Trial in Wales,' [2002] *Criminal Law Review*, p. 805. The Bilingual Juries (Wales) Bill is available at <http://www.parliament.the-stationery-office.com/pa/cm200607/cmbills/046/07046.i-i.html#top>

understanding of Welsh,' thereby disqualifying jurors on the basis of language. This did not become law. The principle of random selection of jurors able to speak and understand Welsh may be possible in parts of Wales, but certainly the number of people who are able to understand court proceedings entirely or in large part in Welsh is limited, making the Bill impractical – for the moment. It is clear therefore that the Welsh language has 'a significantly higher status than a mere due process right,'⁴⁸ imposing positive (human rights) obligations on the state to provide facilities that enable Welsh to be spoken.

The obligations outlined above are a part of the fabric of Welsh policy and law making. As such they constitute an extra layer of obligations above those already in play nationally. Successfully knitting this layer into twenty-first century policy and law making is a challenge, not least in a devolving criminal justice system fit for Welsh purpose.

4 The Criminal Justice System for Wales

The rise of the *new* 'Legal Wales' can be seen in the development of numerous distinct areas: the structures of the administration of justice coming back to Wales, the making of laws in Wales for Wales and a home-grown legal profession dealing with most if not all aspects of law. Sir Roderick Evans described one of the components of a distinctly Welsh legal system as 'the development in Wales of a system for the administration of justice in all its forms which is tailored to the social and economic needs of Wales'.⁴⁹ That is certainly happening, despite the fact that what one could describe as the orthodox view of the administration of justice is not a devolved matter. In the largely civil law realm the 'for Wales see England'⁵⁰ attitude to justice is changing. It is in this haze between national and devolved law making, and in the area where the boundaries between civil and criminal law, courts and tribunals, finance from national and local governments are not clearly set out by any GWA that one can see a slow move towards subsidiarity. Into this mix now comes the commitment by a coalition government to look to devolving criminal justice.

The *One Wales: A progressive agenda for the government of Wales* of 27 June 2007 between Labour and Plaid Cymru makes certain political commitments regarding the criminal justice system for Wales and lays out a rather ambitious programme:

⁴⁸ C Huws, 'The Welsh Language Act 1993: A Measure of Success?', (2006) 5 *Language Policy*, p. 146.

⁴⁹ Quoted in J Osmond, 'Nation Building and the Assembly,' in A Trench (ed) *Has Devolution Made a Difference? The State of the Nations 2004* (Imprint Academic, 2004), p. 63.

⁵⁰ R Rawlings, *Delineating Wales, Constitutional, Legal and Administrative Aspects of National Devolution* (University of Wales Press, 2003), p. 460.

We want to see a fair system of youth and criminal justice, in which the people of Wales have every confidence.

We are firmly committed to tackling the root causes of problematic behaviour, wherever it occurs, in a robust way. We aim to prevent offending and re-offending amongst young people. We will also consider the potential for devolution of some or all of the criminal justice system.

In our programme of government:

- We will continue prioritisation of preventative intervention and non-custodial solutions in relation to youth offending and youth justice matters (a) in the funding of these areas (b) in the use of diversion from custody strategies consistent with an emphasis on evidence on efficacy.
- We will consider effective models of cross-cutting practice between the youth justice system and education, housing and mental health services.
- We will consider the evidence for the devolution of the criminal justice system within the contexts of (a) devolution of funding and (b) moves towards the establishment of a single administration of justice in Wales.⁵¹

Assembly measures cannot create or confer power by subordinate legislation to create any summary or indictable criminal offence which carries a prison term (dependent on which court) or exceeds a specified amount of a fine.⁵² Responsibility for crime reduction, the police and probation service and some other functions of the criminal justice system rests with the Home Secretary. These were not responsibilities of the Secretary of State for Wales and are not devolved functions of the Assembly. Primary legislation continues to be passed by the Westminster Parliament. But that fact has not stopped the WAG from initiating a scoping exercise on a devolved criminal justice system for Wales in January 2008.⁵³ Already the Assembly is responsible for subordinate legislation in relation to the functions transferred to it. And of course, it produces policy which affects the criminal justice system.⁵⁴ Funding for criminal justice initiatives in Wales comes down through the Barnett Formula. Each time some money is agreed for an English service five eighty-fifths is allocated to the Welsh Assembly. The WAG then has the freedom to decide how to use it. In other words, the Assembly does not have to mirror the spending priorities of England. It has a choice. The extra layer of administration (and funding) translates into the various criminal justice agencies who work within Wales having to coordinate their policies with the priorities set by WAG. To some extent, local targeting has always been a part of the fabric of the UK. Devolution takes this one step further: first, there is a political commitment to look into setting

⁵¹ Accessible at <http://new.wales.gov.uk/strategy/strategies/onewales/onewalese.pdf?lang=en>

⁵² See Schedule 5, Part 2 General Restrictions Appendix 2

⁵³ *One Wales Delivery Plan 2007-2011*. Available at

<http://new.wales.gov.uk/about/strategy/strategypublications/strategypublications/1walesdeliveryplan/?lang=en>

⁵⁴ The intersectionality of criminal justice and health came to public attention only recently with the publicity surrounding the Criminal Justice Bill provisions relating to violence on NHS staff not applying in Wales. See below for further discussion.

up an independent Welsh criminal justice system and secondly, the Assembly and WAG as well as public bodies must frame their policies within the constitutional requirements set out in the GWAs (equality of opportunity for all and the Welsh language, among others). These are not merely local/regional variations, rather enforceable obligations which could be subject to judicial review proceedings.⁵⁵

Thus evidence of a (d)evolving criminal justice system for Wales can be seen in two main respects: the setting up of structures specifically in Wales or for Wales and the creation of strategies and policies capturing the specificity of provision of services in and for Wales within the parameters of the Government of Wales Acts' requirements and the aspirations of the *One Wales* agenda. Whereas to date WAG policies have had a wider remit, the focus in *One Wales* is firmly on youth offending with no specific reference made to women. The latter point is rather worrying. The criminal justice system is not all about offending, rather also about helping the victims of crime. Wales, and in particular Cardiff, is seen as an example of best practice in the UK when it comes to trying to deal with domestic violence and sexual assault cases. For example, the Women's Safety Unit, the initiatives to bring people who work in health care provision and criminal justice together, the Dyn Project (a domestic abuse service for men) and many others.⁵⁶ What will happen to these groundbreaking services if the focus is firmly on youth offenders with what will inevitably be a limited budget? For this reason, some issues in relation to violence against women will be included in this article.

To some extent the priorities in the *One Wales* agreement of alternatives to custodial sentences for young (all) offenders and advancing an integrated approach to young (all) offenders and health and social care issues mirror the ones already in existence. In other words, *One Wales* is a political manifestation of a compromise agreement of future intent. The Criminal Justice Act 2003, the national Every Child Matters agenda⁵⁷ as well as other strategies agreed or proposed before the June 2007 agreement (for example, *Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority: Cutting Crime, Reducing Re-Offending and Protecting the Public*)⁵⁸ commit the national government to seek

⁵⁵The Practice Direction on Devolution Issues clarifies the procedure to be used in any question relating to a devolution issue being raised in any court, including criminal courts.

See http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/devolution_issues.htm

The dismantling of the unified court structure is also progressing at pace.

⁵⁶ Of course these types of services also exist in other parts of the UK but they have been particularly successful during their initial phase in Wales.

⁵⁷ In Wales, the policy is set out in *Children and Young People: Rights to Action* and targeted support for children and young people is administered through Cymorth, the Children and Youth Support Fund.

⁵⁸ Home Office, *Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority: Cutting Crime, Reducing Re-Offending and Protecting the Public* (Home Office, London, 2006).

alternatives to custody. Not least because of the shortage of prison places and the costs of building new ones.⁵⁹ Thus the framework already exists which makes political agreement rather easier to obtain and maintain.⁶⁰ But they require a Welsh context. One of the key differences devolution has made to the criminal justice system and any policies that apply in Wales is in 'ensur[ing] that services delivered to offenders, local communities, courts and victims will have a distinct Welsh focus that reflects the Assembly Government's objectives and the founding principles of the National Assembly for Wales: the Welsh language, social justice, diversity, community regeneration, social inclusion and equality of access.'⁶¹ It is the founding principles as enumerated in the GWAs that set Wales apart from 'England and Wales.' These principles and values are part of the constitutional fabric in Wales and cannot be ignored by policy makers national and/or local. Indeed, it is what makes Wales unique and should therefore be celebrated and incorporated in all of its structures and policies. In addition to these considerations, the political landscape of a coalition government between Labour and Plaid Cymru make this *the* moment to progress this rather lengthy and complex process, not least because of a commitment to hold a referendum before 2011 on increasing powers to a possible Welsh Parliament.⁶²

A picture of crime in Wales

The 'average' and overall picture of crime in Wales is not the same as in the rest of the UK. It has geographical and population hotspots with large parts of the country (rural areas) with little crime at all. It is this uniqueness which is another feature that makes Wales a candidate for having its own centre for administration of justice. Policy makers need to take account of all these factors in order to tackle the difficult issues faced by the criminal justice system. In particular, awareness of the unusually high level of economic inactivity in some parts of Wales which affects not only adults, but also the higher than average proportion of children growing up in households where no one goes out to work, is an important aspect of any criminal justice strategy particular to the region. There were 268,000 offences recorded in Wales in 2004/05. The level of crime in Wales alone is lower than the average for England and Wales. The reason put forward is that the crime rate in Dyfed-Powys is significantly lower than the national average. That geographical area covers quite a large portion of Wales. Other parts of Wales are closer to the national average, apart from two areas: North

⁵⁹ E Genders and E Player, 'The commercial context of criminal justice: prison privatisation and the perversion of purpose,' (2007) *Criminal Law Review*, July, pp. 513-529.

⁶⁰ See below.

⁶¹ *Joining Together in Wales: An Adult and Young People's Strategy to Reduce Reoffending*, p. 5.

