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# An Evolution in Devolution? Welsh Criminal Justice and the Commission on Justice in Wales

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☞ Criminal law; Criminal procedure; Crown Prosecution Service; Devolution; Minorities; Prisons; Wales; Young offenders

*This article examines, contextualises, and evaluates the findings of Lord Thomas’ 2019 Commission on Justice in Wales Report, in the context of Wales’ criminal justice system. It explores the findings of Chapter Four of the Report (“Criminal Justice”), contextualising and highlighting the main conclusions reached by the Report, before exploring the potential implications of their implementation. This article thus addresses a broad range of issues relevant to Wales’ criminal justice system, including: funding; transparency and accountability of the courts; the position of victims of crime; the position of defendants; devolution and criminal justice governance; equality and diversity; policing; PCC-style FRAs; mental health crisis response; PCSOs; bail and RUIs; the CPS; prosecution rates; the age of criminal responsibility; youth justice; probation; prisons; and devolution. The article considers the Report’s proposal that Wales’ criminal justice system should be fully devolved to Wales, and explores this, in context, offering conclusions and suggestions throughout.*

## Picture this? A snapshot of the evolution of Welsh devolution

In 1997, Mr Ron Davies, then Secretary of State for Wales, described devolution in Wales as “a process, rather than an event”.<sup>1</sup> Welsh devolution could indeed be described as more akin to an evolution than a revolution, consistent with the sustained efforts over decades, and even centuries, of many people in Wales seeking devolution. Indeed, long before the Commission on Justice in Wales released its 2019 Report, *Justice in Wales for the People of Wales*<sup>2</sup> (hereafter the Commission

\* With thanks to Mrs Ann McLaren and Professor David Ormerod QC for their most formative guidance in the field of criminal justice in England and Wales for over a decade prior to the inception of this article.

<sup>1</sup> D. Torrance, “‘A Process, not an Event’: Devolution in Wales, 1998–2020” (House of Commons Briefing Paper CPB 8318, 6 April 2020), p.4, <https://commonslibrary.parliament.uk/research-briefings/cbp-8318> [Accessed 20 October 2020].

<sup>2</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (The Report of the Commission on Justice in Wales, October 2019), p.18, <https://llyw.cymru/adroddiad>

on Justice in Wales Report, or the Report), there have been calls for increased devolution in Wales, for the people of Wales. The calls have included those for the establishment of an independent legal jurisdiction, distinct from that of the traditional “law of England and Wales”.

This argument has developed from the historical position that Wales possessed its own legal history and heritage, quite distinct from the partial jurisdictional statutory fusion of the present day. Until the 16th century, much of the law of Wales was based on a codified legal system crafted by the lawyers of Hywel Dda, King of Deheubarth, which, in the mid-10th century, covered almost all of Wales.<sup>3</sup> It was not until the Laws in Wales Acts 1535 and 1542 (commonly referred to as the Acts of Union) that an Anglo-centric legal approach for Welsh people was implemented. Much then happened in terms of political and social developments in the following centuries, before the 1997 Devolution Referendum.<sup>4</sup> The Referendum led to the advent of the Government of Wales Act 1998, finally heralding the creation of the Senedd Cymru (the Senedd), now known as the “Welsh Parliament”<sup>5</sup> in English (with its name having been changed from 2020 onwards).<sup>6</sup>

## Calling time: the argument for devolved criminal justice for Wales

It could be argued that restructuring of the Welsh legal system, including the criminal justice system, merited consideration as early as those first Senedd sittings. Although further Commissions<sup>7</sup> and reviews led to the Government of Wales Act 2006,<sup>8</sup> the Wales Act 2014,<sup>9</sup> and more recently, the Wales Act 2017,<sup>10</sup> questions still remain as to whether the English criminal justice system is a suitable fit for Wales. Consequently, it is commonplace to hear that contemporary criminal justice policy, delivery, and administration should be designed in Wales, to meet Wales’ needs, across Wales.<sup>11</sup> Indeed, of the Report’s 78 recommendations, 16 were directed towards Wales’ criminal justice system.<sup>12</sup>

Despite the current situation, there is no denying that the Welsh criminal legislation to date has been constructive. In practical terms, the current devolved

-comisiwn-ar-gyfiawnder-yng-nghymru (in Welsh); and <https://gov.wales/commission-justice-wales-report> (in English) [Accessed 20 October 2020].

<sup>3</sup> *Hansard*, HC Vol.670, col.138WH (22 January 2020) (Liz Saville Roberts (Dwyfor Meirionnydd) (Plaid Cymru)).

<sup>4</sup> Referendum held on 18 September 1997.

<sup>5</sup> Throughout this paper, the Welsh term “Senedd” will be used to signify the Senedd Cymru, and also its English language equivalent term of “Welsh Parliament,” unless any direct quotation uses the latter term. The first elections to the Welsh Parliament were held on 6 May 1999. See Senedd/Welsh Parliament, “The History of Welsh Devolution”, <https://www.assembly.wales/en/abthome/role-of-assembly-how-it-works/Pages/history-welsh-devolution.aspx> [Accessed 20 October 2020].

<sup>6</sup> Following public consultation, s.2 of the Senedd Elections (Wales) Act 2020 sets out that the National Assembly for Wales is to be renamed Senedd Cymru, or the Welsh Parliament, with similar changes for its Acts (s.3) and Members (s.4).

<sup>7</sup> The Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.14 onwards.

<sup>8</sup> Providing enhanced legislative powers for the Senedd.

<sup>9</sup> Providing the Senedd with yet further legislative powers.

<sup>10</sup> Recognising the permanence of the Senedd and Welsh Government, and changing the model of devolution to a Reserved Powers Model—thus significantly expanding devolved powers to all matters, save for those designated as Reserved Matters.

<sup>11</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.18. See also the Welsh Language Act 1993, which was based on the Hughes-Parry Report on the legal status of the Welsh language. Part III, ss.22–24, stipulate the right to legal proceedings through the medium of the Welsh Language.

<sup>12</sup> Lord Thomas of Cwmgeidd, “Justice in Wales for the People of Wales” [2020] 1 Crim. L.R. 1.

legislative powers in Wales have been used in a socially-oriented manner, placing great focus upon preventative measures. The dynamism of the Welsh jurisdiction is exemplified in many ways in this context—but most significant are its endeavours to “tackle social injustice and exclusion and to foster an environment which should reduce the causes of crime”.<sup>13</sup> One good example of this is Wales’ “specific programmes ... designed to tackle domestic abuse”.<sup>14</sup> Welsh criminal legislation has demonstrated itself to be progressive in this arena. For instance, the Children (Abolition of Defence of Reasonable Chastisement) (Wales) Act 2020 will make the use of force against children as a form of chastisement unlawful from March 2022.<sup>15</sup> Similarly, the Violence Against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015<sup>16</sup> has “placed duties on public bodies regarding prevention, protection and support, although it was unable to place duties on the police, CPS or courts”.<sup>17</sup> This was enacted well in advance of England’s ongoing legislative work on the Domestic Abuse Bill,<sup>18</sup> as matters stand—although it must also be noted that the offence of “coercive or controlling behaviour in an intimate or family relationship”<sup>19</sup> applies in both England and Wales—and that the Domestic Violence Bill would also apply to both jurisdictions.

## The Commission on Justice in Wales

In September 2017, the then First Minister of Wales, Mr Carwyn Jones AM,<sup>20</sup> announced a Commission on Justice in Wales<sup>21</sup> to review Wales’ justice system and set a long term vision for its future.<sup>22</sup> The Commission, chaired by the former Lord Chief Justice, Lord Thomas of Cwmgiedd, involved an extended period of seeking evidence—both in written form, and in Lord Thomas and his team travelling around Wales, holding discussion-based and plenary evidence-gathering sessions with key stakeholders, organisations, groups and individuals, including police officers, academics, and members of local communities. The Report<sup>23</sup> was published in October 2019, with optimism of a new horizon that would sweep across the Welsh justice system. The remit of the Report was wide-ranging in its coverage—with Chapters including: A just, fair and prosperous Wales; Past and present; Information, advice and assistance; Criminal justice, Civil justice;

<sup>13</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), Ch.4, p.136 at [4.3.4].

