

# **Independent Expert Advisory Committee for ongoing review of the operation of justice in Wales**

First Report

July 2019

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## Executive Summary

1. This report summarises the work of the Independent Expert Advisory Committee (“the Committee”) for ongoing review of the operation of justice in Wales. The establishment of a Committee was one of the recommendations of the Justice in Wales Working Group established during the passage of the Wales Bill. MoJ and Wales Office Ministers agreed to establish the Justice in Wales Working Group to consider the administrative and practical implications for the justice system of the emerging body of Welsh law made by the National Assembly for Wales (“the Assembly”) and the Welsh Ministers, and recommend improvements in administrative arrangements and procedures to ensure that Assembly laws are fully embedded in the justice system. The Working Group’s report included ten recommendations to Ministers and the Lord Chief Justice.
2. The recommendations of the Working Group were largely around strengthening the relationship between HMG and the Welsh Government ([Annex A](#)). The Working Group included representatives of MoJ, Wales Office, Home Office, Cabinet Office, the Attorney General’s Office, the Judicial Office, and the Crown Prosecution Service. The establishment of a Committee to undertake an ongoing review of justice in Wales was also a commitment made by ministers during the Parliamentary passage of the Wales Act 2017.
3. The Committee is distinct from the Working Group, as it is tasked with ongoing review of the operation of justice in Wales. The Committee draws together experts from the judiciary, the legal sector and operational bodies as well as officials from the Welsh and UK Governments to consider the key issues affecting the delivery of justice in Wales under the framework of the Wales Act 2017 (“the Act”) and to make recommendations where justice can be delivered more effectively.
4. This report is made by the Committee to the Lord Chancellor, with copies to the First Minister of Wales, the Secretary of State for Wales and the Lord Chief Justice. The purpose is to highlight key findings from the work of the Committee to date and put forward solutions to those findings.
5. Information about members of the Committee is at ([Annex B](#)) and terms of reference ([Annex C](#)). As part of its remit, the Committee is considering the effects of laws passed by the National Assembly for Wales and the UK Parliament on the operation of the justice system within the single legal jurisdiction in England and Wales and is working strategically to identify key challenges in the justice landscape in Wales, how they can be overcome and wider opportunities for better administration of justice. These challenges and opportunities cover all areas of the single legal jurisdiction, including criminal justice arrangements; courts and tribunals; prisons and probation; legal practice and the judiciary. The Committee is also monitoring any issues relating to the relationship between reserved and devolved tribunals. The Committee is also considering the wider implications of policy developments in UK government on the operation of justice in Wales, in order to recommend sustainable long-term solutions that would improve delivery. This work provides opportunity for a structured approach to tackling challenges identified in this first report on the operation of justice in Wales.

6. The key issues the Committee are currently focusing on are divergence in laws and accessibility of Welsh laws. The main priorities are to ensure that the impacts on the justice system of diverging laws and legislation are properly identified, accessibility of Welsh laws is improved and that there is continually improving collaboration between the MoJ and Welsh Government officials.
7. This Report reflects the range of views from Committee members. The UK Government and the Welsh Government acknowledge the differences in their respective positions on the devolution of justice. The governments' contributions to the work of the Committee do not affect these positions. The Committee acknowledges that the Welsh Government has commissioned Lord Thomas to undertake a review of justice arrangements in Wales, which is due to report in the Autumn. The Committee's considerations set out in this report have been made without prejudice to the work of Lord Thomas's review. Members of the Committee have engaged with Lord Thomas and his commission and will be interested in seeing his final recommendations in due course.

## Context

8. Since the passage of the Government of Wales Act 2006, the National Assembly for Wales has gained legislative competence over matters that affect the day to day lives of every person in Wales. The Assembly is responsible for legislating in relation to matters such as healthcare, education, housing and social care, most of which interact with matters that remain reserved to the UK Parliament. Justice is perhaps one of the areas with greatest level of interaction between devolved and reserved matters. For example, not only must healthcare and education be provided to those in prison or other forms of detention, but often devolved matters have a significant bearing on the root causes of offending at an early stage: family and social life, substance misuse and other health issues as well as education.
9. Similarly, most devolved policies rely on the justice system in order to ensure they work effectively: from the civil disputes over housing to criminal offences relating to devolved matters, Assembly legislation is likely to impact the justice system to some degree and legal professionals, the judiciary and the general public will need to be aware of the different approaches taken in Wales and in England
10. It is vital, therefore, under the current devolution settlement, that in order for justice to be delivered effectively in England and Wales, there is a close and collaborative relationship between devolved and reserved authorities. There must be clear mechanisms in place to ensure that the interface, in terms of justice, between reserved and devolved matters is identified and managed appropriately by MoJ and the Welsh Government. Those responsible for reserved and devolved policy and delivery of services in Wales need to be fully aware of their duties, obligations and the impacts of the outcomes they are trying to deliver.
11. There are many examples of good practice and collaborative working that are improving the delivery of justice in Wales. The Committee recognises the examples of good working relations in the context of effectiveness of the operations of the justice system. The Committee will evaluate the situation going forward to identify lessons learned and focus attention on areas where improvements can be made. Some of the forums established to enable closer working in Wales include:
  - a. All Wales Criminal Justice Board – this provides a multi-agency strategic approach to improve the efficiency and effectiveness of criminal justice services in Wales. Provides the strategic priorities for local criminal justice boards, and strategic direction for the Integrated Offender Management (IOM) Cymru Board
  - b. IOM Cymru Board – this provides governance and strategic direction for criminal and social justice partners, strengthen joint working and shared responsibility to deliver integrated services to prevent crime and reduce offending and reoffending, and ensure the effective delivery of the ‘Framework to support change for those at risk of offending in Wales 2018-2023’.