⁶² Sir Emyr Jones Parry, a former UK ambassador to the United Nations, has been chosen to chair the convention looking at the referendum issue. The pre-convention committee looking at the terms of reference for the convention has met and has reported to the First Minister and Deputy Minister.

See <http://icwales.icnetwork.co.uk/news/wales-news/2008/02/21/ask-the-people-on-power-says-sir-emyr-91466-20502541/>

Wales has a notably lower incidence of theft, robbery and burglary and Gwent has an unusually high rate of violent crime. In terms of youth offences, in 2003/04 18,528 were recorded in Wales. The overwhelming majority were committed by 14–17 year olds who were also one of the most persistent categories of repeat offenders.⁶³ Recent research suggests that a lower proportion of the 16-20 age group is being convicted by the courts than in the past (from the 1970s to the present). However, a higher *proportion* of those young people who come before the courts exhibit greater versatility and more violence.⁶⁴ So the pattern of offending has changed since the 1970s. The way the criminal justice system reacts to this shift is also changing.

Structural separation for a devolving criminal justice system

The criminal justice system is one of *the* major public services in the country currently (structurally) comprising many agencies, including: the Police Service, the Crown Prosecution Service, Her Majesty's Court Service, the National Offender Management Service (including prisons and probation) and the Youth Justice Board.⁶⁵ At the moment the work of these agencies is overseen by three UK government departments: the Home Office, the Attorney Generals' Office and the Ministry of Justice each with particular responsibilities.⁶⁶ Yet much of the functions of the criminal justice machinery operate locally in order to take account of the particular picture of crime in Wales.

Local structures for local policies

The evidence to support the claim that there is a devolving criminal justice system for Wales can be seen in the structures being carved out of existing government departments and the creation of new organisations taking on responsibility for different aspects of the criminal justice policy. I will focus here on five aspects: Westminster re-organisation, NOMS Wales, prisons, community safety partnerships and the police force. The trend in all of these areas

⁶³ NOMS, *Joining Together in Wales an Adult and Young People's Strategy to Reduce Reoffending*, p. 8.

⁶⁴ K Soothhill, B Francis, E Ackerley, L Humphreys, 'Changing Patterns of offending among young adults,' (2008) *British Journal of Criminology*, 48(1), pp. 75-95, at p. 93.

⁶⁵ This article cannot examine the entire spectrum of the criminal justice system, rather it draws together some of the evidence in particular areas that are seeing a Welsh/devolved aspect to their work as proposed by the *One Wales* document. In addition, the criminal justice system may well have more than six agencies depending on how one counts what agencies and what re-organisation may be on the horizon. There might be further changes with the announcement by Jack Straw to amalgamate and re-organise the Ministry of Justice. 'Reorganisation of the Ministry of Justice,' 29 January 2008, written statement by Jack Straw, Secretary of State for Justice, to the House of Commons and the seemingly endless re-structuring programme of this government.

⁶⁶ At the moment the organization of the agencies is as follows: the Home Office is responsible for crime and crime reduction, policing, security and counter-terrorism, borders and immigration, passports and identity, the Attorney General's Office oversees the Crown Prosecution Service, the Serious Fraud Office and the Revenue and Customs Prosecutions Office and the Ministry of Justice has responsibility for criminal law and sentencing, for reducing reoffending and for prisons and probation. It is also in charge of the former Department Justice, overseeing Magistrates' Courts, the Crown Court, the Appeals Courts and the Legal Services Commission.

is towards localisation of services (subsidiarity). To that end, some recent criminal justice policies which reflect some of the points made in the *One Wales* agreement will be set out.

The agenda to localise many service provisions is evident in the way the government has re-structured some of its departments and assigned tasks to different parts for the different regions. There is also a distinction being made in the names of the services which operate in the different parts of the UK. For example, the division of responsibilities in the Government Offices for the Regions in England,⁶⁷ and the Home Office Crime Team in Wales. The latter is situated in the WAG and is responsible for the National Crime Reduction Strategy. Community Safety Partnerships⁶⁸ are the main organisations designed to deliver the initiatives on creating safer communities, reducing fear of crime and addressing drug related crimes. The Home Office Crime Team monitors the performance of the 22 community safety partnerships against agreed local crime targets. It is also responsible for working with the partnerships to improve performance and disseminate best practice. Responsibility for offender management and delivering a reduction in reoffending is devolved to nine regional offices in England and one office in Wales. The structure that oversees and supports many all-Wales criminal justice strategies is NOMS Wales. It was set up in 2005 shortly after the establishment of the National Offender Management Service (NOMS). Based within the Ministry of Justice, NOMS' incorporates HM Prison Service and the National Probation Service, along with the Youth Justice Board. It is designed to establish a unified system of correctional services for England and Wales and is therefore responsible for reducing reoffending. NOMS is organised on a regional basis, with nine Regional Offender Managers in England and a Director of Offender Management Service Wales overseeing the management of offenders in prison and in the community. The fact that there is a Director for Wales and only Regional Managers in England is a direct result of the acknowledgement of the uniqueness and differences of the criminal justice system in Wales.⁶⁹ This difference is not just in titles. For example, it is the responsibility of the Director to ensure compliance with the equality of treatment requirements in the Welsh Language Act and the GWAs, treating Welsh and English on an equal footing. The Director also has to develop Service Level Agreements (SLAs) and contracts to provide services and policy in all devolved matters in

⁶⁷ The Government Office Network is made up of nine regional offices across England, and the corporate centre, the Regional Co-ordination Unit. The Government Offices represent eleven Whitehall departments and have an important role to play as the key brokers between central government policy and delivery on the ground.

⁶⁸ The term Community Safety Partnerships is one employed throughout Wales. This contrast with England, where the most commonly used term is Crime and Disorder Reduction Partnerships.

⁶⁹ Mr G Sutcliffe MP stated that, 'We acknowledge the uniqueness and differences within Wales and that is why in terms of the National Offender Management we have a Director of Offender Management in Wales as opposed to a Regional [Operations Manager] as we understand Wales's position.' Transcript of Oral Evidence, House of Commons, Minutes of Evidence, Welsh Affairs Committee *Welsh Prisoners in the Prison Estate*, 12 December 2006.

cooperation with various Welsh Assembly Government and UK government departments and agencies. The Director also oversees the development and implementation of a regional delivery plan for reducing reoffending as well as the building and co-ordination of robust regional and local partnerships to help ensure capacity building. It is therefore a part political and part *liaison* role with much potential power to direct strategy for Wales within the policy frameworks of the Home Office and the Welsh Assembly Government. Structurally criminal justice agencies that are set up or re-organised to take account of Wales as a separate jurisdiction with its own agenda will probably use the organisation of NOMS Wales and the Community Safety Partnerships as examples. As terminology is important, the need for different names may be impractical, yet indispensable.

5 Prisons and Juvenile Detention

Particular concerns for any devolved criminal justice system are prisons and the services that feed into them. One major reason is the costs involved. Wales makes greater use of custody than England (around 7.4% compared to 6.2%) despite the fact that there are no women's prisons at all in Wales, no male prison in North Wales and only two secure juvenile facilities, both in the South at Hillside (Neath Port Talbot) and Parc (Bridgend). In order to fulfil a commitment to move away from the frequent use of prison sentences for offenders, especially young ones, an assessment as to the prison estate was made by the Welsh Affairs Committee in 2006/07. The Inquiry into 'Welsh Prisoners in the Prison Estate' had a wide remit, looking at: prison provision in England for prisoners from Wales; prison provision in Wales; provision in prison through the medium of Welsh, in Welsh prisons and in English prisons;⁷⁰ other prison regimes and alternatives and how they might be modified and applied in Wales; closed and open prisons; as well as obligations under the Human Rights Act with regard to location, gender, language etc. It specifically included the experiences of young offenders (males aged 18-21), juveniles (aged under 18), women, and prisoners from north and mid-Wales (where they can be located quite a distance from their homes and families). It concluded, *inter alia*, that in general, prison provision in Wales is modest. Indeed it is evident that there is a shortage of facilities in Wales for all categories of prisoners from juveniles and children through to women and adult males. The percentage of young offenders from Wales held in custody more than 50 miles⁷¹ from home, rather than decreasing, actually increased from 31.9% to 40% between April and October 2006. During the summer months, when the overall number of young offenders rises, the extra numbers

⁷⁰ For an account of the treatment of women prisoners and the Welsh language see A Tomos, 'A Welsh Lady,' in J Aaron, T Rees, S Betts and M Vincentelli (eds.), *Our Sisters' Land* (University of Wales Press, 1994), chapter 15.

⁷¹ Fifty miles being the average distance away from home for male adult prisoners in England and Wales.

have to be housed in England.⁷² That leads to questions over access to education, drug programmes and re-settlement into the community following prison. A major concern over the lack of prisons in Wales is the possible lack of opportunities that are available to prisoners to communicate in Welsh and of course the availability of Welsh language information. The additional concerns over taking into account identity and cultural issues as well as provision of appropriate local custodial facilities in Wales was already raised in the *All Wales Youth Strategy*.⁷³ It was a result of the Welsh Assembly Government, the Youth Justice Board and local agencies working together to develop a strategy that provided a national framework for preventing offending and re-offending among children and young people in Wales, underpinned by the UN Convention on the Rights of the Child and its requirement for consideration of the rights of the young person. It runs alongside the *Joining Together in Wales* Strategy of 2006 and the *Rights in Action: Implementing Children and Young People's Rights in Wales* of 2007.⁷⁴ Both strategies demonstrate a very strong commitment to both children's issues in general as well as the use of more innovative solutions for Wales. There are therefore several human rights issues that may affect (young) prisoners from Wales more than prisoners from England.⁷⁵ The *Rights in Action* strategy recommended a number of options for further expansion of secure facilities for young people within Wales, in order to lessen the number of young people who have to be placed in establishments in England. These included proposals for secure facilities in North Wales and expansion of the facilities at the Hillside Secure Children's Home. This has not as yet happened. In any event, the (over) use of juvenile detention has been a concern for some time.⁷⁶ Recently, the Joint Committee on Human Rights' *Report on State of Human Rights in the UK* in 2007 saw it as a key issue. It was worried that for young offenders 'deprivation of liberty is more frequently used as a measure of first rather than the last resort and for a prolonged period of time.' That is the evidence from Wales as well. It also noted the disquiet of two further international monitoring bodies. The Committee on the Rights of the Child is:

also extremely concerned at the conditions that children experience in detention and that children do not receive adequate protection or help in young offenders'

⁷² Transcript of Oral Evidence and Written Memorandum by Youth Justice Board, House of Commons, Minutes of Evidence, Welsh Affairs Committee *Welsh Prisoners in the Prison Estate*, 28 November 2006. See http://www.parliament.uk/parliamentary_committees/welsh_affairs_committee/welshaffairscommitteeeinquiry/welshprisonersintheprisonestate.cfm

⁷³ WAG, July 2004, p. 2. Available at <http://wales.gov.uk/ds/jlg/publications/communitysafety/youthoffendingstrategy/strategye?lang=en>.

