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PUBLIC ADMINISTRATION AND A JUST WALES

(March 2020)

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PUBLIC ADMINISTRATION AND A JUST WALES

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Public Administration and a Just Wales

1. Introduction

- 1.1. Justice in relationships between individuals and the state 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
- 1.2. Despite its importance to people’s lives administrative justice remains, as Francis Gibb former Legal Editor of the Times put it, often ‘unseen, ignored and unloved’.² It can be unseen ‘on maps of the world’ because it exists mostly in the ‘small places’ of people’s daily interactions with the state; in decisions about social housing, homelessness support, a child’s education, a relative’s social care, licensing, local government, planning and the environment. Its lack of visibility can be vividly contrasted against its scale, the millions of people throughout the world whose central experience of justice will be in the context of public power.
- 1.3. It seems crude to say administrative justice is ignored and unloved because it is not a vote winner, but this too is part of the story. In Wales, the concept of administrative justice does not fit well with the political statement that ‘justice is not devolved’; a soundbite useful to all political parties. It has also been difficult to place justice in Wales more generally, as until very recently, the subject had no home in any particular Assembly Committee, and it remains difficult to determine which Welsh Government Ministers have particular responsibilities. ‘Justice’ may not be an area where Assembly Members, and civil society organisations in Wales, have yet felt that they can have much impact. Because the institutions for holding public bodies to account within the administrative justice system are, in large part, not courts, they do not fit well with the traditional association of justice as being about what lawyers and judges do to interpret and enforce specific duties. Academics in administrative justice have referred to this court heavy approach as ‘Law’s Empire’³ or the ‘pathology of legalism’.⁴ Noting this legalistic perception, a 2016 Report of the Committee for Administrative Justice and Tribunals in Wales (CAJTW) suggested: ‘It may be that elected members sometimes regard administrative justice as an issue for lawyers and theorists, divorced from the day to day concerns of their constituents’.⁵ This view still persists, and whilst we appreciate the significance of criminal and family justice, it is important to stress the Commission on Justice in Wales’ view that: ‘Administrative justice is the part of the justice system most likely to impact upon the lives of people in Wales’.⁶ Its association with public administration makes it perhaps harder to identify as a system of justice in Wales, but, conversely this means it is the system of justice over which Wales currently has the most devolved responsibility.
- 1.4. Lack of awareness of the full spectrum of administrative law principles and administrative justice institutions in Wales means that those designing and operating this significantly devolved system may not even be completely aware that they are designing and operating a justice system, and they may not always be held fully accountable in these roles.

¹ <https://ukaji.org/what-is-administrative-justice/>

² <https://www.thetimes.co.uk/article/administrative-justice-and-tribunals-service-comes-out-of-the-shadows-bqfpjjzsv5p>

³ Margaret Doyle and Nick O’Brien, *Reimagining Administrative Justice: Human Rights in Small Places* (Palgrave Pivot 2020).

⁴ Jeff King, *Judging Social Rights* (Cambridge University Press 2012).

⁵ CAJTW, *Administrative Justice: A Cornerstone of Social Justice in Wales – reform priorities for the Fifth Assembly* (March 2016) para 77: <https://gov.wales/administrative-justice-cornerstone-social-justice-wales>

⁶ Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) para 6.1.

- 1.5. In our engagement activities (noted in our methodology) we found that awareness of the administrative justice system remains limited in Wales. There is variable understanding of the role of the Assembly and Welsh Government in creating and reforming public administrative law (the law that governs public-body decision-making), and even less understanding that the mechanisms and institutions for challenging decisions form an architecture of justice. This lack of awareness extended from some legislators, to those operating redress mechanisms, people working within public bodies, and the general public. That said, people quickly understood the basis of the concept once introduced to it, considering it to be socially and politically powerful. The social and democratic value of administrative justice came out particularly strongly in our discussion with Plaid Cymru members at our fringe event on Justice in Wales, during their 2019 Spring Conference.
- 1.6. The Commission on Justice in Wales concluded that it is important for people to know who is responsible for justice policy and who is responsible for justice delivery, so they can hold them to account. It further stated that routes to accountability are not as clear as they could be in Wales; that the ‘system of administrative justice [is] undoubtedly difficult for individuals to understand and use’; and that the ‘current system of challenging public bodies in Wales is complex’.⁷ The system has developed ad-hoc and people generally do not know where to go to have their disputes resolved. Victoria Winkler of the Bevan Foundation has argued even more starkly that ‘it is not clear who takes administrative decisions in Wales’, and people ‘rarely protest because the whole system of public decision-making can be opaque and set against them’.⁸ We detected an evident, though admittedly hard to substantiate and quantify, sense that people in Wales are more deferential to public decision-makers. This combines with an ingrained assumption that justice is only about courts, judges, lawyers and the police. The central focus of political debate has done little to dispel this myth, though Assembly members have more recently stressed the importance of legal aid funded advice and assistance across a wide range of areas of law affecting people’s lives.⁹
- 1.7. An argument of our Report is that administrative justice provides a missing link or ‘bridge’ in Wales. This is because administrative justice has the potential to span a range of inter-connected concepts of increasing importance to Welsh society, politics and public administration. Crucially administrative justice also provides a means of addressing concerns that Wales is policy rich, but implementation poor in terms of innovations to improve public administration and protect people’s rights and entitlements. This is because administrative justice spans the measures for ensuring that public bodies and officials are held accountable. It also requires that the choice of accountability mechanisms should be principled and evidenced based, and that the operation of such mechanisms should be independently scrutinised.
- 1.8 The Commission on Justice in Wales has emphasised that administrative justice impacts on the daily lives of people in Wales more so than civil and criminal justice and has built up its recommendations by considering these impacts. We also follow this methodology from the ‘ground up’, guided by the principle that justice is at the heart of any system of democratic governance and that the needs of the people of Wales must be paramount.
- 1.9 We take the view that administrative justice necessarily expresses a political vision. As Margaret Doyle and Nick O’Brien put it ‘administrative justice touches the political fabric and fashions its design’.¹⁰ We conclude that developing mechanisms for enforcing rights and duties on behalf of

⁷ Commission on Justice in Wales, paras 5.56, 6.16 and 6.60 among others.

⁸ Bevan Foundation, ‘Where next for Social Justice’ (Cardiff, 15 November 2018)

⁹ See e.g., discussion of the Commission on Justice in Wales report, <https://record.assembly.wales/Plenary/6079>

¹⁰ ‘Reimagining Administrative Justice’ p.132.

individuals and groups, and ensuring accountability, are constitutional activities because they condition relationships between individuals (and groups) and the state. Administrative justice may say more, for example, about Wales' Changing Constitution, than the move to a reserved powers model, or the implications of Brexit, that have been considered as central to Assembly discussions.¹¹

1.10 We conclude that the administrative justice sector should be given more central and explicit attention in Wales; by Welsh Government, the Assembly and a range of other devolved Welsh authorities and institutions. It should be seen as on an equal footing with inter-related concepts of sustainability, well-being, equality (equity) and human rights. This would not require a significant shift in current political thought or administrative practice in Wales, but rather where possible and appropriate, aligning and integrating the concerns of administrative justice with existing (and developing) policies, frameworks, practices and oversight mechanisms. The account of administrative justice in Wales that forms the foundation of this Report is that proposed by CAJTW in its 2016 Report:

ADMINISTRATIVE JUSTICE IN WALES

A FUNDAMENTAL RIGHT

Everyone has the right:

- to be notified, either specifically or by public notification, of any administrative decision affecting them;
- to express views on or voice complaints about any such decision; and
- to appeal against or require a review of any administrative decision adversely affecting them.

And to that end:

Decision Making

- All legislation under which administrative decisions are made should be reasoned, unambiguous and coherent and its implications should be effectively communicated to the public, those who advise them, the legal professions and those whose role it is to administer the decisions
- All administrative decisions should identify the legislation under which they are made and should be lawful, reasoned, unambiguous, coherent, clearly communicated to those whom they affect and should indicate how they may be appealed or reviewed.
- All administrative decisions should be underpinned by integrity and good governance and should be made by those with the expertise and up to date knowledge and experience needed to make fair, accurate and informed decisions.
- All decision making and redress processes should be grounded in continuous improvement and learning, including from the outcomes of complaints and appeal processes.

¹¹ See for example, the Assembly Legislation, Justice and Constitution Committee consultation into 'Wales' Changing Constitution': <http://senedd.assembly.wales/mgConsultationDisplay.aspx?id=368&RPID=1016976081&cp=yes>

Systems and Procedures - All appeal and review systems and procedures should:

- include opportunities for reviewing decisions and for informal dispute resolution prior to any formal process of appeal, provided that the citizen's right to a fair and open appeal is not thereby impaired
- be prompt, accessible, independent, impartial and open
- be proportionate, efficient and effective
- demonstrate respect for human rights, equalities, sustainability and the needs of the most vulnerable
- ensure the interests of unrepresented parties are accommodated and that they are not disadvantaged.

Values and Behaviours

- Citizens' rights and needs should be treated with respect at all times
- Appellants should be kept informed throughout dispute resolution processes and enabled to seek resolution of their problems as expeditiously as possible
- All decisions, including decisions made on appeal or review, should ensure equal treatment of all citizens regardless of language preference between the English and Welsh languages.

2. Methodology

2.1 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 have also attended and presented at conferences in administrative justice, housing and education law and policy, and advice services. Research team members have actively engaged with a range of comparative European and international projects on administrative law, including codification. We held an expert meeting of academics within the Welsh law and administrative justice fields shortly following publication of the Report of the Commission on Justice in Wales.

2.2 Whilst we have completed extensive research into general administrative justice and administrative law, we have also built up our broader conclusions about administrative justice in Wales from two specific case-study areas: social housing and homelessness, and primary and secondary maintained education. We have been able to drill-down into the specific issues of law, policy and practical implementation facing these areas, and abstracted evidence, and matters that we can compare and contrast across the subjects. For each case study we held two main day-long stakeholder workshops for professionals including; judges, private and third 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; and more specialist participants from each field such as local authority staff, housing association staff and bodies representing school governors and head teachers. During these workshops we heard presentations from professionals and discussed the key administrative justice issues affecting each 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 conducted specific activities in each sector such as observing legal proceedings, holding specialist focus groups with sector professionals and with parents/carers of children with additional learning needs, a second set of workshops to gain

feedback on our digital maps of administrative justice in each sector and to take updates on issues affecting the field of law, policy and practice, alongside Freedom of Information Act requests and surveys.

3. Background to Administrative Justice to Wales

3.1 Attempts have been made to take a holistic look at the justice of delivering public administration, and related law and redress, stemming back to the 1950s and 60s. The terminology ‘administrative justice’ became more common place after a UK Administrative Justice and Tribunals Council (AJTC) was established. The AJTC was meant to ‘act as the hub of the wheel of administrative justice’, co-ordinating the various arms of the system. To aid the AJTC in this role the Tribunals Courts and Enforcement Act (TCEA) 2007 provided a definition of an ‘administrative justice system’, alongside rationalising England and Wales tribunals. 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.

3.2 The TCEA followed a 2000/01 review by Sir Andrew Leggatt,¹² which the UK Government also partially responded to in a 2004 White Paper, *Transforming Public Services: Complaints, Redress and Tribunals*.¹³ This included a chapter on ‘The Administrative Justice Landscape’ scoping out the institutions and procedures that could be classified as delivering administrative justice. The Government focused on pursuing what it referred to as Proportionate Dispute Resolution (PDR). For Government this was associated with improving the experiences of individual users of dispute resolution systems, whilst also prioritising costs and efficiency savings. From the AJTC perspective, as expressed in its *Principles of Administrative Justice*, PDR encapsulates public services standards, good governance values, rule of law attributes and human rights. CAJTW’s formulation, noted above, is a modern Welsh extension of these Principles, informed by considering European and international standards as well as domestic values.

3.3 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 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. It was succeeded in 2013 by 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.

3.4 CAJTW commissioned research from Bangor University in support of two objectives: to create a community of interest in tribunal reform and administrative justice issues in Wales which can be supported over the long term; and to provide advice, guidance and commentary that will continue to promote the development of the administrative justice system in Wales. Bangor University’s Report, *Understanding Administrative Justice in Wales*,¹⁴ mapped out which elements of administrative

¹² Sir Andrew Leggatt, *Tribunals for Users: One System, One Service* (March 2001).

¹³ UK Government, *Transforming Public Services: Complaints, Redress and Tribunals* (Secretary of State for Constitutional Affairs 2004).

¹⁴ Nason, *Understanding Administrative Justice in Wales* (Bangor University 2015): <http://adminjustice.bangor.ac.uk/documents/full-report.pdf>

justice have been devolved to Wales, what are the emergent underlying principles of a Welsh approach, and what are the key opportunities and challenges. Following an international conference, a book on *Administrative Justice in Wales and Comparative Perspectives* was published by University of Wales Press as part of its new Public Law of Wales Series.¹⁵ This examined Welsh matters both domestically and in contrast with other legal jurisdictions.

- 3.5 The research concluded that it was necessary to raise awareness of administrative justice in Wales as part of a broader account of social justice defining relationships between individuals and the state. This was seen as especially important due to specific characteristics of Wales such as its comparatively large public sector, political commitments, demographic make-up and the as yet limited development of its public administrative law sector and culture. The research found that the concerns of administrative justice in Wales have sometimes been considered as matters purely of public administration, rather than issues of justice for individuals and groups.
- 3.6 The research informed CAJTW's final 'Legacy' report. CAJTW concluded that administrative justice is of far greater significance than is often realised and that it is best understood as a cornerstone to social justice. Whereas the AJTC Welsh Committee had focused primarily on tribunal reforms, CAJTW's Legacy Report looked across the administrative justice landscape, producing 35 recommendations stressing that: 'Administrative justice is not only about citizen redress but also about learning lessons from what goes wrong and incorporating them into a vision of good public administration'.¹⁶ The Legacy Report also emphasised that 'good law and effective scrutiny' are key components of administrative justice, and that advice services are crucial to enabling people to navigate redress systems and understand their rights and entitlements.
- 3.7 Significant progress has been made towards implementing CAJTW's specific recommendations to improve the procedures and practices of Welsh tribunals, to ensure the independence of the Welsh tribunal judiciary, improve appointments processes and training, and establish judicial leadership through a President of Welsh Tribunals (PWT). This programme of reform continues with a Law Commission project, developed in consultation with Welsh Government, that will likely result in a draft Welsh Tribunals Bill.
- 3.8 Less ostensible progress has been made in terms of progressing CAJTW's broader administrative justice recommendations. For example, CAJTW recommended a more principled, consistent and coordinated approach to the development of redress mechanisms. Welsh Government responded that existing mechanisms though having developed ad hoc and in silos, are adequate on their own terms and that the cost versus benefits of a more coherent approach would need further investigation. Where CAJTW recommends better training on administrative justice for public officials, Welsh Government responds that existing training covers the breadth of law and public administration. Where CAJTW recommends that administrative justice oversight must continue, Welsh Government responds that there is no budget for this. These cautious responses are likely a result of the very small justice policy capability in the areas of civil and administrative justice within Welsh Government (fluctuating between three to four full-time staff).
- 3.9 Until very recently there has been no Minister (or Deputy Minister) within Welsh Government with specific responsibility for justice. Policy officials are reacting and responding both to developments in aspects of the reserved justice system that have particular impacts in Wales and providing information and advice to Ministers on issues raised by them. Administrative justice has

¹⁵ Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (UWP 2017).

¹⁶ CAJTW 'Legacy' Report, Foreword by Professor Sir Adrian Webb (CAJTW Chair).

not been at the top of the political agenda, although there has been interest in the Welsh tribunals where there is a clear route to reform via a Law Commission project.

- 3.10 During the launch of the Commission on Justice in Wales' report, its Chair Lord Thomas expressed his view that there would not be a need for a very significant increase in civil service resources in order for the Commission's proposals to be progressed, but rather that officials could work with outside expertise including legal professionals and Welsh University academics. Whilst we strongly support the co-working proposals, we suggest that an increase in Welsh Government personnel is also needed.

R1: We recommend thought be given to increasing the permanent staff of the Welsh Government Justice Policy Team.

R2: We recommend that Welsh Government Justice Policy Team retains a panel of academic experts from which to seek advice and research assistance on an ad hoc basis (similar to arrangements in place to provide rapid expert knowledge to Welsh Government in relation to the context of Brexit).

- 3.11 Political interest in administrative justice in Wales has begun to grow. In September 2018 a workshop on *Public Law and Administrative Justice in Wales*, was held at the National Assembly, hosted by the Counsel General for Wales, Jeremy Miles AM. Following the workshop, the matter of administrative justice was discussed during Counsel General's questions in Assembly Plenary (with contributions from AMs of different political parties).¹⁷ A session on 'Justice in Wales' was held at Plaid Cymru's spring conference in 2019, including a presentation and discussion of administrative justice and its impact on constituents. The activities of the Commission on Justice in Wales, as well as Sarah Nason's National Assembly Academic Fellowship on the Assembly's role in administrative justice have led to increased awareness and increased political cognisance.
- 3.12 The Assembly has also voted (by 42 votes to 7) to expand the remit and change the name of the Constitutional and Legislative Affairs Committee. Now be called the Legislation, Justice and Constitution Committee. This has been widely reported as allowing the Assembly to 'formally scrutinise justice matters for the first time in its history', perhaps demonstrating a lack of awareness of the Assembly's existing role in scrutinising administrative justice. Nevertheless, when discussing the Report of the Commission on Justice in Wales in Plenary, Mick Antoniw AM (Chair of the Assembly Legislation, Justice and Constitution Committee) argued:

We must also re-establish the link between social policy and the administration of justice. This Parliament has responsibility for children, social care, housing, social services, drug and alcohol policy, education, training and so many other areas. The administration of these services goes hand in hand with the legal system we operate. Poverty and social policy are key factors in the delivery of social and administrative justice that the separation of responsibility for devolved policy in these areas from justice makes absolutely no sense. They need to work and to develop hand in hand.¹⁸

- 3.13 We agree that the link between social policy and the administration of justice is crucial, and have argued in a previous Report (December 2018) that the current devolution settlement hampers Wales' ability to match its promotive rights-based approach to good administration with strong

¹⁷ Counsel General Questions (National Assembly for Wales, Plenary, 26 September 2018) <<http://record.assembly.wales/Plenary/5352#A45564>>.

¹⁸ <https://record.assembly.wales/Plenary/6079> para 494.

and effective rights to individual legal redress.¹⁹ Nevertheless, in this current Report we focus on what Wales can do to strengthen links between social policy and the administration of justice, largely in the areas of both social policy and administrative justice over which it already has full, or significant, devolved powers. It is first important to understand how people experience the administrative justice system in Wales, and what social policy in this context means for people's lives.

4. 'Peoples' Perspectives

4.1 In our reports on social housing and homelessness, and primary and secondary maintained education, we examine specific areas of substantive administrative law and dispute resolution. We have used these as case studies contributing to building up our wider recommendations. This subject specific activity has also enabled us to gain a greater appreciation of user perspectives and make these central to our research. In its 'Research Roadmap' the UK Administrative Justice Institute (UKAJI) preferred to focus on 'people' in the administrative justice system rather than 'users', noting that 'people' extends also to administrative decision-makers, and people operating administrative justice redress mechanisms.²⁰ Here we note some central issues raised by 'people' involved in our research.

*The 'Jagged' Edges of Devolution*²¹

4.2 Our participants stressed the difficulties of an administrative justice system where housing policy is devolved but where welfare benefits are not. For example, the welfare reforms introduced by successive UK Governments in 2012 and 2016 are key to mediating individuals' interaction with social housing and the type of support they can access. 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. The introduction of Universal Credit has had a significant impact on the social housing sector in the areas of Wales where the new benefit has been rolled-out. In the possession proceedings we observed at court in Caernarfon, a significant proportion were partially the result of delayed universal credit, or other problems with benefits, such as the Spare Room Subsidy. In areas where Universal Credit has been rolled-out, landlords in the Private Rented Sector are less likely to rent properties to benefit recipients, thus impacting on the demand for social housing in some areas of Wales, with a potential knock-on increase in the number of disputes over housing issues, such as allocation.

4.3 In education we regularly encountered a lesser understanding of the law relating to discrimination (non-devolved) than that relating to special educational needs (additional learning needs) (the latter being devolved) and a general lack of awareness of public sector equality duties. There was less activity in terms of raising awareness and training of non-devolved law relating to discrimination despite its crucial interaction in practice with devolved education law. The 'jagged edges' between devolved and non-devolved law and redress systems made it difficult for individuals to understand how to enforce their rights and to hold public bodies operating in Wales to account.

Administrative Decision-Makers

¹⁹ Nason, *Administrative Justice: Wales' First Devolved Justice System: Evaluation and Recommendations* (Bangor/ESRC IAA December 2018): <http://adminjustice.bangor.ac.uk/documents/AJWalesReportESRCDec18.pdf>

²⁰ UKAJI, *A Research Roadmap for Administrative Justice* (January 2018):

https://administrativejusticeblog.files.wordpress.com/2018/02/final-ukaji_research_roadmap_web.pdf

²¹ R Jones and R Wyn Jones, *Justice at the Jagged Edge?* (Wales Governance Centre 2019).

- 4.4 An issue raised across our research has been noting 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 the impacts of the decision-making role 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.
- 4.5 Our expert group in housing 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 decision-makers to be supported to make good decisions, by taking a range of factors into account and ensuring the whole process operates compassionately, fostering a broader administrative justice culture.
- 4.6 In education we heard that School Governors are the largest single unpaid workforce in Wales and there are concerns around balancing the need for compulsory training in some areas of their activity against the frequency with which more complex disputes might occur, and the impact that significant training commitments might have on people’s willingness to volunteer.

Partnership Working

- 4.7 We heard examples from housing where partnership working had helped local authorities make the best use of the available supply of housing and led to improved outcomes for people using services. However, our participants also suggested that more extensive change in this context 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 holistically. A significant issue highlighted by our research has been the extent to which partnership and collaborative working, including contracting out, shared services and framework agreements, make it very difficult for individuals to know who is actually taking administrative decisions that affect them, and thus which routes to redress they should follow if they are dissatisfied. The fact that redress routes can differ, often without much justification, depending on the type of body/individual making a decision, and the specific legislation underpinning that decision also further (and unnecessarily) complicates this picture.
- 4.8 True partnership working requires a more joined-up person-centred and/or family centred approach to public services provision. Particularly when administrative justice issues do not come neatly packaged, many concerns span across a range of issues; including most specifically housing, health, education and welfare benefits/social security. Public administration and routes to administrative justice should all seek to reflect this. This is encouraged in various Welsh

Government Guidance, but such does not extend specifically to considering decision making and routes to redress as matters of justice, and our research participants suggested the extent of any holistic approach varied across local authorities.

- 4.9 We found that local authorities are seeking to provide some basic information about different routes to challenge particular types of decision-making, but this does not tackle the issue of whether so many different routes to redress are really necessary, and/or whether it should be the individual's responsibility to try and navigate these (often without independent information/advice).

Legal Complexity

- 4.10 Legal complexity is a significant reason why people find it hard to challenge administrative decisions with which they are dissatisfied, and general reluctance to challenge also makes it hard for professionals to identify and progress claims that could help to clarify law and practice for the longer-term. Education law in Wales is extremely complex and fragmented across a broad range of devolved and non-devolved sources. The administrative justice landscape here involves a plethora of different bodies, with diverse legal sources setting out their powers and responsibilities.

- 4.11 We heard of a poor understanding of the law on behalf of those tasked to apply it, and that this could often result from lack of sufficient training, and the form of law (statutes and regulations that must be looked at 'as amended') alongside the complexity of navigating devolved and non-devolved sources.

Advice and Assistance

- 4.12 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.

- 4.13 We also heard that there's a sense of information overload in some areas, with significant information available (especially online) but not presented in a way that is straightforward to navigate, with different sources not connected together. This can be overwhelming for some users, and there are also concerns about the reliability of information provided.

- 4.14 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. Limited access to advice outside the main urban areas of South Wales remains a problem. Respondents also noted the complexity of the landscape, where public funding is available to challenge some aspects of decision-making but not to challenge other aspects with little justification as to why. 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 rights, including their rights to independent legal 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. Although the quality assurance schemes being developed by the National Advice Network could have some positive impact here, there were concerns, especially from the third sector, about the extent to which this more regulatory approach may be too 'one size fits all' and could cause problems for the many organisations where 'advice' is only a small part of their broader charitable purpose.

4.15 We heard that social media (particularly Facebook groups) are increasingly the forum where people go to seek advice, and there is considerable peer-to-peer activity, felt necessary (it is argued) to fill gaps in traditional provision through bodies such as CAB Cymru (which has experienced budget cuts and service reductions). Resolver has replaced CAB Cymru as the most visited online forum for advice for people in Wales. Advice providers likely need to develop agile means to engage with these forums, for example by having an ‘ask a lawyer’ online sessions through closed groups. Social media is also increasingly an avenue used to complain about public bodies, and this has implications for public body staff, as well as for the broader administrative justice redress process.

Decision-Making Process and Informal Resolution

4.16 It is also not always being made clear to people exactly ‘when’ formal decisions have been made (rather than when they are being given general information about their situation). There also seems to be some lack of clarity between information giving conversations and informal dispute resolution, with individuals feeling that they are pressured to ‘take what is on offer’ through an informal (but pressured) conversation, whereas a more formal review would have had more safeguards. There are also clear concerns about impartiality and independence when both information and advice services are arranged by the local authority responsible for initial administrative decision-making. Even where advice is provided by independent charities, when these are situated in local authority premises, and when their services have been procured (‘arranged’) by the local authority, there is a lack of confidence in their independence, or at least concerns over the appearance of independence.

Data

4.17 On the whole, local authorities do not collect the full range of data on the use of their dispute resolution mechanisms, including informal resolution, and the outcomes of these mechanisms. When data about dispute resolution is kept, this can be across a range of systems, not easily accessible as a means to future learning about the ‘quality’ of administrative decision-making.

Engaging People

4.18 Although there are genuine attempts, including those required or encouraged by legislation, to engage people as users of services, this is often through, and mediated by, representative organisations, rather than through direct engagement. There are very limited opportunities for individuals to engage in any meaningful way in the design of routes to redress in the administrative justice system.

Pathways to Redress

4.19 On accessibility of routes to challenge decisions in the administrative justice system, our research participant’s general view has been that even where the routes might be comparatively clear to lawyers or other advice providers and sector professionals such as initial decision-makers, they are not clear to the general public. Lack of awareness of routes to redress was given as a significant reason people did not challenge or found it hard to challenge administrative decisions, alongside legal complexity, lack of access to advice, and fear that the system is set against them.

4.20 In education, for example, our participants noted it is not uncommon to have tens of different bodies involved in the circumstances of a particular child (and their family), the highest single

example we counted was 47. This landscape is extremely difficult for people to navigate, and we also heard of people not being told the exact roles and responsibilities of people/institutions involved in their situation (despite their having asked to know). We also, however, heard of the difficulties (especially in housing) of people with many problems who would refuse the help offered by a range of organisations.

- 4.21 The initial route to redress on a particular issue may be straightforward, in that there will be no choice. But pursuing further redress may present choices that may be difficult to assess, especially considering the vulnerability of some individuals within the system. For example, whether dissatisfaction with a local authority regarding additional learning needs should go to the ombud or the Education Tribunal will depend very much on the reason for the challenge and the outcome being sought. Making the wrong choice could lead to missing a time limit for a tribunal or judicial review action. Similar issues are encountered in housing where the divide between a legal appeal and the backstop of judicial review is not clearly stated, and where there is access to legal aid funded advice for some issues relating to social housing allocation, but not for others. There are also questions about the costs and efficiency of running such a range of, sometimes unconnected, systems.

Dignity and Impact

- 4.22 Decisions within the administrative justice system have a significant impact on people's lives. Our participants noted the serious long-term effects of poor and incorrect administrative decision-making, this can lead for example to children being out of school for months and years, vulnerable people remaining homeless and unsupported, significant impacts on physical and mental health, family breakdown, and problems within the criminal justice system, we heard examples ultimately of individuals having taken their own lives after long-term engagement with a system they felt was set against them. The overall cost to society of poor administrative decision-making can be huge, both in terms of financial costs to the public purse, but also a denigration in social justice. It is important for us to voice our research participants' concern that overall the administrative justice system must treat people with respect for their individual dignity, it must not occasion more harm than it seeks to repair.

PART ONE: PUBLIC ADMINISTRATION AND ADMINISTRATIVE LAW

5. Public Administration and Social Justice in Wales

- 5.1 CAJTW refers to administrative justice as a cornerstone to social justice (something of great importance on which everything else depends). First Minister Mark Drakeford AM has described good administration as the first principle of social justice in devolved Wales; proposing a set of core principles including the value of good governance, an ethic of participation, and improving equality of outcome.²² This connection to substantive equality has remained evident since former First Minister Rhodri Morgan's 2002 'clear red water' speech where he argued that Wales should take a different approach to the politics of Westminster, noting: 'Our commitment to equality leads directly to a model of the relationship between the government and the individual which regards the individual as a citizen rather than as a consumer'.²³ As we note above, the dignity of the individual citizen should be a key consideration.

²² Mark Drakeford, 'Social Justice in a Devolved Wales' (2007) 15(2) *Journal of Public Finance and Public Choice* 171.

²³ Rhodri Morgan, speech to the National Centre for Public Policy (Swansea December 2002), online at: <https://www.sohealth.co.uk/the-socialist-health-association/sha-country-and-branch-organisation/sha-wales/clear-red-water/>

- 5.2 A 2016 Public Policy Institute for Wales (now Wales Centre for Public Policy) Report notes that post-devolution ‘the Welsh Government adopted a distinctive approach to public service delivery compared to that which was pursued in England. This centred on two key organising principles: “citizen centred services” and “collaboration rather than competition” between service providers’.²⁴ The Report goes on to conclude, however, that this has produced mixed results, noting that challenges facing public services in Wales as a result of fiscal and demographic pressures cannot be addressed without significant reform. The Report also identified a need for more robust evidence about how to incentivise change. Prior to this, the Final Report of the *Williams Commission on Public Service Governance and Delivery in Wales* (January 2014) considered some public service performance to be ‘poor and patchy’. It also suggested that there was, ‘a culture of defensiveness and passivity’ in some areas of Welsh public service.²⁵ Although satisfaction ratings with public services remain comparatively high, the 2017/2018 National Survey for Wales showed that satisfaction with health services (GPs and NHS hospital care) has been falling, as has satisfaction with education (with a marked decline in people’s satisfaction with secondary education provision). In the 2018/2019 Survey, 77% of people said they knew how to find what services their local authority provides and 69% of people were satisfied that good services and facilities were available in their local area (a small increase on the 68% score from 2017/18).
- 5.3 Until 2016/17 local authority public services performance was measured by National Strategic Indicator (NSI) data. A Welsh Local Government Association (WLGA) led task group developed a revised performance measurement framework that was ratified at the WLGA Council in March 2017. The revised framework of Public Accountability Measures (PAMs) provides an overview of local government performance and how it contributes to the national well-being goals. At a local level the framework is completed by the use of appropriate local performance measures, aligned to each authority’s own improvement/well-being objectives.²⁶ Under the previous NSI data, local authority performance was said to be improving against most indicators.
- 5.4 Nevertheless, the 2016 Public Policy Institute for Wales (PPIW) Report conclusion that there is a lack of systematic research on public service improvement, is probably still valid. The Report notes that public service is multi-dimensional including questions of cost, efficiency, effectiveness, equity, access, responsiveness, speed, accountability and transparency (many of these are also the concerns of administrative justice). Whilst public services across the UK may have been closely monitored for accountability purposes, insufficient use has been made of the data generated for learning and improving (again matters central to an administrative justice system). The PPIW Report also concludes that more thought needs to be given to understanding different frameworks for evaluating outcomes, in particular outcomes for individuals alongside understanding how a service operates as a whole. The Report specifically notes that:

Assessment of the Welsh model of public service delivery is hindered by a lack of comparable indicators, and there are too many overlapping accountability frameworks covering the same citizens and outcomes. Audit and inspection are costly and workshop participants argued that current regulatory systems are excessive, especially during a time of austerity.²⁷

²⁴ PPIW, *Improving Public Services: Existing Evidence and Evidence Needs* (2016) p.8.

²⁵ Williams Commission, *Commission on Public Service Governance and Delivery in Wales* (January 2014) : <https://gov.wales/sites/default/files/publications/2019-01/commission-public-service-governance-delivery-full-report.pdf>

²⁶ Welsh Local Government Association, *Public Accountability Measures (PAMs) 2019-20, Guidance for Local Authorities*: <https://www.data.cymru/SharedFiles/Download.aspx?pageid=30&mid=64&fileid=306>

²⁷ PPIW (n 24) p.8.

5.5 The Williams Commission had earlier recommended that the Assembly: ‘Review existing legislation to ensure that it simplifies and streamlines public-sector decision-making rather than imposing undue constraints on it or creating complexity; and either repeal such provisions or clarify their meaning and interaction’.²⁸ It is not clear to us at this stage of our research exactly what attempts have been made to review overlapping accountability frameworks, or to examine whether the compass of existing audit and inspection processes are excessive. It is also not clear whether there has been a review aimed at simplifying and streamlining legislation that applies to public decision-making in Wales. Indeed, significant new legislation and new accountability regimes have since been established.

5.6 Public administration in Wales is now on a path to a new overarching model with sustainability as a ‘central organising principle’. Under the Wellbeing of Future Generations (Wales) Act 2015 (WFGA) public bodies are under a duty to carry out sustainable development understood through the lense of well-being. WFGA defines seven well-being Goals; (1) a more prosperous Wales,²⁹ (2) a resilient Wales,³⁰ (3) a healthier Wales,³¹ (4) a more equal Wales,³² (5) a Wales of cohesive communities,³³ (6) a Wales of vibrant culture and thriving Welsh language³⁴ and, (7) a globally responsible Wales.³⁵ Public bodies must carry out sustainable development, which means improving the the environmental, social, economic and cultural well-being of Wales by taking action in accordance with the sustainable development principle and aimed at achieving the well-being goals. This action must include, but is not limited to, the setting and publishing of well-being objectives and steps that maximise contribution to the national well-being goals and then taking all reasonable steps to meet said objectives. Acting in accordance with the aforementioned sustainable development principle means that public bodies must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs. Acting in accordance with the sustainable development principle includes taking account of the following ‘five ways of working’ set out in the WFGA. These are:

- (1) long-termism: balancing short-term and long-term needs
- (2) integration: considering how the public body's well-being objectives may impact upon each of the well-being goals, on their objectives, or on the objectives of other public bodies
- (3) involvement: involving people with an interest in achieving the well-being goals, and ensuring that those people reflect the diversity of the area which the body serves
- (4) collaboration: acting in collaboration with any other person (or different parts of the body itself) that could help the body to meet its well-being objectives; and

²⁸ Williams Commission (n 25) Recommendation 7, para 2.37.

²⁹ An innovative, productive and low carbon society which recognises the limits of the global environment and therefore uses resources efficiently and proportionately (including acting on climate change); and which develops a skilled and well-educated population in an economy which generates wealth and provides employment opportunities, allowing people to take advantage of the wealth generated through securing decent work.

³⁰ A nation which maintains and enhances a biodiverse natural environment with healthy functioning ecosystems that support social, economic and ecological resilience and the capacity to adapt to change (for example climate change).

³¹ A society in which people’s physical and mental well-being is maximised and in which choices and behaviours that benefit future health are understood.

³² A society that enables people to fulfil their potential no matter what their background or circumstances (including their socio-economic background and circumstances).

³³ Attractive, viable, safe and well-connected communities.

³⁴ A society that promotes and protects culture, heritage and the Welsh language, and which encourages people to participate in the arts, and sports and recreation.

³⁵ A nation which, when doing anything to improve the economic, social, environmental and cultural well-being of Wales, takes account of whether doing such a thing may make a positive contribution to global well-being.

- (5) prevention: how deploying resources to prevent problems occurring or getting worse may contribute to meeting the body's well-being objectives, or another body's objective.³⁶

5.7 The Auditor General for Wales may carry out examinations assessing the extent to which a public body has acted in accordance with the sustainable development principle when setting Well-being Objectives and taking steps to meet them. The Future Generations Commissioner for Wales' role is to promote the sustainable development principle, to act as a guardian for the interests of future generations, and to assist public bodies in thinking about the long term and in working towards achieving the Well-being Goals. The Commissioner has various functions to encourage and promote good practice, including the duty to monitor and assess the extent to which public bodies are meeting their own well-being objectives and the power to carry out reviews and make recommendations.

5.8 An assessment of the impacts of WFGA on public administration is beyond the scope of this research and would also be premature. The Commissioner has set out some key findings in her October 2019 *Report on Progress towards the Well-being of Future Generations Act*.³⁷ These include: that whilst there are excellent examples of innovation brought about by WFGA, these do not always fit into the wider puzzle of an organisation's approach; Welsh Government has not sufficiently resourced implementation of WFGA; the quality of Well-being Objectives set in 2017/18 did not always meet the requirements of WFGA; and that whilst progress is being made towards meeting Well-being Objectives in some areas there is variation in how public bodies (particularly local authorities) are applying the legislation.

5.9 In terms of the WFGA approach, a Working Group set up under the Welsh Government's Gender Equality Review (GER) initiative found that the reflexive learning encouraged by responsive law like WFGA (law seeking to promote cultural change in public bodies) has not yet been significantly established in Wales across well-being and equality contexts, with the Working Group considering reflexivity to be 'missing or insufficiently realised'.³⁸ In the Foreword to his Report, *Reflecting on Year One: How Have Public Bodies Responded to the Well-being of Future Generations (Wales) Act 2015?* The Auditor General noted the risks of well-being duties becoming another tick-box exercise. Stating that:

for some, the Well-being of Future Generations Act is perceived as 'another thing to do'. Unless those bodies and individuals adopt a mind-set where they see sustainable development as an approach that can help them address major budget and service challenges, rather than an additional burden, they will be unable to make the most of the opportunity the Act affords.³⁹

5.10 There remains some debate around which of the duties under WFGA are enforceable by way of individual court actions (judicial review in the Administrative Court), or if the main means of 'enforcement' is through the various review powers of the Future Generations Commissioner and Auditor General for Wales. David Gardner has drawn connections between WFGA and

³⁶ WFGA, s.5.

³⁷ Future Generations Commissioner, *Progress towards the Well-being of Future Generation Act: Overall Findings* (October 2019): <https://futuregenerations.wales/wp-content/uploads/2019/12/FINAL-Progress-towards-the-Well-being-of-Future-Generations-Act.pdf>

³⁸ Dr. Alison Parken, *The report of the Well-being and Equality Working Group: Improving Well-being and Equality Outcomes: Aligning processes, supporting implementation and creating new opportunities* (July 2019) p.10: <https://chwaraeteg.com/wp-content/uploads/2019/09/Aligning-and-Improving-Outcomes-for-Well-being-and-Equality.pdf>

³⁹ Wales Audit Office, *Reflecting on Year One: How Have Public Bodies Responded to the Well-being of Future Generations (Wales) Act 2015?* (May 2018): <https://www.audit.wales/system/files/publications/reflecting-on-year-one-2018-english.pdf>

administrative justice by suggesting that the Five Ways of Working, and perhaps even the Well-being Goals themselves, could be incorporated into a legally enforceable Administrative Law Code for Wales.⁴⁰ The Goals could be taken as central considerations for public administration and the Ways of Working as standards of good administration that seek to raise the bar in Wales above and beyond the traditional judicially developed general principles of administrative law (which Gardner also argues should be codified in Wales). The Ways of Working of ‘collaboration’ and ‘involvement’ in particular can be seen as augmenting existing requirements of common law procedural fairness. We return to the relationship between WFGA and administrative law in more detail below. However, for now our reflection is that WFGA, and well-being in particular, provides a precedent in Wales for a political commitment to promote concepts that can, at first look, appear broad and abstract, that (again at first look) appear to require balancing between competing principles, and where realisation in practice is spread across law, politics and administration. Administrative justice is a similar concept, that could be realised in a similar way, with political will.

5.11 Whilst principles are important, more so perhaps are the people managing, delivering and advising on access to public services, law and redress. Understanding more about the people involved in the administrative justice sector is a central element of the UK Administrative Justice Institute (UKAJI) Research Roadmap.⁴¹ In our engagement workshops it was noted that the approx. 1,250 local councillors in Wales are often a first port of call for people concerned with the decision-making of a local authority in relation to issues such as education, health, housing and other local services and matters. A number of workshop participants were, or had been, councillors themselves and had experienced this first-hand. Assembly Members too are crucial first points of contact for many people who feel that administrative decisions, taken in respect of themselves or family members, have been wrong, unfair or unjust. Our research participants considered some AMs to be particularly hard working and effective when it comes to raising awareness of their individual and community concerns, though they were less clear about whether and how this involvement could lead to longer-term solutions.