<sup>14</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.136 at [4.3.4].

<sup>15</sup> Children (Abolition of Defence of Reasonable Chastisement) (Wales) Act 2020, <http://www.legislation.gov.uk/anaw/2020/3/contents/enacted> [Accessed 20 October 2020].

<sup>16</sup> Violence Against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015, <http://www.legislation.gov.uk/anaw/2015/3/contents/enacted> [Accessed 20 October 2020].

<sup>17</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru), Ch.4, Pt.1, p.141 at [4.9].

<sup>18</sup> Domestic Abuse Bill, 2019–21, <https://services.parliament.uk/bills/2019-21/domesticabuse.html> [Accessed 20 October 2020].

<sup>19</sup> Serious Crime Act 2015 s.76, <http://www.legislation.gov.uk/ukpga/2015/9/section/76/enacted> [Accessed 20 October 2020].

<sup>20</sup> Members of the Senedd.

<sup>21</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru), (2019), p.18. See also Lord Thomas of Cwmgiedd, “Justice in Wales for the People of Wales” [2020] 1 Crim. L.R. 1.

<sup>22</sup> The Legal Education Foundation, “The Commission on Justice in Wales”, <https://www.thelegaleducationfoundation.org/grantee/the-commission-on-justice-in-wales> [Accessed 20 October 2020].

<sup>23</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019).

Administrative justice and Coroners; Family justice; Delivering justice (locality and structure); The legal sector and economy of Wales; Knowledge, skills and innovation; The Welsh language; and Governance, the law of Wales, and the judiciary.

This article's scope is strictly confined to Chapter Four, on the subject of "Criminal Justice: Reducing Crime and Promoting Rehabilitation".<sup>24</sup> The Commission's Chapter on criminal justice<sup>25</sup> has identified six key features of the justice system which currently challenge its capacity to provide justice for people in Wales. This article will use the Commission's six recommendations as thematic headings under which to explore and evaluate the issues reviewed by the Chapter.<sup>26</sup>

## **Rights and wrongs: the Report's recommendations for the Welsh criminal justice system**

### *The complex division of government responsibility and funding*

Part 1 of the Chapter<sup>27</sup> suggests that Wales' criminal justice system has a growing need for improvements in the efficacy of both communication and governance. The system's complexity only serves to compound the complexity of overlap between the Welsh Government, Local Authorities and the Home Office, to name but a few (in addition to the vast number of other Welsh and UK criminal justice agencies in operation throughout Wales). This is leading to confusion in the allocation, attribution, and accountability of responsibilities, which, in turn, can have negative impacts across the criminal justice process. The Report outlines how, under the present arrangements, this disjointed mode of service delivery is far from ideal for the administration of effective governance, accountability, and communication. The Report recommended the creation of a Welsh Criminal Justice Board, for increased clarity of functions and accountability, and improved financial sustainability.

Currently, an All Wales Criminal Justice Board exists,<sup>28</sup> the objectives of which are to "reduce crime; reduce reoffending; protect the public; and strengthen joint working with devolved and non-devolved services in order to reduce re-offending".<sup>29</sup> The judiciary is not represented on that Board,<sup>30</sup> and there is similarly no representation for the defence practitioner community. In addition to that Board, there are four local Criminal Justice Boards (mirroring the four policing areas of Wales).<sup>31</sup> However, they too lack any form of representation from the

<sup>24</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019).

<sup>25</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019).

<sup>26</sup> Legal aid is addressed in a separate Chapter. See See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), Ch.4, p.135 at [4.1]; Ch.3 at [3.67]–[3.84].

<sup>27</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.137.

<sup>28</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.145 at [4.20].

<sup>29</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.145 at [4.20].

<sup>30</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.144 at [4.17].

<sup>31</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.144 at [4.19].

defence practitioner community, and only occasionally have a judicial observational presence.<sup>32</sup> The Report recommends the creation of a new Wales Criminal Justice Board, to “set an overall criminal justice strategy for Wales and provide the means for accountability within Wales for the delivery of that overall strategic approach”.<sup>33</sup> The Report recommends both a new Board structure, and new policy aims, for any such future Wales Criminal Justice Board. These can be broadly summarised as: the avoidance of accountability and efficiency “silos” between the CPS and the Police;<sup>34</sup> increased accountability in the systemic use of resources;<sup>35</sup> increased public accountability on policing matters;<sup>36</sup> a Board membership of sufficiently small size to allow for effective actionable work;<sup>37</sup> ensuring defence practitioners are invited to participate;<sup>38</sup> and ensuring that a Judicial Observer is invited to participate.<sup>39</sup>

The proposal to include a Judicial Observer on a more regular basis is a welcome improvement on the current situation—whereby the Presiding Judges for Wales may attend as observers—and tend to do so only occasionally.<sup>40</sup> The presence of a Judicial Observer from a more diverse cross-section of the judiciary, and on a more regular basis, will serve to improve both understanding and co-operation in the work of all bodies involved. In addition, the presence of defence practitioners is very much to be welcomed, particularly given the complete absence of representation on the current All Wales Criminal Justice Board.<sup>41</sup> Their presence will no doubt assist in ensuring that the systems overseen by the new Board are as efficient as possible from the perspective of, and for the overall benefit of, all their users and participants, in line with the overriding objective.<sup>42</sup>

### *Victims of crime*

One of the ways in which a new Wales Criminal Justice Board might have a direct impact could be in ensuring that victims of crime are better served than is presently the case. The Report’s findings were that the current situation is less than satisfactory. Paradoxically, despite an increase in the reporting of crime, prosecution rates are very much in decline,<sup>43</sup> with this being a particularly prominent pattern

<sup>32</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.144 at [4.19].

<sup>33</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.147.

<sup>34</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.146 at [4.26].

<sup>35</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.146 at [4.27].

<sup>36</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.146 at [4.28].

<sup>37</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.146 at [4.29].

<sup>38</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.146 at [4.30].

<sup>39</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.146 at [4.31].

<sup>40</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.144 at [4.18].

<sup>41</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.144 at [4.19].

<sup>42</sup> Criminal Procedure Rules 2020 at [1.1].

<sup>43</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.151 at [4.4.2].

in the data set on sexual offences.<sup>44</sup> Victims across the full range of criminal offence categories have reported feeling “marginalised and not ... treated with respect”.<sup>45</sup> Indeed, in a similar vein, 46 per cent of witnesses have reflected that they “would not [testify] again”<sup>46</sup>—with the practical ineffectiveness of special measures being a point picked up on by the Report<sup>47</sup>—finding that these issues “must now be addressed”.<sup>48</sup>

The geography of Wales, and the associated transport difficulties (both public and private), are also factors likely to have a negative impact on victims’ and witnesses’ experiences of the criminal justice system.<sup>49</sup> The problem of access to courts has been exacerbated by local court closures. Thus, as well as being inconvenient for victims and witnesses, at its worst, it could create the risk of defendants failing to surrender to custody<sup>50</sup> leading to arrest warrants for breach of bail conditions,<sup>51</sup> or even conviction (though this is unlikely if a reasonable excuse for such absence(s) exists). Logistical issues compound the problems for both victims and defendants, and can lead to justice being delayed for all parties, with all the frustrations that this engenders.

