

Public Administration and Justice in Wales: Social Housing and Homelessness (March 2020)

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DEFINITIONS

Administrative Justice and Tribunals Council (AJTC)

Committee for Administrative Justice and Tribunals in Wales (CAJTW)

European Convention on Human Rights (ECHR)

Housing Disputes Service (HDS)

Public Services Ombudsman for Wales (PSOW)

Regulatory Board for Wales (RBW)

Residential Property Tribunal for Wales (RPTW)

Public Administration and Justice in Wales: Social Housing and Homelessness

1. Introduction

1.1 Justice in relationships between individuals and public bodies is usually referred to as administrative justice. It concerns ‘how government and public bodies treat people, the correctness of their decisions, the fairness of their procedures and the opportunities people have to question and challenge decisions made about them’.¹ The terminology ‘administrative justice’ became more common after a UK Administrative Justice and Tribunals Council (AJTC) was established. The Tribunals Courts and Enforcement Act (TCEA) 2007 provided a definition of an ‘administrative justice system’ to aid the AJTC in its role of seeking to co-ordinate the system. According to the TCEA:

‘the administrative justice system’ means the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including—

- (a) the procedures for making such decisions,
- (b) the law under which such decisions are made, and
- (c) the systems for resolving disputes and airing grievances in relation to such decisions.

1.2 The first body with a formal role to oversee the administrative justice system in Wales was the Welsh Committee of the AJTC set up in 2008. The Committee was abolished along with the AJTC itself by the Westminster Government in 2013 but in its short life it had a significant impact in highlighting the particular administrative justice challenges faced in Wales, and in promoting reform.² It was succeeded in 2013 by the Committee for Administrative Justice and Tribunals Wales (CAJTW), set up by Welsh Ministers to ensure that expert advice remained in place in Wales, and that the needs of users of the system in Wales continued to be paramount. CAJTW’s work facilitated the development of community of stakeholders, including academic researchers, to continue providing evidence-based research and advice on the administrative justice system. CAJTW itself was disbanded in 2016, and no successor body has been established. However, the Commission on Justice in Wales [herein after ‘the Justice Commission’] recognised the importance of administrative justice, concluding that: ‘Administrative justice is the part of the justice system most likely to impact upon the lives of people in Wales’.³ The Justice Commission also noted that: ‘Whatever the current state of divergence [between Welsh and English law], it seems safe to conclude that it is in the field of substantive administrative law that the scope for divergence has the most potential in the short term’.⁴ Housing is of course a key area of substantive administrative law devolved to Wales.

1.3 Our current ‘Housing’ Report is one of three Reports into administrative law and justice in Wales. There is a general Report, *Public Administration and a Just Wales*, which focuses on general Welsh public administrative law and its interaction with Welsh policies on good administration, well-being, human rights and equality. That Report also examines the key

¹ UK Administrative Justice Institute: <https://ukaji.org/what-is-administrative-justice/>

² AJTC Welsh Committee, *Review of Tribunals Operating in Wales* (2010).

³ Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) para 6.1.

⁴ Commission on Justice in Wales, para 6.15.

institutions in the Welsh administrative justice system, how the system is designed and overseen, and suggests reforms. A second Report examines administrative justice in the context of primary and secondary maintained education in Wales. The ‘Education’ Report and this ‘Housing’ Report serve as case-studies about how the various elements of administrative justice function in particular areas of devolved public administration. The conclusions from each of these area specific Reports have helped inform our broader recommendations about public law and administrative justice in Wales. As a Report based on issues in administrative justice our work is limited to disputes of a public character and we do not examine the many private law aspects of housing law and dispute resolution. We recommend that a broader study into private law housing dispute resolution in Wales is needed.

- 1.4 A core conclusion of this Housing Report is that there is an immediate need for a review of housing dispute resolution as it applies specifically to Wales. Various reviews have been conducted ostensibly on an England and Wales basis, including the Law Commission’s Report on *Housing: Proportionate Dispute Resolution* (published in 2008),⁵ the more recent JUSTICE Report on *Solving Housing Disputes* (March 2020)⁶ and the UK Ministry of Housing, Communities and Local Government consultation on *Considering a Case for a Housing Court*⁷ (which is yet to report, but some responses have already been published). Either due to timing, scope or objectives, none of these reviews have been able to fully consider the current situation of housing law and dispute resolution as devolved to Wales, or the detailed interaction between devolved and non-devolved law and redress. This means that some of the solutions proposed either do not apply to Wales (either in whole or in part), or their application is in itself problematic, and may not reflect the specific circumstances of Wales.
- 1.5 There have been extensive changes to Welsh housing law, as distinct from English, and English and Welsh law, including through the Housing (Wales) Act 2014, and the Renting Homes (Wales) Act 2016 (with the latter now due to come into force before the end of the current Assembly (by 2021)). As the Justice Commission put it: ‘Although housing law is fully devolved to Wales, neither the Welsh Government nor the Assembly has, to date, considered trying to consolidate the jurisdiction for housing disputes into one court or tribunal’.⁸ Further, neither the Government nor the National Assembly for Wales (the ‘Assembly’) has considered what a rationalised approach to housing dispute resolution in Wales might look like, that also includes the functions performed by the Public Services Ombudsman for Wales (PSOW), regulatory bodies, advice and advocacy service providers, and where relevant at least some of the Welsh Commissioners who have roles in promoting good rights-based administration and in some cases complaint handling and ‘enforcement’ powers.
- 1.6 Given the comparatively small scale of our project, we do not go as far as proposing a single housing court/tribunal for Wales, with detail on its facets, or a single dispute resolution service for Wales. However, our root and branch analysis of how various aspects of the current system of administrative law, decision-making, dispute avoidance and dispute resolution, are working in practice, will we think provide valuable evidence to any future review. Our research

⁵ Law Commission, *Housing: Proportionate Dispute Resolution* (Law Com No.309, 2008).

⁶ JUSTICE, *Solving Housing Disputes* (March 2020): <https://justice.org.uk/wp-content/uploads/flipbook/29/book.html>

⁷ UK Ministry of Housing, Communities and Local Government, *Considering the Case for a Housing Court* (November 2018): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755326/Considering_the_case_for_a_housing_court.pdf

⁸ Justice Commission, para 5.35.

is not just about how disputes are resolved formally for the people of Wales, but also why they occur and how they can be avoided or resolved informally.

2. Background to Social Housing and Homelessness in Wales

- 2.1 Housing policy is a devolved matter where Welsh Government and the Assembly have wide policy-making and legislative powers. This includes housing, housing finance (with the exception of schemes providing assistance for social security purposes), encouragement of home energy efficiency and conservation (otherwise than by prohibition or regulation), regulation of rent, homelessness, residential caravans and mobile homes.⁹ Welsh legislation around housing and homelessness is considered to be innovative and grounded in policies concerned to improve social justice and equality.
- 2.2 Key legislation such as the Housing (Wales) Act 2014 aims to improve the supply, quality and standard of housing in Wales and places a duty on local authorities to work with people who are at risk of losing their homes to help find a solution to their problems. This introduces a new duty on public bodies to seek to prevent homelessness in the circumstances of anyone who requests assistance. The Renting Homes (Wales) Act 2016 will replace existing leases and licences with two types of ‘occupation contract’; a secure contract modelled on the current secure tenancy used by local authorities, and a standard contract modelled on current assured shorthold tenancies used by the private sector.
- 2.3 There are two key contextual elements of Welsh housing policy to note here. First, the different ideological approach to social housing in Wales to that of England. As highlighted in our wider report on *Public Administration and Justice in Wales*, we note that Welsh political decision-making is nominally focused around the key normative values of social justice and equality. Arguably, this can be contrasted to a more market-based and individualistic values set in England, and some aspects of UK-wide policy. These differences in approach based on values are not identically replicated in all of aspects of housing policy, for instance the UK Government committed to repealing provisions which allow landlords to evict certain renters without reason after a fixed-term tenancy period ends,¹⁰ and Welsh Government are instead looking to extend the required period of notice before such an eviction can be sought.¹¹ Some would argue this means the Welsh approach leads to less protection for the more vulnerable. There are also elements of homelessness legislation in Wales, around ‘priority need’ that might appear less socially just than that of England.¹² However, when looking at the approach to social housing in its broadest conceptual sense we can see a clear understanding by Welsh Government of good housing being a core element of living a life of dignity and there being a strong role for the state in providing support for individuals who are unable to access this via the market. The policy, law and practice around social housing and homelessness in Wales has tended to emphasize collective rather than individual justice, and while this has many positive connotations, we argue that this may limit the attention given to the ability of individuals to seek redress to ensure their substantive legal entitlements are respected. Second, whilst recognising that housing and homelessness are devolved matters, social security is not devolved and therefore some key elements to providing social housing are quite significantly beyond Welsh Government and the Assembly’s control. Welfare reforms introduced by

⁹ Wales Act 2017, s.3 and Schedule 7A reservation F1.

¹⁰ Through the Rented Homes Bill: <https://services.parliament.uk/bills/2019-21/rentedhomes.html>

¹¹ Through the Renting Homes (Amendment) (Wales) Bill:
<http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IID=27569>

¹² H Taylor, ‘The Housing (Wales) Act: What’s Philosophy got to do with it?’ in S Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press 2017) 60-82.

successive UK Governments are key to mediating individuals' interaction with social housing and the type of support they can access. For example, the Spare Room Subsidy places definitions on the appropriate amount of space individuals living in social housing should have and the Shared Accommodation Rate outlines that individuals who are single and under 35 can (normally) only live in shared accommodation if relying on the benefit system to fund their housing. These arrangements can conflict with the values-based approach taken in Wales, and place constraints on its aspirations for how social housing and homelessness policy should be configured. The introduction of Universal Credit continues to have significant implications for the social housing sector in Wales, having tended to reduce the number of Private Rented Sector landlords willing to rent to people receiving state benefits.

- 2.4 Whilst taking into account the background context of housing policy and challenges facing the sector, in this Report we focus on administrative decision-making and redress processes and institutions relating to social housing and homelessness. We take social housing to mean housing provided by the state when individuals are unable to meet their needs via the market. This could be delivered by a variety of providers including Registered Social Landlords (RSLs), local authorities, and third sector organisations. There is a growing role for the Private Rented Sector in discharging the duties of the state, but we do not cover this in the current Report.
- 2.5 Our aim is to map the key problems faced by individuals in their interactions with what they are often likely to view as 'state' entities, regardless of the official (and sometimes contested) legal classification of such entities. We are concerned with the decisions of public bodies, and decisions of a public character taken by hybrid public-private bodies such as housing associations. We note the different legal treatment of local authorities and RSLs in some contexts, and speculate on whether aspects of the legal frameworks applying to each could be brought more closely into line especially in the context of Renting Homes (Wales) 2016 (which itself introduces significant changes to level the playing field between different types of organisations).
- 2.6 Local authorities in Wales have various statutory duties and functions in the context of social housing and discretionary powers to provide housing accommodation. In Wales, as with England, there has been an overall decline in social housing stock, as well as a shift in ownership from local authorities to RSLs. According to Welsh Government data (last updated December 2019) there are 39 organisations registered to provide social housing in Wales, in addition to 11 local authorities that continue to hold social housing stock).¹³ Data from StatsWales from August 2019 showed that 62% of stock is held by housing associations.¹⁴ In addition to housing associations there are also some Community Housing Mutuels (CHM), a type of RSL developed to enable tenants to have greater control over the management of their homes through community ownership. Some participants in our research noted that it can be difficult to keep up to date with all the different housing associations given merger activities, and changes in ownership and control, and that this is challenging for oversight and regulatory bodies, as well as for individuals.
- 2.7 RSLs in Wales are registered and regulated by the Welsh Ministers, with a revised Regulatory Framework coming into effect in 2017. The Regulation of Registered Social Landlords (Wales) Act 2018 removed or amended powers deemed by the Office for National Statistics (ONS) to demonstrate government control over RSLs in Wales. The ONS has then been able to re-classify RSLs as private sector organisations for the purpose of national accounts and

¹³ <https://gov.wales/registered-social-landlords>

¹⁴ <https://statswales.gov.wales/Catalogue/Housing/Social-Housing-Stock-and-Rents>

other ONS economic statistics. Despite this classification, for the purposes of applying administrative law (including specifically human rights law under the Human Rights Act 1998) the status of RSLs as bodies performing public functions still depends on the particular context.

- 2.8 The types of disputes people might have with public bodies, and bodies performing public functions, in the social housing and homelessness sector include: disputes about the allocation of social housing and social housing eligibility; local authority compliance with duties to prevent homelessness and to provide assistance to homeless persons, the provision of temporary and supported accommodation, social housing tenancy disputes including a landlord’s decision to seek possession of a property, and matters relating to repairs and fitness for human habitation. There can also be disputes around anti-social behaviour connected to social housing properties.
- 2.9 Housing disputes often take place within relationships (between landlord and tenant, between homeless person and local authority) where it is necessary to maintain an ongoing relationship. That relationship often also involves an evident power imbalance, between an individual or family who may be vulnerable, and a local authority or RSL with significantly more resources and expertise, and with less at stake.
- 2.10 The main administrative justice redress institutions and procedures relating to social housing and homelessness in Wales include initial complaints to local authorities and RSLs, internal reviews within local authorities (and in some cases in RSLs), county court actions (including where the county court is effectively required to act identically to the Administrative Court on judicial review), the Administrative Court in Wales, the Residential Property Tribunal for Wales (RPTW), the PSOW, the various Welsh Commissioners, and the Welsh Ministers (see Table One below).

Table One: Decision-making & Redress Bodies and Remit

Decision Making or Redress Body	Remit
Local authorities and Registered Social Landlords	Maintain and administer Wales’ social housing stock
Local authorities	Local authorities have various duties in the context of homelessness, including a duty to seek to prevent homelessness in the circumstances of anyone who requests such assistance, and duties to accommodate people in certain circumstances. They also have powers in the context of anti-social behaviour
County courts	Determine a range of housing related proceedings, in particular possession actions, and in some cases in the future will conduct legal reviews of local authority and RSL decisions
Administrative Court in Wales	Judicial review of local authority decisions, and some RSL decisions – normally used as a last resort when other avenues of redress have been exhausted, but sometimes a first instance redress procedure where no other remedy has been provided by statute

Welsh Ministers	Regulate Registered Social Housing in Wales (advised by the Regulatory Board for Wales).
Public Services Ombudsman for Wales	Determine complaints of maladministration and investigate service failures in context of social housing providers (local authorities and RSLs)
Welsh Commissioners	Have a range of powers to promote good decision-making in housing and homelessness in the context of particular rights and principles (right of children, older people, and Welsh language rights, principle of sustainable development through well-being). A range of regulatory and investigative powers. Some Commissioners have powers to investigate complaints made by individuals. The Children's Commissioner, Older People's Commissioner and Future Generations Commissioner do not have jurisdiction over housing associations, the Welsh Language Commissioner's powers are different with respect to local authorities and housing associations. Where they do not have jurisdiction, or lack specific powers, the Commissioners regularly signpost individuals to other appropriate organisations and services
Residential Property Tribunal Wales	The RPTW is an umbrella body that incorporates Rent Assessment Committees, Leasehold Valuation Tribunals, and Residential Property Tribunals which mainly cover the private rental sector
Advice and advocacy providers	Advice and advocacy providers hold key roles in enabling people to access administrative justice. This can range from advice on rights and responsibilities of landlords and tenants, to how to claim appropriate benefits to pay for social housing, to representation at court following a housing dispute. Under s. 60 of the Housing (Wales) Act 2014, local authorities are required to provide advice and assistance for individuals facing homelessness within 56 days of their eviction date. Shelter Cymru is an important body providing both general advice, and specifically legal advice (under a legal aid contract in some cases)
Representative organisations	There are representative bodies for housing organisations which vary depending on the type of organisation. These include: The Chartered Institute of Housing (CIH) (an independent body for professional standards in the Welsh housing sector);

	<p>Community Housing Cymru (membership body for housing associations in Wales); Tai Pawb (organisation for equality and social justice in housing in Wales); Cymorth Cymru (umbrella body for providers of homelessness, housing-related support, and social care services); These organisations provide best practice advice, lobbying on behalf of members, and training opportunities</p>
Higher Appellate Level	<p>Various decisions made by the county courts could be subject to a legal appeal (or a judicial review in the Administrative Court). Decisions of the RPTW could be appealed to the England and Wales Upper Tribunal. Decisions of the Welsh Language Commissioner can be subject to appeal/review by the Welsh Language Tribunal and latterly to the Administrative Court. All judicial bodies are ultimately subject on appeal (with permission) to the jurisdiction of the England and Wales Court of Appeal and UK Supreme Court</p>

3. Methodology

- 3.1 Our research has used a mixture of methods, including desk-based research identifying, collating and examining law and guidance applicable to Wales, alongside policy documents, previous research reports and statistical data. We held two main day-long stakeholder workshops for professionals in the housing and homelessness sector, which included housing association and local authority staff, judges, private and 3rd sector lawyers and other advice providers, Welsh Government officials, academics, restorative justice practitioners, representatives from the Welsh Tribunals, from the PSOW and from some Welsh Commissioners. During these workshops we heard presentations from various professionals and discussed the key administrative justice issues affecting the sector; from legislation, to avoiding disputes, early resolution and different formal methods of dispute resolution, as well as what gives rise to disputes and how to learn from them, and what reforms could be proposed to the sector as a whole. We also observed a day of possession proceedings at the county court in Caernarfon, where we spoke to the judge, legal representatives and some of the parties. We held a focus group primarily for representative organisations in the housing sector (noted in the table above) including specialist housing policy consultants and academics not involved in previous workshops (we refer to this as the ‘expert group’). We presented some early conclusions to the Law Society for England and Wales, Housing Law Committee, and took feedback on these. We also attended (and presented at) various conferences and visited a housing association to learn about its ‘systems thinking’ approach to service provision and administration.
- 3.2 We made a Freedom of Information Act 2000 (FOI) request to all local authorities asking questions about: requests for internal reviews and Letters Before Claim/issued judicial review proceedings relating to social housing allocation, and requests for internal reviews and Letters Before Claim/issued judicial review proceedings relating to the landlord and tenant

relationship. We also asked about early/informal dispute resolution procedures; and any other Letters Before Claim/judicial reviews in the context of temporary housing or other aspects of social housing (excluding homelessness). We sought to tailor these requests to whether the local authority was stock holding or not (noting that non-stock holding authorities would not have information about reviews requested/judicial reviews in the context of the landlord and tenant relationship). Two non-stock holding authorities responded with information, the other non-stock holding respondents considered that all the questions we asked related to functions delivered by RSLs in their area (also giving us information about how to contact the relevant RSLs).

- 3.3 We conducted a small-scale survey of housing sector professionals. There were 36 responses (14% from local authority housing staff, 14% from housing association staff, 39% from advice providers including charities and private law firms, and 33% from other housing professionals including academics, consultants, people working for housing sector representative organisations, and Welsh Government civil servants).

4. Regulatory Regimes and General Administrative Law

- 4.1 We examine first the regime of law and regulation that governs administrative decision-making in social housing in Wales, on the basis that such law and regulation should be as clear as possible to encourage good administration and correct decision-making from the outset. We consider specific subject areas such as homelessness legislation in later sections.
- 4.2 The legal regime governing RSLs in Wales is different in places to that governing local authorities and focuses more on the regulatory environment. Differences have stemmed from the historical context whereby local authorities have a range of statutory duties and powers to provide services to the public, and housing associations have developed as distinctive major players in the provision of social housing. Local authority decision-making is governed by a range of general Welsh administrative law. This includes, for example, legislation relating to sustainability and well-being, the rights of children, older people and disabled people in particular contexts, Welsh language standards, and Welsh Specific Equality Duties. Many of these provisions do not apply (either wholly or in part) to RSLs. Local authority housing services are regulated by the Wales Audit Office as part of its broader responsibilities over local government in Wales, whereas RSLs are regulated separately by the Welsh Ministers.¹⁵ Local authorities are also accountable to their electorates.
- 4.3 For RSLs, the Welsh Ministers have general functions under section 75 of the Housing Associations Act 1985 (as amended by Wales specific legislation), such as to facilitate the proper performance of the functions of registered social landlords, to maintain a register of social landlords and to exercise supervision and control over such persons. In Wales a body is eligible for registration as a RSL if it is a registered charity that is a housing association, or if it is a registered society or company that is principally concerned with Welsh housing, is non-profit¹⁶ and is established to provide, construct, improve or manage houses for letting for occupation, or to provide hostels.¹⁷ Only ‘Welsh bodies’ are eligible to register, and such bodies are registered charities, registered societies or companies with their registered offices

¹⁵ Housing Act 1996, s1.

¹⁶ The meaning of non-profit is set out in the Housing Regeneration Act 2008.

¹⁷ Housing Act 1996, s2(2). There are also other permitted objectives or purposes which can include constructing homes for shared ownership, and acquiring, repairing, improving, or converting a house or other property so that it can be disposed of on sale, lease or on shared ownership terms.

in Wales.¹⁸ To be eligible for registration such a body must be ‘principally concerned with Welsh Housing’.¹⁹

- 4.4 Part 1 of the Housing Act 1996 (also amended by Welsh law) provides the Welsh Ministers with enhanced regulatory and intervention powers concerning the provision of housing by RSLs and the enforcement action that may be taken against them. The Welsh Ministers may set standards of performance to be met by RSLs in connection with their functions relating to the provision of housing and matters relating to their governance and financial management.²⁰ Welsh Ministers may issue guidance that relates to a matter addressed by a standard and may amplify the standard,²¹ and are required to consult various bodies before setting standards or issuing guidance.²²
- 4.5 The Regulatory Framework sets Standards of Performance under section 33A of the 1996 Act and gives guidance under section 33B. Failure to meet the Performance Standards is one of the grounds for the Welsh Ministers to use regulatory and enforcement powers contained under the Housing Act 1996.
- 4.6 The specific standards are contained in Regulations, the ‘Regulatory Framework for Housing Associations Registered in Wales’.²³ The approach to regulation is co-regulatory meaning that the onus for ensuring co-operation with the regulatory requirements rests with the board of the RSL, working in conjunction with their tenants. The approach seeks to be based on proportionality, allowing a degree of self-assessment, continuous assessment and learning, and improving consistency and transparency where appropriate. The Welsh Ministers (as regulator) undertake periodic reviews of RSLs assessing their compliance with each performance standard and will publish a Regulatory Judgement (at least annually) for each housing association in Wales. The Judgement only references areas of performance and risk which are not being appropriately managed at the time of publication.
- 4.7 Where financial or management standards have not been met the Welsh Ministers may serve an enforcement notice on the RSL requiring it to take action to remedy its failings.²⁴ The RSL has a right to appeal to the High Court. The Welsh Ministers may impose a penalty on the RSL if they are not satisfied certain grounds are met, or require the RSL to pay compensation. Also, in cases of severe mismanagement the Welsh Ministers have powers to require an RSL to transfer its management functions.²⁵ In the regulatory function, Ministers are advised by the Regulatory Board for Wales (RBW). The RBW provides advice to Welsh Ministers and is responsible for overseeing Welsh Government regulation of housing associations in Wales and providing related advice to the Minister for Housing and Local Government. RBW members are appointed through Welsh Government’s public appointments process.
- 4.8 Regulation of RSLs in Wales has focused on robust self-evaluation and is underpinned by a commitment to put tenants at the heart of this process. Tenant participation in social housing administration is a key area that differs from the regulatory approach in England. In Wales, there is a requirement to focus on engaging tenants with decision-making within RSLs more

¹⁸ Housing Act 1996 s.1A.

¹⁹ S.2(2).

²⁰ Housing Act 1996, s.33A(1).

²¹ Housing Act 1996, s.33B(1).

²² Housing Act 1996, s.33C.

²³ <https://gov.wales/sites/default/files/publications/2019-02/the-regulatory-framework-for-housing-associations-registered-in-wales.pdf>

²⁴ Sections 50A to 50V of HA 1996.

