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# **Administrative Justice: Wales' First Devolved Justice System: Evaluation and Recommendations**

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With thanks to the Counsel General for Wales Jeremy Miles AM for hosting the 2018 Workshop – *Public Law and Administrative Justice in Wales*, to all Workshop participants (listed at Annex One), and to Sarah Thomas-Morgan, Rebecca Holian and Awen Fflur Edwards (Bangor Law School), and Dr Huw Pritchard (Cardiff School of Law and Politics) for their assistance in organizing the Workshop and note taking.

## **Administrative Justice: Wales' First Devolved Justice System**

1. Administrative justice impacts people's lives a great deal – in more ways and more often than criminal or private civil justice. Yet the phrase 'administrative justice' rarely hits the headlines, it is not the subject of debates and votes in the National Assembly For Wales (though it has recently been the topic of a question to the Counsel General).<sup>1</sup> Administrative justice is depicted as a Cinderella, flanked by the ugly sisters of criminal and private civil justice, and – even in Wales with its public services culture – these latter areas claim much of the political limelight. Part of the difficulty in understanding administrative justice is its scale; encapsulated as 'the justice of public decision-making', its purview extends from complaints about local refuse collections, taxes, planning, school admissions and exclusions, to health and social care decisions, decisions about welfare benefits, and asylum and immigration matters often including alleged breaches of human rights. Wales already has a largely devolved administrative justice system. Wales has already established a distinct administrative justice identity at the level of underpinning principles, and an architecture of procedures and institutions to enforce compliance with these principles. There are moves to increase the coherence and accessibility of Welsh administrative law and redress through codification. More could be done both to recognize the distinctiveness and importance of Welsh administrative justice, and to ensure that existing structures and proposed reforms are delivered in a way that improves the lives of people in Wales.
2. The aim of this Report is to update research into administrative justice in Wales, examining progress made towards achieving previous recommendations, and proposing further recommendations. The Report draws on various sources, alongside presentations and discussions during a Workshop, *Public Law and Administrative Justice in Wales*, held at the National Assembly on 17 September 2018 (the Workshop).<sup>2</sup> Whilst the views of Workshop participants are drawn on to inform the content of this Report, the proposed recommendations are those of its author alone.
3. The overarching theme of this Report is that whilst Wales has established a distinctive and principled account of public law and administrative justice, the current devolution settlement hampers Wales' ability to match its promotive rights-based approach to good administration with strong and effective rights to individual legal redress.

### **Recommendations**

#### **It is recommended:**

1. **That Welsh Government develops a policy for Administrative Justice and Tribunals in Wales which draws explicit connections between administrative justice, and issues of human rights, equality, public services and local government reform in Wales and includes principles of administrative justice redress design**

<sup>1</sup> Counsel General's Question 26 September 2018: <http://record.assembly.wales/Plenary/5352#A45564>

<sup>2</sup> This event was hosted by the Counsel General for Wales, and attended by Assembly Members, Welsh Government officials, the Public Services Ombudsman for Wales, representatives of the Welsh Commissioners, the Law Commission, Law Society, 3<sup>rd</sup> sector, legal practitioners, academics and others.

2. That the number Assembly Members be reviewed in order to ensure in-depth, detailed and focused scrutiny of legislation from an administrative justice perspective
3. That Welsh Government and the Assembly propose options for legislative reform including:
  - a. **An Administrative Procedure Code for Wales: A Code to consolidate and reform existing duties on public body decision-makers in devolved Welsh authorities; extending the duty to have ‘due regard’ to the UNCRC to all devolved Welsh authorities; clarifying and extending the applicability of the Future Generations ‘Five Ways of Working’**
  - b. **A human rights law for Wales, which includes:**
    - A drafting style similar to the ECHR (rights with limitation clauses)

**And the following substantive rights:**

    - A substantive right to administrative justice or good administration
    - A substantive right to use Welsh
    - A substantive right to housing
    - A substantive right to sustainable development
4. Welsh Government and the Assembly further reviews the existing landscape of Commissioners in Wales and the Public Services Ombudsman for Wales with the aim of developing a more coherent, consistent and accessible system of institutions
5. That Welsh Government and the Assembly reviews the relationship between the Public Services Ombudsman for Wales and courts and tribunals with a view to reforming the ‘statutory’ bars to Ombudsman investigations, and providing for the Ombudsman to refer a point of law to the Administrative Court in Wales or to a devolved Welsh tribunal as appropriate
6. That Welsh Government review the operation of ad hoc administrative justice redress schemes and consider introducing general guidance and minimum standards for their operation
7. That when legislating to create new public law duties applicable to devolved Welsh authorities, Welsh Government and the Assembly should apply a presumption that any new legal redress measures created should be by recourse to devolved Welsh tribunals
8. That Welsh Government reconsiders the case for incorporating school admissions and school exclusions appeals into the Education Tribunal for Wales
9. That the Working Group on Next Steps for Local Government Reform engages with issues of administrative justice, and that any proposed Local

Government Bill is properly scrutinized for its administrative justice implications

10. That Welsh Government engages with the Law Commission in its proposed project on Administrative Review, and facilitates additional independent research into administrative review and the early resolution of appeals and complaints by devolved Welsh authorities
11. That the Assembly puts in place a structure for the future oversight of the Welsh Administrative Justice and Tribunals System including the following potentially overlapping options:
  - a. By the President of Welsh Tribunals, including in his Annual Report to the Assembly
  - b. Through a specific independent committee – such as a successor to CAJTW
  - c. By a specific Assembly Committee (most notably the Constitutional and Legislative affairs Committee), or across relevant Assembly Committees
  - d. By the Assembly Cross-Party Group on Law
  - e. By any newly proposed Assembly Standing Committee on Justice in Wales
12. That the President of Welsh Tribunals:
  - a. Incorporates Administrative Justice Principles for Wales into the developing rules and procedures of devolved Welsh tribunals
  - b. Examines how devolved Welsh tribunals communicate with Welsh Government departments, identifying examples of good practice in terms of feedback and learning and considers including these within his report to the National Assembly
  - c. Examines how mediation is used by the devolved Welsh tribunals and how it can be used in future; in particular how is mediation funded/to be funded, to what extent is it/should it be provided for in tribunal rules, at what stage of proceedings should mediation take place and does this need to differ across tribunal jurisdictions
  - d. Reflects on whether there is still evidence of a lack of confidence in the ability of the tribunal justice system as devolved to Wales to deliver processes and outcomes of comparable quality to those delivered by England and Wales combined institutions, and how this lack of confidence could be addressed
  - e. Continues to consider the case for incorporating school admissions and school exclusions appeals into the Education Tribunal for Wales
  - f. Reflects on how judicial training for the devolved Welsh tribunals could include a range of other stakeholders who need to be aware of subject-specific legal provisions, and how such combined training and/or broader engagement between the tribunal judiciary and other stakeholders could assist in ensuring value for money in training. To also reflect on how combined training might lead to possible improved awareness of, and confidence in, tribunal justice as devolved to Wales
  - g. Examines the comparative extent of digitalization across the Devolved Welsh Tribunals and the relative challenges and opportunities for each Tribunal

13. That in its project on Welsh Tribunals, the Law Commission:

- a. Examines how to best incorporate Administrative Justice Principles for Wales into the developing rules and procedures of any proposed new Welsh tribunal system
- b. Takes into account the significant body of learning in *Administrative Justice in Wales and Comparative Perspectives* and other relevant scholarship
- c. Gathers empirical evidence on the advantages and disadvantages of tribunal restructuring, either by amalgamating current tribunals or by creating a single tribunal operating through specialist chambers, and ensures that any such proposals developed for Wales provide for an ongoing process of evaluation
- d. Addresses the importance of making the most effective use of technology within the devolved Welsh tribunals, taking into account the demands of procedural fairness.
- e. Considers the potential for developing Welsh tribunals with civil and administrative jurisdiction in some contexts – in particular those tribunals with jurisdictions covering housing and land law
- f. Considers the creation of a comprehensive system of devolved tribunals (or a single tribunal with specialist chambers) reflecting the full scope of devolution in Wales, based, for example, on broad areas such as:
  - Planning and the Environment
  - Land and Taxation
  - Education
  - Public administration (including local government)
  - Housing
  - Health and Social Welfare
  - Welsh language rights.

### Administrative Justice: Wales' First Devolved Justice System

4. A 2015 Bangor Law School research Report, *Understanding Administrative Justice in Wales* (the '2015 Bangor Report') mapped the core institutions of administrative justice in Wales, and contemporary issues facing them. It found a lack of awareness in Wales, both among professionals and the wider public, as to which aspects of administrative justice are devolved, and recommended that there was a need to raise awareness of administrative justice as part of a broader account of social justice defining relationships between citizens and the state.
5. The Bangor Report raised the profile of administrative justice, for example from 2015 onwards, the annual Legal Wales Conference has included a session (either in plenary or parallel) dedicated to matters of administrative justice, and a community of policy-makers, practitioners, researchers, and more recently elected representatives has developed. In 2016, administrative justice was specifically referenced under the heading 'Developing a Welsh approach to justice' by a Justice Stakeholder Group reporting to the Minister for Public Services,<sup>3</sup> and a training

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<sup>3</sup> Report to the Minister for Public Services by the Justice Stakeholder Group, *Law and Justice in Wales: Some Issues for the Next Assembly* (March 2016) <https://gov.wales/docs/legislation/justice/161209-law-and-justice-en.pdf>

session was delivered to members of the Welsh Language Tribunal. In 2017 an edited collection, *Administrative Justice in Wales and Comparative Perspectives* ('*AJ Wales and Comparative Perspectives*') was published by the University of Wales Press;<sup>4</sup> administrative justice is also being examined by the Commission on Justice in Wales.<sup>5</sup>

6. The Workshop gave further momentum to raising awareness of administrative justice. Following on from the Workshop, the Counsel General was asked (by Mick Antoniw AM) in the Assembly Chamber, what discussions he had had about administrative justice. An exchange followed, including Mark Reckless AM (Chair of the Assembly Cross-Party Group on Law) referencing administrative justice in its broadest sense from good initial public decision-making, to tribunals, courts, ombudsmen and commissioners. The Counsel General also emphasized 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...<sup>6</sup>

7. This is a similar view to that taken by the Committee for Administrative Justice and Tribunals in Wales (CAJTW) in its 2016 Legacy Report: *Administrative Justice, A Cornerstone of Social Justice in Wales: Reform priorities for the Fifth Assembly* (the 'Legacy Report').<sup>7</sup> In his Foreword to the Legacy Report, former Chair of CAJTW, Professor Sir Adrian Webb, stressed that CAJTW had been concerned with two particular questions: 'what is administrative justice' and 'does it matter to the people of Wales?' CAJTW's conclusion was that administrative justice 'is best understood as a cornerstone to social justice in Wales, giving citizens a voice other than through the ballot box and the means through which public services can be held to account'. CAJTW's Legacy Report included 35 recommendations, primarily addressed to Welsh Government, whilst also asking Welsh Government to communicate recommendations to the Assembly and Assembly Commission.
8. In his opening remarks to the Workshop, the Counsel General spoke of the importance of principle-based administrative decision-making in the context of modern devolved government. Such proposed principles were said to include; honesty, fairness, candidness, legality, rationality, proportionality and sustainability. With decisions subject to testing by review processes that are objectively fair and proportionate. These proposed principles echo some of those developed by CAJTW in its set of *Administrative Justice Principles in Wales* (the '*Principles*'). CAJTW recommended that Welsh Government consider its 'suggested principles template, offer their own proposals for consultation and, during the course of 2017, publicize a final version that will stand the test of time as the cornerstone of a distinctively Welsh approach to Administrative Justice'. Welsh Government responded that: 'The proposed principles closely reflect existing values and legislative provisions that inform working practices. The CAJTW formulation will provide a helpful source of guidance for the Welsh Government'.<sup>8</sup> It is not, however, clear to what extent the *Principles* have been drawn on in practice. For example, there have been no direct references to the *Principles* in publicly available documents charting the development of new administrative law redress mechanisms by Welsh Government and the Assembly. The *Principles* are also not mentioned in a Welsh Government

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<sup>4</sup> <http://www.uwp.co.uk/book/administrative-justice-in-wales-and-comparative-perspectives-hardback/>

<sup>5</sup> <https://beta.gov.wales/commission-justice-wales>

<sup>6</sup> See (n 1).