Part 2 of the Chapter<sup>52</sup> calls for re-evaluation of the impact on victims of crime, as the current position neither enhances victim satisfaction, nor provides adequate reassurances that victims are being supported. While the consultation responses on this area were varied and mixed,<sup>53</sup> the Report outlines how the Welsh criminal justice system’s current approach towards victims has generated concerns. There remain many issues reportedly of particular concern to victims in Wales (and their families). While some of the issues raised, such as many victims’ sense of a lack of full involvement in court proceedings, are not dissimilar to those in England, the fact that some of the problems correspond to the overall jurisdiction of England and Wales (as opposed to exclusively Wales), does not in any way dilute or diminish these issues, but rather, adds to the call for action in devolution.

A new Welsh Justice Board would communicate and facilitate victims’ rights more effectively.<sup>54</sup> Like many jurisdictions, cogent arguments can be made for the victim to have a more central role in the criminal justice system in Wales. The victim and their family could be better served in the criminal justice system by better provision of information, greater engagement and involvement in the decision

<sup>44</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.151 at [4.4.2].

<sup>45</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.153 at [4.46].

<sup>46</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.153 at [4.47].

<sup>47</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.153 at [4.48].

<sup>48</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.153 at [4.46].

<sup>49</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.153 at [4.51].

<sup>50</sup> Bail Act 1976 s.6 (“Offence of absconding by person on bail”)—save for that there may be a “reasonable excuse” under s.6(1), if transport difficulties were unforeseeable and beyond D’s control.

<sup>51</sup> Bail Act 1976 s.7 (“Liability for absconding or breaking conditions of bail”).

<sup>52</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.148.

<sup>53</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.148 at [4.32]–[4.33].

<sup>54</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.155 at [4.56].

making, and effective communication of all the significant outcomes in the process. This includes, crucially, ensuring that there is more by way of explanation in court of sentencing,<sup>55</sup> and more generally, judicial engagement<sup>56</sup> in providing explanations in open court, as may be appropriate, throughout the trial and sentencing process. While the effect of any such change would require careful evaluation, it is highly likely that it could both increase victims' satisfaction with how their cases are handled, and, more broadly, engender an improved sense of trust in Wales' criminal justice system.

### *Black, Asian and Minority Ethnic people*

Part 3 of the Chapter<sup>57</sup> presents ample evidence regarding the concerns and apprehensions of Black, Asian, and Minority Ethnic (BAME) people as to their high level of over-representation in custody in Wales.<sup>58</sup> In 2018, Wales' total percentage of BAME prisoners in Wales was 9 per cent.<sup>59</sup> Over the past 10 years, 10 per cent more Black defendants have received a Crown Court custodial sentence in Wales than in England.<sup>60</sup> The situation is similar in the Magistrates' Court, with 4.3 per cent more Black defendants being sentenced to custody, on average.<sup>61</sup> It is noted that the Magistrates' Courts' figure may not be accurate, because of the poor quality of data recording—some cases did not record the ethnic identity of the defendant.<sup>62</sup>

A further concerning statistic is that, while, in 2017, just 0.6 per cent of the population in Wales identified as Black, of Wales' "first-time entrants into the criminal justice system",<sup>63</sup> 2.1 per cent were Black, with the proportion of Black people entering the criminal justice system increasing between 2013 and 2017.<sup>64</sup> While the reasons for this have, as yet, proved to be inconclusive, one idea suggested by the Report was that this may be due to "County Lines".<sup>65</sup> We would, however, urge a note of caution in adopting any such view, as it risks falling dangerously close to racial profiling, and County Lines crime can involve people of many ethnic origins. "County Lines" remain a significant issue for the M4 corridor and North Wales (with ready access to both sea and air travel).<sup>66</sup> A potent

<sup>55</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.155 at [4.52].

<sup>56</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.155 at [4.55].

<sup>57</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.57].

<sup>58</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.57].

<sup>59</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.69].

<sup>60</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.70].

<sup>61</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.71].

<sup>62</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.71].

<sup>63</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.74].

<sup>64</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.73].

<sup>65</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.74]. County lines are also raised again at [4.103].

<sup>66</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.171 at [4.103].



case can be made for the need to investigate further the reasons behind these issues, and whether or not there may also be underlying issues of systemic inequality in the first instance.

The Report also raises concerns regarding the equality and underrepresentation on Wales' criminal justice staff,<sup>67</sup> as further exemplified in a number of national statistics.<sup>68</sup> The statistics show Wales' very low percentage of BAME police officers. The percentage is highest in the South, and declines further North, with the lowest percentage being in North Wales.<sup>69</sup> Of many possible explanations, this could be partly due to the density of population living in the South. A further not insignificant explanatory factor is that South Wales also has its own Representative Workforce Programme,<sup>70</sup> meaning that workplace diversity is necessarily thus improved. Nevertheless, ensuring improvements are made towards increasing diversity in all aspects of the criminal justice system in Wales is clearly necessary. Figures are also low in terms of CPS staff,<sup>71</sup> HMPPS,<sup>72</sup> and the Judiciary, with Wales having "at 3% ... the lowest representation of BAME court judges in England and Wales".<sup>73</sup> The position is similar in terms of the Magistracy, with a figure of 5 per cent in Wales, compared to 12 per cent in England and Wales in general.<sup>74</sup> This is likely to have an adverse effect on public confidence in the justice system—as the public is less likely to trust a system which is not necessarily representative of society at large—whereas a system which reflects society will be more respected.

The Report recommends that Wales implement the recommendations of the Lammy Review,<sup>75</sup> and expand and enhance equality, diversity, and inclusion amidst the ranks of the Police, HM Prison and Probation Service (HMPPS) and, last but not least, the judiciary. The Report further recommended multiple agencies produce annual strategies to systematically implement diversity and inclusion.<sup>76</sup> These recommendations are worthy ones, and ought to be acted upon immediately.

### *The role of the Police*

Overall, the Report recommends a single focus for a policing policy in Wales, accountable directly to a government minister. Building on Wales' socially-oriented

<sup>67</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.60].

<sup>68</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.58]. See also Lord Thomas of Cwmgeidd, "Justice in Wales for the People of Wales" [2020] Crim. L.R. 1.

<sup>69</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.63].

<sup>70</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.64].

<sup>71</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.65].

<sup>72</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.68].

<sup>73</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.66].

<sup>74</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.67].

<sup>75</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.156 at [4.75] and [4.57]—namely that: "(1) there must be robust systems in place to ensure fair treatment in every part of the criminal justice system, (2) trust in the criminal justice system is essential, and (3) one of the biggest symbols of an 'us and them' culture is the lack of diversity among those making important decisions in the criminal justice system".

<sup>76</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.160.

approach, there should also be a coherent policing and crime reduction policy, inclusive of drug abuse and mental-health related matters.<sup>77</sup> As Lord Thomas commented: “Much wider changes are required to align in Wales the making of criminal justice policy and its delivery with policies on health, education and social welfare and a growing body of Welsh law”.<sup>78</sup> A Wales-centric initiative would allow for the cohesive integration of such policies into the Welsh health, education, and social systems, and facilitate both efficacy and best practice in the Welsh criminal justice system.

Part 4 of the Chapter<sup>79</sup> sets out the complexity of police organisation, governance, and accountability under the existing devolved statutory framework. In recent years, changes have been made to Wales’ governance and accountability for policing. For instance, in April 2017, an All-Wales Deputy Chief Constable was appointed,<sup>80</sup> but the post was terminated after a year, with the role’s functions being distributed among other senior police personnel in May 2018.<sup>81</sup> In July 2018, a Cross-Party Group on Policing was created, to generally good effect.<sup>82</sup> Finally, in November 2018, a Policing Board for Wales was established<sup>83</sup> with a membership broadly similar to the All Wales Criminal Justice Board.<sup>84</sup>

As matters stand, Wales has four police forces (North Wales, Dyfed Powys, Gwent, and South Wales) as a result of previous amalgamations, with each being led by a Chief Constable.<sup>85</sup> One of the central tenets of the Report is that Welsh policing matters ought to have more devolved governance, instead of being regularly referred to simply as part of “the 43 police forces in England and Wales”.<sup>86</sup> Such a move could have the advantage of reducing current complexities in governance resulting from the overlap between devolved and centralised oversight of policing.