²⁵ Paragraphs 15B to 15G of Schedule 1 to Housing Act 1996.

recently, with a shift towards tenants being involved at a strategic level. RSLs take differing approaches to this depending on their understanding of the most effective mechanisms for tenant engagement. For example, some RSLs will have spaces on the board for tenant board members whereas others will have separate strategic level functions for gathering and inputting tenants' views. This is an area which is often quite controversial around how regulatory and organisational values are implemented in practice rather than being rhetorical. Although the regulatory focus is on proactive tenant engagement in Wales, rather than reactive as in England, there are still discrepancies around how, and if, all individuals in social housing are able to contribute to the decisions their landlords make.

- 4.9 The RBW has expressed its belief that social housing regulation in Wales is under-resourced, which risks compromising the regulator's functions. The RBW notes that: 'there is also an increasingly-recognised inconsistency and inequality in the nature of housing regulation between the local authority and housing association sectors, increasingly seen as disadvantageous to local authority tenant participation and access'.²⁶
- 4.10 Our research participants noted that one potential reason for this difference is the diverse financial pressures on local authorities and RSLs respectively, that financial arrangements can shift RSLs focus from meeting need to a degree of risk aversion to remain financially viable. On the other hand local authorities have different pressures; our participants suggested they generally have less money available to spend on relational issues like tenant engagement, and that their broader holistic duty is key, if a person becomes homeless the local authority still has a duty to them, but RSLs do not. Tenancy sustainment is an area where the interests of local authorities and RSLs can be different.
- 4.11 The regulatory framework for social housing in Wales is more protective of tenants than the comparative English regime, but this does not extend to the local authority context (aside perhaps for the involvement provisions of the Well-Being of Future Generations (Wales) Act 2015 ('WBGWA') regime. The Local Government and Elections (Wales) Bill makes some provisions to seek to strengthen participation in local democracy and improve the accountability frameworks of local authorities. However, as the RBW puts it: 'There are currently no established national performance standards for local government housing upon which local service provision can be planned or shaped, or upon which regulatory judgements can be formed'.²⁷ It suggests consideration of a 'domain' regulation approach, following a basic principle that regulation of both local authority and RSL housing services should be undertaken by one agency under a common approach. This is more reflective of the situation in England. However, a significant difference between England and Wales is that RSLs in England are profit-making, and regulation draws a more marked distinction between consumer standards and financial standards. Our research participants suggested that the Welsh approach to tenant (consumer) standards is more proactive, whereas the English approach is reactive, requiring a series of repeated serious complaints before action is taken. If the Welsh system is working effectively, serious issues (an example given was of the cladding used on buildings such as Grenfell Tower) should be picked up without the need for a critical mass of complaints that could be harder to pick up and resolve quickly in a more reactive context.
- 4.12 Respondents to our research, however, also considered the other side of this particular issue; that local authorities are subject to general administrative law duties which RSLs are not

²⁶ Regulatory Board for Wales, *Report to the Minister for Housing and Local Government* (May 2019): <https://gov.wales/sites/default/files/publications/2019-05/regulatory-board-for-wales-performance-report.pdf>

²⁷ Ibid.

(including matters of well-being, rights, and freedom of information). There was some feeling that local authorities, and stock transfer RSLs, tend to operate under more formal legalistic approaches based on applicable law (or the legacy of working under particular legal frameworks) and that this can lead to a lack of flexibility, and a potential lack of capacity to take what some research participants referred to as more common sense decisions. It was argued that policies tend to be more rigid in these organisations, following a command and control style paradigm of organisation that impacts on decision-making and service delivery, this then has a knock-on effect on how performance is measured and disputes resolved. We heard instead that at least one RSL has taken an innovative ‘systems thinking’ approach, which is a more holistic endeavour, focusing on the way the organisation’s systems work over time. Such approaches consider the behaviour of the system rather than individuals within it, studying the demand in the system and information coming into it, measuring failure of the system to meet demand. This means that there is less use of formal tools like key performance indicators, and less focus on appraisals for individual staff that might use particular metrics, instead poor performance is seen as being due to failures in the system, and those system impacts are monitored and improvement is sought. In this regard whilst an individual complainant is central to dispute resolution, they are seen as representing a failure in the system and an opportunity to learn and improve, rather than a specific isolated case to be addressed and closed. This approach also focuses more on human judgement (but within parameters and principles) rather than the more traditional bureaucratic account of administrative decision-making as significantly rule-governed. It was stressed that this ability to take a different approach comes from there being more latitude given to RSLs.

4.13 Despite the latitude granted to RSLs, we also formed the view that many RSLs seek to comply with general provisions of administrative law, or at least to work within the ethos of broader standards such as Well-being Goals, even whilst these are not formally applicable. However, it was argued that these should be understood more as adaptations to improve culture in the organisation, rather than enforced compliance. The notion of encouragement and support for cultural change rather than compliance is central to the WBFOWA regime, which is an example of responsive and reflexive law that seeks to catalyse behavioural changes. However, WBFOWA still includes some ‘enforcement’ (or at least accountability) provisions of a kind that apply to local authorities and not RSLs. In that sense RSLs may have more capacity to pick and choose the standards and guidance they seek to learn from.

4.14 Other research participants suggested that given the general thematic areas of decision-making are the same (tenancy management, housing allocation, homelessness prevention) the historical development should not be regarded as a sufficient argument for retaining distinctions between applicable administrative law and approaches to regulation.

Recommendation 1: Welsh Government give more thought/conduct more research/consultation into developing and implementing a ‘domain’ regulation approach, following a basic principle that regulation of both local authority and RSL housing services should be undertaken by one agency under a common approach.²⁸

Recommendation 2: More thought be given by Welsh Government, and the Assembly as to the potential for harmonising the rights and sustainability based administrative law applying to local authorities and RSLs.

²⁸ We note that as we were finalising this recommendation, we heard that the Regulatory Board for Wales has commissioned research into this question, but we consider the recommendation based on our own research evidence remains important.

5. Administrative Decision-Makers and Partnership Working

- 5.1 Whilst policy and regulation are important aspects of the administrative justice system, more important still are the multitude of decisions made each day that affect people's access to and use of social housing, and the support received by people who are homeless or threatened with homelessness. An issue raised across our research has been the need to identify the challenges faced by decision-makers in applying sometimes complex legal principles. For example, we heard that local authorities 'are not legal experts, they just administer law'. More thought needs to be given to whether appropriate training is being provided, and what the impacts of the decision-making role are on those conducting it. We heard examples of a perennial problem for administrative law, namely how to understand distinctions between law and policy, and between rule-governed and discretionary decision-making, and particularly how increases in the volume of soft-law (such as guidance and various new frameworks), that are tools to support decision-making, can lead to confusion about the appropriate space for discretionary judgement. This demonstrates how changes in administrative law legislation (not just in substance but also in the approach to administration this requires) have a knock-on effect at individual decision-making level, and this needs to be better understood, and those taking decisions better supported.
- 5.2 Our expert group suggested that there is a need for administrative justice to focus more on those actually making administrative decisions. In social housing these people often have high caseloads, preventing them from working in a person-centred way. The atomisation of decision-making (into different smaller decisions made by different people or by computer algorithms) also makes it harder to follow cases through and to build relationships with people. Workers may be casualised and not well-paid, worried about their own job security. The precarious nature of people working in housing makes being complained about, or having one's decisions challenged, concerning. The system as a whole then needs to be adequately resourced to enable people to make good decisions, by taking a range of factors into account and ensuring the whole process operates compassionately.
- 5.3 We heard that a number of RSLs adopt restorative justice techniques and practices, with restorative circles and education for tenants from the outset of their tenancies.²⁹ These approaches include 'conferences' to allow a range of parties to come together to explore how each has been affected by a particular issue and to decide, where possible, how to repair the harm that has been caused and to enable people to meet their own needs. These kind of approaches are a genuine attempt to reduce adversarialism in the housing context, to try and prevent disputes from occurring (or recurring), to resolve those disputes that do occur as early as possible, and to allow those living in social housing in particular to live free from the ongoing threat of eviction and from the impacts of anti-social behaviour. Where these approaches have been used, they have led to a decrease in disputes, and a decrease in incidences of anti-social behaviour. This method of preventing disputes from occurring can also reduce costs overall in a holistic sense, for example by reducing costs to other services (including local authority services and emergency services). These kind of costs implications tend not to be appreciated when the focus is on legal compliance and more formal control mechanisms. However, we also heard the view that more extensive holistic change in might only be secured with financial levers, particularly pooled budgets, where the full cost of issues across a range of services can be appreciated and addressed.

²⁹ For example, the range of services provided by Wales Restorative Approaches Partnership (WRAP): <https://restorativewales.org.uk/>

6. Information, Advice and Assistance

- 6.1 In addition to the importance of supporting initial decision-makers, providing information, advice and assistance to those affected by administrative decisions in the housing sector is a key aspect of administrative justice. Different types of bodies provide information, advice and assistance about social housing and homelessness issues in Wales. However, our respondents were particularly concerned about lack of access to legal aid funded advice. There are very few providers who hold legal aid contracts to give housing law advice and those that do are finding their services increasingly stretched. This is also borne out by evidence to the Justice Commission.³⁰ We heard that in Caernarfon, Shelter Cymru will have an adviser or advisers present to give help at court when possession proceedings are listed, but this may not be so at all other courts. Shelter Cymru struggles to have sufficient capacity to meet the demand for its services, and people can find it difficult to get an appointment within a reasonable time.
- 6.2 Our research respondents noted that even when legal rights to seek review or appeal of particular administrative decisions are stated clearly in a decision letter, lack of access to advice (and specifically legal aid funded advice) is still a major barrier to accessing and navigating routes to redress. In order for advice services to be effective, people must be able to access them, but also access broader support (mental health, debt advice, physical health etc) even when they might not be inclined to do so.
- 6.3 We also asked research participants what they thought about the accessibility and quality of legal advice. Many respondents noted that legal advice is difficult to access due to restrictions on legal aid, the resulting lack or patchiness of provision, and that third sector services are over-stretched. Respondents also noted the complexity of the landscape, where public funding is available to challenge some aspects of decision-making (e.g., county court appeals and some judicial reviews) but not to challenge other aspects (e.g., advice on challenging social housing allocation decisions unless this involves judicial review). There was a feeling that advice services generally can be quite ‘hit and miss’ and more could be done to provide clear and easy read information to people about their housing rights, including their rights to independent legal housing advice, as early on as possible. Others said that advice provided was clear and given early, but in some contexts the advice given was not factually correct. One respondent summed up well the range of issues, noting that there is no ‘one size fits all’ answer:

some housing providers can be very good at providing good/reasonable advice very early, whereas others not so. Advice on the whole is not affordable given the restrictions on legal aid availability to enable sourcing independent advice - that is key to many complainants as if they need to challenge decisions or are dissatisfied getting advice from the provider about which they complain is never going to satisfy!

- 6.4 There was some evident concern over the independence of advice. Welsh Government Guidance does not specifically require advice to be available from independent providers, and urges authorities to recognise that whatever advice services they make available, they should ensure that such are ‘viewed as being impartial, available, and accessible to everyone in the locality’. Further consideration could be given to the need for impartial or even independent advice, particularly regarding routes to challenging administrative decisions. For example,

³⁰ Justice Commission, Chapter 3 ‘Information, advice and assistance’.

Welsh housing legislation does not specifically make reference to the need for ‘impartial’ advice, in contrast to our education research where we found that primary legislation requires authorities to ‘have regard’ to the principle that advice provided in certain contexts around additional learning needs and dispute avoidance/resolution ‘must be provided in an impartial manner’.³¹

- 6.5 The overarching view on accessibility of routes to challenge decisions in the administrative justice system from our research participants was that even where the routes might be comparatively clear to lawyers or other advice providers and housing sector professionals, they are not clear to the general public. It was also suggested that the clarity of information and advice given by some local authorities and RSLs varies, and can on occasion actively misguide tenants. There is a need for clear information, advice and support, not just financial but also broader support networks.
- 6.6 Local councillors are also an important first port of call for people with social housing problems. Our expert group considered that councillors provide a huge source of advice and representation (including passing issues directly to local authority housing officers). However, this advice/assistance is not regulated and there is no specific training for councillors on redress in the administrative justice system.
- 6.7 Information issues also extend to concerns around the accessibility of applicable Welsh law, which have been well documented by the Law Commission,³² Justice Commission and others. Significant attempts are now being made to address this through the Legislation (Wales) Act 2019 which will introduce a programme of consolidation and codification, and awareness activities including a re-design of the Law Wales website.
- 6.8 In terms of information about decided cases, there have been improvements in the accessibility of some information. For example, the Residential Property Tribunal for Wales (RPTW) (a devolved Welsh housing dispute resolution tribunal) has more recently started publishing judgments on its website (but these do not create legally binding precedents). Rather the judgments binding in Wales stem from the case law of the High Court and ‘precedents’ of the England and Wales Upper Tribunal, where it is near impossible to filter searches of case databases (including commercial providers and the charity BAILII) to show cases turning in whole or in part on issues of devolved Welsh law. A Housing Code for Wales would help in collating in one place the key Judgments relevant to interpreting Welsh law. In any event, as we discuss below in relation to courts and tribunals, there are only a tiny number of Welsh law cases that reach a final substantive determination and full published Judgment, and this lack of a corpus of case law is seen as limiting independent and transparent judicial interpretation and clarification of Welsh law.

Recommendation 3: More dedicated and specific training on administrative justice issues and routes to redress in the system should be made available for local authority and RSL staff, and for local councillors. This could be delivered under the auspices of representative bodies such as the Welsh Local Government Association, and housing sector representative bodies. The training itself could be delivered by independent consultants and/or by working with Shelter Cymru. This training should also use clear practical examples helping decision-making staff to understand distinctions between policy and law, and how central the initial decision-maker’s role is as part of a system of

³¹ Comparing the Additional Learning Needs and Education Tribunal (Wales) Act 2018 section 9 with Housing (Wales) Act 2014 section 60 and related Guidance.

³² Law Commission, *The Form and Accessibility of the Law Applicable in Wales* (Law Com No.366, October 2016).

administrative justice. Training packages for local councillors could be developed by independent consultants working with the Welsh Local Government Association and could cover multiple areas of administrative justice (housing, education, health etc). There should be more available training specifically on provisions of Welsh housing law, at all levels within local authorities and RSLs. Training on restorative techniques should extend to all local authorities and RSLs.

Recommendation 4: Representative organisations/academics could conduct more research/analysis into the working conditions of local authority and RSL initial decision-making staff, specifically to examine how working conditions impact on their capacity to make good initial ‘person-centred’ decisions, and how staff could be better supported.

- 6.9 We asked housing sector professionals responding to our survey: ‘What do you think are the main reasons why some people do not challenge, or find it hard to challenge, social housing and homelessness decisions with which they are dissatisfied?’
- 6.10 The highest proportion - 83% - thought that ‘lack of awareness of routes to challenge’ was a factor, with 75% saying that the ‘complexity of relevant law’ is a main reason why people don’t challenge or find it hard to challenge. We found that 61% said ‘lack of access to affordable advice’ was a key issue, with 64% agreeing that people may be fearful ‘that the system is set against them’. In a similar vein 50% said that ‘fear of longer-term negative implications for the landlord/tenant or provider/service user relationship’ was a reason people do not challenge administrative decisions. Only 19% said that people do not challenge because there is no need to ‘as matters are dealt with early & informally’ by the local authority or RSL.
- 6.11 Our survey respondents noted that the complexity of issues facing people and their personal circumstances were a key factor. People who are homeless/threatened with homelessness or have social housing concerns can be experiencing a range of complex issues including: poor mental health, learning disabilities, illiteracy and financial problems. The legal framework assumes an individual making rational choices, but the reality can be of people sleeping rough going through seriously traumatic experiences, and more thought needs to be given in practice to where and when decisions are being made, both administrative decisions and the individual’s decision whether to challenge or not.
- 6.12 The case of *Ahmed v London Borough of Tower Hamlets*³³ is illustrative here. The Court of Appeal reversed the decision of Dove J who had found that trying to find legal aid was not a ‘good reason’ for the appellant Mr Ahmed’s lateness in issuing an appeal under section 204 of the Housing Act 1996 (in Wales section 88 of the Housing (Wales) Act 2014). Sir Stephen Richards considered that Dove J may have been overly influenced by case law interpreting appeals made out of time, or applications for extensions of time, by litigants in person under the Civil Procedure Rules and Tribunal Procedure (Upper Tribunal) Rules. The context of section 204 of the 1996 Act was found to be materially different for the reasons given by Shelter in its intervention in the case, summarised by Sir Stephen Richards as presenting ‘a bleak picture of the difficulties faced by homelessness applicants...without legal advice and representation, and of the difficulties they may face in finding someone to provide those services under legal aid, especially as a result of the post-LASPO shrinkage of the housing advice sector’. Whilst Dove J had found that the requirements of bringing a homelessness

³³ [2020] EWCA Civ 51.

appeal were not ‘especially sophisticated or taxing’, Sir Stephen Richards accepted Shelter’s argument that seeking legal aid can, and indeed often will, provide ‘good reason’ for requiring an extension of time to appeal against an adverse decision on administrative review.

- 6.13 One of the most commonly noted reasons for lack of challenge cited by our research participants was ‘exhaustion’, simply not having the ‘energy’ to navigate processes, compounded by negative attitudes from local authority and RSL staff, feeling anxious and intimidated and lacking confidence, especially in relation to matters like preparing written submissions or having to attend oral hearings. The feeling of ‘power imbalance’ between the individual and the public body was also noted; and that when social housing provision is limited and/or managed by a well-networked Private Rented Sector, challenging decision-making risks the individual being branded a bad tenant, evicted or excluded from social housing provision.
- 6.14 We heard from our expert group that reluctance to challenge makes it difficult to identify and progress claims that could help to clarify law and practice for the longer-term. Individuals are reluctant to push issues and become a piece of a larger action that changes things, even when they are well supported in doing this. Understandably people want to move on, they fear being labelled as a complainer, especially when they apprehend a risk of finding themselves back in the system at some point. All this said, some of our respondents said that people with genuine problems, who are able to access appropriate advice and assistance, would be able to follow procedures to challenge administrative decisions.
- 6.15 Access to the administrative justice system requires information being presented in the right terminology, in the right language for people to access the process, and to understand when they are in it. Our expert group suggested there had in the past been an approach in social welfare rights advice (broadly understood), especially through CAB Cymru of empowering people through knowledge to understand their own rights, but that funding cuts had made this difficult to sustain.

Recommendation 5: More should be done to encourage a revival of the ‘empowering people through knowledge’ approach to people’s understanding of their own rights, including their rights to redress in the administrative justice system. This could be promoted through the Wales National Advice Network and Regional Advice Networks.

Recommendation 6: Welsh Government, the Assembly and the housing sector could consider whether legislation should be updated to provide that local authorities should ‘have regard’ to the principle that advice ‘must be provided in an impartial manner’.

7. Avoiding Disputes and Informal Resolution

- 7.1 Much of the specific housing policy applying to Wales, as well as more generally applicable administrative law (such as the Well-being of Future Generations (Wales) Act 2015), aims to achieve longer-term solutions to issues in housing and homelessness, seeking to improve standards of public administration and prevent disputes about local authority and RSL exercises of their powers from occurring. Our research participants also noted that many housing bodies try to emphasise early and informal approaches to addressing concerns/resolving disputes when these do occur.
- 7.2 In our FOI requests, we asked local authorities whether they held any data about the use of informal resolution procedures and their outcomes, but no respondents held such

information. However, some authorities noted examples of working practices that aided in the early resolution of disputes and in preventing disputes from occurring. For example: informal discussions (in person or over the telephone) with local authority staff (including relating to social housing allocation); support mechanisms for tenants who are struggling financially or with anti-social behaviour; referring people to the local authority welfare rights team (providing information and support, including a benefits maximisation check); support through the work of Financial Inclusion Officers (particularly since the inception of Universal Credit); and through use of the Welsh Government Supporting People programme (which gives funding to local authorities to spend on projects aimed at helping people to live in their own home or in supported housing). Authorities also noted that they are trying to work more closely with advice providers, especially to adopt more informal working practices and informal query resolution/dispute resolution. Some local authorities have support from bodies including Shelter Cymru, Llamau and Gofal Cymru (now Platform) working out of their offices. This has the benefit of being able to offer immediate access to advice, and in a sense performs a ‘triaging’ function. Our research respondents suggested that the provision of earlier advice has been catalysed by changes in Welsh housing policy and the less adversarial (more relational) approach fostered by the Housing (Wales) Act 2014. It was suggested that the situation feels less ‘them and us’ between local authorities and advisers.

7.3 In terms of the use of informal resolution, in our survey we asked respondents ‘in your current or most recent employment, how often have you been involved (e.g., as decision-maker, adviser, complainant, litigant or other participant) in particular methods of dispute resolution?’ We found that 36% of respondents had weekly involvement in informal resolution of a social housing or homelessness issue by a local authority or social housing provider, and 14% dealt with such issues daily. A further 22% had monthly involvement, and the remaining 28% had been involved in informal resolution one or twice a year or less.

7.4 Although there are advantages to early and less formal resolution, some of our survey respondents noted that this can also be problematic if an individual’s rights and the implications of the process are not made clear to them. As one survey respondent said:

When formal applications have been taken and formal decisions have been provided in writing then the routes to challenging decisions are clear. However, when clients are dissuaded from making formal applications to begin with or when informal queries result in dissuasion of pursuing a challenge, clients can be left not knowing what their means of challenging those decisions are.

7.5 Our expert group noted that informal resolution might tend to be used by, and work more effectively, for more confident individuals; and that there is a risk of housing officers keen to close down an individual case or issue, suggesting that a person should take what they are offered, and presenting this conversation as informal or alternative dispute resolution method. Despite some of these difficulties, many of our respondents and workshop participants (including judges, legal advisers, local authority and housing association staff) agreed that draconian steps like legal possession proceedings are a desperate measure, and social landlords will take what steps they can to avoid coming to court.

7.6 *Solving Housing Disputes*, the report of the JUSTICE Working party, also found from its ‘evidence gathering...that a vast number of housing disputes, particularly possession claims, are currently resolved through informal negotiation processes outside the court room’.³⁴

³⁴ ‘Solving Housing Disputes’, para 2.18.

Recommendation 7: Local authorities should provide more clarity around the informal or alternative dispute resolution methods they offer. The difference between formal and informal resolution should be explained clearly to individuals. Local authorities should seek to collect data about the use of informal/alternative resolution procedures and their outcomes.

8. Complaints Processes and the Public Services Ombudsman for Wales (PSOW)

8.1 Local authorities and RSLs will have their own internal complaint processes and these should be followed before resorting to external redress such as the PSOW. However, where the matter relates to particular decisions about people's rights and entitlements, such as social housing allocation, homelessness duties owed, and notices seeking possession of a tenancy, an individual will likely need to follow a specific route to review or appeal as time limits apply. Some local authorities provide basic information highlighting examples of matters that should be referred to different processes, be that the authority's general complaints process, issues needing to be addressed by other specific complaints processes (including e.g., social services complaints and complaints around provision of information), and issues that should be referred to an external complaint or legal appeal process.

Recommendation 8: All local authorities in Wales should provide clear information about routes to redress, with illustrative examples, so that people can determine the appropriate route to resolving the most common types of complaints, and disputes over legal entitlements.

8.2 Compared to the 67% of our survey respondents involved in informal resolution daily, weekly or monthly, only 30% of respondents had similarly regular engagement with formal complaint processes, with 25% saying they had never been involved in a formal complaint and the remaining 45% saying they had only been involved infrequently over the years.

8.3 We have not examined individual complaints processes in detail, but note that most bodies seek to comply with the *Model Concerns and Complaints Policy for Adoption by Public Services Providers in Wales* (issued by Welsh Government in 2011). Some authorities seek to work to shorter timescales for resolving disputes (shorter than the 20 working days stated in the policy). A two-stage approach to complaints is generally adopted, with an initial complaint made to the decision-maker, followed by a second-stage investigation by a different (and senior) member of staff if required.