5.12 Neither local councillors, nor Assembly Members, are given any specific training on administrative justice redress mechanisms, including how to sign-post people to appropriate mechanisms, or to provide them with assistance and support in doing so. However, they may receive specific subject matter training, for example when new legislation affecting local authority powers is enacted (such as the Housing (Wales) Act 2014). Our research participants were clear that AMs and Councillors play a vital role, but that more training on administrative justice is needed.

5.13 Many of the individual institutions in the administrative justice system spend considerable effort in sign-posting people to other parts of that system. For example, the Future Generations Commissioner has noted that, despite her lack of individual case-work function, 40% of the letters she received during 2019 asked that she ‘intervene in some way or another in individual decisions, mainly planning and transport but also about opening of fast food outlets around schools, loss of local amenities or to stop the roll out of 5G’; and that elected representatives (AMs and Councillors) also ask her to get involved in individual cases.⁴² We also found examples in the PSOW casebook (particularly in housing) where an aspect of the complaint concerned the local authority’s failure to properly sign-post to administrative justice mechanisms, including a failure to properly sign-post to

⁴⁰ David Gardner, ‘An Administrative Law Code for Wales: Benefits to Reap and Obstacles to Overcome’ (2019) 40(3) *Statute Law Review* 273.

⁴¹ UKAJI, *A Research Roadmap* (n 20).

⁴² See Future generations Commission response to questions from the Assembly Equality, Local Government and Communities Committee (6 December 2019): <http://senedd.assembly.wales/documents/s96601/ELGC5-35-19%20Paper%209.pdf>

its own internal procedures. Sign-posting was seen as especially important role for our research participants, noting the time limits for tribunal appeals and judicial review that can be missed if people are not aware of these processes.

5.14 Some of our research participants also noted that whilst Councillors and Assembly Members are key sources of providing advice and assistance in the public sector, they are not subject to any oversight or regulation in those particular roles. In general, our research shows how important it is to consider the specific contexts and circumstances under which individuals making administrative decisions, and those reviewing them, are working. For example, in the area of social housing, that decision-making staff might themselves be in insecure or temporary employment and living in (or applying for) social housing, staff are not always well supported in understanding the broader legal context to their decision-making and can confuse law and policy. We heard in education that whilst there is a perception (including among lawyers and academics as well as some parents/carers) that school exclusion panels convened by local authorities do not operate sufficiently independently, transparently (and perhaps ‘judicially’), nevertheless individuals involved are said to often act with professionalism, and to put significant time into understanding their own roles, the individual disputes before them, and explaining all this to the parents/carers. It is also worth pointing out that School Governors are the largest unpaid workforce in Wales.

5.15 An administrative justice culture should be instilled from the ground up with the daily decision-making of officials in local authorities, health boards, housing associations and other public services providers. But this must also be driven and encouraged institutionally from the top down through each level of the system, as we discuss below in relation to leadership. In our engagement workshops we demonstrated a prototype of our ‘Artemus’ App (a digital resource for understanding the administrative justice network in Wales and helping map out individual pathways to dispute resolution within it). This was received positively by participants including officials from local authorities, housing associations and school governing bodies, who considered that it could be used as a resource for training of front-line officials taking decisions within the administrative justice system, as well as for those providing advice and assistance in various social welfare contexts. We suggest that this App can also be used for training Assembly Members and local councillors, as well as providing a long-term resource.

5.16 Leadership in Welsh Government and broader public administration is also important. As the Justice Commission notes ‘it is difficult to discern a coherent leadership structure for justice within the Welsh Government and the Assembly’ and that this can ‘adversely affect policy formation and delivery’.⁴³ Following the Commission’s Report, a Cabinet Sub-Committee has been established including the First Minister, Counsel General and the Deputy Minister and Chief Whip (who supports the work of the First Minister). Improved leadership within Government and the Assembly on administrative justice could also catalyse improved leadership, and ownership, of the concerns of administrative justice across the public sector. We also believe that CAJTW’s *Administrative Justice Principles*, could form the basis of training and awareness on administrative justice, that could for example be incorporated into training on *Public Service Values and Leadership Behaviour* and other training modules and resources delivered by Academi Wales.

R3: We Recommend that there should be training on administrative justice, in particular CAJTW’s Principles of Administrative Justice for Wales, for Assembly Members, Assembly Commission staff and local councillors in Wales. This could be delivered

⁴³ Commission on Justice in Wales, paras 12.27 and 12.28.

by, or in association with, members of the UK Administrative Justice Council Academic Panel, other subject area experts, and Welsh Government Justice Policy Team.

R4: We recommend that training and awareness of administrative justice be incorporated into training on *Public Service Values and Leadership Behaviour* and other training modules and resources delivered by Academi Wales.

R5: We Recommend that the ‘Artemus’ Digital Map of administrative justice can be utilised as a training resource subject to funding and/or other support to ensure its sustainability.

5.17 The structure of public administration is also key. The agenda of public service reform in Wales has focused on proposals that some Welsh local authorities are too small to perform effectively, with current policy now based on increasing and improving regional working and considering potential voluntary mergers. The Local Government and Elections (Wales) Bill includes a general power of competence, a power for local authorities to make an application to merge voluntarily, powers to facilitate regional working through corporate joint committees and seeks to introduce a new system for improving performance and governance based in self-assessment and peer review. The Bill also seeks to improve public participation in local democracy, lowering the voting age in local elections to 16 and 17 year olds, and allowing principal councils to choose their voting systems for local elections. The provisions of this Bill should be more fully examined in relation to potential effects on administrative justice, and how reformed accountability mechanisms might interact with the administrative justice environment. Passage of the Bill and implementation can be used as an opportunity to raise awareness of the administrative justice context and to incorporate training on redress mechanisms and institutions into a vision of increased public participation.

5.18 We note the importance of working alongside existing Government policy priorities in public administration and public services reform, as well as in human rights, well-being and equality, and that strategic development of the administrative justice sector in Wales, as well as training packages about it, should where possible be aligned with existing and future planned initiatives. In the following sections we consider how administrative justice aligns with key policy concerns of Welsh Government and Assembly.

6. Administrative Justice and Related Concepts: Social Justice, Human Rights, Equality and Well-being

6.1 Following the 2018 *Public Law and Administrative Justice* Workshop, the Counsel General for Wales emphasised the connection between administrative justice, social justice and equality, stressing:

we can expect that administrative decisions lead us to a more equal Wales...so that decisions taken by tribunals and by commissioners and by ombudsmen within the administrative justice system lead us to that outcome...⁴⁴

6.2 As well as contributing to equality of outcome for individuals, administrative justice recognises structural inequality and seeks to alleviate this through a principled approach to public administrative law, and fair, proportionate and accessible routes to redress.⁴⁵ Learning from the administrative justice system (e.g., through the investigations of ombuds and commissioners, and

⁴⁴ Counsel Generals Questions 26 September 2018: <http://record.assembly.wales/Plenary/5352#A45564>

⁴⁵ ‘Reimagining Administrative Justice’ (n 3).

data from tribunals and courts) can also help better identify the extent of structural inequality and the comparative success or failure of government policies designed to address this.

- 6.3 Striving for some degree of equality of outcome fits with particular interpretations of social justice, and of socio-economic rights especially. On this account socio-economic rights are understood as collective community provision, compared to more liberal individualistic civil rights. In this context, administrative justice helps provide the mechanisms and procedures to balance between collective interests and individual rights.
- 6.4 We suggest that there are two philosophical accounts of social justice that are particularly relevant to administrative justice. First, that of John Rawls who argued that since many inequalities within society are beyond people's control, then the state has some responsibility to redistribute wealth at least in terms of basic social goods.⁴⁶ The precise arrangements are a matter of political and legal negotiation but must work to the advantage of the least advantaged in society; administrative justice has a role to play in enabling that negotiation, and eventual distribution, to take place in a fair and transparent way. Rawls also argued that guiding principles of justice should be those that we would sign up to behind a so-called 'veil of ignorance', that is without knowing about any of our attributes or characteristics and where we might find ourselves within social structures. We might learn from Rawls and propose that a fair system of administrative justice (law, redress and learning) would be one we are prepared to sign up to behind a similar veil of ignorance (we return to this below as a means to test the fairness and justness of the current Welsh system).
- 6.5 Ronald Dworkin shares with Rawls (and with the mainstream of Welsh politics) the belief that social justice will ultimately flow from the principle of equality. For Dworkin this means that the state must treat people with equal concern for their welfare and equal respect for their individuality.⁴⁷ Administrative justice enables us to have a broader practical discussion about how that balance has been reached in Wales.
- 6.6 In Wales equality is regularly connected to respect for human rights. Human rights treaties often refer to equality as a fundamental principle, and human rights should be secured without discrimination, but human rights law also provides more detail in establishing legitimate targets for public policy. Human rights law seeks to prioritise securing and respecting human dignity and autonomy for all as a core of responsible government. Whilst equality provisions set general frameworks for the conduct of public authorities (as part of procedural administrative law), human rights are more likely to add to people's substantive legal rights and entitlements. As Simon Hoffman notes human rights 'speak directly to fundamental human needs as policy objectives, including in areas such as housing, education, social care and health care'.⁴⁸ In examining the relationship between human rights and equality, Hoffman gives particular consideration to the impending activation in Wales, of the socio-economic duty under the Equality Act 2010. This states that when making decisions of a strategic nature about how to exercise its functions, a relevant authority, must have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage. Hoffman stresses that whilst giving effect to the duty in Wales would require more proactive consideration of how to reduce inequality when policy is decided, this does not in itself establish particular policy priorities. He contrasts this with human rights which have specific objectives to help policy makers identify priority areas as the focus for public policy. In short, he states: 'Equality tells us very little

⁴⁶ John Rawls, *A Theory of Justice* (Harvard University Press 1971).

⁴⁷ See e.g., Ronald Dworkin, *Justice For Hedgehogs* (Harvard University Press 2011).

⁴⁸ Simon Hoffman, *Human Rights, Equality and Well-being* (Bevan Foundation 2019):

<https://41ydv11cuyvlonsm03mpf21pub-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Briefing3-FINAL.pdf>

about the standard of provision which governments are expected to achieve'.⁴⁹ Ultimately equality and human rights do not necessarily address the same issues. Equality law is concerned with the interests of those with protected characteristics, in the sense of preventing discrimination and promoting equality of opportunity. That said, we discuss below how Welsh soft-law guidance (part of administrative procedure law) could shift Wales to a more substantive, equality of outcome, equity-based approach.

6.7 The related concept of well-being is not deployed in human rights treaties, it is traceable to the agenda on sustainable development and UN Sustainable Development Goals. Hoffman notes that international human rights can provide anchorage for sustainable development; a point of focus and clarity for action. In turn, sustainable development can contribute to the realisation of human rights, especially to benefit disadvantaged communities. The Social Services and Well-being (Wales) Act 2014 (SSWBA) attempts to define well-being by listing different examples of how this is to be achieved, and also refers to 'securing rights and entitlements' as part of promoting well-being. In WFGA, while well-being is not defined, but it is encapsulated by the four dimensions of well-being - cultural, social, economic and environmental - and the seven national Well-being Goals. For example: 'a prosperous Wales' can link to social rights to education and work; 'a healthier Wales' links to the right to highest attainable standard of health; 'a Wales of vibrant culture and thriving Welsh language' links to Welsh language rights (and minority language rights in international treaties). Each of these examples in turn links to a particular pathway for protecting relevant rights, and resolving disputes about their applicability and protection, through the administrative justice system.

6.8 Administrative justice as 'network' of principles and values, as well as specific laws, procedures, accountability, enforcement, redress, and oversight mechanisms, is inescapably connected to human rights, equality and well-being in numerous ways, both procedural and substantive. However, the Commission on Justice in Wales has argued that whilst:

Wales has far sighted policies on future generations, sustainability, and international standards on human rights. These are, however, not integrated with the justice system. The distinctive legal framework being developed to underpin these policies, including the creation of independent public officers whose role is to promote and protect rights, is not aligned to the justice system.⁵⁰

6.9 The Commission does not define the two key terms of not 'integrated' with and not 'aligned' to the justice system, but it does go on to say that Wales lacks sufficient machinery for implementation of its law through courts and tribunals (suggesting that the small devolved tribunal judiciary only adds to fragmentation and complexity). The Commission further concludes:

The Future Generations Act has raised questions whether (1) the principles are purely aspirational and therefore without a mechanism for enforcement, or whether (2) the principles give rise to duties enforceable by administrative measures through the Future Generations Commissioner or Auditor General for Wales, or whether (3) the principles give rise to duties which are justiciable and directly enforceable by the courts.⁵¹

6.10 The Justice Commission's view may be that policies on future generations, sustainability and human rights are not integrated with the justice system as there is as yet no example of direct incorporation of international norms, or of domestic legislative enactment in Welsh law, that

⁴⁹ *ibid* p.3.

⁵⁰ Commission on Justice in Wales, para 12.21.

⁵¹ Commission on Justice in Wales, para 6.11.

provides individuals with a specific cause of legal action to a court or tribunal for breach of a right or principle. The Commission's implication is that it is lack of devolved responsibility for courts and most tribunals that could be the main reason why enforcement of rights and sustainability principles is not through specifically enforceable and justiciable legal rights. However, our research suggests rather that the decision not to incorporate, or not to provide for justiciable legal rights to redress, may be equally a matter of policy choice.

6.11 The view that rights and sustainability principles are not integrated or aligned with the justice system followed by express reference to lack of control over court machinery suggests that the Commission on Justice in Wales might have taken a narrow interpretation of administrative justice. As we have conceptualised it, an administrative justice system includes a range of bodies other than courts and tribunals, most specifically ombuds, commissioners, auditors and regulators. The Commission might only have in mind courts and tribunals as constituting the justice system. For example, when it states that 'the creation of independent public officers whose role is to promote and protect rights, is not aligned to the justice system' it might be implicitly concluding that these 'independent public officers' (which we can assume means commissioners, ombuds and regulators) are not themselves part of the justice system. When stating that they are not 'aligned' to the justice system there may also be some suggestion of insufficient legal oversight of the public officers themselves.

6.12 'Integration' can also be taken to refer to a mix of different approaches (some traditional legal approaches, and some not) that intermingle and work well together in order to improve the overall effectiveness of administrative justice. 'Alignment' can mean the placing, positioning or adjusting of parts or forces in relation to one another in a more effective and efficient way. We believe it is better to understand integration and alignment in these latter ways, and that such is more in tune with the Justice Commission's commentary about the need to take a more rational and coherent approach to administrative justice. Our point is that rather than seek fundamental change, we should strive to align and integrate the idea of administrative justice within existing frameworks of Welsh administrative law, human rights, equality, well-being, redress mechanisms and institutions, public administrative practices, and oversight and accountability, including political scrutiny. We should not necessarily align human rights and sustainability to a traditional court focused account of justice.

Welsh Administrative Law

6.13 CAJTW stressed that well-made law is essential to administrative justice, and the Commission on Justice in Wales concluded that Welsh substantive administrative law is the area with the most potential for short-term divergence from English law. This can be seen in substantive areas such as housing and education covered in our individual subject matter reports. However, administrative law more broadly is usually said to be dominated by general principles developed by the courts (non-devolved England and Wales common law) providing a framework for public administration across the spectrum of executive and administrative activity.

6.14 Administrative lawyers have tended to focus on the purported systematisation and continual development of common law principles, meaning there has been a relative lack of emphasis on the increasing body of statutory administrative procedure law.

6.15 The specific statutory scheme in the background to most tribunal and court cases plays a major role in legal reasoning, despite that role sometimes being overlooked. When approaching difficult legal questions concerning the proper approach to judicial review, the central focus of the Administrative Court will usually be thinking carefully about the policy goals underpinning relevant

legislation so that these are instrumental to shaping the approach to review ultimately deployed. As Harlow and Rawlings note in practice:

Far from the Victorian prototype of the common law ‘supplying the omission of the legislature’ in sparse statutes, it is commonly a case of judges navigating, evaluating, and commenting on, whole thickets of legislatively sanctioned administrative procedures.⁵²

6.16 The inevitable statute-centricity means judicial review is relatively weak in practice as a mechanism for controlling administration. It offers a framework through which public bodies can be held to account, but provides little opportunity for expanding upon politically determined standards of administration.

6.17 That administrative law is far more statute-based than common perceptions suppose, also explains why Welsh administrative law is distinctive from English administrative law, and increasingly so. Many of the distinctive policy choices in health, housing, education and planning for example, mean that administrative decision-making in Wales is governed by legislative frameworks that differ from English frameworks. We argue below that the potential codification of these subject-matter legislative frameworks provides an opportunity to clarify and consolidate scattered and duplicated provisions relating to administrative procedure, administrative decision-making standards, and redress mechanisms.

6.18 In addition to subject-matter specific law in areas such as housing and planning, Wales has also developed an umbrella of general administrative procedure law that applies either to all ‘devolved Welsh authorities’ (a term defined in the Wales Act 2017), to a large number of them, or to specific sectors, when undertaking all or some of their activities. The growth of general administrative procedure law has also been witnessed across the UK, and within European legal jurisdictions and the EU legal order. However, the Welsh variant has distinctive characteristics, in particular it is more specifically anchored in Welsh policies relating to human rights, well-being and equality.

6.19 The proceduralisation of the administrative state in the UK, on the other hand, is most often associated with so-called ‘New Public Management (NPM)’; designed to reimpose political control over public administration and to reorganise bureaucracy and push it into self-control through the use of managerialist methodology. NPM emphasises procedural tools at various stages of the administrative process; from standard setting, benchmarking and the setting of targets and performance indicators, to cost effectiveness analysis, multiple impact assessments and consultations, compliance codes, measuring impact and monitoring and supervision techniques such as inspections and value for money audits. Risk-analysis has also been increasingly prominent with emphasis on cost-effectiveness especially. The use of ‘impact assessments’ has grown extensively; and has also been influenced by increasing concern for human rights values and principles, including equality. Use of these kinds of impact assessments is more prolific in Wales than in any of the other UK jurisdictions.⁵³ There has also been an expansion of the so-called regulatory state, with new regulatory bodies established, and again this is an area where there have been significant developments in Wales.

6.20 Whilst the NPM association with cost-effectiveness (more market-based and consumerist approaches to public administration) might not be so prevalent in Wales; there is nevertheless a high degree of emphasis on managerialism, rights and equality based impact assessments and

⁵² Carol Harlow and Rick Rawlings, ‘Proceduralism and Automation: Challenges to the Values of Administrative Law’ in E Fisher and A Young (eds), *The Foundations and Future of Public Law (in honour of Paul Craig)* (OUP 2019) p.11-12.

⁵³ Dr Clive Grace OBE, *Reducing Complexity and Adding Value: A Strategic Approach to Impact Assessment in the Welsh Government* (PPIW 2016).

regulation, that has led to an evident increase in dispersed administrative procedure norms across primary and secondary legislation and increasingly within guidance and other soft-law sources. Elsewhere Nason has referred to this growing body as a ‘new administrative law’ for Wales, which has its background in broader global trends responding to issues as diverse as international human rights standards, globalisation, decentralisation, and privatisation.⁵⁴

6.21 Some of the key sources of this ‘new administrative procedure law for Wales’ include those listed below:

Enacted

The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011
Rights of Children and Young Persons (Wales) Measure 2011
Welsh Language (Wales) Measure 2011
Social Services and Well-being (Wales) Act 2014
Well-being of Future Generations (Wales) Act 2015
Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015
Public Health (Wales) Act 2017

Proposed

Local Government Elections (Wales) Bill (where a right to adequate housing is proposed in statutory guidance)
Proposed Social Partnerships Bill

Administrative Justice and Welsh Frameworks on Sustainability, Well-being, Human Rights and Equality

Equality

6.22 We noted above the Counsel General’s view that we should expect individual decisions in the administrative justice system to lead us to a more equal Wales. Equality law in Wales begins with the UK Equality Act 2010 which introduced a Public Sector Equality Duty (PSED) on public authorities to have due regard to the need to: eliminate unlawful discrimination; advance equality of opportunity between people who share a protected characteristic and those who don’t; and foster or encourage good relations between people who share a protected characteristic and those who don’t. A specific body of case-law has developed around the due regard duty. The upshot of the case law is that public bodies will be deemed to have met their equality duties by demonstrating ‘due regard’ to process, whether or not inequalities have been reduced. As Lord Dyson MR has expressed it: ‘The PSED challenge is not concerned with the lawfulness or even the adequacy of the solution that was adopted. It is only concerned with the lawfulness of the process’.⁵⁵ According to Elias LJ, it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that ‘there has been a rigorous consideration of the duty’.⁵⁶

6.23 There are more exacting Wales Specific Equality Duties (WSED) (noted in Annex One to this Report). These include, for example, to publish ‘equality objectives’ or to provide reasons for not doing so. Authorities are also required to comply with ‘engagement’ provisions and have due regard to ‘relevant information’ when considering and designing their equality objectives. Witnesses to a 2016 House of Lords Select Committee on the Equality Act 2010 and Disability,

⁵⁴ Nason, ‘The “New Administrative Law” of Wales’ [2019] *Public Law* 703.

⁵⁵ R (MA) v The Secretary of State for Work and Pensions [2014] EWCA Civ 13 (21 February 2014), para 92.

⁵⁶ R (Hurley and Moore) v Secretary of State for Innovation, Business and Skills [2012] EWHC 201 (Admin), paras 77-78.

examining *The Equality Act 2010: the impact on disabled people*,⁵⁷ gave evidence that the Welsh duties have had more positive impact than their English counterparts. Rebecca Hilsenrath (Chief Legal Officer, Equality and Human Rights Commission) stated that ‘the specific duties give greater clarity in relation to the work of public authorities...We found that their consultation and engagement work had improved, and that was including the disability sector’.⁵⁸ This clarity had reduced ‘the likelihood of under compliance or the tendency to over-comply due to uncertainty about what compliance means’. The charity Mind also reported that the Welsh approach had ‘led to better outcomes and a more embedded approach to equality’.⁵⁹

6.24 Despite this progress, the 2018 EHRC Report, *Is Wales Fairer?* found significant challenges alongside some improvements. It found improvement in education, work and political and civic participation, it concluded however:

Deepening poverty in Wales is leading to an even starker gap in the experiences and opportunities of people born into different socio-economic backgrounds. Our findings show that this gap has widened in particular for women, disabled people, and some ethnic minority groups.⁶⁰

6.25 Though the Welsh approach may have advantages over its English counterpart, it is worth noting that according to an Administrative Court Lawyer for Wales, the WSEDs are rarely raised in the Court, and when they are this is as a secondary, and apparently poorly argued ground. The duties are not translating into specific individual redress, which could bolster public body accountability.

6.26 A recent report of a Working Group convened as part of a Welsh Government Gender Equality Review (GER) concluded that equality legislation applicable in Wales ‘is premised on process compliance’ and that as such monitoring and scrutiny is often also process led. It noted evidence in relation to the PSED ‘that public bodies do not always translate process into setting ambitious objectives or taking action’.⁶¹ The Working Group accepted that the PSED has not provided anticipated improvements in equality and specifically that ‘process-led compliance focused duties have not prompted sufficient subsequent action’.⁶² The Group noted that an upcoming review of the WSEDs should be used as an opportunity to strengthen outcome-based compliance.

6.27 The House of Lords Select Committee concluded that the specific equality duties in Wales [and also in Scotland] better met the then central Government’s aim of outcome focussed transparency. The Committee endorsed an approach recommended by The Discrimination Law Association and the Law Society, seeking to ensure that the duty would not only require informed consideration of equality impact but actual steps towards the elimination of discrimination, the advancement of equality of opportunity and the fostering of good relations. This involves supplementing the concept of ‘due regard’ with a provision stipulating that:

To comply with the duties in this section [section 149 of the Equality Act] a public authority in the exercise of its functions, or a person within subsection (2), in the exercise

⁵⁷ House of Lords Select Committee on the Equality Act 2010 and Disability, Report of Sessions 2015-16, *The Equality Act 2010: the impact on disabled people*: <https://publications.parliament.uk/pa/ld201516/ldselect/ldseqact/117/117.pdf>

⁵⁸ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/equality-act-2010-and-disability-committee/equality-act-2010-and-disability/oral/18810.html>

⁵⁹ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/equality-act-2010-and-disability-committee/equality-act-2010-and-disability/written/21150.html>

⁶⁰ EHRC, *Is Wales Fairer? The state of equality and human rights 2018*, p.3:

<https://www.equalityhumanrights.com/sites/default/files/is-britain-fairer-2018-is-wales-fairer.pdf>

⁶¹ Report of the Well-being and Equality Working Group (n 38) pages 12 and 45.

⁶² *ibid* p.17.

of its public functions, shall take all proportionate steps towards the achievement of the matters mentioned in (a), (b) and (c) in subsection (1).

- 6.28 A duty to take proportionate steps towards the progressive realisation of equality might also better reflect the requirements of the UN International Covenant on Economic, Social and Cultural Rights. This formulation also comes closer to the principle of proportionality as applied to determine whether a *prima facie* interference with human rights can be justified.
- 6.29 The GER Working Group makes recommendations for Wales that could support reflexive practice and organisational cultural change, also recommending an expanded role for regulatory bodies. In part this links to emphasis on the responsive nature of the legislation, with the Working Group proposing that ‘regulators and inspectorates must have a more prominent role in assessing how equality and well-being is being promoted through policy delivery’.⁶³ The idea here being that regulators/inspectorates can be involved in promoting cultural change whereby equality and well-being are central to the core functions of public bodies, rather than being seen as ‘bolt-ons’, or retrospective policy checking norms. However, the Group does not suggest that regulators and inspectorates should stop performing or down-play the specific functions of monitoring and scrutinising compliance with duties. Indeed, the Group suggests that legally enforceable due regard duties should be strengthened, including by extending their coverage (perhaps through either statutory or non-statutory guidance) to enable public bodies to be held to greater account for the substantive outcomes of their policies and decisions. The Working Group considered that the current WSEDs could be strengthened by being re-phrased in a more ‘action orientated’ manner and by including better monitoring for contributions to improved outcomes. For example; by enacting a new specific ‘duty to require public bodies to consider’ the most severe inequalities as priorities; by requiring public bodies to apply the Five Ways of Working to setting equality objectives; a new ‘mainstreaming equality duty’ that would require public bodies to show how all the equality duties (general and specific) have been mainstreamed by becoming integral to structures, behaviours and culture.
- 6.30 However, many of these recommendations cannot be properly backed up with sufficient access to legal challenge to enforce them, without changes to improve the accessibility of judicial review, and/or the supplementation of judicial with additional specific routes to review or appeals such as in the county courts or devolved Welsh tribunals. The judicial review procedure alone is unlikely to function as a strong means of holding public bodies to account for compliance with WSEDs. Many of our research participants were concerned about a perceived lack of awareness within local authorities about the applicability of the PSEDs more generally, especially in the context of disability discrimination. In areas where Welsh law has diverged from English law there is often awareness raising and training activity relating to the new Welsh substantive administrative law, such as in special educational needs (becoming additional learning needs), but little focus on how this relates to non-devolved issues such as disability discrimination in this context. Promoting good policy and decision-making is important, but there is a real lack of access to enforcement as an ultimate final step – even if this is rightly rarely ever needed because issues are resolved earlier.

R6: We Recommend that Welsh Government’s *Strengthening and Advancing Equality and Human Rights in Wales* Steering Group holds a specific workshop examining how administrative justice can contribute to combating structural inequality in Wales, and improving equality of outcomes for individuals.

⁶³ *ibid* p.8.

Sustainability as a Duty and Central Organising Principle of Public Administration in Wales

6.31 As noted above, under WFGA, public bodies ‘must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs’. Public bodies are also under a duty to carry out sustainable development and must set and publish Well-being Objectives, which they then must take all reasonable steps to meet. WFGA has been described as an example of ‘responsive’ and ‘reflexive’ law. ‘Responsive’ law is referred to by the GER Working Group as law in which ‘the emphasis is on making institutions supportive of social goals that are valued by citizens so that injustice is rectified, or better still avoided, before it leads to individual cases’.⁶⁴ The reflexivity element is that such law ‘does not seek to impose greater regulation, but seeks to guide institutions, through ‘regulated autonomy’ to reflect on their practices so they might bring about the redistribution of resources’. Responsive legislation then intends to catalyse systematic change. Thomas Watkin provides an explanation of why responsive law like WFGA seems awkwardly drafted from the perspective of traditional approaches to the law of England and Wales, noting that:

the Act has attracted criticism for utilizing legislation in an inappropriate manner to signal good intentions, imposing duties which are unenforceable, and possibly confusing the creation of duties regarding sustainable development with its actual delivery. There is more than a hint here that the legislation is straining to achieve something which the existing legal order is simply not designed to accommodate. It is striving to place into law an aspiration which thereafter the legal system is meant to promote, rather than the traditional approach of making changes to the law which provide the means of achieving the policy goal with the legal system thereafter applying the law as changed to implement the policy.⁶⁵

6.32 Despite various commentators describing WFGA as ‘aspirational’, Welsh Government and public bodies tend to use language more redolent of legal duties enforceable through court action when referring to it, and there remains some disagreement as to the justiciability of duties, with Welsh Government, the Future Generations Commissioner, and members of the Administrative Court judiciary who have so far considered the issue, taking slightly different views.⁶⁶ In the normal legislative processes, the use of the word *must* implies that a duty which is legally enforceable through court, tribunal or other processes has been created. As Thomas Watkin puts it:

The word *must* in legislation is taken to indicate the presence of a duty, a legal obligation, to perform the conduct in question, and duties placed upon public bodies are generally enforceable at the suit of anyone with a legitimate interest in the issue by means of seeking a judicial review of the body’s conduct with the aim of securing the performance of their duty by the public law remedy of a mandating

⁶⁴ *ibid* p.23, drawing on H Conley, ‘Gender equality in the UK: Is reflexive and responsive legislation the way forward?’ in C Bauschke-Urban and I Jungwirth (eds), *Gender and Diversity Studies in European Perspectives* (Verlag Barbara Budrich 2016).

⁶⁵ Thomas Glyn Watkin, *From Obligations to Aspirations: A Legal-Linguistic Adventure* (Institute of Advanced legal Studies).

⁶⁶ As the Future Generations Commissioner said in an Assembly Equality Local Government and Communities scrutiny session on 7 November 2019: ‘...work that we’re doing at the moment, which we have been doing for about the last year or so, is currently to-ing and fro-ing with Welsh Government officials to try to agree a common understanding between us and Welsh Government’ (para 43), ‘I don’t think there is a common understanding, really, in terms of us having one position and the Welsh Government lawyers advocating a different position’ (para 45): <https://record.assembly.wales/Committee/5746#A54152>

order. None of the paraphernalia of administrative law procedures and remedies seems appropriate – if indeed possible – with regard the duty envisaged here.⁶⁷

6.33 This seems to be the view taken by the three High Court judges (Lambert J, Black J and Garnham J) who have so far considered the duties under WFGA at the permission stage of judicial review proceedings. In *R(B) v Neath Port Talbot*,⁶⁸ the claimant was a parent of a child affected by a proposed school closure, who argued that the local council had not complied with its sustainable development duties under WFGA in its decision to close the school. Lambert J did ‘not find it arguable that the 2015 act does more than prescribe a high-level target duty which is deliberately vague, general and aspirational and which applies to a class rather than individuals...As such, judicial review is not the appropriate means of enforcing such duties’. Counsel for the claimant, Rhodri Williams QC, is reported by BBC Wales to have stated that the Act is a ‘particularly badly-drafted piece of legislation’. Continuing that:

Everyone wants to see a resilient Wales, a prosperous Wales, a Wales in which there isn't any inequality...But the point is unless individuals can rely on these rights - if they feel they haven't been upheld - to challenge the decisions of public bodies, the act is virtually useless. The guidance that has been issued on it is full of fantastic-sounding phrases but in reality individuals are not going to be able to use it.⁶⁹

6.34 The case of *R(B)* failed at the permission stage, meaning that the judges did not consider the claimants to have an ‘arguable case’. This means that detailed legal argument was not heard, and that the decisions reached do not create binding legal precedents. In the case of *R(B)* there was also a second oral hearing (meaning that further oral arguments were presented in addition to the written arguments at the first permission stage). Oral renewals in civil (non-immigration and asylum cases) have roughly a 50% chance of success.⁷⁰ We discuss judicial review in the Administrative Court in Wales in further detail below. But here we note that none of the judges who have so far considered WFGA were based in Wales, nor had they practised law in Wales. They were, to use the phrase of Professor Rick Rawlings, ‘judges on Wheels’ travelling out from London.⁷¹ We do not question the reasoning of the judges in the cases, but consider it possible that had there been more discussion of the specific context of developing ‘new administrative law of Wales’ and the social and political background, including the Assembly record of proceedings, there is an argument in favour of granting permission to more fully explore the intentions of WFGA. There are a range of duties under WFGA, some of which are more explicit than others, and in our view it is arguable (given the broader policy context) that some of these provisions create a duty to take into account Well-being Objectives as relevant considerations, or something similar to ‘due regard’ duties contained in other Welsh administrative law. However, we acknowledge that inclusion of a ‘due regard’ duty was rejected during the passage of the Act. The Assembly Environment and Sustainability Committee recommended that:

If it is the intention of the Welsh Government that SD [sustainability duty] become the ‘central organising principle’ of the public bodies listed, this should be made explicit in the Bill. It is not sufficient to leave this issue to guidance or implication. This could be

⁶⁷ Thomas Glyn Watkin, ‘Aspirations and Obligations’.

⁶⁸ *R (B) v Neath Port Talbot Council* (30 January 2019) CO147470/3018.

⁶⁹ <https://www.bbc.co.uk/news/uk-wales-48272470>

⁷⁰ See e.g., Nason. *Reconstructing Judicial Review* (Hart Publishing 2016) Chapters four and five, and Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing* (Public Law Project 2009).

⁷¹ Richard Rawlings, ‘Modelling Judicial Review’ (2008) 61(1) *Current Legal Problems* 95.

achieved by placing a duty on public bodies to have due regard to the provisions of the Bill when ‘exercising any of their functions’. This would be in line with the duty placed on Welsh Ministers through the Rights of Children and Young Persons (Wales) Measure 2011 to have due regard to the UN Convention on the Rights of the Child.⁷²

6.35 However, this duty did not make it into WFGA as enacted. It might be argued then that the duty of sustainable development is stronger, as it is included as a general principle to be complied with on the face of the Act, not a principle to which due regard should be had. But due regard has a background in case law as to its justiciability and application, whereas the wording of WFGA has led a number of judges and lawyers to conclude that it fails to create a general duty of sustainable development that can be enforced through the courts. The Act has been described by some of our research participants as an uneasy compromise between Government and civil society, and specifically that Government does not want to expose itself to individual legal challenges. In a scrutiny session by the Assembly Equality, Local Government and Communities Committee, the Future Generations Commissioner stated of the *R(B)* judicial review case:

So, our view is that the Act could apply to a class of people in terms of being able to judicially review using the Act. We think that it's probably right that, in terms of applying to an individual, it doesn't assert or give rights to individuals. We chose not to intervene in that case because it was a preliminary judgment, and so on, but we don't think that the judgment was completely accurate.⁷³

6.36 The notion of a ‘class’ judicial review usually includes an organisation that can collectively represent a group of identifiable individuals affected by a particular public body decision. If the class here is parents and children affected by the decision to close the school, it is hard to see that the class claim to standing would be any stronger than that of an individual parent (judicial review standing to claim is not based on strength in numbers). On the other hand if the class is considered to be ‘future generations’ whom by definition cannot litigate, presumably only a suitably equipped charity or NGO would be able to issue proceedings on their behalf. Whilst the courts have often required NGOs to show that they represent identifiable individuals rather than unidentifiable groups, standing has been granted in some purely public interest cases.

6.37 Sedley LJ stressed in *R v Somerset County Council, ex p Dixon*: ‘Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs that is to say misuses of public power’.⁷⁴ There may then be a case for arguing that a wrong has been done to future generations, but this does not get around the view that the duties (breach of which would constitute a wrong) are ‘target’ duties with insufficient clarity to be legally enforced. That said, the broader issue of public wrongs, and the need for judicial review as a means to provide an independent, transparent judicial interpretation of Welsh law is an important theme of our Report. It may be, and indeed appears likely, that the main reason for refusing permission in the cases so far, is that whether or not WFGA duties are justiciable, there was not a sufficiently arguable case that they had been breached on the facts. Still an important opportunity to clarify the law has been missed. At various places in this Report we consider the potential for a form of public interest judicial review procedure, or reference to the Administrative Court on a point of law, as a

⁷² Assembly, Environment and Sustainability Committee, Well-being of Future Generations (Wales) Bill Stage 1 Committee Report (November 2014) para 101.

⁷³ (7 November 2019) para 39: <https://record.assembly.wales/Committee/5746#A54152>

⁷⁴ [1997] JPL 1030, 1037.

means of redressing the lack of access to judicial review in Wales and the constitutional damage that is potentially being caused by this.

6.38 After his tenure as Chair of the Commission on Justice in Wales, Lord Thomas was critical of aspirational legislation, including WFGA, as raising false hopes and undermining the rule of law.⁷⁵ His central interrelated conclusions were: first, that legislation which seeks to improve administrative decision-making must be drafted with sufficient precision to enable an appropriate court, tribunal or other enforcement body to determine whether relevant duties have been discharged on the basis of objective evidence; second, that the use of different enforcement mechanisms should be explored which could include a court or tribunal, but also potentially an ombud with an adjudicative role, or a commissioner with enforcement powers.

6.39 Judicial review is not the only means of holding public bodies to account under WFGA, and we discuss the weaknesses of judicial review itself in various sections of this Report. Lambert J's rejection of judicial review in *R(B)* also centred on acceptance of the defendant's detailed articulation of the other 'accountability' mechanisms under WFGA. She criticised the drafting of relevant Guidance but still concluded that such demonstrated a lack of intention of legal enforceability through the courts on the part of Welsh Government. The central 'accountability' mechanisms in WFGA include for example, that the Future Generations Commissioner must monitor and assess the extent to which public bodies are meeting the Well-being Objectives they have set for themselves. This means watching and judging the progress of public bodies in meeting their objectives. WFGA also requires the Auditor General for Wales to 'carry out examinations of public bodies for the purposes of assessing the extent to which a body has acted in accordance with the sustainable development principle when a) setting well-being objectives, and b) taking steps to meet those objectives'. An examination must be carried out in relation to each public body between 2015 and 2020. The Commissioner, on the other hand does not have a duty to carry out assessments. In 2017, the Commissioner advised all Public Service Boards (PSBs) on their well-being assessments, and in 2018 she published a Report on *Well-being in Wales: Planning today for a better tomorrow*, containing recommendations applicable to all public bodies.⁷⁶ The Commissioner must also advise PSBs on how they might take steps to meet their objectives, but has no other scrutiny powers in this respect. In an Assembly Equality, Local Government and Community Committee scrutiny session, the Commissioner noted particular anomalies in the division of functions between her office and those of the Auditor General for Wales:

There are some anomalies in the legislation... So, my duties are to monitor and assess the extent to which well-being objectives are being met...It's very difficult for me to monitor and assess well-being objectives without looking at how public bodies are applying the five ways of working, and that's the duty of the Wales Audit Office. Now, we try to get around that by working together...I think, in reality, we both recognise that they can't do their job without my input and I can't do my job without their input. So, it's working reasonably well on the ground, but I think the Act could have been better clarified.

⁷⁵ Lord Thomas, 'Thinking policy through before legislating – aspirational legislation' (Statute Law Society, Renton Lecture 2019): <http://www.statutelawsociety.co.uk/home/lord-thomas-text-aspirational-legislation-21-11-19/>

⁷⁶ Future Generations Commissioner, *Well-being in Wales: Planning today for a better tomorrow: Learning from Well-being Assessments 2017* (2018): https://futuregenerations.wales/wp-content/uploads/2017/07/FGCW_Well-being_in_Wales-Planning_today_for_a_better_tomorrow_2017_edit_27082017.pdf

Where I think we both have concerns is around issuing advice on the setting of well-being objectives to public services boards and public bodies. So, the anomaly there is that I have duties to provide advice to public services boards on the setting of their well-being plans, but no duties to monitor and assess their progress. Conversely, I have duties to monitor and assess the progress the public bodies are making against their well-being objectives, but no duties to advise them on setting those objectives in the first place. So, it's kind of back to front, in a way, and what we're seeing at the moment, in terms of the well-being objectives set by public bodies, is the quality of the well-being objectives in many cases is not that good. And, sometimes, the quality of the steps that they're saying that they'll take to meet those well-being objectives is not that good, and yet no-one has duties to advise them on what those should be.⁷⁷

- 6.40 There are advantages to improving accountability in practice through working together, as the Commissioner and Auditor General have done here, without the need for explicit legislative amendment, as this can lead to comparatively quick and efficient action. Nevertheless, amendment of the legislation should remain an option.
- 6.41 The option of amending WFGA needs to remain open not least as a UK Well-being of Future Generations Bill has now been introduced to the House of Lords, and has passed second reading unopposed at the time of writing. This Bill incorporates all the promotive (responsive/reflexive) elements of WFGA, but significantly it also lays down an extensive legal compliance regime, more extensive than that which currently exists in relation to the PSED or Welsh specific equality duties. Under the Bill, clause 4 requires that public bodies must carry out sustainable development. Clauses 20-22 give a UK Future Generations Commissioner powers to conduct reviews and make recommendations. Under clause 24 a public body must take all reasonable steps to follow the course of action set out in a recommendation made to it by the Commissioner, unless the public body is satisfied that there is good reason for it not to follow the recommendation in particular categories of case or at all, or it decides on an alternative course of action in respect of the subject matter of the recommendation. So far this approach is similar to the WFGA, however, clause 27 then states that proceedings may be brought against a public body by a person on the grounds that the body has acted (or proposes to act) in a way that breaches its obligations under clauses 4 and 24. Proceedings are to be brought in the High Court, and on finding a breach the court may grant such relief or remedy, or make such order within its powers, as it considers just and appropriate (clause 28). The UK Bill also seeks to give the Commissioner power (clause 25) to conduct an investigation if he or she suspects that the public body concerned has failed to comply with its duties under clause 4 or clause 24. Any individual can request that the Commissioner conducts an investigation, and if a public body fails to comply with recommendations following an investigation, the Commissioner can apply to the High Court for an order enforcing the recommendations (clause 26).
- 6.42 The Bill lays down sustainable development duties through the lens of Well-being Objectives, but goes beyond WFGA by providing individuals with a specific right to seek legal action in the High Court. This seems at odds with the views of Lambert J (and the other judges to have considered WFGA) that such duties are too vague, general and aspirational to be enforced at the suit of individuals through judicial review. For these judges, and the commentators referred to in this Report, it is the nature of the duties themselves, rather than whom they are owed to that seems to be at issue.

