

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

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TABLE OF CONTENTS

Introduction.....	3
Social Housing and Homelessness Law and Policy in Wales.....	4
Regulatory Regimes and General Administrative Law.....	4
Administrative Decision-makers and Partnership Working.....	5
Information, Advice and Assistance.....	6
Avoiding Disputes and Informal Resolution.....	8
Internal Public Body Complaints Processes and the Public Services Ombudsman for Wales (PSOW).....	9
Redress in Specific Areas of Housing Decision-making: Homelessness.....	10
Redress in Specific Areas of Housing Decision-making: Housing Allocations.....	11
Statutory Redress in the Landlord and Tenant Relationship and the Renting Homes (Wales) Act 2016.....	13
Courts and Tribunals.....	15
Concluding Reflections.....	20
Participants in our Research.....	21

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)

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Introduction

1. Our research concerns administrative justice and housing dispute resolution in Wales. Administrative justice is the justice of relationships between individuals and bodies performing public functions. 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 Administrative justice covers the whole system of taking administrative decisions about people, decision-making procedures, relevant law, and systems for avoiding and resolving disputes.
2. The Commission on Justice in Wales (‘Justice Commission’) recognised that: ‘Administrative justice is the part of the justice system most likely to impact upon the lives of people in Wales’.² It 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’.³
3. The Welsh administrative law of housing has already diverged from that of England (e.g., under the Housing (Wales) Act 2014), and will continue to diverge once the Renting Homes (Wales) Act 2016 comes into force. However, as the Justice Commission put it: whilst ‘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’.⁴ Government and the Assembly have not formally considered what a rationalised approach to housing law and dispute resolution in Wales might look like. Not only at the level of tribunals and courts, but also including the functions performed by the Public Services Ombudsman for Wales (PSOW), regulatory bodies, advice and advocacy service providers, and where relevant some of the Welsh Commissioners.
4. We conclude that Welsh Government should review housing law and dispute resolution specifically as it applies to Wales. Other studies have been conducted ostensibly on an England and Wales basis, but due to timing, scope or objectives, none has been able to fully consider the current situation of housing law and dispute resolution devolved to Wales, or the inter-action between devolved and non-devolved law and redress. This means that some proposals either do not apply to Wales, or their application is problematic.
5. The recommendations we make in this ‘Housing’ Report are aligned to those we make in two further 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 across public services provision, and on Welsh policies about good administration, well-being, human rights and equality. That Report also examines key institutions in the Welsh administrative justice system, how the system is designed and overseen, and proposes reforms. A third Report examines administrative justice in the context of primary and secondary maintained education in Wales. The ‘Education’ Report and this ‘Housing’

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

² Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) para 6.1.

³ Justice Commission, para 6.15.

⁴ Justice Commission, para 5.35.

Report are case-studies about how the elements of administrative justice (law, advice, information, avoiding disputes, dispute resolution and learning to improve performance) function in particular areas of Welsh public administration and impact on people's daily lives.

Social Housing and Homelessness Law and Policy in Wales

6. The devolved Welsh approach demonstrates Government understanding that housing is a core element of living a life of dignity, recognising a strong role for the state in providing support for individuals who are unable to access housing via the market. The policy, law and practice around social housing and homelessness in Wales emphasizes collective rather than individual justice, and while this has positive connotations, we argue that it may limit the attention given to the ability of individuals to seek redress to ensure that their substantive legal entitlements are respected.
7. In this Report we take social housing to mean housing provided 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.
8. Our research maps key problems faced by individuals in their interactions with what they are likely to view as 'state' entities because these entities make decisions around their access to and use of resources, regardless of the official (and sometimes contested) legal classification of such entities. 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 the Renting Homes (Wales) Act 2016 ('Renting Homes Wales') (which introduces changes to level the playing field between different types of organisations).
9. Although social housing policy and law is devolved, administrative justice in the sector is impacted by the reservation of matters such as social security. Welsh Government and the Assembly are sometimes unable to mediate the effects of welfare reforms introduced by UK Governments, including the Spare Room Subsidy and Universal Credit. These reforms have likely led to more people in Wales facing proceedings for possession of social housing, and other increased pressures on the administrative justice system.