8.4 There seemed to be a general feeling amongst respondents that RSL complaints processes are lengthier and more complicated than local authority processes. Some of our survey respondents (and workshop participants) considered that complaint processes can be lengthy and laborious, and that this causes anxiety for tenants, sometimes disproportionate to the resolution eventually achieved. We also heard that complainants with an advocate or adviser of some kind are more likely to have their complaints resolved.

8.5 An issue noted in our workshops, also encapsulated by one of our survey respondents, is the difficulty of distinguishing between service requests and complaints.

In some instances a tenant has had to make several contacts before a housing provider has recognised that s/he is making a formal complaint as opposed to a service request (repairs - repeated complaints about the same issue or delay in

undertaking repairs where a service request/notification about them has already been made).

Distinctions between service requests and complaints, and complaint processes in RSLs, could be a matter for future consideration by the PSOW.

- 8.6 Local authorities generally publish information about the number of complaints received, their topics, and outcomes, but this tends to be presented differently across each authority (and across RSLs as well). There is no central, searchable database for either type of body. This could potentially be looked at by the PSOW's new Complaints Standards Authority role under the Public Services Ombudsman (Wales) Act 2019, which provides that the PSOW must publish a statement of principles concerning complaints handling for listed authorities (which includes social landlords) and that the authorities must have complaints-handling procedures that comply with the principles.
- 8.7 The PSOW has jurisdiction to investigate complaints of alleged maladministration and service failure within most public bodies in Wales, this includes social housing providers (covering both local authorities and RSLs).³⁵ As with ombudsmen legislation from other legal jurisdictions there is no specific statutory definition of maladministration or service failure. However, the PSOW publishes *Principles of Good Administration* including, getting decisions 'right first time', being customer focused, openness and accountability, fairness and proportionality, putting things right and seeking continuous improvement. Failure in one or more of these areas could constitute maladministration and/or an example of service failure.
- 8.8 When social housing providers take decisions that are legally incorrect, unfair or with undue delay, such decisions may be both unlawful and constitute maladministration. As it stands the PSOW cannot investigate a matter where the person aggrieved has had, or could have had, a right of appeal to a tribunal, a remedy by way of proceedings in a court of law, or a right of appeal to a particular Welsh Minister (we consider these other routes to redress in the following sections). However, this exclusion does not apply where the PSOW is satisfied that in the circumstances it is not reasonable to expect the person aggrieved to resort, or to have resorted, to the right or remedy otherwise available.³⁶ Some of our research respondents felt that this so-called 'statutory bar' on the PSOW considering a complaint when a legal route to appeal or review is, or could have been, available to the individual is problematic. This is especially true in homelessness cases where some decisions are subject to a county court appeal and others are not. An individual can easily assume that there is no available route to legal redress as they are very unlikely to be aware that judicial review in the Administrative Court could be available where there is no right of appeal to the county court – people are unlikely to know this without legal advice. In our Report – *Public Administration and Justice in Wales* – we discuss the potential reform of the statutory bars to the PSOW handling particular complaints, and the case for more 'interoperability' between the PSOW, the Administrative Court in Wales and certain devolved Welsh tribunals (where appropriate).
- 8.9 The PSOW Act 2019 gives new powers to the PSOW, including: to accept oral complaints; undertake own initiative investigations; investigate private medical treatment including nursing care in a public/private health pathway; and to undertake a role in relation to complaints handling standards and procedures (the CSA role noted above). We heard from

³⁵ Public Services Ombudsman (Wales) Act 2015.

³⁶ s.9.

research participants that the power to accept oral complaints could be particularly valuable for individuals seeking to complain about social housing decisions and services.

- 8.10 In our research survey, 11% of respondents had been involved in PSOW complaints daily, weekly or monthly, with 47% never involved, and the remaining 42% involved infrequently over the years. This seems quite low, and may be a reflection of the roles of those responding to the survey.
- 8.11 In 2018/2019 the PSOW handled 7,116 enquiries and complaints – this figure was made up of 4,627 enquiries (down 5% on the previous year) and 2,489 complaints (up 10% on the previous year).³⁷ Enquiries and complaints have increased each year, for example, in 2011/12 there were just 1,866 enquiries, and 2,017 complaints.
- 8.12 Complaints against county and county borough councils increased from 2017/8 to 2018/19 (up from 794 to 912); complaints were also up against social housing providers (from 139 to 168). Housing remains the second highest caseload in terms of subject-matter (at 12% of the PSOW's complaints caseload); 11% of complaints concern public body complaint handling processes (a number of these could also relate specifically to complaint processes in the context of housing and homelessness decisions).
- 8.13 In terms of county council complaints, of the total 766 cases closed in 2017/18, 137 were found to be out of jurisdiction, and 217 considered to be premature (one reason for prematurity is where the complainant has not yet followed internal complaints procedures within the council), 107 cases ended in an early resolution procedure or voluntary settlement. Of the cases that were *not* out of jurisdiction, closed after initial consideration or premature, 76% were resolved through early resolution/voluntary settlement, 30 complaints resulted in a report and 19 of these complaints were upheld in whole or part. These are council claims in general, so only a proportion of these would be related to housing issues.
- 8.14 In relation to housing associations (RSLs), 140 cases were closed in 2017/18. Here there were 18 outside jurisdiction and 51 premature (again potentially because the complainant has not yet been through the housing association's own complaint procedure), this is a higher proportion of claims being assessed as premature when compared to council complaints (36% compared to 28%). However, in data for 2018/19, the rate of premature claims was the same for both RSLs and local councils. Nevertheless, some of our research respondents suggested that some RSL complaints procedures are lengthier and more complex than those generally adopted by local councils in Wales, and that these procedures might be harder for individuals to navigate, and therefore to understand when that internal procedure has been exhausted. In some instances, this could constitute a large number of steps in the process over a significant period of time. Individuals' resilience to stay involved could dwindle, and then complaints that arguably should go to the PSOW might not. This also leads to an issue of inequity, where different providers have different complaints processes and so tenants' experiences of these will vary. There was even a suggestion that due to these concerns the PSOW should use its discretion to consider the complaint where there is proof that the internal complaints process had been started but not completed – and where the complexity has meant that the individual cannot complete that process or where relations might have broken down. Welsh Government participants in our research noted that Government and Ministers regularly receive complaints from members of the public (sometimes confusing general complaints that

³⁷ <https://www.ombudsman.wales/wp-content/uploads/2019/07/Annual-Report-and-Accounts-2018-2019-Final-ENG.pdf>

should be addressed in the first instance to the RSL and then to the PSOW, with the regulatory function of the Welsh Ministers). These discussions further imply that a review of RSL complaints processes and advice and information available to people using those processes might be beneficial, and could be conducted by the PSOW's new Complaints Standards Authority.

8.15 As with local authority complaints, the majority of RSL complaints were resolved through early resolution or voluntary settlement (16 complaints out of the 19 that were taken forward), one resulted in a report with the complaint not upheld, and two reports where the complaint was upheld in whole or in part. The PSOW's casebook demonstrates a number of example complaints about social housing including issues such as:

- allocation to a particular banding of housing
- delays in allocation
- not taking into account medical information in decision-making
- incorrect sign-posting (in particular sign-posting an individual to complain directly to the PSOW rather than first using the local authority's own complaints procedure
- relevant law and policies not complied with (constituting maladministration)
- misunderstanding of which sources of law apply to particular aspects of decision-making (at least once local authority responding to our FOI requests was mistaken as to the law which applies to it, and the PSOW's casebook also includes examples of misunderstanding of relevant law, including misunderstanding about the respective applicability of law made by the Assembly and Welsh Minister and law made by the UK Parliament and Ministers).

The remedies recommended by the PSOW included:

- Recommending that decision-making panels arrange to offer fuller explanations for their decisions, and to record more comprehensive reasoning when recording their decisions
- Apologise
- Financial compensation (for time and inconvenience caused to individuals, for distress and uncertainty caused by mishandled applications)
- Correct misinformation (including misinformation about how an individual can appeal or complain about decisions)
- To reinstate an individual to the housing waiting list
- Provide improved relevant staff training
- Carry out a review of policy and procedures to ensure they meet requirements of good administrative practice, including statutory requirements
- Reminding officers of relevant legal provisions
- Recommending that local authority re-assess a situation applying the correct law

8.16 The PSOW also has jurisdiction to investigate complaints against elected members such as local councillors who might put pressure on housing officers to allocate housing in a particular way.

8.17 A large area for PSOW complaints that we have not considered in detail in this Report are social housing repairs and maintenance. Other matters include estate management, the right

to buy, anti-social behaviour, failure to consider complaints about nuisance and failure to perform homelessness assessment duties.

8.18 We note that the UK Ministry of Communities Housing and Local Government has consulted on ‘Strengthening Consumer Redress in the Housing Market’ and has subsequently recommended the establishment of a Housing Complaints Service with a single portal covering a vast range of housing complaints currently determined by different ombuds bodies. We found commentary and references to this concept confusing, and its jurisdictional reach (England only so far as we now understand it) is rarely mentioned, nor is there discussion of how cross-border complaints might be dealt with. If we found it difficult to determine whether the HCS is intended to apply to any particular housing complaints originating wholly or partially in Wales, we can imagine this will also be confusing also for tenants in Wales.³⁸

Recommendation 9: That the PSOW, in particular its new Complaints Standards Authority, review housing association (RSL) complaints procedures, especially as to length and complexity. That complaints standards for social housing providers (both local authorities and RSLs) laid down by the PSOW require a clear explanation to be given of the difference between service requests and complaints.

Redress in Key Areas of Social Housing and Homelessness Decision-Making

It is beyond the scope of this Report to map specific pathways to redress for every area of social housing and homelessness decision-making. However, we examine some key redress routes which are indicative of the most common types of pathways to redress, and the procedures and mechanisms these encompass.

9. Homelessness Decision-Making and Redress

9.1 The UK nations have each introduced distinctive legislation establishing legal duties to secure accommodation for certain homeless applicants. The type of applicant covered, and the degree of assistance provided now differs.³⁹

9.2 The Housing (Wales) Act 2014 (the ‘2014 Act’) places a duty on local authorities to work with people who are at risk of losing their homes to help find a solution to their problems. This has led to a number of positive changes, including the introduction of a prevention duty (which has been replicated elsewhere), a shift in culture towards a more person-centred approach and consequently a broadly more inclusive statutory response to homelessness. There have been some less positive outcomes around definitions of when individuals are seen to be ‘failing to cooperate’ and what this means for their ongoing statutory duties and a differential approach to culture change across local authorities.

9.3 It is important to note that the legislation is not considered a *fait accompli* either by sector or political decision-makers in Wales. There is currently a raft of policy work being led by the Welsh Government and the Assembly looking at rough sleeping, homelessness, substance misuse, and the use of priority need testing in mediating access to help. In June 2019 the

³⁸ UK, Ministry of Housing, Communities and Local Government, *Strengthening Consumer Redress in the Housing Market* (February 2018):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684843/Stregthening_Redress_in_Housing_Consultation.pdf

³⁹ House of Commons Library, *Comparison of Homelessness duties in England, Wales, Scotland and Northern Ireland* (April 2018): <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7201>

Welsh Government established the Homelessness Action Group, a collection of experts from policy, academic, and practice spheres, to complete a set of rapid actions on how continuing issues of homelessness can and should be addressed.

9.4 Our research participants explained that whilst the 2014 Act does not change the routes to redress, it seeks to shift emphasis in the earlier stages of decision-making from a confrontational, quite adversarial approach, to an approach framed around a new relationship with the ‘client’ at the centre.

9.5 From the perspective of administrative justice redress for individuals, the 2014 Act largely mirrors the previous England and Wales provisions from the Housing Act 1996. The redress processes noted below apply only to applications made after 27 April 2015. Most local authority decisions relating to individual applicants can be subject to an internal review procedure within the local authority. However, this does not apply to all decisions, for example a local authority’s decision refusing to carry out a homelessness assessment. Here it is likely that judicial review will be the individual’s only route to *legal* redress. Where an individual is dissatisfied with a local authority decision they can apply for a statutory internal review.⁴⁰ Decisions that can be subject to internal review include:

- a decision of a local authority as to the applicant’s eligibility for help.
- decisions about what duty, if any, is owed to the application (e.g., the duty to help to prevent homelessness, interim accommodation duty, and duty to help to secure accommodation. This also includes decisions about whether an applicant is homeless or threatened with homelessness, and whether an applicant is in priority need or intentionally homeless).
- a decision that any of the above duties owed to the applicant by the local authority have come to an end.
- a decision to refer the applicant to another local authority under local connection provisions, and that the conditions for referral are met.
- a decision that the help to secure duty ceased prior to the end of the key 56-day period because the authority was satisfied that reasonable steps were taken.
- a decision about the suitability of accommodation offered in connection with, or in discharge of any, of the above duties, whether or not the applicant accepted or refused the offer.

9.6 The internal review process is governed by sections 85 and 86 of the 2014 Act and the Homelessness (Review procedure) (Wales) Regulations 2015. The request to review must be made to the local authority which made the original decision. This can be requested by the person affected or by someone else on their behalf, and can be in writing, oral or both. An applicant must request a review before the end of a period of 21 days beginning with the day on which the applicant was notified of the authority’s decision and of their right to request a review. This is unless the authority agrees to a longer period in writing. The authority then has eight weeks from the date of the request to notify the applicant of its decision, unless the applicant and the authority agree a longer period in writing. Where there is a local connection issue, the authority has 10 weeks from the date of the request to notify the applicant of the decision, or 12 weeks if an arbitrator on local connection has been appointed. Within five working days of receiving the request, the authority (or authorities in the case of a local connection issues) must acknowledge receipt and invite the applicant and/or their representatives to make representations in writing, orally, or both, and notify the applicant of

⁴⁰ Housing (Wales) Act 2014, ss.85 and 86.

the procedure to be followed in connection with the review. The review may be carried out by the authority itself or by someone acting on its behalf, but when carried out by the authority the review officer must be someone not involved in the original decision.

9.7 Research from Salford University found that between the 2014 Act coming into force (April 2015) and mid-2016, 21 local authorities reported a total of 371 review applications, but 257 of these involved just one authority.⁴¹ The overall success rate was approximately 50%. This chimes to an extent with our FOI data on internal reviews in other areas of social housing, for example of the five authorities that were able to provide information about allocation reviews, one authority received significantly more requests for review. We did not ask for data on homelessness reviews and appeals as this had recently been asked for by Shelter Cymru in its research (forthcoming). However, from our survey, 36% respondents were involved in requests for statutory review of homelessness or homelessness prevention duties on a weekly or monthly basis (none had daily involvement) and 22% were involved once or twice a year. There has been long-standing research into homelessness internal review processes and outcomes that previously collected data about Wales. The table below is extracted from the research.⁴²

Table Two: Homelessness Reviews in Wales

Number of Review Requests	Data from 13 LAs in 1998	Data from 6 LAs in 2001	Data from 10 LAs in 2003
0	3	0	3
<5	8	5	5
6-15	2	1	0
16-25	0	0	2

9.8 Whilst rates of homelessness internal reviews are small, they are comparatively more common than internal reviews relating to housing allocation, and to issues in the landlord and tenant relationship. Up until the 2003 data at least, the picture of internal reviews requested in Wales tracks trends in England; that most authorities receive either five or fewer requests for review per-annum, with a small proportion receiving a much higher number. The Salford University research, and further research by Shelter Cymru (early findings of which were presented at the WISERD *Wales Housing Research Conference*, January 2019) seems also to confirm that rates of internal review have remained small, but highly variable across local authorities, post the 2014 Act.

9.9 Our research respondents shared some experiences that when reviews of this kind are requested the process can become quite formal, in-depth and lengthy, alongside a feeling that this level of formality (and the impetus for review itself) is being driven by legal advisers. Those authorities with experience of reviews said they tended to be sought by individuals who had received legal advice. One authority noted an example of a review where the applicant had engaged lawyers and the local authority also felt the need to engage external lawyers in order to be sufficiently competent to respond to the issues raised. This seems to chime with research into homelessness reviews in England, which found that the review process has

⁴¹ Anya Ahmed et al, *Post-implementation evaluation of Part 2 of the Housing Act (Wales) 2014: Interim Report* (August 2017): <https://gov.wales/docs/caecd/research/2017/170808-post-implementation-evaluation-homelessness-legislation-interim-en.pdf>

⁴² See e.g., S Halliday, D Cowan and C Hunter, 'Homelessness Applicants and Internal Reviews' (2003) *Legal Action Group* 8 and 'Adjudicating the implementation of homelessness law: The promise of socio-legal studies' (2006) 21(3) *Housing studies* 381; D Cowan et al, *The Appeal of Internal Review* (Hart Publishing 2003).

tended to become more judicialized and legalistic over time, and that applicants are increasingly likely to be legally represented.⁴³ The JUSTICE Working Party also concluded that:

While there are no clear data on the outcome rates for internal reviews, tenant lawyers we spoke to expressed frustration at the approach local authorities take to internal reviews. One described the review process as a form of “shadow boxing” between local authorities and homes persons’ solicitors before judicial review or an appeal to a Circuit Judge is commenced. Most solicitors we spoke to agreed and contended that many local authorities do not meaningfully reconsider the first instance homelessness decision.⁴⁴

9.10 English research has also noted a change over time in who is conducting reviews, shifting from single local authority officials to a panel, to specific ‘expert’ members of staff with a specialist role to conduct reviews. This shift to more expert review can also be seen in some local authorities in Wales. The English research tends to show that reviews have a greater impact on initial (‘street level bureaucratic’) decision-making than higher court precedents (stemming from judicial review or legal appeals which can be around quite ‘niche’ (if important) issues). Respondents to our research suggested that often the applicant is not the primary audience for the internal review decision-letter, which can run into many pages, the lawyer is the audience, with the process going from being an administrative exercise to a more adjudicative exercise. In the past the research had found a correlation between applicants being legally represented and success for the applicant (a kind of ‘representation premium’). However, the more recent 2014 data seems to be equivocal on this, whilst on the other hand demonstrating that the presence of legal representation correlates with a more positive assessment of the review process, and a greater likelihood of making significant improvements in initial decision-making. The researchers found that internal reviews were said to lead to improved decision-making in some 82% of cases.⁴⁵

9.11 The Law Commission intends to commence a project examining internal administrative reviews. It notes that: ‘Administrative review decisions determine the outcome of at least as many cases as appeals, probably more. Yet have received a fraction of the analysis or academic attention given to other aspects of administrative justice’. The aim of the project will be to explore options for promoting ‘correct decisions, cheaper correction mechanisms, and public confidence in decision making’. It will also ‘consider and assess the merits of the different procedures that are in place and make recommendations with a view to identifying best practice and generally improving them’.⁴⁶

9.12 The JUSTICE Working Party advocates that homelessness review functions be removed from local authorities and externalised in the new Housing Disputes Service it recommends be piloted. Whilst dissenting from many of the full Working Party’s recommendations, the Housing Law Practitioners Association (HLPAs) members of the Party accepted that homelessness reviews should be conducted by an independent body.⁴⁷

⁴³ See references at n.42 and C Hunter, D Cowan, A Dymond and S Halliday, ‘Reconsidering mandatory reconsideration’ [2017] *Public Law* 215.

⁴⁴ *Solving Housing Disputes*, para 2.62

⁴⁵ Hunter et al (n.43) p.225.

⁴⁶ <https://www.lawcom.gov.uk/project/administrative-review/>

⁴⁷ *Solving Housing Disputes* (HLPAs Dissent, para 45).

- 9.13 In homelessness decision-making, if an individual is dissatisfied with the outcome of an internal review process, they may appeal to the county court on a point of law. They can appeal if they are dissatisfied with the decision on the review or have not been notified of the review decision within the relevant time period (usually eight weeks, but can be longer if agreed by the parties, or if the matter raises local connection issues). An applicant must exercise the right to appeal within 21 days of being notified of the review decision, or within 21 days of the date by which he/she should have been notified. The court may give permission for an appeal to be brought after this time period if it is satisfied that there is good reason for the applicant having not been able to bring the appeal in time. As note above in relation to advice and assistance, seeking legal aid has been found to provide a ‘good reason’ for requiring an extension of time to appeal against an adverse decision on administrative review. The JUSTICE Working Party recommended that the time limit for appealing a local authority internal review decision on homelessness (s.204 Housing Act 1996) ought to be extended from 21 days to at least 28 days to give appellants more time to access legal aid. We propose that Welsh Government/Assembly consider similarly amending the time limit for an appeal under the equivalent Welsh provisions (s.88 of the 2014 Act).
- 9.14 The role of the county court is to ensure that the authority has correctly understood and applied the law and has followed fair decision-making procedures under general administrative law (as well as taking a reasonable decision), and complied with other applicable law such as the Human Rights Act 1998 and Equality Act 2010, only in rare circumstances will the county court be able to re-examine the facts of the case. The county court has the power to make orders quashing or varying the decision as it thinks fit. The usual outcome in a successful claim is for the court to order that the decision be quashed and remitted back to the authority to take a new decision.
- 9.15 Where the authority was under a duty to ensure that accommodation is available for the applicant, the authority may also secure that suitable accommodation is available during the period for appealing, and if an appeal is brought, until a final determination of the case. Notably this is expressed as that the authority ‘may’ provide accommodation and not ‘must’. In light of this, the applicant also has a right to appeal against an authority’s decision not to accommodate them, or to cease accommodating them, during the appeal period (and appeals process if an appeal is commenced). An appeal on these grounds cannot be brought after determination of the main claim, here the court can order the authority to provide suitable accommodation during the appeal, and the court must either confirm or quash the decision appealed against. In considering whether to confirm or quash a decision not to provide accommodation during the appeals process, the county court is specifically required to apply the principles applied by the High Court on an application for judicial review. It seems an interesting difference here that principles applied by the High Court on judicial review are explicitly mentioned in s.89 (appeals against refusals to accommodate during appeals) and not under s.88 (the appeal itself) as functionally the same legal principles will be applied by the county court to both these decisions. This may be as prior to the 2014 Act there was no right to an appeal against a refusal to accommodate during the appeals process and the complainant would have explicitly had to seek judicial review in separate proceedings. The Salford University research records only four s.88 appeals from April 2015 to mid-2016. Anecdotally, as no figures are collected, we believe there to now be around six s.88/s.89 appeals per-annum determined in Cardiff and a further six determination in locations across Wales.

Recommendation 10: Welsh Government/the Assembly should consider whether the time limit for appealing a local authority homelessness internal review decision under

s.88 of the Housing (Wales) Act 2014 should be extended from 21 to 28 days to allow appellants more time to access legal aid.

10. Statutory Redress in Housing Allocations

10.1 Local authorities must allocate housing in accordance with the provisions of Part 6 of the Housing Act 1996 (which still applies to Wales) and with Welsh Government Code of ‘Guidance for Local Authorities on the Allocation of Accommodation and Homelessness’ (most recent 2016 version).⁴⁸ The fragmentation of law across devolved and non-devolved sources continues to cause problems in the social housing context. For example, we requested information from stock holding local authorities in Wales, under the Freedom of Information Act 2000, about social housing allocation and social housing tenancies, yet one authority responded that their activities were no longer regulated by the 1996 Act, but were instead regulated by the Housing (Wales) Act 2014. However, the 2014 Act does not specifically govern social housing allocation in Wales, or most aspects of the operation of the social landlord and tenant relationship. The 2014 Act has the following aims

provide for the regulation of private rented housing; to reform the law relating to homelessness; to provide for assessment of the accommodation needs of Gypsies and Travellers and to require local authorities to meet those needs; to make provision about the standards of housing provided by local authorities; to abolish housing revenue account subsidy; to allow fully mutual housing associations to grant assured tenancies; to make provision about council tax payable for empty dwellings; and for other housing purposes.

10.2 Returning to social housing allocation, an ‘allocation’ means selecting a person to be a tenant of housing accommodation held by the local authority, nominating a person to be a tenant of housing accommodation held by another person or by a private registered provider of social housing or RSL.⁴⁹ The Renting Homes (Wales) Act 2016 makes significant changes to the nature of tenancies, and this is discussed further below.

