Counsel General Speech – The Public Law Project Wales Conference 2013

Update on Welsh Constitutional Issues

1. Ladies and Gentlemen, it is a great pleasure to have been invited to speak to you today. My remit is to give you an update on Welsh constitutional issues and there is certainly plenty to talk about! The past year has seen events of considerable constitutional significance for Wales.

Recent history:

2. Since 1998, our devolution settlement has undergone a period of steady and progressive – and indeed historically and constitutionally astonishingly rapid - change. The Government of Wales Act 2006 represents a landmark in that Welsh history: formally separating the executive from the legislature in Wales, and providing a host of new powers for Welsh ministers and now, since the 2011 referendum, bringing broad primary legislative power to Wales for the first time in over 500 years.

3. But we still have further to go, and it is important for us to recognise that the Welsh devolution settlement as it stands is not necessarily the complete picture. As the constitutional make up of the UK undergoes change and with the implications of the Scottish referendum on independence we need to ensure that Wales does not lose out. The First Minister has already proposed the establishment of a Convention on the Future of the United Kingdom to consider the future of the UK in the round and not nation by nation in a piecemeal fashion as had been the case to date.

<u>Silk:</u>

4. In October 2011, following a commitment in the UK Government's coalition agreement, the then Secretary of State for Wales established a Commission on Devolution in Wales, commonly referred to as the 'Silk Commission'. Its remit, so far as relevant to today, is to investigate any changes which might be made to the Welsh devolution settlement that would enable both the United Kingdom Parliament and the National Assembly for Wales better to serve the people of Wales. This is, in effect, an inquiry into the best allocation of legislative responsibilities for Wales as between Parliament on the one hand and the Assembly on the other.

5. The Commission has already reported on Part I of its remit which considered the Assembly's current financial powers in relation to taxation and borrowing. The call for evidence in relation to Part II has closed and the Commission is due to report by March 2014.

6. In February, the First Minister of Wales published the Welsh Government's evidence to the Silk Commission. In it, he set out the Welsh Government's vision for a new constitutional settlement for Wales, where matters affecting Wales should be decided in Wales. In our evidence, we have called for the devolution of **policing, community safety and crime prevention** by 2020/21. Longer term, we believe the criminal justice system should be devolved, including responsibility for the courts, prisons and probation. This would allow us to respond to the particular challenges of crime in Wales, including working with already devolved services to promote prevention and rehabilitation.

7. Policing and criminal justice are the only mainstream public services which are not currently devolved to Wales, even though their day-to-

day work involves substantial interaction with devolved services and responsibility for the other emergency services – i.e. health/ambulance and fire and rescue services are already devolved. The status quo is, in our view, increasingly hard to justify, and we believe that a devolved criminal justice system should form part of the long term vision for Welsh governance.

8. Although it makes sense for the future, we do not - for financial reasons - feel able to pursue the devolution of criminal justice in its entirety at this stage. But we believe devolving legislative and executive responsibilities for the police service, together with equivalent responsibilities for community safety and crime prevention is entirely manageable and has the potential to deliver significant benefits for the people of Wales.

9. The Welsh Government's evidence also calls for a new Government of Wales Act establishing a devolution settlement for Wales based on a 'Reserved Powers' model of legislative competence for the Assembly.

10. Currently, legislative competence is devolved in Wales by a "conferral" model. This means that the Assembly only has competence in the areas which have been "conferred" upon it expressly. These areas are currently listed in Schedule 7 to the Government of Wales Act 2006. A reserved powers model was adopted for Scotland, and means that the Scottish Parliament can legislate about any matter, provided that that matter has not been expressly "reserved" from its competence. The reserved matters are listed expressly in Schedule 5 to the Scotland Act 1998.

11. The two approaches might be thought to be able to produce bodies with equivalent legislative competence. In practice, however, that has not proved the case, and the method of conferring legislative competence on the Assembly produces considerable complications.