- c. Justice in Wales Strategy Group – this ensures engagement across the Ministry of Justice and Welsh Government on key areas of policy development and reform, to jointly deliver the best possible outcomes across the justice system for Wales.
- d. Wales Youth Justice Advisory Panel – this assists Welsh Government and the Youth Justice Board to implement policy that prevents offending and reoffending by children and young people in Wales
- e. Women in Justice – this provides governance and strategic direction for criminal and social justice partners, ensuring the effective delivery of the women in criminal justice agenda in Wales and implementation of relevant strategic/policy direction. This forum reports to the IOM Cymru Board in relation to key decisions and developments to support its objective of developing a programme of work as directed by the All Wales Criminal Justice Board.
- f. WG Reducing Reoffending Pathways Group – this informs strategic planning around reducing reoffending and crime through contributing to a better understanding of offending related need in relation to the reducing reoffending pathways; scoping existing provision; and developing objectives, which informs planning and commissioning decisions. Provides advice to the IOM Cymru Board to support the ongoing development and delivery of the ‘Framework to support positive change for those at risk of offending in Wales 2018-2023’.
- g. The Lord Chancellor’s Welsh Language Standing Committee – takes a cohesive approach to ensuring that justice agencies operational in Wales or whose work has a bearing in Wales, treat both the Welsh and English languages equally in the administration of justice. It has within its membership members of the judiciary, the Law Society, the Bar, Welsh Government and the Welsh Commissioner’s Office.
- h. Substance Misuse National Partnership Board – this oversees the delivery of the Substance Misuse Strategy for Wales and its associated delivery plan. Guides and monitors progress and facilitates co-ordination between Welsh Government, statutory agencies and the third and independent sectors.
- i. Chairs of the Area Planning Boards Board – there is a monthly meeting with Welsh Government and Public Health Wales (PHW) to discuss partnership priorities. The priorities are:
  - i. Environmental considerations – creating a health and wellbeing environment across the prison
  - ii. Mental health - Developing consistent mental health, mental well-being and learning disability services across all prisons that are tailored to need
  - iii. Substance misuse - Producing a standardised clinical pathway that integrates with psychosocial services for the management of substance misuse in prisons in Wales
  - iv. Medicines management - Developing standards for medicines management in prisons in Wales

- j. Additionally, to support delivery of these key strategic priorities Her Majesty's Prison and Probation Service (HMPPS) and the Welsh Government are also developing joint prison health indicators that enable us to monitor progress. These will be supported by robust performance information on the delivery of health services in custody. Currently, there are inconsistent reporting arrangements across Local Health Boards (LHB) in respect of prison health performance – having a set of common indicators that are measured across all will assist us in identifying performance issues monitoring progress.
  - k. Each prison has a prison health partnership board where the LHB and Prison come together to discuss issues. Welsh Government also have a monthly meeting with the healthcare leads at each prison to take forward the priorities and share good practice, concerns etc.
  - l. In 2018 HMPPS in Wales and the Welsh Government agreed a strategy for learning and skills and also established a learning, employment and industries committee to oversee the implementation of the learning and skills strategy. This is chaired by HMPPS in Wales – attendees include all governors in Wales, National Probation Service (NPS) representative, Community Rehabilitation Company (CRC) representative, Prison Governor Director, Regional Head of Learning and Skills, Estyn, Welsh Government, New Future Network representative for Wales and Co-Commissioner HMPPS in Wales. This committee meets quarterly and there are task and finish groups outside of these meetings to take forward the work.
12. The Committee does not seek to duplicate the work of these groups; its role is to maintain oversight of issues affecting the effectiveness of the justice system within the single legal jurisdiction of England and Wales.
  13. The Welsh Government has commissioned Lord Thomas of Cwmgiedd to review the operation of the justice system in Wales, including the broader question as to whether there should be any further devolution of the justice system to Wales. There will inevitably be some crossover between the work of this Committee and the Commission, and the Committee will be interested in the findings of the Commission when they emerge.
  14. The Committee began work in May 2018 and has since discussed a broad range of issues relating to the operation of justice in Wales. The Committee is chaired by a senior Cabinet Office official and is independent of MoJ, Wales Office and the Welsh Government. The Committee is free to consider any issues associated with the practical operation of the justice system in Wales within the single legal jurisdiction of England and Wales.
  15. It became apparent in the early stages of the Committee's work that two key issues affecting the delivery of justice in Wales focus around divergence of laws and accessibility of Welsh law. Divergence occurs when there is a difference in the law made by the Assembly and that made by the UK Parliament for England. Accessibility is the challenge faced by the judiciary, practitioners and litigants alike in understanding which laws apply. The Committee has also considered how improvements may be

made within the justice system to complement the work of reserved and devolved services in Wales.

16. The Committee also highlighted the need for more collaborative and strategic working between the MoJ and Welsh Government to ensure that the impact on both reserved and devolved functions is considered properly at an early stage. The Committee is currently considering ways in which the MoJ could offer practical help to stakeholders in relation to the divergence of laws within the England and Wales jurisdiction, and to improve accessibility of Welsh laws, to complement Welsh Government work in these areas. Other key areas relate to prisons and courts reform, which have the greatest potential impact on devolved matters (on court reform this relates to access to justice and for prison reform, it is largely around integration with devolved services such as education and health, housing and social services).

## Accessibility of Welsh laws

17. UK legislation is relatively accessible in England and Wales; statute is available free of charge on the UK Parliament website and lawyers and private individuals alike are able to access relevant law in a thematic way using a variety of commercial publications and digital tools. However, the law on a particular subject in Wales (and indeed in the UK) may not be available in one place, but across case law, primary and secondary legislation, together with other materials such as official guidance, rules of court and practice directions that could affect legal rights and obligations. This is further complicated by the fact that by volume, the majority of legislation is secondary legislation, much of which amends other pieces of legislation – and there are frequent changes that need updating. Accessing relevant law thematically can thus be challenging and require specialist skills to identify, ascertain and understand the current law.
18. It may be particularly challenging and difficult to identify and access the law in relation to a particular subject if it relates to a devolved matter in Wales. Welsh law (the law as it applies to Wales) is contained not only in Acts of the National Assembly for Wales and subordinate legislation made by the Welsh Ministers, but also in enactments of the UK Parliament and Government. Acts of Parliament routinely contain provisions that apply to Wales only, to England only or to England and Wales. Often this patchwork also includes separate provision for Scotland and Northern Ireland which adds to the complexity. For example, a family case might involve a range of issues upon which the Assembly may have legislated including child welfare, housing etc. Yet UK legislation or case law will also be relevant to the case. The parties involved, lawyers and judges will all need to know the relevant law. Currently this may, for example, involve a search of a combination of sources including commercial provider search software and publicly available sources – primarily the [legislation.gov.uk](http://legislation.gov.uk) website, but also the Welsh Government's Law Wales website.
19. The Committee suggests that the situation is more challenging in respect of devolved matters in Wales because it appears that some commercial legal text providers do not provide a dedicated tool to search Welsh specific laws. A similar issue arises in respect of publications and journals. Given the relatively low number of practising solicitors in Wales (approximately 3,743 practising solicitors as compared to 143,198 across the whole of England and Wales) and the proportionately low volume of Assembly law in existence, there was anecdotal evidence that commercial providers did not have sufficient demand to provide a Welsh-focussed tool.
20. The Committee has examined the challenges in connection with access to Welsh laws as set out below.

