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Welsh Parliament
Legislation, Justice and Constitution Committee
Making Justice work in Wales
Response from: The Law Society

Introduction

The Law Society of England and Wales (the Law Society) welcomes this opportunity to respond to the Legislation, Justice and Constitution Committee's inquiry into making justice work in Wales.

As the representative body for more than 200,000 solicitors in Wales and England, the Law Society negotiates on behalf of the profession and lobbies regulators, governments and others. The Society also plays an active role in law reform, the effective operation of legal institutions and access to justice.

In Wales, the Law Society monitors, influences and responds to the devolution of law-making and the developing legal community in Wales. The Law Society's Wales Committee is an advisory committee which comprises specialist lawyers (not all of whom are solicitors) drawn from across Wales who volunteer their time.

This submission will briefly reflect on the Law Society's response to the report of the Commission on Justice in Wales (the Thomas Commission), before moving on to consider six broader themes that we believe the Committee should consider as part of its inquiry.

Commission on Justice in Wales

The Law Society welcomes the Thomas Commission's long-term vision for the future of justice in Wales. As the body of Welsh law grows, it is important that due consideration is given to the distinct needs of the Welsh public and the legal profession as they seek to ensure their businesses remain vibrant and sustainable going forward.

The overarching recommendation of the Thomas Commission is that justice be fully devolved to Wales. The Law Society has no objection in principle to this proposal. However, engagement with Wales-based members has unveiled a full spectrum of views on the matters considered by the Thomas Commission and specific concerns about the financial implications of greater devolution for the future accessibility and administration of justice in Wales.

The Law Society therefore believes that any further devolution of justice functions to Wales must be accompanied by an adequate commitment to funding from UK Treasury (i.e. a full Barnett consequential of spending in England) and meaningful intergovernmental collaboration with the legal sector to ensure its success. The ability of solicitors in Wales and England to practise across the border must be maintained without restriction, and the current single regulatory framework for solicitors across Wales and England should be preserved. The Law Society is also concerned with promoting the single jurisdiction on the world stage and the reputation of Wales and England as a global legal centre, whilst recognising the unique circumstances of Welsh law.

In that regard, the Law Society welcomes the Counsel General's recognition of the need for Welsh Government to be proactive in developing a jurisdictional solution to accommodate Welsh law and

the distinct needs of Wales without creating barriers for the operation of justice or the ability of practitioners to work across Wales and England.

The Law Society therefore calls for a holistic, coordinated and non-partisan approach to system planning and delivery; one hitherto impeded by the jagged edge of Wales' devolution settlement and political impasse.

Legal Aid

Significant reductions in legal aid funding since 2012, coupled with Wales's challenging geography and patterns of communication, have precipitated a crisis in terms of advice deserts, rendering people across large parts of the country unable to access high quality legal advice and representation.

Analysis of data from the Legal Aid Agency directory of providers (September 2019) and the Office of National Statistics (2017) reveals that there are only five providers of community care legal aid covering the whole of Wales (Cardiff, Vale of Glamorgan, Rhondda Cynon Taff, Swansea and Gwynedd). In other words, 77% of Welsh local authorities do not have a single community care legal aid provider.

The provision of housing legal aid fares little better; 49% of the Welsh population live in a local authority which has just 1 such provider. This has and will continue to have a negative impact on the lives of the Welsh public during what is likely to be one of the most difficult times in their life.

Pro bono services, such as those offered by Cardiff Lawyers Care in conjunction with The Wallich, are increasingly regarded as new oases of advice, providing free legal support to those who would otherwise be unable to afford it. While *pro bono* work undoubtedly makes an important contribution to society, it should not be regarded a substitute for a properly funded legal aid system. Practitioners who volunteer their time should also not be taken for granted. This is particularly pertinent to the Covid-19 recovery, as the immediate focus of practitioners who have previously had capacity and commitment to *pro bono* work will likely be on rebuilding the financial and commercial health of their practices.