Regulatory Regimes and General Administrative Law

10. We first address the regime of law and regulation that governs administrative decision-making in social housing, arguing that this should be as clear as possible to encourage good administration and 'right first time' decision-making.
11. Local authorities have various administrative law statutory duties and discretionary powers to provide housing accommodation and are subject to general administrative law duties which housing associations are not (including matters of well-being, rights, and freedom of information). Although some of our research participants were concerned that this legislative background leads to lack of flexibility, and might frustrate the development of more innovative approaches such as 'systems thinking' in local authorities. On the other hand, we note that some RSLs already comply voluntarily with legislation affecting decision-making and service delivery (including sustainability and well-being).

12. For RSLs, there is a distinctively Welsh co-regulatory approach meaning that the onus for ensuring co-operation with regulatory requirements rests with the board of the RSL, working in conjunction with their tenants. This includes a requirement to focus on engaging tenants with RSL decision-making, and more recently also a shift towards tenants being involved at a strategic level. Although the regulatory focus is on proactive tenant engagement, there are still discrepancies around how, and if, all individuals in social housing are able to contribute to the decisions their landlords make.
13. The Regulatory Board for Wales has said that social housing regulation in Wales is under-resourced, which risks compromising the regulator's functions. There is recognised inconsistency and inequality in the nature of housing regulation between the local authority and housing association sectors. This is increasingly seen as disadvantageous to local authority tenant participation and access.
14. 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. The Local Government and Elections (Wales) Bill makes some provisions seeking to strengthen participation in local democracy and improve accountability frameworks, but there are currently no established national performance standards for local authority housing that could determine the planning of local service provision and allow regulatory judgements to be formed.
15. 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. The Welsh Government's longer-term proposals to consolidate and codify Welsh housing law provide an opportunity for re-examining regulation and the application of general administrative law principles and standards.

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.⁵

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.

Administrative Decision-Makers and Partnership Working

16. 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 in their access to and use of social housing. We found that decision-making staff in local authorities and RSLs face significant pressures. Social housing staff often have a high caseload, they may be casualised and worried about their own job security. Atomisation of decision-making (into constituent elements performed by different people and/or

⁵ We note that just 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.

algorithms) also makes it difficult for staff to take a person-centred approach. We heard examples of a perennial problem for administrative law, namely how people can understand the distinctions between law and policy, and between rule-governed and discretionary decision-making. In Wales especially an increase in the volume of so-called soft-law (such as guidance and various new decision-making frameworks that decision-makers are sometimes encouraged rather than obliged to use) can lead to confusion about the appropriate space for discretionary judgement. The public administrative system as a whole must be adequately resourced to enable people to make good decisions, to ensure that individual decision-makers have the capacity and flexibility to take a range of factors into account in performing their roles, and to ensure that processes operate compassionately.

17. Restorative justice techniques have been used by RSLs in Wales, with initial decision-makers as well as leadership and management receiving training. These approaches include restorative circles and 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 kinds 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 to live free from the ongoing threat of eviction and from the impacts of anti-social behaviour. Use of these techniques has had a positive impact on dispute avoidance, and reduces costs caused by disputes across a range of services including linked local authority services such as health and policing.
18. Partnership working has also been encouraged in the social housing sector. We found effective examples of partnership working across local authorities in North Wales, but some local authorities and housing associations in South Wales were less inclined to engage with our project, and we heard that there may be more conflict between South Wales-based bodies. Research participants noted that true partnership working requires a more joined-up person-centred and/or family centred approach to public services provision, and that routes to administrative justice should also seek to reflect this. For many of our participants it was argued that true partnership working requires pooled budgets (despite the difficulties of implementing this). However, partnership working can make it difficult for individuals (and advisers) to know who is responsible for making decisions in their case, what law applies, and where routes to accountability lie. This exacerbates problems already caused by the application of different legal regimes to local authorities and RSLs, and by the fragmentation of law across devolved and non-devolved sources.

Information, Advice and Assistance

19. Providing information, advice and assistance to those affected by administrative decisions in the housing sector is also a key aspect of administrative justice. In Wales, the provision of early advice on homelessness has likely increased to an extent by the Housing (Wales) Act 2014 ('the 2014 Act'),⁶ and local authorities are trying to work more closely with advisers, such as Shelter Cymru and Llamau, who sometimes work out of local authority premises. This may help advisers perform a useful function of 'triaging' disputes, and make

⁶ The 2014 Act 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 system feel less ‘them and us’ for people needing support, but some of our participants noted that this can lead to concerns over whether advisers based in local authority premises are properly perceived as independent and impartial, and these presentational aspects need to be carefully managed. This situation might be improved by considering whether legislation could be amended to provide that local authorities should ‘have regard’ to the principle that advice ‘must be provided in an impartial manner’.