Other than the complexity and overlap of organisational governance structures, one of the key issues raised by the Report was that of funding,<sup>87</sup> including the formula for the allocation of the Home Office policing grant, noting that the funding “does not take enough account of the unique circumstances of each force”.<sup>88</sup> This is an important point, given the disparate and distinct roles of the four forces of

<sup>77</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.186 at [4.146].

<sup>78</sup> Lord Thomas of Cwmgeidd, “Justice in Wales for the People of Wales” (2020) 1 Crim. L.R. 2.

<sup>79</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.161.

<sup>80</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.164 at [4.86].

<sup>81</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.164 at [4.86].

<sup>82</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.164 at [4.87].

<sup>83</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.164 at [4.88].

<sup>84</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.164 at [4.88].

<sup>85</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.164 at [4.78].

<sup>86</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.140 at [4.5].

<sup>87</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.165 at [4.89]–[4.89.4].

<sup>88</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.165 at [4.91].

Wales. Of the four forces, Dyfed-Powys covers a principally coastal-rural area;<sup>89</sup> Gwent's area of coverage is predominantly urban;<sup>90</sup> South Wales' is urban-coastal;<sup>91</sup> and North Wales' is rural-port<sup>92</sup>-University<sup>93</sup> city.<sup>94</sup> Given their distinct positions, it is little surprise that the current funding model might not necessarily reflect the four forces' unique operational and funding needs as closely as it might. Nevertheless, the Report stopped short of recommending a single, centralised, police force for Wales, instead opting to defer such a decision to be made by Wales, for Wales, at some point in the future.<sup>95</sup> Whether or not any such centralised force would be a good idea in the future, juxtaposed against background of an increasingly devolved jurisdiction, remains a point of potential contention, and its merits would depend on the extent to which it could reflect Wales' myriad local differences and diversities.

There are many other relevant distinctions between the Police in England and Wales—with one example being Policing and Crime Commissioners (PCCs). PCCs are principally accountable to two bodies—the electorate (once every four years)—and the Home Office.<sup>96</sup> The Report notes that “the establishment of PCCs did not take much account of Welsh devolution”,<sup>97</sup> but simply “took into account Welsh devolution to the extent that a Welsh group was formed”.<sup>98</sup> Nevertheless, not all divergences are necessarily negative, and Wales avoided becoming caught up in the controversy<sup>99</sup> surrounding England's fusion of PCC governance which moved to combine certain policing and fire and rescue functions, in the new “PCC-style FRA”.<sup>100</sup> In PCC-style FRAs, Fire Service funding for “back room operations” (such as operations control rooms) and certain equipment is then fused with that of the Police—leaving both local services either collaborating with, or competing for, a jointly allocated pool of financial resources—and with the PCC having decisive oversight. Because of the devolved jurisdiction, the concept of a PCC-style FRA does not exist in Wales, and so PCCs do not oversee the Fire and Rescue services. Furthermore, Wales' system of PCCs has significantly less Mayoral nexus than its English counterpart,<sup>101</sup> but whether this is a positive or a negative difference is yet to be seen.

<sup>89</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.172 at [4.106].

<sup>90</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.173 at [4.108].

<sup>91</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.174 at [4.112]. South Wales also covers Cardiff.

<sup>92</sup> Holyhead, the freight and passenger port.

<sup>93</sup> Bangor University (Prifysgol Bangor), in Gwynedd, North Wales.

<sup>94</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), Ch.4, Pt 4, p. 174 at [4.135].

<sup>95</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru), p.187 at [1.147]–[4.151].

<sup>96</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.164 at [4.80].

<sup>97</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.164 at [4.85].

<sup>98</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.161 at [4.79].

<sup>99</sup> Fire Brigades' Union, “No to PCC Takeover” (2016), <https://www.fbu.org.uk/no-pcc-takeover> [Accessed 20 October 2020].

<sup>100</sup> Policing and Crime Act 2017 s. 6 explains that Sch.1 now makes the provision that a person who is the Police and Crime Commissioner (PCC) for an area can also be the Fire and Rescue Authority (FRA) for that area (in England only).

<sup>101</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), Ch.4, Pt 4, p.164 at [4.80].

In terms of national operational policing trends across Wales, in the past five years there have reportedly been some increases in certain types of crime.<sup>102</sup> While some could be attributable to an increase in *reporting*, rather than in the incidence of crime itself, the types of crime apparently on the increase necessarily prompt further focus, especially given the current context of national difficulties for many following COVID-19 and its associated lockdown(s). The Report noted increases in interpersonal, intimate, violent offences (on which Wales has led the way in terms of legislative progression), and cybercrimes.<sup>103</sup> Again, the crime rates in these categories are unlikely to be affected favourably once the population returns to some level of normal societal activity (although it is recognised that the lockdown period may have temporarily reduced interpersonal public order offences, and temporarily increased domestically violent interpersonal and intimate offences).

The post-COVID-19 era may well also see increased demands arising from mental health issues, which could impact on future policing and emergency services' planning. Even prior to COVID-19, the Report noted that, every 13 minutes, South Wales Police received a report of a mental health matter, despite only 4 per cent falling within the scope of exercisable police powers.<sup>104</sup> Across Wales, it is not uncommon for police forces to be called to attend acute mental health emergencies, using training, equipment, and resources designed to deal with crime, but not necessarily an acutely mentally unwell person. While not unique to Wales, this issue received extensive coverage in the Report as one which must be addressed. As the Report itself tellingly emphasises, "police cars should not be used as a replacement for ambulances and police cells are inappropriate for people with serious mental illness".<sup>105</sup> Nevertheless, across Wales, for want of more appropriate multi-organisation systems and resources, this is exactly what is often occurring. Wales' Mental Health Concordat,<sup>106</sup> of December 2015, was an agreement between the Welsh Government and partners (including the police and other justice bodies),<sup>107</sup> aiming to provide collaborative support to those emergency services most likely to be called to attend at an acute mental health crisis. However, as the Report notes, "developing an integrated approach across devolved and UK bodies is difficult".<sup>108</sup>

A potential development would be to adopt the "street triage co-responder"<sup>109</sup> model. This involves multiple agencies (in collaboration, or mutual consultation)

<sup>102</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.170 at [4.100].

<sup>103</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.170 at [4.100].

<sup>104</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.183 at [4.111].

<sup>105</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.183 at [4.111].

<sup>106</sup> Welsh Government and Partners, "Mental Health Crisis Care Concordat" (2015), <https://gov.wales/sites/default/files/publications/2019-03/mental-health-crisis-care-concordat.pdf> [Accessed 20 October 2020]; Welsh Government and Partners, "Wales Crisis Care Concordat National Action Plan 2019–2022" (2019), <https://gov.wales/sites/default/files/publications/2019-10/wales-crisis-care-concordat-national-action-plan-2019-2022.pdf> [Accessed 20 October 2020].

<sup>107</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), Ch.4, Pt 4, p.183 at [4.111].

<sup>108</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.183 at [4.111].

<sup>109</sup> W. Dyer, M. Steer and P. Biddle, "Mental Health Street Triage" (2015) 9(4) *Policing* 377; S. Puntis, D. Perfect, A. Kirubakaran, S. Bolton, F. Davies, A. Hayes, E. Hariss and A. Molodynski, "A systematic review of co-responder models of police mental health 'street' triage" (2018) 18 *BMC Psychiatry* 256.

responding to an emergency incident involving an acutely unwell person. This may work well in Wales, especially as all four Welsh police forces have piloted their use,<sup>110</sup> and they now have some use (to a greater or lesser extent) across all four forces.<sup>111</sup> Nevertheless, since such schemes are “funded by policing ... there is therefore a significant question around sustainability and a desire to seek a financial contribution from other public sector partners who similarly are benefitting from this innovative approach”.<sup>112</sup> Interestingly, while the Mental Health Crisis Care Concordat National Action Plan for 2019–2022<sup>113</sup> refers to collaborative inter-services working, there appears to be no mention of systematic street triage schemes—begging the question whether street triage pilot scheme funding was a matter of paying lip service to an urgently necessary service, rather than securing it with long term funding. Given the lives which could be saved, and acute mental health crises assisted, from such schemes’ expanded and enhanced use of community street triage models, it is suggested that the Welsh Government consider assisting the four forces with secure and substantive allocated funding in their budgets.