10.3 Every local authority in Wales is required to have a scheme determining priorities and procedure for allocating housing accommodation.⁵⁰ The scheme is to include a statement about the authority’s policy on offering people a choice of housing accommodation, or the opportunity to express preferences about housing accommodation to be allocated to them. The scheme is also required to be framed so as to give reasonable preference to certain types of people (e.g., those who are homeless, occupying insanitary or overcrowded housing, people needing to move to avoid hardship, or needing to move on medical or welfare grounds).⁵¹ Preference need not be given to people guilty of a particular degree of unacceptable behaviour.⁵²

10.4 Local authorities must also secure that advice and assistance is available free of charge to persons in their district about the right to make an application for an allocation of housing,

⁴⁸ <https://gov.wales/topics/housing-and-regeneration/services-and-support/managing-social-housing/allocate/?lang=en>

⁴⁹ 1996 Act, s.159.

⁵⁰ 1996 Act, s.167.

⁵¹ 1996 Act, 2.167(2).

⁵² 1996 Act, s.167(2C).

and that necessary assistance in making an application is provided free of charge to those likely to have difficulty in doing so without assistance.⁵³

10.5 A local authority must not make an allocation to ineligible persons.⁵⁴ An applicant is ineligible if subject to immigration control, or if they are an ineligible person from abroad, and/or if they are a person to be treated as ineligible because of unacceptable behaviour.⁵⁵ In the main eligible tenants are existing tenants, a person from abroad other than a person subject to immigration control, and persons subject to immigration control prescribed as eligible (e.g., refugees and those granted exceptional leave to enter or remain in the UK).⁵⁶

10.6 In the context of local authority housing allocations, the main routes to administrative justice are complaints to the local authority, internal reviews within the local authority, and complaints to the PSOW. Judicial review is potentially available in relation to some aspects of decision-making, but it is rarely used. There are three situations where an applicant for local authority social housing has a specific legal right to seek internal review by the authority.⁵⁷

- A review of any decision about the facts of the applicant's case which is likely to be, or has been, taken into account in considering whether to allocate housing accommodation to the applicant. Here the applicant has a right to request that the authority inform him/her of such a decision about facts. There is no prescribed legislative procedure for responding to such a request, but the applicant does have a right to seek an internal review of such a decision about the facts of his/her case, and to be informed of the decision on review and the grounds of it.
- A review of any decision that a person is ineligible based on being subject to immigration control, being an ineligible person from abroad, and/or a person to be treated as ineligible because of unacceptable behaviour. Here the applicant has a right to seek an internal review of the decision and to be informed of the decision on review and the grounds of it.
- A review of a decision not to afford an applicant preference due to unacceptable behaviour. Here the applicant must be notified in writing of any decision that he/she is guilty of unacceptable behaviour and has a right to seek internal review of the decision, and to be informed of the decision on review and the grounds of it.

10.7 In relation to all these circumstances, Welsh Government Guidance requires that where an applicant may have difficulty in understanding the implications of an ineligibility decision, it is good practice for the local authority to make arrangements to explain the decision to the applicant in person.⁵⁸ The Guidance also requires that where notification cannot be sent to the applicant, or where the authority believes that notice may not have been received by the applicant, the authority should make a written statement of the decision with accompanying reasons available at its office.

10.8 Local authority housing allocation schemes are required to provide an internal review process in the above classes of case, but there is no statutory requirement to follow a particular

⁵³ 1996 Act, s.166.

⁵⁴ 1996 Act, s.160A.

⁵⁵ Housing and Homelessness (Eligibility)(Wales) Regulations 2014 (made under s.160A and s.185 of the 1996 Act).

⁵⁶ 1996 Act, s.160A.

⁵⁷ 1996 Act, s.167(4A) esp (c) and (d).

⁵⁸ Code of Guidance for Local Authorities on the Allocation of Accommodation and Homelessness (March 2016). Paras 2.51-2.55.

procedure. Welsh Government Guidance lays down 15 provisions that local authorities ‘may’ adopt to ensure a fair internal review procedure. These include, ensuring applicants are made aware of relevant advice services, ensuring applicants can request further information, that they may request an oral hearing, that the review is carried out by an appropriately independent and senior officer, that changes of circumstances can be taken into account. The Guidance also makes provisions about the powers and role of any person representing the applicant in review proceedings, and respect for Welsh Language Standards. The Guidance does not appear to require the provision of information to the individual about onward routes to redress if they remain dissatisfied with the decision following internal review.

Recommendation 11: Welsh Government could consider consulting on amending the Guidance so that local authorities ‘must’ or ‘should’ adopt provisions around ensuring a fair internal review procedure and this should extend to providing information about onward routes to redress if an individual is dissatisfied with a decision on review.

10.9 From our FOI requests, the number of internal reviews requested varies across local authorities. Twelve local authorities responded to our FOI, three did not keep records of the number of allocations internal reviews requested and their outcomes. Four invoked the section 12 exception to FOI; this makes provision for public authorities to refuse requests for information where the cost of dealing with them would exceed the appropriate limit, which for local government is set at 18 hours/2.5 working days in determining whether the department holds the information, locating, retrieving and extracting the information. One difficulty here was that our FOI request also asked about requests for internal review of particular tenancy related decisions (such as an internal review request following a Notice Seeking Possession). Two authorities then pointed out that responding to the whole request would require a disproportionate amount of staff time. For example, one noted that: ‘We hold this information across several different systems and across different teams and departments. Some would require manual trawl through systems’. Information about requests to review allocation decisions might have been accessible but was then thought not to be severable from our full request.

10.10 However, some other local authorities were able to respond to the full query and did keep records of the number of reviews requested across all social housing issues (without having to conduct a manual trawl of tenancy agreements). Although we appreciate the significant differences between the working procedures and demands on particular local authorities, we suggest that it could be possible for all authorities to keep records of the use of administrative justice processes (including requests for internal administrative reviews) so as to track trends in use and outcomes, using this data as a potential means to improve administration.

Recommendation 12: Welsh Government should recommend that local authorities and RSLs keep records of the number of statutory internal administrative reviews requested, and their outcomes, so as to track trends in use, including as a potential means to improve administration.

10.11 We note the information provided by authorities able to respond in the table below. We have aggregated information about requests for internal administrative reviews in allocation across all types of review: review of decision about facts; person subject to immigration control/ineligible person from abroad; unacceptable behaviour; decisions not to award preference due to unacceptable behaviour.

Table Three: Social Housing Internal Reviews Requested

Authority	Time Period	Reviews Requested	Outcomes	Population (approx.)	Total Social Housing Stock
A	1 April 2017 to 31 March 2019	49	5 led to reversal of original decision	70,000	7,817
B	1 April 2017 to 31 March 2019	48	27 led to reversal of original decision	145,000	8,943
C	1 April 2017 to 31 March 2019	34	Applicant eligibility was confirmed in all cases	246,000	13,525 (council stock only not central housing register – total is 21,467)
D	1 April 2017 to 31 March 2019	22	6 led to a reversal of the original decision	95,000	5,809
E	1 April 2017 to 31 March 2018	165	52 led to a reversal of the original decision	155,000	10,185
F	1 April 2017 to 31 March 2019	0		132,000	7,110
G	1 April 2017 to 31 March 2019	0		60,000	5,837
H	1 April 2017 to 31 March 2019	0		132,000	8,615

10.12 Notable from this data is that one authority reported in just one year, more than three times the number of reviews reported by the next closest authority over a two-year period, and there is some variability across the authorities. However, as we have data for only seven authorities (and only for one to two years) we cannot claim to be presenting a reliable picture of internal review requests across Wales. We have shown reviews requested against the approximate population of the local authority, and the total housing stock for which the local authority makes housing allocation decisions. However, we have not also considered other important factors such as demographic characteristics of the population served by the local authority which will impact on the demand for social housing, and the extent to which demand may outweigh supply, and other issues relating to eligibility (e.g., areas with higher immigrant populations). However, from a rough assessment looking at the Welsh Index of Multiple

Deprivation, the authority with the largest number of review requests does not have a comparatively high rate of deprivation (it is in the lower quartile of all authorities on this Index).

- 10.13 There are other factors that could potentially impact on review requests, including awareness among advisers, local authority staff and the general public, availability and accessibility of advice and assistance (including legal advice and assistance) as well as the administrative practices of the authority itself. This seems to us to be an area that warrants more detailed research across all local authorities including those where all allocation decisions and reviews have been delegated by the local authority to individual RSLs or where there is instead a single housing register (Single Access Route to Housing (SARTH)). As local authorities each manage their functions differently with different staff teams, more detailed research could look at exactly who is involved in reviews in particular areas. In our survey we heard experiences of incorrect (particularly out of date) law being applied. Survey respondents also reported a feeling that ranks are closed on internal review, with independent oversight (either through the PSOW or the courts) being the only way to a truly independent resolution.
- 10.14 There may be some ‘gaps’ in the internal review landscape. For example, the circumstances in which an applicant is legally entitled to an internal review are limited to reviewing key factual decisions, decisions relating to immigration status, and decisions relating to unacceptable behaviour. An applicant might be entitled to seek judicial review if they have no other route to access redress, particularly if a local authority turns down a reasonable request to conduct an internal review (even where they are not legally obliged to conduct one). Judicial review is effectively a ‘gap-filling’ procedure where there is no other right to redress for the individual; as such we cannot list all the circumstances where judicial review might be sought. Some examples could include; a decision that an offer of housing is suitable, a grade or recommendation made by the authority’s medical adviser, or a decision about an applicant’s priority for housing. Another example could be where a local authority operates an internal review procedure that falls short of the common law requirements of procedural fairness. Our research respondents noted that the gaps cause confusion, are not especially well justified, cause access to justice problems, and lead to individuals falling short of the so-called ‘statutory bar’ where the PSOW cannot usually deal with a complaint if an individual had, or could have had, a legal route to redress through a court or tribunal.
- 10.15 The back-stop of judicial review can hardly be considered sufficient. In our FOI requests, none of the 12 local authorities who responded had been subject to an issued judicial review in their last two reporting periods, and those who kept records of pre-issue contacts had also not received any Letters Before Claim (this is a letter sent by a potential claimant seeking to identify the issues in the dispute and determine whether court proceedings can be avoided). From data extracted from the Crown Office Information Network (COINs), the Administrative Court’s IT system, from the date of opening an Administrative Court in Cardiff April 2009 to 30 April 2018, there have been only three ‘housing’ judicial reviews and one ‘housing benefit’ judicial review issued in that nine year period, none of the claimants were legally represented and none of the claims proceeded to a final substantive hearing.
- 10.16 RSLs also make decisions about housing allocation, but Welsh Government Guidance does not apply to these bodies, who then do not have to follow specific guidance in terms of offering and conducting internal administrative reviews. In general, there appears to be no specific, publicly available, document setting out the differences in legislation applying to local authorities and RSLs in Wales across a range of matters. The complexity of housing

law as it applies to England, and England and Wales was recognised by the JUSTICE Working Party, and this is exacerbated for Wales currently due to the devolution context and the delayed implementation of the Renting Homes (Wales) Act 2016. However, the Working Party also importantly found that whilst housing law itself is complex, many disputes are not, this was also our experience.

Recommendation 13: That Welsh Government provides more detailed easy read information (through the Law Wales site) about different legal regimes applying to local authorities and RSLs respectively.

Recommendation 14: That Welsh Government considers the case for requiring RSLs to provide a right to internal review of their allocation decisions, with the same principles applying to these processes as apply to local authority internal reviews.

11 Statutory Redress in the Landlord and Tenant Relationship: Pre-Renting Homes (Wales)

11.1 Here we discuss the redress procedures in the landlord and tenant relationship that have administrative law/broader administrative justice significance. We have considered anti-social behaviour, changes to tenancies, and possession proceedings, but our research does not yet extend to the legal framework for other matters such as repairing obligations. Possession proceedings are a key area where administrative justice-type redress mechanisms can be found in the local authority or RSL relationship with its tenants. This is an area of law that will change in Wales, and we provide an explanation of some existing provisions, followed by the new situation (not yet in force) under the Renting Homes (Wales) Act 2016.

11.2 At present there is a difference between secure tenancies (which most local authority tenants have, and which some RSL tenants have) and other situations which include those with introductory/starter or demoted tenancies, those provided interim accommodation as a homeless person, those living in a local authority hostel, and those no longer living in the property and who don't intend to return to it.⁵⁹ For RSLs, the most common type of tenancy is an assured tenancy. Some RSL tenants may have secure tenancies, assured shorthold (starter) tenancies (similar to local authority introductory tenancies), or demoted tenancies.

11.3 For secure tenants, possession proceedings can only be sought in certain circumstances. These include; that the tenant has breached a term of the tenancy agreement, is in rent arrears, causes some form of nuisance, has engaged in illegal or immoral activities, has damaged the property or been dishonest in order to obtain the tenancy originally. Other grounds include that the landlord intends to demolish the home, or that the home is designed or adapted for a person with special needs and the persons in the household no longer require those facilities. In some cases, the landlord seeking possession will have to provide the tenant with alternative accommodation (e.g., in the special needs adaptation example).

11.4 The landlord is required to give the tenant a Notice of Seeking Possession, which will normally last for a period of four weeks. After this four-week period the landlord can apply to the county court for a possession order. This county court procedure is governed by a specific Pre-Action Protocol for Possession Claims by Social Landlords, Part Two of which only applies where the landlord is seeking possession for rent arrears, and Part Three of which only

⁵⁹ Largely governed by the England and Wales Housing Acts of 1985 and 1996.

applies to so-called mandatory grounds for possession where the court has no discretion over whether or not to grant a possession order. A Policy Briefing by Shelter Cymru examines this Pre-Action Protocol, setting out the case for raising minimum standards for how social landlords work with tenants who may be at risk of eviction, considering whether the Protocol could be improved specifically as pertains to Wales. The JUSTICE Working Party Report also recommends simplifying a range of pre-action protocols applicable to housing disputes.⁶⁰

- 11.5 If the landlord is seeking possession on the ground that the tenant has been involved in serious nuisance, anti-social behaviour or domestic violence there is no minimum period before possession action can commence. The landlord can serve a Notice Seeking Possession and apply to the court immediately. In most cases a Notice Seeking Possession will be valid for 12 months, after which if the landlord has not started possession proceedings it will need to issue a new notice.
- 11.6 For classes of tenancy other than secured tenancies, the landlord does not need to prove a legal reason in court for seeking possession. One example is an 'introductory tenancy'; these can only be provided by local authorities or housing action trusts and are usually implemented where a new tenant has not yet proved to the landlord that they are capable of sustaining a secured tenancy. Here the landlord must give the tenant at least four weeks' notice that it intends to seek a possession order from the county court and explain its reasons. The notice must also set out the date after which possession proceedings may begin, explain to the tenant that they have a right to request an internal review of the decision and that the review request must be made within 14 days. The notice shall also inform the tenant about the advice available to them such as from CAB or a solicitor. The internal review request must be made within 14 days beginning with the day on which the notice of proceedings was served. The landlord is required to notify the tenant of the review decision, and if it is decided to confirm the original decision the landlord is also required to notify the tenant of the reasons for the decision. The review is to be carried out and the tenant notified of the outcome before the date specified in the notice of proceedings as the date after which the court proceedings may begin. The review is governed by the Introductory Tenants (Review) Regulations England and Wales 1997.
- 11.7 There is also a class of demoted tenancies. If a tenant has behaved in an anti-social manner the local authority can demote the tenancy to a less secure type for a specific period. The landlord must apply to the county court for a demotion order, which can only be granted if the court is satisfied that the tenant, or a person residing in or visiting the dwelling house has engaged or threatened to engage in; housing related anti-social behaviour, unlawful use of premises, and it is reasonable to make the order. This demoted tenancy will generally last for 12 months, during which time it is easier for the landlord to seek an order for possession. Where a landlord seeks possession of a demoted tenancy, the tenant has a right to seek an internal review within 14 days (as is the case with introductory tenants above). This review is governed by The Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005. It is worth pointing out here that two (seemingly identical) review procedures are governed in one case (introductory tenancies) by England and Wales law, and in the other (demoted tenancies) by Welsh law
- 11.8 Anti-social behaviour is also an issue for local authorities and RSLs, which might sometimes lead to eviction procedures being commenced. Broadly, the Anti-social Behaviour, Crime and Policing Act 2014 provides for local authorities (and RSLs in some circumstances) to seek

⁶⁰ *Solving Housing Disputes*, paras 3.28-3.37.

injunctions for housing related anti-social behaviour. The injunctions are civil and are available in the County Court or High Court (for adults) and Youth Court (for those over the age of 10 but under the age of 18). They are intended to tackle low-level anti-social behaviour. Such injunctions are intended as a formal sanction after all other informal routes for tackling anti-social behaviour have been exhausted. Local authorities can apply for injunctions in a range of contexts, whereas RSLs can only apply where the anti-social behaviour affects their housing management functions.⁶¹

11.9 An injunction can exclude a person over the age of 18 from their home if they have been engaging in anti-social behaviour.⁶² This power of exclusion is likely rarely used, and specifically engages Article 8 of the European Convention on Human Rights (ECHR). To grant an injunction with an exclusion power the court must be satisfied that the anti-social behaviour includes the use or threatened use of violence against other persons, or there is a significant risk of harm to other persons, from the respondent. In general, the county court can only grant an injunction on the basis of anti-social behaviour if on the balance of probabilities the person has engaged or threatens to engage in anti-social behaviour, and the court considers it just and convenient to grant the injunction in order to prevent the person engaging in anti-social behaviour.⁶³

11.10 A new absolute ground for possession for serious anti-social behaviour was introduced by the Anti-social Behaviour, Crime and Policing Act 2014 in order to expedite eviction of highly anti-social secure tenants. A court will be required to grant possession if one of five conditions is met;⁶⁴ if the tenant, member of the household or visitor has been convicted of one of a number of serious offences, has breached a relevant injunction, has breached a criminal behaviour order, has been convicted for breaching a noise abatement order, or where the property has been closed for more than 48 hours under a closure order for anti-social behaviour. Here the anti-social behaviour must have been committed in, or in the locality of, the property, affected a person with a right to live in the locality of the property or affected the landlord or a person connected with the landlord's housing management functions. In these circumstances, secure tenants of local authorities or housing actions trusts have a right to request a review of the landlord's decision to seek possession on the basis of serious anti-social behaviour,⁶⁵ and must do so within seven days of the notice seeking possession. The Secure Tenancies (Absolute Ground for Possession for Anti-Social Behaviour) (Review Procedure) (Wales) Regulations 2015 specifies the process to be followed for an internal review by a local authority or housing action trust of its decision to seek possession under the absolute ground for anti-social behaviour. Welsh Government notes that this will ensure that landlords and tenants (or their representatives) understand the process and know what to expect. Here, whilst RSLs can also seek possession on this absolute ground, they are under no legal obligation to provide tenants with an internal review procedure.

11.11 In 2018 the Review Together pilot project brought together social housing providers with the Assistant Police and Crime Commissioner's office to look at a relational approach to tackling anti-social behaviour. This is in line with the shift towards a focus on trauma-informed approaches within the housing sector. The project worked with RSLs and local authorities to implement a new approach to addressing issues of anti-social behaviour. This approach focussed on both the 'perpetrators' and 'victims' of anti-social behaviour in a

⁶¹ s.5(3)

⁶² s.13

⁶³ s.1(2) and 1(3).

⁶⁴ Housing Act 1985, s.84A.

⁶⁵ s.85ZA(1) of the 1985 Act (as introduced by s.96 of the 2014 Act).

trauma-informed way, to go beyond penalising individuals for their actions and to understand why individuals were engaging with certain behaviour. The aim was to be able to implement a more sustainable and relational solution to the conflict, that engaged with both parties. Since then, this focus on a trauma-informed approach to decision-making within social housing and homelessness has grown with the Welsh Government commissioning Cymorth Cymru to deliver training across the sector on psychologically-informed approaches.

11.12 For those living in temporary accommodation, supported housing or a hostel there may not be a requirement for the local authority to give notice that it intends to seek possession. The Renting Homes (Wales) Act 2016 makes changes to the supported housing context, discussed below. With respect to temporary occupation, there may currently be basic protection from eviction, but this depends on whether the occupier is classed as an excluded occupant. For excluded occupants only 'reasonable' notice need be given of the landlord's intention to possess (and reasonableness is heavily context dependent). For other classes of occupants there may be a statutory minimum notice period. It is likely that there are no particular statutory rights to redress for occupants here (e.g., an internal administrative review) and that the backstop of judicial review in the Administrative Court may be their only means to seek redress for issues that cannot be addressed by defending the possession claim on the basis of human rights or other public law principles. From our FOI requests of stock holding local authorities, none had been subject to judicial review proceedings in the last two annual reporting periods (and for those that kept information on Letters Before Claim, they had received no such Letters in the last two annual reporting periods either). The backstop of judicial review is extremely rarely used in practice (we have not come across any examples in our research).

11.13 In our research FOIs we asked local authorities how many requests for an internal review they had received in their last two annual reporting periods (April 2017 to March 2019) under the range of legislative provisions noted above (including decision to extend an introductory tenancy, decision to demote a tenancy, request for review following a Notice Seeking Possession, request for review relating to decisions around anti-social behaviour). Only two respondents were able to provide specific information: one had issued a total of four Notices Seeking Possession, two reviews had been requested and one decision was subsequently reversed; the other had issued 551 Notices Seeking Possession (primarily due to rent arrears) and had received no internal administrative review requests. Other authorities noted they kept information about the number of Notices Seeking Possession issued, but not the number of review requests. Most either stated that they did not hold the information, or that it is only recorded in files relating to individual tenancy agreements. As one authority stated, responding: would require a review of each tenancy agreement and that a 'conservative estimate' of the time taken 'at 10 minutes to examine and subsequently collate information from one tenancy agreement, would equate to $5,300 \times 10 \text{ minutes} = 53,000 \text{ minutes}$ or 833 hours'.

11.14 Whereas the discussion above relates primarily to secure tenancies, it should be noted that most RSL tenants have assured tenancies that we do not examine in detail here. Possession proceedings here are governed by the Housing Act 1988, in particular section 8 which requires that a court should only entertain possession proceedings if the landlord has served notice in the prescribed form on the tenant, or the court considers it just and equitable to dispense with the notice requirement. The court can only make a possession order in certain circumstances such as if the tenant has fallen into rent arrears or has breached the terms of the tenancy. The time the landlord has between issuing a Notice Seeking Possession (section 8 notice) and applying to the court for possession depends on the grounds under which the landlord is

seeking possession, and generally varies between two weeks and two months. In the case of serious nuisance, anti-social behaviour or domestic violence the notice can take effect immediately. The RSL must then comply with a specific pre-action protocol.

11.15 Existing law is then complex and spread across a broad range of different sources, from Assembly and Welsh Ministers, to Westminster primary and secondary legislation and guidance. From an administrative justice redress perspective, there are many instances of internal review governed by different legal provisions. (1) an internal review process for specified types of decision on ineligibility for housing allocation (required by statute and fleshed out in Welsh Government Guidance); (2) a review process where a local authority is seeking possession in the context of an introductory tenancy (required by primary statute and governed by England and Wales Regulations); (3) an internal review process where a landlord is seeking to demote a tenancy or seeking possession of a demoted tenancy (required by primary statute and fleshed out by Welsh Regulations) (4) a fourth internal review process relating to possession on the basis of serious anti-social behaviour (required by primary statute and governed by Welsh Regulations). We could also add internal review processes conducted voluntarily by RSLs. As our FOI requests have begun to show, some local authorities in Wales do not keep information about the number of review requests, or the information on reviews requested is spread across a range of systems and not easy to collate. But for those authorities able to provide information, we might suggest that the number of requests to review housing allocation decisions varies widely across authorities and that, whilst the size and demographics of local populations as well as the total stock available are likely factors, still the authorities subject to the most reviews are not necessarily those where local populations have high rates of deprivation and where there is a significant gap between population needs and social housing availability. There are likely other issues at stake, which could include awareness of processes, advice and assistance and the quality of initial decision-making. In relation to internal review requests in the landlord and tenant relationship, only two authorities were able to provide specific information about this (one having issued 551 Notices Seeking Possession with no internal reviews requested).

