Commission on Justice in Wales

Call for Evidence

Response of the Wales & Chester Circuit

This is the response of the Wales and Chester Circuit, representing the Barristers practising in Wales, to the Commission on Justice in Wales' Call for Evidence in its review of the operation of the justice system in Wales. The Circuit notes that the Commission's Call for Evidence comes with a view to promoting better outcomes in terms of access to justice, reducing crime and promoting rehabilitation, ensuring that the jurisdictional arrangements and legal education address and reflect the role of justice in the governance and prosperity in Wales and promoting the strength and sustainability of the Welsh legal services sector and maximising its contribution to the prosperity in Wales. The Circuit wholeheartedly supports these aims.

The Circuit also notes the Commission's approach in considering five work streams, namely (i) criminal justice, including policing, probation and prisons, (ii) civil justice, family justice, administrative justice and tribunals, (iii) the legal profession, legal tech and the economy of Wales, (iv) legal and vocational education and training, (v) access to justice and overarching issues. This response attempts to address all of these streams in its answers to the various questions, but does so under the headings Criminal Justice, Civil Justice, Family Justice and Tribunals. Central to these streams is, of course, access to justice, which is a theme addressed throughout the response.

The Wales and Chester Circuit has already submitted an outline document. That document was circulated among the membership of Circuit by way of consultation. The Circuit has more recently sought input from its members in relation to the specific questions raised by the Commission which formed the background to this current response. This document was formally approved at the Annual General Meeting of the Circuit held on 9th May 2018.

Specific Questions raised in the Consultation Document

1.What is working well in the justice system in Wales? What is not working well? Are there examples of innovation and good practice, both in and beyond Wales, which should be adopted and shared?

Criminal Justice

1. It is no exaggeration to state that the criminal justice system of 'England and Wales' is in crisis.

2. There is a growing recognition, no longer simply among professionals working within the system but also amongst the press and the public, that the criminal justice system (the courts, police, CPS and criminal legal aid) is grossly underfunded and struggling to cope with the increasing challenges of dealing with the explosion in the use of and retention of electronic data in all aspects of our daily lives.

3. Those challenges are aggravated by a centralised, one-size-fits all approach which does not take into account of differences that already exist within the jurisdiction of England and Wales.

4. In relation to criminal legal aid, for example, repeated unsuccessful attempts to reform the graduated fee system for Crown Court advocacy has only illustrated the marked differences that exist in nature and shape of caseloads between different geographical areas of the criminal justice system of England and Wales, and the inappropriateness of using a single formula to calculate remuneration in each and every case. There remains a gross inequality between the criminal legal aid spend in England and the criminal legal aid spend in Wales.

5. At present, the criminal legal aid spend per capita in Wales is only 74% of the figure for England (see table 1 below – based on figures published by the Ministry of Justice and the Office of National Statistics).

Table 1

Crime					
	2012-2013	**2013-2014**	**2014-2015**	**2015-2016**	**2016-2017**
Eng - Litigators (£000s)	£299,529	£279,376	£298,491	£319,554	£300,668
Eng - Advocates (£000s)	£233,491	£220,255	£205,817	£216,856	£155,862
Eng Crim LA (£000s)	**£533,020**	**£499,631**	**£504,308**	**£536,410**	**£456,530**
Wal - Litigators (£000s)	£12,367	£10,775	£12,986	£16,163	£12,323
Wal - Advocates (£000s)	£7,878	£6,594	£7,014	£7,332	£6,666
Wal Crim LA (£000s)	**£20,245**	**£17,369**	**£20,000**	**£23,495**	**£18,989**
Eng Population (ONS) (000,000s)	53.49	53.87	54.32	54.79	55.27
Wal Population (ONS) (000,000s)	3.07	3.08	3.09	3.09	3.11
Eng Crim LA per capita	£9,965	£9,274	£9,284	£9,790	£8,260
Wal Crim LA per capita	£6,595	£5,639	£6,472	£7,603	£6,106
Wal Crim LA per capita as percentage of Eng Crim LA per capita	**66%**	**61%**	**70%**	**78%**	**74%**

6. The failure of the criminal legal aid system of 'England and Wales' has led each of the main chambers on the Wales and Chester Circuit to publicly declare that their members individually have decided to no longer undertake criminal legal aid work. Access to justice in Wales is at breaking point.

Civil Justice

7. The civil justice system in Wales today has strengths and weaknesses that mirror those across the joint jurisdiction with England: on the plus side, there is a generally high quality judiciary. Listing arrangements in the Court of Protection can, when needed, be agile. The Commercial Court in particular provides a high-quality and user-friendly service.

8. The weaknesses include the expensive nature of litigation – the UK as a whole is ranked only 31st in the World Bank's "Doing Business" report 2018[1], including the cost of issuing civil claims. Fees for civil cases of £10,000 or more are 5% of the claimed amount, capped at £10,000. Given that, for example, average earnings in Wales are only 90.6% of those across the UK[2], it seems likely that proportionately fewer cases in Wales will reach the cap than in England. This would mean that people in Wales were subsidising more costly litigation in England.

[1] Greater detail was included in the 2014 report, quoted in the "Justice for Wales" pamphlet.
[2] http://gov.wales/statistics-and-research/annual-survey-hours-earnings/?lang=en

9. There are also weaknesses in the justice system that are particular to Wales. County Court closures have left people without a civil court near to them[3]. Although this is not a problem unique to Wales, transport difficulties in Wales mean that the impact of this may be greater than elsewhere. To take Cardiff Civil Justice Centre as an example, trains into Cardiff are often very crowded at peak times, and car parking in central Cardiff is very expensive. Public transport in West Wales can be difficult[4], and there is no provision for civil justice on the island of Anglesey, and in mid-Wales, Powys is entirely without a County Court. The same goes for provision for hearings in the Court of Protection – a Court administered from London.

10. There is the need for Welsh-language justice provision – not only Welsh-speaking judges, but court staff who can deal with the public in Welsh. There is the need for Solicitors (and support staff) familiar with local communities[5]. In practice areas covered by legal aid franchises, such as housing, that provision can be thin on the ground[6].