## Litigants in Person

21. The House of Commons briefing paper (07113, 14 January 2016): *Litigants in person: the rise of self-represented litigants in civil and family cases* (Gabrielle Garton Grimwood) suggests that (across England and Wales) the proportion of litigants in person in civil and family courts has increased since the Legal Aid Sentencing and Punishment of Offenders Act 2012 changed the scope for legal aid on civil and private law cases in England and Wales from April 2013. There has therefore been an increasing number of individuals resorting to ‘self-help’ in seeking to access laws. Many of these litigants in person would rely on online sources, but online sources are not as easily available to the public – particularly those who may be digitally excluded – as they are to the professional subscriber.

## Welsh language

22. Under the Welsh Language Act 1993, litigants have a right to use the Welsh language in legal proceedings. Both the Welsh Government and UK Government promote the use of the Welsh language and legislation is made by the National Assembly for Wales in both Welsh and English. The “practice direction relating to the use of the Welsh language in cases in the civil courts in or having a connection with Wales” (4 October 2018) also provides for the use of Welsh language in civil proceedings. The purpose of this practice direction is to reflect the principles of the Welsh Language Act 1993 and the Welsh Language (Wales) Measure 2011 that in the administration of justice in Wales, the English and Welsh languages should be treated on the basis of equality. However, commercial law publishers currently do not provide information about law in the Welsh language. So it would be impossible for some litigants to access law in the Welsh language. This might be quite challenging in situations where proceedings would be conducted in the Welsh language.

## The Judiciary

23. Members of the judiciary can access Welsh law via Law Wales and National Archives (legislation.gov.uk) website, which readily allows a judicial user to obtain freestanding copies of Acts of the Assembly and Statutory Instruments (SIs) bilingually. Explanatory Notes can also be accessed. However, it appears that there is presently no straightforward way of establishing which Statutory instruments (SIs) or Guidance Notes have been made in respect of that legislation using these sites. This is particularly problematic in the UK as a whole as well as for Wales.
24. The Assembly website can also help the judiciary to access and understand forthcoming changes, but only Law Wales (to some extent) and the legislation.gov.uk website (the official source) provide public access to the law in Wales.
25. Members of the judiciary also have access to commercial software such as Westlaw. Commercial tools offer an enhanced service allow users to choose to browse Assembly legislation. In the case of Westlaw, the search facility allows an Act to be selected e.g. Housing (Wales) Act 2014 and the facility also has a dropdown menu that includes: commencement; all legislation citing; SI made under this Act; Articles and Journals; Definitions and Insight. The “SIs made under this Act” section is - most

useful - where all the relevant material is available. Under the Social Services and Well-being Wales Act 2014 for example, it identified 48 different sets of Regulations. There may however remain a gap in identifying the appropriate link to Codes of Practice, particularly when using commercial sites. It is the Welsh Government's ambition that the Law Wales/Cyfraith Cymru website will address this issue by locating access to the primary, subordinate and quasi-legislation in one place.

26. Unfortunately, despite the fact that Under the Welsh Language Act 1993, litigants have a right to use the Welsh language in legal proceedings, legislation available via commercial providers is presently only available in English. It may also be necessary to cross-refer between English and Welsh language text legislation in order to interpret the intent accurately. It is also important to note that whilst members of the judiciary may have access to this commercial provider, members of the public or legal profession will not unless they pay for it.
27. The Wales Training Committee of the Judicial College have an important role to play in the promulgation of the laws in Wales as part of the education of the judiciary already undertaken by the Judicial College. Increasing divergence between the laws made in Wales and the laws made in Westminster necessitates greater consideration of the need for specific education which highlights and explains to the judiciary what the differences are and how to consider 'cross-border' issues. This potential need for a different future approach to judicial training will need to reflect the position that divergence occurs where there are two sources of legislation and therefore is not an issue appertaining solely to Wales but to both Wales and England. Adequate funding would be necessary if this type of training is to be provided.
28. Some of the challenges in connection with accessibility are not as a result of Welsh devolution but as a result of the challenges of establishing a consolidated or codified statute book. Generally speaking, the law across the UK is not available thematically via a public platform, however it is more readily available in England via commercial platforms than it is in Wales. The Committee suggested that the central issue was access to consolidated legislation without a subscription service which provides consolidated texts of law. This applies to all jurisdictions and is an issue for litigants in person and practitioners in all parts of the UK.
29. The Committee suggested that, although statute was accessible publicly free of charge, this was not always the case regarding thematic access to law. The Committee considered wider issues. For example, people's right to access law. It suggested that if legislatures continually change people's rights, should they also make the consolidated legislation available at public cost? The Committee suggested that it would be useful to explore options on how people can access consolidated legislation without paying a subscription to private companies who provide this service. The Committee also acknowledged that it may not be commercially viable for private commercial providers to keep some areas of law updated.