11.16 Somewhat surprisingly given our FOI data on statutory reconsideration requests in the context of social landlord and tenant relationships, 9% of our respondents were involved in these daily or weekly, with a further 30% involved on a monthly basis. This might partially be due to the particular roles of those responding to the survey, but it might suggest more activity in this area of dispute resolution than the limited data we were able to obtain from the FOI requests demonstrates. In terms of possession proceedings in the county courts, 36% of respondents were involved either daily, weekly or monthly. Whereas, as we expected, judicial review involvement was rarer, with only 11% involved either daily, weekly or monthly, 50% having never been involved, and the remaining 39% involved infrequently over the years.

11.17 In light of a proposed Housing Code for Wales (contained in the Welsh Government's Draft Taxonomy of Codes of Welsh Law), thought could be given in future to providing a consolidated Regulation on procedures for internal review within local authorities (and also housing associations) of housing decisions including allocations and giving Notice of Seeking Possession. This could avoid the duplication of general requirements, ensure greater consistency and transparency, whilst also being able to provide for subject-matter specific exceptions where necessary (e.g., where different time limits for seeking the review are appropriate). However, such should be preceded by a more detailed, evidence-based assessment of the use and value of internal review procedures in the Welsh social housing sector, taking into account changes made by the Renting Homes (Wales) Act 2016 discussed below.

12 The Renting Homes (Wales) Act 2016

- 12.1 The Renting Homes (Wales) Act 2016 ('Renting Homes Wales') seeks to provide a clearer and more logical legal framework, reflecting fairness and equality, a simplified rental process to improve understanding by landlords and tenants of their rights and responsibilities, and more flexibility for landlords to meet people's housing needs.⁶⁶ Although it does not aim to fundamentally alter the balance of rights and responsibilities between landlords and tenants as currently exists, the Act is intended to establish a clearer and more consistent legal framework which is therefore aimed to result in fewer disputes. The Act was preceded by Law Commission work,⁶⁷ and further consultation by Welsh Government and the Assembly.⁶⁸ Respondents to our research suggested that the whilst the Draft Bill was prepared by the Law Commission, the end result, the Act, is a synthesis of sorts and that there were various disagreements between Welsh Government and the Assembly Equality, Local Government and Communities (ELGC) Committee primarily involved in the legislative process.
- 12.2 According to some of our research participants, the development and passage of Renting Homes highlighted some structural problems of the Welsh housing law environment. The advisors to the Assembly ELGC Committee were primarily specialists in English law and practicing in England, there seemed to be a lack of appropriately specialised and engaged practitioners in Wales (also with detailed knowledge and experience of the Welsh context) for the Assembly and Government to draw on. There is no textbook on Welsh housing law, and existing resources are limited (Law Wales) or designed for a different purpose (Shelter Cymru has very good resources but seeking to be accessible to the general public they lack some of the necessary depth for more detailed legal understanding). Wales' University Law Schools generally do not teach specific modules in Welsh housing law. But there is also a 'mixed bag' approach to the law itself, with Assembly primary legislation quite distinctive in some aspects, whereas much secondary legislation (statutory instruments for example) is largely a carbon copy of English law with a Welsh 'translation' (we see this in the regulations around internal review procedures for example).
- 12.3 Renting Homes Wales was designed to be an improvement from the administrative justice perspective, it is an ambitious codification and simplification of an array of statutory and common law sources, creating a more seamless structure between social and private providers of housing. However, there is an argument that the extent of ambition, and the number of interested parties involved and amendments made during its passage have watered down some of its value. We focus here on the administrative justice redress provisions of the Act, though we note that the substance of the law as well as the redress routes is also part of the administrative justice context.
- 12.4 Renting Homes Wales introduces two new 'occupation contracts'.⁶⁹ (1) A secure contract modelled on the current secure tenancy issued by social housing providers and (2) a standard contract modelled on the current assured shorthold tenancy used mainly in the private rented sector.⁷⁰ A secure contract gives greater security of occupation to the contract-holder than a standard contract. In this Report we focus mainly on secure contracts issued by community landlords (which are local authorities, RSLs, and some other kinds of authority). There are

⁶⁶ Explanatory memorandum paras 7 & 8.

⁶⁷ <https://www.lawcom.gov.uk/project/renting-homes/>

⁶⁸ <http://senedd.assembly.wales/mgIssueHistoryHome.aspx?IIId=12055>

⁶⁹ s.1

⁷⁰ s.8.

also variations that apply to specific types of housing or particular circumstances.⁷¹ These include ‘supported standard contracts’ for supported housing, ‘introductory standard contracts’ and demotion to a ‘prohibited conduct standard contract’.

12.5 An innovation of Renting Homes Wales is to impose statutory requirements applying to all occupation contracts,⁷² including provisions such as; requiring landlord to give contract-holders a written statement setting out the terms of the contract, setting deposits, giving contract-holders a right to occupy their home without interference from the landlord, prohibiting anti-social behaviour, prohibiting some forms of dealing with an occupation contract, seeking and giving the landlord’s consent, and compensation which contract-holders may be entitled to. This is an important core element of the Act, providing information to the tenant and landlord to help them better understand their obligations (and that the same level of information can be expected of all contracts – addressing some of our stated concerns about differences between local authority and RSL practices, extending this also to the private sector).

12.6 The landlord under an occupation contract must give the contract-holder a written statement of the contract within 14 days starting with the occupation date. If it fails to do so the contract-holder may apply to the county court for a declaration as to the terms of the contract.⁷³ The contract-holder can also apply to the county court for a declaration as to the terms of the contract if the landlord provides a written statement of contract that is incomplete, or if the written statement contains various errors. In all these cases the landlord may also be required to pay compensation to the contract-holder if the court is satisfied that the failure or defect is attributable to the intentional default of the landlord.⁷⁴

12.7 Renting Homes Wales provides for three types of contractual terms; fundamental, key and supplementary. Contracts may only be terminated in accordance with fundamental terms or by an enactment.⁷⁵ There can be early termination by the contract-holder giving notice to the landlord or by agreement with the landlord.

12.8 Specific administrative justice redress provisions in Renting Homes Wales concern the different types of contract and redress available where a community landlord adopts a contract that is not a secure contract. Schedule 3 provides for occupation contracts adopted by community landlords that may be standard contracts. One example relates to introductory occupation (an introductory standard contract), with further details being provided in Schedule 4. An introductory standard contract is a periodic standard contract for an introductory period (generally 12 months), in most cases when this period ends the contract will become a secure contract. The introductory standard contract provides less security of occupation for a time-limited period, this allows the contract-holder to demonstrate that they can sustain a secure contract. If the contract-holder has shown themselves not able to sustain a secure contract, then the landlord is able to seek to terminate the introductory standard contract more quickly than would be possible under a secure contract. However, from our FOI requests, similar provisions around introductory tenancies are rarely used under existing law.

⁷¹ Scheds, 3, 4 & 7.

⁷² Part 3.

⁷³ ss.31-38.

⁷⁴ s.35

⁷⁵ s.148.

12.9 The community landlord must give the contract-holder a notice stating that their contract will be an introductory standard contract during the ‘introductory period’.⁷⁶ An introductory standard contract will not arise where the contract-holder previously held a secure contract with a community landlord. In circumstances where a community landlord wishes to enter into a standard contract or does not wish for an existing contract it is adopting to become a secure contract, the contract-holder has a right to ask a county court to review the landlord’s decision.⁷⁷ This is a new type of county court legal review. The landlord must give the contract-holder notice of this right of legal review, and it must be exercised by the contract-holder within 14 days starting on the day when the landlord gave the contract-holder notice of its decision (or later with the permission for the court if it considers there to have been good reason for the delay). The court may confirm or quash the decision to give the notice. The county court is required to apply the same principles applied by the High Court on an application for judicial review and can make any order that could be made by the High Court on a judicial review application. If the county court quashes the original notice, the landlord may give a further notice within 14 days beginning on the day the court quashes the notice. This does not affect the time limit within which the contract-holder may seek a review so, in practice, a contract-holder can apply to the county court again for a review of that further notice.

12.10 Another type of standard contract that can be issued by community landlords is a prohibited conduct standard contract.⁷⁸ The prohibited conduct standard contract is similar to a demoted contract under the existing law, and again from our FOIs these seem to be rarely used by local authorities. Here the community landlord must apply to the court for an order that the tenant is in breach of provisions around anti-social behaviour or other prohibited conduct. The effect of such a court order will be to end the secure contract and replace it with a periodic standard contract for a specified period. The court can only make such an order if it is satisfied that a breach has occurred, that it is reasonable to make the order and that the landlord will provide the contract-holder with a programme of social support the aim of which is the prevention of prohibited conduct. This is designed in effect to be a less drastic approach than pursuing possession proceedings on the basis of anti-social behaviour. Renting Homes Wales does not re-enact the Anti-social Behaviour, Crime and Policing Act 2014 mandatory (or absolute) ground of possession for anti-social behaviour. As such where possession is sought for breach of the anti-social behaviour term of an occupation contract, the court will use its discretion whether or not to grant possession (as it does in other cases). This means the relevant Welsh internal review procedure regulations relating to possession on the mandatory ground of anti-social behaviour will need to be repealed.

12.11 There are further internal review procedures that apply in the context of both prohibited conduct standard contracts, and introductory standard contracts. In essence though the context is different, the procedures are similar. In the case of a prohibited conduct standard contract the community landlord may extend the probation period under the contract,⁷⁹ and in the case of an introductory standard contract the landlord may seek to extend the introductory period.⁸⁰ In both cases the landlord must give the tenant a notice of extension at least eight weeks before the date on which the initial period was supposed to end, the notice must set out reasons for the landlord’s decision. A tenant may then request an internal review of the landlord’s decision, the request must be made within 14 days of the notice. The landlord

⁷⁶ s.13 and Sched 4

⁷⁷ s.14

⁷⁸ Chapters 5 & 8 and Sched 7.

⁷⁹ Sched 7, paras 4, 5, & 6.

⁸⁰ Sched 2, paras 3, 4, & 5.

may then confirm or reverse the decision and must notify the tenant of the outcome of the review and of its reasons. In both cases it is noted that Welsh Ministers may prescribe the procedures to be followed with respect to the internal review procedures. The notification of outcome must also inform the tenant of their right to seek a review in the county court. In both contexts (introductory and prohibited), after seeking an internal review the tenant can seek an onward legal review in the county court. The tenant has 14 days from the internal review notice to seek an onward county court legal review. The court may confirm or quash the decision to give the notice. Here again, the county court is required to apply the same principles applied by the High Court on an application for review.

12.12 Other instances where a local authority can enter a standard contract include accommodation for homeless persons provided under the Housing (Wales) Act 2014, service occupancy, student accommodation, and various forms of temporary accommodation. A local authority can also enter a ‘supported standard contract’ – an occupation contract for supported accommodation. In these cases, where the landlord gives the tenant notice that the contract will not be a secure contract, the tenant has a right to seek a county court legal review.⁸¹

12.13 Renting Homes Wales makes significant changes to the legal provisions around supported housing. Supported accommodation is defined under the Act as accommodation provided by a community landlord or registered charity; where the community landlord or charity provides support services to a person entitled to occupy the accommodation and there is a connection between the provision of accommodation and the provision of support services. Support services are wide-ranging; from support for those with learning disabilities, to those with drug addiction problems, mental health conditions, and prison leavers – a large spectrum of need. This also means that support provision has many different aims; from preventing homelessness, to providing greater independence or support in finding employment. Under the current law there are no particular protections for those occupying supported housing, whereas Renting Homes provides for a new form of supported standard contract.

12.14 The main administrative justice redress procedures here arise because a tenancy/licence in the context of supported accommodation will not be an occupation contract unless the landlord intends it to be one.⁸² The practical implications of this are that a person living in supported housing can still be a tenant/licensee with fewer protections for eviction the tenancy/licence can be terminated more quickly and the other protections under Renting Homes will not apply. The tenancy/licence will become an occupation contract after a relevant period (either six months from the start of the tenancy/licence or longer if it has been appropriately extended). The tenancy/licence can be extended on more than one occasion by periods of up to three months at a time. Here the landlord is required to serve notice on the tenant at least four weeks before the relevant period expires, the landlord must first consult with the tenant/licensee and gain consent from the local authority (if the landlord is not itself the local authority). The notice must set out the reasons for the extension and specify a new period. Here again the tenant has a right to apply to the county court for legal review of the local authority’s decision to extend, or its decision to consent to extension if the landlord is another body (a RSL).⁸³ There may be some issues caused by this process. First, the landlord serves notice on the tenant four weeks before the extension of the tenancy/licence (as opposed to conversion to an occupation contract) is supposed to take effect and the tenant then has 14 days to seek review in the county court. This means that the

⁸¹ Part 8.

⁸² Sched 2 Pt 5 (para 13).

⁸³ Sched 2 Pt 5 (paras 15 & 16).

county court will need to deal with the application within 14 days; there are questions around how realistic this turnaround will be, and how likely tenants are to use the right to review (will they be entitled to legal aid, what will be the specific 'new' county court procedure required to implement this). This general issue around an appropriate procedure could cut across all the areas which introduce a new county court legal review process. It would make sense for there to be one specific form of county court legal review procedure, presumably with its own practice direction, as many of the requirements are the same for all the instances of this procedure, with some exceptions that could be accommodated. Particularly in this context, where the decision challenged is the local authority's refusal to consent to continuing as a tenancy/licence, it could be particularly difficult for the tenant/licensee to challenge such a decision, and it may also not be clear who would be bringing and defending such a case. The landlord can extend the tenancy/licence based on the tenant/licensee's conduct, and this certainly includes anti-social behaviour, but it may not be clear whether extension could also be based on other examples of conduct such as rent arrears or failure to engage with the support provided.

- 12.15 There are two notable provisions of supported standard contracts. One is that the landlord can specify that the contract-holder's dwelling is to be a particular dwelling within a building specified by the contract.⁸⁴ In effect the landlord can require the contract-holder to move between parts of a building. The second is the landlord's right to temporarily exclude the contract-holder from the dwelling for a period of 48 hours.⁸⁵ This can be exercised if landlord reasonably believes that the contract-holder has; used violence against any person in the dwelling, done something in the dwelling which creates a risk of significant harm to any person, or behaved in the dwelling in a way which seriously impedes the ability of another resident of supported accommodation provided by the landlord to benefit from the support provided in connection with that accommodation. It is likely this latter aspect of impeding other residents benefiting from support that may attract some litigation over its precise meaning. The landlord must give the contract-holder notice setting out the reasons why he/she is required to leave (this can be done as soon as reasonably practicable after the contract-holder is required to leave). The power can be used in relation to a particular contract-holder no more than three times in a six-month period. The Welsh Ministers must issue guidance about the landlord's exercise of this power. Guidance requires landlords to put a specific policy in place, that exclusion must be the last resort, it also makes provisions around the form the relevant notice must take.⁸⁶ A relevant policy must specify the job/grade of the decision-maker, that they must be available out of hours, and that decisions should be properly recorded. The Guidance also requires there to be a 'lessons learned' review within 14 days of the exclusion to ensure it was appropriate and procedurally correct, to inform future practice and identify relevant improvements to policy. The excluded party must be invited to participate. This seems to be good practice from an administrative justice perspective particularly around learning, improvement and involvement. However, it seems an excluded person's only right to redress in the time frame would be an urgent application for judicial review, which it is hard to imagine a person being able to issue without legal advice especially at such short notice. Though we have heard examples in other contexts of out of hours judges in Wales granting urgent interim injunctions (in social care not in housing) our research participants were of the view that this is not an adequate route to redress. Here there seems to be no route for the contract holder to challenge the use of the temporary exclusion power. This point was put to Welsh Government in a consultation on relevant Guidance, but doesn't

⁸⁴ s.144.

⁸⁵ s.148.

⁸⁶ <https://beta.gov.wales/sites/default/files/consultations/2018-01/170206-guidance-relating-to-supported-accommodation-en.pdf>

seem to have been discussed in its response in that instance. A review process could potentially be provided for in the relevant Welsh Government Guidance, and our research participants also considered that the lack of a review process could potentially be a breach of Article 6 ECHR (right to a fair trial in determination of civil rights).

12.16 Under the Renting Homes Wales regime, if a landlord wishes to seek possession they must first give the contract-holder a possession notice stating the intention to possess, on what grounds, and the date after which the landlord is legally entitled to make a possession claim.⁸⁷ After the landlord gives notice it must then wait one month before making the possession claim and has six months in total from giving the notice in which to make the claim. Where the breach relates to anti-social behaviour or other prohibited conduct the landlord can make a possession claim from the day it gives notice to the contract-holder that it intends to do so. The county court has various powers and responsibilities in relation to possession claims. First the court cannot hear a claim if the landlord has failed to comply with a range of provisions around notice. The main basis for seeking possession is breach of contract (this can include breach of any fundamental, supplemental or additional term of the contract).⁸⁸ Where the ground alleged is breach of contract the court may not make an order for possession unless it considers it reasonable to do so.⁸⁹ There are approximately nine other circumstances in which a court can make a possession order mainly relating to the giving of notice by either party in relation to specific forms of contract. The court also has various powers to adjourn proceedings and postpone giving up of possession.

12.17 The previous absolute ground for possession for serious anti-social behaviour⁹⁰ will no longer apply. Instead, s.55 of Renting Homes introduces a fundamental term that the contract-holder must not engage or threaten to engage in conduct capable of causing a nuisance or annoyance to others living or engaged in lawful activity in the dwelling, or in the locality or to the landlord or any person acting in connection with the landlord's housing management functions. The contract-holder must also not threaten to use the dwelling or common parts for criminal purposes; or by act or omission allow, incite or encourage any person living at or visiting the dwelling to engage in anti-social behaviour or to use or threaten to use the dwelling for criminal purposes. It is possible that this definition of anti-social behaviour is narrower than under the existing law, a question is then whether the contract could include additional terms, e.g., to specifically make the contract-holder liable for anyone living with or visiting them, to cover criminality in the locality, or other specific behaviours within or even beyond the locality. The difficulty here is that it might be argued that this is seeking to modify a fundamental term, which is prohibited under Renting Homes.

12.18 In the context of possession proceedings, those who have introductory standard contracts and prohibited conduct standard contracts may seek an internal review of the landlord's notice of intention to seek possession.⁹¹ Such an internal review is not available when possession is sought in the case of those who have supported standard contracts. For those who have introductory prohibited conduct standard contracts the landlord can end the contract by giving the contract-holder notice that he or she must give up possession of the dwelling on a date specified in the notice. This is called a 'landlord's notice of possession'. A landlord can also seek possession if an introductory or prohibited conduct standard contract holder is in 'serious rent arrears'. In both these examples the contract-holder has a right to seek an internal

⁸⁷ ss.149 & 150, s.157.

⁸⁸ Chapter 9.

⁸⁹ reasonableness is covered by Schedule 10.

⁹⁰ Anti-social Behaviour, Crime and Policing Act 2014.

⁹¹ s.151, 173, 181 and ss.202 & 204.

review by the landlord (the contract-holder has 14 days to seek the review). If the landlord confirms its initial decision it must notify the contract-holder of its reasons. The Welsh Ministers may make regulations governing the internal review procedure.

12.19 A specific example of possession proceedings is where a secure tenant has given notice to end the contract but has failed to give up possession, the landlord may make a possession claim on that ground, and if the county court is satisfied that such is made out it must make an order for possession (subject to any defence based on the contract-holder's rights under the ECHR.⁹² The landlord must give the contract-holder notice that it intends to seek possession but can make the possession claim from the day that such notice is given. However, in such possession proceedings the contract-holder may also make an application for review by the county court of the landlord's decision to make the claim. The county court can confirm or quash the decision and must apply the principles normally applied by the High Court on judicial review. It can then set aside the notice and dismiss the possession proceedings and make any other order that the High Court could make when issuing a quashing order in a judicial review claim. In this particular species of possession proceedings, the right of the contract-holder to raise the ECHR as a defence codifies existing common law precedent which allows a tenant to raise ECHR rights as a defence to possession proceedings in general. However, the common law also allows broader defences based on general principles of administrative law (including reasonableness and procedural impropriety – it is possible for a decision to be proportionate but still unreasonable for example). It is likely that explicit reference to the 'Convention' here was intended to restate (beyond doubt perhaps) common law precedent, but reference only to the ECHR could arguably be said to exclude other common law administrative law defences as these are not also codified. However, this is not a particularly strong argument as excluding common law grounds of review would require an explicit 'ouster clause' to have any chance of being effective, but nevertheless our research respondents suggested this is a point a creative defendant landlord could try to raise.

12.20 There are other parts of the legislation which explicitly refer to ECHR rights. Although we focus here on secure contracts (as we are primarily interested in community landlords as public bodies), it is worth noting that in relation to Standard Contracts (modelled on the private sector) Renting Homes provides a possible defence to possession proceedings if there is 'any available defence based on the contract-holder's Convention rights'. The same is also provided where the ground of possession is notice under the landlord's break clause.⁹³ The 'availability' of such a defence may be unlikely, given that in *McDonald v McDonald*⁹⁴ the UK Supreme Court held that ECHR Article 8 cannot be used as a defence to possession proceedings against a private landlord. There may possibly be some further clarity needed as to whether RSLs (housing authorities) are always subject to the ECHR (as community landlords) or if they are only subject to the ECHR in relation to particular types of contract.

12.21 Another change made by Renting Homes Wales is the codification of 'reasonableness' in Schedule 10 of the Act. This introduces structured discretion by listing what the court must take into account when assessing the reasonableness of a possession notice e.g., effect on contract holder and landlord, effect on other tenants, nature, frequency and duration of breaches, degree of personal responsibility and general public interest in preventing anti-social behaviour. Schedule 10 also specifies, however, the fact that the contract-holder will become homeless as a consequence of granting possession is not to be considered by the court. Whilst

⁹² s.165 and s.212.

⁹³ s.199(2).

⁹⁴ [2016] UKSC 28.

the objective is to improve clarity and consistency of decision-making, the counter-argument to such ‘codification’ is that it has the potential to lead to litigation over the specific technicalities of wording which may not in itself produce any particular benefits in terms of improving decision-making by community landlords. The same may be true of provisions specifically codifying defences to possession proceedings under the ECHR.

12.22 Renting Homes Wales can be seen as attempting to improve administrative justice, in particular by seeking to simplify the law and consolidate it largely into one statute, this has the potential to reduce the incidence of disputes. There are many issues tackled by Renting Homes Wales that we do not address here (including more around anti-social behaviour, retaliatory evictions, fitness for human habitation and joint contracts). It is an ambitious Act making significant changes to the substantive law. From discussions and evidence presented during the passage of the Act, it seems that a substantial change to the administrative justice redress regime was not thought to be appropriate alongside such significant reforms of substantive law. However, this may have been a missed opportunity. There was some discussion of the respective roles of the county courts and the Residential Property Tribunal for Wales (RPTW) during the passage of the Act, but there seemed to be little evidenced-based discussion of the current efficacy, and extent of use of internal review, which is provided for throughout the Act.

12.23 Internal administrative reviews within local authorities or RSLs are clearly relied on as a first line of redress. However, whilst there has been research into internal review processes and decisions in relating to homelessness decision-making and there has been no Welsh research that we are aware of looking at internal reviews outside the homelessness context (e.g., in allocations and the landlord and tenant relationship).

12.24 There is an opportunity to ensure that the internal review regime under Renting Homes Wales is simpler than the current law where the regulation of internal review decision-making is split over a raft of secondary legislation and guidance (some enacted at Westminster and some in Cardiff Bay, some binding and some advisory). Welsh Ministers could issue a single regulation on internal reviews under Renting Homes Wales, that could have a suite of general provisions that are presumed to apply in all circumstances of internal reviews, with specific exceptions where necessary in the particular context. Welsh Ministers could also consider bringing forward a consolidating regulation covering internal reviews in a range of social housing and homelessness contexts in Wales (both under relevant Housing Act provisions, the Housing (Wales) Act 2014 and Renting Homes Wales), as a precursor to the potential consolidation and codification of Welsh housing law. The implementation of Renting Homes Wales has already been delayed due to the need to liaise with the Ministry of Justice/HMCTS to develop new court-based redress procedures, and associated procedural rules, court forms and processes.