This is another initiative before the *One Wales* agreement.

⁷⁴ *Rights in Action: Implementing Children and Young People's Rights in Wales* (WAG, February 2007). Available at <http://new.wales.gov.uk/docrepos/40382/4038232/403829/4038291/1104233/rightsinaction-e.pdf?lang=en>

⁷⁵ It is acknowledged that there are prisoners from many nationalities in prisons who may face similar issues over isolation and language. Here the concern is with particular ones.

⁷⁶ Nacro, 'UK attitudes to youth crime most punitive after the USA, Nacro briefing reveals,' January 2002; 'Youth custody levels in England and Wales highest in Europe despite low youth crime rate,' April 2002, <http://www.nacro.org.uk/templates/news/newsitem.cfm/2002041700.htm/archive>

institutions, noting the very poor staff-child ratio, high levels of violence, bullying, self-harm and suicide, the inadequate rehabilitation opportunities, the solitary confinement in inappropriate conditions for a long time as a disciplinary measure or for protection, and the fact that girls and some boys in prisons are still not separated from adults.⁷⁷

And the Report of the Council of Europe Commissioner for Human Rights concluded that 'there would appear to be that there are too many young offenders in custody doing too little in overcrowded and stressful conditions.'⁷⁸ The Commissioner urged the UK authorities to use prison sentences for children as a last resort only and to focus on the introduction of essential rehabilitation programmes.⁷⁹ Even where diversion and intervention occurs, there are still issues in relation to who makes the discretionary decisions and on what basis.⁸⁰ Of particular interest were the remarks made about the differences in the Scottish juvenile system. Praising them, the Commissioner hoped that 'the originality of its welfare-based approach is rewarded with success,' concluding that 'in its essentials it deserves to be preserved.'⁸¹ In other words, Scotland has it right on this issue. Perhaps Wales can too once this area of criminal justice is devolved.

Women in prison

That view reflects some of the issues raised by Mr Tidball, President of the Prison Governors Association in his oral evidence to the Welsh Affairs Committee in 2006. He elaborated on his written memorandum that 'Wales has the opportunity to take an alternative approach, and to bring initiative and flair into non-custodial sentences.' He specifically mentioned the SORI programme running in Cardiff Prison as a best practice restorative justice initiative⁸² where prisoners are encouraged to confront witnesses or confront the results of their offending.⁸³ In a non-devolved area such as criminal justice he put forward the idea that it was open to

⁷⁷ Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, CRC/C/15/Add.188, 9 October 2002, para 59. Joint Committee on Human Rights *Report on State of human rights in the UK*, Sixth Report of Session 2007–08, January 2008, paragraph 29.

See <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/38/38.pdf>

⁷⁸ Office of the Commissioner for Human Rights, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights on his Visit to the United Kingdom, 4th – 12th November 2004*, CommDH(2005)6, 8 June 2005, para 97.

⁷⁹ Nacro had already made the point several times that there are too many young adults with mental health problems in the criminal justice system and that diversion from custody especially for these offenders is not adequate enough. 'Court diversion for offenders with mental health problems has been neglected,' Nacro, <http://www.nacro.org.uk/templates/news/newsitem.cfm/2005060900.htm/archive>

⁸⁰ S Field, 'Early intervention and the "new" youth justice: a study of initial decision-making,' (2008) *Criminal Law Review*, pp. 177-190.

⁸¹ Joint Committee on Human Rights *Report on State of human rights in the UK*, Sixth Report of Session 2007–08, January 2008, para. 31. See <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/38/38.pdf>

⁸² See J Sharpland *et al*, *Restorative justice: the views of victims and offenders: The third report from the evaluation of three schemes*, June 2007. Available at <http://www.justice.gov.uk/docs/Restorative-Justice.pdf>

⁸³ M Gosling, 'Another look at restorative justice,' (2007) *Criminal Lawyer*, 174, pp. 3-4.

NOMS Wales or the Assembly to foster and sponsor, and indeed for the National Government, to use Wales as a pilot to alternatives to imprisonment, particularly when the alternative to imprisonment means that minor offenders do not have to go excessively long distances to prisons way the other side of the border ... I do think there are opportunities. The sort of partnership arrangement initiatives that there have been in Wales, between the agencies, to work on crime reduction/reducing re-offending are probably further advanced than anywhere else in the country. I think there is a will and there is a big team there that is ready, given the resources, to go further with looking at alternatives to imprisonment.

In terms of alternatives he suggested residential and hostel provision as well as drop-in-centres (while on probation) especially for those women in need of further assistance in re-integrating into the community. For women offenders, he suggested, in line with the Corston Report,⁸⁴ the use of multiple low security residential facilities including hostels for women and high security women's prisons. Activities in the community for low security prisons rather than at residential centres would be an advantage.⁸⁵ The fact that 60% of women in prison have children under 16 is a major distinguishing feature of the treatment of women facing prison. Despite an increase in women prisoners since the introduction of the Criminal Justice Act 2003 which set out reforming sentencing guidelines,⁸⁶ he may well get his wish if this issue is devolved. Some evidence of a different approach already exists.

The new Home Office Crime Strategy, *Cutting Crime: A New Partnership 2008-2011*, has its focus on drug misuse and alcohol misuse, responding to offenders with mental health needs and addressing social exclusion as well as reducing re-offending. The Strategy emphasises the link between improving health and supporting justice. The Welsh context was captured in the 2006 consultation document *Joining Together in Wales: An Adult and Young People's Strategy to Reduce Reoffending*.⁸⁷ It is Wales-specific in that it takes account of the 'groups and initiatives unique to Wales, but also of the difference which devolution has made to government',⁸⁸ recognising that special consideration has to be given to a specific/different Welsh perspective. The success of this strategy will depend on a co-ordinated, 'joined-up' approach from all the organisations involved in the criminal justice system in Wales. The document, despite committing Wales to (in the longer term) 'work to locate prisoners closer

⁸⁴ Baroness Corston, *A Report of a Review of Women with particular vulnerabilities in the Criminal Justice System*, March 2007. Available at <http://www.homeoffice.gov.uk/documents/corston-report/>

⁸⁵ Transcript of Oral Evidence, House of Commons, Minutes of Evidence, Welsh Affairs Committee *Welsh Prisoners in the Prison Estate*, 28 November 2006. See http://www.parliament.uk/parliamentary_committees/welsh_affairs_committee/welshaffairscommitteeeinquiry/welshprisonersinthepriestate.cfm

⁸⁶ See generally E Player, 'The reduction of women's imprisonment in England and Wales,' (2005) 7 *Punishment & Society*, p. 419.

⁸⁷ January 2006. It can be found at <http://noms.justice.gov.uk/noms-regions/wales/>. The document is one of the results of the Wales Pathfinder which looked all of the pathways through a Welsh 'lense.'

⁸⁸ Joint Ministerial Forward by the Welsh Assembly Government Minister for Social Justice and Regeneration Edwina Hart and Baroness Scotland.

to their home, including making provision for Welsh women prisoners to be located in Wales,⁸⁹ does not mention building a women's prison in Wales. It is clear that among voluntary sector organisations and many criminal justice agencies in Wales, there is very little, if any, support. For example, mental health and criminal justice charities⁹⁰ responding to the innovative initiatives in the Government's *Improving Health, Supporting Justice* consultation strategy in March 2008 urged the Government to re-balance penal policy so that more people can be diverted from custody. This, they reiterated, was especially important in relation to women and children.⁹¹ Building prisons as the solution to overcrowding is not seen by NACRO (National Association for the Care and Resettlement of Offenders) as the answer. However, it acknowledges this as a problematic issue, especially as it recognised that having Welsh prisoners in English prisons (away from their families) had a very detrimental effect on their rehabilitation and resettlement.⁹²

Problems such as family breakdown, due to the pressures of being held in custody far from home, are a major factor in reoffending. This report takes an enlightened view of managing offenders, recommending a new approach for women offenders in small community-based centres, recognising the need for improved resettlement services, and the need for young offenders to be dealt with differently and separately from adult offenders. We are also pleased to see the focus on better mental health practice with the call for improved training in prisons. While we recognise the need for the provision of more prison places, this report must not be seen as a *carte blanche* for the Government to start building prisons across Wales. Any additional places must be reserved for serious and violent offenders and the Government must continue to provide more community based sentences throughout the country.⁹³

The issue of where to house women in prison is therefore a key concern of any devolved criminal justice system for Wales.

Equality of treatment of Welsh and English in prisons

The obligations concerning the Welsh language reach into prisons regardless of where they are located in the UK. To this end, the access to services and information in Welsh is an issue that must be dealt with in prisons both inside and outside of Wales. The availability of bilingual information for prisoners is a vital aspect of fulfilling the Welsh Language Act requirements. Very little data is kept at the moment in English prisons on which prisoners are

⁸⁹ According to the Wales Children and Families of Offenders Pathway Group which is one of nine sub-groups that are taking forward the *Joining Together in Wales* strategy.