20. Our participants also argued that more could be done to provide clear and easy read information to people about their housing rights, including their rights to independent legal advice, as early on as possible. There are obvious concerns around the lack of access to legal aid funded advice. 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.
21. 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 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 be able to access broader support services (mental health, debt advice, physical health etc) even when they might not be inclined to do so.
22. The landscape for accessing legally aided advice is complex, as public funding is available to challenge some aspects of decision-making (e.g., county court appeals and some judicial reviews in the Administrative Court) but not to challenge other aspects (e.g., advice on challenging social housing allocation decisions unless this involves judicial review).
23. Our research participants considered that even where the routes to challenging administrative decisions 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 on occasion actively misguides tenants. We came across examples of advice given being legally incorrect (including because un-applicable English law was relied on). In our survey of housing sector professionals, 83% thought that ‘lack of awareness of routes to challenge’ was a reason why people do not challenge, or find it hard to challenge, social housing and homelessness decisions. A further 75% thought the ‘complexity of relevant law’ is a key reason stopping people from challenging administrative decisions in the sector.
24. 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.
25. We believe that more attention should be given to the role of the approx. 1,250 local councillors in Wales, as a first port of call for people with social housing problems. Councillors provide a large 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.

26. Information should be presented in the right terminology to enable people to understand their rights, to access redress processes, and to understand the stages within such processes. In our research we heard that there has in the past been an approach (primarily via CAB Cymru) in social welfare rights advice (broadly understood) of empowering people through knowledge to understand their own rights, but that funding cuts may have made this difficult to sustain.

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 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.

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 homelessness advice 'must be provided in an impartial manner'.

Avoiding Disputes and Informal Resolution

27. The type of disputes people might have with public bodies 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 homelessness 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. Housing disputes are often be multi-faceted and includes issues of debt, and

mental and physical health outside of the control of parties to an immediate dispute but which may be the main drivers of the problems.

28. Local authorities and housing associations in Wales try to encourage early and informal dispute resolution, and this is the most prevalent form of dispute resolution activity in the sector. Local authorities (and RSLs) have various mechanisms in place to aid early resolution and to prevent problems from occurring. However, we found that local authorities do not generally keep any information about the number of people using informal dispute resolution procedures or the outcomes of these procedures.
29. When formal applications have been made, and formal decisions provided, it is clearer to the individual what the routes of challenge are. Our research participants however, reported concerns about the risk that keenness to close down an issue leads to conversations with individuals where they are advised to 'take what they are offered'. Such conversations are sometimes seen as a type of informal/alternative dispute resolution, without the individual involved realising this.

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.

Internal Public Body Complaints Processes and the Public Services Ombudsman for Wales (PSOW)

30. If informal resolution does not work to resolve an issue or avoid a more formal dispute, an individual can seek to use the RSL or local authority's internal complaints processes. We found that some local authorities provide basic information (especially online) highlighting examples of administrative decision-making 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. However, not all local authorities provide this information in a clear and accessible manner.

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 their legal entitlements.

31. Local authorities generally publish information about the number of complaints received about their administrative decision-making, about the topics of complaints and their outcomes, but this tends to be presented differently across each authority (and across RSLs). There is no central, searchable database for either type of body, so it is difficult to gain a clear picture about use of complaints processes and outcomes across the social housing sector.
32. If a person has followed the local authority or RSL complaint procedure and is still dissatisfied they may be able to complain to the PSOW, who has jurisdiction to investigate

complaints of alleged maladministration and service failure within local authorities and RSLs. Maladministration is not a defined term, and in the case of social housing and homelessness it can include; incorrect allocation to a particular banding of housing due to administrative failures, delays in allocation, not taking into account medical information in decision-making, failure to perform homelessness assessment duties, and 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). A key area of maladministration identified by the PSOW is where relevant law and policy is not complied with including misunderstanding which sources of law apply to particular aspects of decision-making.