11. Some services are simply not available in Wales. For instance, cases cannot be started in the Court of Protection in Wales. The Court of Appeal has no office in Wales. The Intellectual Property and Enterprise Court's Small Claims Guide[7] states boldly that "*All IPEC small claims track hearings take place on the Fourth Floor of the Thomas More Building*".

[3] There are currently County Courts in the following locations in Wales: Cardiff, Aberystwyth, Caernarfon, Carmarthen, Rhyl, Haverfordwest, Llanelli, Merthyr Tydfil, Wrexham, Neath and Pontypridd still open.
[4] Only 3 of the County Court venues in Wales can be described as being in West Wales.
[5] In many – but not all – cases, these communities will be Welsh speaking.
[6] Research suggests that there are only two firms (plus one NGO) with legal aid housing contracts in Wales.
[7] Feb 2018

12. Although Wales has an active civil and public law bar, a significant number of cases involve counsel based in chambers outside Wales[8]. The Welsh Bar have no complaint about competition – and the Welsh public gain from it. But experience suggests that higher fees may be allowed on summary assessment for London-based counsel, even in run-of-the-mill cases. There is no reason why this should be so.

Family Justice

13. In relation to Public Children Law, the Public Law Outline ("PLO") works well in Wales. It is understood that the statistics in relation to compliance with the deadline of 26 weeks for care proceedings have been consistently strong over recent years. In the year 2016/7, despite the significant increase in the number of children subject to care proceedings, rising from 1,371 in 2015/16 to 1,642 in 2016/17, care cases in Wales[9] were completed in an average of 24.5 weeks (compared to an England and Wales performance of 27 weeks). There is also anecdotal evidence that the objective of judicial continuity in care cases is met more consistently in Wales.

14. CAFCASS Cymru have published some impressive statistics in relation to key performance in public law children cases in recent years. In the year 2016/7[10] the average working days to allocate Section 31 (care) cases was 1.2 working days against a target of less than 3 working days. This is impressive in the light of a recent increase in the volume of work. The total number of children involved in public law proceedings in the year 2016/7[11] was 3,012. This was an increase of 17% on the previous year. Public law applications have increased over the past three years, with a 24% increase since 2014-15

[8] An attempt has been made to again precise figures from the Administrative Court in Wales
[9] CAFCASS Cymru Annual Report 2016/7
[10] CAFCASS Cymru Annual Report 2016/7
[11] Ibid

15. In relation to private law children cases, CAFCASS Cymru performance for the year 2016/7 [12] was reasonable, with a 91.9% allocation of officers to open cases against a target of 95% for the year.

16. Anecdotal evidence[13] is that the court system for the determination of divorce financial remedy claims works reasonably well.

17. The Family Bar in Wales, both leading and junior, and the solicitors' profession have well established and strong reputations in the field of family law, which serve the people of Wales well.

18. However, there are real concerns on Circuit as to access to justice in relation to all these 3 areas of family justice in Wales. There is significant anecdotal evidence[14] that there are real problems in terms of the lack of legal representation for parents / other family members in private law children cases following the removal of legal aid pursuant to the Legal Aid Sentencing and Punishment of Offenders Act 2012 ('LAPSO') save for a party who has made substantiated allegations of domestic abuse / violence.

19. Whilst there are fewer concerns in public law proceedings (where parents remain entitled to legal aid regardless of means) some non-parent interveners and / or non-parent potential alternative carers struggle to obtain legal representation.

20. However, there are very significant problems arising from the absence of legal representation in the area of divorce financial remedy claims for people of limited means who would previously have received legal aid.

[12] Ibid
[13] A FoIA request to HMCTS (Wales) has not yielded a substantive response.
[14] A FoIA request to HMCTS (Wales) has not yielded a substantive response / CAFCASS also unable to assist

21. In private law children cases and divorce financial remedy claims it is now common for members of Circuit to appear against litigants representing themselves in such cases, who are disadvantaged as a consequence. There is also anecdotal evidence that there are now many cases where both or all (if more than 2) parties represent themselves, with consequential likely adverse impact on court time taken in dealing such litigation.

22. Particular problems arise around the conduct of cross examination where unrepresented litigants seek to challenge the oral evidence of alleged victims of domestic abuse / violence in both private children and divorce financial remedy cases. The present Westminster Government no longer appears to treat this lacuna as a legislative priority.

23. In terms of obtaining "hard" evidence more generally on this subject, a FoIA request has been made to HMCTS and CAFCASS Cymru in order to try to establish an accurate picture as to the extent of cases where people represent themselves and the impact of this on the court system. This has proved to be a challenging exercise. HMCTS has not been able to provide the necessary surrounding information.

24. In order to try to piece together an indication as to the extent of such cases in the private child law context, CAFCASS Cymru has been provided details as to the number of Rule 16.4 Guardians that have been appointed (with the child joined as a party with legal representation) over recent years before and after LAPSO. It is an anecdotal perception that courts will sometimes appoint a Rule 16.4 Guardian when faced with both parents acting in person in ongoing private law children proceedings in order for there to be a degree of control and order over the litigation through the child's legal representative. The statistics[15] are as follows:-

[15] Cafcass Cyrmu FOIA response

2011- 74

2012- 106

2013- 135

2014- 109

2015- 112

2016- 141

2017- 158

25. These figures, which have risen sharply in the last 2 years, should ideally be compared against the number of private law cases issued over each of these years to establish if the increase in the appointment of such Guardians is inconsistent with the general volume of such cases in each year.

26. However, there are some further details available from Cafcass Cymru[16]. The annual report indicates an increase in the volume of Section 7, Addendum and Rule 16.4 Private Law reports required across all geographical areas compared to previous years as follows:-

North Wales: increases of 21%, 63% and 100%:
South East Wales: increases of 15%, 47% and 15%:
South West Wales: increases of 29%, 42% and 35%
Private law referrals: increased over the past two years, with a 26% increase in 2016/17.