Legal aid services are often provided by smaller law firms which need to be economically viable to survive. Such firms, however, face particular challenges which inhibit their ability to undertake legal aid work, including bureaucratic hurdles, cuts in fees and loss of expertise. Wales boasts a rich network of smaller firms - as the Jomati Review identified, a total of 43% of all Welsh firms employ 10 solicitors or less, while just 18% employ 50 or more. The Review also found that the percentage of older lawyers is noticeably higher in Wales than in England. Under the current regime, therefore, Wales is at a particular disadvantage when it comes to accessing public funds for solicitors.

The Law Society would welcome the introduction of a more robust and streamlined system for administering legal aid in Wales, as recommended by the Thomas Commission: "The funding for legal aid and for the third sector providing advice and assistance should be brought together in Wales to form a single fund under the strategic direction of an independent body." Such a system has the potential to level up advice provision across the country and, subject to the fair allocation of funds, provide a much-needed economic stimulus to indigenous Welsh firms.

The Welsh Government's Single Advice Fund has to date favoured large advice providers, such as Citizens Advice, who provide advice services nationally or on a regional basis. The Law Society

would welcome a change in the criteria which recognises the importance of solicitors' firms, particularly in rural localities, where there are often no other advice agencies. Enabling such firms to apply more easily to the Fund would enhance access to justice and help safeguard their economic resilience. Solicitors also often relieve pressure on individuals through helping with debt, employment and other social welfare problems, which in turn contributes to better health outcomes. In line with the preventative agenda of Future Generations legislation, the Law Society also believes that a mechanism should be established whereby solicitors working in health-justice partnerships can access funding from the health budget.

Criminal Justice System

The Law Society has previously expressed concern about the unsatisfactory current state of the criminal justice system. Following a prolonged period of underinvestment, it faces a number of challenges, including an ever-growing shortage of criminal duty solicitors, an increasing number of court closures, and inadequate prison provision.

Criminal defence solicitors have received no fee increase since 1998, leading many to eschew a career in this vital field and the sector to become an increasingly ageing one. In 2018, the percentage of criminal duty solicitors over the age of 50 stood at 48% in north Wales, 49% in south Wales, 62% in west Wales and 64% in mid-Wales. The comparable percentages for those under the age of 35 were 13%, 13%, 5% and 9% respectively. With insufficient numbers of young lawyers entering and remaining in the field, within five years' time there could be areas in Wales where people who have been arrested will not be able to access a duty solicitor.

Court closures have taken place at an unprecedented pace and scale over the past decade, leaving defendants, witnesses and practitioners having to travel further and longer to access court services. As at March 2019, Wales was home to 27 active HM Courts and Tribunals Service sites, down from 43 in 2015, while the number of magistrates' courts fell from 36 in 2010 to 14 in 2018.

The Covid-19 pandemic has also brought to the fore the unhygienic conditions in which practitioners work in courts to assist the smooth-running of justice, such as a lack of suitably large interview rooms in which to advise clients. While the potential opportunities that technology offer for virtual and remote hearings are great, they have yet to be fully tested and proven. Until such time as they are, there will remain the need for cases to be heard in public at convenient and safe locations. Of course, certain areas of work, such as jury trials and family law matters, will always require face to face hearings. The rollout of technology is therefore but a partial antidote to historic underinvestment in the court estate.

The inadequacy of provision for prisoners in Wales is by now well-rehearsed. The absence of facilities that can accommodate female or Category A offenders means that a significant proportion of Welsh prisoners serve their sentences in England; as many as 37% at the end of December 2018. Pre-release contact between a prisoner and their family is of critical importance for their eventual reintegration into society, but the long distances Welsh families often have to travel endangers this process and, in turn, recidivism outcomes. The Law Society welcomes the planned opening of the UK's first residential centre for women in Wales in 2021, but progress towards establishing parity of provision with male prisoners remains too slow. Meanwhile, overcrowding persists, as does the reality of offenders serving ineffectual and repeat short sentences, at great expense to the public

purpose. Bold steps are required to realise a whole-system approach which meets the unique socio-political circumstances of Wales. The recently published blueprints for the delivery of female offending and youth justice services make an initial move in this direction.

