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REASONS TO BE SCEPTICAL? – A RESPONSE TO ‘THE NEXT STAGE OF DEVOLUTION?’

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At the heart of Jackie Jones' informative article is the core question of whether it is realistic, practicable, or even desirable to devolve some, or even *all*, responsibility for the criminal justice system in Wales to the National Assembly. Of course, this is not to say that Wales and its Assembly do not have any role to play in such matters currently. As is lucidly illustrated in the body of the article, there are numerous areas within this particular field where there is evidence of at least some functions *already* being exercised in a purely Welsh context, not least the tasks carried out by new organisations such as NOMS Wales (National Offender Management Service). Indeed, as Jones herself suggests, these new organisations and structures could be regarded as laying the foundations for the future devolution of more formal competencies. However, as the article's author also correctly identifies, before the Welsh Assembly Government can even consider formally requesting such powers, many difficult questions will need to be addressed – Jones' so-called 'five reasons to be sceptical.'

The author lists the following issues as reasons to be sceptical as to whether it is feasible to 'devolve' criminal justice to the National Assembly; law-making, the provision of legal services, funding, capacity and publicity. While one can agree wholeheartedly with the vast majority of what is said in the section in question, perhaps all the issues, with the possible exception of 'publicity,' could be dealt with under a more general heading of 'capacity.' It is these questions concerning the Assembly's capabilities that will be briefly considered in this response, having particular regard to the role of the Welsh language in some of those issues.

It appears that Jones' argument relating to 'law-making' reinforces the general point that there has been an exponential increase in the number of new crimes created by central government during the last decade and that the Assembly would have severe

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difficulty in keeping up if it were not able to rely upon the law-making machine at Westminster.² Put simply, the Assembly currently does not have the capacity for such prolific law-making, especially when one considers the legal requirement on the Assembly to publish all legislation bilingually.³ As things stand, there is no doubt that this argument is an accurate one. In terms of the number of both policy officials and solicitors, the Assembly Government's civil service would not be capable of satisfying all that would be required of it if criminal justice were to be devolved. One does not have to look far for evidence to support such a conclusion.

Since the Assembly received its powers to enact Assembly Measures in May 2007, quite naturally perhaps, the Assembly and the Assembly Government's focus has switched from the secondary legislation that it had been making *en masse* since 1999 to the new, more symbolic, Legislative Competence Orders and Assembly Measures. Of course, by today, the current problems with the LCO/Assembly Measure procedure are well documented. What is *not* as well documented is the impact that the new system has had on the Assembly Government's output in terms of statutory instruments etc. In 2006, the Assembly made 217 SIs. In 2007, the year the provisions of the Government of Wales Act 2006 came into force, the number of SIs had reduced to 194.⁴ In 2008, the Welsh Ministers only made 112 SIs, an extremely significant drop.⁵ This may be because of one of two factors; either the political emphasis has switched completely to LCOs and Measures, or, that the resources available are insufficient to allow the Government to concentrate on both LCOs/Measures and secondary legislation equally. The reality is that the truth may lie somewhere in between. If there *is* any truth in the second contention, that the Assembly Government simply has insufficient resources, it is clearly unconceivable that the Assembly and its Government could deal with the much-increased workload that would come hand in hand with a devolved criminal justice system.

However, none of the above should be regarded as a criticism of the Assembly, its Government or its civil service. There is no doubting the quality of the officials and

² For an account of central Government's over-eagerness to legislate in the criminal justice field, see Kim Stevenson and Candida Harris, 'Inaccessible and Unknowable: Accretion and Uncertainty in Modern Criminal Law,' *Liverpool Law Review*, 29(3) (2008) 247-267.

³ See s.98(5) Government of Wales Act 2006, for instance, regarding the obligations on the National Assembly with regard to bilingual Assembly Measures.

⁴ s.58 Government of Wales Act 2006 provides that the Assembly's executive functions are now to be exercised by the Assembly Government. Therefore, from May 2007 onwards, the Welsh Ministers have had responsibility for the subordinate legislation that had been previously made by the Assembly.