27. In terms of practicality of access to justice, there is also considerable concern amongst members of Circuit about the loss of numerous high street firms of solicitors in Wales, with the creation of 'deserts' of legal advice and representation in rural parts of Wales. The Law Society in Wales is best placed to provide the necessary data in this respect. Travel to and from Family courts is another related concern in some parts of Wales following the recent court closure programme.

[16] Cafcass Cymru annual report 2016/7

28. In the context of the present issues with access to representation for some people, Circuit members have also expressed concern about the prevalence of 'McKenzie Friends' who assist litigants representing themselves, especially those who seek remuneration from members of the public for their services. Whilst this arrangement can sometimes work well, the fact remains that this is an entirely unregulated area. Some regular McKenzie Friends have no sense of professional conduct or ethics. Neither the public nor justice is served well by such individuals.

29. In terms of obtaining "hard" evidence about the increase in use of McKenzie Friends, a FoIA request was submitted to HMCTS (Wales). Once again, no substantive response was received. CAFCASS Cymru has also not been able to assist with a FoIA request in relation to this subject.

Tribunals

30. There are two issues which particularly affect access to Justice in Tribunals in Wales: language and geography. Firstly, the issue of language and the use of Welsh. As in other jurisdictions in Wales, there has been an approach in recent years of seeking to recruit Judges and support staff who are able to conduct proceedings in Welsh or are at least able to provide some interaction with Tribunal users in Welsh, with varying degrees of success. When doing so, no formal testing of written or oral skills is generally involved in the process.

31. The provision for dealing with written and oral work in Welsh varies from Tribunal to Tribunal. However, as a general rule there is no automatic provision and a Tribunal user who seeks to use the Welsh language or to have an appeal heard in Welsh has to do so on notice, so that special arrangements can be made. These special arrangements involve a longer waiting period for listing of the appeal so that a suitable panel can be arranged. This is unacceptable for a number of reasons which have been rehearsed elsewhere. The argument is that a person seeking to access justice locally in Wales, particularly in a predominantly Welsh-speaking part of Wales such as the North West, should have as ready and timely access to documentation and a hearing in Welsh as a non-Welsh speaker has to proceedings in English, where special arrangements never have to be made. That is not the case and is unlikely to be so until provisions change so that Clerks and other staff for the tribunals are recruited in Wales on the basis that the Welsh speakers are in the overwhelming majority. The appointment of a judicial office holder in Wales should be carried out on the basis that the business need for Welsh-speaking judges in that jurisdiction has been defined and the ability to communicate efficiently in Welsh is then reflected in each recruitment round to meet the ongoing need. The description *"communicate efficiently in Welsh"* is important. Many Judges and staff have a considerable ability in Welsh, which is often hidden due to a lack of confidence and a lack of training. Others are recruited on the basis that they have some Welsh but are seldom called on to use it, and not in a formal way such as to conduct proceedings entirely in Welsh.

32. The issues of language and geography are interlinked, but the effects of the geographical layout of Wales make for interesting problems which usually affect a Tribunal user in a negative way in regard to physical access to a hearing. The recent closures of part of the Estate have meant that further distances to a Tribunal hearing centre, and longer travelling times, are involved. This occurs in rural and less well- off areas of the country where transport infrastructure and public transport is poor.

33. For example, following the closure of the Court facility at Llangefni, in Ynys Mon/Anglesey, an appellant in a Social Entitlement Chamber appeal to the First Tier Tribunal (a benefits appeal) will have to attend Caernarfon Court Centre. The Tribunal is limited to sitting in Caernarfon on certain weekdays, not all, due to the “more efficient" use of the building. An appellant from northwest Anglesey will face a journey of perhaps two hours or more by public transport (bus). An Appellant from the south in Abersoch or Pwllheli will face a similar lengthy journey to a tribunal. It should be noted that large proportions of appellants in this jurisdiction suffer from mental health issues, and that one of the main issues dealt with in such appeals is the ability to cope with journeys.

34. It is submitted that the general reduction in the availability of free advice through Citizens' Advice Bureaux, local authority-funded advice centres, and in particular the current lack of advocacy services for persons seeking to access tribunals in the UK is if anything more adverse to the Tribunal appellant in Wales due to the geographical issues highlighted above. In addition to the difficulties faced by advice agencies in assisting vulnerable persons accessing the Tribunals, the advocates who may be available are unable to commit to attendance at a hearing due to the time commitment involved.

35. Both limbs of the legal profession have a tradition of providing free legal advice and representation in areas of litigation. The Bar in Wales is limited in what can be done in this regard due to the distances involved in attending hearings at tribunals.

2. What are the economic, social, geographical, technological, constitutional and other barriers to improvement and how could these be overcome?

Civil Justice

36. Economic barriers: the cost of litigation and the relative poverty of Wales have been mentioned above. That poverty means that Wales is less able to absorb the costs of litigation. This impacts on the ability of people to access the justice system. There is then the fact that the total justice spend is, per head, significantly lower in Wales than in England. There are two conclusions that can be drawn from that – firstly, that the system's spending is geared towards England's needs, rather than those of Wales, and secondly, that a simple application of the Barnet Formula would increase the available money to spend on justice in Wales[17].

37. Geographical barriers: these have been covered above.

38. Technological barriers: the idea that technology can solve all problems relating to the justice system strikes us as unrealistic. Technology may enable a litigant in, say, Bala, to contact a solicitor, but it does not guarantee that the solicitor will be able to speak Welsh, will know the local community, will be able easily to contact potential witnesses to take statements. Technology may enable hearings to take place, but a remote hearing is invariably second-best to a live one. This is not merely because the tribunal and advocates can better judge the flavour of evidence given in person, but because instructions can readily be taken if evidence takes an unexpected turn – which is often impossible to do in a remote hearing. There is also the consideration that the presence of a court near any significant population centre is a physical embodiment of the state providing a core service to that community.

[17] Whether those resources would be spent on justice would depend on political judgments made in the elected branches of government.