Another aspect of public-facing policing presence in Wales are the 500 Police Community Support Officers (PCSOs), funded by the Welsh Government.<sup>114</sup> The Report found that there “was no statistically significant evidence that the additional numbers of community support officers had helped reduce crime compared to police force areas in England”.<sup>115</sup> Nevertheless, it must be borne in mind the value that PCSOs’ presence has in deterring crime and enhancing public perceptions of policing. That is a value that cannot be easily measured, but a Cambridge University study found that 21 minutes of extra PCSO patrols per day could lead to a significant reduction in incidences of crime and emergency police calls.<sup>116</sup> The need to prevent crime is obvious, considering the steady decline in prosecution rates across England and Wales.<sup>117</sup> This is especially so given that these decreases in prosecutions are juxtaposed against an increase in reported crime.<sup>118</sup> There also remains a clear need for “improvement in public perceptions of safety in deprived neighbourhoods”.<sup>119</sup> Therefore, the “divergence between the volume of recorded

<sup>110</sup> Equality and Human Rights Commission, “Case study: Dyfed Powys Police street triage service” (9 January 2018) [equalityhumanrights.com, https://www.equalityhumanrights.com/en/inquiries-and-investigations/preventing-deaths-detention-adults-mental-health-conditions/case-0](https://www.equalityhumanrights.com/en/inquiries-and-investigations/preventing-deaths-detention-adults-mental-health-conditions/case-0) [Accessed 20 October 2020]; North Wales Police, “Wrexham Street Triage Pilot” (18 May 2016), <https://www.north-wales.police.uk/news-and-appeals/wrexham-street-triage-pilot> [Accessed 20 October 2020]; South Wales Police, “Street Triage Schemes with Health Partners” (6 December 2018), <https://www.south-wales.police.uk/en/disclosure-log/triage-schemes-with-health-partners/> [Accessed 20 October 2020]; D. Rea, “Gwent Police Mental Health Triage: Final Evaluation Report” (2019), <https://cronfa.swan.ac.uk/Record/cronfa52052> [Accessed 20 October 2020].

<sup>111</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), Ch.4, Pt 4, p.179 at [4.125]–[4.126].

<sup>112</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.179 at [4.125]–[4.126].

<sup>113</sup> Welsh Government and Partners, “Mental Health Crisis Care Concordat National Action Plan 2019–2022”.

<sup>114</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), Ch.4, Pt 4, p.175 at [4.114].

<sup>115</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.175 at [4.114].

<sup>116</sup> B. Ariel, C. Weinborn and L.W. Sherman, “‘Soft’ policing at hot spots—do Police Community Support Officers work? A randomized controlled trial” (2016) 12 J. Exp. Criminol 277.

<sup>117</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), Ch.4, Pt 4, p.175 at [4.116].

<sup>118</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru), p.175 at [4.116].

<sup>119</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.175 at [4.116].

crime and the percentage of prosecutions<sup>120</sup> evidences the need for increased focus on the prevention of crime in the first place, wherever this can possibly be achieved.

The education of police officers was also noted as an important area for collaboration between Wales' four forces and its FE and HE providers,<sup>121</sup> with the Report recommending to the Welsh Government and Home Office that agreement should be reached on long-term funding for police apprenticeships "which do not disadvantage Welsh police forces compared to their English counterparts".<sup>122</sup>

Last, but by no means least, the Report notes the Policing and Crime Act 2017's new provisions in relation to bail, and the wholly novel "release under investigation" (RUI) procedures. These have proved problematic for Wales, being specifically recognised by one force as "an area of risk"<sup>123</sup> sufficient to warrant the deployment of a team comprising a Superintendent, four Inspectors, and other Officers, simply to "manage the new arrangements".<sup>124</sup> The problems arise because, while bail remains in use for higher risk cases (where bail conditions can be imposed on the defendant), the new RUI procedure allows for suspects perceived as lower risk to be "released under investigation"—with no contingent conditions at all. This presents a certain degree of risk. The introduction of RUIs aimed, among other things, to tackle issues with custody time limits. However, the Welsh force described above found that: "while ... this has mitigated the risk around authorisation, it has not prevented problems with bail timescales",<sup>125</sup> since: "there is conflict between complex high risk cases with bail and lower risk cases 'released under investigation'. As a result usually high risk cases take precedence and consequently timescales associated with lower risk cases often end up being extended".<sup>126</sup>

There is a rather foreboding aspect to the Report when noting that "the impact of the emerging consequences of bail reform, including longer investigations, the growing rate of crimes not prosecuted and the potential risk to public safety arising from detained persons being released under investigations [sic] has been described as a very real threat".<sup>127</sup> This is an area requiring review.

### *The Crown Prosecution Service and the Courts*

CPS-Cymru is one of 14 CPS areas, and is Wales' national prosecutorial body, based in Cardiff, Mold, and Swansea.<sup>128</sup> Set against "substantial reduction in funding

<sup>120</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.176 at [4.117].

<sup>121</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.170 at [4.127]–[4.131].

<sup>122</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.181 at [1.31].

<sup>123</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.177 at [4.121].

<sup>124</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.177 at [4.121].

<sup>125</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.177 at [4.121].

<sup>126</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.177 at [4.121].

<sup>127</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019) p.177 at [4.121].

<sup>128</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.188 at [4.152]–[4.154].

across the criminal justice system<sup>129</sup> is the “significant reduction of the number of prosecutors employed in the CPS”.<sup>130</sup> From 2012–2013 to 2018–2019, CPS Cymru-Wales saw a reduction in staff of 23 per cent.<sup>131</sup> Despite this, “prosecutions in Wales result in a marginally but consistently higher conviction rate than England”.<sup>132</sup> Yet, contemporaneously, there have been decreases in Wales’ rate of Magistrates’ Court and Crown Court prosecutions and convictions.<sup>133</sup> Despite the Magistrates’ Court being the concluding venue for over 90 per cent of criminal cases,<sup>134</sup> those in Wales have seen a drop in work of around 35 per cent, significantly steeper than that in England.<sup>135</sup> While there have been endeavours to divert some cases into restorative justice, the Report is nevertheless emphatic in expressing concern as to prosecution and conviction rates.<sup>136</sup> Furthermore, while the Court of Appeal (Criminal Division) can, and does, sit in Wales, its rate of doing so would also appear to be on the decline,<sup>137</sup> something to which the Report takes a degree of exception.<sup>138</sup> Nevertheless, the Report reflects that “Wales is consistently better than any of the English regions in the performance of the courts in the delivery of criminal justice”.<sup>139</sup>

While the traditional, court-based (or procedural) approach to justice performs a significant role in both the CPS’ and victims’ perceptions of policing, the Report suggested the potential for problem-solving courts could herald a new dawn for Welsh criminal justice. The Report focused on how this mechanism underpinned legitimacy in Northern Ireland, namely, reflecting on the root causes of offending, and reducing the number of people being sentenced to custodial sentences, with the restorative justice-based approach being seen as supporting procedural justice and police performance.<sup>140</sup> The Report recommended that a pilot for problem-solving courts for Wales should be established (of which there are presently none in Wales)<sup>141</sup>, in a manner consistent with the modelled approach in Northern Ireland.<sup>142</sup>

<sup>129</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.177 at [4.121]; and p.188 at [4.153].