## Welsh Government and Counsel General initiatives to improve accessibility of Welsh law

30. The Committee welcomed the Welsh Government's programme of work to improve accessibility of Welsh law, soon to become a statutory duty assuming the Legislation (Wales) Bill is passed by the Assembly (see below). In particular, the Committee notes the Welsh Government's 'Law Wales' website (a collaboration with Westlaw UK), which aims to provide an overview of Welsh law and commentary on specific topic, so relies on contributions from practitioners and other professionals. It covers issues relating to the economy, public services, environment and culture. It also provides users with key legislation under different subject matters that approximately correspond to the competences devolved to the Assembly. It remains, however, a work in progress.
31. At the request of the Welsh Government, the Law Commission carried out a project on the Form and Accessibility of the Law applicable in Wales and reported on 29 June 2016. The Welsh Government responded on 19 July 2017 and agreed to the Law Commission's recommendation that *"...a sustained long term programme of consolidation and codification of Welsh law...is necessary to ensure that the laws of Wales are easily accessible"*.
32. To that end, the Welsh Government introduced the Legislation (Wales) Bill to the Assembly on 3 December 2018. The Bill's aim is to make Welsh law more clear and accessible. It makes provision about the interpretation and operation of Welsh legislation, and requires the Counsel General and the Welsh Ministers to take steps to improve the accessibility of Welsh law. One of the main goals of the Bill is to facilitate consolidation, and ultimately a form of codification, of Welsh law. This will include remaking legislation within devolved areas that can currently be found in Acts of the UK Parliament.
33. In addition to the Bill, the Welsh Government is working on other projects which will eventually form part of the programme of work required by the Bill. This includes collaboration with The National Archives – in advance of the codification initiative that will take a generation or more to complete – on a system of categorisation of this law. This will enable legislation to be arranged in accordance with its content rather than when it was made. Publishing legislation differently in future will make it easier to find and, fundamentally, to help people be aware of its existence. Statutory Instruments are so numerous and made so frequently that it is very difficult to stay current. And the link between the instruments and the Act they are made under is also unclear. Organising this legislation by subject matter, especially where instruments implement European law, will be a significant breakthrough.
34. Discussions are also underway with The National Archives about the Welsh Government's taking a more prominent role in the way Welsh laws are published. This is the responsibility of the Queen's Printer and fulfilled in practice by the Archive's legislation team in Kew Gardens. They have been making good progress recently incorporating amendments to existing legislation made by subsequent legislation for the purpose of publishing the statute book in up to date form. This progress has, however, been limited mainly to primary legislation and only to the English language text of Welsh primary legislation. New arrangements are in the process of being

agreed under which the task of updating Welsh legislation – in both English and in Welsh – will be taken over by the Welsh Government. The Welsh Government's first priority in fulfilling this new responsibility will be to deal with the discrepancy that currently exists between the English language and Welsh language texts of the published law. And ultimately, the Welsh Government's aim is to ensure that all Welsh legislation on the statute book is published in up to date form.

35. The Welsh Government also intends to relaunch the Cyfraith Cymru - Law Wales website in 2019. This site already serves a useful purpose but its content is limited, so it currently falls short of people's expectations. The Counsel General for Wales has emphasised that it needs to be developed in collaboration with the Welsh legal community and wider civic society.
36. The Committee welcomed the Counsel General's work to improve accessibility of Welsh laws, and his intention to re-launch the 'Law Wales' website. The Committee noted that this provided an opportunity for further collaborative effort regarding steps to improve the issue of accessibility of Welsh laws.
37. The Committee suggested that MoJ needed to engage with the Welsh Government to explore further opportunities for joint working. Proposals may have resourcing implications and steps should be taken to identify the cost implications of proposals. Ministers need to know that there are costs associated with proposals, as this would enable them to make policy decisions on the way forward.

### **Committee's recommendations on accessibility of Welsh laws**

38. **The Committee supports the further work being undertaken in Wales with a view to improve accessibility to laws made in Wales and recommends that the MoJ should:**
  - a. **collaborate with the Welsh Government on its programme of work to improve accessibility of Welsh law**
  - b. **work with the Welsh Government and National Archives to see if Law Wales and legislation.gov can enable better dedicated search facilities similar to that provided by commercial providers**
39. **The Committee also recommends that MoJ could consider the following practical steps to improve accessibility of Welsh laws, for example:**
  - a. **potential joint approaches with the Welsh Government to commercial publishers on the need to improve publication of law (to include the provision of Welsh specific search software) and take into account diverging English and Welsh laws and the Welsh language**
  - b. **potential joint work with practitioner organisations to produce a guide to laws applicable to Wales**

## Divergence of laws

40. Divergence in law exists not only between different enactments (e.g. those passed by the Assembly on the one hand and by the UK Parliament on the other) but also within (UK) enactments. It is possible to have diverging law made under a single piece of primary legislation, for example under the Health Act 2006, which makes specific provision for Wales.
41. Recent examples of potential divergence are the Welsh Government's intention to legislate to remove the defence of reasonable punishment in relation to corporal punishment of children; and proposals to allow 16 and 17 year olds to vote in Assembly and Welsh local government elections, and the Renting Homes (Wales) Act 2016 which makes wholesale changes to the law on residential landlord and tenant in Wales.

## Definition of Homelessness

42. A further example where divergence has already affected delivery is in relation to legislation on homelessness. If an individual is "threatened with homelessness" they are eligible for legal advice. In 2015 a new definition of 'threatened with homelessness' was introduced in Wales through the Housing (Wales) Act 2014. Within the Act, homelessness was defined as anyone who is threatened with homelessness within 56 days, whereas the definition for England was anyone who is threatened with homelessness within 28 days. This application of the definition of homelessness meant access to Legal Aid in this area was available to people in Wales 28 days before those in England and the internal assessment procedures, as well as that of providers of legal aid (solicitors) needed to reflect that.
43. As of 3rd April 2018 the Homelessness Reduction Act 2017 has revised the definition in England to 56 days. The period is now aligned at 56 so both England and Wales are once again following the same definition, but the effect of this has been two changes and a period of divergence.
44. The Committee noted that the systems and processes that have been put in place to manage divergence are currently working well with good engagement between MoJ and the Welsh Government. The Committee however suggested that the current system could come under greater strain if divergence increases. There are no dedicated systems in place at delivery and operational level to manage anticipated further divergence in future. In particular, there is a need to ensure that operational arms are prepared for the impacts and changes brought about once legislation has been enacted, for example on services in prisons where divergence might mean that prisoners in the same cell may have committed the same offence but would have different sentences etc or when changes brought about by the MoJ impact devolved services.

45. As with the cost impacts of initiatives to improve access to Welsh law, Ministers need to know that there are cost and resource implications in arrangements and proposals to better manage increasing divergence in laws.
46. Divergence affects the justice system in several areas.

## **Understanding and applying laws made in Westminster and laws made in Wales**

47. Divergence of laws in England and Wales also means that there are potential complexities for practitioners, members of the judiciary and others involved in the administration of justice in applying the law, for example a remedy or sentence relating to a particular matter could be different in Wales compared with England. This might also impact on legal advice provided by legal professionals and the application of law by judiciary. Increasing divergence of laws made in England and laws made in Wales introduces the potential for increased misapplication of the law. For example, the Welsh Government is bringing forward proposals to remove the sanction of imprisonment for the non-payment of council tax with effect from April 2019. Legal advice provided by legal professionals and the application of law by the judiciary must be cognisant of differences between the law as it applies in England and the law as it applies in Wales.