39. Constitutional barriers: At present, any significant change is simply impossible for the Welsh Assembly and Government to bring about. Real change – for example, the introduction of a Conditional Legal Aid Fund – is outwith the devolved institutions' competence

Family Justice

40. It is presently difficult to see how access to legal representation in the areas identified above can generally be improved in the light of the present devolution settlement which excludes legal aid. Potential ways to improve access to family Justice if the devolution settlement were to be extended include the following:-

(i) Restoration of legal aid for private child law and / or divorce financial remedy claims;

(ii) In the alternative the creation of the equivalent of a form of Public Defender Office in crime to enable parents / spouses to gain access to legal advice and representation in children and / or divorce financial remedy proceedings;

(iii) Further again, or in the alternative, the creation of provision of publicly remunerated special advocates to deal with cross examination of complainants who have made allegations of domestic abuse / violence

Tribunals

41. The cost of litigation compared to the relatively low levels of income in Wales is a barrier to participation in seeking justice within the Tribunal system.

42. One of the main areas of Tribunal work, by volume of cases, is the Social Entitlement Chamber, which deals with areas such as entitlement to Benefits such as Disability Living Allowance and Personal Independence Payment, Housing Benefit, Working Tax Credit and Child Tax Credit, Child Benefit. It will be clear that persons seeking to appeal decisions on these benefits have no money to spare for legal costs, IT equipment, or travel.

43. The Tribunals in Wales at First Tier Level will deal with many thousands of appellants each year. Each appellant will face numerous barriers to engaging with the Justice system, and these have already been touched upon above:

    - increasing distances to travel to hearing centres following closures (e.g. for Appellants from Barmouth/Pwllheli to Holyhead to Rhyl the centres are Caernarfon, Llandudno or Prestatyn.)
    - the lack of legal advice or support and representation
    - the lack of available public transport
    - the lack of facilities at Court Centres, such as waiting areas and disabled facilities

44. In short, appellants in the SEC are by the nature of their appeals often physically and mentally unwell, isolated, living in poverty, and lacking in confidence to present their own appeals. They have little access to legal advice in what is a complex area of law (Social Security legislation) due to the enduring cuts in Local Authority Advice provision. They have very little chance of obtaining advocacy support for a hearing, other than by spending limited income on the unregulated and dubious paid McKenzie friend type services referred to elsewhere in this response. Advocates appearing for appellants in the First-Tier Tribunal SEC are now rare.

3. What problems face the people who work within the justice system in Wales (including policing, prosecution, courts, prisons and probation) and the people who are affected by it?

Criminal Justice

45. The criminal justice system in Wales is grossly underfunded (see above).

46. The collapse of criminal legal aid in Wales threatens both injustice for those requiring access to justice and the sustainability of practice at the criminal Bar.

47. Criminal law practitioners in Wales are an ageing cohort. In West Wales and Mid Wales, for example, more than 60 per cent of criminal law solicitors are over 50 years old, compared with 27 per cent in the legal profession as a whole. The head of justice at the Law Society has described this issue as 'a demographic time-bomb about to hit".

48. Repeated closures of police stations, Magistrates Courts and Crown Courts across Wales has made criminal justice more remote for both members of the public and some practitioners.

49. There is inadequate provision in Wales for prisoners (both on remand and post-conviction), for example:
    - There is no provision at all for Category A prisoners within Wales;
    - There is no facility at all for female prisoners within Wales (whether local female, closed female training, open female training, or restricted status female function);
    - There is no open young offender institution in Wales;
    - There is no category D prison in Wales north of HMP Usk/Prescoed;
    - There is no dedicated remand centre in mid/north Wales; and
    - HMP Swansea has been condemned by the Chief Inspector of Prisons as 'not fit for purpose'

50. Those recent attempts to refresh the prison estate in Wales (the development of HMP Berwyn and the proposal for a new prison in Baglan) have not focussed upon addressing the needs of the criminal justice system in Wales (as opposed to other areas of 'England and Wales'); nor have they been proposed following a proper assessment as to where within the overall scheme of public services in Wales (which are otherwise devolved) the prison service (which is presently not devolved) sits (see the Written Statement entitled 'Justice Policy in Wales' issued by the Welsh Government on 06 April 2018). The Circuit believes that good governance should require the prison service, the police services and the court service to be aligned with the policy approach of other public services in Wales and should not stand apart (as they do at present).

Civil Justice

51. Much of the above relates to the criminal justice system. In the civil sphere, there is the frustration of working in a system that is out of reach to many who need it. Although the Court of Protection judges can be flexible when needed, their workload is significant and that inevitably impacts on cases.

52. There is the impact on career development of working in a system that is largely London-centric. There is a perception, for example, that more interesting cases are retained in London[18]. Whereas in past decades Welsh-based practitioners were able to build up significant civil[19] practices[20], the Welsh-based bar currently has only two silks whose practice is exclusively civil. Of those, one is a personal injury practitioner, the other a public lawyer.

[18] This was voiced, for instance, at a recent Court of Protection users' meeting in Cardiff.
[19] In its broadest sense, as in non-criminal and non-family.
[20] E.g. Sir Malcolm Pill, Sir Wyn Williams.

53. By contrast, the Northern Irish Bar has 18 silks who describe themselves as practising administrative law[21], 19 who practise commercial law[22], 5 who practice company law, 6 who practise defamation[23], 3 who practise employment law[24], 4 who practise land law[25], 17 who practise personal injury law[26], 5 who practise in planning[27] and 14 who practise in professional negligence[28]. Although it is right to acknowledge that many of these will be the same individuals, some of whom will also carry on a criminal or family practice, the picture is nevertheless one of a healthy civil bar that offers a real prospect of taking silk[29]. In Wales, silk is largely perceived as (at best) an irrelevant aspiration for the civil bar, and evidence suggests that the current appointment system favours certain London-based chambers[30]. Perhaps reflecting this, QC Appointments hold interviews in London and Manchester, but not Cardiff.

Family Justice

54. Whilst the Family Bar is strong in Wales, there are similar issues in terms of career progression to Queen's Counsel at the Family Bar. There is also little recognition at the moment by the QC organisation of the need to address the requirement for expertise in the knowledge of Welsh law in considering new applicants for silk.