Whilst the Law Society agrees with the Thomas Commission's analysis of the deficiencies in the criminal justice system in Wales as it stands, devolution does not, in itself, offer a solution to these challenges. Even if the necessary enabling legislation was passed at Westminster, without full and appropriate funding for the operation of a devolved system being allocated by UK Treasury, it is unlikely that the Welsh Government would feel able to assume the new responsibilities. It is also important to consider the implications for effective scrutiny of any new justice functions by an already overstretched and under-resourced Senedd.

The Law Society anticipates that the forthcoming Royal Commission into the Criminal Justice System, announced as part of the Queen's Speech in December 2019, will offer an opportunity to further advance some of the Thomas Commission's proposals and engage in meaningful dialogue about the future direction of criminal justice policy in Wales. We would encourage the Committee to interest itself in the work and membership of the Royal Commission to ensure a strong Welsh voice.

Legal Profession

The Thomas Commission recommended that: "The present system where legal practitioners can practise in England and Wales and the legal professions are jointly regulated should be continued." This integrated and pragmatic approach is particularly welcomed and echoes the Law Society's call for the shared regulatory system to be maintained and developed. Removing the existing cross-border interoperability of legal professions would make little economic or business sense given that the practice of law will continue in a similar way irrespective of further devolution or, indeed, changes to the single jurisdiction.

The economic contribution of the legal services sector to the Welsh economy is well-captured in a 2019 report by the Wales Governance Centre. Their analysis identified that growth in legal activities GVA has been relatively rapid since 2013 and that estimated GVA in legal activities was £473 million in 2017, equivalent to £151 per person, up from £432 million in 2016. The Law Society is concerned with protecting and promoting this growth and the ability of solicitors in Wales to build on their current level of legal services activity.

If new bodies equivalent to the Law Society, Solicitors Regulation Authority (SRA) and the Solicitors' Compensation Fund needed to be created for Wales, then the profession could be faced with a significant increase in the costs of representation and regulation. Moreover, it is inevitable that many practitioners would still regard being qualified in England as advantageous in terms of prestige and their career development. Any duplication in regulatory structures could have repercussions for the recruitment and retention of professionals in Wales, thereby exacerbating the "brain drain" which already affects the Welsh legal sector so keenly.

Whilst supporting a unified legal education and training approach across Wales and England, the Law Society believes there is space within the unified regulatory structure for tailored provisions to

be made which take account of devolved arrangements. In that vein, the Law Society looks forward to working closely with the new Law Council of Wales which will seek to promote the interests of legal education and the awareness of Welsh law. The Law Society also welcomes the SRA's proposed addition of a Welsh language test requirement for the Solicitor's Qualifying Examination (SQE) so that qualified lawyers seeking admission have the option to demonstrate their language competence in either Welsh or English. This is a positive change which highlights the importance of the Welsh language within the single jurisdiction. However, it does not go far enough, and the Law Society would like to see a commitment from the SRA that this same courtesy be extended to domestic lawyers seeking qualification in the SQE from implementation date (Autumn 2021) (see *Welsh Language and the SQE* section below).

Investment in Technology

Legal practitioners, and the people they serve, need an infrastructure that can support a "digital first" approach to justice in Wales. Internet connectivity remains intermittent or non-existent in too many parts of Wales, and this is limiting the ability of practices, particularly those in rural areas, to take advantage of new technologies that could enhance their operations and services. The Law Society welcomes Superfast Cymru's reconfigured offer to law firms in Wales and their commitment to work in partnership on running solicitor-specific seminars, but believes Wales is still losing out to other parts of the UK. Legal services are a critical service for the public good and more investment in digital infrastructure is required of Welsh Government to address gaps in provision.

