

Welsh Human Rights Bill: A parting of the ways?

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The report follows close on the heels of the Law Commission's report on [Devolved Tribunals in Wales](#) published in December 2021 and builds on the work of the [Commission on Justice in Wales \(the Thomas Commission\)](#) which published a report in October 2019.

The tone of the latest report reflects the Welsh Government's frustration at Westminster's failure to act on the on recommendations made by the [Commission on Devolution in Wales \(the Silk Commission\)](#) on devolving justice and policing in its [report](#) published on 3 March 2014; *"despite the near unarguable conclusions of the Thomas Commission, and despite the clear mandate of the Welsh people, the UK Government continues to set itself against any significant change."*

The Welsh Government points out that Wales is the only devolved nation within the United Kingdom that does not have its own justice system; the Senedd can legislate but lacks the jurisdiction to enforce its own laws.

In the report, the Welsh Government highlights problems resulting from the "jagged" interface between devolved and reserved matters. Practical and procedural complexities have arisen across a range of devolved areas such as education, housing and health that closely intersect with justice.

The report cites the Thomas Commission which notes in particular that *"the position in relation to family justice, and in particular the law, the courts, practice and procedure relating to children, in Wales is complex"* and recommended that a degree of that complexity should be removed from the operation of family justice by devolving its operation into one coherent legal system aligned with functions in relation to health, education and welfare.

The report also underlines that law and practice continue to diverge between the two nations, describing this as *"a natural, desirable, and inevitable consequence of devolution."* From the Welsh Government's perspective, the result is that a Westminster controlled criminal justice policy developed by ministers whose focus is primarily on England will not fit the Welsh context and will leave agencies in Wales struggling to find ways of reconciling instructions and policies designed for England with the Welsh way of doing things.

While these are largely systemic problems, the report includes specific examples where the Welsh Government fundamentally disagrees with the direction taken by the Westminster government in relation to justice matters, such as the UK Government's recent introduction of the *"Bill of Rights Bill"* which aims to replace the Human Rights Act and chronic underfunding of criminal justice system.

The Welsh Government and Scottish Government had already signalled their dissatisfaction with the Westminster government's plans for the Human Rights Act by submitting a joint letter to the Lord Chancellor with Welsh Ministers in March 2022.

In the latest report, in light of the requirement that legislation passed by the Senedd must be compatible with the Act, the Human Rights Act is described as fundamental to the Welsh devolution settlement. For the Welsh Government *"it would be a matter of serious concern if the UK Government were to contemplate acting in this area without the agreement of all of the UK's national legislatures."* The latest report includes a commitment to *"Consider the case for a Welsh Human Rights Bill"*, potentially indicating further divergence between the Welsh and English legislatures.

Westminster's underfunding of the criminal justice system is cited in the report as putting at risk access to justice and equality before the law. The Welsh Government highlights its frequent representations against the programme of court closures adopted by the Westminster Government and significant reductions in legal aid eligibility and funding which the UK Government introduced through the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The report specifically cites access to justice on environmental matters where the UK Government has been found to have a prohibitively expensive justice system for those seeking to take action, in contravention of the Aarhus Convention.

Financing is referenced throughout the report, building on the recommendation of the Silk Commission report that "Devolution of justice must be accompanied by a full transfer of financial resources, including all identifiable administrative and capital resources relating to Wales." As a government that is increasingly divergent in its approach both politically and legislatively, this has to be correct.

The report highlights funding initiatives by the Welsh Government designed to address shortfalls in UK Government funding for legal aid, policing, probation services, partnership working, social justice and supporting the legal sector in Wales. The authors point out that this investment, represents a diversion of funds from devolved functions but, due to the UK's current constitutional arrangements, any savings that are made for the justice system will not necessarily be reinvested in Wales. Frustration at the Ministry of Justice's refusal to make funding available for a new Cardiff Civil Justice Centre is openly expressed in the report.

The response presented in the report to these issues is the complete devolution of justice in Wales through transferral of powers and the appropriate levels of funding to the democratic institutions of Wales.

While the Welsh Government is forthright in making the case for change, it describes this report as "the latest stage in a conversation" and points out that under current arrangements many of the recommendations made by the Law Commission and the Thomas Commission are not within the gift of the Welsh Government. As yet it is unclear whether the Westminster Government will respond to this latest report and Ministerial discussions on the Thomas Commission's October 2019 report only began on 13 December 2021.

For further information, please contact [Alistair Taylor](#) or [Tim Edds](#).

Contact



Tim Edds

Partner

tim.edds@brownejacobson.com

+44 (0)330 045 2721

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