55. There is also current widespread disappointment and frustration that two out of the three recent appointments as Family Law Recorders for Wales appear to have little or no connection with Wales.

[21] Bar Library website.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid
[29] It is also right to mention that these figures do not reflect members of the Northern Ireland Bar who are not members of the Bar Library.
[30] Taking silk: an empirical study of the award of Queen's Counsel status 1981-2015, (2015) 78(6) MLR 971-1003, Michael Blackwell

Tribunals

56. The Tribunals system in Wales is underfunded, and this is reflected in the closure of local Court buildings, poor facilities, lack of Court staff, and long delays in listing hearings.

4. Does the justice system in Wales currently provide access to all who require its services, including advice? How would you improve access to justice in Wales?

Criminal Justice

57. Access to justice is at breaking point (see above). The Circuit believes that a devolved system of criminal legal aid, based upon the principle of reasonable remuneration for work actually and reasonably undertaken as assessed on a case by case basis[31], may lead to better outcomes in terms of access to justice and economic development within Wales.

[31] An approach which remains good enough for criminal legal aid in the Court of Appeal (Criminal Division)

Civil Justice

58. The answer to this question is simply No.

59. As discussed above, access to justice is a significant issue in Wales. Statistical evidence is difficult to obtain re civil cases, but given that income levels are lower in Wales than across the UK but court fees no different from in England, reason suggests that this is likely to be so. Other evidence indicating that access to justice is an issue includes the dearth of solicitors with, for example, legal-aid contracts for housing work in Wales. The cost and transport difficulties in getting to courts are also not to be discounted.

60. Access to justice could be improved in Wales in a number of ways. Given that the justice spend per head in Wales is lower than in England, a simple application of the Barnet formula would lead to an increase in the funds available for a Welsh justice system. The observations made by the Circuit following the visit to Northern Ireland on the merits of legal aid there for a range of civil cases are commended. Wales could, for example, introduce a Conditional Legal Aid Fund, which could possibly even run at a surplus[32]. An easing of budgetary pressures on the system would enable the issues canvassed elsewhere in these submissions to be addressed, if the political will were to exist at the relevant time.

Family Justice

61. See the response to question 2 above.

[32] Indeed, it could become a selling point for Wales as a jurisdiction of choice.

Tribunals

62. The areas dealt with in Appeals to the First Tier Tribunal have not previously attracted Legal Aid support e.g. Special Educational Needs, Social Entitlement Chamber. However, the network of advice and advocacy previously available to litigants through Local Authority Advice Shops and Citizens Advice Bureaux has been much reduced. The reduced availability has to be seen in the context of the general problem of reduced numbers of High Street Solicitors in smaller towns across Wales who would have provided some support in preparing appeals, the lack of pro bono advice, the greater distances that often vulnerable appellants now have to travel to find available legal and advocacy support, and the greater costs involved.

63. Improvement would come about through improved funding for Local Authorities to provide advice to their residents in areas such as Benefits and Education, and through more widely available pro bono advice from the Professions. For the Bar, the availability of pro bono advice is limited. There are examples of good practice: in North Wales/Chester the young bar provide advice on Immigration and Asylum issues to appellants to the First-Tier Tribunal via a local CAB. However, the inclination of practitioners relying largely on public funding to make themselves available free of charge when they are struggling to establish or maintain a practice in a harsh financial environment is limited (see elsewhere in this document e.gg note regarding recent CBA action re Legal Aid fees).

64. Lawyers will always volunteer their services in some way, but a healthy and optimistic Bar is much more likely to find time to help those without representation. Further improvement would come from holding hearings nearer to where Appellants live and by offering better amenities at such centres.

5. <u>What impact has devolution had on the justice system in Wales? What impact do you believe devolution will have in the future</u>?

<u>Criminal Justice</u>

65. Increasing divergence in the criminal law is inevitable. The restriction in the new Schedule 7B to the Government of Wales Act 2006 on the legislative powers of the National Assembly to create or modify criminal offences applies only in relation to four narrow categories of offence:

    (a) Treason and related offences;
    (b) Homicide offences and other offences against the person that are triable only on indictment;
    (c) Sexual offences; and
    (d) Offences of a kind dealt with by the Perjury Act 1911.

66. The legislative power of the National Assembly to create or modify criminal offences that fall outside those four narrow categories in unreserved areas is unbounded.

67. The creation of new summary only/'either-way' offences against the person, or modification of existing summary only/either-way offences against the person, is already within the legislative competence of the Assembly (unless in some way such matters fall within one of the specific reservations in Schedule 7A, which is far from clear).

68. Likewise, the creation of new 'Theft Act' type offences or the modification of existing Theft Act offences may fall within the existing legislative competence of the Assembly (unless in some way such matters fall within one of the specific reservations in Schedule 7A, which is far from clear).

69. There is already a wide legislative competence held by the Assembly to make/modify criminal offences, the precise width of that competence remaining to be explored and thereby established. A specifically Welsh body (a Law Commission for Wales) should be established to oversee the development and reform of criminal offences in Wales within that wide competence.

70. Each new or modified offence will, however, become part of the law of England as well as the law of Wales, without any democratic say on the part of England.

71. For example, if the Welsh Government presses on with its proposals to pass legislation in the National Assembly abolishing the defence of reasonable punishment, in relation to the offences of common assault and battery, the law of England will, absurdly, both know a defence of reasonable punishment and at the same time ban smacking. Each example of 'divergence' under the present system will not properly be an example of divergence between the law of England and the law of Wales (which would be unobjectionable), but an ever-widening inconsistency within the law of England and Wales (which is objectionable). The formal separation of the laws of England from the laws of Wales will reflect the existing reality of 'diverging' Welsh law, which is a natural consequence of having separate legislatures and governments within England and Wales, and would address the anomaly that requires laws of the National Assembly for Wales to form part of the law of England. The Circuit believes that with the formal separation of the laws of England and the laws of Wales, so the formal separation of the courts of England and of Wales should follow also (although a common judiciary could perhaps still serve both systems).

