



Introduction

1. The Chairman of the Criminal Bar Association (“CBA”) gave an undertaking to the Counsel General to respond to the Welsh Government’s Consultation on a Separate Legal Jurisdiction for Wales on behalf of its members. This is the Association’s response.
2. The Criminal Bar Association (‘CBA’) represents about 3,600 employed and self employed members of the Bar who prosecute and defend the most serious cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts; ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained

Overview of Legal Jurisdictions in the United Kingdom

3. The United Kingdom consists of three legal jurisdictions. Those of England, Wales and Northern Ireland are based on common law principles. The legal system in Scotland, which dates back to the Middle Ages, consists of civil law principles with some common law elements.

4. In England and Wales the court system is made up of three institutions. The Crown Court, which deals with criminal cases, the High Court of Justice for civil cases and the Court of Appeal. The highest body of appeal in England and Wales is the Supreme Court.
5. Unlike the USA, the UK does not have a written constitution, but it is a member state of the European Union and subject to its laws. The Human Rights Act incorporates the European Convention on Human Rights into UK Law.
6. Entry as a professional into the UK's legal system is commonly achieved through studying for an undergraduate law degree followed by a year-long professional course and examination. The Academic stage mainly focuses on the analysis of legal texts and the learning of legal principles. In recent times, vocational training has turned its attention to providing practical experience of the attributes, knowledge and application that will be needed as a practicing lawyer.

The consultation by the Welsh Government

7. The CBA welcomes the opportunity to respond to this consultation. We are conscious of the importance to England and Wales of the possibility of devolving the responsibility for the administration of justice in Wales to Welsh Ministers and of the far reaching effects such a change might have for the administration of justice generally in England and Wales. We are familiar with the changes brought about by the devolution statutes of 1998 and with the other fundamental changes introduced to the constitution of the United Kingdom and we are familiar also with the changes which have occurred in the administration of justice in Wales since 1998 in the wake of devolution even though that function of government is not a devolved responsibility.¹
8. The three principal questions on which the Welsh Government is consulting are
 - What is meant by the term “separate Welsh legal jurisdiction”;

¹ Described in the response of the General Management Committee of the Bar Council at paragraphs 23 to 31

- Whether or not there should be a separate legal jurisdiction for Wales; and
 - What might be the likely consequences of creating that jurisdiction.
9. The rationale for devolving legal powers to Wales is fundamentally a political matter, for which the CBA has no remit and makes no comment. This response is primarily concerned with the potential consequences and impact upon CBA members should there be a separate legal jurisdiction for Wales.

What is meant by the term “separate Welsh legal jurisdiction”

10. Insofar as what is meant by the term “separate Welsh legal jurisdiction” the careful analysis given to this question by the Bar Council² and the Association of London Welsh Lawyers³ is not controversial and hereby adopted.
11. It is accepted that there already exists a distinct body of law in Wales, comprising a growing quantity of statute and case law; derived from the Acts of the Welsh Assembly⁴ and Acts of the United Kingdom Parliament which apply only to Wales. There is currently no devolved responsibility for the criminal law, *per se*.
12. The CBA is aware that to a very large extent Welsh criminal law mirrors English criminal law. Discrete Welsh criminal offences may be created, however, arising out of the devolved law-making powers of the Welsh Government. By way of example, proposals currently exist to create new criminal offences in Wales in respect of the devolved areas of responsibility. With regard to ‘health and health services’, there is a proposal to create criminal offences where breaches of the

² at paragraphs 24 to 35

³ at paragraphs 15 to 27

⁴ Since 3.3.2011 the Welsh Government is able to propose Bills to the National Assembly for Wales on subjects within 20 fields of policy, set out at Schedule 7 of the Government of Wales Act 2006. The 20 areas of responsibility devolved to the National Assembly for Wales are; (1) Agriculture, fisheries, forestry and rural development, (2) Ancient monuments and historical buildings, (3) Culture, (4) Economic development, (5) Education and Training, (6) Environment, (7) Fire and rescue services and promotion of fire safety, (8) Food, (9) Health and health services, (10) Highways and transport, (11) Housing, (12) Local government, (13) National Assembly for Wales, (14) Public administration, (15) Social welfare, (16) Sport and recreation, (17) Tourism, (18) Town and country planning, (19) Water and flood defences, (20) Welsh language.

proposed opt-out rules relating to organ donation and transplantation occur.⁵ A further proposal exists in relation to offences of assault where the victim is a child; the proposal is to remove the defence of 'legal chastisement'. If such proposals are made law, these will have a unique impact on the criminal law in relation to Wales.