⁷⁷ (7 November 2019) paras 47 and 48: <https://record.assembly.wales/Committee/5746#A54152>

6.43 In discussions during the second reading of the UK Well-being of Future Generations Bill many of their Lordships expressed that WFGA is seen to lack teeth due to the lack of enforcement powers. As Baroness Andrews (Labour) noted, WFGA does not give the Commissioner or the public the power to hold public bodies' feet to the fire. She went on to state: 'The most radical change of all would be to give the commissioner teeth like Gnasher in the Beano to go to law, investigate and then follow that up with legal remedies, and give that right to the public as well'.⁷⁸ This is in effect what the clauses of the Draft UK Bill provide. However, on behalf of the Government, Minister of State for the Cabinet Office, Lord True, stated that the Government cannot support the Bill, significantly on the basis that it creates a new public body and new public duties.⁷⁹ It seems unlikely then that any of the UK Governments' are yet ready for stronger legal enforcement of the sustainability principle.

6.44 Participants in our research generally took the view that WFGA lacks clarity specifically with regard to administrative justice implications, with various duties being layered through the Act itself and within subsequent guidance. The claimant's barrister in *R(B)* described the legislation as 'particularly badly drafted' the defence team also noted that the provisions explaining how the five Ways of Working should be used when 'doing something in accordance with the sustainable development principle' (section 2 and section 5) lead to a scheme that is 'hard to follow' and there is evident lack of clarity around legal enforceability. Lambert J in *R(B)* also criticised the drafting of Welsh Government Guidance. As the Future Generations Commissioner has noted, there are anomalies in the promotion and scrutiny roles as between her office and that of the Auditor General for Wales.

R7: We Recommend that Welsh Government reviews its Core Guidance on the Well-being of Future Generations (Wales) Act 2015 specifically to address lack of clarity over how certain duties are intended to be enforced.

R8: We Recommend that the Well-being of Future Generations (Wales) Act 2015 is amended to revise and clarify the respective roles of the Future Generations Commissioner for Wales and Auditor General for Wales.

R9: We Recommend Welsh Government and the Assembly keep the Well-being of Future Generations (Wales) Act 2015 under review in light of the passage of the UK Well-being of Future Generations Bill through the Westminster Parliament.

Incorporating human rights standards

6.45 Legally enforceable duties are more likely to exist in legislation relating to human rights than to well-being. However, international human rights have not been directly incorporated into Welsh law. Direct incorporation is the most significant method of incorporation and involves transforming an international human rights treaty into domestic law by making it part of national legislation. There are no examples of Welsh law that have followed this model.

6.46 Another model of integration is that of indirect incorporation. This means that a human rights treaty is given some legal effect through domestic legislation. This can be achieved in a number of different ways. For example, the Human Rights Act 1998 creates a duty on public authorities

⁷⁸ HL Deb, 13 March 2020, Col 1242.

⁷⁹ HL Deb, 13 March 2020, Col 1266.

to comply with particular ECHR rights contained in Schedule 1 to the Act. This means that individuals are able to rely on these particular rights as against public authorities in domestic courts and tribunals. There are no examples of Welsh law that have followed this model.

6.47 Another means of indirect incorporation is where human rights are not expressed to bind government or public authorities, but have some indirect impact, for example by requiring government or public authorities to take particular human rights into account when making policy decisions. An example is the Rights of Children and Young Persons (Wales) Measure 2011 (RCYPWM) which requires Welsh Ministers and some other public bodies to have ‘due regard’ to children’s rights protected by the UN Convention on the Rights of the Child in particular circumstances. Indirect incorporation in this manner does not provide individuals with a specific cause of action in a court or tribunal where a breach of a relevant right is alleged, but failure to have ‘due regard’ could align to various grounds of judicial review, such as illegality (failure to comply with a legally prescribed process – that of having ‘due regard’). As far as we are aware at the time of writing there had been no judicial review application that has been successful on the basis of lack of due regard under the RCYPWM.

6.48 A further example of integration/alignment is sectoral incorporation. Simon Hoffman describes this as where ‘some rights are decoupled from the treaty in which they are found and referred to in sectoral legislation...rights in question may be directly referenced, or an attempt made to give effect to the right(s) through legislative provisions’.⁸⁰ This could also include the potential for legal enforcement in a court or tribunal, but it need not. In Wales this includes various legislation on social care, and education which requires particular public authorities to have due regard to the rights of children, older people and disabled people.

6.49 Hoffman has argued in favour of more direct forms of incorporation of rights into Welsh law on the basis that: ‘When it comes to protection of individual and group rights the courts represent a bastion of accountability, and a powerful force to ensure socio-economic policy is human rights compliant’.⁸¹ Hoffman notes in relation to UN Convention on Economic, Social and Cultural Rights and UN Convention on the Rights of Disabled People:

These are the human rights that relate most closely to the competences and powers of the NAW [National Assembly for Wales] and Welsh Government, with potential to provide a guiding framework for the conduct of policy and legislation in devolved areas...the statutory framework in Wales does not incorporate socio-economic rights. This means they are less likely to feature as an aspect of government decision-making in Wales, and accountability for these rights is very weak.⁸²

6.50 The potential for direct incorporation of social rights, and how this might impact on administrative justice, has been examined extensively by Jeff King. He notes that many studies have focused specifically on the impact of judicial review to protect social rights as a means to improve frontline bureaucratic decision-making. Given the lack of specific legal appeal rights so far in Welsh law, judicial review is then the main method of legal accountability. Some of the studies King cites have reached fairly negative conclusions. For example, the respective studies of Simon Halliday and Ian Loveland which both found widespread failure to comply with the letter and spirit of administrative law within housing authorities. King notes:

⁸⁰ Hoffman, *Incorporation of International Human Rights* (Bevan Foundation 2019) p.3.

⁸¹ Hoffman, *Human Rights: Accountability and Enforcement* (Bevan Foundation 2019) p.5.

⁸² Hoffman, ‘Incorporation’ (n 80) p.8.

The studies both conclude, essentially, that (1) there are few applications for judicial review; (2) there is little absorption of legal standards identified on review; and (3) there is a problem of ‘creative compliance’ whereby authorities exploit their knowledge of the legal process to avoid legal control either through abuse of legal proceedings or through ‘bullet-proofing’ decisions.

6.51 The overall ‘picture is of local authorities acting largely in subtle evasion if not outright defiance of public law duties identified in court’.⁸³ However, Kings finds that whilst these (and other studies) raise troubling issues they are not sufficient to draw the conclusion that judicial review is irrelevant or marginal to bureaucratic behavior. Indeed, he cites other studies that have drawn more positive results, including in relation to socially and economically disadvantaged groups. King concludes that some previous studies have been overly focused on qualitative methods, without also identifying and examining relevant quantitative data. He recognises Sunkin et al’s study on the impacts of judicial review cases on local authority decision-making as a rare example of quantitative research. Sunkin et al found that not only did judicial review not worsen local authority performance, as some had claimed it might, rather it was correlated in a statistically significant way to modest improvements over time.⁸⁴

6.52 It can be difficult to develop an appropriately reliable methodology to quantify the impact of judicial review, in part because local authority performance standards tend to change over time (as we have discussed with respect to Wales above). There are also particular issues in Wales as the number of cases is likely too small to be able to develop a robust assessment.

6.53 Any analysis of the possible impacts of judicial review as a means to protect more directly incorporated rights must also take into account pre-litigation impact. As Bondy and Sunkin found: ‘for every ten threats of litigation more than six are resolved without proceedings being commenced’ and ‘the majority of threats were resolved when the authorities accepted the claim’.⁸⁵

6.54 In relation to human rights specifically, PLP research in the first six months of 2002 found evidence that the HRA has not led to a major increase in the number of claims. However, at the permission stage 53% of asylum and immigration AJRs and 46% of other AJRs included a human rights claim. The author, Varda Bondy, concluded:

it would appear that the HRA is most often being used to supplement established grounds for judicial review in cases that would have been pursued in any event on such grounds prior to the introduction of the HRA.⁸⁶

6.55 Qualitatively PLP found that although the differences were not great in most cases, the HRA had added value to 22 out of a sample of 39 cases analysed qualitatively by consultant assessors. King concludes that: ‘Legal activity can clothe people with rights, and possessing rights is a real form of individual empowerment’. He also stresses that a lot of existing studies have focused too much on the impact of judicial review on broader policy issues rather than on whether it provides individual redress.

⁸³ King ‘Judging Social Rights’ p.71.

⁸⁴ L Platt, M Sunkin and K Calvo, ‘Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales’ (2010) 20 (supp 2) *Journal of Public Administration Research and Theory* 243.

⁸⁵ Varda Bondy and Maurice Sunkin, ‘Settlement in Judicial Review Proceedings’ [2009] *Public Law* 237, 244.

⁸⁶ Varda Bondy, *Impact of the Human Rights Act on Judicial Review – An Empirical Research Study* (Public Law Project 2003).

- 6.56 Here Bondy and Sunkin's more recent conclusions are important, for example their study into the *Value and Effects of Judicial Review* found that 77% of a sample of 502 cases from July 2010 to February 2012 inclusive were issued by individuals. Of these challenges, 75% could be classified as own fact cases; these are individual grievances where the claimant seeks to challenge how law, policy or procedure has been applied to their specific circumstances. Some of the tangible benefits to claimants here include; retention of a service, retention of a licence, retention of a particular status or state benefit, compensation, ensuring that a decision is actually made, preventing closure of a facility, and an apology. The *Value and Effects* research also found that whilst 79% of successful claimants reported some form of tangible benefit, 40% of unsuccessful claimants also reported some form of tangible benefit.⁸⁷
- 6.57 The *Value and Effects* study makes reference to claims against Welsh public bodies, the number has been too small to draw reliable conclusions about the impact of judicial review in Wales, or about settlement and other pre-litigation activity and its outcomes.⁸⁸ A Wales-specific study is needed here. It is needed in particular to investigate the question of why an increase in the volume of Welsh law and policy, and an increase in legal specialist expertise in Wales (according to Law Society data), has coincided with a marked decrease in the number of judicial review claims being issued and the number of applicants being granted a remedy.
- 6.58 Despite the absence of a Wales-specific study, some of King's general conclusions likely fit. There has been a tendency to oscillate between two incompatible claims, either too much law (stifling progress, excessive legalism, juridification, law's empire) or so little influence as to make judicial review largely irrelevant to the activities of public administration in the socio-economic context. King concludes that one cannot have it both ways: 'If the no-impact claim is one extreme of the spectrum, then the pathology of legalism is the other. And while both claims are sometimes true, surely wisdom is the mean that lies between them...that mean is a familiar one: some impact, occasionally too much, more often too little'.⁸⁹
- 6.59 King also accepts that despite the broader public wrongs account of judicial review, assuming that individual redress is unimportant 'is to ignore that importance of access to justice and legal needs. Practitioners recognize that it was no accident that the Legal Aid and Advice Act 1949 was introduced along with other key pillars of the modern British welfare state'.⁹⁰ Providing access to justice is itself central to ensuring access to welfare, social security and health.
- 6.60 King draws on a range of evidence from studies in the USA, South Africa, Canada, Brazil, India and Nigeria concluding that legal incorporation of social rights can bring a greater measure of dignity to citizens, especially those who live in conditions of poverty and deprivation, and also that an increase in the quality of democracy can be linked to an increase in social rights litigation. In short, '...the evidence on the whole suggests that constitutional welfare rights can provide an avenue for worthwhile social change, though we should expect it neither to revolutionise welfare provision nor secure the social minimum to all'.⁹¹
- 6.61 King rejects the view that legalistic methods which are characteristically premised on rule and precedent, are necessarily slow to respond to rapidly changing human needs and circumstances.

⁸⁷ 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) 28.

⁸⁸ *ibid* 16-18.

⁸⁹ King, 'Judging Social Rights' p.79.

⁹⁰ King, 'Judging Social Rights' p.75.

⁹¹ King, 'Judging Social Rights' p.85.

His view, and ours, is that rules can be framed in a manner that imposes duties or provides for rights in a claimant-friendly manner, whilst also conferring discretion on public bodies, which also includes discretion to go beyond these duties. King argues that '[c]onstitutional legal accountability can be used as a tool for maintaining flexibility in social welfare policy'. This could, in our view be in the form of a right/principle subject to potentially authorised proportionate interference, or the need for proportionate realisation of a principle, discussed above in relation to equality and prevalent in the drafting of constitutional documents including bills of rights, and in international treaties.

6.62 As we note below in relation to the Administrative Court in Wales, especially in the context of legal aid reform. King must also be right in his reflection that: 'Even if constitutional accountability can provide for worthwhile change, only a fool would disregard the substantial remaining barriers in access to justice faced by impecunious claimants in their quest for justice in the welfare state'.⁹²

Promotion, Process and Individual Rights

6.63 The 'new administrative law' of Wales is aspirational and should be praised for that. It also does not depend wholly (or even substantially) on legal processes. As King notes it is important 'to emphasise that there are different accountability models that can compete with each other and the role for legal accountability must be sensitive to that fact by not unduly disrupting other mechanisms'.⁹³ Therefore, any attempt to bolster access to individual (or collective) redress through courts and/or tribunals needs to be carefully considered; especially in context of the value of aspirational legislation, and moral, social and political accountability.

6.64 Norms of administrative law can extend beyond those which are specifically justiciable in a court or tribunal. As David Feldman notes that the meaning of legislative is that legislation 'carries law', even if it is not law itself, as such a norm expressed in legislation can be a legal norm of the system even if is not justiciable in a court or tribunal. Feldman supposes that: 'Legislation which is non-law-bearing hovers on the boundary between law, politics and morality'; the concept of administrative justice itself hovers on this same boundary. Non-law-bearing law then, is seen as helpful to express political or moral commitments. Feldman articulates four classes of non-law-bearing legislation:

I call legislation 'promissory' where it reflects a political commitment, 'declaratory' when it purports to say what the law is (often to hide or suppress a serious disagreement on the matter), 'aspirational' where it embodies a hope, and 'statements of political support' when it merely emphasises that the political elite favours certain kinds of behaviour or a particular view on a contested issue. Some provisions, or groups of provisions, can perform two or more of these roles simultaneously.⁹⁴

6.65 WFGA is likely both promissory and aspirational. Feldman also notes that such non-law-bearing legislation clearly has effects in the real world, and potentially more significant effects than traditionally worded statutes:

legislation achieves effects mainly by psychological means. To legislate is to assert a special type of authority. It is impersonal and institutional. It taps into a reservoir of

⁹² King, 'Judging Social Rights' p.85.

⁹³ King, 'Judging Social Rights' p.85.

⁹⁴ David Feldman, 'Legislation as Aspiration: Statutory Expression of Policy Goals' (IALS 2015): <http://www.statutelawsociety.co.uk/wp-content/uploads/2015/03/Feldman-Legislation-as-Aspiration.pdf>

respect for the legitimacy of the state and its institutions. It is most effective when not relying on coercive force to secure obedience; subjects' loyalty produces more reliable compliance than enforcement.⁹⁵

6.66 Feldman concludes that despite the potential positive impacts of aspirational legislation there are also disadvantages. The first is confusion over whether particular provisions are indeed law-bearing or not (whether they are legally enforceable through some means or not). For all its good intentions WFGA clearly suffers from this problem. Feldman would also likely argue that some of the norms in WFGA such as integration and involvement lack clarity around what is actually required of public bodies in practice. Much of this detail is, however, filled in by the work of the Future Generations Commissioner and Auditor General. The broader risk, noted by Feldman and shared by participants in our research, is that the creation of wide norms that are not justiciable has the potential to 'debase the currency of legislation'.

6.67 Thomas Watkin's diagnosis of WFGA is that:

the legislation is seeking to set out an aspiration which subsequent legal activity is meant to complement and complete. It is seeking to accommodate within the legal system an approach to law making which belongs and fits within a legal system operating under a written constitution but which strains to fit into one in which there is no hierarchy of primary legislative enactments.⁹⁶

6.68 In the absence of devolved responsibility for its constitution, it is not surprising that Wales is seeking to express a political and constitutional identity through its administrative procedure law. The constitutional status of administrative law does not only relate specifically to concerns of sustainability, equality and human rights. As Tom Ginsberg notes:

the average citizen encounters the state in myriad petty interactions, involving drivers' licenses, small business permits, social security payments, and taxes. It is here that the rubber meets the road for constitutionalism, where predictability and curbs on arbitrariness are least likely to be noticed but most likely to affect a large number of citizens...administrative law is constitutionalist in orientation and arguably more important to more people than the grand issues of constitutional law.⁹⁷

6.69 There is an opportunity for Wales to take a more rational, coherent, and consistent approach to the justice of people's interactions with public power in the small places of their daily lives. We draw the following general conclusions about the rights-based and promotive 'new administrative law' of Wales.

- Aspirational legislation that seeks to encourage responsive and reflexive behaviour still needs to be delivered through administrative processes, and public bodies must be obligated to demonstrate that they have complied with these processes.
- There needs to be more clarity and consistency in legislation and guidance about what these processes require, and consideration of whether they could be strengthened to make public bodies accountable for the outcomes of their decision-making, avoiding process-based duties being seen as a tick box exercise.

⁹⁵ Feldman 'Legislation as Aspiration' p.9.

⁹⁶ Thomas Glyn Watkin 'Obligations to Aspirations'.

⁹⁷ Tom Ginsberg, 'Written constitutions and the administrative state: On the constitutional character of administrative law' in Susan Rose-Ackerman and Peter Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010).

- The duties themselves (in relation to well-being, equality and human rights) can sometimes lack clarity in their content, and there is still limited public awareness and understanding.
- Welsh administrative procedure legislation is distinctive in its heavy dependence upon implementation, it sets out aims that public bodies are required to complete through their own administrative processes, yet accountability through judicial review especially is weak.
- Legislation and guidance sometimes lack clarity (and in some cases also coherence) in the various accountability methods that are to apply, and sometimes lack coherence around the division of functions between particular public officials (Commissioners, regulators etc).
- There is a lack of transparent, independent judicial interpretation of Welsh public administrative law and opportunities for clarification have been missed. This may be seen as undermining the rule of law in Wales.
- The provisions of Welsh administrative law are in effect, ‘quasi constitutional’ expressed notably in the language of constitutions and/or bills of rights, but without constitutional status and without rights of enforcement for individuals and groups.

R10: We Recommend that the Assembly Legislation, Justice and Constitution Committee conduct an inquiry into the perceived lack of integration with the justice system of Welsh policies on future generations, sustainability, and international standards on human rights.

R11: We recommend this inquiry also examines why the distinctive legal frameworks being developed to underpin these policies, including the creation of independent public officers whose role is to promote and protect rights, are perceived as not aligned to the justice system. This inquiry should also examine ‘aspirational’ legislation, including legislation that is ‘responsive’ and ‘reflexive’, and the relationships between such legislation and the rule of law.

PART TWO: ADMINISTRATIVE JUSTICE INSTITUTIONS

7. The Administrative Court in Wales

7.1 Establishing a permanent Administrative Court in Cardiff was part of proposals made by a Judicial Working Group for Justice Outside London. Decentralisation aimed to improve access to justice by allowing cases to be issued and determined locally reducing costs and inconvenience for ‘regional’ litigants and their lawyers. In Wales there was also a constitutional rationale that cases involving Welsh authorities and the rights of Welsh people should be determined in Wales.

7.2 Since the ‘fully operational’ Administrative Court was established in Cardiff in April 2009 it has heard a number of claims of public and constitutional significance, we note just some of those here. In *R (Governors of Brynmawr Foundation School) v Welsh Ministers*,⁹⁸ the Governors challenged the Welsh Ministers’ decision to delegate the function of consulting upon and making proposals about the provision of 6th Form education at the School under s.83 of the Government of Wales Act 2006. On the question of whether the Welsh Ministers could delegate statutory functions Beatson J noted that the court will take into account the nature and purpose of the statute under consideration including whether it is a constitutional statute, specifically noting that the 2006 Act has constitutional status.

7.3 In *R (Welsh Language Commissioner) v National Savings and Investments*,⁹⁹ the Commissioner challenged NS&I’s decision to withdraw its Welsh Language Scheme. This was the first Administrative Court case to be issued and heard in Welsh and included interpretation of the Welsh Language Act 1993. *R (Sargeant) v The First Minister of Wales*¹⁰⁰ held that the First Minister’s control of the Operational Protocol governing the investigation into the death of Carl Sargeant AM, breached a legitimate expectation (founded on a press statement) that the investigation would be independent. The *Sargeant* case was initially lodged in London and involved no Wales-based counsel. The permission hearing was held in London and had the claim failed at that stage an issue involving the lawfulness of the First Minister’s actions would have been fully determined in England. As it happened the case was ‘transferred’ to Cardiff for the substantive hearing.

7.4 According to Practice Direction 54D Administrative Court (Venue), the claim form in proceedings in the Administrative Court may be issued at either the Royal Courts of Justice in London or at one of the Regional Administrative Courts (including Cardiff). The Practice Direction includes the ‘general expectation’ that cases will be issued and determined at the location with which the claimant has the closest connection. This is also supplemented by case law presumptions (e.g., *R (Deepdock) v Welsh Ministers*¹⁰¹ and *R (Condrón) v Merthyr Tydfil County Borough Council*¹⁰²) that cases involving Welsh public bodies should be issued and determined in Wales. In practice, however, a significant proportion of cases involving Welsh defendants are issued in London and often transferred out to Cardiff. In many cases this is due to the lawyers instructed being based in London (particularly counsel), in others it is largely to do with lack of awareness.

7.5 The process of transferring cases to the Administrative Courts outside London has become more efficient since 2017 when the power to make Minded to Transfer Orders was delegated from the judiciary to the Administrative Court Office Lawyers. For example, from 1 January 2019 to 16

⁹⁸ *R (Brynmawr Foundation School) v Welsh Ministers & Anor* [2011] EWHC 519 (Admin) (09 March 2011).

⁹⁹ *R (Welsh Language Commissioner) v National Savings And Investments* [2014] EWHC 488 (Admin) (06 March 2014).

¹⁰⁰ *R (Sargeant) v First Minister of Wales & Anor* [2019] EWHC 739 (Admin) (27 March 2019).

¹⁰¹ *R (Deepdock Ltd & Ors) v The Welsh Ministers* [2007] EWHC 3347 (Admin) (30 October 2007).

¹⁰² *R (Condrón) v Merthyr Tydfil County Borough Council & Ors* [2009] EWHC 1621 (Admin) (01 May 2009).

September 2019, there were 87 claims issued in the Administrative Court Office in Cardiff, but an additional 34 claims were transferred in.

7.6 Writing in evidence to the Commission on Justice in Wales, the Public Law Project and Dr Sarah Nason drew the following conclusions about judicial review in Wales, the submission also includes a range of empirical evidence that we do not seek to reproduce here:¹⁰³

- The ordinary civil (non-asylum and immigration) judicial review caseload has declined across the England and Wales Administrative Court in recent years;
- Wales generates fewer such ordinary civil claims per-head of population than England;
- The proportion of claims issued by Litigants in Person (LIPs) is increasing across the Administrative Court, including in the Cardiff Administrative Court (from 20% of other civil (non-immigration and asylum claimants in 2007, to 37% in 2018).
- The impacts of legal aid reforms, and to judicial review procedures and costs, may have had a disproportionate impact outside London, including in Wales;
- Barristers based at chambers in Wales are instructed in only a very small proportion of the total number of claims handled by the Administrative Court in Cardiff; and
- The judicial review caseload pertaining to Wales is diverse, often involving a complex mixture of devolved and non-devolved law and policy, EU law (and to a lesser extent international law) relevant to the particular claim in a variety of different ways. This complexity presents challenges and opportunities for legal education, legal practice and justice in Wales.

7.7 The Administrative Court in Wales was part of a broader ‘regionalisation’ programme. This had been contentious in some quarters, particularly among those associating the constitutional importance of judicial review with a centralised system of ‘elite’ highly specialised barristers and judges. Under this account of judicial review, the individual grievance is a ‘trigger’ to ensure that cases of legal and/or constitutional significance are addressed at High Court level, whether the individual is from Cardiff, Carlisle or Clapham is largely irrelevant. To an extent this view has been perpetuated in Wales, since although cases may be of unique legal or constitutional significance to Wales, some 80% of counsel appearing in substantive hearings in Cardiff have been from London-based ‘elite’ public law chambers. Welsh Government has committed to instructing more local counsel, but still considers there to be a lack of sufficient highly specialised experts in Wales.¹⁰⁴ We note here the many recommendations of the Justice Commission relating to legal services in Wales that could also begin to address this concern.

7.8 Part of the problem here may be linked to the tendency to over-generalise about judicial review as a procedure for airing disputes of public importance and high constitutional sensitivity; here it can be argued that niche legal expertise is required. On the other hand, as research has shown, in the majority of cases the key necessary expertise is in the law and policy of the specific area of public administration, say Welsh law of community care or education, and where high levels of constitutional expertise are not required and but a clear understanding of Welsh law and context is needed.

7.9 Nason and PLP’s evidence to the Justice Commission found that: ‘The majority of judicial review challenges issued in Cardiff relate to specific public body decisions, but others have concerned the

¹⁰³ Commission on Justice in Wales, ‘Judicial Review in Wales’ Submission by Public Law Project and Dr Sarah Nason: <https://llyw.cymru/sites/default/files/publications/2018-11/submission-to-the-justice-commission-from-public-law-project-sarah-nason.pdf>

¹⁰⁴ Jomati Consultants LLP, *The legal sector in Wales: A rapid review* (June 2019): <https://gov.wales/sites/default/files/publications/2019-10/the-legal-sector-in-wales-a-rapid-review.pdf>

validity of legislation, or the lawfulness of a particular policy adopted by a public body'. Judicial review can be highly effective for individuals in Wales: E.g., in cases concerning the legal interpretation of provisions around learner travel ultimately leading to a school/local authority being required to make specific provision for a particular child, other examples have included urgent injunctions to ensure a vulnerable individual was not unlawfully moved from their current care home provision. It is these types of case that have tended to involve local solicitors and counsel.

7.10 Sarah Nason and Maurice Sunkin's earlier research hypothesis was that 'regionalisation' could improve access to justice outside London by catalysing increased awareness of public administrative law, leading to the 'clustering' of legal services providers around the decentralised Courts. This, it was hoped, would begin to redress some of the 'severe geographical imbalance' in the incidence of judicial review litigation.¹⁰⁵ In Wales, there has been a significant increase in the number of firms and individuals claiming 'public and administrative law' expertise (according to Law Society data).¹⁰⁶ Although 'regionalisation' may not have been the direct cause (the pace of devolution itself is evident), the reforms did coincide with an increase in teaching administrative law in Welsh Universities, a book series (the Public Law of Wales published by University of Wales Press), revitalising the association Public Law Wales, and the instigation of the Public Law Project Wales Conference (which goes from strength to strength and is well attended by public bodies).

7.11 Nason and PLP's evidence to the Justice Commission demonstrates, however, the intermingling of common law and statute in judicial review claims, and how relatively insignificant matters of devolved Welsh law have so far been to the caseload of the Administrative Court. The evidence examined 82 substantive judgments delivered between 2010 and 2017 inclusive in civil judicial review cases (asylum and immigration and other) administered by the Administrative Court in Cardiff.¹⁰⁷ The majority of these claims were heard in Cardiff (occasionally in other locations in Wales), with some heard in Bristol. Nason and PLP were concerned to determine how many of these cases were connected to Wales in various ways and found that: 49 cases involved at least one claimant based in Wales and 40 cases involved at least one devolved Welsh public body defendant (including the Welsh Ministers) – with many involving multiple such defendants. This means there were only approx. six cases per-annum over the eight-year period involving claimants based in Wales. What is also instructive is the difficulty of specifically classifying claims as 'Welsh law' claims. As Nason and PLP noted:

...any attempt to categorise claims precisely as turning on matters of Welsh law and/or devolved Welsh policy, was fraught with difficulties. This is significantly due to the nature of public administrative law, where the general principles - that public body decisions must be lawful, procedurally fair, and reasonable - stem from the common law of England and Wales. Whilst these common law principles have often been described as generalised principles of statutory interpretation, the precise significance of the relevant statutory provisions to the case at hand varies greatly. Judicial review claims rarely ever include just one ground, more often than not multiple common law grounds are argued (including illegality, procedural impropriety and irrationality), regularly accompanied by particular forms of statutory illegality – breach of the UK wide Human Rights Act 1998 or Equality Act 2010, or of a particular piece of EU law.

¹⁰⁵ S Nason and M Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76(2) *Modern Law Review* 223.

¹⁰⁶ <https://solicitors.lawsociety.org.uk>

¹⁰⁷ These were judgments reported in full on Westlaw, and we anticipate that this sample includes 90% of all judgments during delivered during the time period.

At the outset we define ‘Devolved Welsh law’ in this context to include the body of law (primary, secondary, and soft-law e.g., ‘Guidance’) made by the National Assembly for Wales and Welsh Ministers. We acknowledge that ‘Welsh law’ also includes law made by the Westminster Parliament that applies only to Wales. Welsh law can feature in a judicial review application in a number of different ways. Most obviously the lawfulness of a piece of legislation itself can be challenged, usually this is secondary legislation, but in the case of Wales, Devolved Welsh primary legislation can also be challenged as potentially beyond legislative competence. A public body’s compliance with relevant Welsh law can be challenged – has the public body correctly interpreted and applied the law. Particular aspects of Welsh law (primary, secondary, and soft-law) can also be raised as relevant considerations that arguably should have been taken into account by the public body in reaching its decision; sometimes these considerations go to the lawfulness of a public body’s decision, but equally the relevant statutory and policy context is also important in determining whether the public body’s decision was reasonable.

The upshot from the substantive judgments is that cases regularly involve multiple grounds, with multiple sources of law relied on in a number of different ways. For example, the central issue in a case may concern whether a Welsh public body has breached the claimant’s ECHR rights or Equality rights under UK law, but factors going to determining whether a prima facie breach is proportionate can include provisions of Devolved Welsh law and policy. In many cases aspects of the law applicable to the UK, the law applicable to England and Wales, and the law applicable to Wales or England only (as well as related policy/guidance), might all be considerations relevant to the lawfulness and/or reasonableness of a range of public body decisions challenged in just one case. In some areas, most notably environmental law, the relevant legal regimes are primarily of EU law and Devolved Welsh law, with the law applicable to England and Wales sometimes also being examined if certain provisions apply. In cases concerning human rights, international legal regimes (including those beyond the ECHR) have also been examined as considerations (for example, as going to the reasonableness or proportionality of decisions or policies).

Given the complexities of the legal issues addressed in many of the cases, we merely highlight here how many judgments involved an examination of law made by the National Assembly for Wales and Welsh Ministers (we do not purport to determine precisely how this law was relevant to the case). **There were 26 cases in which provisions of such Devolved Welsh law were examined.** There were also a small number of obvious cases in which Westminster legislation clearly applying only to Wales was examined, but we do not purport to provide a detailed analysis of such examples here. Our main reflection is that whilst there were 1,167 civil judicial review claims (both asylum and immigration and others) issued in Cardiff [from 1 May 2009 to 30 April 2018] only a small proportion resulted in a reported substantive judgment turning in whole or in part on matters of Devolved Welsh law.

7.12 Of course we have to note here that only a very small proportion of claims issued reach a substantive judgment, and we should add to this the many concerns that are resolved earlier at Letter Before Claim stage, through informal negotiation, or where a potential claimant may take no action at all. We heard about many examples of pre-litigation discussions, and Letters Before Claim, from our research participants including in the areas of homelessness decision-making, school transport and special educational needs. In the majority of issues discussed by our research participants, either the local authority or Welsh Ministers as potential respondents had either

conceded the legal point, or more likely had committed to re-taking a challenged decision in the potential applicant's favour but without conceding any legal errors in the initial decision.

- 7.13 Whilst Nason and Sunkin's hypothesis about the potential access to justice implications of regionalising the Administrative Court was in part based on the notion of 'if you build it they will come' (they being specialist lawyers), the Commission on Justice in Wales goes further proposing in essence 'we have built it they must use it'. The Commission's recommendation is that:

It should be compulsory under the Civil Procedure Rules for cases against Welsh public bodies which challenge the lawfulness of their decisions to be issued and heard in Wales.¹⁰⁸

- 7.14 It should be noted that the Commission's recommendation does not specifically reference judicial review and could cover a broader range of cases (including in the county courts) involving public body defendants, where there is an even stronger case for ensuring local listing and hearing given the smaller likelihood of matters of general Wales and England legal importance arising here, and where local knowledge and Welsh law expertise is of daily 'bread and butter' importance. There is a precedent for requiring particular types of cases against certain public body defendants to be issued and heard in Wales. For example particular statutory appeals in the Administrative Court against Welsh public bodies under Welsh law must be filled in Cardiff (CPR Practice Direction 52D, para 27A.3(1)). However, this only applies to a small class of potential claims.
- 7.15 The Commission's rationale for requiring judicial reviews against Welsh public bodies to be issued and heard in Wales restates much of Nason and Sunkin's earlier hypothesis. The Commission argues that Welsh cases are likely to be publicised more fully if heard locally and therefore the body that has made the initial decision might be subject to greater scrutiny and accountability; all those persons or bodies directly affected by the decision under challenge would be more likely to engage with the case if the case is heard locally; the Administrative Court in Wales was set up specifically to further the aim of promoting access to justice and maximum use of the court is obviously desirable; the costs of proceeding locally are likely to be less than proceeding in London; and, there are also indirect benefits if such cases are heard in Wales including developing specialism in the legal sector in Wales with the consequential boost to the legal economy and a wider contribution to the Welsh economy.
- 7.16 There remain strong constitutional and practical rationales for claims against Welsh public bodies to be issued and heard in Wales. However, there are some concerns that also need to be addressed. Our evidence likely shows that access to legally-aided public law advice is harder to come by in Wales than in particular areas of England, and that a slightly higher proportion of applicants issuing in Wales do so without legal representation. There are some questions around whether the necessity for issuing and hearing in Wales might implicitly restrict people's capacity to instruct legal advisers of their choice, with lawyers based in England perhaps reluctant to take on cases due to costs of travelling to Wales. However, the evidence seems to show that whilst representation in the Administrative Court is usually from barristers based at chambers located in England, a significant amount of pre-court public law work is done by solicitors and barristers located at firms and chambers in Wales. What may be needed is this nudge, recommended by the Justice Commission, to encourage the use of these more local lawyers in court proceedings as well, giving them an opportunity to develop further expertise in advocacy, also increasing confidence in instructing them in the future. There is a case for saying the capacity and talent is there in Wales, but not well supported by legal aid funding policy in particular, nor by perceptions of a London-centric (even in some cases London-Welsh) elitism.

¹⁰⁸ Commission on Justice in Wales, para 6.27.

- 7.17 However, particular problems may be caused for North Wales, which lacks public law specialists, compared to across the border in Chester, but most specifically in Liverpool and Manchester. Claimants and respondents in North Wales are more likely to instruct lawyers based in England, with cases being issued in Manchester and heard in Liverpool for example, for convenience and cost effectiveness for the lawyers. We heard, for example, a case of a public interest group in North Wales who issued proceedings in Manchester specifically because they wanted to take the cathartic step of handing over the legal documents in person, this would have been much more expensive if they had needed to travel to Cardiff to do so. Indeed, their preference would have been to serve the documents on the public body itself at its offices. The case was ultimately heard in Liverpool, but it is telling that legal representation was from a lawyer living in North Wales but working also across the North West of England. Those in Wales with the capacity to take on these claims may very well be ‘out there’ and could adjust working practices accordingly with appropriate support. We note anecdotally there are a cadre of barristers based at chambers in England who live in Wales, for whom taking on cases that necessarily must be issued and heard in Wales might not be problematic or add to costs.
- 7.18 Since regionalisation was an England and Wales wide reform, the recommendation might cause some concern for the other regions. For example, should it then be compulsory for cases against public bodies in the North East of England to be issued in Leeds? The Welsh context has a stronger constitutional, and also a linguistic rationale, and there is divergence between substantive English and Welsh administrative law, but as Nason and PLP’s evidence demonstrates, this has not so far led to a significant difference in the make-up of the Cardiff Administrative Court’s caseload as compared to the other regional Courts and the RCJ in London, though divergence may well increase in the future.
- 7.19 Ultimately, to use the phrase of one of our research participants, ‘access to judicial review is a mess everywhere and most people can’t afford it, does this add an additional burden that might not have the intended consequences?’ It seems to us, however, that recommending that claims against public bodies (not only judicial review but also other claims in the county court) sends an important message and one which the profession has the capacity to respond to with the appropriate support, but as far as judicial review in particular is concerned there need to be other aligned initiatives to support awareness of, and access to the procedure.
- 7.20 The problems of accessing judicial review are clearly not unique to Wales. The number of other civil (non-immigration) judicial reviews across the Administrative Court as a whole has declined significantly in recent years. From approx. 2,000 per-annum between 1996 and 2012, falling from 2013 onwards down to 1,597 in 2018. Caseloads have reduced in London and in every ‘regional’ Administrative Court. Post 2012/13 there has also been a significant reduction in the proportion of claims involving solicitors from outside London and the South East of England. For example, the proportion of judicial review claims issued by solicitors from the North of England has reduced by more than half since the Regional Courts were established in 2009. Worst hit have been Leeds and Manchester, where civil (non-immigration) judicial review caseloads have reduced by more than half since 2013.
- 7.21 An increase in the proportion of unrepresented litigants, and reduction in activity of regional solicitors has also coincided with a general decline in the proportion of claims issued outside London. In 2018, 25% of civil non-immigration judicial reviews were issued outside London (26% of criminal judicial reviews and 13% of immigration judicial reviews). In the first six months of 2019, of all Administrative Court judicial review issued, 24% of civil non-immigration judicial

reviews were issued outside London (15% of criminal judicial review and 12% of immigration judicial reviews) (data taken from Ministry of Justice Civil Justice Statistics Quarterly).

- 7.22 It is hard to escape that the overall reduction in claims, and disproportionately higher reduction in claims in some regions, and the accelerated increase in the proportion of unrepresented litigants coincided with the implementation of reforms to legal aid and to the judicial review procedure. Specifically, the reforms introduced by the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012 and related Regulations. Although legal aid remains available for judicial review, it does so in an attenuated form, whereby the general presumption is that lawyers will not be paid for significant amounts of work at the permission stage if the claim is refused permission. Joe Tomlinson has described accessing legal aid for judicial review cases post-LASPO as having ‘byzantine complexity’, noting too that the proportion of Administrative Court judicial reviews funded to some extent by legal aid has fallen from 36.7% in 2001 to 4.4% in 2015.¹⁰⁹ Just one example of the ‘chilling effect’ of legal aid reforms on judicial review practice is the significant decline in prisons judicial review in the North East of England caused in substantial part by the closure of specialist firms which previously had legal aid contracts for the work.
- 7.23 Ultimately, by 2018 the proportion of claims issued in the Regional Administrative Court Centres was even lower than the estimated proportion of claims originating with applicants outside London and the South East of England in the years immediately preceding the reforms. A general assessment of regionalisation then, is that whilst in its early days its main impacts were indeed to reduce costs and increase convenience for lawyers, it had begun to catalyse a market for specialist public law legal services and broader administrative law legal cultures outside London. With more time, specialists could well have contributed to increasing general awareness of public law and could have driven broader local access to justice across a wide range of areas of administration. However, this potential broadening out was cut short in its relative infancy due to the impact of legal aid reforms, indeed the disproportionate impact of these reforms on legal practice outside London and the South East of England.
- 7.24 Wales too has seen a reduction, both in some social welfare practices closing down, and with fewer judicial reviews being issued by claimants and solicitors with addresses in Wales nowadays than was the case before the Administrative Court opened in Cardiff ten years ago. UK Government aims to restrict the use of judicial review seem to have been largely successful, which is particularly worrying given that the anecdotal arguments for reform were debunked by empirical evidence, and that the new Government seems now to be considering even further restrictions on the accessibility, and even potentially the grounds, of review.
- 7.25 The paucity of legal aid, continued lack of awareness of Welsh law, and to some extent a culture of individual deference to authority, means that it can be difficult to identify and to fund cases where Welsh law would benefit from transparent, independent judicial interpretation, and which would pass the necessary threshold of ‘arguability’ on their individual facts. Whilst in Wales there has been a tendency to suggest that incorporation of social and economic rights could be coupled with strong enforcement through a right to seek judicial review for breach of those rights, in reality the notion of strong judicial review may be a contradiction in terms. Judicial review is used often because deference to process and sensitivity to the respective expertise and constitutional position of judges and administrators, is built into the process. The stronger way to protect rights would be through a substantive right to legal appeal, relying on judicial review may be a risky backstop.