33. We found that it can be difficult for people to distinguish between services requests and complaints, and that the complaints processes of RSLs tend to be lengthier, more complicated and more difficult for individuals to navigate than the processes of local authorities. These can lead to premature complaints to the PSOW, and complaints wrongly addressed to Welsh Government or particular Ministers.

Recommendation 9: That the PSOW, in particular its new Complaints Standards Authority, review 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 Specific Areas of Housing Decision-making

34. In the next three sections we look at redress processes available in relation to particular areas of social housing and homelessness decision-making, we then draw some more general conclusions about the redress environment.

Homelessness

35. The 2014 Act established new duties on local authorities in Wales in the context of homelessness. This seeks to shift emphasis in the earlier stages of decision-making from a confrontational, adversarial approach, to an approach framed around a new relationship with the 'client' at the centre. However, the Act makes no changes to the dispute resolution process. The first stage in that process is to ask the local authority to conduct an administrative review of its own decision. From the information available it seems unlikely that the 2014 Act has itself led to any reduction in the number of internal administrative reviews sought, and previous research shows that whilst the profile of challenge is variable, the number of reviews across local authorities in Wales and England has been low, with the majority experiencing five or fewer per-annum. Research in England has shown that administrative reviews in homelessness have become more 'judicialised' with increased involvement from lawyers, leading to potentially more formal processes.⁷ In the past this has led to better outcomes for individuals requesting a review, but more recently the results of individual reviews are more equivocal, whereas there is evidence that the involvement of lawyers leads to a more satisfactory process, and a higher likelihood of lessons being learnt and local authority performance improved.

⁷ C Hunter, D Cowan, A Dymond and S Halliday, 'Reconsidering mandatory reconsideration' [2017] *Public Law* 215.

36. There is a right to appeal to the county court following an adverse review decision, but such appeals are infrequent in Wales (anecdotally about a dozen per-annum) with many authorities not subject to any county court challenges in a given year. The Court of Appeal has held, in light of evidence from Shelter about the difficulties of seeking legal aid, that taking time taken to access legal aid can provide a ‘good reason’ for requiring an extension of time to appeal against an adverse decision on administrative review. A report by a JUSTICE Working Party, *Solving Housing Disputes*, has recommended that the time limit for appealing a local authority internal review decision on homelessness (s.204 Housing Act 1996 in England) ought to be extended from 21 days to at least 28 days to give appellants more time to access legal aid.⁸ We propose that Welsh Government/Assembly consider similarly amending the time limit for an appeal under s.88 of the 2014 Act.

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.

37. There are particular aspects of homelessness decision-making that can only be challenged via judicial review in the Administrative Court. Rates of homelessness judicial reviews in Wales have decreased since the 2014 Act came into force (which may suggest less adversarialism), but this should be viewed against the broader impacts of legal aid cuts and procedural reforms that have led to a significant reduction in judicial review claims issued in Wales (and in England) since around 2013.⁹

Housing Allocations

38. The main initial route to challenging housing allocation decisions is again through internal administrative review. Applications for review vary widely across local authorities and may be influenced by many factors including population demographics. We found that local authority culture, working practices and training levels are also likely to have an impact on the number of review requests made. External factors might also be significant, such as the roll out of Universal Credit impacting on whether the Private Rented Sector is willing (or not) to rent to tenants on the new benefit (increasing pressure on social housing and thus on review applications).
39. Local authority housing allocation schemes are required to provide an internal review process for some classes of decision-making, but there is no statutory requirement to follow a particular 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

⁸ JUSTICE, *Solving Housing Disputes* (March 2020) para 3.7: <https://justice.org.uk/wp-content/uploads/flipbook/29/book.html>

⁹ Public Law Project and S Nason, evidence to the Commission on Justice in Wales: <https://llyw.cymru/sites/default/files/publications/2018-11/submission-to-the-justice-commission-from-public-law-project-sarah-nason.pdf>

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 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.

40. Many local authorities do not keep records of reviews requested and their outcomes. This statutory route to redress is rarely used, despite notable examples of PSOW complaints relating to housing allocation involving a misunderstanding of relevant law. Some of our research participants felt that ‘ranks were closed’ on internal review and that the only way to a truly independent resolution of the issue would be a complaint to the PSOW or to seek judicial review in the Administrative Court.