13. It is envisaged that the evolution of Welsh criminal offences will continue incrementally in this vein, creating a small body of criminal law that is distinctly Welsh. These relatively minor adjustments to the substantive criminal law in Wales do not create a need for specialist training, falling as they do within the existing competencies of the criminal Bar of England and Wales. As such the CBA does not foresee an impact on the ability of practitioners to continue with the tradition of practising in England and Wales with complete freedom of movement.

Whether or not there should be a separate legal jurisdiction for Wales

14. The potential advantages and disadvantages of a separate Welsh jurisdiction involve matters that are largely political in nature and extend beyond the specific issues relating to the criminal law. These issues are set out at paragraphs 36 and 38 of the Bar Council's submission and between paragraphs 28 – 59 of the Association of London Welsh Lawyers submission. The CBA seeks to add nothing further to this debate. The purpose of this response is to set out the potential impact that a separation of Welsh legal powers may have on CBA members and the beneficiaries of their expertise, the public. We hereby limit our below submissions to these matters.

What might be the likely consequences of creating that jurisdiction.

⁵ The draft Human Transplantation (Wales) Bill 2012 will introduce a soft opt-out system for organ and tissue donation in Wales, i.e. consent is deemed to have been given unless the individual objected during their lifetime. If passed in its proposed form, it would become a criminal offence under clause 10(3)(b), punishable with up to 3 years in prison, to transplant organs without consent or to use them for a 'purpose that is not a qualifying purpose.'

15. Having regard to the functions of the CBA we have limited our response to the question as to the “Impact of possible separate legal jurisdiction on the legal professions” (question 20 of the Welsh Government’s consultation document). This question is of direct concern to the CBA and its members.
16. As previously stated, the criminal law in England and Wales is similar in principle, practice and procedure. The substantive differences that exist impose no additional training requirements upon CBA members in order for them to competently practice in Wales.
17. Hence, there is no need at this time for a separate system of entry to the legal professions and, moreover, it would be contrary to the public interest to have two separate entry systems between England and Wales. The Bar Council is particularly concerned to highlight that there would be a major implication for the legal profession if there were a separate system of entry to the Welsh and English legal professions and barriers to movement between the two.⁶ Many members of the criminal Bar who practice in Wales and are members of the Wales Circuit have their principal chambers in England and practice in courts in England as well as Wales. Imposing barriers upon practitioners would have an immediate and major impact on the livelihoods of those practitioners who chose to practise in Wales with no clear benefit to the public whom they serve.
18. Furthermore, attempts to undermine the free movement in legal services between England and Wales may be in breach of EU competition law. Regulation of the legal profession is not currently devolved and the CBA concurs with the Bar Council’s view that there is currently no case made out for this to happen. Furthermore, we agree with the Bar Council that it is essential for there to be free movement between legal practitioners in Wales and England as this is in the interests of both the legal profession and of the public at large.

⁶ at paragraph 18

19. We are therefore pleased to note that such barriers are not in contemplation by the Welsh Government. Our understanding of the consultation document is that it is concerned with the machinery by which justice is administered in Wales and not with how the professions are to be regulated.
20. We understand that the only functions which are under consideration for transfer to Welsh Ministers are those of the Ministers of the UK Government concerned with the administration of justice and not those of the statutory regulators of the professions.
21. The statutory regulators, the judges and, to a lesser extent, the professions have authority over rights of audience before the courts of England and Wales. These are not functions that are under consideration for devolving to Welsh Ministers. Consequently, whether or not responsibility for the administration of justice be devolved to the Welsh Ministers, these functions would remain vested in and exercisable by the regulators, the judges and the professions.
22. The regulators will continue to stipulate what the professional competencies of advocates appearing in the courts in Wales should be. Whether the administration of justice is devolved or not, the need for advocates who are familiar with the differences in the substance of the laws applicable to Wales and, in some more limited circumstances, the ability to represent clients through the medium of the Welsh language, will be precisely the same whether responsibility for the administration of justice is devolved or not. Even if Wales were to become a separate jurisdiction there would, therefore, be no barriers nor would there be any need for barriers to members of the Bar of England and Wales appearing before the courts in Wales. The CBA would continue to support a system that preserved this position.

Conclusions

23. Whether a separate legal jurisdiction is created for Wales is a political decision and not one that the CBA seeks to express a view.

24. It is the CBA's view that if Wales were to become a separate legal jurisdiction, it would create no need for a separate system of entry to the legal professions. Neither would it stimulate a need to regulate practitioners in Wales separately from those in England.
25. Members of the CBA currently practice interchangeably in England and Wales and the CBA strongly supports the view that this be allowed to continue without barriers whether Wales becomes a separate legal jurisdiction or not.
26. It is the CBA's strongly held view that it is in the interests of the public and the legal professions to ensure that no such barriers be created.

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