12. There is a strong case for moving to a reservation model with its obvious advantages in terms of clarity in comparison with a 'conferral' method of devolution. Under a reserved powers model the relevant question is whether the purpose of proposed legislation

is about a listed reserved matter. Under the Welsh conferred powers model the questions are far more complex. We must initially ask a series of questions: (1) Is the purpose of the proposed legislation relate to any of the Subjects of competence listed in Part 1 of Schedule 7 to the 2006 Act. There are currently 91 expressions of competent areas listed. (2) Does the purpose of the proposed legislation fall within any of the listed exceptions from competence. (3) Does the proposed legislation trespass on any area as yet undefined and not expressed in the 2006 Act but which arguably sits in the gaps between that which has been expressly devolved and that which has been expressly carved out of the Assembly's competence by way of exception? The potential for complexity, conflict and consumption of much valuable time and effort in working out these difficulties is clear.

13. It is not revealing anything particularly surprising if I say that dealing with differences such as this consumes the time and effort of far too may civil servants at each end of the M4 on far too many occasions; indeed, almost on a daily basis.

14. On balance we take the view that the Scottish model of reserved powers is superior in its specification of the respective legislative responsibilities of the two Parliaments in the context of devolving power to the devolved legislature. That is important both for the practical conduct of day to day public administration, and for minimising the number of disagreements between the Governments. It is for these reasons among others that we have asked the Silk Commission to recommend that Welsh devolution be reconstituted on a Reserved powers basis. Apart from the issues I have discussed already, this would of course have the benefit of reducing the differences between the UK devolution settlements, the so-called constitutional *asymmetry*.

15. So a new Government of Wales Act, reserving matters to the UK Parliament where necessary, and devolving the rest, would certainly be an improvement. But even a move to a reserved powers model may still not make it completely clear what is within competence and what is not. The Scottish settlement has thrown up many areas of uncertainty since its inception and the Supreme Court has commented that that settlement "may not strike one as a model of clarity". Perhaps they should look at the Welsh one!

16. Any improvement in clarity would immediately be undermined if the new scheme contained the same blanket restriction protecting the powers of UK Ministers as we find in Schedule 7 part 2 of GOWA 2006. Under that provision NAW legislation which removes central executive power is incompetent unless an exception applies under part 3, either because the relevant UK Minister consents to the removal of function, or because the removal is "incidental to or consequential upon" other provision in the Act which is clearly competent. Because of the background of Welsh devolution initially by transfer of executive function and only later by transfer of primary legislative power, there are just so many of these ministerial powers, scattered so widely across so many subjects, that the restriction has the potential to become a real stumbling block for even the most straightforward Assembly legislation. As our recent Byelaws case in the Supreme Court showed, this can be so even when the subject matter comprises entirely local laws on devolved matters. This is not a new issue. In 2009 the authoritative All-Wales Convention concluded:

"The problem with this General Restriction is that it seems to introduce an element of uncertainty into the scope of the National Assembly for

Wales's law-making powers. There is no composite list of relevant Minister of the Crown functions, therefore how can there be clarity on the extent of the National Assembly for Wales's law-making powers…?"

17. Devolution is now the settled will of the people of Wales and the Assembly is their democratically elected legislature. The Welsh people have voted in a referendum to give it primary law making powers and it should surely be able to legislate within its area of authority without having to ask members of the UK Government for permission. The Scottish Parliament is not restricted in this way, and nor is the Northern Ireland Assembly. Whatever the reasons for the blanket restriction in the early days of devolution, that justification is surely waning in the context of primary law making responsibility, and as Scotland shows, it is not needed in a reserved powers devolution settlement.

18. In future, any remaining Minister of the Crown functions within the Assembly's devolved legislative competence should be capable of being discharged by the Welsh Ministers. If it is necessary to preserve particular UK Ministerial powers they should be covered by clear

reservations. Otherwise they will only serve to trip up the Assembly and clog up the Supreme Court. Meanwhile, both governments have a responsibility to make the current settlement work effectively for Wales and the UK as a whole.

Supreme Court:

19. However, it is important to remember that devolution does not just develop through commissions and settlements; it develops each and every time its limits are considered in the courts. This is something of which I am acutely aware, as since I assumed my responsibilities as Counsel General, I have twice appeared before the Supreme Court on devolution issues.