<sup>130</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.177 at [4.121].

<sup>131</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.188 at [4.143].

<sup>132</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.188 at [4.155].

<sup>133</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.189, Figure 23.

<sup>134</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.190 at [4.158].

<sup>135</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.190 at [4.159].

<sup>136</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.190 at [4.157].

<sup>137</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.191 at [4.162]–[4.163].

<sup>138</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.192 at [4.163].

<sup>139</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.192 at [4.164].

<sup>140</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), pp.193–196 at [4.166]–[4.178].

<sup>141</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.188 at [4.172].

<sup>142</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), pp.193–196 at [4.166]–[4.178].

*Youth justice, probation and imprisonment: the need for a whole system approach to offender management and rehabilitation*

Part 6 of the Chapter<sup>143</sup> examined three distinct but connected subject areas—youth justice; the prisons and the Probation Service; and offender management and rehabilitation—considering how a preventive and restorative justice-based approach could work for Wales. This approach has been initiated in the Welsh Youth Courts, but the complexities of duality in the jurisdiction of Wales and England has effectively hampered its sustained progress,<sup>144</sup> as, while most of Wales’ children’s services have been devolved, youth justice remains the remit of the UK Government.<sup>145</sup>

Youth justice: taking a preventative approach and the age of criminal responsibility

The Youth Justice Board (YJB) for England and Wales coordinates Wales’ responses to youth crime (offenders aged 10–17 years old).<sup>146</sup> Wales’ principal aim with regards to youth justice is preventive, seeking to implement “joined up solutions” to “joined up problems”.<sup>147</sup> The Report explores the benefits and challenges of inter-agency collaboration at the offender and rehabilitation stages. Despite generally good progress in this area,<sup>148</sup> there remains a degree of risk that even the more intensive youth offender support mechanisms could fail, unless they continue to be managed well.<sup>149</sup> It reiterates how the current climate of enhanced collaboration between key stakeholders, including the Ministry of Justice, exposes yet another “jagged edge” between that which is devolved, and that which is not.<sup>150</sup>

The Report suggests that targeted programmes for the reduction of youths entering the criminal justice system in Wales have great merit if implemented properly.<sup>151</sup> The results regarding collaboration were also disappointingly dependent on the good relationships held by individuals in the posts, rather than by policies.<sup>152</sup> The complexities of funding<sup>153</sup> also exacerbated the underlying preventive approach to youth offending—particularly in terms of issues such as suitable accommodation and Youth Offending Caseworkers. The Report noted progress made to date, and

<sup>143</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), Pt 6, p.197.

<sup>144</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.197 at [4.179].

<sup>145</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.199 at [4.183].

<sup>146</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.197 at [4.181].

<sup>147</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.199 at [4.183]; p.200 at [4.187]–[4.189].

<sup>148</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.201 at [4.192].

<sup>149</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.201 at [4.192.1].

<sup>150</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.201 at [4.192.2].

<sup>151</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.202 at [4.193].

<sup>152</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.201 at [4.192.1].

<sup>153</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.200 at [4.190]–[4.191].



highlighted the need for improved procedural justice, with need for further child and adolescent mental health practitioners. This is particularly important for youths with trauma from Adverse Childhood Experiences (ACEs).

Overall, the Report recommended that youth justice policy be devolved, to be determined and delivered in Wales,<sup>154</sup> and, crucially, recommends that the current age of criminal responsibility (currently 10 years of age in England and Wales) be raised to at least 12 years old in Wales.<sup>155</sup>

As Lord Thomas commented, following the Report: “The current age of 10 is too young and does not comply with the UN Convention of the Rights of the Child. It will soon be the lowest in Europe as the Scottish Parliament has passed legislation raising the age to 12. There are much better ways of dealing with children and young people than criminalising them.”<sup>156</sup> The proposed amendment is arguably a change for the better. The age of criminal responsibility set by England is widely known to be one of the lowest in the world,<sup>157</sup> but, if implemented, this change could foreseeably raise a number of contentious cases as to the *locus* of any such cases in the vicinity of the Welsh border (and, therefore, which of the two ages of criminal responsibility would apply, particularly if a child were between the age of 10 and 12 years of age). These matters clearly require considered thought.

### Offender management: the need for an integrated policy

By contrast to the progressive picture regarding youth justice, the Report found “serious problems in prison and probation services across England and Wales, in large part the result of UK Government policies”.<sup>158</sup> The Report proposed Wales’ devolved characteristics require a clear and unified approach towards offender management and rehabilitation, with special attention in the case of current policy for youth offenders—and, in particular, with improved understanding of Adverse Childhood Experiences (ACEs).<sup>159</sup> The Report describes how funding cuts have made matters particularly difficult for rehabilitation organisations supporting vulnerable offenders. Proposals for a “whole system approach to offender management and rehabilitation”<sup>160</sup> would improve distribution of rehabilitation—which, in turn, would enhance offenders’ engagement opportunities, and provide a sense of empowerment. The “whole system approach”<sup>161</sup> may well reduce recidivism and improve metrics of funding efficiency. The present approach is

<sup>154</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.203 at [4.194].

<sup>155</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.203 at [4.195].

<sup>156</sup> Lord Thomas of Cwmgeidd, “Justice in Wales for the People of Wales” [2020] Crim. L.R. 1.

<sup>157</sup> See further P. Brown, “Reviewing the age of criminal responsibility” [2018] Crim. L.R. 904 and A. Brown and A. Charles, “The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach” (2019) *Youth Justice* (Online, December 2019).

<sup>158</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.204 at [4.196].

<sup>159</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.206 at [4.203]–[4.207].

<sup>160</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.207 at [4.209].

<sup>161</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.207 at [4.209].

fragmented,<sup>162</sup> and thus wastes precious resources which it can scarcely afford to spare.<sup>163</sup>

Access to justice is also costly for defendants, with legal aid cuts proving prohibitive to many, and privately-funded representation beyond the reach of most pockets. Furthermore, while there are many solicitors in Wales, and numerous barristers' chambers in South Wales, the Bar's coverage beyond the South of Wales is sparse at best, with many Counsel commuting to court from England (something which is notable in North Wales). Some in the Welsh criminal justice system are not represented at all—and access to justice, and participants' parity and power in proceedings, is a very real problem.

### *The organisation of Her Majesty's Prison and Probation Service in Wales*

#### Probation in Wales

The delivery of prison and probation services in Wales is managed by HM Prison and Probation Service (HMPPS).<sup>164</sup> On HMPPS' own figures, this net expenditure exceeds £4,000 million.<sup>165</sup> The auditing and inspection of both prison and probation is conducted by the Majesty's Inspectorate of Prisons (HMIP), and HM Inspectorate of Probation (unhelpfully also abbreviated as HMIP).<sup>166</sup> Additionally, the Prisons and Probation Ombudsman (PPO) investigates any allegations of ill-treatment, following incidents such as deaths in custody, or complaints from prisoners.<sup>167</sup> It is recognised that prison and probation services can prove difficult to monitor—and perhaps even somewhat opaque to the subtler distinctions drawn in devolution. In 2014–2015, a Wales Directorate was established<sup>168</sup> to equip the Welsh Government more effectively in its aim to design and deliver services essential to rehabilitation and recidivism reduction. Another interesting finding to emerge from this study was evidence of the presence of strong and committed leadership, despite the complex coalescence of urban and rural areas in Wales.<sup>169</sup>

The Report highlights the purpose of probation,<sup>170</sup> and the value of high-quality Probation Officers, noting that “people can change and that a person's past is not

<sup>162</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), pp.210–213 at [4.214]–[4.224].

<sup>163</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.209 at [4.213]; and pp.212–213 at [4.222]–[4.224].

<sup>164</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.213 at [4.225].

<sup>165</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.213 at [4.226]; and p.79 at [2.107].