<sup>7</sup> Online at: <https://gov.wales/docs/cabinetstatements/2016/160729cornerstoneofsocialjustice.pdf>

<sup>8</sup> Online at: <https://gov.wales/docs/cabinetstatements/2016/160729justicetribunalsreportresponseen.pdf>

Guide to *Making Good Decisions*, published in March 2017.<sup>9</sup> The Guide primarily discusses common law (England and Wales) grounds of judicial review, with some analysis of particular statutory requirements under legislation relating to human rights, equality, data protection, Welsh language and future generations. This is important information, but misses the opportunity to develop broader knowledge about good initial decision-making, redress and learning, and some discussion of CAJTW's *Principles* would have been useful here.

9. The lack of explicit adoption of some set of overarching principles may evidence a degree of reluctance to take a systematic approach to the development of administrative justice in Wales. Despite significant aspects of administrative justice being devolved to Wales, there has as yet been no specific attempt to develop a Welsh administrative justice policy. There are likely many reasons for this beyond any lack of interest or perceived lack of importance of the issue, including; continuing lack of awareness, that there are currently only four members of the Welsh Justice Policy Team, and the circumstances of Brexit take up considerable Government and Assembly time.
10. The Welsh Government is of the view that the existing devolution settlement as concerns responsibility for the administration of justice, and the combined single legal jurisdiction of England and Wales, does not serve the needs of the people of Wales. During the Workshop the Counsel General stated his view that the current situation is 'not fit for purpose'. He also noted that future developments should be based on what can be done to improve the lives of people in Wales, not merely on the accumulation of power for its own sake. At the 2018 Legal Wales Conference the Counsel General stated the matter in stronger terms:

A process has begun to create a distinct legal infrastructure for Wales. This is a process that won't stop. The process of making laws for Wales won't stop, the divergence in laws between Wales and England won't stop. The creation of a Welsh legal jurisdiction and the devolution of the justice system is inevitable.<sup>10</sup>

Much of that infrastructure already distinct to Wales is its administrative law and institutions of administrative justice, which taken together position Wales as a jurisdiction at the forefront of contemporary movements that are more rights-based and designed to engage citizens, at a time when traditional notions of the administrative state are facing a legitimacy crisis. These developments could be collated and expressed as a modern Welsh administrative justice policy. One example of such a policy is that developed by the UK Ministry of Justice in its, *Administrative Justice and Tribunals Strategic Work Programme 2013-2016*; but a Welsh policy could be more ambitious combining a distinctive Welsh approach to administrative law, alongside a coherent view of the roles of various administrative justice institutions. It is true that some areas of administrative justice are not devolved to Wales, and that the current devolution settlement continues to cut through matters public services governance and delivery, still this would not restrict Welsh Government from setting out a policy covering those areas over which it has competence. As well as being a means to improve the lives of people in Wales, the development of such a policy would also send a clear signal to Westminster about Welsh intentions in the field of justice policy, and the administration of justice.

11. Though controversial, the Wales Act 2017 takes some steps forward in this context. The move to a reserved powers devolution model, establishing the 'permanence' of the National Assembly, and giving statutory recognition to the body of Welsh law and the Sewell

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<sup>9</sup> Online at: <https://gov.wales/docs/dpsp/publications/170308-making-good-decisions-en.pdf>

<sup>10</sup> <https://gov.wales/newsroom/improvingpublicservices/2018/181012-a-welsh-legal-jurisdiction-and-a-devolved-justice-system-is-inevitable/?lang=en>



Convention, are constitutionally symbolic developments. Part Three of the 2017 Act is specifically concerned with the devolved Welsh tribunals, introducing measures to improve their coherence, accessibility, quality, consistency and independence. These reforms, and the related creation of the office of President of Welsh Tribunals, were all recommended by the 2015 Bangor Report. Together they aim to enhance the status and systematic coherence of the body of devolved Welsh tribunals – another step towards a maturing and distinctive administrative justice system.

12. Also significant from an administrative justice perspective is the 2017 Act definition of a ‘Devolved Welsh authority’.<sup>11</sup> This gives greater clarity as to the specific set of devolved Welsh bodies making administrative decisions that can be subject to challenge through the administrative justice system in Wales. It provides another incremental step towards defining a distinct administrative justice architecture for Wales.

### **The Public Administrative Law of Wales**

13. In his opening remarks to the Workshop, the Counsel General proposed that a fundamental characteristic of a legal jurisdiction, ‘one uniform body of law’, no longer exists with respect to the legal jurisdiction of England and Wales. Whilst the 2015 Bangor Report focused primarily on institutions of redress in the administrative justice system, a particularly Welsh approach begins earlier, with unique policy and legislation. The examples of administrative law legislation analysed in the first three chapters of *AJ Wales and Comparative Perspectives*, and discussed during the Workshop, provide a window into a distinctly Welsh account. These are, the law relating to children’s rights, the Welsh language, and housing and homelessness.
14. The general view of Workshop participants was that given the devolution context, Wales is a laboratory of experimentation as exemplified by its administrative law. However, there was also recognition that whilst distinctive principles and policy choices underpin proposed legislation, the pragmatic and political context impacts on the extent to which legislation and guidance eventually passed continues to reflect underpinning goals.

#### *Children’s Rights*

15. In the area of children’s rights, a distinctly Welsh approach has been evident from the first Assembly where, in contrast to the UK Government, the language of rights and entitlement as opposed to welfare, was adopted. The law enacted was the Rights of Children and Young Persons (Wales) Measure 2011, under which Welsh Ministers and social services bodies are required to have ‘due regard’ to relevant provisions of the UN Convention on the Rights of the Child (UNCRC), a similar duty to that contained in the UK Equality Act 2010. The Welsh duty was born from a range of factors, including political impetus for early and significant use of enhanced legislative competence, and rushing the legislation through before the outgoing First Minister stood down. Some Workshop participants noted that this left relatively limited time for wide consultation on the proposals. Other options available could have been a light touch requirement to ‘take into consideration’ the UNCRC, which was later enacted in Scotland, or the stronger individual right to public body compliance (for example as concerns ECHR rights under the UK Human Rights Act 1998 sections 6 and 7). This latter approach was likely felt to be too radical a departure given the joint England and Wales jurisdiction – though for more pragmatic reasons than any clear belief in a lack of legislative competence. Even if such

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<sup>11</sup> Wales Act 2017, section 4: a public authority that is either explicitly specified, of a description specified, or which meets the conditions that its functions are exercisable only in relation to Wales, and are wholly or mainly functions that do not relate to reserved matters.

provisions were definitively within competence, the Secretary of State could still intervene to prevent the bill going for Royal Assent if there were reasonable grounds to believe that the divergence would have an adverse effect on the operation of the law as it applies in England.

16. As enacted, 'due regard' functions as an upstream preventative provision designed to generate systematic changes; it does not confer specific legal rights on individuals. During legislative scrutiny, it was argued that an explicit new route would be unnecessary given other avenues, including: complaining to the Welsh Government; contacting the Children's Commissioner for Wales; complaining to an Assembly Member or seeking judicial review. But nevertheless, the lack of a specific redress scheme can be seen as a weakness, particularly given some evidence that judicial review is hard to access in Wales, and that the few challenges which have been issued on this topic have not passed the permission hurdle.<sup>12</sup> Workshop participants noted that upstream preventative measures should not be seen as a substitute for downstream measures (strong and effective individual rights to redress) as the two are connected. Without accessible and effective downstream redress, upstream measures are unlikely to be as effective.
17. It was noted that the introduction of Child Rights Impact Assessments (CRIA) has been a significant step forward in protecting children's rights and that the Welsh approach is world leading in this context. A wide range of policy areas have potential child rights impacts including fields such as economic policy and planning. A particular example of good practice noted was Abertawe Bro Morgannwg University Health Board's development of a *Children's Rights Charter*, the first health organization in the UK to introduce a Charter setting out the rights of children and young people when using health services.<sup>13</sup> Efforts have been made in the Charter to ensure that children are put first by enabling their views to be heard. However, there are concerns around the quality of CRIs, which research has found to be variable.<sup>14</sup> Another concern is the central role given to public officers (the executive branch); in developing schemes to project children's rights, in drafting relevant guidance, making assessments, and determining when assessments should be published. It was said that this leads to a situation where public officials essentially 'have all the levers at their disposal'. The risk of this executive-centric practice is that the voices of those most intended to benefit from a rights-based approach may not be sufficiently heard.

#### *Welsh Language (Wales) Measure 2011*

18. Concerns that relevant legislation may not sufficiently address the intended beneficiaries of rights was carried forward into discussions of the legal regime for protecting the Welsh language. Unlike the Children's rights legislation, much of the Welsh Language (Wales) Measure 2011 (the 'Welsh Language Measure') is concerned with articulating a specific new administrative justice redress environment including individual rights of complaint and appeal; creating a Welsh Language Commissioner (WLC) to develop Welsh Language Standards ('Standards') and to determine individual complaints, and a Welsh Language Tribunal (WLT) to hear appeals against decisions of the WLC. A view expressed during the Workshop was that this significant legislative focus on the duties of the regulator (the WLC) and the appellate body (the WLT) alongside the duties of Welsh Ministers, means there are few provisions in the primary legislation clearly addressed to rights-holders and duty-bearers as to the levels of Welsh language services that are to be expected. It was argued that where the objective is to create a

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<sup>12</sup> See e.g., evidence submitted to the Commission on Justice in Wales by the Public Law Project & Sarah Nason, and by Bangor University Public Law Research Group: <https://beta.gov.wales/commission-justice-wales>

<sup>13</sup> <http://www.wales.nhs.uk/sitesplus/documents/863/Bilingual%20Children%27s%20Rights%20Charter.pdf>

<sup>14</sup> Simon Hoffman, *Evaluation of the Welsh Government's Child Rights Impact Assessment procedure under the Children's Rights Scheme pursuant to the Rights of Children and Young Persons (Wales) Measure 2011*.

system of rights accessible and available to all, then those rights should be articulated in primary legislation. In this example the upstream preventative roles of the WLC to promote the Welsh language are accompanied by explicit downstream complaint and appeal mechanisms, but arguably the balance is still not ideal when individuals and public bodies find it difficult to determine exactly what they have a right to complain or appeal about. It was also stressed that legislation which seeks to change behavior through upstream promotive requirements, can at the same time seek to prevent misbehavior through clear downstream complaint and appeal mechanisms – the two are not mutually exclusive goals.

### *Housing and Homelessness*

19. It is acknowledged that Welsh legislation around housing and homelessness is innovative and grounded in policies concerned to improve social justice and equality. The Housing (Wales) Act 2014 (the ‘Welsh Housing Act’) aims to improve the supply, quality and standard of housing in Wales and places a duty on local authorities to work with people who are at risk of losing their homes within 56 days to help find a solution to their problems. This introduces a new duty on public bodies to seek to prevent homelessness in the circumstances of anyone who requests assistance. The general stakeholder view seems to be that the new legislation offers a clearer framework for local authorities and partners to work in; provides the opportunity for earlier interventions; strengthens the prevention focus and engenders a change in the culture of local authority homelessness services. Overall, this has cultivated more ‘person-centred’ support and has improved the outcomes for people who are homeless/threatened with homelessness.<sup>15</sup>
20. However, the Welsh Housing Act provides a further example of the difficulties of legislating in a rights context. It ticks boxes in terms of providing both for upstream prevention and downstream individual redress (internal review within the public body followed by county court appeals). What it does not provide is a ‘right to housing’, whereas support for legislative entrenchment of such a right seems to be gaining momentum in Wales and has already been enacted in Scotland.
21. In addition to the new duty to provide assistance, the White Paper which preceded the Welsh Housing Act had also proposed a ‘Housing Solutions’ approach to homelessness.<sup>16</sup> Under this account the traditional tests of assessing whether local authorities have a duty to provide housing for individuals, namely priority need, intentional homelessness, and local connection, are eschewed in favour of ensuring all individuals have a ‘safe place to stay’ if they have nowhere to go. However, as enacted the Welsh Housing Act retains the traditional tests such that individuals must still prove that they are in need before the local authority comes under a duty to accommodate them. Under the Welsh Housing Act, local authorities regularly still take into account whether an individual is in ‘priority need’ and whether they are intentionally homeless. There is a shift from the previous England and Wales law where there was a duty to consider intentionality; the Welsh Housing Act replaces that duty with a power, but this shift is not widely perceived to have had any real effect.<sup>17</sup>
22. On the question of priority need, this is often determined by examining whether an individual is vulnerable. The Welsh Housing Act defines vulnerability using the *Pereira* test, which assesses vulnerability based on whether an individual is more vulnerable than the ‘ordinary homeless

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<sup>15</sup> A Ahmed et al. -*implementation evaluation of Part 2 of the Housing Act (Wales) 2014: Final Report*, July 2018: <https://gov.wales/docs/caecd/research/2018/180719-post-implementation-evaluation-homelessness-legislation-final-en.pdf>

<sup>16</sup> Welsh Government, *Homes for Wales* (Welsh Government, 2012).