Civil and Family Justice

72. The Devolution settlement has had an effect on the legal system indirectly, through Welsh legislation dealing with, for example, social services or housing. Such legislation has often been well thought-through and more clearly drafted than much Westminster legislation. However, the Welsh Assembly is not able to make changes to the justice system to enable it better to respond to its legislation and the needs that the latter will create. The impact of devolution on the justice system may diminish with the entry into force of the Wales Act 2017, which, notwithstanding the introduction of a reserved-powers model of devolution, expressly provides for a presumption against competence to make changes to private law.

73. The complexity of the provisions of the Wales Act 2017 that reserve powers to Westminster is such that further litigation about competence seems inevitable. The impact of the EU Withdrawal Bill – in whatever final form it takes – has potential to further muddy the competence waters.

74. Devolution's direct impact on the legal system – as opposed to the substantive law that the system administers – has been, at most, marginal. However, tensions seem likely to emerge the longer the single jurisdiction is maintained. The system is run by a ministry that plays no part in the making of at least a substantial part of the law that the system administers – a recipe for the left hand not knowing what the right is doing. Inadequacies that may emerge in the system's ability to cope with Welsh legislation, or Welsh needs, may have low priority in a system run by Westminster, especially if they are in any tension with English needs. There is the potential for growing dissatisfaction, if the Welsh public believes that legislation passed by its elected representatives is undermined by a justice system run by Westminster.

75. The continued treatment of the law of England and Wales as a single body of law – even if parts of it only extend to one or other country – also has the potential for mischief. Unless it is clearly understood that the law in each country may be different, there is a risk that the courts will interpret Welsh law to minimise any difference with the law that extends only to England. Even if this were only a matter of perception, that perception would be harmful to the interests of justice in Wales. To take what may seem trivial examples, there is the consistent habit of judges in the Supreme Court to refer to "English" law when talking about the law of England and Wales, or the identification of the Court of Protection in Wales as a "region".

6. Could local authority services in relation to justice and the local provision of legal advice be better organised and co-ordinated with policing, prosecution, courts, prisons and probation?

All areas of justice

76. Yes.

7. Are there changes that should be made to the capabilities and effectiveness of the ways in which the police, probation and prisons approach their tasks? What should be done to increase community safety, wellbeing and social cohesion and reduce crime? What can be learnt from other countries where rates of crime and imprisonment are lower?

8. What impact is the divergence between Welsh and English law having upon sentencing? What impact do you foresee in the future? Should Wales implement a different approach to sentencing than England? If yes, what lessons can be learnt from other jurisdictions

77. In relation to sentencing, the commission should consider the effect of the divergence of Welsh and English law within a single jurisdiction on sentencing. Already, the Sentencing Council has had to acknowledge a different sentencing regime in Wales for like offences (see the guidelines on Health and Safety offences at page 39-41). Where there is a different maximum sentence for a like offence in Wales, it is arguable that it should lead to changes in the overall sentencing scale for such offences, at least as it applies in Wales, to reflect the National Assembly's legitimate but different assessment of seriousness (rather than simply acknowledging in the guideline that there is a different maximum applying Wales).

78. Similarly, if the National Assembly passes legislation removing the defence of reasonable chastisement in relation to common assault, (which it will have the power to do under the Wales Act 2017), it is arguable that that ought to have an effect upon the sentencing scale set out in the guideline for common assault. Where, for example, will a defendant convicted in Wales of assaulting his child by smacking stand in a sentencing scale designed for England where the same defendant would otherwise have a complete defence[33]? Should there be, in that case, two sentencing guidelines for common assault within the same jurisdiction (one for Wales, one for England)? Or should the sentencing scale for England & Wales be adjusted to make room for the defendant in Wales convicted of an offence which would not be an offence committed anywhere else in the jurisdiction (with the effect of moving other cases up or down the scale)? If the approach taken is to amend the existing guideline, would it be right for an Act of the Assembly which applies only in Wales, to alter sentencing policy for defendants in England?

[33] Would such an offence be aggravated as suggested by paragraphs 7 to 11 of the guideline, "Overarching Principles: Assaults on children and cruelty to a child" (see in particular, paragraph 10 which refers to the abolition, albeit *throughout the jurisdiction*, of the right of teachers to administer corporal punishment)? Or would there be mitigation in the fact that in one part of the jurisdiction, the defendant would have had a defence? What would paragraphs 12 to 14 of the "Overarching Principles: Assaults on children and cruelty to a child" mean by reference to 'lawful chastisement' and 'a legitimate form of physical punishment', and to a defendant's intention in relation thereto, when the law of England & Wales will both make available to a charge of common assault a defence of lawful chastisement and at the same time make unlawful all forms of physical chastisement?

9. What are the capabilities in the justice system in Wales for responding to Brexit.

79. Foreign affairs is, of course, a reserved matter, as is European Law. However, those two statements hide the fact that much of EU law (or Retained EU law, as it will be called after 29th March 2019) operates in wholly devolved fields, such as agriculture, fisheries and the environment. Whilst the exact parameters of what will be devolved and what will become newly reserved in terms of common framework policies under the terms of the much maligned EU (Withdrawal) Bill have yet to be established, it is clear that Wales has the Courts (and the judges) to deal with such issues should they become the subject of litigation in future.

80. What is less clear is the extent to which such litigation may, for the variety of reasons set out above, be conducted in the commercial courts in London, or whether, should any cases be commenced in or transferred to the Administrative Court in Wales, lawyers based in Wales will even be instructed by the parties in such matters. Under the present joint jurisdictional arrangement, the omens are not favourable

10. What steps do you think need to be taken to facilitate positive change in the justice system in Wales?

81. The biggest positive change that could be made to the civil justice system in Wales is the introduction of a Conditional Legal Aid Fund. This would allow access to civil justice to be extended, making the civil justice system a real service available to individuals and SMEs across Wales.