⁹⁰ It was also supported by: Mind, Nacro, Rethink, The Howard League for Penal Reform, The Prison Reform Trust, YoungMinds, Homeless Link, Fawcett Society, Turning Point, Together, Mencap, Revolving Doors.

⁹¹ 'Charities unite to call for changes in penal policy,' 4 March 2008, available at

http://www.rethink.org/how_we_can_help/news_and_media/press_releases/charities_unite_to_c.html

⁹² 'Welsh prison report takes "enlightened view",' NACRO Press Release, 6 June 2007, Jackie Worrall, Director of Policy and Public Affairs for Nacro, see

<http://www.nacro.org.uk/templates/news/newsitem.cfm/2007060600.htm/archive>

⁹³ 'Welsh prison report takes "enlightened view",' 6 June 2007, Jackie Worrall, Director of Policy and Public Affairs for Nacro, see <http://www.nacro.org.uk/templates/news/newsitem.cfm/2007060600.htm/archive>

admitted into the system with Welsh as their first language. This is problematic and may lead to human rights breaches. In 2002 NACRO Cymru launched the first edition of *The Wales Criminal Justice Yearbook* to fill the information gap. The *Yearbook* is a guide to the criminal justice system in Wales, detailing in Welsh and English, facts, figures and references on the police, courts, prisons, probation, youth offending teams, law firms, community safety partnerships, government agencies and voluntary organisations in Wales.⁹⁴ This will not be enough to fulfil the language requirements. As a consequence prisoners' rights might be being infringed and the prison authorities might not be fulfilling their public sector duties.⁹⁵ They do so at their peril. With a Labour-Plaid government in Cardiff Bay and a Plaid Cymru MP in the Welsh Affairs Committee at Westminster the language issue is never forgotten. This is another facet and consequence of the growing importance of the Welsh language to national identity as well as the realisation that some language obligations cross into England (and Scotland and Northern Ireland).

6 The Police Service and Neighbourhood Policing

Another aspect of a devolved criminal justice system is the police service. Despite the fact that it is not a devolved matter, the call for a single police force *for Wales* is not a new one. Lord Alex Carlile QC made the point in 2003 that policing *should* be a devolved matter following the Lynette White case which took 15 years to solve. He stated that the knock on the confidence in the police 'opened a wider question about the organisation of the police in Wales... I believe that expertise which is available in all Welsh police forces including, of course South Wales Police, is not focussed properly.' He said there had been a 'systematic failure' in the way South Wales Police had investigated murder cases and made the claim that there were 'many people in Wales who despite the inevitable political arguments that would ensue would favour the establishment of a single police force for Wales covering Wales' two and three quarter million population.'⁹⁶ He might have achieved his wish in 2006 when the Home Secretary, Charles Clarke, called for an all-Wales police force. His rationale was that each of the four police forces; Dyfed Powys, Gwent, North Wales and South Wales, had less than 4,000 officers at that time, 'too small to deal with major crime as effectively as their larger counterparts,' for example, terrorism and cross-border crime.⁹⁷ The merger plan proved too controversial, despite the scare-mongering claims by the then Secretary of State for Wales, Peter Hain, that

⁹⁴ <http://www.nacro.org.uk/templates/news/newsitem.cfm/2002031800.htm/archive>

⁹⁵ Transcript of Oral Evidence, House of Commons, Minutes of Evidence, Welsh Affairs Committee *Welsh Prisoners in the Prison Estate*, November & December 2006. See http://www.parliament.uk/parliamentary_committees/welsh_affairs_committee/welshaffairscommitteeeinquiry/welshprisonersintheprisonestate.cfm

⁹⁶ <http://news.bbc.co.uk/1/hi/wales/3047720.stm>

⁹⁷ <http://news.bbc.co.uk/1/hi/wales/4684590.stm>

A single police force is a vital part of delivering security to the people of Wales. Those who oppose police re-structuring are not facing up to the harsh realities of a changing world. The threat of global terrorism; serious crime; and drug trafficking require an increasingly specialised response from the police and this can only be delivered by a larger merged Welsh police force. A single police force for Wales is the only realistic response to the report by Her Majesty's Inspectorate of Constabulary on strategic policing.⁹⁸

This would appear to have been a more of a cost-cutting (political) rationalisation than an informed opinion.⁹⁹ However, revised plans may be more likely. Recently, the powers in the GWA 2006 have impacted on the police in Wales. Schedule 17(4) Local Government and Public Involvement in Health Act 2007 inserts into Part 3 of the GWA 2006¹⁰⁰ '... [the Act] does not prevent a provision of an Assembly Measure making an alteration to the boundary of a police area in Wales if the Secretary of State consents to the provision.' It is possible (and likely) that the four police force boundaries will be re-organized. Proposals include having only two police forces, north and south,¹⁰¹ each structuring their operations around the particular crimes prevalent in their area (in simplified form: North=rural, South=post-industrial, urban).¹⁰² There has, of course, always been some element of local autonomy.¹⁰³ Chief Constables in charge of a particular force can and often do (within the overall framework of national policy) set their own priorities. This has meant a local emphasis where it is felt by the Chief Constable to be best served with the available funding. In Wales this means the Chief Constables have to be mindful of the priorities set by the National Assembly for Wales as well as take into account the views of the voluntary agencies servicing the local communities. In this way Chief Constables, to a large extent already focusing their priorities in terms of the local demand, can channel their operational forces and funding in the most

⁹⁸ http://www.oss.wales.gov.uk/2006/pn_20060215.html

⁹⁹ See the recent proposals to amalgamate all UK police forces 'Closing the Gap – A Review of the 'Fitness for Purpose' of the Current Structure of Policing in England and Wales', September 2005. For a discussion on the effects on a particular police force see S Gatfield-McGloin, 'Strategic Police Forces – one step further in the gradual decline of localised policing?', (2005) 4(2) *Hertfordshire Law Journal*, p. 63-71.

Available at http://perseus.herts.ac.uk/uhinfo/library/u14298_3.pdf

¹⁰⁰ Part 3, paragraph 7 of the GWA 2006, as amended, 30 December 2007.

<http://wales.gov.uk/about/constitutional/govwalesact2006/brieflegcomp?lang=en>

¹⁰¹ Rather than one all-Wales force.

¹⁰² Where exactly Pembrokeshire fits into this scheme is a little unclear. Pembrokeshire (unlike Anglesey which is clearly within the geographical boundary that would be the North Wales Police) is a rural area but situated in the south. It has traditionally been a place where there have been problems with drug importation and, with its 120 mile coastal path, is very difficult to police. It is also important because of its close geographical proximity and ferry ports to Ireland. For example, in human trafficking terms, the UK is slowly being recognized as a transit country for trafficking and there are networks operating through Wales into Ireland and vice versa. It is suspected that Pembrokeshire is one of the trafficking routes. It has also been suggested that there will probably be an all-Wales counter terrorism unit. Joyce Watson AM has set up an All-Party Working Group on Trafficking of Women and Children in Wales which will be looking at some of these issues.

¹⁰³ See N Walker, *Policing in a Changing Constitutional Order* (London: Sweet & Maxwell, 2000), chapter 5, who details local initiatives and transfers of powers before devolution.

appropriate, local way, keeping in mind the (possibly) different policy, constitutional and language requirements in a specifically Welsh context.¹⁰⁴

In any event, that is the trend in the latest modernisation of policing review by Sir Ronnie Flanagan. The *Final Report on the Review of Policing* was published in February 2008.¹⁰⁵ The Report makes some 33 recommendations, several of which acknowledge devolution and the impact on devolved governing. For example, 'the Home Office and Communities and Local Governments (CLG) should consider how best to support improved community safety partnership working in two-tier areas, in particular encouraging greater collaboration between local partnerships to enhance their capacity to deliver key community safety services.'¹⁰⁶ In addition,

the Home Office, CLG and WAG should put in place proper governance and programme support arrangements to deliver the Action Plan which will promote the closer integration of Neighbourhood Policing with a neighbourhood management approach. These arrangements should be in place by autumn 2008. This national resource will build local partners' capacity to deliver shared community safety outcomes through joint training and development for both leaders and practitioners.¹⁰⁷

And the 'promotion of improved partnership working and the closer integration of Neighbourhood Policing within a neighbourhood management approach.'¹⁰⁸ The recently published neighbourhood policing strategy¹⁰⁹ focuses the police activity at local level to meet the needs of communities. It should, according to the government, ensure neighbourhood policing is embedded into core policing activity and to develop effective partnerships with other community safety agencies to tackle local priorities. The aim is an increase in patrolling, better local information gathering, and greater focus on confidence and reassurance.¹¹⁰

Most of the partnership working already takes place in Wales. For example, in Cardiff, the local Community Safety Partnership has created a scheme to increase the support to local police officers from other persons involved in reducing crime and the effects of crime, for example, park rangers, bus inspectors and city centre security staff. The scheme is accredited by the Chief Constable of South Wales Police and has aimed to increase

¹⁰⁴ The Welsh context here is the Beecham review *Making the Connections* and the *Agenda for Change*. Both are actively engaged in by the police and set the parameters for their actions.

¹⁰⁵ Available at <http://police.homeoffice.gov.uk/police-reform/flanagan-police-review/>.

¹⁰⁶ Recommendation 25.

¹⁰⁷ Recommendation 26.

¹⁰⁸ Recommendation 27.

¹⁰⁹ Available at <http://police.homeoffice.gov.uk/community-policing/neighbourhood-policing/>. It is based on the White Paper *Building Communities, Beating Crime* published by the Home Office in November 2004.