<sup>17</sup> Ahmed et al. (n 15).

person'. This includes measurement against the behaviour of individuals who normally live on the streets, including matters such as drug abuse and mental health problems. A specific example noted in the Workshop was of a case where a homeless woman had been assaulted in a car park, the defendant's legal team then argued that as she was homeless, she had probably experienced this before and would not feel the impact as much as an ordinary person.

23. The *Pereira* test originated in case law and had previously been applied as guidance in determining the meaning of 'ordinarily homeless'. At the time of enacting the Welsh Housing Act it was argued that including *Pereira* on the face of the legislation would improve clarity and consistency in approaches to decision-making. However, applying *Pereira* encourages gatekeeping to protect local authority resources, and placing this test in statute rather than guidance makes it harder for individuals to challenge using administrative justice processes. From the devolution perspective the picture is further complicated as the UK Supreme Court has concluded that *Pereira* should not be used in its current form of assessing vulnerability by way of comparison with the ordinary street homeless person. The Supreme Court's decision was based on the England and Wales Housing Act 1996 that has been superseded in Wales by the Welsh Housing Act. The Welsh Government has issued Guidance clarifying how *Pereira* should be interpreted. In substance the Guidance may purport to achieve the same result in Wales as has been achieved by the Supreme Court judgment in England, namely an amended interpretation of *Pereira*. The difficulty is that in Wales, *Pereira* in its original form still stands on the face of primary legislation. It was argued in the Workshop that whilst this is a tiny part of otherwise very positive reform, it can fundamentally change how we might talk about the legislation.

#### *Public Administrative Law: Further Discussion*

24. Issues arising from discussion of Welsh public administrative law included the extent to which Assembly Members (in particular Ministers) engage with administrative justice issues during the legislative process, and that such engagement could be more informed and rigorous. It was stressed that Committee stages in the Assembly are particularly important in this context.

25. Relating to children's rights it was noted that there is what can be termed a 'middle stream', where the upstream notion of promoting rights and systematically preventing rights breaches is then given specific form by Ministers ultimately responsible for producing CRIAs (CRIAs can later be challenged by downstream complaint and appeal mechanisms). Here it was argued that the process could benefit from some reform, that Ministers could be better engaged across Welsh Government (not just the Minister for Children, Older People and Social Care), and that the current timing of CRIAs is not appropriate as they are being published too late to be subject to meaningful challenge. Changes to upstream practice will not be as significant without also having the sharp edge of accountability downstream, but this is particularly difficult in the context of children. For example, children in Wales have a right to appeal on their own behalf to the Special Educational Needs Tribunal for Wales (SENTW), but this has not been used extensively, and uptake will depend on a child's own level of understanding and confidence, and the advice and support available to them.

26. It was noted in the context of the Welsh language that there could be several hundred specific rights contained within a general right to use Welsh and that detailed listing on the face of primary legislation could prove unwieldy. Detailed specification might come at the expense of flexibility, noting in the case of Welsh language that the context varies across geographical areas in Wales. This is also a likely reason why the UNCRC rights were not specifically listed in the Children's Rights Measure. It was suggested, however, that an approach similar to the drafting

of the European Convention on Human Rights (ECHR) could be taken. For example, the ECHR right to a fair hearing includes a range of different protections – some evident on the face of the text and others developed through interpretation over time. A right to use one’s language of choice could potentially be framed in a similar way.

27. On the other hand, the housing context might provide a cautionary tale, a counter example where *too much legislative detail* may have hindered flexibility in a way that works against the dignity of vulnerable people. In the Welsh Housing Act, the *Pereira* test of priority need is enacted in primary legislation, but it has proved controversial and has been rejected by the Supreme Court as providing insufficient protection. Legislative entrenchment of a particular interpretation of the scope of certain rights, or how to interpret what rights people have, can sometimes work against vulnerable individuals. Discussing this view that legislative entrenchment is not always ideal segued into views on the legislative process itself and the practical-political realities. In the context of Welsh language, it was noted that the 2011 Language Measure was rushed through with little consultation, there were no drafts of what Welsh Language Standards might look like. Ideas for improvement had been proposed but these were rejected by Welsh Government.
28. Similarly, in relation to the Children’s Rights Measure, there was limited consultation and discussion of other options to entrench rights, as the Government wished to enact the legislation before the then First Minister stepped down. The view was expressed during the Workshop that it would have been more rational if the duty to have due regard to the UNCRC was imposed on all devolved public bodies in Wales at the same time. As it stands the duty currently applies to Welsh Ministers, to relevant public bodies exercising functions under the Social Services and Well-being (Wales) Act 2014 and will in future apply to relevant public bodies exercising functions under the Additional Learning Needs and Education Tribunal (Wales) Act 2018.
29. Workshop participants also raised the matter of new legislation, the Renting Homes (Wales) Act 2016. This Act replaces existing leases and licences with two types of ‘occupation contract’; a secure contract modelled on the current secure tenancy used by local authorities, and a standard contract modelled on current assured shorthold tenancies used by the private sector. The Act shifts the public law-private law divide in Wales, with increased regulation of the private sphere. The legislative changes are modelled on Law Commission recommendations which were rejected in England, with the Lord Chancellor’s Report for 2011 stating that, ‘while some of the proposals...were accepted in principle by the previous government...reform of this area of the law is not in line with the current government’s deregulatory priorities’. In contrast, the Law Commission compared this English rejection with ‘the imaginative and positive policy reaction...in Wales’.<sup>18</sup> Workshop participants were not critical of the legislation, but noted the importance of monitoring and reviewing its impacts.
30. Workshop participants also raised the subject of planning law. This is the first area of Welsh law where a comprehensive draft legal Code has been proposed and is in the policy development stage. The Law Commission expects a potential Bill to be introduced to the Assembly in 2020. Earlier reforms had already taken effect by way of the Planning (Wales) Act 2015. During the passing of the 2015 Act, a series of amendments were proposed to introduce a third party right of appeal in planning cases – a notable innovation in the administrative justice redress regime. These proposed amendments were raised in Stage Two Committee but the Government concluded that third party rights were not a solution to perceived weaknesses of the planning system and the amendments were not approved. There was also a debate on a

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<sup>18</sup> Law Commission, *Annual Report 2007-8* (Law Com No 310; HC 540), 3.42-44.

Plaid Cymru amendment to introduce a ‘community right of appeal’. This would have given any consultee or objector third party rights of appeal in limited circumstances, broadly where a planning decision was made contrary to the Local Development Plan. The Government resisted the amendments referring to the greater emphasis on pre-application discussions that would result from the Bill’s provisions. The Government defeated this amendment by a single vote, demonstrating how significant individual AMs can be in the passage of Assembly legislation conferring rights of redress.

31. Workshop participants were generally in favour of increasing the number of AMs to ensure in-depth, detailed and focused scrutiny of legislation particularly from an administrative justice perspective. This is a particular manifestation of the need to increase the number of Assembly Members, already recognized by the Richard Commission, Silk Commission and the Assembly Commission, among others. The broader question of taking a further objective look at the quality of legislation was also raised. As the Assembly is a single chamber legislature, some views were expressed that options to develop mechanisms to provide a further objective check on the quality of legislation could be explored. It was suggested that Assembly Committees could be strengthened, that they should combine both policy and legislative scrutiny, and that there could be better linking between particular Committees with cross-cutting remits.
32. The role of broader civil society in legislative (and post-implementation) scrutiny in the field of administrative justice and rights protection was also noted. Specifically, the roles played by voluntary organisations and University research. Scrutiny in general can be easier where the target to be analysed is a specific (and short-term) measure, whereas the achievement of longer-term policy objectives, particularly those addressed through legislation with a largely upstream rights promoting and preventative focus, is harder to determine.
33. Whilst the political environment pre-enactment has a clear impact on legislation in the administrative justice context, so too does discretionary application post-enactment. In the area of housing it was noted that local authority housing officers exercise significant discretion when implementing legal duties and that practice varies geographically. This can mean there is room for innovation, but must be balanced against ensuring basic rights protection for all. It was stressed that public services reform must be better linked to administrative justice concerns (matters of principles, laws and redress mechanisms).
34. Looking to other jurisdictions, it was noted that in Scotland the test of ‘priority need’ in housing cases has been abolished establishing, in effect, a right to housing. However, the implementation of such a right in practice is clearly affected by resources, and by specific local authority practices – a Report by Shelter suggests that the general ‘Housing Options’ approach can be open to local authority malpractice and may lack sufficient legislative accountability.<sup>19</sup> Key then to ensuring administrative justice is be the availability of downstream individual rights to redress.

### **New Legislation for Wales: Codification, Administrative Procedure and Human Rights**

35. Responding to the Law Commission’s Report on the *Form and Accessibility of Law Applicable in Wales* the Draft Legislation (Wales) Bill, places the Counsel General for Wales under a duty to keep the accessibility of Welsh law under review. For each term of the National Assembly, the Welsh Ministers and Counsel General must prepare a programme of what they intend to do to

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<sup>19</sup> Shelter, *Changes to Homelessness Law and Practice in Scotland, Wales and England* (June 2016) [https://england.shelter.org.uk/\\_\\_data/assets/pdf\\_file/0003/1270416/2016\\_06\\_20\\_Changes\\_to\\_homelessness\\_law\\_and\\_practice\\_in\\_Scotland,\\_Wales\\_and\\_England.pdf](https://england.shelter.org.uk/__data/assets/pdf_file/0003/1270416/2016_06_20_Changes_to_homelessness_law_and_practice_in_Scotland,_Wales_and_England.pdf)

improve the accessibility of Welsh law. This must include proposed activities ‘intended to – (a) contribute to an ongoing process of consolidating and codifying Welsh law, (b) maintain the form of Welsh law (once codified); (c) facilitate use of the Welsh language’. This programme may also include activities intended to promote awareness and understanding of Welsh law and activities in collaboration with the Law Commission. During the 2018 Legal Wales Conference the Counsel General announced his intention to introduce the Draft Legislation (Wales) Bill to the Assembly before the end of 2018, and that Annexed to the Bill would be a proposed taxonomy of Codes of Welsh Law.

36. Workshop commentators on legislation relating to children’s rights, the Welsh language, and housing and homelessness, agreed that proposals to codify areas of Welsh public law would have beneficial implications for these three topics. E.g., consolidating and reforming various legislation relating to education in Wales would likely have positive implications for promoting and protecting children’s rights.
37. Whilst the Law Commission proposed various areas of substantive Welsh administrative law that could be codified (education, housing, local government, environmental law), academic work to date has focused on whether the new duties imposed on public bodies in Wales by way of administrative procedure legislation could be collated as an Administrative Procedure Code for Wales. The duty to have ‘due regard’ to the UNCRC is one such duty, as are the range of well-being duties imposed by the Well-being of Future Generations (Wales) Act 2015. It has also been proposed that CAJTW’s *Administrative Justice Principles for Wales* could be given legislative expression in a suitably adapted form.<sup>20</sup>
38. A proliferation of duties on public body decision-makers was recognised by the 2014 Williams Report on *Public Service Governance and Delivery in Wales*. The Report 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’.<sup>21</sup> It is not clear whether such a review of legislation has taken place, and there have been a number of new duties imposed since the Williams Report. In its response to the Williams Commission the Welsh Government confirmed that it would work with the Law Commission to explore opportunities for consolidating and simplifying legislation.
39. During the Workshop it was noted that most legal jurisdictions across the world have an administrative procedure Code or Act of some kind, but with variations as to the degree of specificity with which administrative procedure duties are expressed. There is a case for saying that most such Codes/Acts provide more general back-stop principles that are not intended to displace detailed law and guidance relating to particular subject areas of decision-making. That said, such Codes/Acts (which can be of varying legislative status) can provide an overarching foundation of guiding principles, e.g., similar to overriding objectives in the England and Wales Civil Procedural Rules. Even where Codes are primarily designed to streamline and consolidate existing provisions, they can have a major impact on the culture of public body decision-making and administrative justice, e.g., *AJ Wales and Comparative Perspectives* explains how the introduction of a General Administrative Procedure Act for the Netherlands had wide impacts for the jurisdiction. However, not all of these impacts have been positive, and the experiences of other jurisdictions (including South Africa and Federal Australia) suggest that codification

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<sup>20</sup> David Gardner, ‘An Administrative Law Code for Wales: Benefits to Reap and Obstacles to Overcome’ (2018) *Statute Law Review*.

<sup>21</sup> Online at: <https://www.lgcplus.com/Journals/2014/01/21/d/r/x/Commission-on-Public-Service-Governance-and-Delivery-Wales.pdf> [para 2.37].

can lead to additional litigation around legal technicalities of expression that adds little to improving good administration in practice.