20. The first such occasion was shortly after my appointment, where I acted for the FM intervening in the Scottish case: *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) (Scotland)* [1] to represent devolved Welsh interests. The Welsh Government sees the judgment as recognition by the Supreme Court that the National Assembly has, within the scope of its policy areas, the same law making powers as the

[1] [2011] UKSC 46

Westminster Parliament. It sets a precedent for how Acts of the Assembly will be treated by the courts and it is clear from the judgment that the circumstances in which the courts may overturn an Act will be exceptional and certainly not on a par with the general common law grounds (*illegality*, procedural impropriety and irrationality,) on which Judicial Review can be made of *secondary* legislation.

21. This was a decisive victory for all of the devolved administrations in the UK, and I am very pleased that my team was able to well to represent the interests of Wales and the Welsh public at the Supreme Court.

22. The second such occasion occurred when we defended the Attorney General's reference on the Local Government Byelaws (Wales) Bill (the first Act to be passed by the Assembly but the second to receive Royal Assent!). This was on its face a purely Welsh case, but it is interesting that the Attorney-General for Northern Ireland chose to appear, just as I had done in the Scottish AXA case; and this reminds us that the various devolution settlements, although differing in

detail, exhibit some common elements of interest to all of the devolved institutions. In this case, the Attorney General for England and Wales referred the Byelaws Bill to the Supreme Court under section 112 of the Government of Wales Act 2006, a power which he and I both share, which enables either of us to submit any Bill which we feel requires a ruling by Supreme Court on competence for scrutiny.

23. This was the first such direct Reference to be heard. Never before has a dispute between two administrations gone straight to the Supreme Court to decide whether a piece of primary devolved legislation could stand. Supreme Court Justice Lady Hale (who did not sit on the Byelaws case) recognised the significance of the case at last year's Legal Wales Conference:

"It comes before the Court, not in a concrete case, but as pure constitutional review along continental lines. This is, as far as I know, the first case in which this has happened. We are not used to deciding cases in the abstract, without reference to a particular set of facts.

The important point is that, as long as they keep within the express limits of their powers, the devolved Parliaments are to be respected as democratically elected legislatures and are not to be treated like ordinary public authorities. The United Kingdom has indeed become a federal state with a Constitution regulating the relationships between the federal centre and the component parts."

24. The case concerned the interpretation of a clause in the Bill which removed the need for Local Authorities to have certain byelaws confirmed by Ministers. While in most cases this power to confirm byelaws was held exclusively by Welsh Ministers, due to the wording of the original Transfer of Functions Order in 1999, certain confirming powers were held concurrently by Ministers in both Cardiff Bay and Whitehall. The Bill proposed to remove both aspects of ministerial power in order to localise the process of byelaw-making to the authorities passing them, without the need for executive review or scrutiny.

25. It was the removal of UK Ministerial functions which was of concern to Wales Office and hence to the Attorney General.

26. Under paragraph 6 of Part 3, Schedule 7 of GOWA, an Act of the Assembly may remove or modify a pre-commencement function of a Minister of the Crown without the Secretary of State's consent provided that it is *incidental to, or consequential on*, any other provision contained in the Act. It was, our contention that these provisions were consequential on the main provisions of the Act.

27. In the event, after two days of legal argument the five Supreme Court Justices unanimously rejected the Attorney General's challenge and held that the Byelaws Bill was within the Assembly's competence. In doing so it has given some guidance on the interpretation of constitutional statutes such as the Government of Wales Act as well as more specific guidance on the interpretation of the general restriction.

28. The Byelaws Act has now received Royal Assent, but questions remain about its somewhat tortuous journey into law. Is the Government of Wales Act 2006 simply too complicated and uncertain

in its effect to provide a coherent, stable and workable devolution settlement? In this case, it took five Supreme Court Justices, the Law Officers of England, Wales and Northern Ireland, several of the UK's leading constitutional lawyers and a great many officials across three Governments to decide it was lawful to make minor changes to the way Welsh local councils deal with things like dog-fouling and loitering in public lavatories.

29. Nor is it likely to be the last time a Welsh Bill is referred to the Supreme Court. The judgment helps clarify the interpretation of the 'incidental or consequential' exception, but that is only one small part of the Government of Wales Act. Much of what the Assembly can and cannot do remains untested judicially. It is inevitable that as Wales and Westminster go about their business there will be disputes about the boundaries of their respective areas of responsibility.