Recommendation 15: A proposed Housing Code for Wales should include a consolidated and codified approach to administrative review of housing decisions including allocations, giving Notice of Seeking Possession, homelessness and the wide range of administrative reviews provided for under Renting Homes. This could avoid the duplication of general requirements, ensure greater consistency and transparency, whilst also being able to provide for subject-matter specific exceptions where necessary (e.g., where different time limits for seeking the review are appropriate).

Recommendation 16: Consolidation/codification should be preceded by a more detailed, evidence-based assessment of the use and value of internal review procedures

in the Welsh social housing sector, including under Renting Homes once it comes into force. In particular, such a review should address whether some reviews currently conducted by local authorities ought to be externalised to an independent body.

Recommendation 17: The lack of a statutory routes to redress in some areas of social housing decision-making is confusing, not especially well justified, and leads to people falling short of the statutory bar to the PSOW handling a complaint. Amendments to current law or a new proposed Housing Code for Wales should fill the gaps in the current system where some administrative decision-making can only be challenged by judicial review in the Administrative Court, and reforms should either provide for court-based, or alternative (e.g., tribunal-based), redress that is coherent and consistent.

12.25 Renting Homes Wales mirrors much of the existing law; however, it is, as our research participants noted, more ‘court heavy’, introducing new rights for tenants to seek a legal review in the county courts of some community landlord decisions. These are in situations where tenants would previously have only been able to seek judicial review in the Administrative Court, or new situations relating to provision of information about contracts and contract disputes. County courts have already been regularly tasked to apply public administrative law principles, including the principle of proportionality in human rights related claims. This usually happens in possession proceedings (in effect as a ‘defence’ to possession proceedings), or where an applicant is challenging the lawfulness of a local authority’s decision in the context of homelessness (again often on human rights grounds).⁹⁵ The provisions under Renting Homes Wales are however, unique in that they introduce a new statutory route to review in the county court. This is likely to be a cheaper, more proportionate and less complex process for the parties than Administrative Court judicial review. However, it may raise some concerns; first around the general appropriateness of the county court conducting such reviews, and second concerning the less systematic reporting of county court judgments (which do not set legal precedents).

12.26 As we have discussed above, legal appeals under other Welsh housing law (specifically the Housing (Wales) Act 2014 - homelessness appeals that may apply public law principles) are quite rare. This suggests that judges may not have much experience of applying public law principles in county courts in Wales in the particular context of homelessness. On the other hand, possession proceedings are much more common (for example there were 3,780 county court claims for possession by social landlords in Wales in 2017), but we do not have any data on how often public administrative law ‘defences’ are raised in possession proceedings in Wales. We heard anecdotally from practitioners that the use of public administrative law defences (and particularly those relating to human rights and equality) might be increasing and that some types of possession hearing can become more complex as a result, but it seems likely that the only way to verify this would be through more specific observational research. It was also noted that the issues facing tenants (for example mental health issues and a range of complex needs) also complicate possession proceedings. Recent research looked at processes leading to social housing evictions and support provided by social landlords to prevent evictions, this did look at awareness and use of court pre-action protocols, but did not consider human rights issues or the prevalence of other public law issues (defences) in relation to the evictions process.⁹⁶

⁹⁵ *Manchester City Council v Pinnock* [2010] UKSC 45.

⁹⁶ <https://gov.wales/sites/default/files/statistics-and-research/2019-07/understanding-social-housing-evictions-in-wales.pdf>

12.27 Local authority and housing association possession proceedings are considered to engage Article 8 of the ECHR (right to family life) and, as such, relevant decisions must be justified on the basis of proportionality. Landlords who are public bodies are also subject to general principles of England and Wales administrative law (legality, procedural propriety and reasonableness/rationality). Practical difficulties (affecting access to justice) have arisen in the past because of a principle of ‘procedural exclusivity’ requiring such matters of administrative law (and human rights) to be raised via judicial review in the High Court, rather than in the county courts where the immediate housing action (usually possession proceedings) is taking place. Where a local authority makes decisions in the context of homelessness, the county courts were granted specific powers to apply judicial review principles (currently contained in the Housing (Wales) Act 2014). Renting Homes Wales expands this by giving the county courts a specific power to conduct a legal review of community landlord decisions in particular cases.

12.28 The Law Commission has previously endorsed the idea that county courts are well equipped to handle public law disputes in the housing context noting: ‘In our view, the county court is the better forum for decisions on housing matters, whether grounded in public law principles or in occupation agreements’.⁹⁷ Renting Homes Wales goes further by introducing county court reviews in a number of other contexts, in particular where community landlords make decisions around the type of occupation contract (introductory and prohibited conduct) including extending the period a contract-holder is to occupy on a less secure form of contract. The new caseload is unlikely to be significant, but will its basis in statute (as opposed to the inherent common law jurisdiction of the Administrative Court) at least make it more visible/accessible and therefore more likely to be used?

12.29 During our research we observed a day of possession proceedings in Caernarfon county court. It was noted, in our observation and by many research participants, that housing associations and local authorities can, and generally do, assist the court by being clear in their requests and using standard forms where appropriate. The judge also noted that it is unusual to make an outright order for possession. Shelter Cymru have advisers present at the court when possession claims are listed, and were helping in some of the cases observed. In general, it was noted that defendant tenants often don’t come to court. Some of the reasons for this are the difficulties of accessing the court, especially by public transport, but it can also be caused by general disengagement with the issues (even where the landlord and Shelter Cymru have repeatedly sought to engage).

12.30 Of the cases observed in Caernarfon, only one of the five social housing tenant defendant attended the proceedings. There were also two cases of mortgage companies seeking possession and here defendant tenants were present (one with a private solicitor). The other defendant tenant had received no advice or assistance prior to entering the hearing and the judge adjourned the proceedings so that Shelter Cymru could provide help, this led to a postponement of the possession allowing the tenant longer to try and sell the property. It was noted in this case that the defendant’s witness statement was clear and articulate, but the defendant was also suffering from anxiety and depression as well as a range of physical conditions. It is here we see that court proceedings can be difficult to navigate even for retired professionals, and the mortgage company possession cases were notably more adversarial. Most of the local authority and housing association tenants were in rent arrears due to delayed

⁹⁷ Law Commission, *Renting Homes* (Law Com No.284, November 2003) paras.9.107-9.108.

receipt of benefits, or changes to benefits, and these cases were adjourned on terms that the defendant pay the sums due plus arrears.

- 12.31 One case observed was more complex. The defendant had been granted an unsecure tenancy by a local authority through the homelessness route under s.68 of the Housing (Wales) Act 2014. The tenant had severe physical disabilities and mental health problems, though at various stages had been deemed to have capacity. The defendant refused to engage with multi-agency services in the context of both physical and mental health, and was determined to try and take their own life. The defendant set fire to the property on two occasions, telling the fire service on the first occasion of the intention to take their own life by starting the fire. The defendant started a second fire, rendering the property uninhabitable.
- 12.32 The local authority was awarded a civil injunction to prevent the defendant from returning to the property (now boarded up). Residents had made complaints about anti-social behaviour causing them alarm and distress. The defendant had protected characteristics under the Equality Act 2010, but the judge considered that in the circumstances the injunction was a proportionate means of achieving a legitimate aim.
- 12.33 The local authority served notice to quit the tenancy on the basis of breach of the tenancy (in particular anti-social behaviour). The defendant was then staying in a hotel paying for this accommodation from their own resources. The claimants directed the defendant to a private law firm and to Shelter Cymru, neither were initially able to help. The local authority considered its homelessness duty discharged as the defendant had purposefully ignited the property. It seems that the defendant had more recently had some support from The Wallich (Tenancy Support Service).
- 12.34 Shelter Cymru had only recently gained legal conduct of the case and had not had time to prepare a detailed defence. The Shelter Cymru help at court representative passed a letter from the Shelter Cymru Legal Team to the Judge. This stated that the original unsecure tenancy agreement referred to its having been made under the Housing Act 1996, which was a mistake of law as the tenancy would have to have been made under the Housing (Wales) Act 2014 (the 1996 Act was no longer in force in relation to Wales when the unsecure tenancy agreement concluded). Shelter Cymru argued that this would be a defence to the possession proceedings. The claimant council responded that although (regrettably) the wrong legal provision was referred to, the particular sections of the 1996 and 2014 Acts in this case have exactly the same practical effect (and cited case law precedent that when the wrong section has been referred to as long as both are of the same effect in practice this is to be taken into account by the judge). However, in this particular case as Shelter Cymru had only recently gained conduct, they also wished to raise potential further submissions in defence based on the Equality Act 2010 and Human Rights Act 1998.
- 12.35 The judge was also concerned of the need for more information about mental capacity of the defendant and more evidence on these issues around health. This being a more complex case it needed to be fully pleaded, and the judge ordered that Shelter Cymru have 14 days to put in a fully pleaded defence, with the council having 14 days from receiving that to put in a further response and a date set to list for an allocation and directions hearing as soon as possible after receipt of the council's response. Cases like this demonstrate the stark reality of the administrative justice system. Still our experience was the same as that of those engaging with the JUSTICE Working party in its *Solving Housing Disputes*, Report, specifically that: 'Judges intervene as far as they are able; they manage possession lists by encouraging parties

to pursue negotiated solutions, such as rent repayment agreements or suspended possession orders subject to certain obligations on a tenant'.⁹⁸

13. A Single Housing Jurisdiction?

13.1 In our report *Public Administration and Justice in Wales*, we discuss the idea of 'pathways' to administrative justice, which could include a 'single' or 'fused' administrative law jurisdiction. 'Pathway' may be the better word here as 'jurisdiction' has connotations of formality in the division of powers and functions, whereas the aim is for something more flexible. For example, early pilot schemes have been aimed at coordinating the jurisdictions of courts and tribunals in particular subject areas of expertise, drawing together claims arising from the same dispute, which fall under more than one jurisdiction. These can then be dealt with by a single judge, in a single hearing, sitting simultaneously as a court and tribunal judge. As the UK Ministry of Housing, Communities and Local Government (MHCLG) put it:

In some instances, claimants need to have hearings in both the county court and the [Residential Property] Tribunal to resolve a dispute. A pilot project is currently being conducted to ensure that simultaneous determinations by one single judge are made, for all jurisdictions, either by the court or the Tribunal.⁹⁹

13.2 The JUSTICE Working Party explains that:

Since the end of 2016, certain property disputes that traverse both the County Court and the FTT (PC) have been subject to the Residential Property Deployment of Judges Pilot. By this process, in some cases proceedings commenced in the County Court are transferred to the FTT (PC) or alternatively, a judicial case management decision is made to deploy a judge, who is both an FTT judge and County Court judge, to hold a hearing in which all aspects of a single dispute (which traverses jurisdictional lines) are solved....We understand that some 500 disputes have been dealt with using this method, and our Working Party supports its expansion. Flexible deployment of the judiciary to hear disputes in one forum promotes access to justice by reducing the confusion where claims cross jurisdictional lines, by promoting collegiality, knowledge and up-skilling across the bench, and by taking advantage of judges' specialised skills without unnecessary legislative process of conferring concurrent jurisdiction. We see great potential in using the property and housing experience of specialist FTT (PC) and District Judges across all housing disputes, irrespective of the jurisdiction in which the dispute falls.¹⁰⁰

13.3 This 'cross-ticketing' model is also supported by the HLPAs members of the Working Party who rejected many of the majority's broader recommendations. In our research it was noted that the phrase 'the Administrative Court' in the context of housing can be understood to include both the administrative law jurisdiction of the county court (already developed under the Housing Act 1996 and Housing (Wales) Act 2014) and the Administrative Court formally so-titled within the Queen's Bench Division of the High Court. In this regard, Renting Homes Wales can then be seen as innovative in terms of making it easier for people to access an administrative law jurisdiction (by reducing the number of instances where a person would have to seek judicial review in the Administrative Court). More broadly, researchers examining

⁹⁸ *Solving Housing Disputes*, para 2.6.

⁹⁹ 'Considering the case for a housing court', para 31.

¹⁰⁰ *Solving Housing Disputes*, paras 4.3 – 4.4.

the *Value and Effects of Judicial Review* have concluded that some types of judicial review claim ‘could be more proportionately dealt with by courts and tribunals other than by way of JR in the Administrative Court...Such developments may be applauded if they allow cheaper, quicker and more local methods of resolving legal disputes’.¹⁰¹ The introduction of the Housing Act 1996 county court appeal route led to a 300% reduction in the number of housing judicial reviews issued in the High Court. However, for Wales, our research shows that for most of the equivalent/similar issues under the current law, for which Renting Homes Wales provides a new county court legal review, people very rarely seek an internal review from the first instance decision-maker, and there have only been three judicial reviews issued in nine years. Despite how rarely these procedures are currently used (and therefore how rarely we can expect their replacements to be used) respondents to our research were clear that one of the reasons for the delayed implementation of Renting Homes Wales has been the difficulty of liaising with the UK Ministry of Justice and HMCTS in order to develop the necessary procedural rules to implement new county court functions. Our findings suggest perhaps that the high degree of time and resource, both Welsh and broader UK, given to developing new formal and court-based redress may not be justified by the amount of use that we can predict will eventually be made of these procedures.

13.3 Our research respondents have also noted that the tiny number of county court decisions (and limited reporting of these) makes it difficult to establish a corpus of Welsh case law clarifying aspects of legal interpretation and application; limited academic and practitioner commentary is also a problem. It seems to be that the few judicial references to Welsh housing law come as things said by the way (*obiter dicta*) in cases turning on English law.

13.4 The UK MHCLG is also currently ‘considering whether there is merit in bringing all housing issues under a single, specialist Housing Court’. This would go further than existing initiatives to ‘cross ticket’ judges. The proposed housing court would combine the housing dispute resolution jurisdictions of the county courts (in England and Wales) and the First-tier Tribunal Property Chamber (in England), but not (it would appear) the jurisdiction of the RPTW. Devolution of responsibility for the administration of particular tribunals is not necessarily permanent, though politically very hard to reverse. It would not be impossible for the RPTW to be absorbed into an England and Wales housing court, and such ‘reverse devolution’ was proposed by the Law Commission in a 2007 consultation on proportionate dispute resolution in housing.¹⁰² It is extremely unlikely this would take place now given the political context and increasing divergence between English and Welsh housing law. Before discussing this matter in more detail, we outline the current jurisdictions of the RPTW and county courts in Wales.

Table Four: Comparison of Courts and Tribunals in Property Disputes

County Courts	RPTW	First-tier Tribunal Property Chamber
Possession claims (by private and social landlords, residential mortgage lenders, lessors seeking forfeiture from flat owners) and claims for possession against squatters	Leasehold Disputes, right to manage, administration charges, forfeiture, insurance, variation of leases, appointing a manager, estate charges, leasehold service charges	Land registration

¹⁰¹ V Bondy, L Platt and M Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, Their Outcomes and Consequences* (PLP, London School of Economics, University of Essex 2016) 26.

¹⁰² *Housing Proportionate Dispute Resolution* (n.5).

Claims for other remedies including; landlords/lessor for unpaid rent and/or service charges	Leasehold Enfranchisement, lease renewal, missing landlord, acquisition of freehold, ground rent and terms, reasonable costs	
Tenants claims for damages for disrepair and injunctions	Tenants associations, application for recognition	
Tenants claims in respect of tenancy deposits	Management Orders, empty dwelling, interim and final management orders, local authority management orders, housing health and safety rating systems	
Tenants claims for damages for unlawful evictions and injunctions	Licensing Houses in Multiple Occupation, Rent Smart Wales, Refusal to Grant licence, improvement notice, refuse improvement notice	
Homelessness appeals	Assessment of market rent and assessment of fair rent	
Boundary disputes and rights of way	Mobile Homes	
Landlords and agents		
Succession to tenancies		
Breach of tenancy/lease terms		
Local authority and housing association actions on housing-related anti-social behaviour		
Trusts and some other ownership disputes		

13.4 The passage of Renting Homes provided an opportunity to divert more claims to the jurisdiction of the RPTW. In evidence to the Assembly Equality, Local Government and Communities (ELGC) Committee inquiry into the general principles of the Renting Homes Bill (2015), some of the following responses were received:

- Shelter Cymru: ‘The county court is not always the most effective route for resolving disputes. As well as the escalating court costs themselves, we also find that a lack of expertise in housing law among District Judges can sometimes result in delays and poor decision-making that ultimately prejudice both parties. Many other countries have specialist housing tribunals...We suggest that the most cost-effective solution for Wales may be to expand the role of the Residential Property Tribunal, which is currently quite under-used. Creating a specialist tribunal for Wales would considerably increase landlords’ and tenants’ confidence that they can resolve disputes quickly and fairly when they need to...’

- Cymorth Cymru: ‘Many vulnerable individuals would find a county court intimidating and potentially exclusionary. A mediation service and other bodies as first steps would be more inclusive, and could still be passed up to the county court if necessary for appeal’.
- Guild of Residential Landlords: ‘...the court is not best placed to deal with possession proceedings and housing related disputes. It’s a very specialist area and unfortunately we see a large percentage of cases failing not because of some defence by a tenant but because of intervention by the court not understanding the rules...We fully support the idea that the Residential Property Tribunal Wales would be more suited to ordering possession and dealing with disputes’.

13.5 The RPTW itself noted specific examples of cases where it might be the more appropriate jurisdiction for determining disputes, these were:

- Review of a Notice by a Community Landlord that a contract is not a secure contract
- Failure to supply/incorrect written statements
- Succession disputes
- Applications for consent
- Determination of whether a property is fit for human habitation with particular reference to health and safety rating systems.

13.6 The most detailed concerns around extending the jurisdiction of the RPTW were expressed by the Residential Landlords Association (RLA) in a response to further information requested by the Equality, Communities and Local Government Committee (the Committee). The RLA supported the transfer of defended disrepair cases to the RPTW, but considered that the majority of cases should remain in the county courts with HMCTS already having ‘the necessary infrastructure’ in place. The RLA acknowledged concerns over whether District Judges have the necessary housing law expertise given their increasing and varied workload, and proposed that greater specialism within the courts would be a way forward. Their reservations around cases being determined by the RPTW related to:

- The RPTW is not assimilated into a courts and tribunals service and lacks infrastructure and resources as a result (e.g. designated hearing venues) – specifically noting that RPTW members sit part-time and that, ‘with the current climate affecting public expenditure, it is unrealistic to think that this [expanding the jurisdiction of the RPTW esp. to include possession claims] is a priority to which resources could be devoted.’
- The RPTW does not have the necessary resources, structures or experience to deal with a high volume of cases (e.g., the large volume of often un-defended possession claims processed by the county courts)
- RPTW jurisdiction has already been expanded by the Housing (Wales) Act 2014 (so adding further work would risk overwhelming it)
- There is already a ‘tracking’ process in the county courts which could be used to refer disputed defences over disrepair to the RPTW (there is precedent for this in cases raising service charges which are referred from the courts to the RPTW for determination).
- The RPTW has expertise in relation to the condition of properties, but not in relation to harassment, anti-social behaviour, or breach of contract terms. RLA state that when these latter types of claim are defended they often turn on issues of fact, which may be more suited to a court experienced in providing for cross-examination (in effect more adversarial procedures).
- The RPTW has no costs jurisdiction (which could encourage litigation due to the lack of sanction for wrongly pursuing a case)

13.7 The notion of existing practices to ensure relevant expertise was raised elsewhere in our research. For example, noting that the county courts in Wales can already identify cases that might be more appropriate for judges with particular types of expertise and experience. In North Wales at least all Housing (Wales) Act 2014 cases tend to be directed to a particular judge with public law expertise, who might take an initial look at the case and potentially release it back to the 'local' judge, communicating about whether each judge feels competence to determine particular types of disputes especially when complex cases arise. A broader question for administrative justice, however, is the extent to which more informal arrangements like this can be relied upon, or whether there is a need for more systemic change, such as expanding the RPTW jurisdiction, or providing perhaps for explicit protocols or memorandums of understanding between the county courts and Administrative Court in Wales, and the RPTW.

13.8 In oral evidence, the Assembly ELGC Committee further pursued why Renting Homes Wales does not confer any powers on the RPTW, and in fact removes some functions from it. Issues raised in oral evidence included:

13.9 *Awareness and Use:* The President of the RPTW (at the time Andrew Morris) was asked why there is limited awareness of the tribunal. A summary of his response is that:¹⁰³

- RPTW jurisdiction is quite niche
- Some social landlords have written their tenancy agreements specifically to exclude RPTW jurisdiction
- Social tenants have learnt that the RPTW can only set a market rent, which is said to be, generally speaking, above the rents which are benchmarked by Welsh Government
- Private sector tenants are wary of challenging rents due to risk of eviction, or tenancy not being renewed
- There is limited education about dispute resolution and the role of RPTW (both among tenants and landlords)
- Limited publicity – the tribunal has only had a website since 2013

However, the RPTW is given new roles under the Mobile Homes (Wales) Act 2013 and Housing (Wales) Act 2014 which may increase awareness and use.

13.10 *Resources/Capacity:* Respondents noted that a significant reason for not conferring additional powers to resolve disputes on the RPTW is the current capacity of the tribunal,¹⁰⁴ specifically its financial resources. At present the RPTW caseload is approx. 150 claims per-annum, whereas housing claims in the county courts in Wales are in the order of 4,500-6,000. In general, respondents did not seem to think that Renting Homes Wales would lead to additional litigation in the county court, but some stressed the pressures already on the county courts particularly in terms of the number of possession proceedings.¹⁰⁵ The President of the RPTW noted in oral evidence that as it stands the tribunal could not determine possession claims (due to resources), but also that such would require 'a huge change of mindset from

¹⁰³ National Assembly Equality, Communities and Local Government Committee, evidence session 30 April paras [305]-[306].

¹⁰⁴ Those making this point included: Lesley Griffiths AM (22 April 2015) paras 338-342, Simon White (Welsh Government) (22 April 2015) para 343-345.

¹⁰⁵ Ms Plant, Chair of Housing Law Committee, Law Society, 30 April para 165.

the kind of work that we do'.¹⁰⁶ That said he did not disagree that it could be done in phased development and built up over a period of time. The amount of resources required (e.g., in terms of providing for new members to be appointed) would depend on which types of cases were to be transferred and in what timescale.

13.11 *Phased Development*: Though this point relates to the matter of capacity/resources, it also raises a further general issue that Renting Homes Wales makes major changes to the substantive law and practice around renting in Wales, it was argued that to also make significant changes to dispute resolution processes at the same time would not be advisable. The argument being that the legislation should be given more time to 'bed in' before re-considering possible changes to dispute resolution processes and the role of the RPTW. A similar point is that for the RPTW to take over possession claims would require a change of approach ('mind set') and it would take time to develop necessary expertise and experience.

13.12 *Expertise, Procedure, Access to Advice and Representation*: It was noted that in general the RPTW is accessible to tenants without specialist legal support, whereas this is not the case in the county courts, seemingly for two reasons: 1. The nature of court proceedings generally and 2. The type of disputes being determined in each jurisdiction and relevant expertise. It was argued that in private sector disrepair disputes expert evidence is often involved, respondents then expressed concern at how this would be adduced in tribunal proceedings, how it would be interpreted and put forward by the contract-holder and how it would be defended by the landlord (in the absence of legal advisers/advocates).¹⁰⁷ For example, in disrepair claims in the county courts it was said that there is often reliance on surveyors' reports. Concerns were raised as to whether these would be interpreted correctly in the tribunal. These concerns were two-fold, one in terms of how they would be understood and adduced by claimants who do not have representation (due to not having legal aid), but two, whether the tribunal panel would itself have the appropriate expertise (and background knowledge in housing law) to properly determine the issues before it.¹⁰⁸ The President of the RPTW, however, noted that the tribunal would be well capable of having a role in resolving disputes around fitness for human habitation and issues involving particular categories of hazards. He noted that members have a lot of experience of inspecting properties and considering the state of repair they are in, and a lot of experience in relation to improvements, and taking that into account when setting rents. Other issues under Renting Homes Wales that the tribunal has appropriate expertise to deal with were said to be disputed succession rights, and failure to supply a contract.¹⁰⁹ This evidence seems to refute the view that the RPTW does not have the expertise to deal with issues around disrepair (which was argued by others). In its written evidence the RLA was of the view that the RPTW is well placed to deal with expert evidence about disrepair as it has surveyor members who are may be better placed to weigh up expert evidence than District Judges in the county courts. Some respondents suggested that their experience of county court claims had been of highly adversarial procedures (especially in anti-social behaviour cases) and were concerned about whether a tribunal is the appropriate venue for more 'heated' disputes.¹¹⁰ The RLA also made this point (in the context of anti-social behaviour and defended possession claims) in its written evidence. In our research we observed a day of proceedings in possession claims at Caernarfon county court. These were not especially adversarial and were to some extent like social work (in the view of the judge and lawyers for some of the parties). We could see the case here for so-called 'problem solving

¹⁰⁶ Andrew Morris, President of RPTW, 30 April para 309.