<sup>166</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.214 at [4.227].

<sup>167</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.214 at [4.227.3].

<sup>168</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.215 at [4.228]; see also Commons Select Committee on Welsh Affairs, *Prison Provision in Wales* (30 April 2019), p.2 at [7], [https://publications.parliament.uk/pa/cm201719/cmselect/cmwelajf/742/report-files/74205.htm#\\_idTextAnchor009](https://publications.parliament.uk/pa/cm201719/cmselect/cmwelajf/742/report-files/74205.htm#_idTextAnchor009) [Accessed 20 October 2020].

<sup>169</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.223 at [4.243].

<sup>170</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.216 at [4.230].

his or her destiny”.<sup>171</sup> However, criticisms have been levelled at “Transforming Rehabilitation” reforms, with the Report noting “it is sufficient to state that the reforms failed”.<sup>172</sup> To address the disjuncture between the supervision of offenders by the National Probation Service (NPS) and the reality of liaising with Community Rehabilitation Companies,<sup>173</sup> in May 2019, the Ministry of Justice published a largely welcomed Draft Operating Blueprint for England and Wales, to support the importance of effective rehabilitation of offenders in Wales.<sup>174</sup>

The courts, in sentencing, also make ample use of Community Orders.<sup>175</sup> The designation and scope of these Orders also falls within the Probation Service’s remit, in terms of oversight of offenders, with assigned cognitive and behaviour programmes, and abstinence from drugs, and alcohol testing, in addition to additional intervention measures. The Report noted comparative assessments carried out by NPS and the Community Rehabilitation Company, and how some results were far from ideal, albeit with some improvements.<sup>176</sup>

The Chief Inspector of Probation has previously commented that the service was difficult to navigate.<sup>177</sup> The Report recommends that a number of basic design principles set out in the 2018 report of the then Chief Inspector of Probation should be applied to the National Probation Service of Wales, with regular metrics for outcomes being made public, to improve accountability.<sup>178</sup> While the statistics themselves are inherently variable (as with all data of this kind), public accessibility of this data would be a progressive step forward for public transparency and accountability.

## Prisons and Wales

Given the matters discussed above, it may come as little surprise that the arrangements for Wales’ six prisons<sup>179</sup> are also somewhat fragmented. Consequently, the political appetite for seeking a separate, fully devolved, criminal justice jurisdiction for Wales continues. The prison service in Wales aims to encourage a wide range of programmes for prisoners, regardless of their category of offences. One aim is to foster engagement with, and provide clarity on, the multiple pathways available to support the capabilities and limitations of both prison resettlement programmes and prison capacity.

<sup>171</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.217 at [4.231].

<sup>172</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), pp.218–219 at [4.234]–[4.239], with particular focus on [4.238].

<sup>173</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.220 at [4.239.1].

<sup>174</sup> HM Prison and Probation Service, *The Proposed Future Model for Probation: A Draft Operating Blueprint* (Probation Reform Programme, 19 June 2019), [https://publications.parliament.uk/pa/cm/201719/cmselect/cmwelf/742/report-files/74205.htm#\\_idTextAnchor009](https://publications.parliament.uk/pa/cm/201719/cmselect/cmwelf/742/report-files/74205.htm#_idTextAnchor009) [Accessed 20 October 2020].

<sup>175</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.221 at [4.240].

<sup>176</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), pp.221–224 at [4.241]–[4.244].

<sup>177</sup> HM Inspectorate of Probation, *Report of the Chief Inspector of Probation* (March 2019), <https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2019/03/HMI-Probation-Chief-Inspectors-Report.pdf> [Accessed 20 October 2020].

<sup>178</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.224 at [4.244]. Wales’ six prisons are: HMP Berwyn, HMP Cardiff, HMP Swansea, HMPs Usk and Prescoed, and HMP/YOI Parc (the latter being a private sector prison).

<sup>179</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.225 at [4.247].

Over the past number of years, the Inspectorate of Prisons has inspected all of the few Welsh prisons, and their conclusions illustrate many unresolved concerns. These include an unsettling unease over rehabilitation programmes and security, with significant evidence of self-harm still being reported; day release incentives failing statutory provisions; and overcrowding, leading to prison staff attacks. In 2017, there was an average of at least one daily attack on prison staff in Wales,<sup>180</sup> with 2017 data showing assaults on staff being almost three times higher in Wales than in England.<sup>181</sup>

All of Wales' adult prisons except HMP Usk are designated as resettlement prisons.<sup>182</sup> Three of these prisons are Victorian (Cardiff, Swansea, and Usk), and Prescoed was built in 1939 by prisoners' own labour.<sup>183</sup> HMP Parc has a "specialist lifer unit",<sup>184</sup> and most prisoners held in HMP Usk have committed sex offences, but there is no Category A prison in Wales.<sup>185</sup> Interestingly, around 66 per cent of HMP Berwyn's inmates are from England,<sup>186</sup> when, by contrast, in 2018, 37 per cent of Wales' adult male prisoners were being held in English prisons.<sup>187</sup> There are also Welsh prisoners still serving Indeterminate Public Protection (IPP) sentences in English prisons, despite the IPP sentence being abolished in 2012.<sup>188</sup> Overall, the very nature of Wales' prisons raises the need for reform being a pressing consideration.

There are currently no women's prisons in Wales,<sup>189</sup> meaning that all women sentenced to imprisonment are sent to prisons in England for the entirety of their sentences.<sup>190</sup> The Report notes that, "since 2011, the number of women from Wales sentenced to immediate custody has increased by almost a fifth",<sup>191</sup> but that, between 2010 and 2017, 78.6 per cent of Welsh women sentenced to custody received sentences of less than 12 months, with 24.8 per cent (a quarter) receiving custodial sentences of a month or less. Furthermore, Wales' women prisoners are held at greater distances from home than Wales' male prisoners,<sup>192</sup> to profound familial effect for those women who are fortunate enough to have their children still at home (with many women's children being removed into the care system upon

<sup>180</sup> R. Jones, "Imprisonment in Wales: A Factfile" (Welsh Governance Centre, June 2018), p.12 at [4.23], [https://www.cardiff.ac.uk/\\_data/assets/pdf\\_file/0008/1195577/Imprisonment-in-Wales-A-Factfile.pdf](https://www.cardiff.ac.uk/_data/assets/pdf_file/0008/1195577/Imprisonment-in-Wales-A-Factfile.pdf) [Accessed 20 October 2020].

<sup>181</sup> Jones, "Imprisonment in Wales: A Factfile" (2018) at [4.24].

<sup>182</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.226 at [4.249].

<sup>183</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.227 at [4.250].

<sup>184</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.226 at [4.249].

<sup>185</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.227 at [4.250].

<sup>186</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019) p.227 at [4.251].

<sup>187</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.227 at [4.252].

<sup>188</sup> Jones, "Imprisonment in Wales: A Factfile" (2018) at [5.14]. IPPs were abolished by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012).

<sup>189</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.232 at [4.264]. See also D. Fraser, "There are no women's prisons in Wales. What does this mean for Welsh women?" (19 September 2018) *Clean Break*, <https://www.cleanbreak.org.uk/news/blog-womens-prisons-wales/> [Accessed 20 October 2020].

<sup>190</sup> Jones, "Imprisonment in Wales: A Factfile" (2018), p. 23 at [6.12].

<sup>191</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.231 at [4.262].