¹⁰⁹ Joe Tomlinson, ‘Crowdfunding public interest judicial reviews: a risky new resource and the case for a practical ethics’ [2019] *Public Law* 166, 169.

R12: We Recommend that the Welsh Government Cabinet Sub-Committee on Justice, and the Assembly Legislation, Justice and Constitution Committee, monitor any further proposed reforms to judicial review by the UK Government and Westminster Parliament and seek to mitigate the effects of any such reforms on the rule of law and public body accountability in Wales.

R13: We Recommend that the Assembly Legislation, Justice and Constitution Committee conduct its own inquiry into the effectiveness of judicial review as a remedy for breaches of Welsh administrative law and/or breaches of general administrative law principles by devolved Welsh authorities. This should also take into account the role of judicial review in the context of integrating Welsh policies on future generations, sustainability, international standards on human rights, and Welsh specific equality duties, with the justice system.

8. The Public Services Ombudsman for Wales

8.1 Long described as ‘the buckle in the belt’ of administrative justice, the PSOW provides a form of ‘one stop shop’ for complaints against a broad range of public bodies in Wales. Under the Public Services Ombudsman (Wales) Act 2019 the PSOW has recently gained new powers; to accept oral complaints, to undertake own initiative investigations, to investigate private medical treatment in the public/private healthcare pathways, and to undertake a role in relation to complaints handling standards and procedures (a Complaints Standards Authority (CSA) role).

8.2 In 2018/19, whilst the number of enquiries to the PSOW was down 5% on the previous year, the number of complaints was up 10% to 2,489.¹¹⁰ Over the years the increase in enquiries has been more notable than the increase in complaints (enquiries were up from 1,866 in 2011/12 to 4,627 in 2018/19). Some 41% of complaints to the PSOW relate to health, and the number of such complaints has been increasing significantly over the years. On the whole the PSOW’s use of early resolution has increased. That said given the increase in public body complaints, the number sent to detailed considerations/investigation in 2018/19 was 647 (up 30% on the previous year) and 532 resulted in resolutions or complaints upheld (up 31% on the previous year). The number of local authority Code of Conduct Complaints was also up from the previous year (up 4% to 282) and 51 of these were investigated (up 70% on the previous year). Of these eight were referred to the Adjudication Panel for Wales (APW) and Standards Committees (88% of these related to the promotion of equality). The APW determines alleged breaches by elected and co-opted members of Welsh county, county borough and community councils, fire and national park authorities, against their authority’s statutory code of conduct. The APW has recently issued a Practice Direction (APW/PD/01/2020) on Responses to a reference from the PSOW.¹¹¹ Other than the APW, the PSOW has not had any specific engagement with other devolved Welsh Tribunals.

8.3 The PSOW’s corporate plan for 2019/20 to 2021/2022 is entitled ‘Delivering Justice’, noting that the PSOW’s mission is: ‘To uphold justice and improve public services’. This is coupled with three strategic aims. First to ‘deliver justice’ by providing a ‘fair, independent, inclusive and responsive complaints service’; Second, to ‘Promote learning from complaints and stimulate improvements on a wider scale’; and Third, to ‘Identify and adopt best practice. Secure value for money and services that are fit for the future. Support staff and ensure good governance which supports and challenges us’.¹¹²

¹¹⁰ *The Public Services Ombudsman for Wales, Annual report and Accounts 2018/19*: <https://www.ombudsman.wales/wp-content/uploads/2019/07/Annual-Report-and-Accounts-2018-2019-Final-ENG.pdf>

¹¹¹ <https://adjudicationpanel.gov.wales/sites/adjudicationpanel/files/2020-01/apw-practice-direction-01-2020.pdf>

¹¹² <https://www.ombudsman.wales/wp-content/uploads/2019/04/Corporate-Plan-2019-20-2021-22.pdf>

8.4 The ‘delivering justice’ aim has various priorities including remedying injustice through fair and impartial settlements and investigations. Commentators have proposed that an ombuds unique position in administrative justice makes them well placed to foster greater coordination and cooperation between parts of the administrative justice system (WFGA ways of working ‘collaboration’) and that ombuds can assist in empowering people to choose the form of redress most appropriate and convenient for them (WFGA ‘involvement’). As we discuss further below in relation to design and oversight, this begins with the idea of interoperability between functions and institutions and leads some to go far as suggesting a ‘fusion’ between particular bodies with respect to some of their activities. It has been suggested that ombuds could be central to such co-ordination and to the broader development of an administration justice system. For example, in forthcoming work on the Parliamentary and Health Services Ombudsman, Kirkham, Gill and others suggest that there could be a statutory duty for (in this case the PSO) to report annually on its contribution towards administrative justice, broken down into a series of sub-issues including; quality control of standards of decision-making; implementation of recommendations; analysis of complaints per sector; engagement with bodies in jurisdiction; results of systemic and public interest investigations; implementation of the Complaint Standards Authority role; details of any legal developments affecting the ombud (including all proceedings brought by way of judicial review); Freedom of Information claims; consultations with other oversight bodies; a statement on the administrative justice system; and periodic independent and peer review.¹¹³ In Wales, the PSOW likely already publishes much of this information in various ways through Annual Reports and casebooks, or is intending to publish such information on commencing performance of new roles. The addition of a statement on the overall health of the administrative justice system in Wales could well help raise awareness of administrative justice, but this is not within the current statutory remit of the PSOW, and would require additional resources for the office.

Relationship between the PSOW, the Administrative Court and Devolved Welsh Tribunals

8.5 As noted, the only devolved Welsh tribunal the PSOW has distinct engagement with is the APW, though we heard that there are regular and open lines of communication between the PSOW and the Welsh Government Welsh Tribunals Unit that administers most Welsh Tribunals. This leads to clear sign-posting between the different institutions where relevant.

8.6 The PSOW’s relationship with the Administrative Court in Wales was specifically considered by the Assembly Finance Committee in 2015. On considering extending the PSOW’s powers the Committee considered recommendations made by the Law Commission in its 2011 report, *The Public Services Ombudsmen*.¹¹⁴ The first relevant recommendation was that ‘access to the Ombudsman could be improved by modifying the “statutory bar” which restricts the ability of citizens to choose the institution for administrative redress the refer (i.e. the Ombudsman or the courts)’. The statutory bars exist in all UK ombuds legislation and provide that an ombud should not accept a complaint if the complainant had had, or could have, recourse to a court tribunal or other mechanism for review (in Wales, for example this could be review by a Welsh Minister). However, ombuds have discretion to accept a complaint if it is reasonable for them to do so. In practice the statutory provisions do not create an absolute bar, they create a strong presumption against an ombud opening an investigation. As the Law Commission notes, the first bar was enacted in 1967, a product of its time and designed to preserve the supremacy of the courts over strictly legal matters whilst confining ombuds to administrative complaints. Such a strict division no longer fits with 21st Century understandings of law and administration.

¹¹³ Richard Kirkham and Chris Gill, ‘Principles for a New public Services Ombudsman’ *forthcoming*.

¹¹⁴ Law Commission, *The Public Services Ombudsmen* (Law Com No.329, 2011): https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc329_ombudsmen.pdf

- 8.7 The Law Commission's 2011 recommendation was that the bar be replaced with the discretion for an ombud to take a claim unless they decide it not appropriate. In effect this would mean both the PSOW and Administrative Court in Wales could have concurrent jurisdiction. The Law Commission, however, noted that some consultees thought this 'would merely put on a statutory basis the current practice of the public services ombudsman'.¹¹⁵ The ombuds responding to the consultation noted that the factors going to discretion to take a claim or not would largely be the same whether the initial presumption was in favour or against investigation.
- 8.8 However, the Law Commission is likely right that legislation signals intentions, and the current presumption in favour of litigation does not fit well with more recent attempts to move away from 'law's empire' or the 'pathology of legalism' as central to justice in public administration. The Senior President of Tribunals has called for more 'interoperability' between ombuds, courts and tribunals, noting that there has been a 'lawyerisation' of administrative justice, potentially at the expense of making full use of expertise evident in other parts of the system.¹¹⁶ Doyle and O'Brien argue that the ombuds process operates more 'humanely and democratically' with more potential for informal engagement and involvement of individuals and communities affected by administrative issues, allowing for longer-term, preventative solutions in a more open-ended process of systemic improvement.¹¹⁷
- 8.9 However, the UK Government has never responded to the Law Commission's 2011 Report, and the Assembly Finance Committee considered that replacing the statutory bar with a discretion would likely be best addressed at UK level. However, given that some of the Law Commission's recommendations refer to Wales, the Finance Committee recommended that Welsh Government respond to the Law Commission report.
- 8.10 Removal of the statutory bar may raise issues of legislative competence. The Law Commission's recommendation effectively alters the presumption that ombuds cannot investigate where a complainant has potential recourse to the courts, to a presumption that an ombud can investigate. Legislative change here would primarily impact on the jurisdiction of the devolved PSOW, but arguably it would also have an impact on the jurisdiction of the relevant courts and tribunals by removing a presumption in favour of their exercising exclusive jurisdiction over the claim. However, this same problem would not be encountered with respect to the devolved Welsh tribunals, and it would likely be possible to remove the statutory bar (presumption against the PSOW investigating) where an individual has, or could have had, recourse to a devolved Welsh tribunal.
- 8.11 The Assembly Finance Committee took evidence on the potential practical impacts of removing the statutory bar.¹¹⁸ In response, the Wales Council for Voluntary Action (WCVA) and CAB Cymru were of the view that removal could improve access to justice, that it would not lead to a costly increase in either complaints to the PSOW or claims to the Administrative Court since individuals are already reluctant to complain (as our current research also finds) and would be unlikely to take both routes simply because they happen to be available. The Auditor General noted concerns about costs to the taxpayer of both routes being concurrently available, and an

¹¹⁵ Law Commission 2011, para 3.37.

¹¹⁶ Sir Ernest Ryder, 'Driving Improvements: Collaboration and Peer Learning' (Ombudsman Association Conference, Belfast May 2019): https://www.judiciary.uk/wp-content/uploads/2019/09/2019_09_19_SPT_Ombudsman_Conference_-Belfast_May2019_FINAL-2.pdf

¹¹⁷ Doyle and O'Brien, 'Reimagining Administrative Justice'

¹¹⁸ National Assembly Finance Committee, Consideration of Powers: Public Services Ombudsman for Wales (May 2015): <https://www.cynulliad.cymru/laid/%20documents/cr-ld10200/cr-ld10200-e.pdf>

Audit Office official expressed concern that a ‘double jurisdiction’ or ‘twin-track approach’ would lead to greater public expenditure.¹¹⁹ We think this is unlikely to be the case, not least as the jurisdiction of the Administrative Court is already circumscribed by the principle that applicants must generally have exhausted all other remedies before seeking judicial review. If concurrent jurisdiction allows issues to be more fully addressed bringing to bare expertise necessary to clarify the law, as well as to improve standards of public administration, costly future disputes could also be avoided, and systemic improvements made to public administration.

8.12 We think it is also concerning, however, that the difficulties of accessing the courts due to legal aid reforms tend often to be given as a reason for removing the statutory bar (noted in evidence of, for example, CAB, WCVA and the Welsh Local Government Association (WLGA)). In our view, where an individual legal right is at stake a legally enforceable remedy should be available which may be a specific right to legal action for breach of a duty in the county courts or a devolved Welsh tribunal. However, judicial review should also be accessible as a constitutional fundamental for clarifying points of legal principle and practice, and ensuring that Welsh law receives independent, transparent judicial interpretation and enforcement where appropriate. The better proposition here is to improve access both to the courts and devolved Welsh tribunals where relevant, and to judicial review in the Administrative Court in Wales. As we have discussed above, there is a need to increase access to judicial review in Wales even if this will necessarily have financial implications.

8.13 The Commission on Justice in Wales does not make any recommendations about the statutory bar on ombuds investigations; however, it endorses the Law Commission’s other two recommendations that:

The Administrative Court should have the power to stay court proceedings whilst the Public Services Ombudsman for Wales investigates a complaint. The Ombudsman should have the power to refer a point of law to the courts.¹²⁰

The PSOW gave evidence to the Commission proposing that these recommendations should be adopted in Wales.¹²¹

8.14 In relation to the ‘stay’ provisions the Law Commission recommended the creation of a specific power to stay an application for judicial review so that appropriate matters could be handled by an ombud rather than the courts. There is no provision, in legislation or the CPR, that specifically allows an ombud to consider a complaint where a judge has determined that it would be the better means of resolution. The stay power would provide greater flexibility, and would mean that complainants avoid the potential pitfall of having to choose quickly what is the appropriate forum for their dispute (given the three month (and sometimes shorter) time limit to seek judicial review). Proceedings could be issued, whilst also knowing that this does not prevent an ombuds investigation if such is considered appropriate (and indeed potentially in the broader public interest).

8.15 Participants in our current research were generally in favour of such a ‘stay’ power but thought that ‘the devil will be in the detail’ of how it is to work practically. On this matter, the Law Commission’s more specific recommendations were that:

¹¹⁹ Finance Committee, ‘Consideration of PSOW Powers’ para 213.

¹²⁰ Commission on Justice in Wales, para 6.55.

¹²¹ <https://gov.wales/sites/default/files/publications/2018-06/Submission%20to%20the%20Justice%20Commission%20from%20the%20Public%20Service%20Ombudsman.pdf>

- The Commission recommends ‘a general power to allow an action to be stayed either before or after permission’.
- The parties should be able to request that a matter is stayed, and make submissions on that point which might be different to those raised in the initial application.
- ‘Where the court, of its own volition, is minded to make an order to stay an action before it, it should seek written representations from the parties to the action before making such an order’.
- ‘...the stay power should allow an ombudsman to dispose of the matter as it sees fit. It should not require an ombudsman to open an investigation’.
- after the public services ombudsman has disposed of the matter. There is still a stay in existence. Where permission has not been granted, the findings of the public services ombudsman, or their refusal to investigate, could be considered at the permission stage. This would allow the court to see whether there is still any issue of administrative illegality that needs to be considered by the Administrative Court and decide at this preliminary and normally paper-based stage accordingly. If permission were to be granted, the court could then issue case management directions based on the remaining matters.
- Where permission has already been granted, but the matter is subsequently stayed, the court would consider the ombudsmen’s findings, or decision not to investigate, and any application to set aside the stay. At that stage, the Court could set aside the stay, either with or without further case management directions.
- **we have concluded that establishing our recommended mechanism would require an express power in the Senior Courts Act 1981 and an amendment to the provisions of the Civil Procedure Rules, probably in Part 54.**
- On the matter of how the Administrative Court should deal with actions that come before it on issues that have, in another case, been stayed so that the matter can be investigated by an ombudsman. The Law Commission concludes: ‘If the actions concern the same defendant, then this should be picked up by the Court’s centralised computer system, known as COINS. This should mean that all actions are transferred to be heard at the same court. If they do proceed elsewhere it will be with the full knowledge of how the related proceedings are progressing. Consequently, a decision should be made with full information concerning other actions. If problems concerning related actions do manifest themselves, we suggest that this could be dealt with by an appropriate Practice Direction or an amendment to the Civil Procedure Rules’.

8.16 We note the Law Commission’s view that the process they have proposed would require an amendment to the Senior Courts Act 1981. A power to allow a stay so that the PSOW could investigate would then require discussion and agreement with MoJ and amendment to primary legislation.

8.17 The Assembly Finance Committee considered evidence that the Administrative Court might already be able to use its existing stay powers to allow an ombuds investigation. In evidence to the Assembly a representative from the Law Commission commented that: ‘the court already has a power to stay its proceedings – it’s one of its general powers. What we’re talking about would be a specific application of that power...I personally don’t see any obstacle to that being done under present rules’.¹²² David Gardner, Administrative Court Lawyer for Wales at the time also noted that the Court has:

¹²² Finance Committee, ‘Consideration of PSOW Powers’ para 221.

a discretionary power to stay any proceedings before it. The power to stay arises out of the Court's inherent jurisdiction to control its own proceedings and thus the Administrative Court may order proceedings to be stayed at any stage of the proceedings. This inherent power...is expressly noted in Civil Procedure Rules ('CPR') 3.1(2)(f). Thus, were the Court minded to exercise its discretion, it could stay proceedings to await an Ombudsman's decision.¹²³

8.18 Given the difficulties of amending the Senior Courts Act 1981, we suggest that this recommendation can be progressed in practice by what the Law Commission refer to as 'comity' between the ombuds and the court (in this case specifically between the PSOW and the Administrative Court in Wales). When we think of the small size of Wales as an asset, there are opportunities for engagement between the PSOW and the Administrative Court in Wales (respecting the independence of each) including through attendance of PSOW representatives at Administrative Court User Group Meetings. The appropriate use of the inherent stay power could be encouraged where appropriate by raising awareness among public lawyers (for example through the representative organisations such as Public Law Wales, whom the PSOW recently addressed in a seminar). In our discussion of redress design and oversight we note that the Commission on Justice in Wales has recommended that: 'Dispute resolution before courts, tribunals, alternative dispute resolution and ombudsmen, as well as dispute resolution in respect of administrative law, should be promoted and coordinated in Wales through a body chaired by a senior judge'.¹²⁴ Promoting 'comity' and 'interoperability' between the PSOW and courts and tribunals in Wales could be one of the functions of this board. There could also be an important leadership role here for the Administrative Court Liaison Judge for Wales. Though as we discussed above in relation to the Administrative Court in Wales, this can depend on the individual occupying the post, their connections with Wales, and more significantly time spent in the post, which has tended to be comparatively short, for all but one of the previous office holders.

8.19 We agree with the Law Commission, and evidence to the Assembly Committee, that a power to stay proceedings would likely to be used sparingly (even following the kind of promotion activities we have suggested) and would not lead to a significant increase in the PSOW caseload. However, we also note that the potential 'off setting' (in reduced costs to the Courts) would not work in practice in Wales given that Welsh Government is responsible for the financing the PSOW, but not the Administrative Court or the legal aid budget. It is likely understandable, then, alongside concerns about legislative competence, that the Minister for Public Services considered it better 'on balance...to have a line of demarcation between the ombudsman and the court'.¹²⁵ We believe, however, that this is an example of the current devolution context making it difficult for people in Wales to access justice in a manner most convenient to them, and in a manner best attuned to resolving individual disputes as well as facilitating future improvements in public administration.

8.20 As we discuss elsewhere in relation to system-wide reform, the UK Administrative Justice Council (AJC) has an 'Ombudsman and Tribunals Familiarisation' workstream, which aims to 'share learning between ombudsman schemes and tribunals'.¹²⁶ An AJC Working Group aims to develop pilots that could potentially be rolled-out to other jurisdictions. Currently this includes work undertaken between the Local Government and Social Care Ombudsman for England (LGSCO) and the SEND Tribunal. This has culminated in 'a programme of shadowing and information

¹²³ Finance Committee, 'Consideration of PSOW Powers' para 222.

¹²⁴ Commission on Justice in Wales, para 5.55.

¹²⁵ Finance Committee, 'Consideration of PSOW Powers' para 231.

¹²⁶ Administrative Justice Council, *Annual Report 2018/19* p.12: <https://ajc-justice.co.uk/wp-content/uploads/2019/11/AJC-Annual-report-.pdf>

exchange and an Information sharing protocol'. Shared working practices are one matter, but the SPT has also proposed a 'bold plea' and 'manifesto for change'. This includes:

The ability of administrative courts and tribunals to refer matters that are prima facie maladministration to an ombudsman who can consider them using their own initiative powers.¹²⁷

8.21 This then extends the idea of stay of proceedings for an ombudsman investigation to tribunals as well as the Administrative Court. In Wales this could be achieved through legislation and practice relating to devolved Welsh tribunals (in areas such as Special Educational Needs and Residential Property), this does not raise any legislative competence concerns. The SPT notes examples of this kind of practice having worked successfully in family law in the past where courts referred examples of poor practice to the then social service inspectorates who reported back to the judge or published their own conclusions.

8.22 As an example of why this needs to be done, the SPT refers to the English SEND tribunal, where for the academic year 2017/18, 89% of appeals were decided in favour of parents/young persons concerned, indicative of broader administrative problems in the English education system. In Wales success rates in SEN appeals have been lower, but we note the significant proportion of appeals to the Special Educational Needs Tribunal for Wales (SENTW) that are effectively conceded by local authorities, and concerns from parents and carers in our focus groups that local authorities are only willing to take them seriously if there are clear signs that they intend to appeal. A significant, and generally growing, percentage of appeals every year are conceded by the local authorities: 39% in 2016/17, 30% in 2015/16, 29% in 2014/15 and 30% in 2013/14. Separate from these are the cases which have been 'withdrawn by consent' which means that the parties have reached agreement and the parent agrees to withdraw their appeal on the basis of the agreed amendments. These represented 10% of outcomes in 2016/17, 12% in 2015/16 (but none in 2014/15). There is also a significant percentage of claims that are withdrawn. The statistics don't give reason for withdrawal, but state: 'In addition, there is a percentage of appeals which are withdrawn by parents: 17% in 2016/17, 16% in 2015/16 and 36% in 2014/15.' Another way of looking at the statistics is that of those cases that are not withdrawn, withdrawn by consent, conceded, struck out or remitted, pending, or upheld, the number of cases dismissed are very low: 5% were dismissed in 2016/17, 7% in 2015/16 and 4% in 2014/15. The significant withdrawal rates could potentially be addressed by a PSOW investigation.

8.23 Creutzfeldt and Kirkham suggest that it is unclear how innovations in 'interoperability' between ombuds and tribunals could be taken forward without legislative reform. For Wales own initiative powers of investigation are already established in law, but specific stay provisions are not. It would be open to the Assembly to reform legislation governing devolved Welsh tribunals to provide a specific power of stay for an ombuds investigation. Indeed, such provisions could be proposed in any new Welsh Tribunals Bill that might follow from the current Law Commission project examining the devolved Welsh tribunals. Creutzfeldt and Kirkham however also wonder if the SPT is 'suggesting that sufficient "back channels" already exist for tribunals to cajole litigants in the direction of ombuds' and that caseworkers in tribunals could be 'challenged to use their discretion' in terms of making suggestions about the best way forward for particular cases. They also suggest that 'there is a hidden potential for the judiciary to compile the learning from multiple cases and ask the question – why does this keep happening?'.¹²⁸ This is a task that could be

¹²⁷ Sir Ernest Ryder, 'Driving Improvements' (n 117) p.2.

¹²⁸ Creutzfeldt and Kirkham, 'Reform of the administrative justice system: a plea for change and a research agenda' (UKAJI September 2019): <https://ukaji.org/2019/09/16/reform-of-the-administrative-justice-system-a-plea-for-change-and-a-research-agenda/>

reasonably conducted for Wales jointly between the Administrative Court Liaison Judge and the Administrative Court Lawyer for Wales. It may be something that already happens informally. Given the very small number of cases that make it to a substantive hearing, effective monitoring would likely need to be of case files in issued claims (many of which are withdrawn pre-permission) and in permission stage decisions (which are usually not reported).

8.24 Creutzfeldt and Kirkham note there may be concerns from the ombuds sector about attempts to ‘familiarise’ them with the practices of courts and tribunals, as they put it ombuds ‘would no doubt be nervous that the direction of travel would be all one way – with the judicial culture formalising and diluting the more “equitable” form of justice currently delivered’. We note a recommendation of the Justice Commission, which we examine in more detail below, that the PSOW be subject to oversight of the President of Welsh Tribunals. This is likely to cause similar concerns both over the nature of the ombuds functions, the PSOW’s independence, and that the ombuds is already accountable to the Assembly. Nevertheless, as the SPT puts it, the matter is one of ‘comity’ rather than so-called judicialisation, and the PSOW in Wales, we argue, should be confident in the value of its own procedures.

8.25 In 2011, the Law Reform Committee of the Bar Council was opposed to the Law Commission’s proposals for similar reasons, arguing that such could risk imbuing the ombuds essentially informal procedure with aspects for formality and adversarialism, and the ombuds ‘should not become a substitute for the vindication of individual rights which litigation alone provides’. In response the Law Commission concluded:

We do not think that the change in the principal forum for a matter, which is properly categorised as a dispute in the context of a court, to an ombudsman would lead to the latter process becoming adversarial. The ombudsmen’s processes are investigatory and the parties have to respond to that investigation rather than acting as they do in a court case. Given the discretion accorded to the ombudsmen by their governing statutes, it is hard to see how the parties to the original case could upset the freedom of an ombudsman to dispose of a matter as it sees fit.

We accept that the courts are the primary forum within which to vindicate rights. We see the public services ombudsmen primarily as institutions for administrative justice rather than as human rights defenders. We suggest that this would be a factor that would guide a court’s decision whether or not to stay.¹²⁹

8.26 The third recommendation of the Law Commission, endorsed for Wales by the Justice Commission, is that the PSOW should have a power to refer a point of law to the Administrative Court. The Justice Commission refers only to the courts and not tribunals, most likely because the devolved Welsh tribunals are not senior courts of record, whereas the Administrative Court and the England and Wales Upper Tribunal are, therefore the devolved tribunals would not be able to issue binding judgments on a point of law. Notably the SPT recommends a power in an ombud to refer to the Administrative Appeals Chamber of the Upper Tribunal any issues they believe require guidance by judicial review determination, or individual redress beyond their powers. The SPT also notes that the power to issue binding legal guidance ‘should not be underestimated’.¹³⁰

¹²⁹ Law Commission 2011, para 3.82.

¹³⁰ Sir Ernest Ryder, ‘Driving Improvements’ (n 117).

- 8.27 Again, going back to the Law Commission's original proposals we find more detail on how a reference procedure might operate. Our expert research participants were in favour of the proposal in principle, but questioned how it would work in practice. The Law Commission noted: 'The reference procedure we are recommending is an entirely new one'.¹³¹ The important point to stress, again based on comity between institutions, is that the procedure would be part of the ombuds own process rather than a transferral to the court.
- 8.28 The Law Commission proposed that a reference procedure would be a useful tool to facilitate the work of the ombuds. Two main reasons were: first, so that the ombud is not forced to abandon an investigation that could otherwise have been concluded due to a question of law they were not equipped to determine, and second, the power could be used to resolve occasional questions about the ombud's own jurisdiction. Notably one aspect of the SPT's more recent suggestion is missing, that is to provide individual redress beyond the powers of the ombud.
- 8.29 For the Law Commission, the proposed mechanism is for the ombud to ask a specific question or questions of law for a formal ruling by the Administrative Court. The Commission recommends this should be considered a judgment of the Court for the purposes of section 16 of the Senior Courts Act 1981 and, therefore, potentially subject to appeal to the Court of Appeal. This would effectively be a declaration on a point of law, and it seems unlikely that the Law Commission considered the reference procedure an appropriate mechanism to provide other remedies to 'parties' (e.g., a mandatory order requiring a public body to retake a specific decision cognisant of the legal clarification supplied).
- 8.30 Our research participants were interested in this distinction between a reference purely to clarify a point of law, or, what the SPT more recently seems to propose, which would enable the Upper Tribunal in particular to grant a remedy (individual redress) that would be beyond the powers of the ombud. Across our research we recognised the importance of seeking greater flexibility in the award of remedies so as to better engage with the user (involve and collaborate with them to a degree in establishing a suitable and effective remedy) whilst also thinking about broader remedies appropriate in the public interest. The flipside of this flexibility is a concern about processes, and particularly individuals' understanding and ability to navigate them. Responding to the Law Commission in 2011, the Law Reform Committee of the Bar Council noted the risk of 'imbuing an essentially informal procedure with elements of a formal, adversarial procedure', it also thought that it would be 'unattractive to compel a person to depart from the procedure he or she has selected and enter a different kind of procedure'.¹³²
- 8.31 The Law Commission's response to these concerns was that the ombud should notify the complainant and the relevant public bodies before making a reference, inviting them to submit their views and/or to intervene before the court, but that where they do chose to intervene they would have to meet their own costs. There is a balance to be struck here as the parties are not compelled to participate, so they are not 'compelled' to use a different procedure, but they may find it necessary and important to express their own views and this would be at their own cost. The Law Commission considered that such references are likely to occur only rarely; that the ombud will have the final decision on whether or not to refer; and that standard judicial review processes (including permission and case management) will apply to ensure that none of the parties seek to abuse court processes (e.g., as a means to delay the conclusion of an ombuds investigation).

¹³¹ Law Commission 2011, para 4.91.

¹³² Law Commission 2011, para 3.65.

8.32 The procedure would need to be established in legislation, and therefore would potentially raise legislative competence issues in Wales, as arguably it impacts on the jurisdiction of the Administrative Court by requiring it to determine what the Law Commission accepts is an ‘entirely new’ procedure. That said there are other examples of devolved Welsh law which requires either the High Court or county courts to determine types of claim that do not exist in English law. However, these are specifically appeals on a point of law, and appeals identical to judicial review (such as under the Housing (Wales) Act 2014, analogous to the Housing Act 1996) which are already familiar to the England and Wales courts. An entirely new species of reference procedure might be more problematic. On the other hand, it could be argued that there is a precedent, for example statutory provision for determination of a devolution issue after a reference from a Magistrates Court (part 2 of Schedule 9 to the Government of Wales Act 2006). However, there has to date been no reference under this provision so we cannot be sure what the practical arrangements would be.¹³³

8.33 The Welsh language Commissioner has a specific statutory power to ‘institute or intervene in legal proceedings in England and Wales if it appears to the Commissioner that the proceedings are relevant to a matter in respect of which the Commissioner has a function’.¹³⁴ This power is qualified, however, by the restriction that it “does not create a cause of action”. Although the effect of this restriction has not been tested in the courts, it may well prove an obstacle to the Commissioner seeking declaratory statements as to the law by the courts in advance of the exercise by the Commissioner of the function to which the question of law relates.

8.34 There has been some discussion of whether an ombud could bring ordinary proceedings against a public body, without any unique statutory power, seeking the remedy of a declaration to clarify the law. Given provisions around standing the ombud would still have to identify an individual or individuals affected by the allegedly unlawful decision(s) of the public body, but such persons need not formally be party to the litigation. This is to be distinguished from the reference procedure proposed by the Law Commission and endorsed by the Commission on Justice in Wales.

8.35 In our research we heard instances where participants considered aspects of Welsh law to be in urgent need of clarification by the courts (primarily through judicial review) but where access was proving difficult. The reasons for this seemed to include: the difficulty for individuals of accessing legal aid funded services, the difficulties for solicitors in securing legal aid for particular cases or types of cases, the tendency of public bodies (including local authorities and Welsh Government) to reach a negotiated settlement either on receipt of a Letter Before Claim or soon after proceedings had been issued (but usually this does not involve the public body conceding the point(s) of law raised). NGOs and other representative organisations also suggested that individuals are reluctant to complain, and specifically reluctant to be involved in legal action, or for their concerns to be made subject of legal action, and that it is difficult to identify cases strong enough on their facts and where the individual(s) affected are content for proceedings to be issued.

8.36 It is not immediately clear that giving the PSOW a power to refer a point of law to the Administrative Court would help improve access to judicial review, nor is that the aim of the proposed procedure. However, seeking a legal reference in a case that raises systemic issues, including under an ‘own initiative’ powers investigation, might have broader implications for the

¹³³ Appeal by way of case stated from a Magistrates’ Court under s.111 Magistrates Court Act 1980 or the Crown Court under s.28 Senior Courts Act 1981. Under s.105 the Welsh Language Commissioner or a relevant party may appeal from the Welsh Language Tribunal (with the permission) to the High Court (Administrative Court).

¹³⁴ WLWM, s.8(1).

public interest in legal clarification. A reference procedure would need to be enacted in primary legislation, in the absence of this, and in the shorter term, there might be potential for the PSOW to issue proceedings in its own right seeking a declaration.

8.37 It is questionable how much use might be made of a reference procedure in practice. For example, Creutzfeldt and Kirkham note that an equivalent power held by the Pensions Ombudsman has been used only once in a 25-year period (as far as they are aware). Another example is that the Charity Tribunal has jurisdiction to hear references on questions of charity law from the Attorney General and from the Charity Commission. This is governed by Charities Act 2011, which provides that ‘questions’ may be referred to the Charity Tribunal which involve either the operation of charity law in any respect, or its application to a particular state of affairs. But the Act does not confer the Tribunal with power to award particular remedies such as a quashing order or damages. Following consultation, the Law Commission decided that provision of such remedies is not required and that the Tribunal has adequate powers to determine references through delivering judgments on the legal issues at stake. The reference procedure was introduced to prevent charities incurring costs of commencing proceedings to resolve points of general uncertainty in the law. As Judge McKenna described it, the reference process is: ‘a novel procedure, designed to settle questions of general importance to the charity sector without the need for individual charities to appeal against a specific decision’.¹³⁵ As with the example of the Pensions Ombuds reference procedure, this procedure too is rarely used (for example in evidence to a Law Commission consultation in 2017, the Charity Law Association said that only two references been brought by that time since the procedure came into force in 2012).

8.38 We wonder whether there is potential for a specific procedure that would allow particular bodies in the Welsh administrative justice system to seek clarification on questions of general importance on matters of devolved public law and administrative justice. The Welsh Language Commissioner already has a power to initiate judicial review proceedings in relation to matters within the Commissioner’s remit. The Older People’s Commissioner may 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 and the Welsh Language Commissioner has a similar power where the case is relevant to the Commissioner’s functions. The Equality and Human Rights Commission has a power to institute judicial review proceedings in matters of relevance to its functions including where a public authority has breached the general equality duty. Again, we heard suggestions in our research that at least some of these bodies considered seeking judicial review difficult due to the reluctance of individual(s)/groups affected to be involved.

R14: We Recommend that the Law Commission and Welsh Government consider the case for including an express power for devolved Welsh tribunals to ‘stay’ proceedings for a PSOW investigation to be included in any draft Welsh Tribunals Bill.

R15: The Commission on Justice in Wales has recommended that: ‘Dispute resolution before courts, tribunals, alternative dispute resolution and ombudsmen, as well as dispute resolution in respect of administrative law, should be promoted and coordinated in Wales through a body chaired by a senior judge’. We Recommend that consideration be given to whether one of the functions of this board could be promoting ‘comity’ and ‘interoperability’ between the PSOW and courts and tribunals in Wales. This could extend to advocating for enactment of the Law Commission’s 2011 Recommendations that the Administrative Court should have a power to ‘stay’ proceedings for an ombuds investigation and that ombuds should have a power to refer a point of law to the Administrative Court.

¹³⁵ A McKenna, ‘The Charity Tribunal – where to and from’ (2014) 4 *Private Client Business* 213.

Ombuds Procedures

8.39 Another issue that has been raised is what the Law Commission refers to as the ‘closed’ nature of ombuds procedures. Investigations are usually conducted in private, and the ombuds (including the PSOW) are exempted from aspects of Freedom of Information legislation. One concern around interoperability between the ombuds and the courts is that for the most part court proceedings are not private. As we have noted, commentators have expressed concern that reference procedures to the courts risk judicialising ombuds, particularly with the potential to lead to the release of private information. The ombuds are subject to data protection legislation, and the Law Commission’s view is that new legal provisions could be put in place to provide that ombuds can only release information where they deem it necessary to conduct an investigation concerning a wider group of individuals, or to conduct an investigation into systemic failure. The PSOW (Wales) Act 2019, s.18(8) currently requires that investigations be conducted in private.

Ombuds, Human Rights and Equality

8.40 There has been recent focus on the potential roles for ombuds in human rights accountability, especially in the context of socio-economic rights.¹³⁶ Ombuds clearly have the advantages of being an effective and cost-efficient avenue for ensuring justice in the welfare state. The PSOW is free to use, nowadays is able to respond to concerns expressed in a variety of ways, not just in writing, can respond flexibly including using informal methods prior to a potential investigation, and can advise on matters of policy (being generally accepted as having a more significant impact on policy issues than the courts and tribunals). Ombuds procedures are generally more flexible than the courts, investigative powers are a particular asset allowing for an investigation of the dynamic and operational impact of particular proposed causes of action. Ombuds may be a more appropriate avenue for adjudication in disputes that turn primarily on the allocation of resources. Ombuds have a broader range of remedies at their disposal, including recommending apologies and financial compensation (though these are recommendations not binding orders they are invariably complied with).

8.41 That said, this does not mean that an ombud could provide a full substitute for the role of the Administrative Court, particularly in the realm of legally incorporated socio-economic rights. Jeff King provides a number of reasons why ombuds should not provide the sole means of adjudication in matters of socio-economic rights:

- Maladministration and legality are different, and the former is mostly operational whereas the latter can concern the substantive rationale for some behaviour or policy, or the plausibility of interpretations of legislative or constitutional mandates.
- The ombudsman is largely in control of the investigation and fact-finding process, (King argues that this can limit the client’s agency in building the case).
- There is a possibility of ombuds pre-judgement or lack of client control created inconspicuously by the combination of fact-determination and deciding (this is not to criticise the independence of ombuds, but rather to note that were ombuds to replace courts entirely in socio-economic rights adjudication their procedures might necessarily have to become more legalistic).

¹³⁶ See Doyle and O’Brien, ‘Reimagining Administrative Justice’ (n 3) and the many references therein.

- Resources are a problem for ombuds and it is generally seen as easier for government to underfund ombuds (and other inspectors and regulators too) than to underfund courts given their constitutional authority and independence.¹³⁷

8.42 There is a broader general issue around the perceived and actual constitutional authority of ombuds. As King notes: ‘Important legal questions implicating rights in the welfare allocation context do arise, and may require authoritative legal ruling alongside the questions of fairness, reasonableness, proportionality and so on. And of course, the compliance of legislation itself with social rights is something beyond the existing or foreseeable remit of the ombudsman. The decisions of courts in theory and often in practice are available to other citizens, unlike the decisions of the ombudsman. One rarely bargains in the shadow of an ombudsman report’.¹³⁸

8.43 Doyle and O’Brien have more recently argued that this builds an overly negative picture. As they note: ‘The suspicion endures in the UK that the ombud in particular, and administrative justice in general, is a pale imitation of authentic justiciability in respect of social and relational rights’. They argue that: ‘Examining the distinctive characteristics of the ombud makes it possible to construct a stronger image of how it can uniquely reinforce the prioritisation of community, network and openness and so reconnect administrative justice with the values of democracy and human rights’.¹³⁹ For Doyle and O’Brien this is due to the ombuds techniques including being able to offer investigation as a viable alternative to adjudication or mediation as forms of negotiated justice. The ombud also has a key role as storyteller, the advantage of being a continuous repeat player in administrative justice whose experience and expertise enables the detection of patterns. The ombuds process is also iterative, a process of to-ing and fro-ing with the parties and particularly the public bodies within the system. Finally, the ombud is the part of the administrative justice system with the clearest capacity to look beyond the individual cases at hand, to use the intelligence gained from resolving grievances to build bridges between individuals and the state for the future.

8.44 The recent enactment of own initiative powers and a Complaints Standards Authority (CSA) role for the PSOW will enable more extensive system-wide learning and bridge building. The PSOW has also recently published an *Equality & Human Rights Casebook* focusing on cases where human rights and/or equality matters have either been expressly raised as part of the complaint or have been central to the PSOW’s findings.¹⁴⁰ This includes 11 cases where the PSOW found that public bodies failed to consider or safeguard the human rights of services users, and three of these cases resulted in the issue of public interest reports under section 16 of the PSOW Act of 2005 (these all related to health bodies). Issues in the casebook spanned healthcare, social services, and housing services, school transport and complaint handling. The PSOW notes in his Foreword to the casebook:

Over the past two years, my investigative team has placed greater emphasis on exploring equality and human rights considerations when dealing with complaints...this is my first casebook for external publication. Express findings of a breach of any relevant laws are not matters for me, but the Courts. However, by outlining the thinking behind these decisions, I hope to demonstrate the approach I take and the continued importance of equality and human rights considerations in the work of my office.

¹³⁷ King, ‘Judging Social Rights’ p.91-93.

¹³⁸ King, ‘Judging Social Rights’ p.93.