<u>Welsh Judge in the Supreme Court:</u>

30. The Byelaws case was heard in the Supreme Court without the benefit of a judge with particular knowledge and experience of Welsh

law or the Welsh devolution settlement on the bench. Interestingly during the case, I was more than once called upon to take the Court through the development of Welsh devolution in some detail. Wales is the only part of the UK, with its own legislature, not formally represented in membership of the Supreme Court. That position should not be allowed to continue, regardless of whether we move to a separate legal jurisdiction for Wales. We will continue to make that case vigorously.

A Separate Welsh Jurisdiction

31. So now I turn to the question of whether Wales should be a separate legal jurisdiction.

32. This question is truly fascinating for the lawyer and an important issue for all of the people of Wales. While it is primarily a political rather than purely legal question, it carries significant consequences for the legal system here in Wales and, as the Welsh Government's Law Officer, I have of course taken a keen interest in it.

33. The Welsh Government held its own consultation on a separate legal jurisdiction for Wales. In general the views were mixed as to whether or not Wales should have a separate legal jurisdiction. Those in favour of establishing a separate legal jurisdiction generally acknowledged that, whilst this may not be an immediate prospect, there is a likelihood that a separate Welsh jurisdiction will be required at some stage in the future, and that preparatory steps are desirable now in order to facilitate this change.

34. Their reasons were as follows: Firstly, that the existence of the Assembly's legislative competence is a key consideration in arguing for the creation of a separate Welsh legal jurisdiction. Some consultation respondents noted that it is unusual (if not unique) to have two legislatures in the same jurisdiction and with general power to legislate on the same subject matter as part of the same overall body of law: laws passed concerning Wales both in Cardiff and in Westminster form part of the corpus of the law of England and Wales as a whole. Separating Wales from the existing jurisdiction was seen by them as a logical consequence of our having created an Assembly for Wales with broad legislative competence.

35. Secondly, consultation respondents drew attention to the increasing divergence of Welsh law from that applying in England. Respondents believed that as this divergence will continue as the Assembly continues to legislate in its subject areas. The current joint jurisdiction may well be untenable over time, thus strengthening the need for a Welsh legal jurisdiction sooner rather than later to avoid a purely reactive and passive response to this inevitable legal and practical development.

36. Despite this, a significant number of responses raised concerns about the potential impact of a separate Welsh legal jurisdiction on professional practice in Wales. Their comments were in reference to both the quality of academic training available in Wales, and also in terms of preserving the ability of the lawyers in Wales to continue practising in England.

37. I believe these concerns are not insurmountable, and further, more detailed work can be commissioned to demonstrate how such impacts could be effectively managed. It is important that, if we

move forward with proposals for a separate jurisdiction, that we actively work to assuage effectively the concerns expressed by consultees, and ensure that any steps taken are fit for purpose to serve the needs of all citizens and organisations operating in Wales.

38. As for those who were in favour of maintaining the jurisdictional status quo, their arguments generally referred to the undoubted success the current joint jurisdiction has enjoyed for centuries, and their view that the current devolution settlement was strong enough to deal successfully with any divergence in the laws of England and Wales. Concerns were also expressed that nothing should be done to raise artificial barriers between legal practice in each of England and Wales; and it was suggested that Welsh economic interests would be badly-served by action having the effect of excluding Wales and its lawyers from the English commercial law system which is regarded as a world leader. It obviously does *not* go without saying – and so I say it – that there is no appetite *at all* in Welsh Government to embark upon *any* changes which would have the effect of disadvantaging the legal professions in Wales. On the contrary, we need very much to foster and grow a high quality and efficient legal sector here able to

serve the people of Wales – and Government! - and to "punch above its weight" as the legal professions in Wales have always done historically. The same applies in relation to the business community, or the public at large. The approach of Welsh Ministers to further devolution is entirely pragmatic centred around what will be of benefit to the people of Wales who they work so hard to represent and serve.