## **Legal education and training**

48. Currently, practitioners undergo undergraduate and academic professional education and training. Whilst Welsh legal education and training providers now offer Welsh-focused content, very few providers in England and Wales have dedicated modules covering Welsh law and therefore there is a risk that in a continuously diverging landscape, a significant proportion of practitioners will be unaware of the divergence between laws made in England and laws made in Wales.

## **Operational delivery and resources**

49. Divergence of law requires justice delivery bodies to develop specific arrangements which differentiate between the laws which apply in Wales and the laws which apply in England. Court IT systems and software must be able to accommodate divergent laws. All delivery bodies need to consider specific business planning arrangements to adequately anticipate and reflect the impact of distinct Welsh laws, for example legislative impacts on court volumes and prison populations may be different to England. There would also be additional training for court staff to understand how different laws apply.
50. A significant impact that has already been felt in some areas is the cost of developing new or existing IT systems which need to operate slightly differently depending on divergent legislation. The most prominent example of this is the changes required to the HMCTS online portal for possession claims. As a result of the Renting Homes (Wales) Act 2016, there is a slightly different pathway for landlords claiming possession in Wales compared to England. While the legislation is relatively clear

to distinguish, users of the online system should expect to see some different forms if they are using it for cases in Wales. The development of the system to cope with this difference is both costly and time-consuming and this will need to be considered each time legislation changes the way any of HMCTS' systems operate.

## Other challenges relating to divergence of laws

51. These include:

- a. the transfer of subordinate legislation making powers under successive devolution settlements makes it unclear which body has the power to make law or to exercise legal powers.
- b. primary legislation in the devolved areas may be amended by both the UK Parliament and the National Assembly. This means that even within a single section, there is a need to identify the different provisions which apply to different administrations. (for example - Section 569 of the Education Act 1996)
- c. the traditional style of amendment employed in respect of UK Parliament legislation is just to publish the amendment – not the amended text (although this does not relate solely to Wales). Unless it is related back to the statute that is being amended, its meaning may not be clear; and
- d. the sheer volume of legislation and the fact that different rules applicable to a given situation are not to be found collected together, but across the statute book. The Law Commission 2016 report on the accessibility of the law applicable in Wales gave the following example: depending on how widely “the law of education” is defined, the law which applies to education in Wales is to be found in between 17 and 40 Acts of Parliament, 7 Assembly Measures and 6 Assembly Acts, as well as hundreds of statutory instruments.

## Divergence and the Courts

52. Divergence also has implications for the courts, although impacts so far have been insignificant. This appears to be because the courts adopt a consistent approach to dealing with all persons brought before them, irrespective of the source of the legislation creating the alleged offence for which the person has been prosecuted. The processes and procedures of the court apply equally to any case and would be applied to any legislation that might bring a divergence in criminal offences.
53. HMCTS is confident that any crimes under Welsh legislation can be readily dealt with by the court applying standard procedures. So the impact of divergence on some court business has also been minimal (for example, in relation to Family work, the Social Services and Well-being (Wales) Act 2014 was implemented in 2016). The Judiciary and family Legal Advisers received training on this legislation, which it was anticipated would have a major impact on the Family Courts in Wales. The Act imposes greater duties on Local Authorities, Health Boards and Welsh Ministers than on those in England, requiring them to work to promote the well-being of those who need care and support, or carers who need support, including adults as well as children. It was therefore expected that the Act's implementation would have a major impact on the courts, for example by the court having to deal with challenges that local authorities had not provided the level of level of care and support required by the Act. In reality, there has been a minimal impact on the courts.

## **Crown Prosecution Service approach on divergence**

54. The impact of divergence has also not been problematic in terms of CPS approach in prosecuting cases for different investigators, such as HM Revenue and Customs and the Department for Work and Pensions, who may have divergent enforcement policies regarding referral of cases to the CPS for a charging decision. This is because the broad Code principles can be applied flexibly and supplemented by dedicated CPS policy, guidance and Charging Standards, as necessary.
55. The CPS has suggested that any crimes under Welsh legislation can be readily accommodated into their policies and practice. However, if specific guidance is required in relation to a particular offence, they can address this in their legal guidance and/or by amending or even creating a relevant Charging Standard, as they are designed to assist prosecutors and police officers in selecting the most appropriate charge, in the light of the facts of the case.

## **Impacts of divergence on magistrates and their legal advisers**

56. Divergence has an impact on the operations of magistrates and their legal advisers. The Committee has suggested that a process is required to ensure that courts, prosecuting authorities and defence solicitors receive timely notification of legislation that creates a divergence between English and Welsh legislation, for example distinct offences. Magistrates and Legal Advisers need to be equipped to understand and work with divergence as part of the training programme prescribed by the Judicial College. Guidance in respect of legislative change is ordinarily provided by Home Office circulars, the Judicial College and the Justices' Clerks Society. This guidance needs to reflect legislation applicable only to England and only to Wales.
57. When sentencing defendants, magistrates rely on sentencing guidelines set by the Magistrates' Sentencing Council to ensure consistency of approach. It is important to ensure that this consistency applies across board. The JSII process should however ensure that any downstream impacts, including changes to sentencing guidelines, will be picked up.
58. The main source of legal reference used by Legal Advisers is Stone's Justices' Manual, which does not include legislation specific to Wales. This needs to change, or an alternative source needs to be used. This is particularly important in respect of matters that rarely come before the court, as it is difficult for Legal Advisers and magistrates to retain expertise and good working knowledge of such matters. For example, the legislation introducing Adult Protection and Support Orders came into force in Wales on 6th April 2016, but applications have been rare, making it difficult to build and retain good working knowledge to assist in advising magistrates.