¹³⁹ Doyle and O’Brien, ‘Reimagining Administrative Justice’ (n 3) chapter 5.

¹⁴⁰ PSOW, *Equality and Human Rights Casebook* 2019/20: https://www.ombudsman.wales/wp-content/uploads/2019/11/104483-Equality-and-Human-Rights-Casebook_Eng_v03.pdf

- 8.45 Case-workers have looked closely at the language used in enquiries and complaints to see if there may be human rights implications. Common issues are around end of life care, dignity in dying and family life, and the casebook refers to a range of ECHR Articles (e.g., right to life freedom from inhumane and degrading treatment, family life, religious beliefs and non-discrimination). It is notable that these cases are primarily concerned with civil rights, not social and economic rights, though the equalities cases are also instructive.
- 8.46 It is not the role of the PSOW to make determinations about whether human rights law has in fact been breached. Numerous commentators have, however, suggested that ombuds have a unique role in administrative justice generally, as bridging between other institutions and seeking to promote human rights values and principles including the so-called FREDAs principles (said to underpin a human rights-based approach to public administration). These latter principles are: Fairness, Respect, Equality, Dignity and Autonomy. Again, these are matters reflected in CAJTW's *Administrative Justice Principles for Wales*.
- 8.47 King notes that whilst ombuds should not take over complete responsibility for adjudication of social and economic rights issues, 'it is clear that the expertise of the ombudsman could be used as an alternative complaints venue at the first instance, but also as a partner where the respective competency of the ombudsman is relevant'. Ombuds 'might be used to investigate a dispute of a factual nature or to resolve complex questions of administrative workability, or to work out suitable arrangements between claimants and respondent bureaucracies or ministers. Coordination would complement constitutional social rights'.¹⁴¹
- 8.48 New Welsh law is increasingly seeking indirect incorporation of social and economic rights, through duties on public bodies to have 'due regard' to 'take into account' such rights, the PSOW could pay specific attention over time to decision-maker's compliance with these duties, though without of course specifically adjudicating on whether they have been breached as a matter of law.

R16: We Recommend that any Assembly Legislation, Justice and Constitution Committee inquiry into the integration and alignment with the justice system of Welsh policies on future generations, sustainability and international standards on human rights, takes into account the contribution of the PSOW to administrative justice in Wales.

9. Tribunals

- 9.1 Traditional thinking about the role of tribunals has identified several core characteristics, often distinguishing tribunals from courts, including 'cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject'.¹⁴² These principles remain a central part of the statutory foundation for tribunals through section 2(3) of the TCEA 2007 and, in Wales, under section 60 of the Wales Act 2017. Although some of these characteristics are not exclusive to tribunals,¹⁴³ they remain central to the ethos of devolved Welsh tribunals in particular.
- 9.2 More recently the distinctions between courts and tribunals have been blurred as a result of the Leggatt Report and its implementation through the TCEA 2007, along with creation of HMCTS. These developments require us to reconsider how tribunals should operate and what level of

¹⁴¹ King, 'Judging Social Rights' p.93.

¹⁴² Report of the Committee on Administrative Tribunals and Enquiries (Cmnd.218, July 1957) [38].

¹⁴³ Civil Procedures Act 1997, s.1(3)

judicialisation is appropriate, whilst balancing the traditional advantages of tribunal justice.¹⁴⁴ As Welsh tribunals are outside the remit of HMCTS there is an opportunity to consider a Welsh approach to tribunal judicialisation and modernisation.

9.3 Tribunals are an important aspect of the administrative justice system in Wales and have been at the centre of justice reform. In part due to devolved Welsh tribunals being the only judicial bodies administered by Welsh Government, but also because this is an area of ‘justice’ where there is some degree of consensus between the Welsh and UK Governments. In particular resulting in provisions about Welsh Tribunals being included in the Wales Act 2017.¹⁴⁵

9.4 The Leggatt Report was not expressly concerned with devolved tribunals, but noted some of the complexity their existence would cause to ongoing broader reforms:

The process is complex because devolution has been achieved in different ways in each country as regards jurisdiction, powers, policy responsibilities, legislation and operational matters. There are tensions between general (devolved) administrative justice matters and the reservation of UK tribunals.¹⁴⁶

9.5 The Welsh Committee of the AJTC went on to publish a Review of Tribunals Operating in Wales in 2010, and many of CAJTW’s 2016 recommendations related to the continuation of work to improve the independence, impartiality and leadership of Welsh tribunals. The Welsh Government Justice Policy Team has also conducted a number of relevant internal reviews of the tribunal landscape in Wales. As we have already noted, the Commission on Justice in Wales made some recommendations relating to tribunals in Wales, and the Law Commission is currently undertaking a wide project looking at various matters such as appointments, procedures, and onward routes to appeal.

Welsh Tribunals

9.6 Tribunals that operate in Wales work across several territorial and subject-matter jurisdictions. There are a number of tribunals that operate only within the territorial jurisdiction of Wales. Statutory Welsh Tribunals (s.59 of the Wales Act 2017) are administered by the Welsh Tribunals Unit within Welsh Government.¹⁴⁷ These include, the Agricultural Land Tribunal for Wales (ALTW), the Mental Health Review Tribunal for Wales (MHRTW), the Residential Property Tribunal for Wales (RPTW), the Special Educational Needs Tribunal for Wales (SENTW), the Registered Inspectors of Schools Appeal Tribunal and the Registered Inspectors of Nursery Education Appeal Tribunal (under section 27 of the Education Act 2005), the Adjudication Panel for Wales (APW), and the Welsh Language Tribunal (WLT). There are some other tribunals limited to the territorial jurisdiction of Wales that operate outside the WTU, being funded and administered either by Welsh Government or local authorities.

9.7 Welsh Government is responsible for funding the statutory tribunals administered by the Welsh Tribunals Unit (WTU). The WTU is a management structure within the Welsh Government that

¹⁴⁴ Peter Cane, *Administrative Tribunals and Adjudication* (Hart, 2010) 271-272; Edward Jacobs, *Tribunal Practice and Procedure* (2il. Arg., LAG, 2011) [1.24].

¹⁴⁵ HM Government, Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales (Cm9020 February 2015) 38.

¹⁴⁶ Report of the Review of Tribunals by Sir Andrew Leggatt, *Tribunals for Users – One System, One Service* (March 2001) [11.3].

¹⁴⁷ S Nason, *Administrative Justice: Wales’ First Devolved Justice System: Evaluation and Recommendations* (December 2018) [75]-[76]. There are other bodies that have adjudicative functions to some degree that may be classed as tribunals but these are not the subject of this section.

provides administrative support for each Welsh Tribunal. In 2010 Welsh Government had established an Administrative Justice and Tribunals Unit in response to an AJTC Welsh Committee report on devolved tribunals.¹⁴⁸ The current WTU was established in 2015. It might seem somewhat of a retrograde step to move from a broader Administrative Justice and Tribunals Unit, to a more specific WTU. We question whether this reflects limited Government interest in a wider account of administrative justice, noting also that no successor to CAJTW has been established, and that CAJTW's recommendations on administrative justice generally were less likely to be taken forward than its specific recommendations about tribunal in Wales. On the other hand, it may reflect a Government wish to specifically ensure that the judicial character of tribunals is understood within Welsh Government, where the shadow of tribunals being part of Government administrative departments still looms long.

9.8 The WTU employs 34 members of staff,¹⁴⁹ and Welsh Government's Tribunals Budget was just over £3 million in 2017/18, which has increased from £2.3 million in 2012/13.¹⁵⁰ This represents a tiny proportion of spending on justice in Wales.

9.9 The WTU management structure provides some degree of separation from policy departments whose policies and actions may be scrutinised by tribunals. The AJTC itself had recommended that Welsh tribunals initially be administered by a unit within government, noting that a 'separate executive agency is not the most efficient or economical solution'.¹⁵¹ It can also be described as a 'shared service' model that allows access to pooled resources, technology, and expertise, including bilingual expertise, that can also be seen in smaller Federal tribunals in Canada.¹⁵²

9.10 Table One shows the general caseload over time of the WTU administered tribunals, noting how significant the range is (from just two to three APW appeals to just over 2,000 Mental Health Review claims). In the following sections we consider particular issues relevant to devolved tribunals in Wales, drawing lessons from tribunal reform in other jurisdictions, in particular Scotland.

Table One: General Caseload of WTU Tribunals¹⁵³

Tribunal	2016-17	2017-18	2018-19
Agricultural Land Tribunal for Wales	17	17	29
Adjudication Panel for Wales	3	3	2
Mental Health Review Tribunal for Wales	2,034	2,028	2,046

¹⁴⁸ Administrative Justice and Tribunals Council: Welsh Committee, *Review of Tribunals Operating in Wales* (2010).

¹⁴⁹ Welsh Tribunals, *President of Welsh Tribunals First Annual Report* (31 March 2019) 8.

¹⁵⁰ G Ifan, *Public spending on the justice system for Wales* (WGC, May 2019) 33-34 <https://www.cardiff.ac.uk/__data/assets/pdf_file/0005/1549094/Public-spending-on-the-justice-system-for-Wales-Final.pdf>.

¹⁵¹ AJTC Welsh Committee 2010 (n 145) [70].

¹⁵² Administrative Tribunals Support Service of Canada Act, SC 2014, c 20; Philip Bryden, 'A Canadian Perspective on Tribunal Independence' paper presented to a Council of Australasian Tribunals (COAT) seminar, Adelaide (16 April 2015) cited in Robin Creyke, 'Amalgamation of Tribunals in Australia: Whether 'tis Better ... ?' in Sarah Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (UWP 2017) 325.

¹⁵³ Commission on Justice in Wales, Figure 38, 278.

Residential Property Tribunal for Wales	130	101	176
Special Educational Needs Tribunal for Wales	132	131	139
Tribunal under section 27 of the Education Act 2005	0	0	0
Welsh Language Tribunal	9	4	3

Independence and Impartiality

9.11 ‘Protecting judicial independence’ is part of the remit of the Law Commission’s current review of Welsh tribunals. This is also of central importance to the President of Welsh Tribunals (PWT) and was a matter highlighted by the Commission on Justice in Wales.¹⁵⁴ The WTU’s status as part of Welsh Government causes concern around the appearance of independent and impartial judicial and administrative structures for tribunals in Wales. The lack of independent status is an issue which the PWT is eager to tackle ‘as soon as reasonably practicable’.¹⁵⁵ The PWT has noted:

As well as providing substantial advantages for the operation of the Welsh Tribunal system in terms of efficiency and direction, the conferring of executive agency status on WTU would provide an element of independence from Welsh Government which can only assist in reinforcing the constant need for the Welsh Tribunal system to be and to be seen to be independent of Welsh Government. Judicial independence is a cornerstone of our democratic system and there is always a need to be vigilant to ensure that it is maintained and seen to be maintained.¹⁵⁶

9.12 One way of achieving this could be through a ‘Scottish model’. However, in reality there are various ‘Scottish models’ that have developed over time due to reforms establishing a Scottish Courts and Tribunals Service, which has included the transfer of administration for tribunals covering reserved matters.¹⁵⁷

9.13 An incremental approach was developed in Scotland through the creation of the Scottish Tribunals Service as a delivery unit of the Scottish Government in 2010 (until the Scottish Courts & Tribunals Service was established in 2015). By 2013, six tribunals had been transferred into the STS with the ability to incorporate further transfers in future.¹⁵⁸ The Scottish Government reported ‘key benefits including, an improvement to the quality, consistency and efficiency of the

¹⁵⁴ Commission on Justice in Wales, para 6.59.1.

¹⁵⁵ President of Welsh Tribunals 2019 (n 150) 10

¹⁵⁶ President of Welsh Tribunals 2019 (n 150) 10

¹⁵⁷ President of Scottish Tribunals, *The Scottish Tribunals: Annual Report prepared by the President of Scottish Tribunals* (Judicial Office for Scotland, July 2019).

¹⁵⁸ Scottish Government, *Consultation on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service* (2013) [11], Mental Health Tribunal for Scotland, the Lands Tribunal for Scotland, the Additional Support Needs Tribunal for Scotland, the Private Rented House Panel / Homeowner Housing Panel, the Scottish Charity Appeals Panel, the Pension Appeal Tribunals Scotland, the Council Tax Reduction Review Panel.

service provided¹⁵⁹ and a flexible form of administrative support that ensured that ‘each individual tribunal can work in the best way for their particular jurisdictions.’¹⁶⁰

9.14 This is a ‘quasi-independence’ approach, which academics and judges (such as Lorne Sossin) have argued can be effective where there is strong political leadership to uphold the quasi-independent structure.¹⁶¹ In Wales such a commitment to judicial independence (despite Government administration) can be seen in the Counsel General’s 2017 Cabinet Statement on the independence of the Welsh Tribunal judiciary.¹⁶² Some Welsh Tribunal leaders have also concluded that this ‘quasi-independent’ model is working in practice and that, according to a Chairperson of the Agricultural Land Tribunal for Wales there ‘is already a well-understood separation of roles, reflecting the separation of powers between the judiciary and the executive’.¹⁶³ Our research also found that the WTU is perceived to be different to other Welsh Government departments and workstreams, and that there is growing respect and understanding for judicial independence and expertise. Having a judicial lead has also created some valuable space between tribunal Presidents and Ministers.¹⁶⁴

9.15 Nevertheless, ensuring that independent and impartial justice is ‘seen to be maintained’ is a powerful principle.¹⁶⁵ In this regard, the Scottish Committee of the AJTC had come to consider that previous ‘quasi-independence’ structures in Scotland were ‘not consistent with the idea of a properly independent tribunal system’.¹⁶⁶ The Committee also emphasised that a tribunal system ‘requires more than the limited associations created by the sharing of administrative support’. Rather, it requires a single organisation, with robust management that could facilitate a strong collective ambition and responsibility to fulfil the needs of tribunal users.¹⁶⁷

9.16 The model eventually chosen by the Scottish Government (establishing a Scottish Courts & Tribunals Service) could not be adopted wholesale for Wales without changes to legislative competence and addressing issues raised by the single legal jurisdiction of England and Wales. However, there are other examples of ‘Scottish models’ that could be appropriate and adapted to Wales.¹⁶⁸ The AJTC in Scotland noted that bringing all tribunals within one structure would be valuable, not only for separation of powers arrangements, but also to ‘safeguard the distinctiveness of their approach from the courts, standardise processes where appropriate and improve practice through the provision of appropriate support for tribunal members’.¹⁶⁹

9.17 One of the models suggested by the AJTC Scottish Committee provides a potential solution for Welsh tribunals, recognising the distinct needs of Wales. The Committee recommended the

¹⁵⁹ *ibid* [12].

¹⁶⁰ *ibid* [14].

¹⁶¹ Lorne Sossin, ‘The puzzle of administrative independence and parliamentary democracy in the common law world: A Canadian perspective’ in Susan Rose-Ackerman & Peter Lindseth (eds) *Comparative Administrative Law* (Edward Elgar 2010) 220-221.

¹⁶² *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 and Counsel General, ‘Written Statement: independence of the Welsh tribunals’ (March 2017).

¹⁶³ Commission on Justice in Wales, *Oral Evidence Session* (22 March 2019) <https://gov.wales/sites/default/files/publications/2019-05/Oral%20evidence%20to%20the%20Justice%20Commission%20on%20Tribunals%20in%20Wales_0.pdf>.

¹⁶⁴ Research Interview with Head of WTU (June 2019).

¹⁶⁵ President of Welsh Tribunals 2019 (n 150) 10.

¹⁶⁶ Administrative Justice and Tribunal Council: Scottish Committee, *Tribunal Reform in Scotland: A Vision for the Future* (2010) [4.35].

¹⁶⁷ *ibid* [4.36].

¹⁶⁸ Scottish Consumer Council, *Options for the Future Administration and Supervision of Tribunals in Scotland: A Report by the Administrative Justice Steering Group* (2008)

¹⁶⁹ AJTC, Scotland 2010 (n 167) [4.36].

‘overarching structure’ of an independent Scottish Tribunal Service that would have responsibility for several tribunals, be led by a Chief Executive accountable to what would be a newly established Board of the Scottish Tribunal Service. The establishment of the role of Senior President of Scottish Tribunals (SPST) was also envisaged to provide judicial leadership.¹⁷⁰ It was foreseen that the Board would also have responsibilities in monitoring efficiencies that were hoped to derive from unifying administrative support of future Scottish tribunals joining the STS, and any tribunal jurisdictions that might have been devolved in future.¹⁷¹

9.18 The Committee did not recommend a chamber structure such as in the TCEA 2007,¹⁷² although it did see advantages for some smaller tribunals to be grouped together.¹⁷³ Tribunal presidents would retain some statutory function and be responsible for making practice directions and arranging tribunal hearings.¹⁷⁴ The SPST would provide general guidance for all tribunals and take over responsibilities for recruitment and training, with involvement of individual tribunal Presidents.¹⁷⁵ These proposals also had the added foresight that were additional tribunal jurisdictions to be devolved in future, that they could also retain characteristics of self-standing tribunals.¹⁷⁶ It was envisaged that tribunal members could be cross-deployed between the different tribunal jurisdictions.¹⁷⁷ Although this was not the exact model chosen by the Scottish Committee, as it preferred to unify the courts and tribunals service, it is a useful template to discuss the governance of Welsh tribunals and parallels can already be seen since the Wales Act 2017.

9.19 There are models closer to home that have similar organisational arrangements that could provide templates for developing the WTU. For instance, the Valuation Tribunal for Wales is an independent body that operates with a similar structure of judicial President (with Governing Council), Board, and Chief Executive.¹⁷⁸

9.20 A statutory non-ministerial department structure is illustrated by the Welsh Revenue Authority (WRA).¹⁷⁹ The WRA is a body corporate that is legally separate to the Welsh Government, but is staffed by civil servants. This removes day-to-day administration and decision making from Ministers.¹⁸⁰ It is comprised of a Board and Chair, Chief Executive who is a senior civil servant, and staff of the WRA, who are also civil servants. The WRA Board is responsible for leadership and strategic direction of the WRA and ensures that its statutory functions can be fulfilled, and that the WRA achieves objectives and priorities agreed with Welsh Government.¹⁸¹

9.21 The WRA may establish committees and sub-committees to provide governance, direction and oversight, such as the Audit and Risk Assurance Committee and the People Committee. Our research identified that the WTU, with the President and judicial leads, are developing equivalent expertise aligning with roles delivered by HMCTS, The Judicial Conduct Investigations Office and Judicial Office. It is natural that areas which are perceived to be outside Welsh Government’s

¹⁷⁰ AJTC, Scotland 2010 (n 167) [4.37]-[4.40].

¹⁷¹ *ibid* [4.49].

¹⁷² *ibid* [4.44].

¹⁷³ *ibid* [4.53].

¹⁷⁴ *ibid* [4.45].

¹⁷⁵ *ibid* [4.45].

¹⁷⁶ *ibid* [4.44].

¹⁷⁷ *ibid* [4.46].

¹⁷⁸ Valuation Tribunal for Wales, *Annual Report 2018-19* <https://www.valuationtribunal.wales/fileadmin/resources/docs/publications/en/Annual_Report_2018-19.pdf>.

¹⁷⁹ Tax Collection and Management (Wales) Act 2016; Welsh Revenue Authority, *Annual Report and Accounts 2017-19* (WG38294, 2019).

¹⁸⁰ Welsh Government & Welsh Revenue Authority, *Welsh Revenue Authority Framework Document* (March 2018) 3.

¹⁸¹ *ibid* 5-8.

core responsibilities, such as judicial salaries, pensions, and complaints, require attention.¹⁸² A Welsh Tribunals Board structure could include sub-committees for developing oversight strategic direction for matters such as judicial salaries, pensions, complaints, and training. It would also, by being allocated a specific budget, improve transparency in relation to the resources provided by the Welsh Government for the administration of the Welsh tribunals.

9.22 The WRA has also built a recognisable and distinctive approach through principles of ‘Cydwethio, Cadarnhau, a Cywiro’ (Co-operating, Confirming and Correcting). If the WTU was developed on a similar model, it could seek to adopt some or all of CAIJW’s Principles of Administrative Justice for Wales as central to its ethos, further helping distinguish tribunals from less flexible court-based justice.

9.23 The WRA non-ministerial model is in close alignment with the current WTU structure in terms of civil service staffing arrangements and current operation. It would formalise the relationship between WTU and Welsh Ministers and extend the level of impartiality from government. This is attractive in terms of incrementally developing the WTU further and giving it its own recognisable identity. It is also consistent with the ‘Scottish model’ as envisaged by the Commission on Justice¹⁸³ as the Scottish Courts and Tribunal Service is also established as a non-ministerial department under the Judiciary and Courts (Scotland) Act 2008.

9.24 A new Welsh Tribunals Service (WTS) could then adapt some of the reforms in Scotland that are relevant to tribunals in terms of maintaining tribunal jurisdictions and continuing to enhance the role of the President, in alignment with Presidents of each tribunal, while taking advantage of strategic leadership from a WTS Board and improved separation from Ministers.

R17: We Recommend Welsh Government examines developing the Welsh Tribunals Unit as an independent statutory non-Ministerial body, with a Board and Board Chair, and Chief Executive. We Recommend that this body should be founded on a principled approach recognising the distinctive character of administrative justice, and that it should be scrutinised by the Assembly.

Procedure and Practice

9.25 Unique procedures and practices go to the heart of distinguishing tribunals from courts.¹⁸⁴ Being separate from HMCTS, devolved Welsh tribunals have been able to use less formal venues which are closer to users, and have subsequently been less negatively impacted by the cuts to the HMCTS estate. Consistent with the tradition of administrative tribunals, flexible practices have been developed to suit particular jurisdictions.

9.26 Inevitably, the ability of devolved Welsh tribunals to provide an effective bilingual service, treating both languages on a basis of equality, is much greater than that of bodies that operate on an England and Wales basis. With one or two exceptions, devolved Welsh tribunals are required, in their dealings with the public, to comply with specific Welsh language standards imposed under the WLWM.

9.27 However, there are legacy and structural inconsistencies, stemming from the pre-devolution origins of most tribunals, that remain across rule and regulation making processes. For example, rules and regulations of the Agricultural Land Tribunal for Wales are made by the Lord

¹⁸² Research Interview with Head of WTU (June 2019).

¹⁸³ Commission on Justice in Wales, p284.

¹⁸⁴ Jacobs (n 145) [1.103].

Chancellor, despite funding and administration of the tribunal being the responsibility of the WTU. There are other legacy matters, for example, where English subject-matter jurisdictions have been transferred to the First-tier Tribunal (Residential Property Tribunals) under the TCEA 2007, the corresponding Welsh jurisdiction (Residential Property Tribunal for Wales) still remains under the old England and Wales legislation which in turn only applies in Wales (Housing Act 2004).¹⁸⁵ Such rules were not designed for a Wales only context where housing law has significantly diverged from that of England.

9.28 The Welsh Language Tribunal was the first tribunal to be fully established under devolved Welsh law.¹⁸⁶ The WLT President was responsible for drafting the tribunal regulations (in consultation with, and with support from CAJTW), and it is notable that the appointments regulations require the relevant Welsh Minister to ‘have regard’ to upholding the principles of rule of law and independence of the Tribunal.¹⁸⁷

9.29 Under the Wales Act 2017, the President of Welsh Tribunals has to have regard to innovative methods of dispute resolution. These, it is anticipated, may include mediation and other ADR techniques, inquisitorial methods, and digitalisation. The Report of the Justice in Wales Stakeholder Group noted that changing judicial and administrative styles could involve costs and new training requirements and should only be adopted in order to improve outcomes for individuals.¹⁸⁸

Digitalisation

9.30 A development closely aligned to practice and procedure is digitalisation. A 2018 administrative justice Report, following a Workshop hosted by the Counsel General for Wales, recommended that in its work on devolved tribunals, the Law Commission should ‘addresses the importance of making the most effective use of technology within the devolved Welsh tribunals, taking into account the demands of procedural fairness’.

9.31 Digitalisation across England and Wales is likely to have a major impact on access to justice. This is especially true for tribunals under the current *Tribunals Judicial Ways of Working* programme, which examines the importance of providing (eventually) for full video hearings and continuous online resolution.¹⁸⁹ This is already occurring for the First-tier Tribunal (e.g., through a pilot process in the Social Security and Child Support Chamber) and for some appeals from Welsh Tribunals to the England and Wales Upper Tribunal. Welsh tribunals will also need to consider the extent to which they want to pursue similar reforms on a flexible basis.

9.32 Each Welsh Tribunal now has its own website that includes access to application and claim forms and materials, guidance, and hearing lists and decisions for some tribunals. However, there is also evidence of different pace of digitalisation in Wales. We heard in our research that for some tribunals, such as the Welsh Language Tribunal, applicants are able to submit all papers and their

¹⁸⁵ *Transfer of Tribunal Functions Order 2013*, SI 2013/1036, sch 2, pt 1 para 1.

¹⁸⁶ Catrin F Huws, ‘Administrative Justice and the Welsh Language (Wales) Measure 2011’ in Sarah Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (Cardiff, UWP, 2017).

¹⁸⁷ *Welsh Language Tribunal (Appointment) Regulations 2013*, SI 2013/3139.

¹⁸⁸ Justice Stakeholder Group, *Law and Justice in Wales: Some Issues for the Next Assembly* (March 2016) <<https://gov.wales/sites/default/files/inline-documents/2018-11/written-statement-justice-stakeholder-groups-report-law-and-justice-in-wales.pdf>>.

¹⁸⁹ President of Tribunals, *Tribunals Judicial Ways of Working* (2019) <<https://www.judiciary.uk/wp-content/uploads/2019/01/tribunals-jwow-response-1.pdf>>; Joe Tomlinson, *Justice in the Digital State: Assessing the next revolution in administrative justice* (2019).

application electronically over e-mail. However, for others with more specialist documentation this is not yet available and in other contexts full digitalisation would not be appropriate.

9.33 With digitalisation reforms moving ahead at pace and on multiple levels by HMCTS, we have heard concerns of a two-speed or multiple-speed processes between England and Wales, where Welsh tribunals could be left behind in part due to not being able to take advantage of economies of scale in technological developments.

9.34 On the other hand, this allows the WTU and Welsh Tribunals to evaluate the effects of HMCTS digitalisation, and adapt those where Wales has comparable jurisdictions. This should be welcomed as due to the pace of change in England and Wales, there have been limited opportunities for independent research which has concerned commentators.¹⁹⁰ There is also a risk that digitalisation prioritises efficiency and economy over fairness and equal access to justice.

R18: We Recommend that any digitalisation reforms in Wales should be introduced in the interest of good administration and access to justice and that the President of Welsh Tribunals and Welsh Tribunals Unit should closely monitor reforms to the First-tier tribunals in particular to determine what is appropriate for Wales.

9.35 Digitalisation reforms for Welsh Tribunals should be seen as part of a broader digital network as recommended by the Commission on Justice in Wales. This should include a ‘workable court IT network’ with video and digital facilities, assistance for users, improved information on accessing dispute resolution remotely, a ‘digital network’ and a court centre in Cardiff ‘fit for a capital city’¹⁹¹ Welsh Tribunals may want to consider how they can be a part of this. However, in the case of tribunals, this should be balanced with the individual idiosyncrasies of each jurisdiction and should not erode from the core characteristics of tribunals. A one-size-fits-all approach may not be able to maintain current good practices and procedures and may see them adopting more court-like approaches to change for digitalisation.

9.36 Workshop participants discussed the risk that digitalisation, rather than enhancing access to justice, could be another means of entrenching inequalities. This has been articulated by the House of Commons Justice Committee who highlight the risk of digital exclusion due to barriers such as level of internet usage and digital skills, literacy, access to technology, and consideration of disadvantaged and vulnerable groups.¹⁹² The Commission on Justice were also concerned regarding digital disenfranchisement.¹⁹³ Overall, digital exclusion in Wales has fallen from 22% in 2012 to 10.9% in 2018. However, statistics still show that the percentage of the Welsh population with 5 basic digital skills, including filling in forms, is only 66% (with a UK average of 79%) and the percentage of the population with zero basic digital skills is 19%.¹⁹⁴ The Welsh Government has a strategy for digital inclusion and support through Digital Communities Wales. It is likely that these will need to extend over the justice system as digital services becomes the prevalent option. Furthermore, there is a suggestion that for tribunal users it is not only the digital process, but the complexity of the law for unrepresented users, that can be an added access to justice issue

¹⁹⁰ Public Law Project, *The Digitalisation of Tribunals: What we know and what we need to know* (PLP 2018) <<https://publiclawproject.org.uk/wp-content/uploads/2018/04/The-Digitalisation-of-Tribunals-for-website.pdf>>.

¹⁹¹ Commission on Justice in Wales, Recommendation 39.

¹⁹² Justice Committee, *Court and Tribunal Reforms* (HC190, 30 October 2019) [38].

¹⁹³ Commission on Justice in Wales, para5.22.

¹⁹⁴ Office of National Statistics, *Exploring the UK’s digital divide 2017-18* (4 March 2019) <<https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/articles/exploringtheuksdigitaldivide/2019-03-04#what-is-the-pattern-of-digital-exclusion-across-the-uk>>.

when it comes to digitalisation.¹⁹⁵ It should not be assumed that technological developments for courts should be transferred directly to tribunals. There is a need to review digital strategy for tribunals and to adapt these appropriately to context, not taking a one size fits all approach.

R19: It should not be assumed that technological developments for courts should be transferred directly to tribunals. We Recommend a review of digital strategy for tribunals in Wales, and that reforms should be tailored appropriately to context, not ‘one size fits all’.

Confidence and Standards

9.37 Research in 2015 highlighted a lack of confidence in the capacity of the justice system as devolved to Wales to deliver quality outcomes and experiences comparable to combined England and Wales institutions.¹⁹⁶ CAJTW stressed that users and legal professionals must be able to have confidence in the system and that it should deliver ‘at least as good a quality of justice as in England’.

9.38 Ensuring confidence within the judicial branch, can be achieved through matters such as consistent judicial appointments, appraisal and discipline mechanisms that are capable of passing a ‘parity test’ with England.¹⁹⁷ Due to constitutional arrangements the process of judicial appointments remains inconsistent across Welsh Tribunals. For example, the Lord Chancellor appoints the president and legal chairs of the Special Educational Needs Tribunal for Wales (SENTW), whereas the appointment of lay members has been transferred to Welsh Government (though Secretary of State consent is required).¹⁹⁸

9.39 Since the AJTC report in 2010, Welsh Government have been building capacity aimed to ‘achieve standards that are comparable with non-devolved tribunals’.¹⁹⁹ This includes working with England and Wales justice bodies to manage processes not yet available on a Welsh level. For example, there is a Framework Agreement between the Judicial Appointments Commission (JAC) and Welsh Government. In practice the process for appointing tribunal judges is the same regardless of whether the Lord Chancellor or Welsh Ministers are the appointing body, however this is not reflected in statutory frameworks which are still disjointed.²⁰⁰

9.40 Other examples we encountered as part of this research include support from the Judicial Office providing access to guidance and training materials, and allowing the Welsh Tribunal judiciary to use the same ejudiciary communication network as England and Wales judges. These aspects of cross-border arrangements help to provide a consistent level of service maintain levels of expectation.²⁰¹ This has been managed despite the constitutional complexity and remaining gaps in the role of England and Wales judicial bodies over Welsh Tribunals.²⁰² For example, the

¹⁹⁵ Justice Committee (n 193) [23]-[24].

¹⁹⁶ Sarah Nason, *Understanding Administrative Justice in Wales* (November 2015) 17 <<http://adminjustice.bangor.ac.uk/documents/full-report.pdf>>.

¹⁹⁷ Committee on Administrative Justice and Tribunals Wales, *Administrative Justice: A Cornerstone of Social Justice in Wales; Reform priorities for the Fifth Assembly* (2016) [25], recommendation 11 <<https://gov.wales/docs/cabinetstatements/2016/160729cornerstoneofsocialjustice.pdf>>.

¹⁹⁸ This will remain the case when the provisions for the Education Tribunal for Wales come into force under the *Additional Learning Needs and Education Tribunals for Wales (Wales) Act 2018* (Wales), s 91.

¹⁹⁹ Welsh Government Response to the CAJTW

²⁰⁰ Welsh Government Response to the CAJTW

²⁰¹ President of Welsh Tribunals (n 150)

²⁰² Committee on Administrative Justice and Tribunals Wales, ‘Legacy Report’ [26].

responsibilities of the JCIO do not extend to all devolved tribunals and the Wales Training Committee of the Judicial College has no responsibility for devolved Welsh Tribunals.²⁰³

9.41 Arrangements have previously been in place with the Judicial College (in respect of training) and the Judicial Conduct Investigations Office (JCIO) regarding complaints. The President of Welsh Tribunals now reviews whether complaints have been investigated reasonably and proportionately according to the complaints' procedures.²⁰⁴ The Wales Act does not provide guidance on the supervisory role of the President.²⁰⁵ The Commission on Justice recommends that the supervisory role of the President should extend over all public bodies making judicial or quasi-judicial decisions in Wales.²⁰⁶ This would potentially mean reconceptualising the role of the President and introducing a substantial increase in the role and responsibilities.

R20: We Recommend that Welsh Government, the Lord Chief Justice and the President of Welsh Tribunals produce further Guidance on the role of the President of Welsh Tribunals, especially taking into consideration the extension of functions recommended by the Commission on Justice in Wales.

9.42 CAJTW recommended that comprehensive agreements should be in place with judicial offices including the Judicial College, but also emphasised that Welsh training should not be delivered by England and Wales bodies alone.²⁰⁷ In Wales, each Tribunal President is responsible for training their own members, now with oversight from the President of Welsh Tribunals. It has been suggested that the minimum amount of training is being met by these arrangements.²⁰⁸ But a robust WTS Board, according to the structure explained above, could provide additional support and guidance on developing training.

9.43 Since the research in 2015, a notable aspect of development has been in the parity of opportunity between judicial members of the Welsh Tribunals and the 'English' judiciary. At the time, it was suggested that there was little incentive for practitioners to undertake a judicial career in Wales due to lack of opportunities, risking a 'second-rate' judiciary in Wales.²⁰⁹ Reforms underpinned by the Wales Act 2017 provide that Welsh Tribunal judges can be cross-deployed across other Welsh Tribunals, and to the First-tier Tribunal England and Wales. Our research participants indicated that this has been successful in terms of judicial interest and quality of candidates, it has also helped reduce recruitment costs.²¹⁰ Cross-deployment into First-tier Tribunal chambers in England and Wales has occurred in the case of the Property Chamber. A member of the tribunal judiciary in Wales has also been appointed as a circuit judge. There is a clear sense of improvement and progression since the research in 2015.

9.44 The Commission on Justice recommended that Welsh tribunals should be used for dispute resolution in future Welsh legislation when they have the competence and capability to determine the dispute.²¹¹ *Administrative Justice: Wales' First Devolved Justice System* highlights some case studies where Welsh law confers jurisdiction on the County Court or England and Wales tribunals rather

²⁰³ *ibid* [28]; Commission on Justice in Wales, *Oral Evidence Session* (22 March 2019) <https://gov.wales/sites/default/files/publications/2019-05/Oral%20evidence%20to%20the%20Justice%20Commission%20on%20Tribunals%20in%20Wales_0.pdf>.

²⁰⁴ President of Welsh Tribunals (n 150) 3.

²⁰⁵ President of Welsh Tribunals (n 150) 3.

²⁰⁶ Commission on Justice in Wales, p281.

²⁰⁷ Committee on Administrative Justice and Tribunals Wales, 'Legacy Report' Recommendation 10.

²⁰⁸ Research Interview with Head of WTU (June 2019).

²⁰⁹ Nason 2015 (n 193) [7.6]-[7.9].

²¹⁰ President of Welsh Tribunals (n 150); Research Interviews with Head of WTU (June 2019).

²¹¹ Commission on Justice in Wales, para6.59.2.

than Welsh tribunals. This is most notably the case in the Renting Homes (Wales) Act 2016 where the majority of disputes will be determined by the County Court. Similarly, in the case of Welsh Land Transaction Tax, the appeal is to the First-tier Tribunal (Tax).²¹²

9.45 There are both pragmatic and principled rationales about why this may be the case. In evidence on the Renting Homes (Wales) Act 2016, the Residential Landlords Association supported the jurisdiction of the County Court as the infrastructure is already in place such as designated hearing centres and there would be financial resource implications as tribunal judges are fee-paid rather than salaried in RPTW.²¹³ On the other hand, there was support during the passage of the Act for more ADR options, such as mediation, and use of RPTW.²¹⁴ We discuss the case of Renting Homes in detail in our housing report. The recommendation from the Commission on Justice that Welsh tribunals *should* be the venue of dispute resolution for Welsh law will require Welsh Government to provide significant further justification regarding their political choices about appropriate means of dispute resolution and redress in draft primary and secondary legislation. These political choices about redress mechanisms should be scrutinised by the Assembly Legislation, Justice and Constitution Committee. Significant thought must also be given to increasing the resources of individual Welsh tribunals and the WTU to enable the Commission on Justice in Wales' recommendation to be implemented. As we discussed above, the Welsh Revenue Authority has been created as an independent body, making quasi-judicial decisions (in the parlance of the Commission on Justice in Wales), with an internal administrative review mechanism, followed by appeal to the First-Tier Tribunal Tax. Thought could instead have been given to developing a devolved Welsh tax tribunal. The reason for not doing this is due to costs and other resources including infrastructure and judicial resources. The reality (as can be seen from relevant Justice Impact Assessments) is that it currently makes financial sense in many cases for Welsh redress routes to mirror those of England, even if this may make access to justice more limited for individuals, and can stifle innovation. We discuss these matters further, and make recommendations, in our section on Redress Design and Oversight.

Tribunals, Equality and Human Rights

9.46 Tribunals have an important role to play in the subject-matter specialist aspects of rights adjudication, particularly in relation to socio-economic rights. Tribunals were not historically concerned with precedent in any strict sense. Nowadays tribunal judgments are more routinely published and in many tribunal jurisdictions it is expected that key judgments will be followed. However, this is primarily at the level of the Upper Tribunal and likely does not extend to the devolved Welsh tribunals. The most important difference here is in lay representation in subject matter; in particular multi-member panels in tribunals (which are comparatively rare in courts). Tribunals also use more enabling or managerial procedures, and this is likely still the case especially in Welsh tribunals (though some such as mental health might be necessarily more adversarial in some aspects). Many of the aspects of flexibility and inquisitorial procedure can make tribunals well suited to appreciating the nuances of socio-economic rights, equality and discrimination issues, as they impact on people's daily lives.

²¹² S Nason, *Administrative Justice: Wales' First Devolved Justice System: Evaluation and Recommendations* (December 2018) 25-26.

²¹³ Residential Landlord Association, *Letter to Communities, Equality and Local Government Committee* (27 May 2015) <<http://www.senedd.assembly.wales/documents/s40793/RH%2029b%20-%20Residential%20Landlords%20Association.pdf>>.

²¹⁴ Shelter Cymru, *Response to the Communities, Local Government and Equality Committee inquiry into the general principles of the Renting Homes Bill (2015)* <<https://sheltercymru.org.uk/wp-content/uploads/2015/03/Renting-Homes-general-principles-evidence-web.pdf>>.

9.47 As Jeff King notes, tribunals ‘have taken the good of legal accountability and combined it with accessibility features and subject-matter expertise of professional social welfare experts. They are thus (notwithstanding their chequered development in Britain) an evolution of legal accountability’. Tribunals then, manifest a balance between expertise and independent accountability that could be particularly well suited to the enforcement of the new administrative law of Wales discussed at various places in this report.

9.48 However, when it comes specifically to more constitutionally oriented accountability for rights, the court structure may still offer advantages. Tribunals, and particularly the devolved Welsh tribunals, presently lack general jurisdiction, both as to remedies and to subject matter. They ordinarily lack the capacity to apply legal principles that are coordinated with other bodies of law, to ensure system-wide consistency. There is less use of participatory features such as interventions (though these are now allowed in the Upper Tribunal) and flexible rules of standing. There is less publicity around tribunal decision making, and arguably less potential to articulate standards or guidance that can be communicated to administrators and apply to their decision-making in future. Tribunals also lack the constitutional authority of the courts (they cannot for example issue Declarations of Incompatibility under the HRA 1998), and their institutional position can mean they struggle to secure comparable resources, including the number and quality of lawyers and interveners preparing cases, the number of quality judges, and subsequent academic and professional scrutiny of judgments.

9.49 King concludes that what ‘is needed is a principle of coordination as between courts and specialised tribunals’. We might again call this interoperability, but based on ‘comity’, a phrase used by the Law Commission when considering the relationship between ombuds and the courts. If constitutional social rights were at issue, the degree of deference to be shown to tribunal judgments/degree of weight to give the tribunal’s findings will depend heavily on the extent to which the narrow issue on appeal falls squarely within its subject-matter expertise.

R21: We Recommend exploring the potential for greater ‘interoperability’ and ‘comity’ between the Administrative Court in Wales and the devolved Welsh Tribunals, especially in relation to human rights and equality. This could be explored by any new board created to promote and co-ordinate dispute resolution in Wales, and/or jointly by the President of Welsh Tribunals and Administrative Court Liaison Judge for Wales.