82. The next most positive change that could be made would be to devolve control of the justice system to Wales, so that changes necessary to respond to Welsh needs would not have to compete with English needs for legislative time and ministerial attention. What changes might be made would be a matter for debate in Wales – they might include a single Court including trial and appellate divisions, conducting both civil and criminal business, like the Supreme Court of South Australia. Northern Ireland provides a ready example of running a justice system in a small, common-law jurisdiction within the United Kingdom.

83. Justice in Wales should be managed in Wales. A devolved system would be much more likely to manage the complex issues arising from the language, geography and poverty in Wales, and more efficiently meet the needs of Court users.

11. How could the strength and sustainability of the legal sector in Wales be promoted? How could its contribution to the prosperity of Wales be optimised?

84. The legal professions have the potential to contribute significantly to the prosperity of Wales. They also have much to contribute to the vibrancy of civic society. However, their ability to do so is limited by the joint jurisdiction. Anecdotal evidence suggests that a greater number of Welsh cases involve English-based lawyers than vice versa. Many Welsh lawyers maintain cross-border practices and would wish to continue to do so, but the current arrangements mean that a significant proportion of the fees arising from Welsh cases are exported to England.

85. An illustration of this may be obtained from the three Welsh references under the Government of Wales Act 2006 to the Supreme Court considering the Assembly's legislative competence: in the Agricultural Wages reference[34], both the Attorney-General and the Welsh Government were represented by counsel from London chambers[35]. The Local Government Byelaws reference saw the Attorney-General represented by London-based counsel and Counsel General leading a London-based silk. Only the Assembly Commission had Welsh-based counsel[36]. The Recovery of Medical Costs for Asbestos Cases reference saw the Counsel General leading a London-based silk, appearing against two London-based counsel.

86. Finally, in the constitutionally very important case of Miller, two London-based counsel appeared for the Welsh government[37]. The representation in these cases suggests that the Northern Ireland Bar retains a far greater proportion of the legal work that is generated in Northern Ireland, and the fees for that work correspondingly stay in Northern Ireland, contributing to the Northern Irish economy.

[34] AGRICULTURAL SECTOR (WALES) BILL -Reference by the Attorney General for England and Wales [2014] UKSC 43

[35] The A-G for Northern Ireland, intervening, appeared personally, leading an Irish Senior Counsel.

[36] The A-G for Northern Ireland again intervening, lead a Northern Ireland junior.

[37] The A-G for Northern Ireland also intervened, and there were two Northern Ireland parties additionally. The A-G for NI lead an Irish silk, the Secretary of State for Northern Ireland had Northern Irish leading and junior counsel, and of the other parties, one had Northern Ireland leading and junior counsel, the other a Northern Ireland silk leading a Northern Ireland junior and an Anglo-Welsh junior who is also a professor at Queen's University, Belfast.

87. Although it may be said that there is greater specialisation at the London Bar, this argument only goes so far. Firstly, there is specialisation in Wales too. Secondly, the broader nature of practice in Wales in the early years at the bar provides a breadth of experience that someone who has specialised in a possibly narrow field from pupillage will not have. As a Northern Ireland silk commented anecdotally, take a London silk outside the scope of their skeleton argument and they can sometimes flounder. A broad background can enable one to see the wood from the trees, and is a better preparation for eventual appointment to the bench, where judges can expect to have to try a range of cases.

12. To what extent do current university curriculum and vocational and professional development courses reflect the law in Wales and the need to deal with the digital revolution and how should they be further developed?

Current courses

88. The Circuit believes that current university curricula and vocational courses in Wales broadly reflect the law in Wales, in so far as any university course can bearing in mind the level at which such courses are taught and the subject matters addressed. Individual Welsh universities can and in our view should provide responses in respect of the educational provision they provide and how reflective their institution's offering is. Those institutions will be best placed to comment on their own practices.

89. In respect of the vocational course to become a barrister (the Bar Professional Training Course, 'BPTC'), the only provider in Wales is Cardiff University. The BPTC at Cardiff University has been provided for 20 years and is staffed by practitioners and former practitioners, including several individuals that sit in fee paid judicial roles. The Circuit understands that it reflects the law in Wales in each of the modules that are taught on the BPTC (if and when any divergent law arises it is addressed to the degree necessary for the level of learning on the BPTC). It must be remembered that the amount of divergent law on such a course, which teaches a combination of the skills and knowledge to become a barrister (to the broad requirements set by the regulator for the Bar, the Bar Standards Board), is extremely small.

Future developments

90. Legal education is at a time of review. The BSB are reviewing training to become a barrister in their 'Future Bar Training' consultation (currently ongoing). In contrast to the solicitors' profession's current proposals (being that any degree will be required to become a solicitor, not necessarily a law degree), although as yet not finalised, it appears that the BSB will generally require future training for barristers to comprise a law degree, then a postgraduate vocational course and a pupillage. Unless the position changes, the BSB will continue to set requirements for the educational stage. The general areas of law and skill that are covered in the law degree and BPTC do not appear to be sufficiently divergent from England so as to require a different degree and / or BPTC.

91. Any development of undergraduate or vocational courses should not create barriers for students studying in Wales to become barristers in England or *vice versa*. The current freedom to study either or both of the educational stages in either Wales or England allows students to maximise their opportunities to study in whatever institution best suits them. It also provides Chambers and other institutions providing pupillage to pupil barristers in Wales (such as the Crown Prosecution Service) the opportunity to take the best candidate, whether that candidate has studied in England or Wales for either of the educational stages. It also benefits Welsh universities, including those that offer the professional legal qualification.

92. The exact future of legal education for the legal profession and in particular the Bar, will depend greatly in the first instance on the decisions of the BSB as a result of its current consultation.

93. It is suggested that the future of legal education in Wales should be aligned to the requirements of the BSB and continue to allow potential entrants into the Bar on Circuit that have studied in England or Wales for either or both the law degree and vocational aspect of legal education.