## Current efforts to manage divergence

59. The need to identify and manage divergence was recognised by the Justice in Wales Working Group, which recommended that:
60. *“The Ministry of Justice should establish clear mechanisms for ensuring that (a) the distinctive needs of Wales are fully considered in the development and implementation of policy, and the Welsh Government is involved where appropriate; and (b) information from the Welsh Government and NAW (for example about upcoming legislative changes) is effectively communicated to all relevant parts of the justice system”.*
61. As of 1 April 2018 the Assembly is required to publish a statement by the person in charge of a Bill upon introduction of the impact of the Bill on the justice system. There are a number of arrangements currently in place to manage the impact of divergence within the single jurisdiction to ensure that the justice sector works closely and collaboratively with devolved agencies in Wales so that policies, strategies and objectives can be delivered effectively.
62. The Committee acknowledged that efforts have been made by officials to manage divergence. For example, MoJ worked closely with the Welsh Government to successfully implement a Justice System Impact Identification (JSII) form, which allows direct contact between Welsh Government officials and relevant policy officials within the MoJ and its delivery arms to ensure that potential impacts are identified before Bills are introduced into the National Assembly for Wales. This allows relevant steps to be taken to ensure that Welsh legislation can be implemented properly and effectively. In addition to primary Assembly legislation, this process applies to significant subordinate legislation made under Assembly Acts made after 1 April 2018. The Justice Impact Test process (the system by which the impact of UKG legislation on the justice system is identified) (JIT) can be used to identify and record instances where England-only legislation is created. The JIT process requires policy leads to state whether the legislation applies to England only and this information is used to identify all such legislation since the process began.
63. The Committee noted that increasing divergence of Welsh and English law is inevitable given that there are two legislatures making laws within the England and Wales jurisdiction. The Assembly will continue to develop legislation that creates laws that apply only in Wales, some with new criminal offences, licensing provisions, enforcement measures and more, all having varying degrees of impact on the UK justice system, courts and tribunals. Similarly, England-only legislation passed in the UK Parliament may require different approaches to justice delivery when compared against arrangements that are in place in respect of Welsh legislation, and may have impacts on devolved services. The system would increasingly become unmanageable, so more steps need to be taken to further strengthen the system.

64. The Committee suggested that it was important to identify what more can be done to address the practical operational implications for the justice system of legislative divergence. The Committee highlighted:
- a. the risk of duplication of enforcement of laws originating within Wales with provisions for enforcement that already apply on a England and Wales basis or UK basis;
  - b. the need for those involved with the operation of justice to be aware of and understand differences which could exist when cases originate from (or impact on) Wales, e.g. for the CPS in terms of advice on charging/prosecuting, and courts in terms of hearing cases of common assault on children;
  - c. the need for awareness and understanding of the impact on the police of divergent laws; and
  - d. the need for general awareness of divergent laws across the justice landscape.
65. The Committee also thought it was important to consider what can be done in the short term to ensure robust, effective management of divergence, for example more robust and closer collaboration and engagement between MoJ, Welsh Government and other partners, such as: the Judicial College regarding dedicated training for members of the Judiciary; professional training providers for inclusion of Welsh laws as part of practitioners continuous professional development; legal education providers and regulators to support the development of Welsh law in education and training programmes.

### **Committee's recommendation on divergence**

**66. The Committee recommends that:**

**67. MoJ and the Welsh Government should consider the following:**

- a. **practical arrangements should be put in place to ensure that delivery arms and devolved bodies are notified of divergence before divergent legislation is implemented to enable them to put in place measures to identify, agree and manage any impacts effectively.**
- b. **an awareness campaign to inform stakeholders about divergence issues**
- c. **ensuring that training for practitioners reflects divergence**
- d. **work with the Law Society and Bar Council to engage legal education providers and ensure they adapt courses appropriately.**

## Background

68. The Justice in Wales Working Group was established in the context of debates about the nature of justice devolution during the passage of the Wales Bill, and the terms of reference particularly emphasised the issue of diverging law between Wales and England. The working group sought to promote and ensure the orderly and effective delivery of justice for the people of Wales and recommended that:
69. *“The UK Government should work with the Welsh Government to establish a non-statutory expert advisory committee to keep under review the operation of the justice system in Wales. The membership should draw on expertise from the justice sector and its chair should be independent of MoJ, Wales Office or the Welsh Government.”*
70. Similarly, during the passage of the Wales Bill (2017) through UK Parliament, UK Ministers made a commitment for the UK Government to establish a non-statutory, independent committee to pursue ongoing review of the delivery of Justice in Wales. The committee was envisaged as an independent body to undertake an ongoing review of the justice system in Wales and advise the MoJ on potential measures that could be employed to ensure the effective delivery of Justice in Wales despite the persistent impacts of diverging Welsh and English law.
71. Subsequently, in early 2017, the terms of reference and proposed membership for the committee were agreed by the Lord Chancellor, Lord Chief Justice and Secretary of State for Wales and the prospective Committee members were approached.
72. Since 1 April 2018 the Wales Act has been fully in force (some provisions having been brought in earlier when it gained Royal Assent in January 2017). The Welsh devolution settlement up until 1 April 2018 was based on a conferred powers model. Powers that were devolved to the National Assembly for Wales were listed in Schedule 7 to the Government of Wales Act 2006 (GoWA). But the recent Wales Act 2017 (the Act) put in place a new reserved powers model of devolution in Wales under which any matter not listed in the new Schedule 7A to GoWA is devolved. More information on the Welsh devolution settlement is at ([Annex D](#)).
73. England and Wales continue to have a joint legal jurisdiction (the single legal jurisdiction of England and Wales) with a combined administrative arrangement for delivering justice within the legal jurisdiction. The operating model on the joint legal system serves the whole of England and Wales and aims to provide access to justice.
74. The main HM Courts and Tribunals Service (HMCTS), HM Prison and Probation Service (HMPPS) all have operations that encompass the whole of England and Wales, with dedicated visibility in Wales enabling a shared system to administer justice within the England and Wales legal system.
75. The justice delivery agencies are therefore geographically dispersed across England and Wales to provide the system, including infrastructure and resources that facilitate the delivery of justice services in England and Wales. They also provide the support necessary (across England and Wales) to enable the judiciary, tribunal members and

magistracy exercise their judicial functions independently. The Judicial Office and Judicial College also provide services that support the Welsh judiciary including strengthening their capability.

76. Given the Welsh devolution settlement and connections between devolved and reserved matters, it is important to ensure that there is a close, continuing and collaborative relationship between devolved and reserved authorities and justice delivery agencies in Wales. The working arrangements between MoJ, justice delivery agencies and the Welsh Government are set out in ([Annex E](#)).
77. The outcome of EU exit may have an impact on the justice system and delivery of services in Wales. But due to the nature of the Exit discussions at this stage, it is not possible to identify where the Committee will need to focus its considerations on EU Exit issues, however, it is keeping abreast of developments.