PART THREE: OPPORTUNITIES FOR LEGISLATIVE REFORM – CONSOLIDATION AND CODIFICATION

10. Consolidation and Codification

10.1 Given that Wales is actively considering the structure of future Codes of Welsh Law and how to better communicate the effect of legislation and clarify its meaning, we consider the case for consolidation and codification reform in administrative law. In our separate reports on education and housing we consider the case for codification of these areas of law. Codification provides a unique opportunity to simplify and more rationally systematise the law, but also to perform an educative function of what law and justice in Wales for the people of Wales means. As Anna Bargenda and Shona Wilson-Stark have put it, codification in Wales provides the opportunity ‘to carve out a national identity’ for a ‘living system of law’.²¹⁵ The consolidation and codification process has potential to enable the crafting of a more rational and coherent network of principles, individual rights, public body duties, pathways to redress and encouraging learning to improve administration.

Codification of Administrative Law: Legislation

10.2 Consolidation (and codification) in Wales provides an opportunity to rationalise existing standards, alongside improving the awareness of public bodies, practitioners and individuals. The ability to quickly identify those codified standards could assist public bodies in complying with their duties and assist individuals and the courts in holding those public bodies to account.

10.3 As the Commission on Justice in Wales noted ‘substantive administrative law’ of Wales has the most scope for short term divergence from that of English law. The Commission did not define what it meant by substantive administrative law. This can be understood to include the sectoral (subject matter specific) laws applying to particular areas of public administration (including housing, education, planning, and health and social care for example). However, substantive administrative law could also refer to general principles of administrative law that apply to the exercise of administrative power across all, or almost all, areas of public administration. These principles condition the legality of administrative decision-making, and include that administrative decisions must be reasonable, sometimes they must also be proportionate, and in some circumstances policies or statements made by administrative bodies relied upon by individuals may create a legitimate expectation of substantive benefit. These principles of substantive administrative law are largely found in the common law of England and Wales, as well as in applicable Council of Europe and EU law/retained EU law. In addition to substantive principles, the common law also lays down procedural standards that public administrative bodies must comply with. As discussed above in our sections on administrative law, the Assembly and Welsh Ministers have laid down general administrative law principles for Wales. Such principles can also be established by regulatory bodies in Wales and/or by what the Commission on Justice in Wales refers to as ‘independent public officers’, this is through what are often called ‘soft-law’ norms expressed in guidance.

10.4 Also discussed above is the Williams’ Commission recommendation that the body of legislation governing public decision-making in Wales should be reviewed. We acknowledge that a consolidated and simplified process of Integrated Impact Assessment has been developed,

²¹⁵ A Bargenda and S Wilson Stark, ‘The Legal Holy Grail? German lessons on codification for a fragmented Britain’ (2018) 22(2) *Edinburgh Law Review* 183.

bringing together more than 20 types of impact assessment aiming to reduce duplication and complexity in strategic and policy decision-making. But this does not go as far as re-examining the legislative provisions which themselves underpin the impact assessment or what it means for a public body to demonstrate that it has ‘taken into account’ an assessment. Simplifying impact assessment does not assist individual administrative decision-makers in determining how legislation applies to their day to day administrative acts. It is also not straightforward to access the impact assessments, and a centralised online database would be valuable to raise awareness and understanding of Welsh law.

R22: We Recommend Welsh Government publish a searchable database of all Integrated Impact Assessments on the Law Wales website.

10.5 In light of the complexity, fragmentation and lack of administrative and general public awareness of existing law, there is a case for considering whether some of the duties governing public decision-making in Wales could be clarified, even strengthened (which would then be more than a technical reform) and consolidated into a new act within the Welsh Government’s proposed Public Administration Code (or a specific section or part of the ‘Principal Act’ of the Code).

10.6 We note the Draft Taxonomy is not intended to be exhaustive, but think it important to consider where some administrative law legislation not currently included in the Draft should fit, for example the Rights of Children and Young Persons (Wales) Measure 2011. As we have discussed this imposes a duty on Welsh Ministers to have ‘due regard’ to certain provisions of the United Nations Convention on the Rights of the Child. This duty has been extended by the Social Services and Well-being (Wales) Act 2014 to bodies exercising functions under that Act (in the Health and Social Care Code) and to persons exercising certain functions under the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (not yet in force, and in the Education and Skills Code). This example may illustrate the difficulties of determining where to place legislation containing administrative procedure duties within the Taxonomy and structure of Codes. The duty sits in different Codes for different bodies, and it is not yet clear where the legislation applying the duty to have due regard to children’s rights to Welsh Ministers should be placed. Another similar example is that public authorities exercising functions under the Social Services and Well-being (Wales) Act 2014 are required to have due regard to the United Nations Principles for Older Persons. This duty could potentially be extended to other public bodies performing different functions under different legislation, so that again the due regard duty on public bodies would sit across a range of subject matter Codes.

10.7 In his Eileen Illtyd Memorial Lecture, the Counsel General for Wales noted that such procedural duties protecting rights could be brought together (consolidated) into a single act, noting:

Provided we steer clear of reserved areas, in my judgment there is nothing in principle which would prevent the Assembly responding to a weakening of human rights protections across the board, by doing in one act what we have chosen to do piecemeal in subject-specific bills to date.²¹⁶

10.8 The Welsh Government has commissioned research on *Strengthening and Advancing Equality and Human Rights in Wales*, and there is a need for further consultation and debate, but consolidating legislative protection for human rights and equalities either as a section or part of the ‘Principal

²¹⁶ Jeremy Miles AM, ‘A Human Rights Act for Wales’ Eileen Illtyd Memorial Lecture (Swansea University 14 November 2018).

Act' under the Public Administration Code, or as a separate Human Rights Code, might start to solve some of the problems caused by lack of awareness of procedural protection for rights. Improved awareness of the rights and procedural protections might also lead to better protection for individuals and groups through catalysing increased use of judicial review as an enforcement and accountability procedure. We recommend that such a Code must provide a clear and express route to redress for breach of its provisions (be that in the Administrative Court and/or relevant devolved Welsh tribunals and/or PSOW complaints and investigations). Consolidation and codification, and the initial Taxonomy of the Codes themselves then provide an opportunity to consider whether further integration and alignment of human rights, sustainability, and well-being with the justice system is needed, and how that might be achieved. Or if perhaps Wales needs new competences to be able to adapt its justice system to achieve these ends (we consider these matters further in our sections on design and oversight of administrative justice systems).

- 10.9 Relevant here too are cross-cutting general administrative law procedural duties around equality. It is not so easy to determine where general procedural duties on administrative bodies, such as those created by the WSEDs, should be placed in the Taxonomy of Codes of Welsh law. The WSEDs are hardly ever referred to in judicial review applications, and when they are the argument is said to be secondary and poor. Some of our research participants, particularly in the area of education, also felt there is a lack of awareness of equalities law generally among administrative decision-makers, particularly as relates to disability discrimination and special educational needs. It is notable that in 2018/19, 51% of PSOW Code of Conduct Complaints related to promotion of equality and respect, and 88% of cases referred to the APW and Standards Committees related to promotion of equality.²¹⁷
- 10.10 If Welsh Government activates the socio-economic duty as intended, this will expand the content of the Public Sector Equality due regard duty, a further amendment to public administrative law applying to devolved Welsh authorities, although only in their strategic decision-making. Central equality duties exist as a matter of UK law, and human rights are the product of the UK being signatory to international treaties. Welsh law provisions in this respect do not, and could not under the current devolution settlement, be formally classed as constitutionally protected values and rights. A Human Rights and Equality Code for Wales, whether separate or within the proposed Public Administration Code, would need to clearly reference the UK Equality Act 2010 and Human Rights Act 1998 (the latter of which may be a so-called 'constitutional statute').
- 10.11 Current Welsh law is administrative law designed to give concrete effect to rights and values by imposing procedural requirements on decision making of relevant authorities (be that strategic or at individual level). This means there is necessary interplay with the common law. Whilst the courts have developed case law elaborating the meaning of due regard in the context of UK equality duties, there is no corpus of case law interpreting and applying the WSEDs, or Welsh due regard duties in the context of children's rights, or due regard to principles for older persons. A more detailed section or part within Wales' Public Administration Code could seek to expand upon the meaning and operation of these duties, as a partial substitute for limited judicial activity.
- 10.12 We anticipate that more thought needs to be given as to whether the current procedural protections, due regard, take into account and so on, should be revised in some areas and replaced with a substantive duty to comply with human rights and value-based norms. Participants in our research noted that taken together these developments imply a Welsh

²¹⁷ PSOW, *Annual Report 2018/19*.

approach to public law that may be quite different to the traditional, more deferential, account of the England and Wales Administrative Court. As a matter of legitimacy there would be some benefit in this shift in approach being clearly delimited in a legislative Code, giving the judiciary the necessary imprimatur to use more holistic interpretive methods when reviewing decision-making, if this indeed is what is intended. Our discussion with Welsh Government suggests that the mindset is currently quite fixed to the idea of ‘due regard’ rather than the enactment of individual legally enforceable rights.

10.13 In addition to rights and equality based administrative procedure laws, there are other laws governing the practices and decision-making of public bodies where consolidation, potentially with reform, could be considered. Some of these relate more specifically to regulatory procedures and reporting duties that could be reformed and/or better aligned, and consolidated.

10.14 The Public administration Code is currently proposed to contain primary and secondary legislation and guidance relating to: Audit, the PSOW, Inquiries, Records & Information and the Welsh tribunals. Broadly these are all so-called ‘integrity’ branch institutions and processes, and in that regard, there could be merit in bringing them together symbolically and educationally. The idea of an ‘integrity’ branch can be traced to Australian writing, and an enhanced role for that branch can be seen as characteristic of Welsh administrative justice. A Code bringing together relevant institutions, their procedures, roles, and to whom such integrity bodies are accountable would help improve public awareness and has the potential to establish more consistency in functions and oversight.

10.15 Some of these integrity bodies are regulators, with the potential for codification clarifying their roles and procedures. As Harlow and Rawlings have put it:

statutory public regulators are themselves in an ambiguous position, acting on the one hand as enforcers of good governance standards and fair procedures, on the other as targets for them. There have, for example, been complaints that regulators are insufficiently open and suggestions that the UK should adopt an equivalent to the American Administrative Procedures Act.²¹⁸

10.16 The American Administrative Procedures Act (APA) lists grounds and standards of judicial review, however it also sets out procedures to govern administrative rule-making and administrative adjudication. Harlow and Rawlings have suggested that the increasing proceduralisation of administration, which is especially evident in Wales, has catalysed calls for some form of administrative procedure act of this kind which provides a more generalised statement of principles applying to administrative rule-making and regulatory type activity. This could also apply to ‘integrity’ institutions which sometimes do not have a high level of independence from government (in effect bureaucratic regulation of government and administration by other bodies with varying degrees of connection to government). However, only the Welsh Language Commissioner has a specifically regulatory status (with the power to issue civil penalties, for example). The Children’s Commissioner and Older People’s Commissioner could on the other hand be better characterised as National Human Rights Institutions. Nevertheless, the Commissioners are at least all united in being integrity institutions and part of the administrative justice system.

²¹⁸ Carol Harlow and Rick Rawlings, ‘Proceduralism and Automation: Challenges to the Values of Administrative Law’ in E Fisher and A Young (eds), *The Foundations and Future of Public Law* (in honour of Paul Craig (OUP 2019) 11-12.

10.17 The Children’s Commissioner and Older People’s Commissioner wrote jointly in evidence to the Assembly Constitutional and Legislative Affairs Committee (CLAC) (now Assembly Legislation, Justice and Constitution Committee) consultation on the Legislation (Wales) Bill and draft Taxonomy for Codes of Welsh Law. They requested that the legislation underpinning the work of both Commissioners be moved from the Code of Health and Social Care to the Public Administration Code. Their reasoning was as follows:

both younger and older people access a range of other public services beyond health and social care, including education, justice, employment and housing. Likewise, our offices conduct a significant amount of work beyond health and social care...Whilst this codification [under Health and Social Care] does not affect our ability to discharge our statutory functions, it is important to show those that are making use of the Taxonomy, including the public, that our work extends beyond health and social care.²¹⁹

10.18 In addition to this broader educative function, we would also add that as well as acting to promote the rights of children and young persons and older people respectively, both Commissioners have some legal powers to review the activities of a range public administrative bodies and hold them to account. The Commissioners ought to be within the Public Administration Code in any event, but were a Human Rights (or Human Rights and Equality) Act for Wales (or sections or parts on these matters) to develop within the same Code, it could be beneficial to package together the relevant rights and public body duties, alongside the powers and duties of the Commissioners to promote and enforce them.

10.19 We appreciate that codification requires a complex balancing exercise in how to construct an architecture appropriately slotting in both general and subject-matter (sector) specific legislation. It seems more appropriate that a Public Administration Code includes only those procedural and substantive administrative law norms (including those working to concretise human rights protection) that apply either to all devolved Welsh authorities (as defined by the Wales Act 2017) or to a substantial number of them across multiple areas of administration (e.g. health and social care, education and housing). In that regard we understand that Welsh Government, and the Assembly, are already considering expanding the applicability of particular duties to protect rights to a wider range of devolved Welsh authorities.

10.20 We do not have a concluded view about the proper place for protection of the Welsh Language within the Taxonomy of Codes. There is logic to including the Welsh Language (Wales) Measure 2011 in the Public Administration Code as we have constructed it, both because Welsh language rights (again expressed mostly in procedural protections and Standards, rather than explicit rights) could then be brought together in a Human Rights (or Human Rights and Equality) Act, and the functions of the Welsh Language Commissioner would sit in the same Code as those of the other Commissioners. This would also facilitate revisiting the question of the potential for a more consistent approach to the powers and accountability of some of the Commissioners if considered appropriate. This would also reflect that current legislation covers relationships between the Welsh Commissioners, and the Commissioners and the PSOW respectively, further supplemented by a Memorandum of Understanding (MOU) between them.²²⁰ This raises a further question of whether the MOU could be enacted as Guidance within the Code, which could further strengthen ‘interoperability’ and ‘comity’ between these bodies.

²¹⁹ CLA(5) LW09:

<http://senedd.assembly.wales/documents/s83696/LW%2009%20Older%20Peoples%20Commissioner.pdf>

²²⁰ <https://www.ombudsman.wales/wp-content/uploads/2018/03/MoU-PSOW-Commissioners-Signed-Eng.pdf>

- 10.21 A central source of generally applicable administrative law norms is the Well-being of Future Generations (Wales) Act 2015 (WFGA). WFGA aims to make provision requiring public bodies to do things in pursuit of the economic, social, environmental and cultural well-being of Wales in a way that accords with the sustainable development principle. We have discussed WFGA in some detail in previous sections. Welsh Government considers sustainability to be the ‘central organising principle’ of public administration in Wales; we would then expect WFGA to be central to the Public Administration Code.
- 10.22 The justiciability of various duties under WFGA remains an open issue. Whilst the Administrative Court has so far refused permission in two claims,²²¹ stating that the duties are too vague, general and aspirational to be enforced by judicial review, no precedent has been set, and the Future Generations Commissioner and Welsh Government continue to take different positions on the issue. But regardless of whether the duties (such as to set and work towards Well-being Objectives and to use the Five Ways of Working) are enforceable through court action, they remain central to public administration and underpin Integrated Impact Assessments. Placing WFGA in the Public Administration Code, would also situate the Act alongside legislation relating to ‘Audit’ and particularly the Auditor General for Wales who carries out examinations assessing the extent to which a public body has acted in accordance with the sustainable development principle when setting Well-being Objectives and taking steps to meet them.
- 10.23 Alongside ‘Audit’, the PSOW and the Commissioners, tribunals are also part of the machinery of administrative justice, but they do not sit so well under the heading of Public Administration. As far back as 1957, the Franks Report concluded that ‘tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration’.²²² We think it highly unlikely that the proposed Taxonomy suggests tribunals are to become part of public administration in Wales (causing constitutional separation of powers issues), and it is admittedly difficult to see where else the tribunals could be placed in the absence of a ‘Justice’ Code. It would undercut the aims of systematisation and principled consistency if each devolved Welsh tribunal were to be placed within a specific subject-matter code (e.g., the Mental Health Review Tribunal for Wales within the Health and Social Care Code, the Residential Property Tribunal for Wales within the Housing Code). This approach would also fail to reflect that at least some of the Welsh tribunals determine claims from more than one specific subject-matter area. Given the Law Commission’s current project on devolved Welsh tribunals, and the potential for a draft Welsh Tribunals Bill, it is appropriate that the tribunals be contained within one Code. However, there is a perceptible uneasiness in classifying tribunals as part of administration rather than adjudication. The issue here is less any serious concern that including Welsh tribunals in the Public Administration Code would actually risk damaging judicial independence from administration, but more that this does little to raise awareness (an educative function) about their role as a central part of Wales’ justice system. The Commission on Justice in Wales noted that it is not clear to the public at present where accountability lies for aspects of the administration of justice that are devolved to Wales. More explicit reference to ‘justice’ in Codes of Welsh law might be beneficial here. Given the UK Government’s currently negative view on further devolution of justice powers, waiting for

²²¹ *R(B) v Neath Port Talbot Council* and *R (British Association for Shooting and Conservation) v Natural Resources Wales*. CO/4740/2018; and CO/4881/2018.

²²² *Report of the Committee on Administrative Tribunals and Enquiries* (Franks Report), 1957, para.40.

specific occasion to create a broader Justice Code (also covering aspects of criminal, civil and family justice), risks relegating administrative justice to ‘Cinderella’ status. In this regard we note that the Québec Act Respecting Administrative Justice aims to ‘affirm the specific character of administrative justice, to ensure its quality, promptness and accessibility and to safeguard the fundamental rights of citizens’, and that this framing has had an impact on the culture of public administration and tribunal practice.²²³

- 10.24 The Public Administration Code as we have developed it altogether, then takes on a more expansive character than its current draft content. An important question in codification processes will always be how much does size matter? There are multiple connections between legislative topics; choices and compromises are necessary. We note here that Codes are not just technical exercises in reducing inconsistencies and bringing more rational order to law, they are an expression of the legal culture of a people, and can both reflect concrete social norms, as well as cement developing norms. A broader Administrative Justice Code may fit with our normative conceptualisation of the subject matter, but it needs also to fit with the practices of the legislature including legislative drafts people, and the way the bodies under the Code understand their own roles. The bodies in our proposed Administrative Justice Code are supervised by, and accountable to, different Assembly Committees, and there may be a case for saying that the Taxonomy of Codes should be more explicitly aligned to the remit of the Committees that will have responsibility for overseeing the development and maintenance of individual Codes.
- 10.25 In its most expansive sense administrative law includes: the institutional frameworks of public administration; the normative framework of public administration (the norms governing administration, especially administrative decision-making and rule-making by administrative bodies); and mechanisms for holding administrators to account for the performance of their functions and exercise of their powers. Often in the UK a distinction is made between the general legal principles that apply to exercises of public powers - general administrative law - and administrative justice, which as we have discussed it, encompasses the broader sweep of law, institutions and mechanisms for ensuring that administration is exercised lawfully, fairly and efficiently, and that disputes are learnt from.
- 10.26 We recognise that the additions to the Public Administration Code that we have suggested could shape its character as a Code conditioning relationships between individuals and the state, ensuring that important (often constitutionally important) values and rights are protected in day-to-day practice. In the absence of constitution-making powers, Wales has expressed commitment to values normally seen in constitutions through its administrative law. For example, sustainable development features in some countries’ Constitutions, and many Constitutions refer to protecting the rights and interests of children, older people and disabled people, and promoting equality. These rights and goals are then concretised in practice by procedural and substantive administrative law. Many nations seek to achieve this through the vehicle of a Public Administration, Administrative Law, or Administrative Procedure Code or Codes, and such can take a range of different forms. This could include the institutional frameworks of public administration, general legal norms (often procedural norms), and mechanisms for holding administrative bodies to account (through specific administrative

²²³ <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/J-3> and Prof Dr Pierre Issalys, Université Laval (Québec) ‘Codification of Administrative Law’ workshop, Universität Zürich, 23rd & 24th January 2020 (publication forthcoming).

courts or through ordinary courts). Many such Codes draw a distinction between the rules that govern individual administrative acts or administrative decisions, and the law that governs the broader activities of administrative bodies; this can also extend to general legal principles governing how administrative (and especially regulatory) bodies must conduct their own rule-making processes (e.g., when they lay down guidance or policies for particular sectors). It is not unusual for such Codes to also state specific rules for administrative contracts, and the terms of service of public administrators. Codes often also lay down the general legal principles on which judicial review of administration can be sought, and the procedures for issuing and determining claims, as well as the remedies available.

10.27 The exact content, and form of an administrative law code, and the language used, varies across nations, not least because administrative law is inextricably linked to the political and constitutional order of the individual state and its historical development over time. Codes can be adopted at state, territory or regional level in Federal countries and countries with some form of devolution, and these Codes will then interact with, and can sometimes be overridden by, Federal or central codes, and the requirements of applicable international and supranational legal orders.

An Administrative Law Code for Wales: Legislation, Common Law and Rights

10.28 What is missing then from a proposed Public Administration (or Administrative Justice) Code for Wales is an Administrative Law or Administrative Procedure Act (as a part or section of a new 'Principal Act', for example). David Gardner has proposed that an Administrative Law Code for Wales (ALCW) could increase awareness and improve access to justice by restating the general requirements of administrative law that apply to devolved Welsh authorities in one place.²²⁴ The extent of application could be easily identified by the Wales Act 2017 definition of a devolved Welsh Authority, and an ALCW could largely be a consolidation (with some restatement) of existing law. Gardner argues that there is scope to include the Five Ways of Working under WFGA (long-termism, integration, involvement, collaboration and prevention), in an ALCW, and provide that failure to demonstrate having acted in these ways gives rise to a specific legal cause of action in a court or tribunal. Considering whether to consolidate the Ways of Working, alongside other duties applying generally to public decision-making (whether in an ALCW or otherwise), provides an opportunity to clarify whether they are intended to give rise to duties that are legally enforceable in a court or tribunal.

10.29 Consolidation (into an ALCW or otherwise) would also provide an opportunity to clarify whether each individual policy decision of a public body must achieve all the Well-being Objectives or if such should be achieved more broadly as a collective endeavour across decision-making. It could also address 'anomalies in the legislation' around the respective roles of the Future Generations Commissioner and Auditor General for Wales.

10.30 Gardner also proposes that an ALCW 'should start with the traditional common law principles of administrative law and give them the clarity of being outlined in a single place'. He proposes four central principles: that a public body in Wales must act in ways that are; lawful, reasonable, procedurally proper and human rights compliant (noting the latter is a specific statutory duty under the Human Rights Act 1998 s.6).

²²⁴ D. Gardner, 'An Administrative Law Code for Wales: Benefits to Reap and Obstacles to Overcome' (2019) 40(3) *Statute Law Review* 273.

10.31 In contrast TH Jones has argued that restatement of this kind leads to legislating for broad principles that might be considered obvious or even banal. Jones proposes that: ‘Any practitioner or professor of administrative law could write down the principal grounds of judicial review on the back of an envelope’ and that an authorising statute which merely identifies principles of this kind might be more rational and certain but would not perform an educative function. He argues that such ‘would make the law no more accessible than looking at the table of contents of a standard treatise on judicial review’.²²⁵ Our response, and likely that of Gardner too, is that those people to be reached by the ALCW extend beyond practitioners or professors of administrative law, to local authority staff (so-called ‘street-level bureaucrats’) and the general public, who are unlikely to have a standard treatise to hand. Greater accessibility can lead to codes performing an educative function both for individuals, and for the administrators who are subject to duties under the code. Codes can make the law easier to understand for those who are not legally trained, which is particularly advantageous for so-called ‘street-level bureaucrats’ who take administrative decisions. One of the developing conclusions from our research is that better training on general administrative law principles, and particularly emphasising that these are principles of justice, could improve public administration and the protection of individual rights and interests in Wales. In some countries with an element of codified administrative procedure law, consequent improvements to the educational requirements and training of administrators may have had more impact on better decision-making than the codification process itself.²²⁶

10.32 There are, however, other problems with seeking to codify common law. The experience of the Australian Federal Administrative Decisions (Judicial Review) Act 1977 (ADJR Act), which sought to codify some 18 grounds of judicial review, is instructive. The ADJR Act introduced a new procedure for seeking judicial review that was hoped would be more accessible than that existing under the Constitution, however the constitutional route of course remained in force. Under the ADJR Act, litigants have to fit their claims within the specific legislative grounds, whereas the constitutional route has expanded to include more malleable principles of legality and fairness and is proving to be more flexible. There is said to be a risk that codifying grounds of judicial review in statute could stunt or ossify the development of common law, though this may not have been the experience in Australia where (as with other Commonwealth countries) the ingenuity of the common law judiciary tends to find a way. The greater concern is that a cottage industry of litigation has grown up around the technical meaning of individual sections of the ADJR Act and that the outcomes of this litigation do little to improve the quality of administration or to provide satisfactory remedies for individuals. Other countries developing general administrative procedure legislation, such as the Netherlands and South Africa have also had this experience of increased involvement of lawyers and focus on technicalities, without necessarily also increasing access to justice for individuals. That said the Netherlands General Administrative Law Act (GALA) is said to have had some empirically provable positive impacts on the teaching and practice of administrative law more generally,²²⁷ and as we have discussed in relation to judicial review and other Administrative Court claims, Wales would certainly benefit from further development of its administrative law legal sector.

²²⁵ TH Jones, ‘Judicial review and Codification’ (2000) *Legal Studies* 517, 521-522.

²²⁶ ‘Codification of Administrative Law’ workshop, Universität Zürich, 23rd & 24th January 2020 (publication forthcoming).

²²⁷ Prof Dr Tom Barkhuysen (Universiteit Leiden) ‘Codification of Administrative Law’ workshop, Universität Zürich, 23rd & 24th January 2020 (publication forthcoming).

10.33 The policy aim of GALA was also to promote access to justice without lawyers, through the uniformity of administrative procedure legislation, with the overarching principle that there should be a low threshold for instituting proceedings. In effect seeking to improve access to justice for individuals by developing an administrative law system, including individual access to legal redress, that was comparatively easy to access without legal representation and designed in part to address power imbalances between citizen and state. These would be relevant policy aims for Wales to consider in developing its administrative procedure law. Seerden and Wenders note:

The impact of this Act on Dutch administrative law has therefore been great; some have even called it a cultural revolution... Where previously those seeking general concepts and principles of administrative law had to explore a patchwork of special branches of law, special laws and case law of special administrative courts, the GALA, with its basic definitions and general rules, now provides some structure. As a result, administrative law has become far more accessible.²²⁸

10.34 What Gardner is proposing for Wales is not an extensive codification; his approach would be to consolidate into statute the central general grounds of review (which are much individuated by case law) as a means to perform an educative function. A new judicial review procedure could not be introduced as judicial review is a reserved matter. In this regard Wales will need to closely monitor the current UK Government's attempts to implement its manifesto commitments to 'update the Human Rights Act and administrative law'. These updates may aim to restrict individual access to the courts, and discourage development of the more holistic, interpretive approach to judicial review that seems to be implied in the examples of Welsh administrative procedure and human rights law that we have discussed. The matter of whether a Welsh Public Administration or Administrative Justice Code could be the vehicle for a distinctive Welsh approach remains open, and there may be some legislative competence issues that we do not discuss in detail here. The broader educative function of a proposed ALCW for Wales is that it would bring together a statement of common law principles alongside the Wales specific duties that should, we argue at least, condition their application to the decision-making of devolved Welsh authorities. This enables individuals to see all their public administrative law rights against devolved Welsh authorities in one place, it enables the authorities to see all their duties in the same one place. This also has the potential to condition interpretation, including judicial interpretation, of common law standards alongside Welsh specific duties.

10.35 Still, there are further problems associated with codification of common law, borne out by the experiences of the South African PAJA and Australian ADJR Act. PAJA is not regarded as an exhaustive statement of legal principles and this has given rise to complex issues, firstly in the subsequent interpretation of principles by the courts. For example, the PAJA states that an administrative action is one that must 'adversely affect the rights of any person', whereas the courts have interpreted this as meaning that the decision must 'have the capacity to affect legal rights'. Use of the word 'adversely' also appears to have been no barrier for finding that a decision which conferred a benefit on an individual qualified as administrative action under PAJA.²²⁹ We might argue that judicial interpretation of a code is a normal and necessary part of legal evolution, however this has led to particular issues on the boundary between constitutional

²²⁸ Rene Seerden and Danielle Wenders, 'Administrative Law in the Netherlands' in Seerden (ed) *Administrative Law of the European Union, its Member States and the United States* (3rd edn, Intersentia 2012).

²²⁹ G Penfold, 'Substantive Reasoning and the Concept of "Administrative Action"' (2019) 36 *South African Law Journal* 84, 109.

and administrative law. For example, the PAJA definition of ‘administrative action’ also seems to be inconsistent with the meaning attributed to the same concept by the Constitutional Court prior to PAJA’s enactment.²³⁰ This sets up a conflict with constitutional law, and a phenomenon, also now being experienced in Kenya, with laws similar to PAJA, of a twin-track realm of judicial review based respectively on the Constitution and on the relevant codified administrative law/administrative justice statute. The ADJR Act in Australia seems to have produced a similar problem, whereby there might be three separate tracks to judicial review (constitutional, administrative law code, and residual common law) each with different interpretations of legal principle applying. If a Welsh administrative procedure code sought to either codify (and/or supplement) common law principles applying to England and Wales, Wales might find itself in a similar position (especially if this is coupled with a requirement that cases against Welsh public bodies be issued and determined in the Administrative Court in Wales). For example, there could be judicial review claims under the Welsh Code, but also claims under England and Wales common law (stemming from the inherent constitutional jurisdiction of the High Court), with potential confusion over which Administrative Courts (Wales or also England) have jurisdiction over each species of claim. These kinds of developments may, however, eventually prove to be an inevitable consequence of devolution, catalysing the case for a separate court structure and judiciary for Wales.

10.36 A means to avoid some of these concerns would be to potentially legislate for a general administrative law of Wales, and that the devolved Welsh tribunals be the primary institutions for determining whether this law has been adhered to, as well as determining whether the substantive administrative law of the field (education, housing etc) has been complied with. This would also fit with the Justice Commission’s recommendation that ‘the Welsh tribunals should be used for dispute resolution relating to future Welsh legislation’. However, another lesson from some jurisdictions with general administrative law (for example the Netherlands) is that a strict jurisdictional divide between the competence of the ‘civil’ and ‘administrative’ courts and tribunals leads to unnecessary disputes over forum and does not advance access to justice. This is also reflected in the Justice Commission’s view that civil and administrative justice in Wales should be jointly rationalised, promoted, and coordinated, with a view to eventual unification. Whilst in practice an administrative law for Wales might primarily be enforced by devolved tribunals, they will not have exclusive jurisdiction. For the time being authoritative interpretation will be the job of the Administrative Court in Wales. This causes other issues that we do not discuss here, but which are similar across all areas of Welsh law, namely that the courts of England and Wales, and the UK Supreme Court are final arbiters.

10.37 Gardner argues that at least some of CAJTW’s *Principles of Administrative Justice for Wales* could be given statutory force in his proposed ALCW. One reflection from comparative administrative law scholarship is that general principles already widely accepted are more appropriate for codification than developing norms. In this regard Welsh Government has said that: ‘The proposed principles closely reflect existing values and legislative provisions that inform working practices’.²³¹ Our view is that some of the Principles could be central a proposed Public Administration/Administrative Justice Code (particularly those classed by CAJTW as ‘a fundamental right’ - to be notified of administrative decisions, to express views about them and to have a clear right to appeal or review).

²³⁰ C Hoexter, ‘The Constitutionalisation and Codification of Judicial Review in South Africa’ in F Forsyth, M Elliott, S Jhaveri, M Ramsden and A Scully-Hill (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010) 55-56.

²³¹ <https://gov.wales/sites/default/files/publications/2018-11/welsh-government-response-to-cajtw-report.pdf>

10.38 The overall lesson from other nations is that the quest to have better rules in administrative law need not always end with the specific model examples provided by Continental European Codes, but rather that each legal jurisdiction's approach should reflect its own bespoke needs and there needs to be a strong political consensus on what standards to include.

Strengthening and Aligning Soft-law

10.39 Even in the absence of a more ambitious Public Administration or Administrative Justice Code as we have presented it, there are other opportunities to develop an administrative justice culture and perspective. Many of the rights-based and equality duties we have discussed in previous sections as requiring a more consistent legislative approach, have also been addressed in terms of their impacts on softer law and administrative practice. The GER Working Group considered the potential alignment of existing legislative requirements relating to equality, well-being and human rights, concluding that there are various opportunities for process alignment within existing frameworks, only some of which would require changes in legislation and/or guidance.²³² These include:

- aligning timescales for various planning and reporting duties, where Welsh Government and public bodies can align processes for engaging/involving, objective-setting and planning, and delivery against their well-being and equality objectives;
- the joint incorporation of objectives and strategic plans for well-being, equality and VAWDASV within corporate plans;
- integrate equality into local well-being assessments;
- that the Future Generations Commissioner and Equality and Human Rights Commission issue a combined engagement and involvement framework using the principles of WFGA and the PSED;
- mechanisms to address the variation in coverage of public bodies in relation to the statutory duties and the geographical and/or demographic 'footprint' within which they operate;
- encouraging public bodies to set mutually reinforcing well-being, SSWB, VAWDASV and equality objectives as a means to promote efficient and effective implementation.

10.40 These alignment recommendations should help redress any developing 'silo' mentalities around equality, rights and well-being, and could improve the overall coherence and effectiveness of existing frameworks for conducting assessments, setting objectives, planning and reporting. Other initiatives could include improving Equality Impact Assessment processes in particular to reduce their use as retrospective policy-checking tools, and increasing transparency by requiring public bodies to publish strategic equality plans and reports on a central searchable website. Not all of these initiatives would necessarily require primary (or even secondary) legislative change, but some at least could be cemented in a Code that potentially spans human rights, good administration and administrative justice. Thought could also be given to strengthening and aligning some of the practices, reporting periods and activities of bodies across the Administrative Justice system in Wales.

A Right to Administrative Justice and CAJTW's Principles

10.41 CAJTW principles refer to administrative justice as a fundamental right. In South Africa a right to administrative justice has been enshrined in section 33 of the Constitution, alongside the later

²³² Dr. Alison Parken, *The report of the Well-being and Equality Working Group: Improving Well-being and Equality Outcomes: Aligning processes, supporting implementation and creating new opportunities* (July 2019) p.10: <https://chwaraeteg.com/wp-content/uploads/2019/09/Aligning-and-Improving-Outcomes-for-Well-being-and-Equality.pdf>

enactment of PAJA designed to give practical effect to that right. This has also influenced Kenya's Fair Administrative Action Act 4 of 2015 (FAAA) which gave effect to Article 43 of the Kenyan Constitution of 2010. The contents of PAJA are narrower than those of CAJTW's Principles, and more akin to the codification of grounds of judicial review in Australia's ADJR Act.

- 10.42 The AJTC had previously proposed a right to administrative justice that would be 'founded not only on the rule of law and the general principles of legality and legal certainty but also on the principles of good administration, democratic accountability, equality of treatment and citizen empowerment'.²³³ However, Elliott and Forsyth have argued that a right to administrative justice already exists, 'embedded deep within the common law constitution and reflects a wide range of principles of good administration that condition the relationship between the individual and the state'.²³⁴ But, as we have noted above, enforceability of this right requires access to common law judicial review, which we have argued is clearly lacking in Wales.
- 10.43 A Council of Europe Task Group has described the right to good administration as a right the implementation of which 'can be broken down into individual rights which can be applied against the administration'.²³⁵ The Group further noted that some of these rights can be safeguarded by courts and tribunals whereas others might be better protected by ombudsmen processes. These issues could be addressed in the proposed Public Administration/Administrative Justice Code for Wales, alongside considering the balance between goal-based promotive norms, and more explicit procedural and substantive requirements.
- 10.44 Article 41 of the EU Charter of Fundamental Rights (CFR) provides a 'right to good administration'. On its face this is limited to where individuals deal with EU institutions, however, the right combines general principles of EU law, and may be capable of enumerating principles of good administration not specifically listed in the text (though Harlow and Rawlings consider it to be legalistic and adding little to good administration more broadly). The status of the right to good administration as a fundamental right has been hailed as 'revolutionary' as such a right has rarely been constitutionalised in Member States.²³⁶ The presentation of good administration in the form of a right derives from the case law of EU courts articulating rule of law requirements, again a legalistic interpretation of good administration. Margret Vale Kristjansdottir concludes that Member States must 'respect the right to good administration, not because of article 41, but in spite of its wording'.²³⁷ This conclusion may be of some use to Wales, as the EU CFR will not be incorporated into domestic law post-Brexit, but the general principles of EU law will be (under the status of 'retained EU law'). The difficulty for individuals trying to enforce administrative rights is the European Union (Withdrawal) Act 2018 provision that there will be 'no right of action in domestic law ... based on a failure to comply with any of the general principles of EU law.'

²³³ AJTC, British Bill of Rights and Responsibilities: A Right to Administrative Justice.

²³⁴ Mark Elliott and Christopher Forsyth, 'A Right to Administrative Justice?' UK Const. L. Blog (10th October 2012)n (available at <http://ukconstitutionallaw.org>)

²³⁵ CJ-DA-GT, *Meeting Report*, December 2007, p.9 [2].

²³⁶ Jill Wakefield, *The Right to Good Administration* (Kluwer International, 2007) 3; Xavier Groussot and Laurent Pech, *Fundamental Rights Protection in the European Union post Lisbon Treaty*, 173 *Foundation Robert Schuman/European Issue*, 5 (2010).

²³⁷ Margret Vale Kristjansdottir, *Good Administration as a Fundamental Right*, 9(1) *Icelandic Review of Politics & Administration*. 237, 251, (2013).

10.45 Wales is concerned to determine whether rights lost under withdrawal from the EU CFR could be retained or re-enacted in Welsh law through some other means. A right to good administration within the proposed Public Administration Code under the current Welsh Government Draft Taxonomy would be a means of ensuring this right in Wales.

10.46 Nevertheless, Elliott and Forsyth's summary of the potential advantages and disadvantages of including a right to good administration or a right to administrative justice in a codified UK constitution is instructive (and sceptical):

A blandly expressed right to good administration in a bill of rights would be unlikely to do much damage, and its omission from a catalogue of rights might create a misleading impression as to its fundamental importance. But any attempt to lay down the principles of good administration in detail, or to define with precision the reach of the right, might well add needless layers of complexity and uncertainty while making little by way of a positive contribution.²³⁸

10.47 Elliott and Forsyth are particularly concerned that an attempt to codify the principles of good administration in a reasonable amount of detail might risk inhibiting the development of an area of law that owes so much to the creativity of the judiciary. They also recognise the 'boundary problems' experienced in Australia and South Africa, noting that definitions such as 'administrative action', particularly in a jurisdiction where there is no clear distinction between public and private law, 'creates the danger that the precise course of the boundary line rather than the substantive issues of justice and fairness will come to dominate the law'. However, we might argue that Elliott and Forsyth have an excessively court-centric view of administrative law, and as we have noted variously throughout this report, administrative law norms can be morally, politically and socially persuasive without necessarily requiring to be enforced by a court or tribunal.

10.48 The Council of Europe Working Party on Good Administration considered a right to good administration to be 'a third generation right ... of general scope but acknowledged with difficulty as an individual right ... its implementation can be broken down into individual rights which can be applied against the administration'.²³⁹ It further noted that some of these rights can be safeguarded by judicial review, whereas others might be better protected by ombudsmen processes. This notion of a third-generation right which can be broken down into individual rights, enforceable (or promoted) through various means is very similar to the principle (or right) to sustainability under the UN Sustainable Development Goals (and of course WFGA). Our suggestion, then, for both WFGA, and a potential right to good administration in Welsh law, is that each can be broken down into constituent parts, some enforced through legal action in a court or tribunal, other variously promoted and enforced through integrity branch institutions such as Commissioners and the PSOW. However, with WFGA, and going forward with a potential right to good administration, there needs to be more clarity around which aspects of the various duties are to be enforced through what means, and this should be clearly stated either within the currently proposed Public Administration Code, or within a broader Administrative Justice Code.

²³⁸ Elliott and Forsyth, 'A Right to Administrative Justice' (n 235).

²³⁹ CJ-DA-GT, *Meeting Report*, December 2007, p.9 [2].