¹¹⁰ One of the reasons Lord Carlile called for a single, local police force for Wales in 2003.

significantly such support figures in the community over the next few years. One example of joint operations between police and park rangers is tackling anti-social use of motorbikes in the city's parks and estates confiscating machines and recovering stolen ones. Another example is joint working between officers, British Transport Police and bus inspectors in addressing anti-social behaviour in the central bus station area.¹¹¹

Given the points above, the localisation of the police force, and the fact that 'the "modernisation" of police powers has come to be a regular and enduring feature of criminal justice policy in England and Wales,'¹¹² it may not be pure conjecture to suggest that future modernisations of PACE may well have more of a Welsh element.¹¹³ As Huws has argued

although the Welsh Language Act 1993 seeks to treat the Welsh and English languages on a basis of equality, there is no scope for the Codes of Practice contained in the Police and Criminal Evidence Act 1984 to be applied in any language but English. Therefore, where a suspect is charged, the English version of the charge sheet carries greater authority than any Welsh translation thereof.¹¹⁴

Community Safety Partnerships and the principle of partnership working

The criminal justice arena is one place where the development of the structures for Legal Wales can have a major impact, tailored to the needs of the people in Wales, governed by the principles set out in the Government of Wales Acts 1998 and 2006. The prevailing method of administration in Wales is 'partnership working' or 'collaborative working.'¹¹⁵ It is an example of how the WAG has tried to find another way of developing services and policies by bringing people with it by literally working with organizations through consultation and rolling out programmes with the help of the voluntary sector organizations. Some services and initiatives within the criminal justice system are run by a number of voluntary sector groups. Most voluntary sector providers have some representation in the devolved areas. Victim Support and NACRO are two examples. In addition, there are twenty-two Community Safety Partnerships in Wales, coterminous with the local authority boundaries. These cooperate with the National Assembly for Wales, ensuring that the policies set by the Assembly complement the priorities agreed by community safety partnerships. The Assembly thus comments on the progress of local strategies, support and encourage partnerships, and keeps in touch with local developments. The Minister for Social Justice

¹¹¹ *Neighbourhood Policing: your police; your community; our commitment* (Home Office, 2005). Available at http://police.homeoffice.gov.uk/news-and-publications/publication/community-policing/neighbourhood_police.pdf?view=Binary

¹¹² E Cape, 'Modernising police powers - again?' (2007) *Criminal Law Review*, Dec, pp. 934-948.

¹¹³ For example, giving the caution in Welsh and interviewing suspects in Welsh.

¹¹⁴ C Huws, 'The Welsh Language Act 1993: A Measure of Success?', (2006) 5 *Language Policy*, p. 150.

¹¹⁵ See for example, WAG, *Making the Connections: Delivering Better Services for Wales* (October 2004).

and Local Government, Dr Brian Gibbons, is responsible for community safety and crime reduction issues within the Welsh Assembly Government. He is supported by the Assembly's Community Safety Unit (CSU). Although part funded by the Home Office the CSU works primarily for the Minister. It is the responsibility of the Minister to take forward the Assembly's agenda for creating safer communities in Wales, reducing both crime and the fear of crime. In doing this he has control over the Assembly's £100 million Crime Fighting Fund, which tries to provide a joined-up approach to combating crime, the fear of crime and substance misuse, for example, the *Working Together to Reduce Harm* strategy announced in March 2008.¹¹⁶ In terms of addressing substance misuse, the Community Safety Partnerships across Wales have been allocated an extra £9.35million over the next three years from the Substance Misuse Action Fund to help to deliver the new substance misuse strategy.¹¹⁷ The funding is intended to help deliver the priorities within the new strategy in a Welsh context. It includes improving the access, availability and quality of children's/young people's services, addressing waiting lists for services including those for inpatient services. In addition, it should tackle alcohol misuse and commission appropriate detoxification and rehabilitation services. Another example of joined-up, partnership working between local authorities and criminal justice agencies within a specifically Welsh context is the *Housing and Ex-Offenders Risk Management: The Link Protocol Wales* Protocol. It identifies the key stages in homelessness prevention and housing risk management for former prisoners and ex-offenders produced under the previous Minister with responsibility for community safety, Edwina Hart. The Protocol was agreed by all the relevant criminal justice actors: the Welsh Assembly Government, HM Prison Service, Operational Office for Wales (incorporating HMP Cardiff, HMP Usk and Prescoed and HMP Swansea) HMP Parc, the National Probation Service - Wales Probation Areas (Dyfed/Powys, Gwent, North Wales, South Wales), The Youth Justice Board for England and Wales, Wales Youth Offending Teams, Welsh Local Government Association and the Director of Offender Management Services in Wales. It also incorporates work undertaken in this area by local authority housing departments, housing associations, housing support providers, the prison and probation service and the Youth Justice Board in Wales. It is seen as a very good example of effective partnership working.¹¹⁸

Equality for all and violence against women

¹¹⁶ *Working Together to Reduce Harm* proposes a joint approach to drugs, alcohol and other misused substances. It sets out how the Welsh Assembly Government and partner organisations could work together to reduce the damage caused to individuals, their families and society from all substance misuse. '£9.35m to deliver substance misuse strategy,' 3 March 2008, <http://wales.gov.uk/news/presreleasearchive/030308comm/?lang=en>

¹¹⁷ That policy is out for consultation at the moment.

¹¹⁸ *Joining Together in Wales an Adult and Young People's Strategy to Reduce Reoffending*, p. 12.

Despite the fact that the emphasis in the *One Wales* document is clearly on youth justice, that focus may be at the cost of recognised gains made in service provision for victims in the criminal justice system. Any strategy dealing with reducing the incidence of repeat offending as well as seeking community based solutions needs to take into account domestic violence. At present, domestic violence accounts for nearly one quarter of all recorded violent crime, with *the* highest rate of repeat victimisation. It is therefore a significant part of the business of the criminal justice system and services and estimated to cost the UK around £23 billion per year. The state pays £3.1 billion per year on the criminal justice system, the health system, social services, social housing and legal aid bills to support victims.¹¹⁹ It costs Cardiff an estimated £15.5 million per year alone.¹²⁰ But there is a second, legal reason which policy and law makers need to take into account that applies to the public sector. Women within the criminal justice system have a gender equality duty to fall back on (not to mention that it is a human rights issue). So when Baroness Corston reports that ‘prison is disproportionately harsher for women because prisons and the practices within them have for the most part been designed for men’ this fact may be justiciable under the public sector duty on gender equality. And equally, when she states that ‘because of the small number of women’s prisons and their geographical location, women tend to be located further from their homes than male prisoners’,¹²¹ women face greater difficulties over maintaining family ties, receiving visits and resettlement back into the community. Under the gender equality duty this type of difference in treatment is no longer acceptable. Baroness Corston makes several recommendations on this point. Action must now (and can) be taken. It would therefore not be wise to prioritise youth offenders at the expense of women’s provisions. Especially not in Wales with a history of recognised best practice in the area of tackling domestic and sexual violence. It is here that the partners in the criminal justice system work extremely effectively with the people in the voluntary sector, health service, police, probation and other vital services. It is *the* criminal justice arena where most, if not all, of the specific Welsh governance obligations are being actively engaged with.

The *Tackling Domestic Abuse: The All Wales National Strategy* of 2005 and the Home Office *Domestic Violence Strategy* of 2006¹²² outlined three distinct initiatives to help tackle domestic violence: a series of ‘one-stop-shops’ for victims, multi-agency approaches for high

¹¹⁹ S Walby, *The Cost of Domestic Violence*, Women and Equality Unit & the DTI, September 2004.

¹²⁰ A Robinson, ‘Improving Services for Victims of Domestic Violence: the Cardiff Experience,’ Presentation on 5 March 2007, the Hilton, Cardiff.

¹²¹ Baroness Corston, *A Report of a Review of Women with particular vulnerabilities in the Criminal Justice System*, March 2007. Available at <http://www.homeoffice.gov.uk/documents/corston-report/>

¹²² There is of course much more in these strategies. But focus here will be on three.

Available at <http://www.crimereduction.homeoffice.gov.uk/domesticviolence/domesticviolence51.pdf>.

The government’s strategic approach to tackling domestic violence was set out in the consultation paper *Safety & Justice*. It led to the enactment of the Domestic Violence, Crime & Victim Act 2004.

risk victims (multi-agency risk assessment conferences (MARACs)) and specialist domestic violence courts. All three have been achieved in parts of Wales. The Women's Safety Unit in Cardiff is a one-stop-shop where victims can access a variety of services, including: housing referrals, counselling, children's services and advocacy at court. It has a dedicated police officer who gathers evidence in safe (and hygienic) surroundings as well as acting as a bridge between the victim and the criminal justice system. The fact that it has existed since 2001 and is seen by victims as real progress attests to the fact that the Women's Safety Unit is a success stories. The Cardiff MARACs have met since 2003. Such is the increase in the number of high risk cases (and success of MARAC) that they have had to increase the frequency of their meetings from once per month to once per fortnight. The MARACs are attended by a multitude of agencies, including members of: police, probation, local authority, health, housing, refuge, mental health, education and the Women's Safety Unit. They aim to provide a forum for sharing information and taking actions that will reduce future harm to very high-risk victims and their children - a homicide watch.¹²³ There have been very positive results which reveal the benefits of multi-agency approach to helping women (and their children). The number of police domestic violence complaints and police call-outs for domestic violence post-MARAC, and telephone interviews with victims, all indicate that in the majority of cases victims (about 6 in 10) had not been re-victimized since the MARAC.¹²⁴ Specialist Domestic Violence Courts (SDVCs) have been set up in partnership with police and the Women's Safety Unit. Both of these innovative initiatives service the criminal justice system but much more importantly see the victim as the key player in any lasting, safe solution for all involved, especially children. They work. So much so that they are being rolled out across the country. The reason is that most, if not all, evaluations conclude that the specialist courts and MARACs are the best arena in which this type of crime can be addressed. For SDVCs they reduce the time a case takes to conclude, reduce the number of ineffective trials and (for both) provide more support for victims so that the decision as to whether or not to prosecute is not too daunting. These are success stories of a localised response to difficult criminal justice issues.

But there are continued difficulties over the recognition that national organisations must take account of the different constitutional framework in Wales. The Crown Prosecution Office (CPS) is a national organisation, but organised along the lines of the police. There are therefore four regions in Wales it services. In its recent consultation on a strategy to combat

¹²³ A Robinson, 'Improving Services for Victims of Domestic Violence: the Cardiff Experience,' Presentation on 5 March 2007, the Hilton, Cardiff.