40. An example proposed during the Workshop was the Québec *Act Respecting Administrative Justice*.<sup>22</sup> The purpose of the Act is, ‘to affirm the specific character of administrative justice, to ensure its quality, promptness and accessibility and to safeguard the fundamental rights of citizens’. It goes on to delineate general administrative procedure rules, whilst noting that these may be supplemented by special rules. A non-statutory example is the Council of Canadian Administrative Tribunals (CCAT) *Principles of Administrative Justice* which relate to all Administrative Tribunals, their Adjudicators and Staff, affiliated with CCAT operating in any Canadian jurisdiction.
41. There is a need for continuing discussion about how to – in the words of the Québec Act - ‘affirm the specific character of administrative justice’, particularly when seen as a cornerstone to social justice, equality and human rights in Wales. The President of Welsh Tribunals has an important role to play and could propose laying down guiding administrative justice principles when developing Devolved Welsh Tribunal procedure rules, this is also something the Law Commission could consider as part of its examination of the possible need for a Welsh Tribunals Bill.
42. Looking to Europe, the Council of Europe has developed a Code of Good Administration for member states. This Code influenced the AJTC’s development of *UK Principles of Administrative Justice*, many of which formed the foundation of CAJTW’s *Welsh Principles*. Council of Europe institutions, in particular the European Court of Human Rights, have come close to recognising a specific right to good administration. Such a right exists at European Union level, being included in the EU Charter of Fundamental Rights (CFR). It is not entirely clear whether the right as codified in the CFR (and the general principles of EU law it codifies) applies only to EU institutions, or also to Member States when implementing EU law. The CFR itself will not be incorporated into UK law after Brexit; the general principles of EU law it codified will be retained domestically, but there will be no individual cause of action through which to claim a remedy for breach of these principles. A right to good administration has, however, received some support in discussions concerning a new British or UK bill of rights.
43. The relationship between administrative justice and human rights is especially important to Wales; it is not surprising that the three specific areas of law discussed during the Workshop are grounded in rights; rights of children, language rights and the right to housing. There is increasing recognition that administrative justice is at root about protecting rights. Nick O’Brien has argued that ‘administrative justice can be viewed, in essence, as a set of “bridging institutions” whose cultivation of the ‘habits’ of trust and civic virtue are made possible by the adoption of design principles and operational practices that in turn are shaped by human rights values and principles’.<sup>23</sup> An administrative justice policy for Wales and Administrative Procedure Code for Wales could incorporate these ideas.
44. The UK Government has committed to reviewing domestic human rights law after Brexit, and the option to repeal the Human Rights Act 1998 and/or to withdraw from the ECHR is still on the table. The Welsh rights landscape is increasingly different to that of England. Although international relations are a reserved matter, it is for the devolved nations to develop their own requirements for the observation and implementation of international obligations including those contained in the ECHR and other human rights treaties. There is a broader question

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<sup>22</sup> Online at: <http://www.legisquebec.gouv.qc.ca/en/showdoc/cs/J-3>

<sup>23</sup> Nick O’Brien, ‘Administrative Justice in the Wake of I, Daniel Blake’ (2017) *The Political Quarterly* 9.



around whether Wales could systematize its developing approach to rights into some form of overarching Welsh human rights legislation. There is an opportunity for Wales to develop policy and legislation that takes a fully integrated approach to human rights and administrative justice, and such could be highly innovative whilst also being well within the direction of travel of developing pan-European scholarship and practice.<sup>24</sup>

**It is recommended:**

- 1. That Welsh Government develops a policy for Administrative Justice and Tribunals Policy in Wales which draws explicit connections between administrative justice, and issues of human rights, equality, public services and local government reform in Wales, and includes principles of administrative justice redress design**
  - 2. That the number of Assembly Members be reviewed in order to ensure in-depth, detailed and focused scrutiny of legislation from an administrative justice perspective**
  - 3. That Welsh Government and the Assembly propose options for legislative reform including:**
    - a. An Administrative Procedure Code for Wales: A Code to consolidate and reform existing duties on public body decision-makers in devolved Welsh authorities; extending the duty to have ‘due regard’ to the UNCRC to all devolved Welsh authorities; clarifying and extending the applicability of the Future Generations ‘Five Ways of Working’**
    - b. A human rights law for Wales, which includes:**
      - A drafting style similar to the ECHR (rights with limitation clauses)**
- And the following substantive rights:**
- A substantive right to administrative justice or good administration**
  - A substantive right to use Welsh**
  - A substantive right to housing**
  - A substantive right to sustainable development**

### **Welsh Commissioners and the Public Services Ombudsman for Wales (PSOW)**

45. In Wales, Commissioners are central to implementing and monitoring human rights obligations. The Older People’s Commissioner for Wales and the Children’s Commissioner for Wales (which have similar powers) are neither ombudsmen nor regulators, but come closest in powers and structure to National Human Rights Institutions (NHRI), otherwise known as citizen’s champions in the field of rights. They have some powers to investigate individual complaints, as well as a broader role of conducting systematic investigations on their ‘own

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<sup>24</sup> See e.g., German Research Institute for Public Administration Speyer, *The development of a pan-European general principle of good administration by the Council of Europe and its impact on the administrative law of its member states* <http://www.foev-speyer.de/en/research/european-administrative-space/internationalisation/herausbildung-paneuropaeischer-grundsaeetze-guter-verwaltung.php>

initiative' (i.e. without the need for a specific complaint). When conducting systematic investigations, the Commissioners have the same power to compel the giving of evidence as a High Court Judge (the same is true for systematic PSOW investigations). Examples of successful investigations can be found in *AJ Wales and Comparative Perspectives*, including in relation to school toilets (Children's Commissioner) and community transport (Older People's Commissioner).

46. Despite some high-profile systematic investigations, Commissioners often deal with complaints by sign-posting individuals to other forms of advice and assistance. This raises concerns about how well other aspects of the administrative justice system are functioning, including the availability and accessibility of advice services and people's awareness of these services. There is also evidence of Commissioners determining complaints that ought to have been dealt with by internal processes within relevant public bodies. The Commissioners power to 'name and shame' may be of particular importance.
47. Balancing between the Commissioners individual complaint handling, systematic and promotive roles is complex. How much time and resources Commissioners should be spending on individual complaints is a matter of debate, as is the question of how Commissioners decide which individual complaints to investigate. It was noted during the Workshop that more research needs to be done into the characteristics of individuals complaining to Commissioners (particularly their social and economic group). The phrase 'sharp elbowed' parents was used a number of times during to depict the possibility that administrative justice redress (of all kinds, but particularly Commissioners who are supposed to be accessible citizen champions) is more accessible to those in higher socio-economic groups.
48. Whilst also labelled 'Commissioner', the WLC is a regulatory body rather than an ombudsperson or NHRI. A 2017 White Paper proposed reforms to abolish the WLC. The proposals are aimed at 'reducing bureaucracy' and ensuring 'value for money' in the Welsh language regime.<sup>25</sup> The hope is to strike a more proportionate balance between promoting the language and regulating compliance with Welsh Language Standards. The WLC will be replaced with an independent Welsh Language Commission. Under the new structure the Welsh Government will be responsible for making and imposing Standards, the Welsh Language Commission will monitor and enforce compliance with the Standards and promote language use. The reforms emphasize internal processes, with individuals being required to complain first to the public body before taking their complaint to the Commission. It is proposed that the new Welsh Language Commission should only investigate complaints in serious cases and that a permission requirement should be introduced into some appeals to the WLT.
49. Welsh Government concluded that 'the Standards are numerous and complicated, and the way they are made and enforced is bureaucratic and time-consuming'.<sup>26</sup> It regards them as overlapping and unclear, with a lack of certainty over which bodies particular Standards apply to. It believes that the current system over-emphasises enforcement, at the expense of focusing on putting things right and ensuring public bodies improve. It is disappointing then that when highlighting these central issues of administrative justice, Welsh Government did not refer to the *Administrative Justice Principles for Wales* developed by CAJTW for guidance.
50. Consideration was given to enacting a right to use Welsh into primary statute. This was rejected, largely on grounds of cost - given the extent of Welsh language skills in the workforce (arguably

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<sup>25</sup> Welsh Government, *White Paper Consultation Document: Striking the right balance: proposals for a Welsh Language Bill* (WG32353 October 2017) [4].

<sup>26</sup> *Ibid* [21].

it would lead to a large list of exceptions).<sup>27</sup> It is disappointing that more detailed thought was not given to this proposal, particularly in terms of potentially enumerating rights with limitation clauses (as noted above in a form of ECHR-esque approach). This would provide general limitation clauses to be interpreted as opposed to long lists of specific exceptions.

51. Workshop participants expressed support for the reform proposals, in particular the aim to reduce the bureaucratic nature of the existing system, and the focus on early dispute resolution. However, under the proposals the new Welsh Language Commission will still not be sufficiently independent from Government. The current WLC is a regulatory body, a function that will be retained by the new Commission. As it stands, individuals cannot directly challenge the content of Welsh Language Standards developed by the WLC; if a complainant considers there has been a flaw in the WLC's investigation into compliance with its own Standards, they can appeal to the WLT. The WLC is a regulator on behalf of Welsh Government yet also bound by law to monitor the Welsh Government's own compliance with relevant Standards. The new Commission would also be appointed by the Government and sit in judgment on Government compliance with Welsh Language Standards. There needs to be further clarity around the precise division of roles under new legislation, in particular what type of arms-length body the proposed new Commission will be, what exactly will be its roles (regulatory, ombudsman-esque, promotive) and its relationship with Welsh Government and the Assembly. This is unlikely to be confirmed until draft legislation is published.
52. There was some discussion of the relationship between the proposed new Welsh Language Commission, and the PSOW. The PSOW already acts as an independent complaint-handling body with regards to the Assembly Commission, the body responsible for the day-to-day running of the Welsh language services of the Assembly. It has been suggested, (including by academic researchers at Cardiff University Language, Policy and Planning Research Unit), that Welsh language functions might be better separated, with the new Commission performing a regulatory role, and the PSOW taking over the individual complaint handling function.<sup>28</sup> This suggestion has been rejected for the time being as requiring legislative changes to the PSOW's powers that might have wider consequences beyond the language complaint context.<sup>29</sup>
53. The central point in discussion, however, was to stress that methods of resolving complaints should be accessible as close as possible to the individual(s) affected and to the issues concerning them, and that early resolution with co-operation from the public body is key. It was noted that the PSOW has powers to facilitate quick and effective redress through early resolution, whereas the existing WLC does not. Ultimately it does not matter 'who does what' as long as effective routes to redress exist, and individuals do not fall through 'gaps' in provision. Perhaps this should be rephrased as, it does not (and should not) matter to the individual member of the public 'who does what', but this should matter to those responsible for 'designing' administrative justice redress systems (questions of comparative expertise, efficiency, independence and costs will need to be addressed by system designers).

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<sup>27</sup> Ibid 13-14 rejecting 'Option 5: right for individuals to use Welsh set out in primary legislation'.

<sup>28</sup> See e.g. Written and oral evidence from Professor Diarmait Mac Giolla Chríost, Professor Colin Williams and Dr Patrick Carlin in response to Written Statement of January 31 by the Minister for Lifelong Learning and the Welsh Language on the matter of consulting upon preparing for a Welsh Language Bill.