Substantive Additions to a Welsh Administrative Law/Justice Code

10.49 Particular legal principles could be added to an Administrative Justice Code for Wales, with the potential to further improve public administration. In 1978 a Committee of experts (JUSTICE-All Souls) recommended drawing up a statement of principles to be followed by administrators and that the appropriate institution to formulate the principles should be the Parliamentary Ombudsman (now PHSO), but that two recommendations be implemented through legislation; these were the duty to provide reasons for administrative decisions, and to provide financial remedies where a person suffers loss as a result of wrongful administrative action not involving negligence (including where loss is caused by excessive or unreasonable delay in reaching a decision).²⁴⁰ These latter principles feature in the administrative law codes of many European jurisdictions, and Wales could consider adopting and codifying them in its Public Administration Code. Financial remedies in particular could strengthen compliance with administrative law. Despite much discussion, case law expansion and Law Commission examination, neither of these duties have yet been accepted as general common law duties.

Subject-matter Specific Codification: Housing and Education

10.50 Within the Draft Taxonomy of Codes of Welsh law there is considerable opportunity to codify existing subject-matter specific administrative procedure law applying to that particular area of public administration. Harlow and Rawlings consider that this practice has considerable attraction, referring to what they describe as ‘multiple statutory mini-codifications’, which they consider to be ‘a key space for contextualisation, influenced to a greater or lesser extent by judicial precepts and typically designed in pragmatic fashion for particular policy domains’.²⁴¹ We have discussed consolidation and codification of Welsh education and housing law in each subject-matter report, and in our submission to Welsh Government’s consultation on The Future of Welsh Law.

R23: We Recommend, that the Well-being of Future Generations (Wales) Act 2105, and legislation relating to the Children’s Commissioner for Wales, Older People’s Commissioner for Wales be included within the currently proposed ‘Public Administration’ Code for Wales.

R24: We Recommend Welsh Government and the Assembly review the range of human rights, well-being and equality based administrative procedure laws applying to some or all Devolved Welsh Authorities, with a view to achieving greater consistency, simplicity and coherence, and with a view to improving practical impacts on the quality and outcomes of administrative decision-making. We recommend that these legislative provisions be consolidated (with a view to codification).

R25: We Recommend that the proposed ‘Public Administration’ Code be ‘re-badged’ as a Public Administration and Administrative Justice Code, in light both of the inclusion of the Devolved Welsh Tribunals (as judicial not administrative bodies) and the need to take a principled approach which affirms the special character of administrative justice.

R26: We Recommend that developing a ‘Public Administration’, or ‘Public Administration and Administrative Justice’ Code for Wales provides the opportunity to reconsider the case for greater consistency in the roles and procedures of some of the Welsh Commissioners

²⁴⁰ JUSTICE-All Souls, *Administrative Justice: Some Necessary Reforms* (Oxford: Clarendon Press, 1988).

²⁴¹ Harlow and Rawlings (n 219) p3.

where appropriate, and that Commissioners should generally be accountable to the Assembly rather than Welsh Government.

R27: We Recommend that Welsh Government and the Assembly consider the case for future drafting of an Administrative Procedure Act for Wales, to include consolidated human rights, well-being and equality based procedural duties, potentially extending to other matters such as ‘Ways of Working’, the right to be given reasons for an administrative decision, and compensation for wrongful administration not actionable as a civil wrong. An Administrative Procedure Act must contain an express mechanism for seeking redress for breach of its provisions.

R28: We Recommend that key case law (especially that interpreting and applying devolved Welsh administrative law) be included, as a matter of presentation and quick accessibility, within a ‘Public Administration’ or ‘Public Administration and Administrative Justice Code’ for Wales, but that such common law should not itself be codified.

PART FOUR: ADMINISTRATIVE JUSTICE – REDRESS SYSTEM DESIGN AND OVERSIGHT

11. Redress and System Design

11.1 Administrative justice is often said to have evolved ad hoc; even in continental European jurisdictions with distinctive Administrative Court structures and a separate administrative judiciary, the system has not been ‘the product of an architect’s design’.²⁴² This causes people difficulties in trying to navigate sometimes complex networks which operate in various different ways. The Commission on Justice in Wales concluded that the ‘system of administrative justice [is] undoubtedly difficult for individuals to understand and use’.²⁴³

11.2 A theme of this Report is that administrative justice is inescapably political, and this is true especially of designing redress. Andrew le Sueur has argued that ‘designing redress is a constitutionally significant activity’ as the outcomes - the redress mechanisms - condition individual-state relationships.²⁴⁴ However, he concludes that designing redress has not received sufficient attention, nor has it been recognised as a discrete activity. Both our research, evidence submitted to the Commission on Justice in Wales, and the Commission’s conclusions and recommendations, show that redress design has received insufficient attention in some aspects of Welsh law, policy and administrative practice. Confusion over the legal enforceability of duties under WFGA is one example, but there are also discrete examples from our case-study areas of housing and education, as well as in other subject-matters of public administration.

11.3 Welsh Government responded to CAJTW’s concern about redress design, especially the development of ‘ad hoc’ mechanisms, by stating that:

Providing the means for fair, effective and proportionate systems for redress is embedded into the Welsh Government’s initial stages of the policy assessment process. The Welsh Government’s Justice Policy and Legal Services teams are involved in this process.²⁴⁵

11.4 However, our research participants suggested that this process could be more rigorous, and specifically more evidence-based, consulting publicly with a range of stakeholders and with a more detailed attempt to assess the costs and benefits (broadly understood) of particular redress mechanisms. Integrated Impact Assessments have streamlined processes, but only minimal detail is publicly available.

11.5 Whereas at UK level there have been concerns about central Government’s involvement in contemporaneously designing, operating and participating (as defendant) in a range of core administrative justice redress processes,²⁴⁶ there are fewer concerns that Welsh designs might be impacted by shorter-term political priorities. Nevertheless, it cannot be certain that this situation will continue, and safeguards (especially from constitutional principle) ought to be built into the redress design process.

11.6 Design thinking (which is prevalent across other areas of Welsh Government) could likely be better incorporated into the design of redress mechanisms. A main concern here is that Justice is

²⁴² Giacinto della Cananea, ‘Public Law Disputes in Europe’ (2015) 7 *Italian Journal of Public Law* 102-156.

²⁴³ Commission on Justice in Wales, para 6.16.

²⁴⁴ Andrew le Sueur, ‘Designing Redress; Who Does it, How and Why?’ (2012) 20(1) *Asia Pacific Law Review* 17.

²⁴⁵ Welsh Government Response to CAJTW

²⁴⁶ Robert Thomas and Joe Tomlinson, ‘A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals’ [2019] *Public Law*.

a comparatively new policy function for Welsh Government and there is limited experience in redress design, as well as limited resources among designers, and a lack of impetus to consider more innovative approaches, in part due to levels of experience and expertise, but much more due to costs and infrastructure considerations, and the absence (until recently) of a Minister responsible for justice. As we have noted above, Welsh Government's Justice Policy Team requires further resources to conduct more innovative and detailed redress design functions, and we have recommended that this could be assisted by calling on contributions from a standing register of academic (and other) experts. We have heard, however, that there is already significant engagement between Welsh Government departments such as the policy departments responsible for individual bills, the Justice Policy Team and Legal Services Department. This positive engagement also extends to considering the human rights and equality implications of bills. Nevertheless, we still believe that the voice of the potential 'user' of the administrative justice system, the individual who might need to seek redress for breach of particular provisions, is not being sufficiently considered in this process. As we discussed in our opening sections, Wales should seek to design an administrative justice system that promotes both equal concern for well-being but also equal respect for individual rights. This should not only be understood as protection of fundamental civil and political rights, but also social and economic rights, and the capacity to enforce substantive rights and entitlements provided for under subject matter specific Welsh administrative law (including in housing and education). However, in terms of engagement with the UK Ministry of Justice, it should be noted that the advent of Justice Impact Assessments on proposed legislation, which s.110A of Government of Wales Act 2006 has, since April 2018, made mandatory, has helped to solidify engagement relationships both within and outside Welsh Government, as well as providing a formal mechanism whereby the Ministry of Justice can express a view on redress design proposals that impact on the courts.

11.7 The Commission on Justice in Wales also expressed some concerns over redress design. Specifically, a reluctance to use devolved Welsh tribunals as a means to redress grievances under Welsh law; and the creation of what the Commission refers to as 'public officers' not integrated and aligned with the justice system. The Commission also highlighted concerns caused by the creation of 'ad hoc' 'quasi-judicial' redress mechanisms (which we assume means schemes like the Discretionary Assistance Fund for Wales (DAF), and various appeal panels including forestry and continuing NHS healthcare, and school exclusions appeal panels convened by local authorities).

11.8 CAJTW's 2016 Report, and previous research, have examined some of these ad hoc schemes. For example, the DAF scheme replaces the system of making discretionary payments under the Social Fund (created by the Social Security Act 1986). The DAF provides for payments to meet special needs (primarily of claimants receiving means tested benefits). It is administered by a private contractor (Northgate Public Services). Unsatisfied claimants must first seek an internal review by the DAF team. A second stage review can then be sought, and this will be determined by the Family Fund Trust (a UK wide registered charity formed in 1973 to give practical help to families with severely disabled children under the age of 16). There is no information about what action an individual can take if dissatisfied with the outcome of this second stage review, judicial review might lie but there are complexities around seeking judicial review of the decisions of charitable organisations. Complaints of maladministration, as opposed to decisions not to award a payment, can be made to the PSOW. In this context there are different redress procedures for social funds in Scotland and England respectively. In Scotland local authorities continue to administer the relevant Scottish Welfare Fund, but substantive appeals are determined by the Scottish Public Services Ombudsman – an unusually 'judicial' role for an ombudsman institution. CAJTW recommended that further attention be paid to the DAF process, including whether an alternative and more transparent route to redress in disputes over decisions not to award a

payment could be developed. Other examples of similarly ‘ad hoc’ redress procedures given by CAJTW in its Legacy Report were the Independent Appeals Process for farmers and Forest Owners, and Continuing NHS Healthcare (CHC) Review Panels. CAJTW recommended in relation to these ‘ad hoc’ schemes, that:

R16 Reports on ad hoc Welsh appeal schemes to be made available to the National Assembly in an informative and accessible way.

R28. The Welsh Government introduces general guidance, standards for the operation of ad hoc redress schemes, that new redress schemes are reviewed by the Welsh Government’s Justice Policy Team (JPT) with legal support and that monitoring is in place to ensure conformity and consistency.

R29. Straightforward, clear, consistent Wales-wide basis governance arrangements for ad hoc schemes.²⁴⁷

Welsh Government responded that further work is needed on the cost and feasibility of reports on ad hoc appeal schemes, and that:

Consideration needs to be given to the benefit to developing and introducing generic guidance and standards and Wales-wide arrangements. Operationally schemes are administered under separate arrangements with the flexibility to tailor schemes to specific needs.

There are in place monitoring systems to review the operational arrangements of individual schemes. There is no mapped overview of the administrative arrangements in place for schemes so it is not possible to say whether monitoring extends to cover all redress schemes.

These recommendations are substantial and would need further exploration involving costs and benefits analysis.²⁴⁸

11.9 In Essence the Welsh Government has not had the resources to conduct an extensive review of ad hoc schemes, and there is even a case for saying that new schemes have been created (again because this is less resource intensive than developing a new function within an existing Welsh tribunal or creating a new tribunal jurisdiction). The Commission on Justice in Wales recommended that greater coherence and principled operation could be brought to the ad hoc bodies by bringing them under supervision of the President of Welsh Tribunals:

All public bodies, ombudsmen and other tribunals which have been established under Welsh law or by the Welsh Government, which make judicial or quasi-judicial decisions, and are not currently subject to the supervision of the President of Welsh Tribunals, should be brought under the supervision of the President.²⁴⁹

11.10 We examine the matter supervision, and specifically of oversight further below, but as we have noted in our tribunals section, implementing this recommendation would likely require a significant extension to the role of President of Welsh Tribunals as currently perceived. Returning specifically to redress design, it is useful to consider Le Sueur’s distinction between **First, Second,**

²⁴⁷ CAJTW, ‘Legacy Report’

²⁴⁸ Welsh Government Response to CAJTW.

²⁴⁹ Commission on justice in Wales, para 6.50.

and **Third Order Change**; and to distinguish between particular redress mechanisms, and the **administrative justice landscape** as a whole.

- 11.11 **First Order Change** is where the overall goals of policy instruments remain the same, but there may be fine-tuning of existing procedures or changes in practices within existing legislative frameworks. Here there is likely already a broad consensus about policy aims, and tends to be little consultation, legislative or governmental interest in redress design changes. Usually these changes are implemented through restructuring administrative practices, and there tends to be value in the institutions responsible for the redress having sufficient autonomy to initiate, plan and implement the reforms.
- 11.12 One example from our current research is the approach of the North Wales Region to internal reviews of homelessness decision-making under the Housing (Wales) Act 2014. The Region has produced *A Regional Approach to Tackling Homelessness in North Wales*, which aims to share best practice across the region, develop shared services and collaboration where possible, and develop a better understanding of the causes of homelessness through data capture across the region. Five local authorities in North Wales have joined together to conduct internal reviews of aspects of their homelessness decision-making. Reviews are carried out by a single team, based physically in Flintshire. The aims are to ensure that reviews are carried out in a consistent way, so that all applicants are getting the same service regardless of whereabouts in North Wales they live; this also gives a sense of greater independence to the review process. The reviewers have been collecting data, examining trends in issues raised on review, and identifying training needs to ensure that authorities learn and improve.
- 11.13 Another example could be the PSOW's approach to considering when early and more informal resolution should be attempted to resolve any particular complaint, and his more recent decision to place greater emphasis on exploring equality and human rights considerations when dealing with complaints (leading to publication of his first Equality and Human Rights Casebook).²⁵⁰
- 11.14 The specialist expertise, and closeness (including local connection) to the issues being addressed in both these examples demonstrates the benefit of First Order Change. This kind of change also does not come without accountability. For example, local political and financial accountability in North Wales local authorities, and the PSOW's accountability to the Assembly (and to the Administrative Court where relevant).
- 11.15 However, as Le Sueur argues, there might be other examples of local authority officials, and also officials within executive agencies, or even politicians, engaging in redress design without necessarily realising that they are doing so. As Le Sueur notes, there might be little consciousness that the activity constitutes redress design because there is 'not always a bright line between design and other activities intended to improve the quality of administration within an organisation'.²⁵¹ Our research in education and housing found instances of local authority officials not aware that they were involved in implementation of a redress system, though this is somewhat different to lack of awareness of involvement in design. There were also examples of so-called 'gatekeeping' obstacles erected by local authorities (again in both housing and education) that were preventing people from accessing redress mechanisms, though this seems to be more based on a misunderstanding, or misapplication, of relevant law than deliberate alternative redress design.

²⁵⁰ https://www.ombudsman.wales/wp-content/uploads/2019/11/104483-Equality-and-Human-Rights-Casebook_Eng_v03.pdf

²⁵¹ Le Sueur, 'Designing Redress' (n 241).

11.16 One particular concern is the extent to which first order change in redress design in local authorities and executive agencies might be carried out through contracted services, either with the private sector, or through service level agreements, and framework agreements, across particular public sector bodies. This can lead to some confusion around independence and accountability in developing and operating the redress mechanisms, and in avenues for onwards complaints or appeals. Participants in our research were concerned about the independence and impartiality of locally developed redress schemes, in particular more informal ‘arrangements’ and Alternative Dispute Resolution (ADR) including mediation, where opportunities, practices, standards and funding seem to vary across local authorities.

11.17 Noting that redress design is dispersed across the governance system Le Sueur concludes that:

Recognising redress design as a distinct activity, and raising awareness of it amongst those engaged in relevant activities, may bring practical benefits to a system. It may create opportunities for better joined-up thinking about how remedies relate to one another; heightened awareness may also enable designers to be more consistently informed by basic principles of constitutional propriety and administrative justice.²⁵²

11.18 We would not wish to discourage First Order Change in redress design, but consider that there is a need for greater awareness, particularly in local authorities, of redress design principles as part of a broader need to raise awareness of principles of administrative justice. We propose a set of Design Principles below, but first discuss Second and Third Order changes.

11.19 **Second Order Change** involves establishing novel techniques, or new procedures and institutions for carrying out redress. This more likely involves policy-focused officials, departmental and Assembly lawyers, Welsh Government legislative counsel and Assembly Members. Examples include the creation of the Office of Welsh Language Commissioner and establishing the Welsh Language Tribunal under the Welsh Language (Wales) Measure 2011, and reforms to the powers of the PSOW, including the power to conduct own initiative investigations (under the Public Services Ombudsman (Wales) Act 2019). In each of these examples there was public consultation and Assembly scrutiny.

11.20 However, an area of Second Order Change that tends to receive little attention is the conscious (or even subconscious) decision not to change existing redress mechanisms utilised under the England and Wales administrative justice system, when legislating to create new rights and duties specifically under Welsh law. There seem to be a number of potential reasons for this:

- It is assumed, in some cases without taking empirical quantitative or qualitative evidence, that existing mechanisms (including internal reviews, county courts appeals, and judicial reviews) are working appropriately, fairly, efficiently, effectively and so on, for people in Wales and will continue to do so in the future (even where substantive Welsh law is changing).
- As the Justice Commission puts it: ‘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’.²⁵³
- There is some evidence that particular mechanisms, especially judicial review but not limited to this, are not providing a proportionate means for enabling individuals to resolve their grievances, or not providing for sufficient independent and transparent legal interpretation of

²⁵² Le Sueur, ‘Designing Redress’ (n 245).

²⁵³ Commission on Justice in Wales, para 6.59.

Welsh law, but alternatives are not considered/not accepted due to concerns over costs and other resources including judicial and administrative expertise.

- Innovation in redress design is not attempted due to concerns that substantive law on the one hand, and redress mechanisms on the other, should not be changed at the same time as this might lead to confusion and subsequent difficulties for individuals in accessing justice.
- There is political disagreement over which redress mechanism(s) to adopt and resulting legislation reflects a compromise position (that sometimes consequently lacks clarity).

Examples from within our research include:

- Renting Homes (Wales) Act 2016. The Act will replace existing leases and licences in Wales with two types of ‘occupation contract’, designed to make renting a home simpler and easier. At present the majority of housing disputes are determined in the non-devolved county courts, with a smaller number of matters handled by the Residential Property Tribunal for Wales (RPTW). The legislative process provided an opportunity to reform how the majority of housing disputes are determined in Wales. In evidence during the Bill’s passage respondents expressed enthusiasm for increased use of ADR processes (especially mediation) and greater use of the RPTW to resolve housing disputes. The Assembly Committee recommended a modest transfer of some existing types of county court claims to the RPTW, and that some new claims (arising specifically in the context of renting Homes (Wales) obligations) also be determined by the tribunal. These included; disputes in relation to rent increases, fitness for human habitation issues, succession rights, and failure to supply a contract. The President of the RPTW indicated that the tribunal would be an appropriately specialised forum to determine these cases, but that it would require additional resources. However, the Welsh Minister responded to the Committee stating: ‘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’.²⁵⁴ She did not explain why the Government were not then taking up the opportunity to consider and consult on increasing RPTW capacity. More broadly in this context, the Commission on Justice in Wales has questioned why, given that housing law is fully devolved, neither the Welsh Government nor the Assembly has yet considered trying to consolidate the jurisdiction for housing disputes into one court or tribunal.
- Various Welsh human rights and equality legislation that has adopted a ‘due regard duty’ without a specific means of legal appeal or complaint when a person considers that duty to have been breached. This means the main redress for individuals will be through judicial review in the Administrative Court; there has only been limited discussion (with some acknowledgement) of judicial review’s (in)effectiveness as a means of redress. As we have noted above, in an eight-year period only 26 substantive judgments of the Administrative Court concerned matters of devolved Welsh law or policy.

11.21 Le Sueur proposes a number of matters weighing for and against the express creation of new grievance processes in legislation that would be useful for various people involved in redress design in Wales to consider:

²⁵⁴ Response of the Minister for Communities and Tackling Poverty, to Assembly Communities, Equality and Local Government Committee Stage One Report into Renting Homes (August 2015): <http://www.senedd.assembly.wales/documents/s44686/Ministers%20Response%20to%20the%20Committees%20Stage%201%20report.pdf>

Factors against the creation of an express process are: that such would be expensive to set up and run; that it could risk delay in the implementation of an administrative scheme; that providing interested parties with opportunities to make representations before a decision is made is an adequate substitute for a right to challenge the decision after it has been made; the public body action that might be challenged is not itself a decision or a determination; the public body should be allowed to innovate (this could also perhaps include innovation in terms of developing its own internal complaints mechanisms).

Factors in favour of an express mechanism are: providing a process may enable proportionate dispute resolution (especially if an aggrieved person is steered away from judicial review); it is important that grievances are handled by people with appropriate subject-matter expertise; the Human Rights Act 1998 requires an express grievance process; public confidence in the administrative scheme could be enhanced by express provision.

11.22 The for and against factors are not exhaustive (for example, we have discussed more detailed considerations in our foregoing sections on well-being, equality, human rights incorporation and judicial review generally). Le Sueur notes too that the potential for expense, delay and administrative disruption to government or public bodies, does not necessarily justify the omission of a specific grievance mechanism in legislation. Le Sueur and the Public Law Project both propose ‘a presumption in favour of all administrative decision making schemes making express provision in legislation for an effective pathway and remedies for addressing disputes and grievances’.²⁵⁵ In Wales, the organisation Public Law Wales has argued that: ‘As a matter of principle, where the National Assembly legislates on a non-reserved matter, any administrative remedies created should be by recourse to the Welsh Tribunals system’.²⁵⁶ The Commission on Justice in Wales has more broadly recommended that: ‘The Welsh tribunals should be used for dispute resolution relating to future Welsh legislation’.²⁵⁷

R29: We recommend Welsh Government and the Assembly adopt a presumption in favour of an express provision in legislation for an effective pathway and remedies for addressing disputes and grievances, in the first instance within the devolved Welsh tribunals.

R30: We recommend that Welsh Government (including the Welsh Government Cabinet Sub-Committee on Justice) and the Assembly Justice, Legislation and Constitution Committee monitor on an ongoing basis the capacity of Welsh tribunals to cope with any possible increase in caseload.

11.23 Whilst we have focused here on new administrative powers in Welsh legislation that should require examination of redress design, other reasons for Second (and even Third Order Change) could include: the need to fill gaps in the administrative justice system (some of which we identify in this Report); simplifying and rationalising existing mechanisms (this could be part of consolidation and/or codification); the need to divert grievances from one mechanism to another (e.g., this could be used to transfer current county court actions into the jurisdiction of various devolved Welsh tribunals); responses to international law (e.g., the discussion above around incorporation of international human rights standards); activation of currently dormant rights (e.g., the commencement of the socio-economic duty in Wales provides an opportunity

²⁵⁵ Le Sueur, ‘Designing Redress’ (n 245).

²⁵⁶ Public Law Wales, Evidence to Commission on Justice in Wales

<https://gov.wales/sites/default/files/publications/2018-08/Submission-to-the-justice-commission-from-public-law-wales.pdf>

²⁵⁷ Commission on Justice in Wales, para 6.59.2:

to consider how best to enforce this duty, and if the existing ‘due regard’ duty could be strengthened in Wales). Another reason for amending redress design in a devolved nation could be that central government policies are making it prohibitively difficult to access existing England and Wales, or UK redress mechanisms. For example, central government legal aid policy has had disproportionately negative impacts on access to justice in Wales. Whilst legal aid is a reserved matter, Wales could circumvent detrimental effects of central government law and policy by developing its own innovative dispute resolution/grievance handling mechanisms that do not require legal aid funding to function effectively, fairly and proportionately.

11.24 The latter example might potentially shade into **Third Order Change**. Here the power of change is activated by the persuasiveness of ideas. This results in a programmatic strategy extending beyond concerns for grievance redress, for example to modernise public services, or even to change constitutional relationships between legislature, executive and judiciary. UK-wide examples have included the Citizen’s Charter Programme, enactment of the HRA 1998, and emphasis on user focus and proportionate dispute resolution following a 2004 Government White Paper and enactment of the TCEA 2007. A more recent example could be the current HMCTS Reform Programme, although despite its significance this seems to be being progressed with little need for legislation and arguably limited consultation (more indicative of **First Order Change**) – this may be a cause for concern.

11.25 Potentially in Wales we are experiencing a programme of change that is tantamount to **Third Order Change**, but which (as the Justice Commission puts it) may not be sufficiently integrated nor aligned to the justice system (and which does not include mechanisms for providing justice to individuals through grievance resolution). If sustainability is truly to be the central organising principle of Welsh public administration, alongside increased incorporation of international human rights standards and emphasis on enhancing equality (in particular equality of outcome), this arguably represents a paradigm shift for administrative justice. Expert contributors to our research suggested that this implies an approach to public administration, and particularly an approach to public administrative law (as aspirational, seeking to promote certain moral norms), quite different to the England and Wales tradition. We believe that the redress requirements, or implications, of this paradigm shift have not been fully thought through.

11.26 One framework to examine different ‘paradigms’ or ‘models’ of administrative justice is that proposed by Michael Asimow. Asimow proposes that there are three phases to administrative justice; the initial decision, administrative reconsideration and what he calls judicial review, but what we shall call legal proceedings (for Asimow judicial review refers to wherever a matter is formally considered by a judge). For Asimow the initial decision does not actually refer to the front-line decision (e.g., whether to offer a family social housing, whether to admit a child to a particular school etc), it refers to the first opportunity a person has to query that front-line decision. Asimow is also concerned with avenues to challenge the substance of administrative decisions, and does not include, e.g., external complaint handlers such as ombudsman in his models. However, a key insight is that:

Each country tends to rely primarily on one of the three phases (that is, initial decision, reconsideration, or judicial review) to achieve a fair and accurate result. Efficiency concerns require countries to make this choice. Countries cannot afford to invest resources equally in two, much less all three, of the phases. The phase that each country

chooses as the recipient of most resources is likely to be the phase that private parties regard as providing their best chance to win the case.²⁵⁸

- 11.27 Asimow presents what he considers to be the UK Tribunal Model, central facets of which are: initial administrative decisions are taken by public bodies, the first reconsideration opportunity is through an adversarial appeal to a tribunal (that has jurisdiction over questions of law and fact), and the secondary opportunity for reconsideration is through judicial review in a general common law court (such as the High Court Administrative Court) that has jurisdiction over matters of law but which cannot substitute its judgment for that of the initial public body decision-maker. The model is necessarily over-simplified and misses the role for internal administrative review, and the more inquisitorial nature of some tribunals, plus what Robert Thomas has more recently referred to as the role of tribunals in ‘dispute avoidance and containment’.²⁵⁹ However, on the whole Asimow argues that across the UK, tribunals are seen as providing the best chance for the individual (the private party) to win their case, and as such receive substantial investment from the state.
- 11.28 The Welsh model may differ from this in that the state seems to place more emphasis on promoting good initial decision-making through a number of avenues: first, the emphasis on Commissioners and the PSOW (Wales for example, generally spends more per head of relevant population on its Commissioners than the other UK nations; and the PSOW is considered one of the most progressive UK ombuds in terms of jurisdiction and practices); second, it can be argued that so far there has been limited investment in the devolved Welsh tribunals, and that Welsh Government seems reluctant to make greater use of them. Again, this may be an over-simplification, given Welsh Government’s current interest in the devolved Tribunals and its instigation of a Law Commission review. Also, whilst the Children’s Commissioner for Wales is comparatively well funded compared to English and Scottish counterparts, the distinctively Welsh Future Generations Commissioner has a budget of approx £1.4 million and describes monitoring and assessing 345 well-being objectives within this as ‘a huge challenge’.²⁶⁰
- 11.29 In any case, our point is that the Welsh model is focused on prevention of wrongs by public bodies and fostering good decision-making particularly at strategic and policy levels. But there is, it can be argued, less consideration of the routes individuals might see as providing them with the best opportunity to ‘win’ their case.
- 11.30 Nason has previously identified engagement with individuals as part of what she then referred to as a nascent model of administrative justice in Wales that is more egalitarian, focusing on engaging and involving citizens. In evidence she cited the WFGA principle of ‘involvement’ and various examples of co-production and co-delivery of public services. She argued that this model also emphasises reforming administrative justice hierarchies (courts and the PSOW) so that they work more harmoniously with regulatory and value-promoting parts of the system (Commissioners, regulators and aspirational legislation).²⁶¹
- 11.31 It may be that Nason’s model was more normative than descriptive, seeking to present existing evidence in its best light. For example, developments since, alongside the large body of evidence submitted to the Commission on Justice in Wales, suggest that rather than encouraging more

²⁵⁸ Michael Asimow, ‘Five Models of Administrative Adjudication’ (Stanford Public Law Working Paper No 2632711, 2014).

²⁵⁹ Robert Thomas, ‘Current Developments in UK Tribunals: Challenges for Administrative Justice’ in Sarah Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (UWP 2017).

²⁶⁰ <https://record.assembly.wales/Committee/5746#A54152>

²⁶¹ S. Nason, ‘Administrative justice in Wales: a new egalitarianism?’ (2017) 39(1) *Journal of Social Welfare and Family Law*.

harmonious engagement between traditional hierarchies (courts, tribunals and ombuds) and regulatory and value promoting parts of the system, these two faces of administrative justice might be developing in parallel without sufficient co-ordination (for example, the Justice Commission's conclusion that value promoting public officials are not 'aligned' to the justice system), and that more oversight and supervision of the developing landscape is needed.

11.32 Nason also suggested that the Welsh model pays significant attention to the needs of users. However, on reflection we might argue that attention is paid to engaging and involving users in matters of public services design, in setting various goals and objectives (particularly relating to well-being, human rights and equality), but that there is little engagement with users in terms of designing administrative justice redress mechanisms. A continuing theme of our research engagement was that potential users of redress mechanisms should be more involved in the process of designing mechanisms that meet their needs, and which fit with their perspectives on satisfactory outcomes. The Senior President of Tribunals has stressed the need to work towards 'the creation of an administrative justice sector that our users' value'.

R31: We Recommend that it is necessary in Wales to promote and enable better engagement and involvement with individual and group users of administrative justice redress mechanisms. This should extend to involvement in the design of redress mechanisms, and oversight of their operation, as well as the greater participation by individuals in resolving their own disputes that can be facilitated by an empowerment approach to advice services, and through technology (and specifically by digitisation). This could be promoted variously by Welsh Government Justice Policy Team, any board established to promote and co-ordinate dispute resolution in Wales, by the President of Welsh Tribunals, by the proposed Law Council for Wales, and by the Wales National Advice Network.

11.33 With Second (and even First Order) changes it is possible to identify a line of documents relating to policy-making, and where relevant, public deliberation. In the case of wide-scale paradigm shifts in the principles of public administration in Wales (like a new egalitarian approach, or moving to sustainability as a central principle) much of this material exists, but there has been no concurrent attempt to map, or critique, broader impacts of such developments on the administrative justice landscape. Not least since there has been no Welsh Government department, or Assembly Committee with express responsibility, or institutional capacity (including resources), to take on the role. On the other hand, as we discuss below, more overt paradigm shifts in administrative justice (such as the TCEA structure, or fundamental changes to the Australian system of administrative justice), have been coupled with the creation of specialist independent statutory oversight committees.

11.34 Le Sueur proposes that: 'In the absence of any direct political or executive coordination of policy-making about redress, an alternative has been to look to the development of statements of principle about aspects of administrative justice'.²⁶² Public Law Project (PLP) research, authored by Le Sueur and Varda Bondy, has proposed nine principles to be taken into consideration when designing new systems of redress in the field of administrative justice. Bangor's first research Report, *Understanding Administrative Justice in Wales*, built upon these principles to develop the following checklist that can be used at all levels of proposed change: First, Second and Third Order, though some Principles might be more relevant to particular changes or orders of change.

²⁶² Le Sueur, 'Designing Redress' (n 245).

R32: We Recommend that the Welsh Government Justice Policy Team, and other redress designers across Government, adopt the following checklist (especially when conducting Justice Impact Assessments), and that the checklist is also utilised in scrutiny by the Assembly Legislation, Justice and Constitution Committee:

1. There should be a presumption in favour of all administrative decision-making schemes making an express provision in legislation for an effective pathway and remedies for addressing disputes and grievances
2. Institutional design should respect constitutional principles
3. There should be public accountability for the operation of grievance handling
4. Evidence and research should inform the creation of new redress mechanisms and the reform of existing ones
5. There should be opportunities for grassroots innovations
6. Mechanisms should ensure value for money and proportionality
7. There should be a good 'fit' between the type of grievance and the redress mechanism
8. Fair and rational criteria and processes should be used to 'filter' inappropriate grievances
9. As well as dealing with individual grievances, redress mechanisms should contribute to improvements in public services
10. Whenever new issues arise that need to be dealt with by the administrative redress system, consideration should first be given to allocating them to an existing redress institution under an existing procedure
11. Redress mechanisms should be designed primarily from the users perspective

11.35 There are other examples of principles and guidance developed by Welsh bodies that could also be taken into consideration in designing redress, with potential for amalgamating these into some form of toolkit or checklist for redress design. It would also be beneficial for Welsh Government to formally adopt design tools so produced.

Resources relevant to design include:

If the redress method/proposed new method includes concerns and complaints, organisations are advised to consider Welsh Government Model Concerns and Complaints Policy and Guidance, which the PSOW urges relevant bodies to adopt.²⁶³

The Future Generations Commissioner has developed a Framework for service design²⁶⁴ that could apply where the service is a grievance redress or dispute resolution service (thinking of dispute resolution as a service need not necessarily cut against other more traditionally legalistic administrative justice principles such as independence and transparency). The Framework for service design describes what the five ways of working mean in practice for service design, setting out a series of questions to consider alongside four key concepts:

- Delivering an integrated service with partners in the best interest of the people accessing the service.

²⁶³ <https://www.ombudsman.wales/model-concerns-and-complaints-policy-and-guidance/>

²⁶⁴ https://futuregenerations.wales/wp-content/uploads/2018/11/33869-Future-Generations-Framework-for-Service-Design_English_FINAL-WEB.pdf

- Starting from what people can do, not what they can't, and involving them in decision-making as an equal partner.
- Ensuring people can access the service they need, when they need it and only for as long as they need it.
- Always learning, positively challenging and aiming to improve.

11.36 When laying down its own Principles for Administrative Justice, the AJTC noted that there are potential pitfalls in developing principles, including that they are unlikely to have a significant impact without a frame of reference against which to measure adherence. Some of the resources noted above could be used in evaluation processes, as could more specific tools relating to particular bodies. For example, the Council of Australasian Tribunals (COAT) has developed a tribunal competency framework, which commentators have also argued should be adopted in other similar jurisdictions such as Canada.²⁶⁵ The COAT Framework identifies eight measures of excellence against which all tribunals should be assessed. These are: independence, leadership and effective management, fair treatment, accessibility, professionalism and integrity, accountability, efficiency and client needs/satisfaction.

12. The Administrative Justice Landscape

12.1 In his foreword to Professor Christopher Hodges' book, *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales*, Lord Thomas argues that: 'What is plainly needed is a system that is cohesive and coordinated. Such a system must cover all forms of dispute resolution, including informal resolution at the outset by advice and discussion'.²⁶⁶ He goes on to conclude that this cohesive and coordinated system cannot be achieved by 'tinkering' but requires 'a rebuild of the present system of advice and dispute resolution to form an integrated and comprehensive system'.

12.2 The foundational ideas behind this direction of reform are not new; there has long been discussion of the value to a 'single point of entry' or 'one stop shop' approach to administrative justice, beginning with access to information, advice and assistance, enabling people's problems to be appropriately 'triaged' to the most appropriate form of dispute resolution (be that a court, tribunal, ombud, ADR or other process). Such was recommended for Wales in Bangor's 2015 Research Report and commended by Hickinbottom J (as he then was) in his foreword to the book, *Administrative Justice in Wales and Comparative Perspectives*. Where he stated:

Administrative justice ranges over the whole gamut of how the dissatisfaction of individual citizens, or groups, with administrative decisions in Wales might be dealt with. That is in itself important. It sets down a clear marker that the consideration of lawfulness, proportionality, merits and the quality of administrative decision does not have to be compartmentalised; and, **particularly in a country the size of Wales, restricted, or even a single point of entry for complaints about such decisions may legitimately be, not merely an ideal, but a practical aim.** In any event, it marks that it may be in the best interests of both Government and citizens in Wales to deal with these issues differently from the way they are dealt with by Westminster.

12.3 Professor Hodges too considers that a holistic review is well overdue, and that current complexity results in people who wish to complain having to navigate a bewildering maze. This is likely exacerbated in Wales as the maze has both devolved and non-devolved pathways that may interact

²⁶⁵ <https://coat.asn.au/wp-content/uploads/2018/11/TribunalCompetencyFramework.pdf>

²⁶⁶ Christopher Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales* (Hart Publishing 2019).

and overlap. But, at least, as Professor Hodges notes ‘this is a period in which the idea of improving pathways is under active consideration, even if that concept itself is not currently an objective or slogan that is used’.²⁶⁷

12.4 The most significant UK wide initiative in design, the HMCTS Reform Programme, is seeking to address issues of complexity. As the Lord Chancellor, Lord Chief Justice, and Senior President of Tribunals stated in 2016:

Innovative ‘problem-solving’ opportunities will be created to improve the determination of a range of issues which have historically been spread across courts and tribunals. This ‘one stop shop’ approach is being piloted with property disputes which can be dealt with before one specialist judge, giving claimants a speedier more conclusive resolution to their complaint. The potential to extend this into other areas such as Mental Health and Employment will be explored.²⁶⁸

12.5 As Professor Hodges notes, early pilot schemes have been aimed at coordinating the jurisdictions of courts and tribunals, 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. These pilots, Hodges and others suggest, are the early steps towards amalgamated civil and administrative jurisdictions in areas such as housing, property, and mental health. There are similar opportunities to draw together Equality Act 2010 discrimination matters (dealt with by the county courts) with tribunal matters relating to employment. From our research we found that special educational needs disputes are another area where there could be better co-ordination of court functions in disability discrimination, and the broader functions of the Special Educational Needs Tribunal for Wales.

12.6 Hodges considers that the ‘long-term aim is the establishment of a single administrative law jurisdiction’.²⁶⁹ This may cause particular problems for Wales, as whilst substantive administrative law is diverging from English law, Welsh and English civil law disputes involving public bodies remain largely unified with disputes resolved primarily through non-devolved tribunals, county courts and High Court Divisions.

12.7 A particular example of this is evident in our housing case study. The UK Ministry for Housing, Communities and Local Government consulted on a housing court (and is currently analysing the responses).²⁷⁰ The call for evidence notes: ‘Whilst housing policy is devolved, the jurisdiction of the county court is England and Wales. We will work closely with the Welsh Government to ensure that any changes to the current functions of the county court take account of devolved policy in Wales’.²⁷¹ However, the consultation itself makes no reference to the RPTW, to its jurisdiction, or to any issues that might arise as a result of the devolution context – presumably it is left to those responding to the consultation to raise these issues. 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.²⁷²

²⁶⁷ Hodges, ‘Delivering Dispute Resolution’ p.426.

²⁶⁸ *Transforming Our Justice System* (September 2016):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf

²⁶⁹ Hodges, ‘Delivering Dispute Resolution’ p.379.

²⁷⁰ <https://www.gov.uk/government/consultations/considering-the-case-for-a-housing-court-call-for-evidence>

²⁷¹ *ibid* para 14.

²⁷² Law Commission, *Housing: Proportionate Dispute Resolution – The Role of Tribunals* (Consultation Paper 180, 2007).

12.8 The current attempt to better coordinate the respective jurisdictions of courts and tribunals does not yet go as far as specifically proposing a Civil and Administrative Tribunal (CAT) structure for particular topics of dispute resolution in England and Wales, and this type of extensive reform would raise significant challenges for Wales. As we have noted elsewhere in our Report, the subject specific and general administrative law of Wales is changing, any unified England and Wales CAT structure could be both a possible example of ‘reverse devolution’ of tribunal responsibility, and would require in effect sub-chambers of Welsh law specialists in each subject area, for example housing, education and so on. This is an unlikely prospect. In the longer-term the Justice Commission recommends further devolution to Wales, of civil justice and responsibility for the administration of the courts, and also that such functions once devolved should be reformed along CAT structure lines:

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 rationalised, 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.²⁷³

12.9 Various chapters in *Administrative Justice in Wales and Comparative Perspectives* examine the potential advantages and challenges raised by unification of courts and tribunals in civil and administrative justice, and we do not wish to repeat that analysis here. This is a longer-term objective, whereas current focus could usefully be on what the Senior President of Tribunals has described as ‘interoperability’. This has a range of dimensions, one of which is cross-deployment of tribunal judges across at least three of the four UK nations. Cross-deployment between tribunals both within and across territorial and subject-matter boundaries is built into the Wales Act 2017. For example, with Welsh Tribunal judges deployed to English Property Tribunals. The Tribunals (Scotland) Act 2014 contains similar foundations that could see the territorial cross-deployment of Scottish Tribunal judges. Another dimension of ‘interoperability’ is in co-operation and shared services between devolved and reserved tribunals, with the opening of a new joint tribunal centre in Glasgow being seen as a positive example.²⁷⁴ In these dimensions interoperability advances the Leggatt Review’s earlier reflections on the need for improved cross-border co-operation.²⁷⁵ This encapsulates an evolving relationship between administrative justice systems where there is a more fluid relationship across UK jurisdictions, whilst remaining sensitive to the diverging substantive law of each nation. Some ‘interoperability’ or in effect ‘cross deployment’ between members of the Welsh tribunal judiciary, county and High Court judges sitting in Wales, could also be established to address concerns about individual complainants having to attend multiple hearings, and navigate multiple pathways to have different components of a particular dispute addressed.