¹²⁴ For a library of information on these topics see http://www.caada.org.uk/library_resources.html. A Sexual Assault Referral Centre (SARC) will soon open its doors in Cardiff.

violence against women¹²⁵ it took no account of the different constitutional and devolved context that might shape the effectiveness of the strategy in Wales. This aspect was highlighted by the Violence against Women Working Group in Wales when it responded to the consultation by stating that in order for the CPS

to successfully implement this [new] strategy it will need to work closely with partners across central government, devolved government, local government and the third sector. A clear understanding of the areas of devolution is required for this strategy to succeed and we would note that the national context as outlined in the strategy **does not recognise devolution**. The Welsh Assembly Government is responsible for elements of victim support and tackling VAW in Wales. The CPS has previously been criticised for its poor communication with victim and witness support schemes, it is critical that to improve this communication, the CPS has a clear understanding of those fields that are devolved in Wales. The Government of Wales Act 2006 sets out these fields.¹²⁶

It equally did not make any reference to the *All Wales Domestic Abuse Strategy* or the history of partnership working so important to Wales. That is worrying and requires more sensitivity on the part of national organisations.

7 Five reasons to be sceptical

It is clear that any future research into the workings of the criminal justice system, its policies and the emerging rights culture will have to take account of a different landscape in other parts of the UK, not just Scotland. Not least with the advent of a different rights culture emerging in Wales. There is clear evidence of a devolving criminal justice system for Wales. For the moment there are more policies, strategies and protocols which are being developed specifically for Wales than structures being set up for a fully devolved criminal justice system. Some of the structures and policies are welcome: they provide localised solutions to matters properly dealt with in Wales. However, it may *not* be feasible or desirable to devolve the entire criminal justice system (ever) to Wales. I put forward five reasons for this opinion: law-making, the provision of legal services, funding, capacity and publicity.

To devolve the entirety of the criminal justice system to Wales is ambitious to say the least, and perhaps a little unrealistic. It has been estimated that between 1997-2007 there has been a 22% increase in legislation, with at least 450 statutes, containing 2,685 new laws and 3,000 new criminal offences. There has equally been a huge increase in statutory instruments. When one compares these figures with the whole period of Conservative

¹²⁵ Available at http://www.cps.gov.uk/consultations/vaw_consultation_document.pdf

¹²⁶ *Crown Prosecution Service Violence Against Women Strategy: VAW Wales Working Group Consultation Response*, February 2008. Emphasis added.

government from Thatcher to Major, when only 500 new crimes were created, 'frenzied law-making' is evident.¹²⁷ Wales simply does not have the capacity to (literally) write legislation on anywhere near that scale in English *and* Welsh.¹²⁸ And even if it only wrote half or a smaller fraction of this amount, Wales would still struggle. In any case, would the legislation be very different, if at all, in Wales than in England? Some, even many, clearly would, most, I suspect, would not. Evidence from Scotland would suggest a somewhat mixed bag. Much legislation in criminal justice matters is Scotland specific with priorities that can be different to the rest of the UK. On some 'big' issues, however, Scotland has followed the rest of the UK, most notably terrorism and the fight against serious crime, in a number of coordinated police strategies requiring information sharing and joint operational logistics work across the British isles. These (will) remain.¹²⁹ That overall picture could be reproduced in Wales. However, the fact that there is no mandate (yet)¹³⁰ to draft legislation or policy in Gaelic in Scotland makes a difference in terms of capacity and the length of time it takes to write legislation. It is a legal duty in Wales so there is no way of getting around it.¹³¹

That is where a 'home grown' legal profession or lawyers competent to draft legislation in Welsh comes in.¹³² The pool is rather small and much more needs to be done in order to increase it in the future, not least because at present very few universities teach law and Welsh or Welsh legal drafting.¹³³ In addition, there has been and there may still be a preference for local authorities and other public bodies to use Counsel from London or Bristol in legal proceedings rather than local ones. Perhaps this is a matter of history, tradition and confidence, but will change as the law in Wales diverges from that of England.

¹²⁷ K Stevenson and C Harris, 'Frenzied Law Making,' *Experiencing the Law* Conference, 7 December 2007, Institute of Advanced Legal Studies.

¹²⁸ For a discussion see R Rawlings, 'Law Making in a Virtual Parliament: The Welsh Experience,' in R Hazell and R Rawlings, *Devolution, Law Making and the Constitution*, chapter 3 and K Bush, 'New Approaches to UK Legislative Drafting: The Welsh Perspective,' (2004) 25(2) *Statute Law Review*, p. 148. Bush also mentions capacity issues over bilingual administrators.

¹²⁹ A Trench and J Jarman, 'The practical outcomes of devolution: policy-making across the UK,' in A Trench, *Devolution and power in the UK*, pp. 116-119.

¹³⁰ But see the Gaelic Language Act 2005 which received Royal Assent in June 2005. It is modelled on the Welsh Language Act 1993. It provides, *inter alia*, 'to establish a body having functions exercisable with a view to securing the status of the Gaelic language as an official language of Scotland commanding equal respect to the English language, including the functions of preparing a national Gaelic language plan, of requiring certain public authorities to prepare and publish Gaelic language plans in connection with the exercise of their functions and to maintain and implement such plans, and of issuing guidance in relation to Gaelic education.' C Huws, 'The Welsh Language Act 1993: A Measure of Success?,' (2006) 5 *Language Policy*, pp. 146-149.

¹³¹ GWA 1998 sections 47, 66 and 122; GWA 2006 sections 35, 78 and 156.

¹³² Not that there have not been and do not continue to be many excellent Welsh and Welsh-speaking judges and lawyers. See the discussion in Sir D Williams' speech at the inauguration of the Centre for Welsh Legal Affairs entitled 'Wales, the Law and the Constitution,' (2000) 31 *Cambrian Law Review*, p. 51.

¹³³ Bangor Law School is one example. Two-thirds of the School of Law's members of staff speak Welsh and actively contribute to the Law School's Welsh medium provision and most (if not all) foundational courses are offered through the medium of Welsh. A further optional module, *Cymru'r Gyfraith* (Legal Wales), is taught wholly through the medium of Welsh. This specialist 20 credit module concentrates on Welsh legal history in the first semester and on aspects of devolution and the Welsh language in the second semester. There are other examples in Aberystwyth and Glamorgan, but not as highly developed as at Bangor.

The Office of the Counsel General for Wales has advertised various appointments in order to substantially enlarge the pool of possible candidates, the most recent of which is a full-page advert in *Counsel* magazine in April 2008. But again, this will take a substantial amount of time and investment to realise. There is more work to be done for this to change in a significant way. The other concern is the availability of legal service within Wales which can deal effectively with devolved issues. In their 2005 evaluation of the quantity and quality of legal services provided by the solicitors' profession in Wales, Davies and Mainwaring argue that:

Both are found wanting compared to England as a whole and compared to an appropriate comparator region in England. Moreover, the distribution of services within Wales is extremely uneven.¹³⁴

The latter point is borne out by Franklin and Lee who looked at the provision of legal services in rural Wales and its sustainability, finding that

One of the trends emerging from the empirical research was that legal practices are slowly thinning out in the communities visited, with a number of instances in which firms recently closed with no available buyers or partners for merger. Although there is no immediate prospect of Welsh towns without legal services provision, this pattern shows no sign of abating.¹³⁵

These are practical considerations which cannot be overlooked by political actors whatever party they represent. Capacity and knowledge is equally an issue in terms of the number of lawyers schooled in the provisions of the GWAs and what use can be made of them in legal proceedings. That applies to criminal cases as well, where a devolution issue may well arise especially once policies and procedures as well as the different rights culture in Wales becomes more pronounced.

Funding of services is always a difficult issue. The National Assembly for Wales will soon have a budget of £16 billion per annum. Sometimes it gets lucky and is given further money under the Barnett Formula¹³⁶ like this year when a Barnett consequential of £5m over the next three years has been handed to Wales. It can be spent any way the WAG decides.¹³⁷ There is growing consensus that the Barnett Formula has outgrown its usefulness. Even its

¹³⁴ I Davies and L Mainwaring, 'Legal Services in the Regional Economy: Evidence from Wales,' (2007) 98(3) *Tijdschrift voor Economische en Sociale Geografie*, p. 374.

¹³⁵ A Franklin and RG Lee, 'The Embedded Nature of Rural Legal Services: Sustaining Service Provision in Wales,' (2007) 34(2) *Journal of Law and Society*, p. 226.

¹³⁶ See D Bell and A Christie, 'Funding devolution: the power of money,' and A Trench, 'The politics of devolution finance and the power of the Treasury,' both in A Trench, *Devolution and power in the UK*, chapters 4 and 5 respectively.

¹³⁷ P Murphy, Secretary of State for Wales, 'Welsh pensioners, children, businesses and the environment were budget winners,' *Western Mail*, 13 March 2008, p. 3.

inventor has said so. However, the big issue is what to replace it with? The idea of a block grant to parts of the UK sounds appealing. It is just a matter of making it fair for everyone. Whatever system replaces the Barnett Formula, a growing confidence and desire to spend more money on Wales-specific policies inevitably means priorities have to be set. Some people are going to be disappointed. Some services which Wales may wish to have within its borders may not be a cost-effective way of solving an issue. The political commitment to build prisons is one example. They are notoriously expensive to build. The cost of keeping prisoners in any Welsh prison will have to be met from within funding from the Barnett Formula. That will be politically contentious. And is the best solution for Wales a prison in North Wales and a female prison somewhere in the South when indicators are in favour of community solutions, especially for women? This is a big (political) issue. So is the coverage of local courts for all purposes.¹³⁸

A contested topic is and will remain capacity. For a population of nearly three million, experts may not be available to deal with extremely specialised issues within one (or indeed many) particular criminal justice service(s).¹³⁹ One example is 'honour' crime prosecutions. There are a multitude of difficulties in this area. The vast majority of judges have not been trained in these specific crimes and may not understand the sensitivities involved and are therefore in need of guidance via expert testimony. Experts who can help with the specific subject matters relating to *all* aspects of an 'honour' crime *prosecution* (rather than support through and after a prosecution)¹⁴⁰ are few and far between in the UK,¹⁴¹ let alone in Wales. Another aspect is finding the right people to speak with the victim. As most victims are children or very young adults¹⁴² their friends are often the first ones to know. Who can they talk to who will be able to understand *and* be able to take effective action in the face of an intimidating community – whichever community it may be.¹⁴³ A neighbourhood which will probably see,

¹³⁸ Sir S Richards, 'The Court System in Wales: Challenges and Change,' (2001) 32 *Cambrian Law Review*, p. 90.