<sup>29</sup> Written Statement - The Public Services Ombudsman for Wales' response to the White Paper on a proposed Welsh Language Bill, the Minister for the Welsh Language and Lifelong Learning  
<https://gov.wales/about/cabinet/cabinetstatements/2018/PSOW/?lang=en>

54. One issue of concern with the proposed restriction that the new Commission should only investigate complaints of ‘serious breach’, is the difficulty around determining what constitutes a serious breach of Standards. This could be seen as a matter of the scale and effects of the alleged breach, how many people are affected and how extensively, but such misses the context of how each individual personally experiences a particular issue. Systematic problems are often only revealed through a series of apparently smaller scale complaints.
55. Natural justice is also key to the complaints systems. When complainants are heard this can lead to future improvements in relevant systems, but being heard is also a function of individual dignity – of intrinsic worth to the individual either alternatively to, or in conjunction with, instrumental improvements for the individual complainant and others. Respect for individual dignity might in particular require ‘validation’ of the complaint by a body external to the public authority being complained about. This chimes with evidence from research into the Older People’s and Children’s Commissioners, that their power to ‘name and shame’ is seen as significant by complainants.
56. A range of Commissioners have been created in Wales, and the devolution context underpins what has become a complex proliferation of bodies with different appointment processes and structures, different accountability mechanisms (both externally and internally), and different powers. Whilst a variety of bodies are labelled ‘Commissioner’ they were each created to address different problems, and each developed at different stages in the process of Welsh devolution (impacting on their powers and the nature of legislation underpinning each institution). There are principled reasons for divergence, the WLC is a regulatory body, the Children’s and Older People’s Commissioners are closer to NHRI, as is the Future Generations Commissioner (though the latter does not have an individual complaints handling jurisdiction). However, as Mike Shooter put it in his review of the Children’s Commissioner, the ‘uncertainty breeds confusion and misconception’.<sup>30</sup> In practice this lack of certainty over roles, jurisdiction and accountability can cause problems for access to justice. Commissioners (including the Future Generations Commissioner) often have a role in sign-posting people to other forms of advice and assistance. Commissioners sign-post in order to help people access justice, and there are examples of good working relationships, for example between the Future Generations Commissioner and Children’s Commissioner, in order to provide a common answer especially around what is the most appropriate route for the individual seeking redress. There is also a Memorandum of Understanding between all the Commissioners and the PSOW. Whilst there is evidence of good practice here, including joint training and information sharing where appropriate, it is likely that more could be done to build on existing work to improve relationships, which can sometimes depend on the particular persons occupying the office of Commissioner. Another issue raised by the prevalence of the ‘sign posting’ role is whether this is evidence that problems are not being solved earlier on in the system, such as through internal review procedures within local authorities. It seems that Commissioners are often an individual’s ‘first resort’ where information about their rights is not clear, and their last resort where information about redress routes may be clearer but for various reasons these have not been satisfactory from the perspective of the individual. It was noted that in some cases there is a genuine gap in redress provision, the example again given was the lack of third-party rights to complain/appeal in planning cases, particularly in the context of sustainable development.
57. It was stressed that more clarity is needed, as Wales has in effect been a victim of language and labelling – it is important to better label the various Commissioners in a manner more

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<sup>30</sup> Mike Shooter, ‘An Independent Review of the Role and Functions of the Children’s Commissioner for Wales’ 1.3(d).

appropriate to communicate their respective functions – perhaps also coupled with a further review of their powers and accountability.

58. It was also noted that there has been a proliferation of ombudsmen schemes that are not covered by traditional definitions of administrative justice, in particular those that cross the public-private divide. One example is The Property Ombudsman (TPO), a scheme covering England and Wales, providing alternative dispute resolution between consumers and property agents. Given the future impact of the Renting Homes (Wales) Act 2016, which transforms the system of tenancies and licences in Wales replacing them with occupation contracts in both the public and private sphere, further thought may need to be given to the roles and functions of the TPO and PSOW respectively.

59. The Public Services Ombudsman (Wales) Bill was introduced by the Assembly Finance Committee in October 2017 and is at the stage of Committee Consideration of Amendments, at the time of writing. The Bill sets out new powers for the PSOW to; accept oral complaints, undertake own initiative investigations, investigate private medical treatment including nursing care in a public/private health pathway, and undertake a role in relation to complaints handling standards and procedures. The current Bill does not, however, address some other matters particularly the office's role as an administrative justice 'bridging institution' with the courts. In evidence to the Commission on Justice in Wales, the PSOW called for further attention to be given to:

- a. The statutory bars [on the ombudsman investigating when a court or tribunal-based action is available] be replaced with the discretion for the ombudsman to investigate if appropriate
- b. The Administrative Court should have an express power to 'stay' an action before it, to allow a public services ombudsman to investigate or dispose of a complaint; and
- c. The Ombudsman be given the power to refer a point of law to the courts.

Whilst the Wales Act 2017 continues to reserve civil procedure and judicial review of administrative action, there are already examples of Wales-specific amendments to Civil Procedure Rules, and a precedent for a Welsh administrative justice institution having power to refer a point of law to the Administrative Court.<sup>31</sup> In 2015, the Assembly Finance Committee considered that these proposals involved complex practical issues in the context of the single legal jurisdiction and reservation of courts, however it also noted that these matters should be revisited in light of the progress of devolution. It is highly unlikely that the Assembly lacks the legislative competence to remove the bar to the PSOW investigating claims that could be subject to court-based remedies, or to create a 'point of law' reference mechanism. Given the Counsel General's statement that a Welsh jurisdiction is 'inevitable', further thought could be directed to the PSOW's relationship with the courts (and tribunals) in Wales, in context of the Law Commission's recommendation that these proposals 'would give complainants greater freedom of choice over the institution, and related procedure, for administrative redress they can use' thus enhancing access to justice.<sup>32</sup> This is another example where Welsh Government and the Assembly could show courage of conviction by using their competence to support a different approach to administrative justice in Wales.

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<sup>31</sup> The Welsh Language Tribunal.

<sup>32</sup> Law Commission, Public Services Ombudsmen (Law Com No. 329, 2011):

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/247386/1136.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/247386/1136.pdf)

**It is recommended:**

**4. Welsh Government and the Assembly reviews the existing landscape of Commissioners in Wales and the Public Services Ombudsman for Wales with the aim of developing a more coherent, consistent and accessible system of institutions.**

**5. That Welsh Government and the Assembly reviews the relationship between the Public Services Ombudsman for Wales and courts and tribunals with a view to reforming the ‘statutory’ bars to Ombudsman investigations, and providing for the Ombudsman to refer a point of law to the Administrative Court in Wales or to a devolved Welsh tribunal as appropriate**

## **Tribunals in Wales**

60. There have been significant developments in the process of reforming tribunals in Wales. These have followed from a Review conducted by the AJTC Welsh Committee, an internal Welsh Government Review, the recommendations of the 2015 Bangor Research Report and CAJTW Legacy Report. These include reforms to the processes for appointing tribunal judges to ensure greater independence and consistency, and that appointees possess appropriate knowledge and expertise. Devolved Welsh tribunal websites are clearer and more accessible, and a broader range of information has been made available online in a timely fashion.

61. The Wales Act 2017 now identifies specific Welsh tribunals<sup>33</sup> and makes provision for further tribunals to be designated. These Tribunals are defined as having functions that, do not relate to reserved matters, and functions which are only exercisable in Wales. The 2017 Act creates a President of Welsh Tribunals to provide leadership, ensuring tribunals are accessible, fair, efficient, that their members have sufficient expertise, and having regard to ‘the need to develop innovative methods of resolving disputes’.<sup>34</sup> It will be important to monitor how the President performs these duties over time, and it is worth noting some concerns expressed in the 2015 Bangor Report which could now be addressed:

- a. A need for a continuing dialogue about how best to provide judicial training that is appropriate and good value for money in Wales, bearing in mind the smaller pool of relevant training recipients as compared to larger jurisdictions such as England.
- b. With respect to training specifically on areas of devolved Welsh law – that training events could include a range of other stakeholders who need to be aware of developing legal provisions (e.g., housing associations in the context of housing law, relevant local authority personnel with respect to additional learning needs developments).
- c. Where training is ‘bought in’ for example from England or on an England and Wales basis (often with respect to ‘judge craft’) there must be an assurance of proper regard for Welsh concerns and interests – the same is true when other services are ‘bought in’ such as recruitment and selection.

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<sup>33</sup> Wales Act 2017, s.59.

<sup>34</sup> Wales Act 2017, s.60(4)(d).

62. The 2017 Act makes provision for ‘cross-deployment’ of judges between various devolved Welsh tribunals (with the consent of the President of Welsh Tribunals).<sup>35</sup> On this latter point it is worth reflecting on the 2015 Bangor Report which noted:

given the small number of claims issued in devolved Welsh tribunals there is sometimes little to motivate junior practitioners towards a career as a member of the judiciary in Wales. The limited number of cases makes it difficult to gain experience alongside having financial implications for fee-paid judges. It was argued that this lack of opportunities to sit could lead to the development of a second-rate judiciary in Wales, who would like to sit more and determine more cases but simply don't have the opportunity. It was argued that good candidates are lost to England where caseloads are higher, and where it was suggested, there is more ‘cross-ticketing’ between particular jurisdictions again enhancing opportunities for judges to sit. An example given was that some members of the Residential Property Tribunal for Wales (RPTW) also sit in the Mental Health Review Tribunal for Wales (MHRTW), but in order to do so they must currently hold two separate judicial appointments (with the RPTW appointment made by Welsh Ministers and the MHRTW appointment made by the Lord Chancellor).

63. Cross-deployment has now been authorised and taken place, e.g., judges have been cross-deployed to determine claims in both the RPTW and the Special Educational Needs Tribunal for Wales (SENTW), with these judges no longer having to hold two separate judicial appointments. Judges have also been authorised for cross-deployment between mental health tribunals in Wales and England respectively.

64. Cross-deployment should ensure more sittings per judge, and that the available pool of talent in Wales is better utilised whilst providing a practical solution to the problem of comparatively small caseloads. The previous Bangor research also highlighted a perceived lack of confidence in the ability of the justice system as devolved to Wales to deliver processes and outcomes of comparable quality to those delivered by England and Wales combined institutions. In the context of both specialisation and access to training it was noted that the Welsh judiciary must be recognised as having parity with judges in England and Wales; Welsh posts should be universally acknowledged as having equal status and there should be some level of recognition in relation to both the sharing of expertise and the sharing of jurisdictions. It will be important to continually reflect on whether the Wales Act 2017 provisions, including the appointment of a President of Welsh Tribunals, have begun to redress these concerns. This is something that could be addressed by the Law Commission in its project to review Welsh Tribunals (due to commence in 2019). Of particular concern is that cross-deployment between England and Wales has so far been used to deploy ‘English’ judges to fill shortages in the availability of judges to determine ‘Welsh’ claims – this seems to be cross-deployment used for quite contrary purposes to how it was perhaps envisaged.

65. As previous research has highlighted, administrative justice has developed ad hoc in many jurisdictions, but in Wales this has been exacerbated by the piecemeal and convoluted devolution process. In this regard the Law Commission argues that the rules and procedures governing the devolved Welsh tribunals are ‘complicated and inconsistent, and in some instances, unfit for practice’.<sup>36</sup> The Commission will review issues such as the scope of a tribunal system for Wales, the roles of the President of Welsh Tribunals and the Welsh Tribunals Unit (WTU), the appointment and discipline of tribunal judges and members, appointment of Presidents/Deputies, the potential for standardized procedural rules, appeals and complaint

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<sup>35</sup> Wales Act 2017, s.62.

<sup>36</sup> <https://www.lawcom.gov.uk/new-welsh-law-reform-project-on-tribunals-announced/>

processes, and protecting judicial independence. In short, the Law Commission is proposing a mini-Leggatt Review for Wales – with the most extensive future option perhaps being ‘One system – One Service’ for devolved Welsh tribunals (with some tier and chamber structures).

66. As the Bangor research noted back in 2015 there were immediate and longer-term issues facing devolved Welsh tribunals. Immediate issues were seen to be; the need to introduce cross-ticketing, reform of judicial appointments and training, and more efficient and effective use of administrative resources across the tribunals. There were also concerns to improve co-operation, co-ordination and collaboration amongst the devolved Welsh tribunals, and between these institutions and non-devolved tribunals determining ‘Welsh’ cases. Workshop participants noted that there is now an active forum involving the judicial leads of the devolved Welsh tribunals, but limited engagement between WTU administered tribunals and other tribunals operating in Wales, including both devolved and non-devolved bodies.
67. The longer-term issue raised in 2015 was the potential to restructure the entire cohort of devolved Welsh tribunals – now part of the Law Commission’s proposed work. In that regard *AJ Wales and Comparative Perspectives* provides insights, from across the UK and its devolved jurisdictions (particularly Scotland and Northern Ireland) and from various Australian States and Territories as well as at Australian Federal level, on matters of tribunal reform including amalgamation of jurisdictions, training and administration, and innovations in dispute resolution. Some key points are summarized by Professor Robin Creyke in her chapter; who notes that any proposed reforms must take into account political commitment to reform, organizational structures, and processes and procedures of the individual tribunals and the proposed super structure, and organizational cultures of the particular individual tribunals.
68. On the matter of innovative methods of dispute resolution, the 2015 Bangor Report noted that devolved Welsh tribunals already operate flexibly, with existing examples of good practice. This includes using a range of venues, e.g., the Agricultural Land Tribunal for Wales (ALTW) uses hotels, village halls, and local pubs for its hearings, and sittings of the Mental Health Review Tribunal for Wales (MHRTW) can be held in hospitals. The innovation in where devolved Welsh tribunal hearings take place may in part be a function of historic lack of resources – these tribunals have always had to be flexible due to a limited supply of formal court buildings; such flexibility is a strength, especially during a climate of austerity.
69. However, at the non-devolved level, respondents to the 2015 research stressed that it appeared to be policy at the time, that HMCTS courts and tribunals should only use HMCTS venues. This was echoed in the 2018 Workshop; it was said that there is a non-devolved tribunal mindset that tribunals should mimic much of the court system, including sittings in formal court buildings. Australian experiences have shown that a particular problem of amalgamating tribunal jurisdictions (the one system, one service ‘super tribunal’ approach) can be greater ‘juridification’ of the system – with all areas of dispute resolution becoming more ‘court like’ under the influence of larger jurisdictions within the whole structure. Perhaps an example for a proposed Welsh superstructure might be the MHRTW, which has a comparatively high case load, and given its subject matter may have to act in a more court like fashion. Another lesson from Australia is that despite the existence of large amalgamated tribunals, judicial and other members are more a collection of specialists under one conglomerate umbrella than generalists regularly cross-deployed across a wide range of jurisdictions. There has been scant research into pros and cons of amalgamating tribunals, including in relation to the UK and England and Wales reforms – in Australia the benefits of amalgamation were often assumed in advance of reforms taking place, with no follow up evaluation.