12.10 Interoperability also covers relationships between tribunals and courts and other bodies, most specifically ombuds, as we have discussed in the sections above relating specifically to the PSOW. Interoperability, however, creates its own complexity, of how and when to deploy particular types of expertise across the network of promoting good decision-making, resolving disputes and learning from those disputes. This network approach also accepts that

²⁷³ Commission on Justice in Wales, para 5.56.

²⁷⁴ Judicial Office for Scotland, *The Scottish Tribunals: Annual Report prepared by the President of the Scottish Tribunals, 1 December 2016 - 31 March 2018* (September 2018) 5.

²⁷⁵ Leggatt Review [11.3]-[11.4].

administrative justice is messy, and that attempts to rationalise its elements into neat (and perhaps hierarchical) structures could do more harm than good for individuals and broader public administration. The proposed solution is that ‘interoperability’ is heavily connected to use of modern technology as a means to manage complexity and to cater for individual needs. As the joint statement on transformation (from the Lord Chancellor, LCJ and SPT) from 2016 notes:

Tribunals will be digital by default, with easy to use and intuitive online processes put in place to help people lodge a claim more easily, but with the right levels of help in place for anyone who needs it, making sure that nobody is denied justice. Once a claim is made, automatic sharing of digital documents with relevant government departments will mean that the tribunals and the parties will have all the right information to allow them to deal with claims promptly and effectively, saving time for both tribunal panels and claimants. Those who use tribunals will have access to specialist judicial expertise using tools and technology that they use routinely in other parts of their lives. This will allow the nub of a case to be identified quickly, wrong decisions resolved, and hopeless causes weeded out – improving justice for everyone involved.²⁷⁶

- 12.11 The reform programme also extends the involvement of case-officers in aspects such as file preparation and pre-hearing supervision (in both tribunals and courts); case-officers (and other types of advice and support bodies) can provide ‘assisted digital’ services to those identified as needing them. As the Justice Commission has recommended for courts in Wales, an aim is to shift the perception of litigation from an adversarial dispute to a problem to be solved, drawing inspiration from various ‘problem solving courts’ initiatives. Whilst digital technology can be used to provide for a range of attributes - from digital filing of documents, to online hearings, or more expansively to a process of ‘online continuous hearing’ - technology can also be used to facilitate ‘interoperability’ between particular specialists in the dispute resolution process.
- 12.12 Whilst Welsh public administration is seeking to embrace ‘interoperability’ in the form of collaboration and involvement under WFGA, more could likely be done to co-ordinate the development of administrative justice redress mechanisms. In a lecture to the Ombudsman Association the Senior President of Tribunals argued that across England and Wales, more attention should be paid to joint working and mutual co-operation. A first step towards achieving this in Wales would be greater awareness that there is an ‘administrative justice sector’. We have noted that this requires the contribution of a range of bodies, but an important element is continued collaboration by the bodies within that sector.
- 12.13 There is a Memorandum of Understanding (MOU) between the PSOW, Children’s Commissioner, Older People’s Commissioner, Welsh language Commissioner and Future generations Commissioner. This outlines the role of each body and notes some specific legal bases for co-operation and joint-working including joint-investigations where appropriate. The MOU also provides examples of practical engagement such as providing for regular and ongoing contact and exchange of information through sharing of appropriate documents, regular meetings, sharing of information about trends, data and policies (where appropriate), and joint training activities at various levels of each organisation. Joint training has been conducted particularly in the areas of human rights and equality which cut across the roles of each organisation. The MOU notes that the bodies are of equal status, with an overarching aim ‘to contribute to the development of excellent public services in Wales that respect and promote

²⁷⁶ ‘Transforming our Justice System’ (n 270).

the human rights of citizens in Wales and are sensitive to the needs of the most disadvantaged and vulnerable members of society'.²⁷⁷

- 12.14 In its first Annual Report the AJC references its 'Ombudsman and Tribunals Familiarisation' workstream, which aims to 'share learning between ombudsman schemes and tribunals'.²⁷⁸ The AJC notes that a Working Group has been established which is 'exploring how the two sectors can work together more closely, from more effective signposting to encouraging sharing of best practice and learning between the sectors'. Participants in our research noted that there is engagement between staff of the PSOW and the Welsh Tribunals Unit, including for example, an understanding about the respective roles of each body and the ability of staff in each body to sign-post enquiries to the other.
- 12.15 More formally the AJC Working Group aims to develop pilots that could potentially be rolled-out to other jurisdictions. Currently this includes work undertaken between the Local Government and Social Care Ombudsman for England (LGSCO) and the SEND Tribunal. This has culminated in 'a programme of shadowing and information exchange and an Information sharing protocol'. The Working Group has generally noted that importance of these 'interoperability' developments being established from the ground up in the working practices of the relevant organisations, before being potentially more formalised in protocols. The need for a specific programme of shadowing or for a protocol/memorandum of understanding is less relevant to Wales where there is already inter-action and clear lines of communication between the PSOW and the Welsh Tribunals Unit.
- 12.16 In his account of 'interoperability', the Senior President of Tribunals goes further proposing that 'judges able to work as ombuds and vice-versa – not just collaboration and co-operation but career paths and that includes for our case workers and case officers. One of our case officers has become a judge and others will follow. They have materially identical skills and abilities frameworks in both our services'. In Wales, there are examples of tribunal judges being appointed to the High Court bench, but not yet of any specific transfer or cross-appointment of tribunals and ombuds staff. The ability for career paths to cross both institutions could be particularly attractive in Wales given that the comparatively small size of the institutions might be said to cause problems for career progression.
- 12.17 The Commission on Justice in Wales has recommended that: 'As a short term measure there is a need for better coordination in relation to administrative justice so that the public have a clear understanding on where to go to have their disputes resolved'. The Commission further recommends that this co-ordination function be performed by a body chaired by a senior judge with the aims of promoting and co-ordinating dispute resolution before courts, tribunals, ADR and ombudsmen, as well as dispute resolution in respect of administrative law.²⁷⁹
- 12.18 The longer-term recommendations of the Justice Commission parallel those of various commentators on administrative justice. As Lord Thomas puts it in his Foreword to Professor Hodges book on *Delivering Dispute Resolution*, there should be:

a rebuild of the present system of advice and dispute resolution to form an integrated and comprehensive system...Piecemeal reform will fail. It will result in replicating a disjointed, expensive and difficult to use set of alternative methods of dispute resolution with legal aid being seen as something separate. What is needed is a modern system that integrates

²⁷⁷ <https://www.ombudsman.wales/wp-content/uploads/2018/03/MoU-PSOW-Commissioners-Signed-Eng.pdf>

²⁷⁸ AJC 'Annual Report'.

²⁷⁹ Commission on Justice in Wales, para 5.55.

the provision of advice and dispute resolution and in addition uses the data collected by such a system for the benefit of society so that behaviour which has resulted in disputes can be addressed for the future.²⁸⁰

- 12.19 Professor Hodges' initial blueprint for this rebuild is to go back to basic questions around what is it that decision-makers actually have to do, how difficult are those tasks, what kind of risks are involved, how do we establish facts, apply relevant law and exercise appropriate discretion in particular situations? This echoes a central finding of our research and engagement, that not enough attention is paid to the circumstances of those tasked with making initial administrative decisions.
- 12.20 For Hodges whilst there may be a range of different pathways to dispute resolution, it should not be, as it currently is, the responsibility of the individual to identify and navigate those pathways. Exactly what this might mean for Wales particularly must be the subject of ongoing discussion and research. As Hodges argues: 'Having a single pathway for claims against the state would bring clarity and maximise the citizen's knowledge of where to go to get information and to raise a problem'.²⁸¹ This would also bring potential to create a wide database of information from which to learn and seek improvements in public decision-making.
- 12.21 Hodges suggests an initial stage of assistance and triage, that could involve fusion of a public ombuds service and citizens advice. In this regard, the National Advice Network for Wales, and the Justice Commission's proposal to bring together funding for legal aid and third sector advice/assistance provision into a single fund under strategic independent direction, could form the basis of a nascent national legal advice service. There could be strategic co-ordination and co-operation, between this service and the PSOW to provide initial advice and to triage claims into particular pathways. Some matters could be resolved through advice alone, some through advice and assistance, others through informal resolution involving ombuds case-workers, and others could be tracked as appropriate ultimately to a more formal investigation (which might be conducted jointly with one of the Welsh Commissioners) or to legal resolution in a devolved Welsh tribunal. Whilst this co-ordination and 'single point of entry' approach is attractive, the stronger notion of 'fusion' potentially risks undermining the status of the PSOW as a separate and impartial office.
- 12.22 Hodges notes one concern might be that this proposal goes too far in confusing a distinction between appeals and complaints. However, part of the triage function within the advice/ombuds stage would be to determine whether there are matters of substantive legal entitlement that need to be addressed, issues of maladministration, issues relating to the legality of processes not specifically touching on substantive entitlement, or some combination of each. A bespoke combination of resolution pathways can then be generated to deal appropriately with each issue whilst recognising the likely cross-overs between them. The individual complainant should also be involved in this process, particularly if it ultimately leads to a potential 'choice' of remedies – we should ask what is the individual seeking in resolution, but also if the matter raises broader questions of public interest.
- 12.23 The more potentially complex matter for Wales is the proposal to move towards a 'single administrative law jurisdiction' already being experimented with in the context of English housing law disputes. This can include elements of the appeal jurisdictions of the relevant subject-matter tribunal and the county court, but also potentially the judicial review jurisdictions

²⁸⁰ Lord Thomas, Foreword to Hodges 'Delivering Dispute Resolution'.

²⁸¹ Hodges, 'Delivering Dispute Resolution'.

of the Upper Tribunal and Administrative Court. Analysing the distinction between tribunal appeals and judicial review is beyond the scope of this Report, but it has been argued that there is a high degree of so-called ‘functional equivalence’ between appeals and reviews, particularly given that the majority of judicial review claims involve individual grievances against specific decision-making bodies and turn on their own facts. The fused administrative law jurisdiction would likely have to provide for the identification of claims that raise issues of broader public importance, or clarification of legal principles, practices or administrative procedures. As we have noted elsewhere in this Report, there ought to be some mechanism for the advice/ombuds/commissioners sector to refer issues of law for clarification to the legal administrative law jurisdiction, even in the absence of an individual complainant who wishes to proceed down this pathway.

12.24 The bigger potential problem here is that whilst some tribunals are devolved to Wales, others are reserved, and so is the courts system. We have already noted existing concerns about changing the relationship between ombuds and the courts for one UK jurisdiction only. However, as we also discussed, to some extent this type of proposal might largely formalise interoperability that is already practiced on a discretionary basis in both England and Wales.

12.25 The above might seem like very ambitious proposals, but many of the building blocks are already in place, for example, the single PSOW for devolved Welsh authorities, movement towards a national advice service, collaboration and co-operation between administrative justice institutions. Other developments could be catalysed by recommendations of the Justice Commission, but for longer-term reform proposals to succeed it is essential that there is genuine multi-party political commitment, and the cost implications must be fully understood and committed to at the outset.

13. Oversight of Administrative Justice

13.1 There must be oversight of the administrative justice sector as it is developing in Wales. The Justice Commission made two key recommendations in this context:

Dispute resolution before courts, tribunals, alternative dispute resolution and ombudsmen, as well as dispute resolution in respect of administrative law, should be promoted and coordinated in Wales through a body chaired by a senior judge;²⁸² and

All public bodies, ombudsmen and other tribunals which have been established under Welsh law or by the Welsh Government, which make judicial or quasi-judicial decisions, and are not currently subject to the supervision of the President of Welsh tribunals, should be brought under the supervision of the President.²⁸³

13.2 In relation to the first recommendation, some matters to be addressed are; what is meant by promotion and co-ordination of dispute resolution mechanisms, and what should be the composition of the body doing to promoting and co-ordinating? Promotion could mean seeking to increase awareness and use of existing mechanisms, potentially through forms of public legal education, or promoting training for advice providers. The body could also consider how to promote the use of devolved redress mechanisms (particularly tribunals) as a means to resolve disputes under devolved Welsh law. This could be a specific aim of the increased early engagement between the judiciary, Welsh Government, and the Assembly, which the Justice

²⁸² Commission on Justice in Wales, para 5.55.

²⁸³ Commission on Justice in Wales, para 6.50.

Commission also recommends. The co-ordination function of the body could involve taking stock of existing examples of interoperability between ombuds, tribunals, courts and other bodies, and examining how to improve this for the future.

R33: We Recommend that, if established, a body promoting and coordinating dispute resolution in Wales should have a diverse membership particularly from across the administrative justice sector; including the Administrative Court Liaison Judge for Wales, the President of Welsh Tribunals, the PSOW and Welsh Commissioners, representatives from the Welsh Local Government Association, and from the advice sector as well as groups representing users.

R34: We Recommend that this body considers how to promote the use of devolved redress mechanisms (including devolved Welsh tribunals) as a means to resolve disputes; and that it should take stock of existing examples of interoperability between ombuds, tribunals, courts and other bodies, and examining how to improve this for the future.

- 13.3 It seems anticipated that the body would have a more substantial role than any of the existing 'Justice Councils' in England and Wales, including the Civil and Family Justice Councils. Unlike the previous AJTC (and CAJTW) covering administrative justice, the Civil and Family Justice Councils are judicially-led; they are not looking from the users' point of view but rather examining more detailed, operational matters. Civil and family justice also deal with a far smaller number of cases than administrative justice. Whilst improvements in coordination are to be welcomed, our research participants questioned the centrality of the senior judiciary to this process, noting that the benefits of administrative justice stem from the flexibility of tribunals (as compared to the courts) and other central institutions and methods such as the PSOW and the Commissioners in Wales. Whatever composition and functions of this body, it should aim to look from the user's perspective.
- 13.4 The second recommendation concerning the role of the President of Welsh Tribunals, is more specific, and we suggest likely an attempt to tackle concerns about the development of 'ad hoc' redress mechanisms. Our research participants expressed some surprise at use of the term 'quasi judicial' which has fallen out of fashion in administrative law parlance due to the difficulty of classifying bodies and procedures according to the term. In plain English we might say this includes bodies that have the power to conduct investigations (including specifically to hold hearings) into disputes about substantive rights and entitlements under Welsh law. The PSOW is likely referred to specifically as ombuds investigations are generally not conducted using the more formal methods associated with a judicial approach. In our view the reference to 'quasi judicial' covers 'ad hoc' mechanisms such as initial decision-making and dispute resolution under the DAF process, NHS Continuing Healthcare dispute resolution, school exclusions appeal panels convened by local authorities, and other mechanisms and procedures that operate similarly to tribunal decision-making.
- 13.5 The Welsh Language Commissioner likely operates quasi judicially when conducting investigations and ruling on allegations of interference with freedom to use Welsh under s.111 of the Welsh Language (Wales) Measure 2011. The Children's Commissioner and Older People's Commissioner could potentially be acting quasi judicially when exercising their powers to consider individual cases. The PSOW is then likely mentioned specifically as its broader powers are likely the least judicial in nature when compared to these specific functions of the Commissioners. On the other hand, we think it unlikely that any of the Future Generations Commissioner's roles could be considered quasi judicial.

- 13.6 Participants in our research also thought that the notion of ‘supervision’ by the President of Welsh Tribunals requires further elaboration. This should not, for example, extend to accountability since the PSOW is already accountable to the Assembly, and the Commissioners are accountable to Welsh Government, as well as being subject to the scrutiny of relevant Assembly Committees. The independence of the PSOW and Commissioners is important, and specifically with respect to the PSOW, there are broader concerns around whether increased interoperability with judicial institutions might lead to pressures towards increased formality in processes that are specifically not judicial.
- 13.7 Nevertheless, it may be appropriate for the PWT to express a view on the suitability of current accountability mechanisms with respect to the range of ad hoc redress mechanisms such as school exclusion panels convened by local authorities and the DAF process. It is more likely that the supervisory function is aimed at the need to review whether such ad hoc processes are complying with standards of fairness, independence, transparency, accessibility and so on in their proceedings; in short whether they are complying with relevant parts of CAJTW’s *Administrative Justice Principles*. Their practices could also be tested against the redress design tools we have highlighted elsewhere in this Report.
- 13.8 Taken together these supervision roles may take the PWT beyond what is conceived of for the role under the Wales Act 2017. Formalising some of these supervisory roles, if this is what is desired, would potentially require further legislation.

A Statutory Oversight Committee

- 13.9 Whilst the proposed methods of promotion, coordination and supervision provide some degree of oversight of the administrative justice system, we suggest they are unlikely to go far enough, and argue that there is a case for establishing a specific statutory oversight body. Such bodies have in the past been established in the context of significant reforms (what we have referred to above as **third order reform** or **paradigm shifts** in administrative, like the one we argue is under way in Wales at present).
- 13.10 For example, in the early 2000s the UK Government envisaged that ‘a range of tailored dispute resolution services’ would need to be developed whilst also delivering targeted and cost-effective court and tribunal services. The TCEA 2007 then established the AJTC with a statutory remit to keep this broad range of mechanisms under review and to ‘consider ways to make the system accessible, fair and efficient’. Under TCEA schedule 7 clause 13 the AJTC was also tasked to advise the Lord Chancellor, the Senior President of Tribunals (and relevant Ministers in Scotland and Wales) on the development of the administrative justice system and proposals for change. The first Senior President of Tribunals (Sir Robert Carnwath) spoke of the AJTC as ‘a powerful ally’ in the programme to reform tribunals and transform public services through proportionate dispute resolution.²⁸⁴ The AJTC had a statutory duty to keep under review, and report on, the constitution and working of tribunals within its jurisdiction. It was also able to comment on legislation affecting tribunals, including procedural rules. Members had a right to attend and observe any tribunal proceeding, even when held in private or in a format other than a ‘hearing’. The TCEA provided for the AJTC to have between 10 to 15 members, plus the Parliamentary Commissioner for Administration (the Ombudsman) as an ex officio member. The Lord Chancellor, Welsh Ministers and Scottish Ministers could each appoint two or three members. It was supported by a Secretariat made up of staff seconded from the MoJ and Scottish Government and had an annual budget in 2010-11 of £826,146 for general AJTC work,

²⁸⁴ R Carnwath, *Speech to the First Conference of the AJTC* (2007).

£128,092 for its Scottish Committee, and £55,466 for its Welsh Committee. Its scope of operation was broader than bodies overseeing other elements of the justice system such as the Civil and Family Justice Councils. This is because the latter bodies are judicially-led; they are not looking from the users' point of view but rather examining more detailed, operational matters. Civil and family justice also deal with a far smaller number of cases than administrative justice. The AJTC had a Welsh Committee with a statutory duty to oversee administrative justice as it applies to Wales, extending to tribunals administered by Welsh Government. This provided an opportunity to define devolved tribunals operating in Wales in a converging, but loose and non-comprehensive structure based on the statutory remit of the Welsh Committee.²⁸⁵

13.11 Another example is from Australia. In the 1970s and 1980s Australian administrative justice underwent innovative and extensive reforms instigated by a report of the Commonwealth Administrative Review Committee (the Kerr Committee). The Kerr Committee concluded that 'it is highly desirable to encourage in Australia a comprehensive system of administrative law...which is essentially Australian and which is specifically tailored to meet our own experience, needs and constitutional problems',²⁸⁶ wise words for Wales at this juncture. The Kerr Committee specifically decided to establish a centralised Administrative Appeals Tribunal (AAT) to perform a new 'merits review' function. Given the comprehensive changes instigated by the Kerr Committee, it also recommended establishing an Administrative Review Council (ARC) with a wide remit to oversee and monitor the operation of the new Federal administrative law system. The ARC's role, and early days of operation, were crucially linked to developing and overseeing the new administrative justice system. As Justice Duncan Kerr has noted: 'Those who designed the new administrative law were keenly aware of the risks of back-sliding. Its champions in the bureaucracy were few. The ARC was established as a counter-balance to ensure that change would be coherent, profound and enduring'.²⁸⁷ The work of the ARC and its membership is governed by its originating statute, the Administrative Appeals Tribunals Act 1975. The governing statute is also supposed to ensure that ARC activity is politically considered. Under section 51C, the Minister must cause ARC Reports to be laid before each House of Parliament within 15 sitting days of that House after the Report is received by the Minister. In addition to receiving advice from the ARC, the Minister may also give directions to the ARC in performance of its functions and refer matters to it.

13.12 We have referred above in relation to codification to the South African PAJA. This was developed by the South African Law Reform Commission (SALRC). SALRC recommended the creation of an Administrative Review Council and considered 'the Council/unit as one of the keys to harmonising the constitutional requirements of administrative justice and efficient administration and, hence, to the success of the [Administrative Justice] Bill. If this capacity is not created, the Bill cannot work'.²⁸⁸ Such a Review Council has never been created, and commentators have argued that its absence is one reason for the lacklustre impact of the reforms to codify general administrative law in South Africa. There has to be political and policy impetus for change and longer-term oversight. The examples above from Australia, South Africa (and to an extent the UK) demonstrate some inevitable resistance to oversight. Hoexter suggests that the failure to set up a review Council alongside codification of administrative justice in South Africa was a missed opportunity to the extent that it is 'unlikely that the government will ever

²⁸⁵ *Tribunals, Courts and Enforcement Act 2007* (UK) sch 7, pt 4, para 27 defined them as tribunals whose functions are only exercisable in Wales and where Welsh Ministers have powers to either appoint or make regulations; See also *Administrative Justice and Tribunals Council (Listed Tribunals) (Wales) Order 2007*, SI 2007/2876 (W.250).

²⁸⁶ J Kerr, *Commonwealth Administrative Review Committee Report*. Parliamentary Paper No 144 (1971) para 237.

²⁸⁷ D Kerr, 'Reviewing the reviewer: the Administrative Appeals Tribunal, Administrative Review Council and the road ahead' (2015) *FedJSchol* 16.

²⁸⁸ SALRC, *Report on Administrative Justice in South Africa* (2009) 36.

again have the necessary incentive to impose further...administrative procedures on itself, or the political will to do so' and that without an administrative justice champion the prospects of government providing funding for reform and seeing proposals through to implementation are fairly bleak.

- 13.13 None of the Committees above remain fully operational and the fate of each is instructive in understanding the difficulties of establishing and maintaining independent statutory oversight, but more broadly the demise of these bodies speaks to the practical difficulties of co-ordinating administrative justice.

Costs, Performance, Digitisation and Data

- 13.14 Following the 2010 general election, the Conservative and Liberal Democrat Coalition proposed to curb public spending through the abolition of quasi-autonomous non-governmental organisations. A so-called 'bonfire' of quangos. Abolition of the AJTC was then provided for under the Public Bodies Act 2011 and occurred in 2013. Whilst the Australian ARC still exists, it is effectively moribund. Successive Attorney's-General had showed little interest in the ARC's work, though they had not been actively hostile to it. In a similar vein to the 'bonfire of quangos', the Australian Federal Government led by Tony Abbott announced the abolition of the ARC, with residual functions to be managed by the Attorney General's Department. These reforms were part of the Government's 'Smaller Government – Transforming the Public Sector' budget agenda aimed at 'transforming public service by improving efficiency, effectiveness and by eliminating waste and duplication'.
- 13.15 The main rationale for abolishing the AJTC, downgrading the Australian ARC, and failing to establish a South African ARC, has been a perception that the proven benefits do not justify the costs involved. However, the benefits can be particularly difficult to quantify. In relation to the AJTC, neither the MoJ's impact assessment on abolition, nor the AJTC itself, was able to offer a quantitative estimate of the scale of costs avoided by improving the administrative justice system and thereby reducing the need for appeals and complaints. A PASC inquiry into the Future Oversight of Administrative Justice drew on a National Audit Office (NAO) report from 2005, concluding that: 'Improving the cost of current redress arrangements by as little as five per cent would save more than five times the Government's most optimistic estimate of savings to be derived from the abolition of the AJTC'.²⁸⁹ PASC member Charlie Elphicke MP had specifically pressed AJTC members for evidence of 'cast iron KPIs', in terms of the amount of public expenditure saved or the number of injustices averted due to its interventions. An Australian Senate Committee also considered 'cost effectiveness' to be crucial to the case for retaining the ARC as an independent body.²⁹⁰
- 13.16 There are real difficulties in quantifying improvements, e.g., increased caseloads for particular redress bodies could be evidence of poor performance, but they could also be evidence of increased awareness of redress routes and improved access to justice. High rates of successful complaints/appeals could be evidence of poor decision-making, or evidence that mechanisms to filter out weak cases, or to triage issues into earlier more informal dispute resolution, are working such that only the most contested, complex, or wider public interest cases make it to formal redress bodies.

²⁸⁹ PASC, 2012, para 52

²⁹⁰ Senate Legal and Constitutional Legislation Committee, *Senate Committee Report on the Role and Functions of the Administrative Review Council* (1997).

13.17 These concerns could be addressed in two particular ways. This first is that the process of digitisation of various aspects of administration and redress provides an opportunity for the collection of data about the administrative justice system that could be combined to provide more reliable and multi-factor models able to estimate with greater accuracy the quantitative success of oversight interventions. The Law Commission has been conducting some scoping work developing methodologies for quantifying the impact of law reform, these might be transferable to broader oversight activity.

A second, related, matters is to take a more rounded approach to measuring success. The Australian ARC proposed the following criteria:²⁹¹

- Extent to which the oversight body's advice has been accepted, implemented or at least acted as a catalyst for change
- Extent to which the body's reports have served as useful summaries and analyses of law contributing to debate and discussion
- Extent to which its other policy input such as comments on Government proposals and submissions to parliamentary inquiries have been successful
- High reputation among those outside government
- Extent to which its contribution as a facilitator led to worthwhile exchanges of ideas, cross-pollination of best-practices, and experiments and innovations

System-wide, expert oversight

3.18 The broader measures of success noted above highlight the advantages of independent statutory committees that can provide a whole government educative function, and strategic vision, promoting the coherence of the system and taking account of the values and principles that inform it. Networking, co-ordination and collaboration are important to oversight bodies, as is the longer-term retention of their specialist expertise and connections.

Independence

13.19 Key to the UK Government's case for abolishing the AJTC was the argument that it replicated functions which could be satisfactorily performed by the MoJ. The Minister argued that development of administrative justice policy and oversight of the administrative justice system were properly the functions of the MoJ.²⁹² In response AJTC members stressed that it was never the role of the AJTC to develop government policy but rather to advise and float ideas for improving the system. Whilst MoJ officials could provide balanced and impartial advice to Ministers, they could not act with the same degree of independence as the AJTC. As Ann Abraham (former PHSO) stressed in evidence to PASC, by definition MoJ officials lack the essential independence of judgment and freedom of action to challenge policy proposals, characteristics that were key to the AJTC's role.²⁹³

13.20 In the Australian context the ARC has been transferred to the Attorney-General's department and now advises only on 'matters of current Government priority', meaning it is now subject to what former ARC Chair Paul Neave described as 'turf protection difficulties' making it difficult for a unit within government to take a system-wide approach.²⁹⁴

²⁹¹ ARC Response to Senate Legal and Constitutional Legislation Committee.

²⁹² PASC 2012, Ev 30 Ministry of Justice p.18.

²⁹³ PASC 2012, para 40.

²⁹⁴ Senate Legal and Constitutional Legislation Committee.

13.21 Independence is also crucial to the oversight function. It was argued that the AJTC oversight role was moribund after significant responsibility for tribunals had been transferred to HMCTS (an executive agency of the MoJ). This is short-sighted for two reasons, one is that administrative justice is about much more than tribunals, and two that since HMCTS is the administration that supports tribunals and courts, it would effectively be overseeing itself in this role. A number of PASC inquiry respondents pointed out that it would be irregular for the government, that is often the primary defendant in disputes about public law rights, to also be the primary overseer of the system designed to protect these rights.

Combination of Oversight with Another body

13.22 In the UK, Australia and South Africa, it was argued that there were other avenues for oversight. These included charities, NGOs and other lobbyists representing individuals and groups with particular interests in administrative justice. These bodies could certainly assist with administrative justice oversight, but their funding is precarious, and they would not be able to take a system-wide approach. It has also been suggested that administrative justice oversight could be performed by a relevant law reform commission or human rights commission. But again, whilst these bodies are important partners in progressing administrative justice, they could not perform the more specific 'hard edged' oversight functions.

13.23 It has also been suggested that academics could perform the oversight role. However, what has been distinctive about both the ARC and AJTC, is that the respective Parliament's role in the scheme has been relatively clear, to consider the council's work and specific reports. This cannot be replicated by academics who have a similar level of political independence from government, but who are also entirely independent of the administrative justice system. Statutory bodies were part of the system and charged by legislatures with specific functions to perform in respect of that system.

13.24 There are other options for oversight, but we consider these approaches inferior to a statutory oversight committee. For example, following abolition of the AJTC, the UK MoJ's own more recent attempts to oversee administrative justice were largely based on an *Administrative Justice and Tribunals: Strategic Work Programme* covering the period 2013 to 2016.²⁹⁵ This Programme was divided into six key areas: governance (how MoJ works with other government departments to make sure the administrative justice system is transparent, fair and proportionate), tribunals outside the TCEA structure, tribunal fees, improving initial decision-making, enhancing proportionality, and maintaining user focus. The Final report of progress against the strategic work programme identified performance against each of the six key areas of focus. The Report is fairly broad brush when compared to the more comprehensive Reports of the AJTC. It is based on government's own assessment of its performance against key policy priorities primarily concerned with costs and efficiency savings. However, it does emphasize learning through user experiences and feedback, and the need for greater availability and transparency of data including for academic research purposes, and as a means to identify concerns and areas for improvement.

13.25 The MoJ Report draws on the work of an Administrative Justice Forum (AJF) set up following the dissolution of the AJTC. The AJF's aim was to provide a link between the MoJ and

²⁹⁵ Ministry of Justice, *Administrative Justice and Tribunals: Final report of progress against the Strategic Work Programme (2013/16)* (March 2017):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/601481/administrative-justice-tribunals-final-progress-report.pdf

organisations involved with administrative justice in order to inform policy. The AJF had an independent chair (previously a member of the AJTC) and membership included representatives from the judiciary, ombudsmen and other complaint handlers, academics, and organisations representing users of the system. It held two formal meetings a year with agenda items including; using feedback to improve policy and processes, reform of the ombudsman sector and, monitoring key tribunal trends. It also hosted three ‘roundtable’ workshops looking at proportionality in dispute resolution, feedback mechanisms and the user experience. The MoJ progress Report states that various discussions from AJF events have fed into particular areas of policy making, whereas other experts have described it as merely a ‘talking shop’. Certainly, whatever role it did in fact perform was less significant, extensive and practically focused than that performed by the AJTC. But at the very least we would recommend Welsh Government establishes a forum of this kind to replace CAJTW.

- 13.26 If not established by Welsh Government, the President of Welsh Tribunals could seek to establish such a forum as part of his supervisory function proposed by the Commission on Justice in Wales. This Forum could also involve representatives from Welsh Government (most obviously its Justice Policy Team), academia, advice services and user representative organisations.

The UK AJC and UKAJI

- 13.27 A new Administrative Justice Council (AJC) was established in 2017. Its terms of reference state that it is to keep the operation of the whole UK administrative justice system under review, considering how to make it more accessible, fair and efficient, giving relevant advice to the Lord Chancellor, other ministers and the judiciary, sharing learning and good practice across the UK, providing a forum for the exchange of information between Government, the judiciary, ombudsmen, academics and organisations working with users of the administrative justice system, to identify areas that would benefit from research and make proposals for reform. This is an extremely wide range of objectives for a body reportedly receiving initial funding of £15,000-£20,000 per-annum from the MoJ and £25,000 over two years from ‘charitable sources’ (the Legal Education Foundation)(the Legal Education Foundation contribution will increase from 2020). Given its limited resources, and dependence on the ‘good will’ of its members across the main Council and individual panels, it is likely inevitable that the AJC’s work will consist of subject-specific contributions to particular issues, focusing on those areas where members consider that Central Government (and others) are most open to implementing, or at least responding to, relevant research and recommendations. Although the AJC main Council and Academic Panels include Welsh members (from ombuds, tribunals, justice policy and academia), the AJC cannot perform an extensive oversight function of Welsh administrative justice, rather it seeks to consider specifically Welsh perspectives, interests and concerns in relation to broader themes (such as the relationship between tribunals and ombuds, discussed above).
- 13.28 The UK Administrative Justice Institute (UKAJI) was established in 2014, funded by the Nuffield Foundation for three years to kickstart the expansion of empirical research on administrative justice in the UK. Its three main priorities in this phase were; to link policy, practice and research communities; develop a co-ordinated research agenda; and identify and tackle research capacity constraints. UKAJI produced a Research Roadmap which identifies challenges to research such as funding, capacity, access to data and access to users of the system, it also outlines opportunities including to develop a more co-ordinated and holistic approach to empirical research, building on and making best use of existing capacity, and the potential of new technologies. Since January 2018 UKAJI has been funded by the University of Essex with

second phase activities including progressing the priorities identified in the research agenda, specifically relating to; the operation of different administrative justice mechanisms, encouraging good early decision-making, efficiency and effectiveness of administrative justice systems; access to justice and the enforcement of outcomes. The UKAJI blog has been a particularly successful initiative with regular contributions from leading academics and other stakeholders, and monthly round ups of significant legislation, policy developments, research findings and events. UKAJI also maintains a Register of current administrative justice research. UKAJI was instrumental in establishing the connections between policy-makers, practitioners and academics that catalysed the current research programme examining the Welsh administrative justice sector. Welsh academics and other stakeholders in administrative justice continue to engage fruitfully with UKAJI and benefit from its resources to support research and engagement.

Public Law Wales

13.29 Public Law Wales was established as part of a growing network of specialist associations among legal professions as part of the response to devolution in 1998. It now has membership that includes members of the judiciary, private and public practice, the public sector, and academia. Its aims are to promote, in Wales, discussion, education and research relating to public law and human rights; and promote expertise amongst lawyers practising in Wales in the fields of public law and human rights. It does so by holding regular public seminars and debates on matters of public law, human rights, and administrative justice. It also arranges the public law strand at the annual Legal Wales conference.

A Role for the Law Council of Wales

13.30 An early recommendation of the Commission on Justice in Wales was for the establishment of a Law Council for Wales. Modelled on the Joint Standing Committee for Legal Education in Scotland, the aim of the Council will be to promote awareness of Welsh law, secure provision of legal resources through the medium of Welsh, and help Welsh law schools to provide their students with the necessary education and training.²⁹⁶ It is envisaged that the Council will be a relatively small body comprising of a senior Welsh judge, the President of Welsh Tribunals, representatives of the legal profession, heads of law schools, a lay representative, the Counsel General and one member each from the Legal Wales Foundation, the Law Commission and the Judicial College. The development of specialised bodies alongside the main Council is to be kept under review.²⁹⁷

13.31 This has positive potential in terms of widening the awareness of administrative justice and developing training resources for both students and the profession. Administrative justice and Welsh law go hand in hand and any enhancement in teaching Welsh law, in housing or education for example, will necessarily include enhancing the teaching of administrative justice. It is important that the overarching administrative justice aspect is not lost among substantive or other procedural materials that may be produced or commissioned by the Council. This research has exposed a general lack of awareness of administrative justice practice in Wales and the Council could provide part of the solution of improving awareness of what administrative justice is and the principles that should be seen as underpinning it. The Council could be well supported by Public Law Wales and UKAJI in this regard.

²⁹⁶ Commission on Justice in Wales, *Law Council for Wales* (2 October 2019) <https://gov.wales/sites/default/files/publications/2019-10/Law%20Council%20of%20Wales%20paper%20ENG_1.pdf>

²⁹⁷ *ibid.* [6]-[7]

Recommended Characteristics of Administrative Justice Oversight

R35: Drawing together the various evidence, we recommend the establishment of an independent statutory oversight body for administrative justice in Wales, and that such should be defined by the following characteristics.

- Independence and sufficient authority to challenge politicians
- Sufficient resources, extending to personnel and expertise, including resources necessary to conduct tribunal oversight visits
- A separate secretariat
- A separate research budget and appreciation of the centrality of research to policy-making
- Be established by statute, including statutory powers and duties, and a statutory relationship whereby reports must be laid before the relevant parliament and must be responded to
- Must be able to make recommendations across the whole administrative justice sector, and not be rooted in ‘silos’ or arms of the justice system
- Must have the capacity to act as both watchdog and mentor, reviewing the functions and effectiveness of various institutions and procedures, but also making proposals to facilitate better decision-making, and providing support and training to administrative justice professionals (including tribunal members and others)
- Must bring together policy-makers, practitioners and academics
- Must have to ability to work flexibly and adapt to changes in the nature of administration and new challenges (must be reactive as well as proactive in its functions)
- Must be transparent in its activities

R36: Given the necessary time taken to develop statutory oversight, we recommend the immediate establishment of an Administrative Justice Forum (similar to the previous MoJ AJF) with an independent chair and membership to include representatives from the judiciary, ombudsmen and other complaint handlers, academics, and organisations representing users of the system. This could hold two formal meetings per-annum, as well as occasional topic specific workshops, seminars or other meetings and activities. This Forum could eventually become a sub-committee of a body established to promote and coordinate dispute resolution in Wales.

14. The Role of the Assembly in Administrative Justice

14.1 We note that on 29 January 2020, the Assembly voted (by 42 votes to 7) to expand the remit and change the name of the Constitutional and Legislative Affairs Committee. It is now called the Legislation, Justice and Constitution Committee. In reporting this change it was said that ‘the Assembly will formally scrutinise justice matters for the first time in its history’. We can look at the more negative side of this statement, to wonder whether the Assembly had then not in the past been scrutinising the parts of administrative justice that were devolved to it. In our research we found for example that the Assembly had not scrutinised the First Annual Report of the President of Welsh Tribunals, or the Reports of other tribunal Presidents/Chairs in devolved Welsh Tribunals. The issue of CAJTW’s 2016 Legacy report in March 2016 led to an oral

statement on 1 August 2016 (during the Assembly recess) where the First Minister noted the Report, and Welsh Government's response to it, had been published. However, there was no follow up in the Assembly and no further discussion of the Report.

- 14.2 Both in Plenary, and through various Committees the Assembly has scrutinised important matters of administrative justice, from the passage of the new PSOW Act 2019, to the establishment of the Welsh Language Tribunal and the passage of the Additional Learning Needs and Education Tribunal (Wales) Act 2018. These areas of legislation relating to tribunals and the ombud are squarely within the realm of administrative justice. The Assembly is also involved regularly in scrutinising administrative justice when it considers the routes to redress provided for (or not) in legislation giving powers to, or placing duties on, public administrative bodies in Wales. It might be a sign of the still 'Cinderella' status of administrative justice that such activities are not seen as scrutinising matters of justice.
- 14.3 In substance, the Welsh approach to administrative justice can be seen as progressive, as beginning to make the connections between administrative justice, equality, human rights, and indeed democracy. There are examples of so-called 'interoperability', and what we consider to be an appreciation that justice is not only to be had through the courts. However, the current focus on the Commission on Justice in Wales' criminal justice recommendations, the well worn phrase that 'justice is not devolved', and the very public statement that the Assembly has never before scrutinised justice issues, suggests the progressive Welsh approach to administrative justice might have been more through default of not having responsibility for court structures, than a positive attempt to strike out in a different, more egalitarian and inclusive direction.
- 14.4 The re-badged Legislation, Justice and Constitution Committee has a clear opportunity to accept administrative justice as a central element of justice in Wales for the people of Wales. Assembly Members are in a unique position in the administrative justice system. In their constituency work they deal first-hand with people's problems with public bodies, providing support, assistance and advice. But AMs, especially Ministers, are also potentially likely to have their own decision-making scrutinised through administrative justice redress mechanisms including judicial review. In some situations, they operate redress mechanisms, where an individual might be able to make a specific complaint to a Welsh Minister. More broadly AMs have a central role in scrutinising how the whole system of public administrative law, and how people can challenge decisions, is developing over time. They have both a ground-up and a top-down view of public law, administration, redress and learning.
- 14.5 Recent years have seen increased awareness of administrative justice amongst the political class in Wales. Following on from the Workshop on Public Law and Administrative Justice, hosted by the Counsel General in 2018, an event at Plaid Cymru's Spring Conference in 2019, and Nason's Assembly Fellowship of 2019/20 (leading to Senedd Research blog posts and a presentation to the Assembly (then CLA now LJC Committee). It is hoped with the establishment of a Cabinet Committee on Justice and the reformed remit of the LJC Committee there can be more direct consideration given to administrative justice, and an improved understanding of the need to take a co-ordinated approach. As we have discussed in our section on system design and oversight, developing redress mechanisms is a political process and the type of mechanisms adopted represent a political choice that is expressive of policies around individual-state relationships.