¹³⁹ Indeed, capacity and experience may also be an issue with the (literally overnight) creation of some offices/administrations required to service the new organizations required for the proper functioning of any independent criminal justice system. Who is to lead all of them? Will they be Welsh speakers? See several references made to the issue of capacity in many aspects of the provision of criminal justice services and institutions in such strategies and consultation documents as *Joining Together in Wales* and *Improving Health, Supporting Justice: A Consultation Document*.

¹⁴⁰ That does *not* cast aspersions on any organisation in Wales (or the UK) which undertakes fantastic work in the area. For example, BAWSO and the Henna Foundation. Rather it is an indictment on the difficulties of securing a conviction in this type of crime and the kind of expertise required that a court will understand and accept.

¹⁴¹ N Azfal, 'Prosecuting Honour Crimes,' Crown Prosecution Service, *Experiencing the Law* Conference, 7 December 2007, Institute of Advanced Legal Studies.

¹⁴² 'Honour' crime victims typically range from 12 to 24 years old, depending on the crime at hand. They can be much younger than that. For example, school children being taken to Pakistan for the summer holidays and never returning or returning having been married. The issue is therefore a cross-cutting one, requiring a multi-agency approach.

¹⁴³ Most 'honour' crimes in the UK are committed by a variety of ethnic minority groups. For example, Kurds, Pakistani and Bangladeshi. The responses of how to deal with the families and communities have to be varied in

for example, failure to comply with the wishes of the family for an arranged (or in the victim's eyes forced) marriage as an attack on the values and honour of the entire community and will thus not regard any resulting action (false imprisonment, GBH, rape, murder) on the part of the family members as a crime, rather their rightful duty. Capacity and understanding around these situations remains an issue. The same may be said of other areas of law. A focus on stopping youth offending does not necessarily address the issue of youth victims. That is why another approach is required. To some extent the focus on close partnership working as a necessity, especially in a small geographical area and population, and has therefore become one of the distinguishing features of Welsh governance. Availing itself more of the Third Sector's expertise may be one way of addressing the capacity issue.¹⁴⁴

The capacity issue also translates into the cost effectiveness of setting up structures to accommodate very specialised areas. This is a cyclical problem. Whereas the voluntary sector may have the persons required to undertake the tasks, their funding is always very precarious. Most voluntary sector organisations obtain their funding in order to deliver projects. When the project is complete, their funding is withdrawn. That leads them to make some very difficult choices, in constant search of new funding streams. It may well be the case that expertise in one area crucial to, for example, reducing youth offending, may be gone once the funding dries up. There is therefore a concern over the ability to deliver longer term strategies. If, on the other hand, criminal justice agencies are devolved there may equally be a question over the number of individuals Wales can afford to employ to deal with the particular issue at hand. If a national agency can second a number of people with expertise in several different areas pertinent to the issue at hand who can be accessed by Wales then that may be a better solution - as long as the special Welsh context is taken into account and Welsh priorities are not sacrificed.

Marketing is everything. The absence of clear, accessible and knowledgeable publicity around what devolution means to the UK is a major concern because it leads to confusion, lack of understanding and mistakes. That is translated into popular culture and a misconception about the importance of devolution. One example is the publicity over the UK government bill introducing new criminal offences on NHS premises. The NHS is devolved, whereas criminal justice law making is not. As outlined in the national press and on television, a new offence of 'creating a nuisance or disturbance on NHS premises' designed

order to accommodate cultural specificity. It is then a question of finding the right person(s) for each community to intervene and be able to take appropriate action. Because of the complexity of this area, more detailed discussion is not possible here.

¹⁴⁴ Some of these issues have been picked up in the new *Forced Marriage and Honour Based Crime in Wales – Three Year Action Plan*, published on 1 April 2008. Available at <http://new.wales.gov.uk/dsjlg/publications/communitysafety/forcedmarriage/actionplane.pdf?lang=en>

to protect staff from physical or verbal abuse would not apply to Wales. The Ministry of Justice consulted the Welsh Assembly Government last year who confirmed that they did not want the provisions to extend to Wales. The Ministry is now discussing the issue of the extension of this provision to NHS premises in Wales with the Wales Office and the Department of Health. Meanwhile in Wales, a committee led by the Royal College of Nursing is producing a report on developing its own set of policies and actions for protecting staff who work in the Welsh NHS to meet Welsh needs and circumstances soon. Health Minister Edwina Hart said a working party was developing practical measures to protect NHS staff in Wales from abusive or violent patients and relatives. She said there were already enough legal powers to deal with violence in Welsh hospitals.

We've got to progress things in a practical way and we've got to get solutions to this and I'm not certain that what [the MPs and peers] are doing is going to make any difference... You've only got to look at the laws that have come about over the years. There's been a lot of legislation [about] guns, knives and everything, and what real progress has there been made? What I'm looking at is how I can get better relationships going with the police - the police have been marvellous - what we can do with the CPS and how we can get the reality of change.¹⁴⁵

Clear evidence that Wales has its own ideas on criminal justice matters which may contradict the national initiatives. There is no *one* solution, merely alternatives. That is the power [and arguably the future] of devolution, even in an as yet non-devolved area like criminal justice.

Conclusion

As Burrows has stated

Devolution is the recognition in law of the national identities and national boundaries that exist inside the nation state that happens to be called the United Kingdom, but which could easily fall into a definition of a union kingdom.¹⁴⁶

Or maybe 'legislative devolution [is] federalism without the courage of its convictions.'¹⁴⁷ The national identity described here is the one laid down (and being laid down) in law in the Welsh Constitution. Writing legislation, building structures and making policy the 'Welsh way' means finding a way of bringing (as far as possible) everyone along in order to provide equality of opportunity for all. The combination of these very onerous duties will lead to a

¹⁴⁵ <http://news.bbc.co.uk/1/hi/wales/7317999.stm>

¹⁴⁶ N Burrows, *Devolution* (2000), p. 189.

¹⁴⁷ Sir D Williams, 'Wales, the Law and the Constitution,' (2000) 31 *Cambrian Law Review*, p. 54. See also Sir D Williams, 'Devolution in Wales: The Challenges Ahead,' speech at the *Legal Wales Symposium*, 21 September 2007.

rights culture distinctive to Wales for two main reasons. First, because differences in rights cultures spring from the distinctive legal-professional culture in Wales with its emphasis on 'Welshness', especially the Welsh Bar. The clearest indicator of which is the obligation to treat English and Welsh equally. Secondly, because human rights adjudication takes place at an intersectional level that must take into account the local particularities. As Murphy and Whitty point out

The post-devolution Scottish legal context provides a good illustration: several of the leading cases challenging Scottish Executive action under the Scotland Act 1998 have involved prisoner litigants. To an unexpected degree, prisoners' rights claims have been centre-stage as judges develop a new Scottish legal constitutionalism. Of course, this discourse has also generated strong *anti*-prisoner rights sentiments within the Scottish Parliament and amongst the wider public on the ground that prisoners are availing of 'special rights'.¹⁴⁸

The commitments in relation to the Welsh language contained in the *One Wales Delivery Plan* are also human rights issues. If successful, the current discussions between WAG and Westminster to make an application to Council of Ministers for Welsh to receive EU language and working language status during 2008 would be a significant step forward.¹⁴⁹ It would signify a clear, serious commitment to give Wales back its national identity. From there, it is simply a matter of time before Wales establishes a devolved criminal justice system that can accommodate the special features of Welsh constitutionalism (or federalism).

¹⁴⁸ T Murphy and N Whitty, 'Risk and human rights in UK prison governance,' (2007) *British Journal of Criminology*, p. 806. Footnotes omitted. See also the discussion on Article 6 European Convention on Human Rights (ECHR) and devolution in A O'Neill, 'Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council,' (2001) 64(4) *Modern Law Review*, p. 605.

¹⁴⁹ This may be especially significant as Welsh is seen by many who use minority languages as a survivor of the most powerful language in the world. C Huws, 'The Welsh Language Act 1993: A Measure of Success?,' (2006) 5 *Language Policy*, p. 143.

Appendices

Appendix 1

Section 149 Government of Wales Act 2006 which refers to Schedule 9 Devolution Issues.

PART 1 PRELIMINARY

1 (1) In this Schedule “devolution issue” means—

- (a) a question whether an Assembly Measure or Act of the Assembly, or any provision of an Assembly Measure or Act of the Assembly, is within the Assembly's legislative competence,
- (b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is exercisable by the Welsh Ministers, the First Minister or the Counsel General,
- (c) a question whether the purported or proposed exercise of a function by the Welsh Ministers, the First Minister or the Counsel General is, or would be, within the powers of the Welsh Ministers, the First Minister or the Counsel General (including a question whether a purported or proposed exercise of a function is, or would be, outside those powers by virtue of section 80(8) or 81(1)),
- (d) a question whether there has been any failure to comply with a duty imposed on the Welsh Ministers, the First Minister or the Counsel General (including any obligation imposed by virtue of section 80(1) or (7)), or
- (e) a question of whether a failure to act by the Welsh Ministers, the First Minister or the Counsel General is incompatible with any of the Convention rights.

(2) In this Schedule “civil proceedings” means proceedings other than criminal proceedings.