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 for the future.

41. RSLs also make key housing decisions, including decisions about social housing allocation, but Welsh Government Guidance about administrative review procedures 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.

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.

42. There are ‘gaps’ in the internal review landscape. No review is provided for to challenge a decision that an offer of social housing is suitable, to challenge a grade or recommendation made by the local authority’s medical adviser, or to challenge a decision about an applicant’s priority for housing. These gaps, supposedly filled by the backstop of judicial review, cause confusion, are not especially well justified, and cause access to justice problems. The gaps also 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. Awareness of judicial review as a route to redress is limited and the process is extremely difficult to access in a timely fashion without legal advice.
43. Judicial review appears to be near negligible in its actual use as a means to challenge housing allocation decisions in Wales, or other aspects of housing decision-making outside the homelessness context. There have been only three ‘housing’ judicial reviews issued in

Cardiff (from April 2009 to May 2018) involving Welsh public body defendants, none of the claimants was legally represented and none of the claims proceeded to a final substantive hearing. There were less than 20 homelessness judicial review applications over the same period, and most were prior to the 2014 Act coming into force and almost all involved Shelter Cymru. In our FOI requests, none of the 12 local authorities who responded had been subject to an issued judicial review on any aspect of housing or homelessness 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).

Statutory Redress in the Landlord and Tenant Relationship and the Renting Homes (Wales) Act 2016

44. Law in force at the time of writing governing redress in the landlord and tenant relationship, particularly relating to types of tenancies and possession proceedings, is complex and spread across different sources. A tenant's initial route to statutory redress is again through internal administrative review, but local authorities do not generally keep specific records of reviews requested and their outcomes, and requests are quite rare. Reviews are governed by different regulations, and different guidance about the procedure to be followed during the review process, spread across Welsh, and English and Welsh law.
45. Renting Homes Wales 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. It has potential to improve administrative justice in Wales as it is intended to establish a clearer and more consistent legal framework, therefore aimed to result in fewer disputes. Our Report focuses mainly on redress available under secure contracts under Renting Homes Wales, which give greater security of occupation to the contract-holder.
46. Renting Homes Wales harmonises much of the law applying to RSLs and local authorities respectively, adding further weight to our view that a 'domain' based approach to regulation and expanding applicability of general Welsh administrative law to RSLs could be desirable. However, it is also indicative of a tendency in Welsh housing law to make substantive legal changes, without detailed reconsideration of routes to redress. Assembly primary legislation is distinctive in some aspects, but much secondary legislation (statutory instruments for example) is largely a carbon copy of English law (we see this in the regulations around internal review procedures), yet there has been no detailed assessment of whether these routes to redress are working proportionately, fairly and effectively.
47. There are a number of administrative justice issues raised by Renting Homes 2016 including; reliance on internal administrative review as a first means of redress, and on appeals and a new form of county court legality review as the second stage; codification of reasonableness (whether a possession notice is reasonable) that has the potential to clarify the law but could also limit development and lead to technical legal disputes; and the landlord's power to temporarily exclude a contract-holder from the dwelling for 48 hours (with no right to redress other than the back stop of judicial review – potentially breaching Article 6 ECHR according to legal experts responding to our research).

48. Renting Homes Wales mirrors much of the existing law on redress; 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).¹⁰ 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 ideally likely to be a cheaper, more proportionate and less complex process for the parties than Administrative Court judicial review. 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’.¹¹ However, implementation of Renting Homes Wales has been delayed due to the need to liaise with the Ministry of Justice/HMCTS to develop the necessary procedural rules, court forms and other processes required for these new types of legal claim. Our research suggests that these new procedures are likely to be used only rarely, and that there has been no detailed costs-benefits analysis, including considering a range of alternative forms of dispute resolution.

Recommendation 15: A proposed Housing Code for Wales should include a consolidated and codified approach to internal administrative review within local authorities (and also RSLs) of housing decisions including allocations, giving Notice of Seeking Possession, homelessness and the wide range of internal administrative reviews provided for under Renting Homes Wales. 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 Wales once it comes into force. In particular, such a review should address whether some internal 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 either provide for court-based, or alternative (e.g., tribunal-based), redress that is coherent and consistent.

¹⁰ *Manchester City Council v Pinnock* [2010] UKSC 45.