## ANNEX A

# Justice in Wales Working Group Recommendations

The Justice in Wales Working Group recommended that:

1. The Secretary of State could consider whether there would be benefit in giving an MOJ Minister specific responsibility for considering how MOJ services are delivered in Wales (in addition to the existing Ministerial role in relation to devolution generally).
2. The Ministry of Justice Board should consider having (at least) an annual discussion of how the department as a whole is meeting the distinctive needs of Wales. The discussion should be informed by the work of the Expert Advisory Committee (recommendation 10). The Board should consider holding this meeting (or others) in Wales.
3. The Ministry of Justice Executive Committee should consider holding a discussion with the MOJ senior managers responsible for Wales from each of main operational bodies to discuss how they are working together (and with others) to most effectively deliver services in Wales.
4. MOJ Ministers should actively engage Ministers from the Welsh Government on the conclusions of the Working Group, in particular seeking agreement on the need to finalise a concordat.
5. The MOJ Executive Committee should consider meeting jointly with its counterpart from the Welsh Government to discuss how MOJ can work with devolved bodies on shared objectives. Consideration should be given to whether this should be done on an annual basis.
6. The Ministry of Justice should establish clear mechanisms for ensuring that (a) the distinctive needs of Wales are fully considered in the development and implementation of policy, and the Welsh Government is involved where appropriate; and (b) information from the Welsh Government and the Assembly (for example about upcoming legislative changes) is effectively communicated to all relevant parts of the justice system.
7. The Ministry of Justice should consider the creation of a single point of contact to lead the overall co-ordination of its work in Wales, working closely with partners in other organisations and the Welsh Government. This could be one of the existing senior managers from NOMS Wales or HMCTS Wales, with some additional support for their new role.
8. The Ministry of Justice should undertake a review of how its data collection and publishing practices reflect the distinctiveness of Wales, where possible disaggregating data to give a clear picture of how justice in Wales functions.
9. The Ministry of Justice should consider the way in which information is presented on its website, in order that information about Wales is easily accessible.
10. The UK Government should work with the Welsh Government to establish a non-statutory expert advisory committee to keep under review the operation of the justice system in Wales. The membership should draw on expertise from the justice sector and its chair should be independent of MoJ, Wales Office or the Welsh Government.

## ANNEX B

### Members of the Independent Expert Advisory Committee

| ORGANISATION                               | REPRESENTATIVE   |
|--|--|
| Cabinet Office                             | <ul style="list-style-type: none"> <li>Peter Lee (Director) - Chairman</li> </ul>  |
| Judiciary in Wales/Judicial College        | <ul style="list-style-type: none"> <li>Mr Justice Lewis (If unavailable Mr Justice Picken)</li> <li>His Honour Judge Harrison (If unavailable His Honour Judge Jarman QC)</li> </ul> |
| Judicial Office                            | <ul style="list-style-type: none"> <li>Matthew Gaunt (Office of the Lord Chief Justice)</li> </ul>   |
| Welsh Government                           | <ul style="list-style-type: none"> <li>Jeff Godfrey (Director, Head of Legal)</li> <li>Christopher Warner (Deputy Director, Constitution and Justice)</li> </ul>                     |
| Wales Office                               | <ul style="list-style-type: none"> <li>Peter Newbitt-Jones (Head of EU Exit Policy)</li> </ul>   |
| Bar Council (Practitioner in Wales)        | <ul style="list-style-type: none"> <li>Paul Hopkins QC</li> </ul>  |
| Law Society (Practitioner in Wales)        | <ul style="list-style-type: none"> <li>Mark Evans (Chair, Law Society's Wales Committee)</li> <li>Kay Powell (Law Society – Interim Head of Wales)</li> </ul>                        |
| Her Majesty's Courts and Tribunals Service | <ul style="list-style-type: none"> <li>Luigi Strinati (Director)</li> </ul>  |
| Her Majesty's Prison and Probation Service | <ul style="list-style-type: none"> <li>Ian Barrow (Director)</li> </ul>  |
| Ministry of Justice                        | <ul style="list-style-type: none"> <li>Dominic Lake (Deputy Director)</li> </ul>   |
|  |  |
| Secretariat                                | <ul style="list-style-type: none"> <li>Geraint Davies (Ministry of Justice)</li> <li>Ken Lewis-Allagoa (Ministry of Justice)</li> </ul>  |

## **ANNEX C**

# **Terms of reference and membership independent expert advisory committee**

## **Ongoing Review of the Justice System in Wales**

### **Purpose and scope**

1. The purpose of the Committee is to review the operation of the justice system in Wales and make recommendations to make it more efficient and effective within the single legal jurisdiction of England and Wales.
2. The Committee will review the operation of the justice system in Wales on an ongoing basis under the framework of the Wales Act 2017, making recommendations annually about how the system could be improved.
3. The Committee will examine how justice services are delivered in Wales, and specifically the interactions across the devolution boundary. The Committee will make recommendations to ensure that justice services fully reflect the distinctiveness of Wales and continue to be fit for purpose.
4. The Committee will not consider issues relating to merits of the single legal jurisdiction or the devolution boundary prescribed under the Wales Act 2017.

### **Objectives**

The Committee will:

5. review the operation of the justice system in Wales on an ongoing, periodic basis.
6. make recommendations that ensure that the justice system in Wales keeps pace with both Assembly and Parliamentary law making within the single jurisdiction.
7. monitor the effectiveness of administrative arrangements on justice in Wales and make recommendations to deliver efficient and effective justice services across the devolution boundary, building on examples of good practice and co-operation.

### **Reporting and Accountability**

8. The Committee will operate independently of government and will begin its work by Spring 2018. It will meet at least quarterly in the first year, with the majority of meetings held in Wales and will review these arrangements in its first report.

9. The Committee will submit a report annually to the Lord Chancellor, with copies sent to the First Minister of Wales, the Secretary of State for Wales and Lord Chief Justice. A copy of the Report will be published on GOV.UK.
10. The first Report will be submitted and published in Spring 2019.

## Stakeholder Engagement

11. To inform its reviews, the Committee will consult relevant stakeholders and gather evidence from practitioners who administer justice in Wales and the recipients of those services. The Committee may issue calls for evidence to support its stakeholder information gathering.