70. The 2015 Bangor Report proposed that given the smaller scale of Welsh governance compared to England, the devolved Welsh tribunals could potentially do more to encourage settlement than their English counterparts. The example of SENTW was given as an area where there have been few, if any, onward appeals to the England and Wales Upper Tribunal. It was suggested that this may be significantly due to the tribunal taking a proactive role in encouraging co-operation and settlement. Though it was also noted that a high rate of withdrawn appeals could indicate that local authorities were routinely waiting until proceedings had been issued before then providing requested assessments. In terms of encouraging settlement, the 2018 Workshop focused on mediation and how this could be perhaps be better utilized by devolved Welsh tribunals. Examples were given of education tribunal hearings in some jurisdictions taking the form of a mediation hearing, rather than an inquisitorial or adversarial process. It was noted that this is something the President of Welsh Tribunals could address and/or the Law Commission in their upcoming review. Though the matter was already a fairly contentious one in developing the roles of the Education Tribunal for Wales as part of the Additional Learning Needs and Education Tribunals (Wales) Act 2018. As there are different sets of rules and procedures varying across the devolved Welsh tribunals, the scope for mediation (what form it would take, at what stage in the proceedings, how will it be funded) is likely different (or simply not addressed) across the different tribunals. It is possible that greater coherence could be achieved here, whilst also accounting for the variable subject matter jurisdictions. There will be resource implications, it was noted that in the context of planning tribunals that the parties will often co-fund a mediator. Further questions then arise as to whether there is a need for specific tribunals to adopt an approach that is closer to a mediation-style process, or if procedural rules should address the appointment of an external mediator (and how this is to be paid for), and the case for mandating that mediation be attempted before a tribunal hearing can be listed.

#### *Tribunals and A Separate Legal Jurisdiction*

71. Reforming the devolved Welsh tribunals is now widely acknowledged as a perceived test bed for developing broader Welsh competence in the administration of justice. It is argued that many of the issues raised with respect to tribunals would be similarly applicable to other areas of justice; judicial appointments, training and careers, discipline, rules, procedures, remedies and enforcement, so-called 'back office' administration and managing resources (both human and financial). How well such can be managed on a 'Wales only' basis will provide some important lessons. Yet the Welsh Government's objective of devolution of responsibility for justice does not sit well with its apparent reluctance to make greater use of the devolved Welsh tribunals. The following are some examples:

- a. the Housing (Wales) Act 2014 retains the previous England and Wales approach to appeals against public body decision-making; local authority internal review followed by a possible appeal to the county courts. Whilst there has been extensive research into the operation of internal review process in English local authorities, there has been no research in Wales, so we cannot be clear of the particular pros and cons of internal review specifically for Wales. This example is also noteworthy given the decision to continue to direct appeals to the non-devolved county courts, rather than for such appeals to be determined by the RPTW or any newly proposed Housing Court/Tribunal for Wales. There seem to be at least two concerns here; one is a matter of costs resulting from an inevitable increase in the RPTW caseload were it to determine appeals under the 2014 Act. However, Salford University research shows that up until June 2016, across 16 local authorities responding to the research there had only been four

county court appeals under the 2014 Act.<sup>37</sup> A second concern may be that the RPTW currently deals with disputes relating to private rented and leasehold property, whereas county court appeals concerning housing and homelessness turn mainly on principles of public law. That said, there is no particular reason to think that RPTW members could not be sufficiently trained in principles of public law, and indeed may become more proficient and sensitive in applying these principles to the specific context of property and housing across Wales.

- b. Another example is the Welsh Land Transaction Tax (LTT) which replaced stamp duty land tax in Wales from April 2018. This is collected by the Welsh Revenue Authority (WRA), and individuals can seek an internal review by the WRA if they are dissatisfied with an appealable decision. An individual may also appeal to the 'tribunal', either at first instance, or following the outcome of the internal review process. In this case the relevant tribunal is the England and Wales First-tier Tribunal (Tax). Again, there is a question around why the decision was taken not to direct these appeals to the RPTW, or to some other devolved Welsh tribunal. There are also some decisions of the WRA that are not appealable, suggesting that judicial review in the non-devolved Administrative Court might be the only route to redress.
- c. In the context of judicial review, that the majority of claims issued before the Administrative Court in Cardiff involve lawyers from England. Approximately half of all claims in the Court originate in the South West of England, in those cases originating in Wales a significant proportion involve solicitors based in England, and 85% of barristers appearing before the Administrative Court in Cardiff are based at chambers located in England. In a sense then, directing Welsh law claims to the Administrative Court in Cardiff, at least for the time being, seems of significant benefit to English lawyers. In addition to this, at least one-third of claimants in civil (non-asylum and immigration) judicial review claims are unrepresented (litigants in person). This adds a further dimension to the question of how appropriate it is (in terms of developing a Welsh legal jurisdiction) to use judicial review as a primary mechanism for resolving Welsh public law disputes. It would be beneficial to have further information about the proportion of litigants with legal representation in devolved Welsh tribunal claims who are represented by lawyers based in Wales.
- d. Respondents to the 2015 Bangor research argued that the jurisdiction of the ALTW should be extended. In areas currently beyond its jurisdiction the only route to redress is through arbitration paid for by the parties. In 2017 Welsh Government consulted on extending the jurisdiction of the ALTW to handle disputes currently specified as compulsorily referable to Arbitration under the Agricultural Holdings Act 1986. Of 32 respondents, 19 were in favour of extending ALTW jurisdiction, but 13 were against. Arguments 'for' proposed that tribunal resolution would be quicker and reduce costs, that given 80% of land in Wales is farmed and a significant proportion of this is managed under tenancy agreements the relationships between landlords and tenants can have a major impact on the management of natural resources (a public policy concern not just a private contractual relationship), that arbitration itself is now more costly and slower. Those who were 'opposed' were concerned that referring matters to the tribunal

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<sup>37</sup> A. Ahmed et al. (n 15).

might result in increased juridification, including the appointment of barristers whereas parties are usually represented by surveyors in arbitration, concerns were raised around confidentiality in public tribunal proceedings compared to private arbitration, others were concerned about the capacity of the ALTW to succeed in the new role without additional funding and whether its members would have the specialist knowledge and skills to undertake the additional work.<sup>38</sup>

72. In addition to supporting CAJTW's development of *Principles of Administrative Justice for Wales*, the 2015 Bangor Report drew on previous work by the Public Law Project to propose 13 principles for designing administrative justice redress regimes in Wales. Further thought could be given to updating these principles, and potentially incorporating them into the work of Welsh Government and the Assembly when proposing new redress mechanisms for rights granted under Welsh public administrative law. The Redress Design Principles are stated for information below, with more explanation on each Principle in the 2015 Bangor Report. In the context of devolution progress, a further principle – presumption that redress should be through a devolved Welsh tribunal has been added.

#### **Redress Design Principles**

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. There should be a presumption that where legislation creates enforceable legal rights, that redress should be to a devolved Welsh tribunal
3. Institutional design should respect constitutional principles
4. There should be public accountability for the operation of grievance handling
5. Evidence and research should inform the creation of new redress mechanisms and the reform of existing ones
6. There should be opportunities for grassroots innovations
7. Mechanisms should ensure value for money and proportionality
8. There should be a good 'fit' between the type of grievance and the redress mechanism
9. Fair and rational criteria and processes should be used to 'filter' inappropriate grievances
10. As well as dealing with individual grievances, redress mechanisms should contribute to improvements in public services
11. 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
12. Redress mechanisms should be designed primarily from the user perspective
13. Redress mechanisms should be designed with due regard to the context of devolution in the UK
14. The design and delivery of redress mechanisms must be accompanied by appropriate publicity and information

#### *An Education Tribunal for Wales*

73. The Additional Learning Needs and Education Tribunal (Wales) Act 2018 (ALNET) makes provision for a new statutory framework to support children and young people with additional learning needs (replacing existing legislation surrounding special educational needs (SEN)). ALNET continues the existence of SENTW, renaming it the Education Tribunal for Wales.

<sup>38</sup> <https://beta.gov.wales/sites/default/files/consultations/2018-06/sustainable-management-summary-of-responses.pdf>

There are many administrative justice matters addressed by the legislation; the aim to develop a simpler and less adversarial system for producing and revising Individual Development Plans, increased collaboration between a range of services involved in working with children, avoiding disagreements and earlier dispute resolution (ensuring matters are considered and resolved at the most local level), and providing clear and consistent rights of appeal.

74. The main concern of Workshop participants in this context was the lack of information and unsystematic nature of education appeals *currently conducted outside SENTW*. In particular, school admissions and exclusion appeals, that are determined by local authorities. Reservations were expressed about the consistency, quality, and lack of transparency of these appeal processes. Workshop participants supported CAJTW's recommendation that Welsh Government should reconsider the case for extending the jurisdiction of the (soon to be) Education Tribunal for Wales to school admissions and exclusion appeals.

**It is recommended:**

- 6. That when legislating to create new public law duties applicable to devolved Welsh authorities, Welsh Government and the Assembly should apply a presumption that any new legal redress measures created should be by recourse to devolved Welsh tribunals**
- 7. That Welsh Government reconsiders the case for incorporating school admissions and school exclusions appeals into the Education Tribunal for Wales**

*Ad Hoc Redress*

75. A further concern expressed both in the 2015 Bangor Report, CAJTW Legacy Report and the 2018 Workshop, is the extent to which ad hoc redress schemes (outside the structure of tribunals, courts and the PSOW) have been created as mechanisms for challenging the exercise of devolved powers by public bodies in Wales. One example is the Discretionary Assistance Fund for Wales. In 2013 discretionary payments under the Social Fund (created by the Social Security Act 1986) were abolished and replaced by a new scheme under which payments to meet special needs (primarily of claimants receiving means tested benefits) would become the responsibility of local authorities. In Wales the relevant Discretionary Assistance Fund (DAF), 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 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.

76. Other examples of ad hoc 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. Concerns raised by 2018 Workshop participants about the proliferation

of ad hoc redress suggests support for CAJTW's recommendation that Welsh Government review the operation of ad hoc redress schemes.

**It is recommended:**

**8. That Welsh Government review the operation of ad hoc administrative justice redress schemes and consider introducing general guidance and minimum standards for their operation**

**Administrative Procedures: Decision-making, learning and feedback**

77. Whilst the structure of the administrative redress system is important, so too is the extent to which public bodies make decisions 'right first time'. This phrase has fallen out of fashion in recent years, but is a reminder that the millions of individual initial decisions taken by public bodies are ground zero for the application of administrative justice principles. There are some areas of public body decision-making, notably the non-devolved subjects of immigration and social security, where evidence suggests that initial decision-making is frequently poor. For example, in social security cases some 70% of appeals to the Social Security and Child Support Tribunal concerning disability benefits are now successful, raising serious questions about the quality of initial decision-making and Mandatory Reconsideration (an internal administrative review procedure). Success rates in appeals to the First-tier Tribunal Immigration and Asylum Chamber are also high. This of course only captures those decisions where individuals have followed the review and/or appeals process, there may be many more people who are dissatisfied but who do not take things further.