94. There are strong arguments to suggest that any proposed changes in the Welsh legal system (such as a separate legal jurisdiction) that create a system whereby in order to become a barrister who practises in Wales one must have studied a different degree and/ or vocational course than those practising in England would have significant disadvantages to Chambers, students and, ultimately, to consumers of legal services in Wales, such as:

a. It would significantly limit the choice for Chambers of candidates seeking to enter the market in Wales;
b. It would significantly limit the options for students studying in Wales and England seeking to enter practice;
c. These factors may impact on the quality of candidate to enter the Bar in Wales and they may impact, in the long term, on the quality of legal services offered in Wales.

95. A final noteworthy matter in respect of legal education in Wales is that the current University providers teach many international students that export UK legal education around the world (both for degree and BPTC). It would be financially damaging to Welsh Universities if changes to the legal system in Wales removed or reduced the international appeal of such institutions.

96. It is therefore suggested at this very preliminary stage and subject to the ongoing legal education consultations, that in the future, legal education for the Bar in Wales should:

a. Continue to allow practice in Wales following the study of a law degree in either England or Wales;
b. Continue to allow practice in Wales following study of the vocational aspect of legal training in either England or Wales;
c. If changes to the Welsh legal system are made, to avoid these changes creating barriers to students entering the profession from England to Wales and *vice versa* (or creating additional hurdles / costs to do so); and
d. That Welsh legal education should remain a source of training for the international market.

97. It is suggested that providing university curricula address divergences in the law, to the degree required for their courses, and more importantly that they identify to students any relevant possibility of divergence and teach their students how to research the law, they will continue to appropriately educate future lawyers in Wales.

98. Concern about universities reflecting divergences between the law in England and Wales are probably over-stated. Law schools need to prepare students for a lifetime of legal practice in which the law will change. They serve students poorly if they simply teach what the law is at the time it is studied – students need to keep up with developments, they need a grounding in legal principles and method. To compare it with medicine, a kidney's function remains the same throughout a doctor's career, whereas a crime or tort may be redefined, introduced or abolished.

99. The most important thing, for lawyers and aspiring lawyers on each side of the border, is that they are aware that the law in Wales is not necessarily the same as in England. Specific training is not necessary. For example, until recently admission as a lawyer in any UK jurisdiction (or Ireland) sufficed to entitle one to be admitted to the Gibraltar Bar, without examination. Anglo-Welsh barristers of 3 years' practice can be called to the Northern Ireland Bar with a minimum of formality, and no examination on Northern Ireland land law. Northern Irish barristers can be admitted in England and Wales, or Ireland[38], equally easily. Anglo-Welsh lawyers frequently travel to smaller commonwealth jurisdictions and appear without any formal training in local law.

[38] https://www.kingsinns.ie/prospective-students/specially-qualified-applicants

100. The difficulty comes with having a fused jurisdiction. A lawyer in England may have no reason to suppose that a dispute arising in Wales engages different law. He or she therefore has no reason to consider that the law might be different, and to take the trouble to look up whether it is. Separate English and Welsh jurisdictions would flag up for lawyers practising in each[39] that these questions need to be considered.

13. What is the current provision for the Welsh language within the justice system and legal education in Wales? How should Welsh language provision within the justice system and legal education in Wales be improved?

101. There is a right for any litigant to have his or her case conducted through the medium of Welsh should he or she require this. Generally, the quality of instantaneous interpretation provided by the Court Service is very high. On the other hand, the Court may well require Court documents to be translated into English if the originals are to be drafted in and filed in Welsh and this can be an additional administrative burden on the party requiring the Welsh language to be used. This is to cater both for the monolingual English speaking opposing litigant and the fact that there is no guarantee that the judge hearing or dealing with the case will be bilingual.

102. Nevertheless, the current provision for the Welsh language within the justice system is generally good, even when considering the ability of the Court to determine issues of interpretation where both languages of a piece of legislation, for instance, have equal standing in order to decide the true meaning of that legislation.

[39] The Circuit support a system of simple mutual recognition, under which English barristers and solicitors would be able to practice in Wales, and vice versa, without formality.

103. The problem, if such it is, is with the uptake of the use of the Welsh language, particularly in civil litigation. Often the choice of representative in this regard is crucial. For the reasons previously discussed, the choice of solicitor or counsel based outside of Wales will reduce the likelihood of that person being able to conduct a case through the medium of Welsh, even if the other party (or even his or her own client) so desires and the Court's hands may thus be tied. Finally, it is perhaps a sad reflection of reality in the 21st Century, that it is often more expedient for a litigant to forego his linguistic rights in order to get a swifter form of justice.

104. In respect of legal education in Wales, once again, individual institutions in Wales should be contacted to explain their offering. The Circuit understands that Cardiff University, for example, has good provision for legal education through the Welsh language. Students in Cardiff University can study many core modules in Welsh, have a Welsh speaking personal tutor and that Cardiff University has, as of 01.04.2018, implemented its 'Welsh Language Standards' scheme. This scheme ensures Welsh is treated no less favourably than English and that Welsh speakers are aware of the services they are entitled to in Welsh.

105. The aspect of legal education that may need improving in this regard is the number of modules offered through the medium of Welsh at Welsh universities. However, this requires more individuals able to speak Welsh to be willing and / or able to teach law and / or on the BPTC through the medium of Welsh. This in turn may require thought as to how to make such employment more attractive and whether more can be done in this regard.

14. Is access to Welsh law properly available?

106. Its availability is no worse than Westminster-made legislation – Westlaw does a good job at indicating differences between English and Welsh provisions in the same legislation. And its drafting is often clearer than Westminster legislation.

Conclusions and Recommendations

107. In the light of the above, the Wales and Chester Circuit therefore supports the following recommendations:

- The devolution of powers in relation to the civil and criminal justice systems (civil law, criminal law, police, courts, tribunals, prisons, and the administration of justice) to the National Assembly for Wales;

- The creation of a devolved criminal legal aid system in Wales, based upon the principle of reasonable remuneration for work actually and reasonably undertaken as assessed on a case by case basis;

- The establishment of a Law Commission for Wales; and

- The creation of a distinct jurisdiction of Wales, with a law of Wales, and the creation of the Court of Appeal (Criminal and Civil Divisions) of Wales, the High Court of Wales and the Crown Court of Wales subject to future developments.