¹⁰⁷ Miss Price, Member of Housing Law Committee, Law Society, 30 April para 173.

¹⁰⁸ Miss Price, Member of Housing Law Committee, Law Society 30 April para 178.

¹⁰⁹ Andrew Morris, President RPTW, 30 April paras 309-311.

¹¹⁰ Miss Plant, Chair of Housing Law Committee, Law Society, 30 April para 174.

courts' seeking to address the issues leading to unlawful behaviour in a multi-disciplinary and rehabilitative way (drawing in mental and physical health, debt advice and so on). In relation to Renting Homes, Assembly ELGC Committee member Peter Black AM suggested that the tribunal could have a role in a sense as acting as a 'tenant's champion' in terms of being more accessible than the courts.¹¹¹ The RPTW President was concerned about this in a sense, noting that the tribunal is impartial, whilst also recognising that its service is more informal, can be less costly, with disputes more easily resolved given the tribunals specific experience of particular issues.¹¹² The RPTW President also noted that the tribunal has considerable experience of unrepresented applicants. He noted that, 'our tribunal chairmen and members are very good at teasing out what the issues are...making sure that both sides of the argument are heard and the issues are aired. Sometimes we get knocked down for doing that. The upper tribunal has been quite critical of tribunals taking issues that the parties have not taken, particularly technical issues. We feel that it is our obligation as an expert tribunal to get to the crux of the matter'. This may raise a further point about oversight from the England and Wales Upper Tribunal, potentially preventing the RPTW from going as far as it might wish to in adopting more inquisitorial procedures. The President of the RPTW also noted that the tribunal 'is not unused to dealing with simpler issues' where the parties do not attend. This may suggest that the main reason the tribunal would not be able to deal with a high volume of un-defended possession claims is a matter of the number of tribunal members rather than other issues such as expertise or procedures. At the time of the evidence session the RPTW President said that the tribunal itself does not offer Alternative Dispute Resolution (ADR). However, he said it would be an excellent idea to do so, particularly as with many disputes before the tribunal (e.g., in relation to service charges) a lot of the issues arise because of lack of transparency – putting all cards face up through mediation might lead to earlier resolution.¹¹³ The representative from the Housing Law Practitioners Association (HLPAs) noted the value of mediation and that HLPAs had initially proposed a compulsory mediation term that could be included in housing contracts issued under Renting Homes Wales (but noted this had not been taken forward in the draft Bill). Again, this seems to show a lack of willingness to innovate in terms of routes to resolution in administrative justice.

13.13 *Inter-play between types of case, appeals and reviews:* A specific example given by a number of respondents was where landlords may seek possession as a means to avoid the claimant bringing an action for disrepair. It was noted that there would be some jurisdictional complexity if disrepair claims were transferred to the RPTW with possession claims remaining in the county court. E.g., defences can be raised to possession proceedings on the basis of disrepair.¹¹⁴ However, these kinds of concerns could be addressed by adopting the processes being trialled in England where a single judge (or panel of judges as necessary) can sit as judges of the county court and relevant residential property tribunal. As we understand it there is nothing preventing an individual from holding an appointment as a county court judge and a judge of the RPTW. However, there might be further issues raised in terms of onwards appeals. As it stands appeals from the RPTW go to the England and Wales Upper Tribunal (Lands Chamber). It was stated in evidence that the Lands Chamber already has a back-log of cases and would not be set up to deal with additional appeals from Wales. But also further to this, decisions made by the Upper Tribunal are not binding on the county court as there is no legal hierarchy between them, so in cases where there is significant inter-play between aspects of county court jurisdiction and aspects of actual (or proposed future) jurisdiction of the

¹¹¹ Andrew Morris, President RPTW, 30 April para 312.

¹¹² Andrew Morris, President RPTW, 30 April para 313.

¹¹³ Andrew Morris, President RPTW, 30 April para 326 [*this was in 2015 it may be that the RPTW does not offer mediation or other forms of ADR*].

¹¹⁴ Miss Price 30 April para 180.

RPTW, any appeal decisions taken by the Upper Tribunal would not be binding on the county courts (it was said by a representative of the HLPAs that this could lead to ‘legal chaos’).¹¹⁵

13.14 *Legal Aid*: A number of discussions focused on the fact that there is no legal aid available for RPTW proceedings whereas some housing and related cases in county courts are covered by legal aid. Disrepair cases are not covered by legal aid, and so this may reinforce the view that these could be transferred to the RPTW without too much difficulty. However, in possession proceedings legal aid is available, and questions were raised as to whether then a transfer of these proceedings to the RPTW in the longer-term would also require legal aid to be made available in these claims before the RPTW (but that as a reserved matter this is not a decision for Welsh Government/Assembly). The representative from HLPAs put this quite starkly: ‘The downside of the residential property tribunal is, one, there will never be legal aid for it. Just conceptually, there isn’t legal aid for tribunals. It’s just the divide that we strike as a matter of legal policy in this country. But, two, the reality is landlords are represented...I can count on the fingers of a deformed hand the number of times that tenants are represented as well’.¹¹⁶ It was also argued that this could lead to ‘de-skilling’ of housing law, as the primary determination of legal rights would take place in a forum that is effectively one-sided in terms of presentation of the law, and lacks the adversarial approach of a judge deciding based on quality legal arguments from both sides. There also seems to be a concern among independent advice providers that the simplification of the law promised by Renting Homes may be used as a justification for limiting their future funding, on the basis that simplified law leads to fewer disputes and therefore less need for advice and advocacy services. We cannot say at this stage whether Renting Homes Wales will reduce the number of disputes, but from an administrative justice perspective, since it re-enacts existing dispute resolution mechanisms (internal review and county court appeals) and brings in new procedures (county court legal reviews), suggesting that the need for advice and advocacy in this context may be just as much, or greater, than current need particularly in the earlier years of implementation.

13.15 *Assembly Committee Recommendation and Response*: It is worth stating the Assembly ELGC Committee’s recommendation following written and oral evidence, and the response of the Welsh Government Minister for Housing and Local Government:

It is our view that the Bill places too much reliance on the courts to resolve disputes. We believe that going to court should not be the only option for contract-holders or landlords wishing to enforce their rights, particularly given the limitations on legal aid and the intimidating nature of court proceedings.

There is already a body operating in Wales, whose role includes resolving disputes over rent, licensing and the condition of property. As such, it seems counter-intuitive to remove a number of its core functions, particularly when it is able, and willing, to provide a service that would be more accessible and expedient, and less costly than court proceedings. That body has been conferred new powers and obligations under the terms of the Housing (Wales) Act 2014 and will presumably require training and expansion to deal with those obligations. We do not see that a further modest increase from this Bill will add unduly to that burden.

We recommend that the Minister amends the Bill to make provision for adjudication over disputes in relation to rent increases, fitness for human

¹¹⁵ Justin Bates, Housing Law Practitioners Association (HLPAs) 20 May paras 137-138.

¹¹⁶ Justin Bates, Housing Law Practitioners Association (HLPAs) 20 May para 136.

habitation issues, succession rights, failure to supply a contract and alternative dispute resolution/mediation services. We believe the most effective way of doing this would be to expand the current role of the RPT Wales.

We recognise that there will be cost implications associated with this recommendation and that the Minister will need to undertake further cost analysis in this area.

The Minister responded:

Whilst such an amendment may initially have some attraction, the Residential Property Tribunal for Wales does not have the necessary capacity to deal with such disputes. Building in such capacity would be costly and would need to be fully considered and consulted upon.

13.16 This issue has been taken up by the Justice Commission, in a number of its recommendations and broader commentary. The Commission notes that: ‘There has been a tendency in the legislation passed by the Assembly for it to specify that dispute resolution should take place in the County Court or in the non-devolved courts and tribunals. We regard this as anomalous when specialist Welsh tribunals exist that have the competence and capability to determine disputes’.¹¹⁷ In consequence it recommended that: ‘The Welsh tribunals should be used for dispute resolution relating to future Welsh legislation’. The above discussion of Renting Homes Wales brings into sharp focus many of the issues that might be raised by seeking to implement this recommendation. The Commission also noted that: ‘Although housing law is fully devolved to Wales, neither the Welsh Government nor the Assembly has, to date, considered trying to consolidate the jurisdiction for housing disputes into one court or tribunal’.¹¹⁸

13.17 In addition to examining the background to Renting Homes Wales, we also asked our survey respondents for their views on a single housing court or tribunal for Wales. Some responses related to the practical location of any proposed court/tribunal, for example were it only to sit in one place, or perhaps in major cities, this would cause serious problems for accessibility, whereas the RPTW is more flexible in where it sits. Other respondents noted that some problems of accessibility could be addressed by the court/tribunal having digital options (from digital issue of proceedings and case management up to online hearings, or even the kind of ‘continuous online resolution’ being trialled in some England and Wales tribunals.

13.18 The Justice Commission has argued that:

The processes of the court and tribunal system are not easy to understand without advice. Many courts and tribunals have come about in part as a matter of history and in part out of a desire to provide simpler and cheaper means of dispute resolution...The system has never been rationalized, it is unduly complex and it should be better aligned with legal aid...Our analysis is that the current structure for resolving disputes demonstrates that there is a need to unify courts and tribunals, both for civil justice and administrative justice.¹¹⁹

¹¹⁷ Justice Commission, para 6.59.2.

¹¹⁸ Justice Commission, para 5.35.

¹¹⁹ Justice Commission, para 5.56.

13.19 However, our respondents had some misgivings about such unification, proposing that where this has occurred in England and Wales (at least at an administrative level), tribunals had been stripped of the financial resources necessary to rent convenient local hearing spaces (hotels, community centres etc) and had been restricted to court buildings (alongside an extensive programme of court closures).

13.20 Our respondents also raised concerns around the appropriate expertise of judges: if the proposed single jurisdiction were a ‘court’ would the judges specifically be District Judges, Deputy District Judges or Circuit Judges, would there be enough judges to handle the potential caseload, and if not would this lead to less qualified part-time lawyers hearing more cases with resultant concerns about quality. The variety of housing law disputes was also raised by our respondents with one noting that:

Housing law cases can vary from simple rent arrears cases to long-running disrepair claims or counterclaims, complex Equality Act and Human rights defence cases requiring experienced and specially trained judges, and in some cases an Equality Act assessor.

That said, our respondents did agree that a single jurisdiction would on the whole lead to improved consistency in decision-making.

13.21 Taking the responses to the Assembly ELGC Committee inquiry into Renting Homes Wales general principles, and the key issues raised by our respondents, we conclude that a ‘fused’ (or perhaps better put ‘harmonised’) approach to housing disputes is appropriate, and that such a legal pathway should have the following characteristics (whether or not this is to be achieved specifically within a single court or tribunal, or through flexible ‘interoperability’ between existing courts and tribunals):

Recommendation 19:

- Housing cases must be dealt with by judges possessing appropriate expertise and experience properly supported by specialist lay persons (e.g., surveyors and experts valuers)
- Legal aid must be available for advice and assistance whether the single jurisdiction is classed as a court or a tribunal
- Cases must be dealt with by appropriate procedures, or in appropriate pathways, e.g., case managers should determine whether particular disputes are better addressed through ADR, a more inquisitorial process, or an adversarial process (with the full adversarial process always being an option, even if it is not regularly used)
- The single court/tribunal should not be based in a single location, there must be easy local access and digital access utilising best practice in design

13.22 This is a quite ambitious set of requirements, but could be achieved with appropriate funding, political commitment, and the use of technology. However, a note of caution is that many concerns over lack of accessibility of existing processes relate in part to the nature of housing dispute resolution, to the longer-term under funding of legal aid, and programmes of court closures. The Law Society for England and Wales has been particularly critical of proposals to establish a single housing court, noting that central issues delaying resolution of disputes are insufficient resourcing of the county courts, and the (necessary) procedural

requirements that must be complied with before a person can be evicted from their home.¹²⁰ There is a risk that establishing a specialist court will invite further reductions in the availability of legal aid funding for advice and representation, leading to even higher numbers of unrepresented litigants. The question for the Welsh housing sector is whether to address problems with existing arrangements (as best it can within the current devolution settlement) or to take a new approach.

14. A Housing Disputes Service for Wales?

14.1 At the very end of our writing-up period from our research, JUSTICE published its Working Party Report, *Solving Housing Disputes*. JUSTICE concluded that: ‘the system as currently configured fails in several ways. Responsibility and oversight reside in too many places, preventing a coherent understanding of structural problems within housing. Disputes are submitted to a system in which judges are ultimately required to adjudicate what are presented as single-issue disputes through an adversarial system’.¹²¹ The JUSTICE Report focuses on courts and tribunals as dispute resolution forums for a vast array of housing disputes (in administrative and private law), whereas our current Report focuses on the end-to-end administrative justice system in social housing and homelessness (going back to legal complexity issues, regulation, information, advice and avoiding disputes). Nevertheless, there are many synergies in our respective findings.

14.2 Our findings also support the view that a more holistic and problem-solving approach, which tries to identify, address and remedy the drivers of housing disputes for the longer-term, and restore something approaching peace between the parties, is desirable. This approach to solving disputes would also fit with broader policies in Wales, both in the housing sector specifically, and in general administrative law (including that relating to equality, well-being and human rights).

14.3 JUSTICE specifically proposes a new Housing Disputes Service (HDS), that would be neither court, tribunal nor ombuds institution, but a new model of dispute resolution. As JUSTICE states, the HDS model:

...would set out all the circumstances and relevant issues in a housing relationship, not confined by the parties’ initial assumptions as to what the issues are, which can themselves reflect an information imbalance derived from unequal resources between the parties. The investigation would include identifying, assessing and attempting to find solutions for the underlying problems giving rise to the housing dispute and meeting participants’ real interests in the outcome. The aim is to ensure that all relevant areas of dispute are brought to the surface, including compliance with notice and other contractual and regulatory requirements... [HDS] would approach the relationship neutrally from the perspective of all its aspects and parties, finding facts, applying the relevant regulatory framework and/or any applicable codes of conduct, and the law. It would absorb other considerations, including the parties’ intentions in the conduct of the dispute. Disputes would be resolved through a staged approach. Following an investigation, there would be an initial provisional assessment which would include a preliminary view of what should follow in terms of resolution, before what might be called an ADR stage

¹²⁰ Law Society England and Wales, Considering the house for a Housing Court - Law Society response (January 2019): <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/considering-the-case-for-a-housing-court/>

¹²¹ *Solving Housing Disputes*, para 2.7.

and if need me, concluded by final determination. Appeals from the HDS would be available to a court or tribunal as of right.¹²²

14.4 HDS itself would not be a regulator, but it would work closely with regulatory bodies. Specifically, it would be intended to ‘establish a new culture, collaborative, open and ethical, designed to allow all parties to the relationship to fulfil their continuing roles otherwise than at each other’s cost’.¹²³ The JUSTICE Working Party Report requires detailed study and we cannot reproduce its full account of the HDS here. Some facets to note are the proposed key values and operating methods of the HDS. Specifically, that it is designed to be investigative, holistic and multi-disciplinary, specialist and quality, fostering ongoing relationships, assisting and protecting participants, making use of digital approaches and data for learning, and function in non-adversarial way. Were it to achieve these aims it is likely that a HDS could foster the ‘Five Ways of Working’ laid out in the Well-being of Future Generations (Wales) Act 2015, namely: collaboration, prevention, long-termism, involvement and integration (these are discussed in detail in our Report, *Public Administration and Justice in Wales*).

14.5 JUSTICE also recommends that the HDS would have to be accessible in various ways including face-to-face, telephone and digital; it would need to be widely known as a free service and must conduct itself in a user-friendly manner. The general characteristics of the proposed HDS sit well with those we have independently proposed in recommendation 19 above for a Welsh housing disputes ‘pathway’; for example, specialist expertise, inquisitorial methods, the need to maintain advice and assistance, and flexibility of operation including ease of local access alongside digital presence.

14.6 In terms of jurisdictional coverage, the JUSTICE Report does not specifically address the context of Wales. What is proposed is a model of dispute resolution, that draws on examples from England only, and from England and Wales methods of dispute resolution. JUSTICE proposes ‘a national service with local offices’,¹²⁴ and it appears that ‘national’ here is intended to mean ‘England and Wales’. The unique position of Wales requires further examination in the process of developing pilot versions of the HDS. We identify here some of the issues raised for Wales.

14.7 JUSTICE proposes that the HDS takes on disputes that currently reside in the First-tier Tribunal (Property Chamber), the county courts and the magistrates’ courts. JUSTICE has not yet considered how to accommodate the housing disputes that are currently determined by the RPTW (Table Four above) and the broader debate in Wales (including the Justice Commission recommendations) that the devolved Welsh tribunals ought to play a much greater role in resolving disputes under Welsh law. Would it be the case that the Welsh ‘*regional*’ HDS would also include the jurisdiction (past and future) of the RPTW, or should there eventually be a *completely separate (devolved)* ‘HDS Wales’ given that housing is a devolved area and Welsh housing law has significantly diverged from English housing law?

14.8 JUSTICE does not make any reference to the role of the PSOW in relation to complaints of maladministration in the social housing sector in Wales. JUSTICE considers that the various ombuds jurisdictions with responsibility over maladministration across the housing sector (both public and private) be subsumed into the HDS, but it does not address subsuming the PSOW into the HDS. As we have discussed above, the UK MHCLG proposal for a Housing

¹²² *Solving Housing Disputes*, para 2.10-2.14.

¹²³ *Solving Housing Disputes*, para 2.16.

¹²⁴ *Solving Housing Disputes*, para 2.20.

Complaints Service (HCS), makes no reference to the PSOW, and although we found it confusing, the HCS appears to be an England-only proposition. JUSTICE is supportive of the HCS proposal and considers that any HCS as developed could be subsumed into the HDS in the longer-term. It will be confusing for people in Wales if there is to be a single ‘one stop shop’ for *all* housing maladministration complaints both public and private sector except for the social housing providers currently under the jurisdiction of the PSOW. Again, the question for Wales is whether the Welsh *regional* HDS also subsumes the PSOW’s complaints jurisdiction, or if there is a *completely separate* Welsh HDS.

14.9 A HDS for Wales could address some concerns raised by the Justice Commission. For example, the Commission concluded that routes to resolve disputes are too varied, fragmented and complex and that courts and tribunals resolving civil and administrative law disputes could eventually be unified in Wales. A HDS Wales would unify the RPTW, and the jurisdiction of the county courts and magistrates’ courts in Wales in relation to housing issues. Such unification would also include the ‘new’ administrative law review jurisdiction of the county courts in Wales under the Renting Homes 2016. HDS Wales would also presumably subsume the current jurisdiction of the First-tier Tribunal (Property Chamber) over disputes from parties based in Wales. HDS Wales could also subsume administrative reviews under the Housing (Wales) Act 2014. Cross-border geographical issues would arise and need to be addressed, but similar issues would arise across the jurisdictional boundaries of the separate English regional HDS branches (or services).

14.10 The above proposition, however, raises devolution considerations. For example, administration of the county courts and magistrates’ courts is not currently devolved to Wales, nor is the jurisdiction of the First-tier Tribunal (Property Chamber) as relates to Welsh cases. A Welsh HDS as a ‘*regional*’ branch of the England and Wales HDS may very well be unacceptable for political reasons and would effectively require ‘reverse devolution’ of the jurisdiction of the RPTW (and also potentially the housing complaints jurisdiction of the PSOW). On the other hand, a standalone Welsh HDS would require devolution of responsibility for aspects of dispute resolution currently conducted by reserved bodies (county courts, magistrates’ courts and the First-tier Tribunal). This can be set in the broader context that the Justice Commissions’ recommendation for the legislative and executive devolution of justice to Wales was met with swift rejection from the UK Government. There is also the aligned question of how HDS Wales would be funded, whether as a branch of HDS England and Wales or as a separate (potentially devolved) Welsh institution (and if the HDS is to be fully devolved, will sufficient funding also be transferred).

14.11 The HDS proposal met with strong criticism from the Housing Law Practitioners Association (HLPAs) members of the Working party who wrote a separate dissenting report. Some concerns focused on the methodology of the study and the level of engagement with practitioners (we do not discuss these here). Other dissenting reasons centred around how, and whether, the HDS would be properly funded with concern expressed that it would be a poor relation to more traditional court and tribunal focused systems. The HLPAs dissent argued that the HDS would risk ‘a retrogression in the protection of occupiers’ rights and risks levelling down the current inequalities between litigants’.¹²⁵ The HLPAs dissent did not accept the view of the majority of the Working Party that an underlying design feature of the HDS is protection for the vulnerable who are significantly excluded from, or not well-served by, the more traditional court and tribunal focused system. HLPAs instead argued that lack of protection for the vulnerable stems ‘almost entirely’ from legal aid cuts caused by LASPO and

¹²⁵ *Solving Housing Disputes*, HLPAs Dissent, para 3.

under-funding of the county courts, rather than the nature of the existing dispute resolution system itself. The shortage of social housing and benefits reforms were also noted. However, the concerns here may be more than just a matter of resources, as HPLA is also concerned about the extent to which the HDS could potentially have decision-making powers over multiple areas of a person's life, and that the Working party may not yet have made clear what is to be the exact status of various different officials within HDS. For example, what will be the specific functions of particular individuals, who they will be employed by, will they be able to make decisions around ancillary matters such as whether a person is entitled to particular benefits or not, and if they can make these decisions what status will such determinations have and how could these determinations be reviewed/appealed?¹²⁶ These matters could be worked out in more detail at the stage of piloting the HDS in selected areas.

14.12 The HPLA dissent suggests that the HDS idea neglects the fact that many lawyers, and judges in their current practice are focused on trying to maintain relationships between parties and potential parties to disputes. However, as the Chair of the Working Party pointed out in his response to the dissent, this has been taken into account by the full Working Party (and it is something we have also found evidence of in Wales). The difference here between the majority and the dissent seems less about current practice and more about what should be done to improve the situation. For the dissenters it is largely a case of better funding for current institutions and practices, they do not believe that a proposal as 'radical' as the HDS is justified as there will be costs and risks involved in establishing it, and in HPLA's view similar improvements could be achieved by less costly and/or less risky methods.

14.13 HPLA is especially concerned that the government would not properly fund the HDS for a range of reasons. One is that the HDS is designed to be holistic, identifying and resolving a range of issues between the parties and broader matters (such as core housing issues but branching out into debt and health concerns). As HPLA puts it: 'What government will agree to fund a system which not only adjudicates upon live issues but also, at its own instigation, seeks out new ones'.¹²⁷ HPLA states that 'the HDS is proposed on the basis that it will be adequately funded. We see no evidential basis whatsoever for this assumption'.¹²⁸

14.14 The role of lawyers (and especially legal aid funded lawyers) within the present system and alongside the proposed HDS is a key area of disagreement between the majority and the HPLA dissent. The HPLA dissenters consider that the HDS is to be a 'lawyer-free zone'¹²⁹ and that to 'remove representation is to create serious injustice'.¹³⁰ HPLA suggest that the role of lawyers alongside the HDS is ambiguous and/or impracticable. The Chair of the Working Party addresses this in his response to the dissent as follows:

During Stage 1, lawyers will assist clients in responding to requests for information and/or in correcting inaccurate information procured by the HDS (including that submitted by another party). At Stage 2, they will receive and consider and advise their clients – in writing or not as they may decide- on the initial, provisional assessment and on what their bottom line entitlements are for the purposes of Stage 3. If no satisfactory agreement is reached at Stage 3, they will of course advise their clients on Stage 4 adjudication and represent them in any appeal, armed with the full information secured by the HDS some or even much of which may not

¹²⁶ *Solving Housing Disputes*, HPLA Dissent, para 39.