¹¹ Law Commission, *Renting Homes* (Law Com No.284, November 2003) paras.9.107-9.108.

Recommendation 18: Welsh Government should monitor and evaluate use of the new court-based redress procedures introduced by Renting Homes Wales. Welsh Government should monitor use of the power to temporarily exclude a contract-holder and whether a right to seek an urgent review should be introduced in relation to such exclusion decisions.

Courts and Tribunals

49. Questions remain about whether a different approach to redress could have been taken under Renting Homes Wales, specifically making greater use of the Residential Property Tribunal for Wales (RPTW). Many respondents to an Assembly Equality, Local Government and Communities Committee inquiry into general principles favoured making more use of the RPTW. Some issues raised were in discussion were:

Awareness and Use of the RPTW is currently limited because: its jurisdiction is quite niche; some social landlords have written their tenancy agreements specifically to exclude RPTW jurisdiction; there is limited education about dispute resolution and the role of RPTW (both among tenants and landlords) and limited publicity about the tribunal. However, the RPTW is given new roles under the Mobile Homes (Wales) Act 2013 and under the 2014 Act, which may increase awareness and use.

Resources/Capacity: 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 6,000 per-annum. As it stands the tribunal could not determine possession claims (due to resources), but such a transfer would also require a significant change in mindset from the RPTW's current workload. This could, however, be achieved in phased development and built up over a period of time.

Expertise, Procedure, Access to Advice and Representation: The RPTW is aimed to be accessible to tenants without specialist legal support, whereas this is not always 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.

Inter-play between types of case, appeals and reviews: There could be jurisdictional complexity for example, if disrepair claims were transferred to the RPTW with possession claims remaining in the county court. 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.

Legal Aid: There is no legal aid available for RPTW proceedings whereas some housing and related cases in county courts remain covered. 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 are raised as to whether a transfer of these proceedings to the RPTW 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). More broadly, there also seems to be a concern among independent advice providers that the simplification of the law promised by Renting Homes Wales could be used as a reason for reducing their

funding on the basis that the new law should be easier to understand than its predecessor fragmented legislation.

50. We cannot say whether Renting Homes Wales will reduce the number of disputes, but from an administrative justice perspective, it largely 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 may be just as much, or greater, than current need particularly in the earlier years of implementation. The Assembly ELGC Committee concluded that Renting Homes Wales places too much reliance on the courts to resolve disputes and recommended an expanded role for the RPTW. However, the Welsh Minister responded that the RPTW does not have capacity and no further costs-benefits review has yet been conducted.
51. This issue has been taken up by the Justice Commission, which noted 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’.¹² In consequence it recommended that: ‘The Welsh tribunals should be used for dispute resolution relating to future Welsh legislation’. Renting Homes Wales brings into sharp focus many of the issues that might be raised by seeking to implement this recommendation.
52. The discussion around making greater use of the RPTW is indicative of the issues disclosed by various proposals to rationalise housing dispute resolution in England and Wales. For example, potentially establishing a single housing court, currently being considered by the UK Ministry of Housing, Communities and Local Government. The single court would combine the housing dispute resolution jurisdictions of the county courts (in England and Wales) and the First-tier Tribunal Property Chamber (England, and in some cases England and Wales), but not (it would appear) the jurisdiction of the RPTW. The RPTW could potentially 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.¹³ However, it is extremely unlikely this would take place now given the political context and divergence between English and Welsh housing law.
53. We 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 accessibility problems, 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).
54. The Justice Commission has gone further, arguing more broadly 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’.¹⁴ This is on a much wider scale, not only in relation to public (and private) housing law disputes, but for many different subject areas

¹² Justice Commission, para 6.59.2.

¹³ Law Commission, *Housing: Proportionate Dispute Resolution* (Law Com No.309, 2008).

¹⁴ Justice Commission, para 5.56.

of dispute. Our respondents had some misgivings about unification, proposing that where this has occurred in England and Wales (at least at the 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). Nevertheless, our respondents on the whole agreed that a single housing dispute jurisdiction would lead to improved consistency in decision-making.