2 A devolution issue is not to be taken to arise in any proceedings merely because of any contention of a party to the proceedings which appears to the court or tribunal before which the proceedings take place to be frivolous or vexatious.

PART 2 PROCEEDINGS IN ENGLAND AND WALES

Application of Part 2

3 This Part applies in relation to devolution issues in proceedings in England and Wales.

Institution of proceedings

4 (1) Proceedings for the determination of a devolution issue may be instituted by the Attorney General or the Counsel General.

(2) The Counsel General may defend any such proceedings instituted by the Attorney General.

(3) This paragraph does not limit any power to institute or defend proceedings exercisable apart from this paragraph by any person.

Notice of devolution issue

5 (1) A court or tribunal must order notice of any devolution issue which arises in any proceedings before it to be given to the Attorney General and the Counsel General (unless a party to the proceedings).

(2) A person to whom notice is given in pursuance of sub-paragraph (1) may take part as a party in the proceedings, so far as they relate to a devolution issue.

Reference of devolution issue to High Court or Court of Appeal

6 A magistrates' court may refer any devolution issue which arises in civil proceedings before it to the High Court.

7 (1) A court may refer any devolution issue which arises in civil proceedings before it to the Court of Appeal.

(2) Sub-paragraph (1) does not apply—

- (a) to a magistrates' court, the Court of Appeal or the Supreme Court, or
- (b) to the High Court if the devolution issue arises in proceedings on a reference under paragraph 6.

8 A tribunal from which there is no appeal must refer any devolution issue which arises in proceedings before it to the Court of Appeal; and any other tribunal may make such a reference.

9 A court, other than the Court of Appeal or the Supreme Court, may refer any devolution issue which arises in criminal proceedings before it to—

- (a) the High Court if the proceedings are summary proceedings, or
- (b) the Court of Appeal if the proceedings are proceedings on indictment.

References from Court of Appeal to Supreme Court

10 The Court of Appeal may refer any devolution issue which arises in proceedings before it (otherwise than on a reference under paragraph 7, 8 or 9) to the Supreme Court.

Appeals from superior courts to Supreme Court

11 An appeal against a determination of a devolution issue by the High Court or the Court of Appeal on a reference under paragraph 6, 7, 8 or 9 lies to the Supreme Court but only—

- (a) with permission of the court from which the appeal lies, or
- (b) failing such permission, with permission of the Supreme Court.

PART 5 GENERAL

Direct references to Supreme Court

29 (1) The relevant officer may require any court or tribunal to refer to the Supreme Court any devolution issue which has arisen in any proceedings before it to which that person is a party.

(2) In sub-paragraph (1) “the relevant officer” means—

- (a) in relation to proceedings in England and Wales, the Attorney General or the Counsel General,

(b) in relation to proceedings in Scotland, the Advocate General for Scotland, and
(c) in relation to proceedings in Northern Ireland, the Advocate General for Northern Ireland.
30 (1) The Attorney General or the Counsel General may refer to the Supreme Court any devolution issue which is not the subject of proceedings.

(2) Where a reference is made under sub-paragraph (1) by the Attorney General in relation to a devolution issue which relates to the proposed exercise of a function by the Welsh Ministers, the First Minister or the Counsel General—

(a) the Attorney General must notify the Counsel General of that fact, and
(b) the function must not be exercised by the Welsh Ministers, the First Minister or the Counsel General in the manner proposed during the period beginning with the receipt of the notification and ending with the reference being decided or otherwise disposed of.

Costs

31 (1) A court or tribunal before which any proceedings take place may take account of any additional expense of the kind mentioned in sub-paragraph (3) in deciding any question as to costs or expenses.

(2) In deciding any such question the court or tribunal may award the whole or part of the additional expense as costs or expenses to the party who incurred it (whatever the decision on the devolution issue).

(3) The additional expense is any additional expense which the court or tribunal considers that any party to the proceedings has incurred as a result of the participation of any person in pursuance of paragraph 5, 14 or 24.

Procedure of courts and tribunals

32 Any power to make provision for regulating the procedure before any court or tribunal includes power to make provision for the purposes of this Schedule including, in particular, provision—

(a) for prescribing the stage in the proceedings at which a devolution issue is to be raised or referred,
(b) for the staying or sisting of proceedings for the purpose of any proceedings under this Schedule, and
(c) for determining the manner in which and the time within which any notice or intimation is to be given.

References to be for decision

33 Any function conferred by this Schedule to refer a devolution issue to a court is to be construed as a function of referring the issue to the court for decision.

Appendix 2

Section 77 Government of Wales Act 2006 Equality of opportunity

(1) The Welsh Ministers must make appropriate arrangements with a view to securing that their functions are exercised with due regard to the principle that there should be equality of opportunity for all people.

(2) After each financial year the Welsh Ministers must publish a report containing—

(a) a statement of the arrangements made in pursuance of subsection (1) which had effect during that financial year, and
(b) an assessment of how effective those arrangements were in promoting equality of opportunity, and must lay a copy of the report before the Assembly.

Section 79 Government of Wales Act 2006 Sustainable development

(1) The Welsh Ministers must make a scheme ("the sustainable development scheme") setting out how they propose, in the exercise of their functions, to promote sustainable development.

(2) The Welsh Ministers—

(a) must keep the sustainable development scheme under review, and
(b) may from time to time remake or revise it.

(3) Before making, remaking or revising the sustainable development scheme, the Welsh Ministers must consult such persons as they consider appropriate.

(4) The Welsh Ministers must publish the sustainable development scheme when they make it and whenever they remake it; and, if they revise the scheme without remaking it, they must publish either the revisions or the scheme as revised (as they consider appropriate).

(5) If the Welsh Ministers publish a scheme or revisions under subsection (4) they must lay a copy of the scheme or revisions before the Assembly.

(6) After each financial year the Welsh Ministers must—

(a) publish a report of how the proposals set out in the sustainable development scheme were implemented in that financial year, and
(b) lay a copy of the report before the Assembly.

(7) In the year following that in which an ordinary general election is (or, apart from section 5(5), would be) held, the Welsh Ministers must—

(a) publish a report containing an assessment of how effective their proposals (as set out in the scheme and implemented) have been in promoting sustainable development, and
(b) lay a copy of the report before the Assembly.

Section 78 Government of Wales Act 2006 The Welsh language

- (1) The Welsh Ministers must adopt a strategy ("the Welsh language strategy") setting out how they propose to promote and facilitate the use of the Welsh language.
- (2) The Welsh Ministers must adopt a scheme ("the Welsh language scheme") specifying measures which they propose to take, for the purpose mentioned in subsection (3), as to the use of the Welsh language in connection with the provision of services to the public in Wales by them, or by others who—
 - (a) are acting as servants or agents of the Crown, or
 - (b) are public bodies (within the meaning of Part 2 of the Welsh Language Act 1993 (c. 38)).
- (3) The purpose referred to in subsection (2) is that of giving effect, so far as is both appropriate in the circumstances and reasonably practicable, to the principle that in the conduct of public business in Wales the English and Welsh languages should be treated on a basis of equality.
- (4) The Welsh Ministers—
 - (a) must keep under review both the Welsh language strategy and the Welsh language scheme, and
 - (b) may from time to time adopt a new strategy or scheme or revise them.
- (5) Before adopting or revising a strategy or scheme, the Welsh Ministers must consult such persons as they consider appropriate.
- (6) The Welsh Ministers must publish the Welsh language strategy and the Welsh language scheme when they first adopt it and—
 - (a) if they adopt a new strategy or scheme they must publish it, and
 - (b) if they revise the Welsh language strategy or the Welsh language scheme (rather than adopting a new strategy or scheme) they must publish either the revisions or the strategy or scheme as revised (as they consider appropriate).
- (7) If the Welsh Ministers publish a strategy or scheme, or revisions, under subsection (6) they must lay a copy of the strategy or scheme, or revisions, before the Assembly.
- (8) After each financial year the Welsh Ministers must publish a report of—
 - (a) how the proposals set out in the Welsh language strategy were implemented in that financial year and how effective their implementation has been in promoting and facilitating the use of the Welsh language, and
 - (b) how the proposals set out in the Welsh language scheme were implemented in that financial year, and must lay a copy of the report before the Assembly.

Section 78 The Welsh language see Appendix 2

- (1) The Welsh Ministers must adopt a strategy ("the Welsh language strategy") setting out how they propose to promote and facilitate the use of the Welsh language.
- (2) The Welsh Ministers must adopt a scheme ("the Welsh language scheme") specifying measures which they propose to take, for the purpose mentioned in subsection (3), as to the use of the Welsh language in connection with the provision of services to the public in Wales by them, or by others who—
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 - (a) if they adopt a new strategy or scheme they must publish it, and
 - (b) if they revise the Welsh language strategy or the Welsh language scheme (rather than adopting a new strategy or scheme) they must publish either the revisions or the strategy or scheme as revised (as they consider appropriate).
- (7) If the Welsh Ministers publish a strategy or scheme, or revisions, under subsection (6) they must lay a copy of the strategy or scheme, or revisions, before the Assembly.
- (8) After each financial year the Welsh Ministers must publish a report of—
 - (a) how the proposals set out in the Welsh language strategy were implemented in that financial year and how effective their implementation has been in promoting and facilitating the use of the Welsh language, and
 - (b) how the proposals set out in the Welsh language scheme were implemented in that financial year, and must lay a copy of the report before the Assembly.

Schedule 5, Part 2 General Restrictions

Criminal offences

- 2 (1) A provision of an Assembly Measure cannot create, or confer power by subordinate legislation to create, any criminal offence punishable—

- (a) on summary conviction, with imprisonment for a period exceeding the prescribed term or with a fine exceeding the amount specified as level 5 on the standard scale, or
 - (b) on conviction on indictment, with a period of imprisonment exceeding two years.
- (2) In sub-paragraph (1) “the prescribed term” means—
- (a) where the offence is a summary offence, 51 weeks, and
 - (b) where the offence is triable either way, twelve months.