78. At the devolved level, people in Wales consistently report higher rates of satisfaction with their public services than people in England. Nevertheless, the Final Report of the Williams Commission on Public Service Governance and Delivery (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. Reforms proposed by the Commission have since been taken forward, though respondents to the 2015 Bangor Report and various Legal Wales Conference sessions since, have given anecdotal examples of defensiveness by public bodies; the most commonly cited relating to health, education, local government and the police. Whilst satisfaction rates concerning Welsh public services remain high, the latest National Survey for Wales shows 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).<sup>39</sup>

79. As yet there is little engagement at the policy and legislative level between public services and local government reform initiatives, and issues of administrative justice. This is likely due to the absence of any overarching administrative justice policy for Wales, or of any specific administrative justice oversight body. In July 2018 the Cabinet Secretary for Local Government and Public Services made an oral statement in the Siambr about, *The Next Steps for Local Government Reform*. It was noted that Welsh Government will work in partnership with local government and the Welsh Local Government Association (WLGA) to agree a shared approach, and that an independently chaired working group would be created 'to identify common ground and to propose a way forward on structures, additional powers, flexibilities and support for change'.<sup>40</sup> The Working Group has since been established, with Derek Vaughan

<sup>39</sup> <https://gov.wales/docs/statistics/2018/180620-national-survey-wales-2017-18-headline-results-en.pdf>

<sup>40</sup> <https://gov.wales/topics/localgovernment/local-government-reform/?lang=en>

MEP as Chair, and various membership from Welsh Government, Trade Unions, business and third sector. There would be value to this Working Group engaging with issues of administrative justice that arise in the context of local government reform. Any Local Government (Wales) Bill ultimately proposed should be properly scrutinized for its administrative justice implications.

**It is recommended:**

**9. That the Working Group on Next Steps for Local Government Reform engages with issues of administrative justice, and that any proposed Local Government Bill is properly scrutinized for its administrative justice implications**

80. There are various other initiatives in Wales that have potential to improve the quality of initial public decision-making including the Well-being of Future Generations (Wales) Act 2015, which requires public bodies to work in five particular ways when carrying out sustainable development. These are; 1. long-termism, 2. integration, 3. involvement, 4. collaboration, and 5. prevention. The Welsh ways of working emphasise horizontal accountability (inter-institutional accountability), enabling citizen participation and furthering opportunities for deliberative democracy. Co-operation, involvement, co-decision and co-production in the design of the administrative state and the services it provides are also watchwords. Whilst only applicable to particular areas of public body decision-making under specific legislation, the ways of working are likely to cross-pollinate to other fields, impacting on the overall culture of particular organisations. These approaches foster both good initial decision-making, feedback and organisational learning.
81. Other issues related to feedback and learning are the extent to which channels of communication can be established between devolved Welsh tribunals and Welsh government departments to improve decision-making for the future. In the context of tribunal reforms (particularly those relating to digitalization) close engagement between government departments and the relevant tribunals service can be crucial to the success of reforms.
82. Welsh legislation has increasingly provided for early resolution of appeals/complaints against Welsh public bodies. There is now a need to review this range of early resolution mechanisms to ensure principled consistency, fairness and independence. The 2015 Bangor Report noted some concerns in the context of early resolution in healthcare decisions, including a lack of clarity around when internal investigations and complaints might escalate into legal proceedings, and evidence of variable practice across a range of health bodies.
83. In this context, the Law Commission is planning a project to examine administrative review (processes allowing individuals to challenge a decision made about them by a public body – normally carried out by relevant public bodies at their discretion). The project will consider and assess the merits of different procedures that are in place (in both England and Wales) and make recommendations with a view to identifying best practice and seeking improvements, both in terms of promoting correct decisions, cost effectiveness and public confidence in decision-making. The specific terms of reference of the Law Commission review have not been determined, however, the impetus for the project was the development of new types of review procedure in high volume areas of non-devolved decision-making (social security and immigration), where central Government both designs, operates and participates (as defendant)

in the process.<sup>41</sup> This type of new bureaucratic redress has been heavily criticized, and can, to an extent, be seen as different to the historic collection of internal review processes used by a broad range of public bodies. In this regard there is no overview of the Welsh landscape; e.g., the number of different types of procedures, the principles and processes deployed, the number of people using the procedures and their outcomes, whether the processes are optional or compulsory before further appeals/complaints. It would likely be beyond the resources of the Law Commission to conduct an extensive review of all these Welsh procedures, but the Law Commission could liaise with researchers examining particular areas of administrative decision-making in Wales (such as housing, education, health and planning) so that a more comprehensive assessment could be developed.

**It is recommended:**

**10. That Welsh Government engages with the Law Commission in its proposed project on Administrative Review and facilitates additional independent research into administrative review and the early resolution of appeals and complaints by devolved Welsh authorities**

### **Administrative Justice Oversight**

84. Research into administrative justice in Wales was originally commissioned by CAJTW, which replaced the Welsh Committee of the Administrative Justice and Tribunals Council (AJTC). Abolition of the AJTC under the so-called ‘bonfire of quangos’ was much criticized.<sup>42</sup> Short term funding was made available from the Ministry of Justice for CAJTW in Wales and the Scottish Administrative Justice and Tribunals Advisory Committee (STAJAC) to operate for an initial two years. CAJTW was given additional funding from Welsh Government, but was disbanded in March 2016. At broader UK level, the AJTC was replaced by an Administrative Justice Forum (AJF) hosted by the Ministry of Justice, bringing together policy-makers, and civil servants across a range of Government departments, with practitioners and academics; discussing thematic issues such as digitalization and proportionate dispute resolution. However, with the loss of the AJTC, CAJTW and STAJAC, there are no longer any bodies with a statutory duty to oversee administrative justice either at UK, or Scottish and Welsh devolved level. Alongside the abolition of the AJTC, the statutory definition of an administrative justice system was also repealed.

85. Recently an Administrative Justice Council (AJC) has been created, its secretariat function is provided by the charity JUSTICE, and it is funded by the Ministry of Justice and charitable sources. The AJC is chaired by the Senior President of Tribunals, and has just over 40 members including senior judges, civil servants, public services ombudsmen and other complaint handlers, legal professional bodies, NGOs and academics. There is a Steering Group of core members guiding its work, plus an academic panel and a pro bono panel of law firms. AJC members with specialist expertise from Wales include; the President of Welsh Tribunals and Head of the WTU, the PSOW’s Director of Policy, Legal and Governance, and the former Secretary to CAJTW. There are no law firms based in Wales on the Pro Bono Panel.

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<sup>41</sup> Robert Thomas and Joe Tomlinson, *Current Issues in Administrative Justice: Examining administrative review, better initial decisions, and tribunal reform* (November 2016):

<https://drive.google.com/file/d/0B9hEf7Oxz59QR2toVWEwQkhVcEk/view>

<sup>42</sup> House of Commons Justice Select Committee - Eight Report Scrutiny of the Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013 (March 2013).

86. The AJC describes itself as being, ‘the only body with oversight of the whole of the administrative justice system in the UK, advising government, including the devolved governments, and the judiciary on the development of that system’.<sup>43</sup> Without wishing to make too much of semantics, given the context of devolution it would be more accurate to say that the AJC is the body having oversight of the range of UK administrative justice systems, including those operating at devolved level by the devolved governments. More specifically the AJC intends to build on the work of the previous AJF with the following aims:

- to keep the operation of the administrative justice system under review
- to consider how to make the administrative justice system more accessible, fair and efficient;
- to advise the Lord Chancellor, other relevant ministers and the judiciary on the development of the administrative justice system;
- to share learning and areas of good practice across the UK;
- to provide a forum for the exchange of information between Government, the judiciary, and those working with users of the administrative justice system;
- to identify areas of the administrative justice system that would benefit from research; and
- to make proposals for reform.

87. This is an extremely wide remit and it will be important to monitor how the AJC attempts this task in the longer-term. It was proposed during its first full Council meeting that ‘working parties would look at specific issues, bringing back papers to the Council so they would be in a position to respond to government policy initiatives’. This is a thematic approach, perhaps designed to direct efforts to areas that can have more immediate impacts on government. A similar approach is taken by the academic panel, which has identified four main themes in the early stages to its work; these are, ombudsman reform (in England), access to data for research purposes, administrative procedures (decision-making, learning and feedback), and knowing more about the HMCTS tribunal modernization programme. There are Welsh dimensions to the latter three areas, and academic panel members should ensure that the Welsh context is explored within the panel’s work. As yet it is early days, but neither the Council or related bodies have so far proposed any specific Welsh or Scottish projects.

88. The AJC pro bono panel of law firms has resolved to examine two main topics; 1. digitization of the courts and automated ‘triage’ in court and tribunal processes (using the online social security tribunals as an example) and 2. stricter enforcement of tribunal rules on state parties and one-way tribunal costs. The pro bono panel is also interested in exploring application of the ‘polluter pays’ principle in administrative justice. This is where those responsible for poor and/or unlawful decision-making ultimately pay the costs of steps taken to redress the matter, including legal costs. This is something that the President of Welsh Tribunals and/or Law Commission could consider for devolved Welsh tribunals – though it perhaps does not sit well with the general Welsh approach of promoting a culture of public involvement and collaboration in public services provision – perhaps the Welsh culture at present is more ‘carrot’ than the polluter pays ‘stick’ approach.

89. The AJC will be an important engagement forum for research, sharing of best practice across jurisdictions, and maintaining awareness of administrative justice. However, it will not be able to perform a systematic oversight function of the Welsh system of administrative justice, it does not have the sufficient resources. Numerous Reports (including those of the Bangor research, CAJTW and the 2016 Justice Stakeholder Group) have recommended retaining a body with

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<sup>43</sup> <https://justice.org.uk/ajc/>



specific functions to oversee administrative justice and tribunals in Wales. In particular this should have powers and resources to conduct a regular programme of observing Welsh tribunals, speaking to members, litigants and their advisers. Such a body would also be able to encourage more joined-up thinking across Welsh Government and engage Government departments with administrative justice issues. It has also been recommended that any successor body to the Justice Stakeholder Group (such as a potential Standing Committee on Justice in Wales) should have administrative justice explicitly within its terms of reference. A specific Standing Committee on Justice in Wales has not yet been established, perhaps given the current Commission on Justice in Wales, but when the Commission reports it may propose some form of ongoing oversight function for justice in Wales and this should explicitly include administrative justice. The Justice Commission's recently proposed Welsh Law Council would not fulfill any justice oversight roles – it would be an independent advisory forum promoting knowledge, skills, best practice and innovation in various matters relating to law and justice.

90. The President of Welsh Tribunals will present Annual Reports to the National Assembly, but it is as yet not clear how such reports will be scrutinized. In the 2015 Bangor Report it was recommended that a judicial lead of Welsh Tribunals could also take a broader view of administrative justice – engaging with other senior figures such as the Administrative Court Liaison Judge for Wales, the PSOW and the Welsh Commissioners.

91. CAJTW's Legacy Report and Bangor research have also recommended that a particular Assembly Committee could be given some degree of responsibility for oversight of administrative justice including the devolved Welsh tribunals administered by the WTU – but also extending to administrative justice in Wales in its broadest sense. The recently established Cross-Party Group on Law could also be seen as an important forum for engaging elected representatives with administrative law and administrative justice issues and oversight. There are then a range of potentially overlapping ways in which administrative justice in Wales can be monitored.

**It is recommended:**

**11. That Welsh the Assembly puts in place a structure for the future oversight of the Welsh Administrative Justice and Tribunals System including the following potentially overlapping options:**

- a. By the President of Welsh Tribunals, including in his Annual Report to the Assembly**
- b. Through a specific independent committee – such as a successor to CAJTW**
- c. By a specific Assembly Committee (most notably the Constitutional and Legislative affairs Committee), or across relevant Assembly Committees**
- d. By the Assembly Cross-Party Group on Law**
- e. By any newly proposed Assembly Standing Committee on Justice in Wales**

**Comparative Perspectives on Administrative Justice**

92. *AJ Wales and Comparative Perspectives* is a rich resource for insights into administrative justice developments across a range of legal jurisdictions. A number of general conclusions from the book are worth reiterating. The more responsibility Wales gains for tribunals (and potentially

courts as well), the more it will have to consider matters such as the balance between the potential amalgamation and fragmentation of particular court and tribunal jurisdictions, and of various appeal rights and judicial review.