## Membership

12. The Committee will be constituted of (names provided once membership agreed):
  - a. Chair: Senior official from the Cabinet Office
  - b. Senior official, the Ministry of Justice
  - c. Senior official, the Welsh Government
  - d. Representatives of the judiciary in Wales
  - e. Representatives of the legal profession (Law Society and Bar Council) in Wales
  - f. A representative of Judicial Office/Judicial College
  - g. Senior official, Wales Office
13. A secretariat function will be provided by the Ministry of Justice. Members will be not be remunerated, but travel and subsistence costs will be reimbursed by the Ministry of Justice.

## ANNEX D

### Welsh Devolution Settlement

1. Following the publication of the command paper Powers for a purpose: *Towards a lasting devolution settlement for Wales* (known as the “St David’s Day Agreement”), the UK Government introduced the draft Wales Bill into Parliament which created, for the first time, a reserved powers model for Wales.
2. In accordance with 2015 party manifestos, this was based on the principle that responsibility for justice would remain with the UK Parliament and that justice would, for the first time, be defined as “reserved”. The Act did this by defining and listing justice functions as “reserved matters” under a new Schedule 7A to the Government of Wales Act 2006 and prescribing the single legal jurisdiction of England and Wales as including the following reserved matters
  - a. courts (including, in particular, their creation and jurisdiction);
  - b. judges (including, in particular, their appointment and remuneration);
  - c. civil or criminal proceedings (including, in particular, bail, costs, custody pending trial, disclosure, enforcement of orders of courts, evidence, sentencing, limitation of actions, procedure, prosecutors and remedies);
  - d. pardons for criminal offences;
  - e. private international law;
  - f. judicial review of administrative action.
3. The Act also made some important exceptions to these reservations to recognise National Assembly for Wales competence on devolved matters and ensure that responsibilities are clear where there are interactions between the justice system and those devolved matters, for example;
  - a. The reference to prosecutors above does not prevent an Act of the Assembly from making provision about responsibility for the prosecution of devolved offences;
  - b. Advice, representation and support in relation to family proceedings involving the welfare of children ordinarily resident in Wales is not reserved;
  - c. Whilst tribunals are generally reserved, the Act recognises the existence of (devolved) Welsh Tribunals and creates a new President of Welsh tribunals who is responsible for
4. *“the maintenance of appropriate arrangements for the training, guidance and welfare of members of the Welsh tribunals within the sources made available by the Welsh Ministers; and for representing the views of members of the Welsh tribunals to the Welsh Ministers and to other members of the National Assembly for Wales”.*
5. The Act also recognises that the Assembly must be able to modify the law in relation to devolved matters so that Welsh legislation can be given proper effect. This allows the Assembly to create new criminal offences relating to devolved matters (for example, punishment of children). However, criminal law itself, is restricted under Schedule 7B, which states that Assembly legislation “may not make modifications of, or confer power by subordinate legislation to make modifications of, an offence in a listed category”, which includes;

6. treason and related offences; homicide offences (including offences relating to suicide), other offences against the person (including offences involving violence or threats of violence) that are triable only on indictment; sexual offences and perjury.

Similarly, a provision of an Act of the Assembly “cannot make modifications of, or confer power by subordinate legislation to make modifications of, the law about—

- (a) criminal responsibility and capacity,
- (b) the meaning of intention, recklessness, dishonesty and other mental elements of offences,

Wales Act 2017 (c. 4)

Schedule 2 — New Schedule 7B to the Government of Wales Act 2006

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- (c) inchoate and secondary criminal liability, or
- (d) sentences and other orders and disposals in respect of defendants in criminal proceedings, or otherwise in respect of criminal conduct, and their effect and operation

## ANNEX E

### Working Relations Between MoJ and Welsh Government

1. MoJ and its delivery agencies have taken forward a number of initiatives, which have significantly improved not only the delivery of justice in Wales, but also the working relationship between the MoJ and the Welsh Government and other delivery partners across the justice landscape in Wales. For example, the publication of a Concordat agreed between the MoJ and the Welsh Government, sets out the basis for strong collaborative working and represents an important step forward towards MoJ and Welsh Government engagement. The Concordat which was agreed in May this year sets out arrangements for consultation and co-operation between the Welsh Government and the MoJ, covering exchanges of information, justice impacts, access to services, resolution of disputes and review of relations. The Concordat currently underpins and strengthens the working relationship between MoJ and the Welsh Government.
2. There is now a senior single point of contact within HMPPS Wales to help make the connection between MoJ policy and the operational and Welsh Government interface. This has given a new focus to collaborative working in Wales and as a result there have been some improved relationships between partners in Wales.
3. A Justice in Wales Strategy Group (mentioned above) was also established, which brings together operational and policy colleagues from Welsh Government, Ministry of Justice and Crown Prosecution Service. This has provided an effective forum for discussion and has allowed collaboration on policy issues in Wales more effectively than in the past. This new approach to working together has also opened up opportunities to recognise and take advantage of the different ways in which services are delivered in Wales.
4. HMPPS Wales also produced a strategic blueprint in 2018 to frame a more collaborative approach to service delivery. The current focus is on women and young people with a view to extending the approach to adult males as these areas are progressed. This represents a significant change in the relationship to a position of collaboration between the organisations. The All Wales Criminal Justice Board, chaired by HMCTS Wales Delivery Director, has also agreed the priorities that would ensure that all major stakeholders, including PCCs are engaged in the improvement of Justice in Wales.
5. There have been a number of initiatives to reflect the distinctiveness of Wales in the delivery of justice. This includes the recent consultation on the future of probation services in England and Wales. This set out a vision going forward which includes:
  - a. Community Rehabilitation Company (CRC) contracts ending two years early in 2020, with new arrangements put in place to address current challenges
  - b. CRC and National Probation service (NPS) areas to be aligned – helping to strengthen ties with key partners
  - c. An extra £22 million each year invested in through-the-gate support for offenders over the next two years to improve housing and employment prospects

- d. NPS and CRC in Wales will be brought together into one system, to better reflect the devolution arrangements with the Wales Government. NPS Wales will take responsibility for managing all offenders, with additional interventions and services procured from the market.
6. As part of ongoing engagement MoJ's Justice Devolution Team works very closely with the Welsh Government's Justice Policy Team across all policy areas; the two teams meet regularly to provide updates on key areas and invite policy leads to bi-lateral meetings to discuss initiatives in detail. The teams worked together to develop and agree the Concordat. They also worked together to develop and implement the new process for identifying the impacts of Welsh policies on the justice system, helping to meet the duty under section 11 of the Wales Act 2017.