39. In the Welsh Government's recent evidence to Silk we stated that the establishment immediately of a separate jurisdiction was not calculated to be of benefit to the people of Wales. The establishment of a separate jurisdiction would only follow from the full executive and legislative devolution to Wales of criminal justice and the administration of justice functions. The Welsh Government is calling for early steps to prepare the foundations for transition to a separate legal jurisdiction in the future. These include:

The appointment of a Welsh member of the Supreme Court;

A stronger Welsh identity in the Higher Courts of England and Wales, including new Welsh offices for the Court of Appeal and the High Court;

The acceptance of the principle that the legal business of people in Wales should be administered and dealt with in Wales wherever possible;

Maintaining the requirement in primary legislation for at least one member of the Judicial Appointments Commission "to have special knowledge of Wales.

It is now for the Silk Commission to consider our evidence, alongside that submitted by many other organisations and individuals. We look forward to learning the outcome of the Commission's deliberations in due course.

40. Given the Welsh Government's call for new Welsh offices for the Court of Appeal and the High Court and the continuing success of the Administrative Court in Cardiff I would like to take this opportunity to invite – indeed urge - practitioners of public law to ensure that public law claims are issued in Wales or transferred back to Wales, to make

practice management decisions with appropriate foresight, and to work hard to continue to build public law expertise in Wales.

41. Some legal commentators have asked what would be the implication of a reserved powers model on the question of a *separate legal jurisdiction* for Wales? My view is that, frankly, a reservation model of competence could function as effectively in a joint England and Wales jurisdiction as in a separate Welsh jurisdiction. To put it another way, even if we are successful in persuading Silk to recommend the reservation model, that need not <u>necessarily</u> lead us down the route of arguing for a separate legal jurisdiction. The issues of SLJ will remain to be argued on their own merits in this respect.

<u>Accessibility of legislation:</u>

42. One issue that has been raised consistently through the debate on SLJ is the accessibility of Welsh law. In my recent statement to the National Assembly for Wales, I expressed my view that for the rule of law to prevail, legislation must be effective and accessible. I am

concerned that Welsh legislation is not sufficiently clear and accessible.

43. I believe that we can learn a lot from other Commonwealth jurisdictions. In September 2012, I visited New South Wales and New Zealand to learn more about their institutional infrastructure for developing legislation and the internal organisation of their civil service. Countries such as Australia, Canada and New Zealand have not only developed legislation that is distinct from that of the Westminster Parliament, but have also led the way on some clearer legislative drafting initiatives and other methods of better informing the public of the laws which apply to them. They have also given more prominence to ensuring that their legislation, taken as a whole, or in other words their "statute book", is modern, manageable and well organised. In New Zealand, the Parliament has recently passed a Legislation Act, which seeks to entrench consolidation of laws as a duty imposed on the Attorney General. Notably this process began because of the concerns of the New Zealand Law Commission, which produced two detailed reports in to the issue. I will be publishing my report on my visit to New Zealand shortly.

44. Turning to the Welsh Government's legislative programme. I have previously stated that, where this is a choice, bills should *restate* the existing provisions for Wales where practicable, instead of making amendments to existing laws of England and Wales or the UK. I am pleased to say that this has been a feature of nearly all bills introduced to date. Two of the larger bills, the Schools Standards and Organisation Bill and the Social Service and Well-being Bill, are notable in this respect, as they comprise reform and recasting of entire systems for Wales. They will be excellent examples of Acts of this Assembly which fully establish – without the need to look elsewhere – the law as it applies in Wales. Similarly the Human Transplantation Bill ("Organ Donation"), one of our more high profile legislative proposals, could have been drafted by amending the Human Tissue Act 2004, legislation that applies to England, Wales and Northern Ireland. In many ways doing so would have been more straightforward, partly because the UK wide transplantation system will continue, but the decision was taken that such legislation should stand alone and apply to Wales alone.

45. Devolution gives the opportunity for a small, smart, country able to engage in developing laws made by and for Wales. It's essential that constructive engagement takes place and that Wales fully debates what may be needed for the interests of Welsh communities, environment etc.

46. Public law in Wales will be increasingly important as the devolution settlement and its legal and constitutional effects progress and become increasingly obvious, with the law applicable to the citizen in relations with others - including public bodies - becoming increasingly divergent from that applicable to the English citizen. This presents significant challenges and opportunities for us all, including the legal professions. I very much hope and expect that the professions will seize those opportunities in their own interests and in the public interest. We need a high quality legal community to deliver high quality legal services to its clients in Wales and dealing with Wales.

Thank you for listening and I hope you all have an enjoyable day.