93. Funding for tribunals and courts, and for legal aid, is an important consideration. In many jurisdictions legal aid is not commonly available, often it never has been. Systems then have to be designed and/or reformed so that they are fair and accessible for unrepresented litigants, often alongside austerity-based reductions in the capacity of the administration and the judiciary.
94. The 2018 Workshop focused on administrative justice in Federal jurisdictions, particularly the Belgian experience. In the 2000s the Flemish region of Belgium began developing its own system of administrative courts. As is the case in other continental European jurisdictions such as Italy, the Flemish region was constitutionally prohibited from developing its own administrative courts. It had to rely on a technique of implied powers, where distinct institutions could be created by sub-national entities if three conditions exist; 1. where deemed necessary in the exercise of the sub-national entity's powers, 2. that the matter can be regulated in a different manner across the country, and 3. that the impact of the matter is marginal. In some ways the exercise of this power is similar to the drip-feed of devolved competencies to Wales over time. The Flemish region has since set up multiple administrative courts, but this fragmentation may endanger the very objectives sought to be achieved by creating new bodies, objectives such as to improve efficiency in the delivery of administrative justice.
95. The main specialist courts in Flanders operate in three areas; urban planning, environmental sanctions and electoral disputes. Problems of variable caseloads soon emerged with creation of these courts, the urban planning court has a very high caseload (causing a backlog – approx. 1,000 cases per annum), on the other hand the environmental sanctions court had too few cases, approx. 80 per annum. In light of this a number of measures have been trailed to improve efficiency; including the development of a combined administrative structure to support the work of the three courts, cross-ticketing between the courts, a discussion of possible digitalization, restricting individual standing in urban planning, and the possibility of giving more powers to the courts to provide guidance to administrative bodies to redress their errors delivering future systematic improvement.
96. Of particular relevance is the 2017 adoption of a policy note on Flemish administrative case law (*Beleidsplan Vlaamse Bestuursrechtspraak*) by the administrative structure supporting the administrative courts, stating that it is open to the possibility of developing a 'Flemish administrative case law' – in effect general principles of administrative law beyond the case law on specialist areas. In Wales, general principles of administrative law are part of the common law of England and Wales, and as yet there appears to be no evidence of any departure from these principles (e.g., developing a general administrative common law for Wales), but greater pressure towards such a development could be envisaged in future, particularly if Welsh specific public body duties (e.g., with respect to children's rights, well-being goals, and public body 'ways of working') are more regularly litigated. The enhancement of the devolved Welsh tribunals into a more coherent, consistent and principled structure might also catalyse the development of more distinctively Welsh administrative law principles.
97. In Flanders in 2018 the first Chairman of the collective of courts spoke in the Flemish Parliament about the need to ensure open channels of communication between the administrative support structure of the courts, and the government and Parliament, as a means to earlier resolution of disputes. In Wales it has been suggested that the smaller scale of

government and administration could facilitate ease of communication between tribunals and public bodies, including Welsh Government departments. There will be elections in Flanders in 2019 and following the outcome of these it is likely that the development of a properly integrated Flemish system of administrative justice will be back on the agenda. The Flemish Government has already developed a draft bill with the objective of organising relationships between citizens and public bodies, as well as improving public body administration and organization. An ambition is to develop a code containing general administrative law principles (beyond those already applied by the current Flemish specialist administrative courts). As it stands the draft document is some 900 pages long, including explanatory notes and opinions provided by consultative bodies. This can be seen in significant contrast to the Quebec Administrative Justice Act noted above (p16) which provides a much shorter account of what citizens are generally entitled to expect in their interactions with public bodies.

98. The Flemish approach also appears to include a greater willingness to develop jurisprudence with respect to a particular subject matter such as environmental justice, but across its administrative, civil and criminal aspects. Such would be a unique development in Belgium where administrative courts and civil/criminal courts have been separated since the 1940s. In England and Wales, the public-private divide is less pronounced, though there has been a general trend towards specialization in public administrative law (through the creation of a distinctive judicial review procedure and an England and Wales Administrative Court). In future there may be potential for Wales to experiment with law and administrative justice redress organized more around subject matter specialisms, than on traditional public-private lines. The Renting Homes (Wales) Act 2016 may to an extent be an example of this, with the concern being to better regulate all tenancies in the interests of equality and fairness, potentially blurring aspects of the public-private divide as traditionally conceived. With this in mind Wales could eventually follow the lead of some Australian States and Territories by developing combined Civil and Administrative Tribunals – this could in effect be the form the RPTW might take were it also to gain responsibility for ‘public law’ appeals under the Housing (Wales) Act 2014.

### **Technology and Digitalization**

99. The UK Government is undertaking a large-scale project to transform the civil justice system. This is said to be based on principles of fairness, proportionality and accessibility. Much of the transformation is to be achieved by innovations in dispute resolution. This includes increasing use of specially trained case officers to handle more basic case management and case progression duties, enabling the judiciary to focus on areas that warrant their specialist expertise. The second, more revolutionary change is the aim to provide a single online system for starting and managing cases in civil, criminal and family courts and HMCTS tribunals, and the introduction of online document and case management systems. Some cases will be determined entirely online, with a pilot currently being conducted in the Social Security and Child Support Tribunal. It is anticipated that there will be a suite of online, virtual and traditional hearings across different areas of law, with the use of telephone and video-conferencing in a range of contexts.

100. This is an ambitious programme and 2018 Workshop participants noted the importance of ensuring that the needs and context of Wales are taken into account. This context includes geography, demography, (in particular computer literacy), rates of digital exclusion and broadband capacity. Whilst much administrative justice policy, and some dispute resolution processes, are devolved to Wales, significant aspects of redress relating to areas of Welsh administrative law still take place in England and Wales tribunals (in the First-tier, or in the

Upper-tier on appeal on appeal from a devolved Welsh tribunal), or in the HMCTS England and Wales county courts and Administrative Court.

101. To a large extent the benefits of digitalization of courts and tribunals have been assumed, whereas there is only limited empirical evidence concerning the use of digital technologies in justice systems.<sup>44</sup> It may be that little research, if any, has been done to examine the specific potential impacts of the HMCTS transformation programme in Wales, including how to ensure that bilingualism is built into online services from the outset rather than bolted on later in the process. Current experiences of the roll-out of Universal Credit (another system relying heavily on technology) suggest that bilingualism had not be addressed at the outset and is now causing difficulties and delays in transferring people in Wales to the new benefit system.
102. It was stressed during the Workshop that fundamental issues of fair and just dispute resolution remain; new technologies are tools incorporated into or augmented onto system design. It is essential to gain a more sophisticated understanding of what procedural fairness might mean in a digitalized context, and how the fairness of particular systems and technologies can be evaluated.
103. The experience of developing and implementing the HMCTS transformation programme will be an important one for Wales to monitor, in particular in determining what extent of digitalization might be appropriate for the devolved Welsh tribunals and how this is to be delivered. The context of austerity is crucial, reforms are billed as working towards a world class justice system for the digital area, but the context of technological reforms as designed to do more with less, or to achieve better with less must be kept in mind. There are many practical issues including; what kind of platforms will be developed, will they be available to all tribunals, what alternatives will be available for tribunals that can't use particular platforms, what will be the performance benchmarks, what data will be captured from online systems and will this be published, and what might be the role of lawyers within the new systems.
104. In the Workshop it was noted that where populations are remote from their nearest court centres, particularly in rural areas of Wales, access to online procedures can be especially beneficial. An example given during the Workshop was planning cases which already use some online and telephone conferencing methods. Another example is of video conferencing used for disability benefits claims in the SSCS tribunal. This has recently been used on Anglesey, where there are no longer any court or tribunal buildings. The nearest court is in Caernarfon, symbolically across the water and notoriously difficult to get to using public transport. Faced with having no provision at all, a council building has been set aside, rented every Friday for criminal, family and social security appeal hearings (by video link or telephone). An article in the Law Gazette describes this provision as 'ad hoc and agile' given the comparative expense and infrequent use of a court building. However, the adequacy of this provision was raised by local practitioners and judges during a visit of the Commission on Justice in Wales to Bangor University in March 2018. At the heart of such concerns is the comparatively impersonal nature of the process, and matters of procedural fairness including how often decisions have had to be set aside because video links have disconnected during hearings. A related issue is that the vast majority of litigants are unrepresented. Whilst there may be a general expectation that tribunal parties should not need legal representation in order to access and fully participate in processes and hearings, there is evidence that lawyers and other advisers add value in various ways depending on the subject matter of the tribunal and nature

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<sup>44</sup> See Public Law Project, *The Digitalisation of Tribunals: What we know and what we need to know* (April 2018): <https://publiclawproject.org.uk/resources/the-digitalisation-of-tribunals-what-we-know-and-what-we-need-to-know/>

of its proceedings (e.g., how adversarial its hearings are). That current practices in Anglesey are described as, ‘something is better than nothing’, does not bode well for access to justice in Wales.

105. A general theme of Workshop discussions was nevertheless that increased use of technology and digitalization of courts and tribunals is an incoming tide that cannot be turned, and that it is something Wales must prepare for. Participants expressed concerns about ensuring proper public legal education, tackling digital exclusion and continuing to develop broadband networks in Wales.
106. A major concern to participants was the identification of disputes not appropriate for digital resolution. The HMCTS transformation programme stresses that savings used by developing online hearings will be used to provide additional support in cases not appropriate for online resolution. Attention will then need to be paid to how cases not suitable for online resolution are identified as this can include the nature of the case, the facts and legal issues and information about the specific attributes of the parties.
107. Internet access and the quality of access available link closely with wealth, and that digitalization runs the risk of recreating old inequalities in an online way. Limited access to legal aid is also a factor that can entrench inequalities in a justice system. There are many questions for the WTU around what degree of digitalization is envisaged for the tribunals it administers. The cost of technology and related economies of scale is one issue. But Workshop participants also reflected on the idea of having two-speeds or even multiple speeds of tribunal processes. By which was meant, the HMCTS aim to use the same online systems across all courts and HMCTS tribunals need not be adopted by the Welsh tribunals, each could use digital technology to a different degree depending on the nature of the individual tribunals. Any new procedural rules, or Welsh Tribunals Bill that might be developed in the future, should address making the most effective use of technology taking into account the demands of procedural fairness.

**It is recommended:**

**12. That the President of Welsh Tribunals:**

- a. **Incorporates Administrative Justice Principles for Wales into the developing rules and procedures of devolved Welsh tribunals**
- b. **Examines how devolved Welsh tribunals communicate with Welsh Government departments, identifying examples of good practice in terms of feedback and learning and considers including these within his report to the National Assembly**
- c. **Examines how mediation is used by the devolved Welsh tribunals and how it can be used in future; in particular how is mediation funded/to be funded, to what extent is it/should it be provided for in tribunal rules, at what stage of proceedings should mediation take place and does this need to differ across tribunal jurisdictions**
- d. **Reflects on whether there is still evidence of a lack of confidence in the ability of the tribunal justice system as devolved to Wales to deliver processes and outcomes of comparable quality to those delivered by England and Wales combined institutions, and how this lack of confidence could be addressed**

- e. Continues to consider the case for incorporating school admissions and school exclusions appeals into the Education Tribunal for Wales
- f. Reflects on how judicial training for the devolved Welsh tribunals could include a range of other stakeholders who need to be aware of subject-specific legal provisions, and how such combined training and/or broader engagement between the tribunal judiciary and other stakeholders could assist in ensuring value for money in training. To also reflect on how combined training might lead to possible improved awareness of, and confidence in, tribunal justice as devolved to Wales
- g. Examines the comparative extent of digitalization across the devolved Welsh tribunals and the relative challenges and opportunities for each tribunal

13. That in its project on Welsh Tribunals, the Law Commission:

- a. Examines how best to incorporate Administrative Justice Principles for Wales into the developing rules and procedures of any proposed new Welsh tribunal system
- b. Takes into account the significant body of learning in *Administrative Justice in Wales and Comparative Perspectives* and other relevant scholarship
- c. Gathers empirical evidence on the advantages and disadvantages of tribunal restructuring, either by amalgamating current tribunals or by creating a single tribunal operating through specialist chambers, and ensures that any such proposals developed for Wales provide for an ongoing process of evaluation
- d. Addresses the importance of making the most effective use of technology within the devolved Welsh tribunals, taking into account the demands of procedural fairness
- e. Considers the potential for developing Welsh tribunals with civil and administrative jurisdiction in some contexts – in particular those tribunals with jurisdictions covering housing and land law
- f. Considers the creation of a comprehensive system of devolved tribunals (or a single tribunal with specialist chambers) reflecting the full scope of devolution in Wales, based, for example, on broad areas such as:
  - Planning and the Environment
  - Land and Taxation
  - Education
  - Public administration (including local government)
  - Housing
  - Health and Social Welfare
  - Welsh language rights.

## List of Workshop Participants

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Sir Wyn Williams, President of Welsh Tribunals and Justice in Wales Commissioner  
Keith Bush, President of the Welsh Language Tribunal  
Andrew Felton, Secretary to the Commission on Justice in Wales  
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Katrin Shaw, Director of Policy, Legal and Governance, Public Services Ombudsman for Wales  
Kay Powell, Wales Policy Adviser, The Law Society  
Rick Rawlings, Professor of Public Law University College London, Justice in Wales  
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Vivienne Sugar, Bevan Foundation  
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