⁵ All statistics courtesy of Wales legislation online - <http://www.wales-legislation.org.uk/>

solicitors involved, only their quantity. Provided that sufficient lead-in time is granted, and that Jones' third cause for concern, financial resources, is resolved, there is nothing to prevent the Assembly from increasing its capacity by boosting the number of civil servants available to work on fields such as criminal justice. The fact that resources are limited today should not mean that the devolution process can be allowed to stagnate and there is a duty on the coalition government in Cardiff Bay to ensure that mechanisms are in place to increase capacity as and when it is required.

The other issue related to capacity and the provision of legal services within the law-making procedure is the fact that all Assembly legislation has to be bilingual. It is clear that the author does not believe that the current pool of bilingual lawyers is sufficiently large to allow the Assembly Government to be able to draw a sufficient number of bilingual draftsmen and draftswomen from it. In this respect, she is probably accurate in her conclusion. As was noted in the article itself, the teaching of law through the medium of Welsh at university level is a relatively novel concept. As a result, it will take a few years for such graduates to reach senior drafting posts in the Welsh civil service. However, this does not mean that the Assembly cannot create bilingual legislation in the meantime. While the Assembly has had bilingual co-drafting as its aim from the outset in 1999, where both versions of the legislation would be created side by side by bilingual lawyers, this has not necessarily been possible thus far.⁶ As a result, the vast majority of the Assembly's legislation has been translated from English into Welsh by the Assembly Government's specialist Legal Translation Unit.⁷ Until such time as the pool of bilingual lawyers increases in size, the Assembly may choose to continue relying upon the expertise of the Unit and persevere in its attempts to recruit more translators to it. In fact, a short term solution to Jones' anticipated problem may be to tempt more translators to legal translation work by creating a new academic or vocational qualification in such translation. In future, such a qualification could be regarded as a mandatory requirement for anyone applying for a post in the Unit.

Therefore, even as things currently stand with the shortage of bilingual draftspersons, the Assembly is able to meet the demands of publishing all legislation bilingually. If the Assembly's areas of competencies were to be extended into fields such as

⁶ For a general overview of the development in the legal status of the Welsh language and its current use in the legal system, see also D.L. Jones, 'The Welsh Language and the Judicial System - realities, difficulties and opportunities,' *Communications Law*, 13(2) (2008) 47-55.

⁷ The translated legislation would then be checked and edited by one of the Assembly Government's Welsh-speaking lawyers to ensure consistency with the English version.

criminal justice, provided that the financial resources were in place to support the work of the Translation Unit, there is absolutely no reason why the increased demand could not continue to be met. In this respect, the Welsh language should not be regarded as a barrier to the devolution of further functions. Indeed, as Jones herself mentioned in her conclusion, the Welsh language has very recently had an increase in status that may, in due course, even *contribute* to the eventual devolution of functions such as the criminal justice system. As of July 2008, the Welsh language followed the Spanish regional languages of Catalan, Galician and Basque in being made a co-official language of the European Union.⁸ While there may be some justification for being sceptical as to whether this step *on its own* will lead to any further conferral of powers, it may well contribute to a strengthening of national identity. According to the author, it is only a matter of time from that point until the further powers are granted. It remains to be seen whether or not allowing the Welsh language to be used in European Union Council of Ministers meetings *will* contribute to such a gradual strengthening of national identity.⁹

If it *is* eventually decided by the Assembly Government that there is sufficient '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',¹⁰ it is vital to remember that it may not have to be an all or nothing approach. As Jones implies, it may well be the case that the Assembly Government will decide that any formal devolution within the criminal justice field should be gradual, starting with those areas such as youth justice where the Assembly Government already exercises some functions. If so, the Assembly and its Government will at the very least have more time to adapt and to resolve the issues of capacity that were validly raised by Jones' article. Under no circumstances should these issues be regarded as insurmountable and permanent barriers to further devolution. In reality, they should only be regarded as obstacles that *can* be overcome.

⁸ The 'co-official' language status was established by Council Conclusion 2005/C 148/01, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:148:0001:0002:EN:PDF>

⁹ The Welsh language can be used in the Council of Ministers, Committee of the Regions and in the Economic and Social Committee. Discussions are continuing about its future use in the European Parliament.

¹⁰ One Wales: A progressive agenda for Wales, p.29. Available from <http://wales.gov.uk/about/strategy/1wales/?lang=en>