¹²⁷ *Solving Housing Disputes*, HPLA Dissent, para 8.

¹²⁸ *Solving Housing Disputes*, HPLA Dissent, para 38.

¹²⁹ *Solving Housing Disputes*, HPLA Dissent, para 22.

¹³⁰ *Solving Housing Disputes*, HPLA Dissent, para 17.

have been available under current arrangements, especially given constraints on legal aid. Assuming a sustainable rate of legal aid for all this work, this is, on its face, a patently more satisfactory economic model...What lawyers are excluded from is the ADR Stage 3. The presence of lawyers risk defeating the overarching purpose of bringing the parties together to seek out the common ground that can provide a basis for sound continuing relations.¹³¹

14.15 HPLA clearly disagrees with whether any government would pay a ‘sustainable rate’ for lawyers’ work here. Having argued in its dissent that, ‘it is wholly unrealistic to suggest that there could be the political will to pay for lawyers in a system where lawyers play only an “advisory” role. To go further and suggest that they may be paid *more* than under the current system is fanciful’.¹³² But we can at least perhaps draw some level of agreement between the majority and the dissent, that the current funding model does not serve the best interests of the majority of the public. The rates of legal aid funding for earlier stage legal help work (e.g., most advice on homelessness and advice on notices seeking possession prior to court proceedings) do not cover the costs. As HPLA points out, its legal aid funded members then only survive in practice due to the cross-subsidy from representing clients in litigation where costs are awarded at *inter partes* rates (often in judicial review and possession cases) where HPLA states that costs awarded can be more than three times higher than legal aid rates.¹³³ We should pause here and note then, however, that this might have little effect in Wales given that there appear to have been only three housing judicial reviews issued in Cardiff in a nine year period, and none of the applicants were legally represented. In the approx. 12 homelessness judicial reviews in the same period applicants were either unrepresented or represented by Shelter Cymru. In possession claims in Wales, if defendants are represented by legal aid funded advisers, it will almost always be by Shelter Cymru. Whatever its other advantages and disadvantages, establishing a HDS Wales would be unlikely to damage the practices of the current legal aid funded advice provider as long as establishing the service includes significant engagement with, and a clear role for, Shelter Cymru. Perhaps a final word to the Chair of the JUSTICE Working Party here who notes:

it is understandable ‘how people who have struggled to help tenants and the homeless in the only way available to them are resistant to a proposal that appears to cut them out of a small part of the process, threatening the economic model by which they subsist, which is one of subsidising advisory work through higher paid litigation income.’¹³⁴

14.16 The role of lawyers, however, is also linked to more fundamental questions about the nature of dispute resolution. As HPLA points out, their concern is also the risk that ‘housing law will become de-professionalised and will fall behind other areas, perceived as a form of relationship management rather than a distinct area of jurisprudence’.¹³⁵ They are concerned that ‘the proposed focus on a non-adversarial approach in the HDS is to the detriment of other imperatives, such as the maximum protection of occupiers’ legal rights...the role of any “dispute service” is to resolve that dispute by establishing and vindicating rights’.¹³⁶ This concern is also linked to our discussion above about the role of the RPTW. Here too HPLA representatives were concerned that transferring cases from an adversarial jurisdiction to a

¹³¹ *Solving Housing Disputes*, Chair’s Response, paras 17-18.

¹³² *Solving Housing Disputes*, HPLA Dissent, para 25.

¹³³ *Solving Housing Disputes*, HPLA Dissent, para 40.

¹³⁴ *Solving Housing Disputes*, Chair’s Response, para 1.

¹³⁵ *Solving Housing Disputes*, HPLA Dissent, para 12.

¹³⁶ *Solving Housing Disputes*, HPLA Dissent, para 6.

more inquisitorial one risks reducing the capacity to truly vindicate rights and develop the law through thorough cross-examination style processes, which arguably cannot be achieved to the same degree by inquisitorial methods. The current role of lawyers is also clearer in relation to adversarial approaches, and funding (although still often inadequate), at least follows from a long-term understanding of the nature and value of the role of lawyers in a common law system. The HDS introduces new roles that need to be piloted and evaluated.

- 14.17 More concerningly still, the HLPD dissent argues that the proposed HDS breaches Article 6 ECHR. They argue that ‘the HDS could not itself satisfy the requirements of Article 6 for “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” with judgment pronounced publicly’.¹³⁷ The JUSTICE Working Party majority would likely take the view that this is not necessary, as they propose that an appeal to a court or tribunal be available as of right. With the HDS intended in general to replace the county court and First-tier Tribunal roles, such an appeal would be to a Circuit Judge, and/or the High Court or the Upper Tribunal (Lands Chamber) depending on context. However, HLPD remain concerned that the intention of HDS is to replace entire tiers of dispute resolution, which are currently the most frequently used tiers. The question remains whether an appeal to the High Court and/or the Upper Tribunal would really be sufficient to comply with Article 6, especially alongside the practical concern that government would not properly fund legal aid lawyers to represent parties in these appeals, after having already funded the HDS stage.
- 14.18 The HLPD dissent is also concerned that parties might not be able to opt out of the HDS process once it is started, and that they would not have any control over how the process is organised, in particular including the degree of ‘compulsion’ to use ADR methods. However, these criticisms could potentially be dealt with at pilot stage.
- 14.19 In addition to developing the HDS model, the Working Party also propose reforms to the current system. Since these focus on courts and legal aid they are also applicable to Wales, at least for the time being. These recommendations include that the Ministry of Justice should urgently address the need for sustainable funding for the legal aid and advice sector, including how to respond to legal aid ‘advice deserts’ and to provide funding for advice to address ‘clustered’ legal problems. The Working Party also proposes that legal aid categorizations should be revisited to better address ‘clustered’ problems including debt, health and housing issues and that initiatives to move aspects of housing resolution online, such as continuous online resolution for possession claims, must involve access to a virtual housing duty solicitor.
- 14.20 The Working Party also recommends that where communities no longer have a physical court or tribunal presence, HMCTS should operate pop-up or peripatetic courts. In Wales, the RPTW is already able to operate in this flexible way. The Working Party also emphasizes pre-action engagement including recommending that the Civil Procedure Rules Committee revisit pre-action protocols for housing disputes in order to make them more user friendly especially for unrepresented litigants. This would also include requiring litigants to produce more evidence or include more details about their engagement with other parties to resolve their issues pre-action. The Working Party also recommends improved mechanisms to identify vulnerable parties early on in processes. It further recommends that the Civil Justice Council consider how to promote and encourage the use of ADR, and that Civil Procedure and Tribunal Rules Committees consider the case for stronger compulsion to engage in ADR, including a presumption or direction to ADR before any formal adjudicative process takes

¹³⁷ *Solving Housing Disputes*, HLPD Dissent, para 27.

place. These are matters that could also be considered by the RPTW and more generally by the President of Welsh Tribunals.

14.21 In their dissenting report, the HLPAs members also accept the need for changes to the current system, specifically around legal aid, and cross-ticketing and other mechanisms to ensure that appropriately specialized judges are deployed flexibly. Both the HLPAs dissent and the majority of the Working Party agreed that proper funding is crucial. As the Chair of the Working Party put it in his response to HLPAs's dissent:

Government needs to understand this loud and clear: there is no point even testing it [the HDS] unless there are housing lawyers available and willing...it will not work. That not only means that legal aid must be available before, during and after the process, but that – if there is to be no reliance on successful litigation costs – legal aid must be at a sustainable rate. It would be absurd to spend what is needed to try the process out while paying lawyers at a rate that means they have an incentive to torpedo it.¹³⁸

14.22 We conclude that Welsh Government is unlikely to be able to avoid engaging in detailed consultation about the future of housing dispute resolution in Wales, whether or not the HDS is eventually piloted as intended. Any proposed reform will have specific impacts in Wales, and it will be necessary to decide whether Wales continues to seek to align its approach to resolving housing disputes with that of England despite the significant differences in policy, regulation, substantive law, and in future also differences in the form of law (with codification).

15. Promoting Rights-based Decision-making in Housing and Homelessness

15.1 One distinctive feature of public administration in Wales is a focus on promoting the progressive realisation of respect for rights. We first consider the four Welsh Commissions who have roles in rights promotion, then considering a proposal to make reference to a 'right to adequate housing' in Welsh law.

15.2 There are four Welsh Commissioners that each have some administrative justice redress jurisdiction over particular aspects of social housing and homelessness decision-making in Wales, as well as important functions to promote rights-based decision-making.

The Welsh Language Commissioner

15.3 The Welsh Language Commissioner has a broad range of functions and powers relating to the promotion and facilitation of use of the Welsh language, as well as laying down new Welsh Language Standards that will eventually replace older Welsh Language Schemes. Whilst the Commissioner is primarily a regulator, there are circumstances where individuals can complain to the Commissioner about a public body's alleged lack of compliance with particular language requirements. In the context of social housing, for the time being Welsh Language Standards have been set for local authorities (county and county borough councils) replacing their existing Schemes, but this has not yet been done for housing associations. This means that at present the standard of Welsh language provision that is legally required of housing associations may be less detailed, less exacting and less consistent across different associations than the standard required of local authorities. It was intended that specific Welsh

¹³⁸ *Solving Housing Disputes*, Chair's Response, para 21.

Language Standards would be developed for housing associations during 2018, but this process has been delayed.

- 15.4 It seems to be the case that individuals have greater rights to redress against local authorities than housing associations here, because (at the time of writing) housing associations continue to be governed by schemes rather than standards. As the Welsh Language (Wales) Measure 2011 regime applies only to Standards (and not Schemes) an individual cannot appeal to the Welsh Language Tribunal against the Welsh Language Commissioner's decision following an investigation relating to Welsh Language Schemes as opposed to Welsh Language Standards. This also means there is no onward right of appeal to the Administrative Court in Wales. Likewise, for housing associations that are dissatisfied with a decision of the Commissioner relating to their Welsh Language Scheme, they have no specific right of appeal. If an individual or housing association were dissatisfied with a Commissioner's decision, their further route to redress would be through potentially seeking judicial review.

The Children's Commissioner for Wales

- 15.5 The Children's Commissioner for Wales is principally concerned to safeguard and promote the rights and welfare of children, and in doing so must have regard to the United Nations Convention on the Rights of the Child (UNCRC). The Children's Commissioner has jurisdiction over specific public bodies, and this includes county and county borough councils, but not housing authorities or providers of registered social housing. In the context of county councils then, some of the Children's Commissioners powers are to review the effect on children of the exercise of functions or proposed exercise of functions; review and monitor how effective are the arrangements for complaints, whistleblowing and advocacy in safeguarding and promoting the rights and welfare of children; and examine complaints in respect of individual children in certain circumstances.
- 15.6 Where local authorities take decisions in the context of for example, housing allocation and their various duties in the area of homelessness (under the Housing (Wales) Act 2014), the Children's Commissioner may be able to review the effects of such decision-making functions on the rights of children. The Commissioner may also be able to examine complaints raised in respect of individual children. Under the Children's Commissioner for Wales Regulations 2001, the Commissioner can examine the case of a particular child/children where the complaint relates to issues concerning the provision of services or the effect on the child/children of the exercise of functions of a public body. The Commissioner can only examine individual complaints where the representation made by the child or a person on their behalf raises a question of general principle which has broader application or relevance to the rights or welfare of relevant children. Where the Commissioner decides not to investigate then the reasons for that decision must be given to the initial complainant. Following an investigation, the Commissioner must make a report setting out findings and conclusions, as well as any recommendations made. The body in respect of whom the report is made then has three months to respond to the report and recommendations. The Commissioner may not review or examine a matter that is currently under judgement or has been decided by a court of law or tribunal. In addition to individual complaints powers the Commissioner's office also provides a great deal of support and signposting, including through its investigations and advice section. StatsWales (2018) data shows that of the total number of households owed a duty to secure accommodation under homelessness legislation in 2017/18 (2,229 households), there were 882 households with dependent children, 126 pregnant women in households with no other dependent children, 81 care leavers or persons

at particular risk of exploitation and 66 young people aged 16-17.¹³⁹ The Children's Commissioner has investigated issues relating to homelessness and the provision of supported accommodation for young people who are care leavers.

The Older People's Commissioner for Wales

- 15.7 The Older People's Commissioner may review the way in which the interests of older people are safeguarded and promoted when public bodies discharge their functions, propose to discharge their functions or fail to discharge their functions. The Commissioner can also review whether, and to what extent, the arrangements of certain bodies' advocacy, whistle-blowing and complaints arrangements are effective in safeguarding and promoting the interests of relevant older people in Wales. Following such a review, the Commissioner may issue a report and recommendations and may require that bodies provide information outlining how they will comply with the recommendations or explaining why they will not.
- 15.8 The Older People's Commissioner can also assist a person who is, or has been, an older person in Wales in making a complaint about or representation to public bodies. Assistance includes financial assistance or arranging for a person to advise, represent or assist an older person. The Commissioner may assist a person in certain legal proceedings but may not review or examine a matter that is currently under judgement or has been decided by a court of law or tribunal. The Commissioner may only assist in legal proceedings where the issues in the case are of wider interest to older people and not merely specific to a particular older person.
- 15.9 The Commissioner may examine the case of an older person in relation to a matter which affects the interests of a wider group of older people and not just the individual concerned. Following an examination, the Commissioner must produce a report and may make recommendations. The body which is the recipient of the report/recommendations then has three months in which to respond. However, as with the Children's Commissioner, the Older People's Commissioner has jurisdiction over local authorities but not RSLs (housing associations) and so cannot perform any of the above functions in relation to housing associations.
- 15.10 From the Older People's Commissioner Impact and Reach Report 2012-2018, the Commissioner reports having provided assistance and support to under her casework function to individuals facing housing issues including accessing home adaptations, home safety, evictions and couples being separated. She also notes the common themes that public body policies and procedures can 'be complex and challenging to people unfamiliar with them' and that 'older people say all too often that they are not treated as equal partners, are excluded from decision making processes, have limited and untimely communication'. She also notes how human rights in particular the right to family life, free association, liberty and degrading and inhuman treatment feature in the case work around housing.

The Future Generations Commissioner for Wales

- 15.11 The Future Generations Commissioner for Wales was established under the Well-being of Future Generations (Wales) Act 2015 (WBGWA). WBGWA requires relevant public bodies to carry out sustainable development, including by setting and publishing 'well-being objectives' which show how the body will maximise its contribution to achieving seven well-being goals. Under WBGWA public bodies are required to 'take all reasonable steps' to meet

¹³⁹ <https://gov.wales/docs/statistics/2018/180801-homelessness-2017-18-revised-en.pdf>

well-being objectives. WCFGWA also establishes Local Authority Public Service Boards with duties to promote well-being. The Commissioner's general duty is to promote the sustainable development principle, acting as a guardian of the ability of future generations to meet their needs, and encouraging public bodies to take greater account of the long-term impact of the things that they do. For that purpose, the Commissioner has powers to monitor and assess the extent to which well-being objectives set by public bodies are being met. At the present time the Future Generations Commissioner has jurisdiction over local authorities (county and county borough councils) but not over housing associations. We have examined the Future Generations regime in detail on our Report on *Public Administration and Justice in Wales*.

- 15.12 As with the other Commissioners above, the Future Generations Commissioner does not have jurisdiction over RSLs (housing associations). However, there has been proactive engagement in the sector voluntarily endorsing aspects of the future generations regime. For example, CHC has endorsed Wales Procurement Policy Statement (WPPS) which supports the WCFGWA. Although intended for the public sector, CHC endorses the WPPS principles as self-evidently reasonable and modernising. It has also been suggested that housing associations could report on their contribution to well-being to enhance value for money reporting. The Future Generations Commissioner has stated that she is 'pleased to see the housing sector, and related industries like the construction sector, proactively adopting the principles of the Act. There are many brilliant examples of the difference this is making which is particularly pleasing given that housing associations are not covered by the Act'.¹⁴⁰

A Human Right to Adequate Housing

- 15.13 There has been discussion of incorporating a right to adequate housing into Welsh law. In particular, in June 2019 Tai Pawb, CIH Cymru and Shelter Cymru launched a jointly-commissioned report outlining the impact that incorporating the UN-enshrined right to adequate housing could have in Wales. The report outlined a number of ways in which the Welsh Government could enshrine the right: informal, formal, and a dual approach of both. The Report recommended this final option, as this allows for a 'strong proactive framework for policy making and strong enforcement if the right to housing is breached'.¹⁴¹ However, rather than directly or indirectly incorporating a right to adequate housing into Welsh law (thus giving individuals enforceable substantive or procedural rights), the Welsh Government's approach is to promote progressive realisation of the right through either a policy framing duty or a more specific procedural duty to have 'due regard' to the right to adequate housing, that is currently proposed to be included in Guidance to be made under the Local Government and Elections (Wales) Bill once enacted. This duty will aim to colour local authority decision-making, but it will not apply to RSLs, and will not give individuals any directly legally enforceable rights. As our research participants stressed, in reality social housing resources are not sufficient, and so the duty cannot be coupled with individual legally enforceable rights without extensive investment in social housing. In terms of resources, some of our research respondents thought increased provision should specifically be local authority (not RSL) homes, replacing those lost under the right to buy scheme that has now been ended in Wales. Others were clear that increased provision needs to go beyond what is already planned.

¹⁴⁰ Future Generations Commissioner for Wales, *Annual Report 2018/19, Acting today for a better tomorrow*. <https://www.assembly.wales/laid%20documents/agr-ld12698/agr-ld12698-e.pdf>

¹⁴¹ S Hoffman, *The right to adequate housing in Wales: Feasibility Report* (Tai Pawb, CIH Cymru, Shelter Cymru, June 2019): <https://www.taipawb.org/wp-content/uploads/2019/06/RightToHousing-Full-ENG.pdf>

15.14 Many of our respondents were concerned that a right to adequate housing expressed in law might create unrealistic expectations about what local authorities in particular would be able to provide. Hence the current approach is really more aspirational, aimed to guide local authority working practices, not to provide any effective redress to individuals.

15.15 Our respondents provided valuable, practically informed, comments about how a more specific legal right might work in practice and what its benefits would actually be. For example, some respondents noted that the framing definitions of 'housing' and 'adequate housing' in particular would have to be clear if the right is to be legally enforceable. One respondent noted that complexity of existing relevant law in this regard:

The current definition of homelessness already includes accommodation which is not reasonable to continue to occupy, but does not encompass the overcrowding provisions of Part X HA 1985. There is a patchwork of health and safety regulations breach of which can make an accommodation uninhabitable, and it would certainly help if all these provisions were reviewed and incorporated into one enactment. If a 'right to housing' were to be introduced, the current legislation on grounds for possession would have to be amended to override the right.

15.16 Other respondents questioned what a housing 'right' is supposed to add to the existing housing 'duty'. Another legal and practical issue raised by respondents was that the duty to comply with a right to adequate housing would be on local authorities (potentially legally enforceable against local authorities) but that the majority of authorities have transferred some or all of their stock to RSL (housing associations). Respondents felt it was then not clear what legal and practical impacts enacting a right to housing would have on relationships between local authorities and RSLs.

15.17 As proposed, reference to the right to adequate housing is to be made in Guidance. Complete failure to take that right into consideration in local authority decision-making at a more strategic level might potentially lead to a ground for seeking judicial review. But as we have noted throughout this Report, judicial review is a vanishingly rare occurrence in the Welsh housing sector for many practical reasons and there have been no successful judicial review claims based on other Welsh law duties to take into account particular rights.

15.18 Some of our respondents did, however, see the value even to a largely promotive expression of the right, noting that if this is articulated clearly it could establish a framework for policy, and send positive and signals that housing in Wales is viewed as an essential and not as a commodity. Nevertheless, one respondent in particular captured some of the concerns with rights-based administrative procedure legislation that we have identified as a broader issue across Welsh public administrative law, namely:

Whilst incorporating the 'right to housing' into Welsh law would send positive signals, it is unlikely to significantly improve the condition of the Welsh housing sector unless significant investment is put into the sector to construct new social housing, ensure rents remain genuinely affordable and to ensure adequate support services are in place to support people. We have seen examples of other 'rights based' legislation enacted in Wales which has not fed through to as significant a change in practice as may have been envisaged.

16. Representative Organisations, Systematic Change and Some Final Conclusions

- 16.1 There are a variety of representative bodies for housing organisations which provide best practice advice, lobby on behalf of members and offer training opportunities. These include: Community Housing Cymru (membership body for housing associations in Wales); Tai Pawb (organisation for equality and social justice in housing in Wales); and Cymorth Cymru (umbrella body for providers of homelessness, housing-related support, and social care services). These bodies are actively engaged in a range of discussions that relate to housing rights, regulation and dispute resolution, but participating in our research constituted their first engagement specifically with the concept of administrative justice.
- 16.2 Whilst these organisations do not generally have functions to assist individuals experiencing housing difficulties, including difficulties with the administrative justice system, they do receive and respond to occasional queries and perform a sign-posting role to appropriate sources of help and advice. Their broader roles are to advocate for better systems, to consider means to avoid and prevent problems occurring and to promote and share best practice.
- 16.3 A group of experts from representative bodies engaged in our research noted that they could have a role in promoting an administrative justice culture, in particular by promoting a sectoral culture that welcomes challenges to decisions and the opportunity to learn. There was some concern that more thought needs to be given about the building blocks to deliver progressive Welsh policies, and in particular that representative organisations can promote training and support for individual decision-makers, not as an initial burst of activity following legislative reform but as an ongoing activity.
- 16.4 The experts noted too that whilst Wales does have a co-production and co-design culture in areas of service delivery, this does not extend to the design of routes to redress and learning in the administrative justice system. So too it was noted that whilst there is extensive consultation on legal and policy changes this is usually at the bureaucratic level. Tenants are sometimes engaged through focus groups facilitated by representative organisations or RSLs themselves, but there is no forum to elicit the unfiltered tenant voice (such as a tenants' union). It was suggested that representative bodies could think more about which voices are being heard in discussions about rights and redress.

17. Concluding Reflections

- 17.1 To ensure access to administrative justice in the social housing sector in Wales, we believe that advice at the right time and in the right way, and following a person-centred approach is key. People need to know what their rights are at particular points in a process of decision-making and should be properly advised at key stages. People are able (with support) to make a reasoned choice about what services meet their needs, and better implementation of a person-centred approach could well lead to overall reductions in the costs of service provision and dispute resolution over time.**
- 17.2 Welsh law should include clear rights to redress, that are grounded in evidence about their effectiveness, and that are accessible in practice. Aspirations towards rights, equality and good administration in Wales must be more explicitly recognised as matters of justice, and administrative justice redress mechanisms should be seen as a means to bridge the gap between policy and implementation, ensuring that both policy makers and decision takers are held to account.**
- 17.3 Individual rights to redress, and their practical effectiveness, should be strengthened, and there is a need for more independent and transparent judicial interpretation and**

clarification of Welsh housing law. Housing law regularly requires a determination of people's legal rights as well as relationship management. But this need for more formal justice should not be met at the expense of less formal structures of collective justice; indeed when these structures have developed from the grass roots level they should be encouraged and supported with better mechanisms to identify community issues and to enable people to address concerns together and support lesson learning in a more informal context. These types of developments could be supported by the housing representative organisations, the PSOW and restorative justice bodies.

ANNEX: Participants in Our Research

Local authorities
Housing associations
Welsh Government officials
Judiciary
Solicitors and barristers
Charities
Think tanks
Restorative justice practitioners
Public Services Ombudsman for Wales officials
Housing representative organisations
Academics
UK Administrative Justice Institute
UK Administrative Justice Council