55. Short of proposing a single housing court, other pilot initiatives include flexible co-ordination and/or ‘cross-ticketing’ of judges so that housing disputes with elements that are fragmented across the county courts and relevant tribunals, can then be dealt with by a single judge, in a single hearing, sitting simultaneously as a court and tribunal judge.¹⁵ Judges of the devolved Welsh tribunals have already been cross-deployed into other tribunals, and court to tribunal cross-deployment in Wales could, we argue, also be effective, with identification of appropriately specialised and experienced judges. However, the matter of case-management functions would have to be addressed, including whether the devolved Welsh tribunals will be adopting the ‘Core Case Data’ system, a digital system likely to be rolled out across HMCTS courts and tribunals.
56. We conclude that some form of ‘harmonised’ approach (whether within a single court or tribunal, or through flexible ‘interoperability’ between existing courts and tribunals) is appropriate. Such a harmonised jurisdiction or pathway should have the following recommended characteristics:

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 using best practice design

57. As we were finalising our Housing Report, a JUSTICE Working party published its study, *Solving Housing Disputes*. This proposes a new Housing Disputes Service (HDS) that would be neither court, tribunal, nor ombuds institution, but a new holistic model of dispute resolution. The main features of the HDS are that it would be 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. The HDS would adopt the problem-solving mentality which the Justice Commission recommended for Wales, and we think it would foster the ‘Five Ways of Working’ under the Well-being of Future Generations (Wales)

¹⁵ <https://www.gov.uk/government/consultations/considering-the-case-for-a-housing-court-call-for-evidence> para 31.

Act 2015.¹⁶ The HDS would seek to address ‘clustered’ problems where the trigger to the dispute may not have been the central issue between the parties (e.g., benefits, debt and health). The JUSTICE Working party considers that legal advisers will still be crucial to the system and that they would work alongside (or in some cases within) the HDS at *sustainable rates*. JUSTICE also recommends that the HDS would have to be accessible both including face-to-face, over the telephone and digitally; it would need to be widely known as a free service and must conduct itself in a user-friendly manner.

58. The HDS idea met with strong dissent from Housing Law Practitioners Association (HLPAs) members of the Working Party. HLPAs concerns included the adequacy of the methodology of the report and extent of engagement with stakeholders, as well as questioning whether the HDS would be properly funded (and specifically whether lawyers would indeed be funded to *sustainable rates* and what their roles would actually be). They were also concerned about proposed HDS procedures and the decision-making powers of its officials over clustered issues (such as benefits). HLPAs members also argued that replacing the most commonly used tiers of the court and tribunal system (magistrates, county court and First-tier tribunal) with what they referred to as a means of ‘relationship management’ rather than a determination of legal rights, could breach Article 6 ECHR (even though appeal to a higher court or tribunal from HDS is intended to be available as of right). HLPAs were also concerned about the extent of compulsion to use various ADR methods.
59. Despite the strength of the dissent, there are areas of agreement between the majority of the JUSTICE Working Party and the HLPAs members. First, that current problems are significantly due to under-funding of legal aid and of the county courts. The England and Wales Law Society has been sceptical of creating a single housing court, for similar reasons (that current problems stem from under-funding and from the time taken comply with legal procedures that are *necessarily* required to protect individuals in disputes about their homes). Second, that judges and lawyers already engage in trying to maintain relationships between parties to a dispute and adopt inquisitorial methods (as we found in Wales through observing court proceedings). Third, that cross-ticketing and/or cross-deployment of judges is one means to partially ameliorate some of the fragmentation of the current system. Fourth, despite some equivocation on this point, that housing law is complex, but many housing disputes are not, (adding further evidence we think, to the case for consolidation and codification of Welsh housing law).
60. We suggest there are two key issues of disagreement between the majority and the HLPAs dissent, and that both relate largely to the role of lawyers. HLPAs notes that under the current legal aid model work done at legal help (e.g., advising in relation to homelessness issues or avoiding county court possession proceedings) is not funded sufficiently to cover costs. HLPAs members in effect make a living from subsidising this work by litigation representation and *inter partes* costs orders. HLPAs thinks that the risks of moving to a new model of dispute resolution (the proposed HDS) do not justify the potential benefits, which could be secured by better funding of legal aid. This may, however, misunderstand some of the key facets of the HDS, in terms of its aims to protect the most vulnerable, and to level up dispute resolution standards (rather than level them down, which is HLPAs’s concern). Nevertheless, HLPAs raises a point which is especially instructive for administrative justice in Wales. This is that disputes are often centrally about maximising legal rights protection for individuals. Determination of legally guaranteed rights is

¹⁶ These are: thinking long-term, prevention, integration, collaboration and involvement.

something distinctive from problem-solving, fostering good relations, or promoting good administration, well-being and other values.