<sup>192</sup> Jones, "Imprisonment in Wales: A Factfile" (2018), p.23 at [6.13].

their sole parent's imprisonment). The Report adds that, in 2016, of 623 women in Wales sentenced to immediate custody, 86 per cent were convicted of non-violent offences.<sup>193</sup> Yet, the Report notes, "far from the absence of a women's prison in Wales being seen as a problem, we believe it should be seen as a benefit and support the new approach to be taken".<sup>194</sup>

The Report recommends a distinct approach to women's justice in Wales,<sup>195</sup> making it clear that satisfactory intervention-based rehabilitative alternatives to custody (namely Women's Centres<sup>196</sup>) must be swiftly established.<sup>197</sup> The primary aim of such an approach is to reduce female prisoners and custodial sentences for women in Wales. There are arguably also some preventive parallels here with Wales' stance on domestic abuse and prohibition of corporal punishment against children. Offender treatment and mental health programmes, with enhanced inter-agency collaboration at any early stage are likely to yield significant results on both a statistical and individual level. This is particularly true for those women who have come from abusive upbringings and/or partners; or are suffering from substance abuse issues; or who are living with mental health matters.<sup>198</sup> There are also signs that the Commission's work has had some effect here—as, since its publication, the UK Government has announced a £2.5m Female Offending Strategy funding initiative for preventive community services for women—with Wales being selected as the location for the UK's first Residential Women's Centre, providing an alternative to imprisonment for women convicted of low-level crime.<sup>199</sup>

Ironically, despite Wales having no women's prisons, it bears two secure children's units, both in the South. The first is the Youth Offenders' Institution (YOI) Parc in Bridgend, a separate wing of the men's prison, with a capacity of approximately 64, for boys under 18.<sup>200</sup> In 2017, the majority of child prisoners at YOI Parc were from outside of Wales.<sup>201</sup> A 2016 inspection found that a third of imprisoned boys felt unsafe there.<sup>202</sup> The second is Hillside Secure Children's Home (SCH) in Neath<sup>203</sup> which has only six beds.<sup>204</sup> It is also noteworthy that there is practically no provision in Wales for child prisoners who are girls.<sup>205</sup> Other child prisoners beyond the capacity or provision of these two institutions thus have to

<sup>193</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.231 at [4.262].

<sup>194</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.235 at [4.273].

<sup>195</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.235 at [4.271].

<sup>196</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.235 at [4.273].

<sup>197</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.236 at [4.276].

<sup>198</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.235 at [4.271]–[4.272].

<sup>199</sup> UK Government, "Press Release: Funding boost to steer more women away from crime" (5 May 2020), <https://www.gov.uk/government/news/funding-boost-to-steer-more-women-away-from-crime> [Accessed 20 October 2020]; Welsh Government, "Press Release: Female offenders to get residential centre in Wales" (5 May 2020), <https://gov.wales/female-offenders-get-residential-centre-wales> [Accessed 20 October 2020].

<sup>200</sup> See Jones, "Imprisonment in Wales: A Factfile" (2018), p.30 at [7.11].

See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.136 at [4.3.3].

<sup>201</sup> See Jones, "Imprisonment in Wales: A Factfile" (2018), p.31 at [7.14].

<sup>202</sup> See Jones, "Imprisonment in Wales: A Factfile" (2018), p.33 at [7.33].

<sup>203</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.198 at [4.182.3].

<sup>204</sup> See Jones, "Imprisonment in Wales: A Factfile" (2018), p.30 at [7.10].

<sup>205</sup> See Jones, "Imprisonment in Wales: A Factfile" (2018), p.32 at [7.28].

go to prisons in England, with this happening in 45 per cent of cases in 2017.<sup>206</sup> This can lead to bullying, and linguistic and cultural “otherness”.<sup>207</sup> It is contextually thus perhaps not surprising that Wales’ devolved focus rests upon prevention and rehabilitation.

As the Report notes, “The Welsh Government makes a substantial contribution to the criminal justice system without having a say on expenditure policy (save in limited areas) or on expenditure or how resources could be used more effectively to create a better overall system”.<sup>208</sup> This is perhaps ironic, given the reciprocal issues faced by those who are party to it, with even the Chair of the Report, the previous Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, noting that “our justice system has become unaffordable to most”.<sup>209</sup> There is, however, no immediate prospect of control over the allocation of funding for criminal justice matters, or over legal aid, being devolved as of yet. Overall, with regards to prisons and probation, the Report finds that “the present policy of making piecemeal reforms needs to be re-evaluated . . . Wales should move forward speedily to set in place a new policy, based on a whole system approach with a re-evaluation of sentencing policy based on the experience of other nations”.<sup>210</sup>

## Conclusion: Welsh Devolution in evolution?

The conclusion reached by the Report on prison reform essentially sums up its holistic stance on criminal justice in Wales in general—namely, that: “The current situation which we have set out requires action as resources are not being used effectively. The time is right to do so”.<sup>211</sup> As Lord Thomas has since concluded: “Much wider changes are required to align in Wales the making of criminal justice policy and its delivery with policies on health, education and social welfare and a growing body of Welsh law. Our clear conclusion was that little progress would be made in the justice system unless there is a more joined-up approach”.<sup>212</sup>

While the prospect of change is predominantly positive, there nevertheless remain a few practical issues which would require resolution prior to the implementation of a devolved criminal justice system in Wales. These are, most notably, funding, and the question of the border with England, and the questions that this inevitably raises in terms of *locus delicti* and jurisdiction over offences committed. As previously noted, there could be a significant issue in this respect were Wales’ age of criminal responsibility to differ to that of England (as the Report proposed). There could also be questions of fairness in terms of prisoners’ status and conditions, if prisoners who have committed offences in Wales are sent to England and vice-versa. This is particularly relevant to female offenders, given the positive progress Wales is making in respect of their support. These, while

<sup>206</sup> See Jones, “Imprisonment in Wales: A Factfile” (2018), p.30 at [7.11].

<sup>207</sup> See Jones, “Imprisonment in Wales: A Factfile” (201), p.32 at [7.27].

<sup>208</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), p.136 at [4.3.3].

<sup>209</sup> Lord Bach, *The crisis in the justice system in England & Wales: Interim Report of the Bach Commission on Access to Justice* (November 2016, The Fabian Society), p.4 (Foreword).

<sup>210</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), pp.237–238 at [4.277] and [4.278].

<sup>211</sup> See Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cyfiawnder yng Nghymru dros Bobl Cymru) (2019), pp.237–238 at [4.277] and [4.278].

<sup>212</sup> Lord Thomas of Cwmgiedd, “Justice in Wales for the People of Wales” [2020] Crim. L.R. 1, 2.

practical points, remain nevertheless problematic, and requiring resolution—along with the question of overall funding for Wales’ criminal justice system—prior to any future devolution of the Welsh criminal justice system. It is, however, perhaps telling that these issues arise only because of the Report (and, ipso facto, Wales) advocating what is arguably an innovative approach to criminal justice when compared to that in England.

Reflecting on the Report, Lord Thomas observed that, in general:

“... there was much that should be done differently. There is no rational reason why justice is not devolved to Wales and is instead the product of the accidents of history. We concluded that devolution of justice was the only way in which significant changes could be made. This would enable much better development of overall policy, proper coordination of expenditure and delivery, and more rigorous accountability.”<sup>213</sup>

Finally, in the words of Baroness Humphries, recent decades have shown that the Welsh Parliament is “no longer a toothless dragon”,<sup>214</sup> and proposed reforms for the Welsh criminal justice system ought not to be left to drag on in years to come. The Report’s recommendations must be given serious consideration, and the prospect of Wales’ devolved criminal justice within the next decade should remain a very real possibility. Though vastly different from the current, non-devolved, position of Wales’ criminal justice system, here, the words of Lloyd George serve as a suitable note on which to conclude: “Don’t be afraid to take a big step. You can’t cross a chasm in two small jumps.”<sup>215</sup>

<sup>213</sup> Lord Thomas of Cwmgeidd, “Justice in Wales for the People of Wales” [2020] *Crim. L.R.* 1, 2.

<sup>214</sup> *Hansard*, HL col.2041 (22 May 2019) (Baroness Humphries).

<sup>215</sup> *Hansard*, HL, col.2041 (22 May 2019) (Baroness Humphries) (citing David Lloyd George).