The ongoing Covid-19 pandemic has brought into sharp relief the need for significant investment in the IT infrastructure of law firms. Many continue to operate using on-premises servers and are yet to transition to cloud-based solutions. This has clear implications for the ability of staff to work from home, thereby impacting on business profitability, and has the potential to give rise to data management and compliance issues. In October 2019, Swansea University and the Welsh Government announced a £5.6 million investment in the Legal Innovation Lab Wales operation which is intended to help law firms innovate at the intersection of law and technology. The Law Society believes this investment should be prioritised towards rolling out cloud-based solutions, such as Microsoft 365, across all firms in Wales so as to establish a digital baseline.

Business Support

The Law Society fully endorses the aim of transforming south Wales into a legal centre, as recommended by the Thomas Commission, and looks forward to working with partners to explore how this can be achieved. However, it is vitally important that the benefits of this venture and complementary businesses support infrastructure are felt right across the country so that firms in lesser urban parts of Wales are not left behind. Aside from being legal advisors, many solicitors also double up as business managers. It is critical, therefore, that solicitors are able to navigate the latest advice and support packages available so as to enable them to make the right choices for their firms. The ongoing Covid-19 pandemic has highlighted this need more than ever, with firms facing unprecedented cash flow pressures and reduced fee income, putting many at risk of collapse. The Law Society is currently working with Business Wales to equip firms with the skills

they need to take advantage of new technologies and practices and looks forward to collaborating further to enhance the offer that is available.

The Law Society would also particularly encourage the Committee to consider the future design and accommodation requirements for civil justice in Wales. For various structural and cultural reasons, civil justice has historically served as the poor relation of its criminal and family counterparts in terms of resources, organisation and policy, the legacy of which remains clear today. The non-devolved tribunals, for example, are poorly accommodated. The location of the Cardiff Civil Justice Centre to the rear of the old General Post Office can only be described as obscure, while the fact that Employment Tribunals in Cardiff are held in the Magistrates Court is unsatisfactory. The Welsh tribunal system similarly lacks its own infrastructure of hearing and administrative facilities yet, as the Senedd goes on making distinct provision for Wales, the scope of the Welsh Tribunals' jurisdiction can only increase.

The importance of image for promoting south Wales as a centre of excellence for legal services cannot be overstated. The development of a new, purpose-built legal hub, co-locating civil courts, tribunal hearing rooms, accommodation for practitioners and research and training facilities, has the potential to place Cardiff in the top rank for hearing and professional facilities. Whilst recognising the significant cost implications of such a proposal, failure to invest will ultimately result in Cardiff losing out to other regional centres.

Welsh Language and the SQE

The way that solicitors qualify is set to change with the introduction of the SQE in the autumn of 2021. The SRA's current position is that SQE assessments will not be offered through the medium of Welsh from implementation date. Rather, the SRA is planning for an "incremental approach" to offering the SQE in Welsh and aims to assess demand for such provision over coming years. The reasons for this are cited as being the cost implications of translating the assessment questions and difficulty in ensuring equivalence between the English and Welsh versions. The Law Society regrets this decision and maintains the steadfast view that domestic lawyers seeking qualification should be able to do so using Welsh as their first language.

It is currently unclear whether the SRA is legally obliged to provide the SQE in Welsh, and there appear to be no current plans within Welsh Government to mandate otherwise through the Welsh Language (Wales) Measure 2011. However, the strong view of Welsh Government remains that the SRA should aspire, as a minimum, to providing the ability to answer questions in Welsh when the SQE goes live. With fewer than 18 months to go until then, clarity is urgently needed from the SRA on whether the first cohort of candidates will be able to undertake any part of their assessment in Welsh. If, as looks likely, the SRA cannot commit to this, then a transparent process should be established whereby the SRA works with partners, including Welsh Government and the Law Society, to map out a pathway for achieving linguistic parity within a sensible and mutually agreed timeframe. The Legal Services Board has identified the provision of assessment in Welsh as an area against which the SRA's next application will be assessed and we remain hopeful that we will reach a mutually acceptable solution soon.