61. JUSTICE does not specifically address the context of Wales, it proposes ‘a national service with local offices’,¹⁷ and ‘national’ appears intended to mean ‘England and Wales’. 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. We question then: would it be the case that the Welsh *regional* HDS should include the jurisdiction (past and future) of the RPTW, or should there eventually be a completely separate *HDS Wales*?
62. JUSTICE proposes that 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 the position of the PSOW. 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 those currently under the jurisdiction of the PSOW. This also does not take into account that the PSOW has own initiative powers, unlike the English and UK ombuds that would be amalgamated and subsumed into the HDS. Again, the question for Wales is whether the Welsh regional HDS should also subsume the PSOW’s complaints jurisdiction, or if there is to be a completely separate Welsh HDS (and what would be covered by that service?)
63. A HDS Wales could address some concerns raised by the Justice Commission. For example, 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 could unify the RPTW, and the jurisdiction of the county courts and magistrates’ courts in Wales in relation to housing issues. Such unification could also include the ‘new’ administrative law review jurisdiction of the county courts in Wales under Renting Homes Wales. HDS Wales could 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 homelessness administrative reviews under the 2014 Act. JUSTICE recommended that similar internal reviews in England be externalised to the HDS, and the HLPAs dissent at least agreed that these reviews should be removed from local authorities and be conducted by an independent body.
64. Cross-border geographical issues would arise in relation to HDS England and HDS Wales, but similar issues would arise across the jurisdictional boundaries of the separate English regional HDS branches (or services).
65. This proposition, however, clearly raises devolution considerations. 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 HDS Wales 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 was met with swift rejection from UK Government. There

¹⁷ *Solving Housing Disputes*, para 2.20.

is 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).

66. Welsh Government is unlikely to be able avoid engaging in detailed consultation about the future of housing dispute resolution in Wales, (both public law as covered by our Report, and private law) whether or not the HDS is eventually piloted as intended. Any other reforms proposed by UK Government will have specific impacts in Wales, and it will be necessary to decide whether Wales continues to align its approach to resolving housing disputes with that of England despite the significant differences in policy, regulation and substantive law.
67. One key area of policy difference with England is Welsh Government's intention to promote progressive realisation of right to adequate housing. 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'.¹⁸ Whilst our research participants recognised the potential value of a 'right' to adequate housing as a means to establish a framework for policy, many were concerned that it could lead to unrealistic expectations on social housing providers, and that it would have little practical impact unless coupled with an extensive increase in social housing stock. The current Welsh Government approach, of either a policy framing duty or 'due regard' duty in guidance, would also not give individuals either a directly or indirectly enforceable legal right, it would largely be a promotive and/or procedural duty (and as we have seen, judicial review to enforce policy framing and promotive considerations especially is a very distant prospect in Wales). It was also suggested that whatever status the right takes, terms such as 'housing' and 'adequate housing' should be clear in legislation and guidance, and that existing law on standards of social housing, health and safety, and grounds for possession might need to be amended. 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, whereas the majority of authorities have transferred some or all of their stock to RSLs. Respondents felt it was then not clear what legal and practical impacts enacting a right to housing would have on relationships between these bodies, adding further complexity to an already confusing landscape.

Concluding Reflections

68. **In our view, improving access to advice, clarifying and consolidating current law, and increasing the availability and strengthening the effectiveness of existing individual routes to redress may well have more impact on just and fair outcomes in the social housing sector, than a policy-framing right to housing – though we recommend that all these elements should be simultaneously pursued. 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,**

¹⁸ Dr Simon Hoffman (Swansea University) for Tai Pawb, the Chartered Institute of Housing Cymru and Shelter Cymru, *The Right to Adequate Housing in Wales: Feasibility Report* (June 2019): <https://www.taipawb.org/wp-content/uploads/2019/06/RightToHousing-ExecSummary-ENG.pdf>

ensuring that both policy makers and decision takers are held to account. There is a need for more independent and transparent judicial interpretation and clarification of Welsh housing law. Housing law regularly requires determination of people's legal rights alongside 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.

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