Reviewing Judicial Review in Wales

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Executive Summary

The Administrative Court Centre in Cardiff was part of reforms to 'regionalise' judicial review. Centres were also established in Leeds, Manchester and Birmingham, with the aim of improving access to public law justice outside London and southern England. Over time the 'Administrative Court in Wales' has been hailed as a constitutional success and a jurisdictional improvement, but its overall impact on access to justice has been less clear. The constitutional position, and jurisdictional improvement, has been further cemented by reforms to the Civil Procedure Rules in October 2020: claims against Welsh public bodies *must* be issued and heard in Wales. This can be contrasted to the 'regionalisation' Practice Direction under which location of the defendant is just one factor going to the most 'appropriate' location for issue and hearing.

Research had shown an initial post-regionalisation increase in 'Welsh' judicial review claims (claims issued by applicants with a given address in Wales, and/or where the claimant solicitor is based in Wales, and/or where the defendant is a devolved Welsh public body). However, this has since waivered and appeared to reduce, notably in terms of the number of solicitors based in Wales issuing Administrative Court judicial review. This can be contrasted with an eventual, and much overdue, increase in the proportion of barristers based at Chambers in Wales appearing in the Court in recent years.

Our research has focused on what are called 'other civil judicial reviews' (that is non immigration civil judicial review claims). According to the Independent Review of Administrative Law (IRAL 2021) some 90% of the total judicial review caseload in England and Wales (Administrative Court and Upper Tribunal) concerns immigration. Conversely, Welsh judicial reviews are overwhelmingly other civil judicial reviews (the main areas being planning, education, social care, and the environment).

Roughly half of the judicial review claims issued in the Administrative Court Office in Cardiff concern south west England (being heard in Bristol or Exeter). Ministry of Justice data shows that whilst the caseload of the Administrative Court Office in Wales (which includes these south west England claims) has remained relatively stable over the years, conversely, the number of other civil judicial reviews issued in the north of England (both Leeds and Manchester) had, by 2019, fallen to one-third of the number issued in 2010, with a further decrease for claims issued in 2020. Birmingham claims are also down, though to a lesser extent. The downward trend in other civil judicial reviews outside London requires further consideration.

Our current research initially aimed to investigate why there seemed to be a decrease, or at least no increase, in judicial review activity relating to Wales specifically in a

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period where both the competence of the Senedd Cymru/Welsh Parliament and Welsh Government, and the volume of Welsh legislation and guidance, had increased. Our research was conceived before IRAL, and this report is not intended as a specific response to IRAL. Nevertheless, it is worth pointing out that many submissions to IRAL expressed concern over access to justice in judicial review claims, noting the difficulties of accessing specialist advice especially outside London including in fields such as social care. IRAL concluded: 'More should be done to make the procedures for bringing claims for judicial review accessible to ordinary individuals'. Published submissions to IRAL conclude that the scales of judicial review are either appropriately balanced between public bodies (including central Government) and individuals, or weighted against individuals. IRAL itself concluded that none of the responses it received suggested judicial review seriously impedes the proper or effective discharge of central or local government functions.

IRAL was challenged on its approach to devolution and confirmed that 'Wales only' judicial review was outside its terms of reference. It took this to mean review of powers that may be exercised only in Wales, including powers exercised by either Welsh Ministers, UK Government Ministers, or both concurrently. However, in recognising that judicial review is a reserved matter, IRAL concluded that its recommendations would apply equally to 'Wales only' judicial review, despite having stated that examination of the nature and conduct of such disputes fell outside its terms of reference. IRAL did, however, stress the importance of further consultation on reform proposals, that a two-tier system of devolved and reserved judicial review would be undesirable, and that all devolved nation respondents saw no case for reform especially if such would curtail access to justice. Our research then fills the gap by specifically considering judicial review in Wales: its dynamics, substantive grounds, values and effects. We adopted a mixed methods approach collating quantitative data on potential and issued claims and their outcomes, and qualitative data, including from semi-structured interviews with solicitors and barristers acting for both claimants and defendants, and from group discussions with experts, alongside a literature review and case law analysis of judicial review claims involving devolved Welsh public bodies.

Our Findings: The Dynamics of Judicial Review in Wales

Pre-Issue

Public bodies in Wales (including health boards, local authorities and Welsh Government) are increasingly alert to the 'threat' of judicial review and are proactive in conscientiously seeking to ensure the lawfulness of their polices, strategies and decisions from the outset, including through seeking external legal advice in the policy development and implementation stage. Whilst this seeking of early advice is related in part to public body culture, our evidence suggests it is also associated with the majority of Welsh local authorities likely having had less experience of the threat of judicial review particularly as compared to many English local authorities, and comparatively less experience of responding to pre-action correspondence. Importantly, this proactivity is seen as contributing to the avoidance of disputes.

The size of governance in Wales, and comparative ease of communication between public bodies is associated with greater knowledge sharing and a more consistent approach to threatened and actual judicial review. However, this communication is also perceived as a means to encourage settlement to prevent controversial legal

issues being determined by a court. The closeness of some charities and other organisations to Welsh Government is also seen as part positive, enabling persuasion and influence in policy development, but with a part possible negative corollary of reluctance to issue, or to otherwise be involved with, litigation.

There was a majority view among our participants that people in certain areas of Wales are less likely than people in most areas of England to seek to use *legal* methods to resolve concerns/disputes with public bodies. It was difficult to pinpoint precise reasons for this. There was a perception at least that such reluctance could be linked to a culture of greater deference to authority, and to the proportion of the population receiving some form of state social security or welfare benefit and/or receiving care services and related concern that legal challenge specifically would cause problems for future interaction with public bodies providing benefits and/or services. A perceived lack of general public awareness and understanding of public law was also consistently raised.

Other reasons for a reluctance to seek legal action included the prominence of other administrative justice institutions in Wales that are comparatively better known and well used, and that are free to access, especially the Public Services Ombudsman for Wales. Our participants suggested that there might be greater trust and confidence in the political branch of state in Wales, including through complaining to local council members, Members of the Senedd and Members of the UK Parliament, and that political representatives might be both more visible and more accessible as compared to England in light of devolution, contributing to a greater sense of political 'efficacy'.

Across the evidence the difficulties accessing legal aid were stressed, alongside a reduction in the number of solicitors able to offer legal aid funded advice in Wales in relation to matters impacting on individuals in their daily experience of public services, especially social welfare, community care and housing. The concept of 'advice deserts' was repeatedly raised especially alongside concerns about the sustainability of specialist practices.

Word of mouth, the intervention of local authorities themselves, and other front-line service providers such as GPs and social workers, were seen as key to people being able to access legal advice. Claims involving strategic local issues affecting a community, and matters of wider legal principle or practice, are more likely to proceed.

In terms of the 'dynamics' of judicial review, we found that out of 41 letters before claim received by a total of 15 Welsh local authorities in a two-year period, only one resulted in 'success' for the claimant at a final substantive hearing. On the other hand, we determined that at least 33 seem to have resulted in some form of benefit to the potential claimant. The most common issues raised at pre-action with local authorities are education, planning and social care. The majority of matters seem to be resolved early with at least some benefit to the potential claimant, few claims are withdrawn after issue and permission success rates in these applications against local authorities are much higher than the Administrative Court average. The most common reason for withdrawal is a negotiated benefit to the applicant/potential applicant, followed by distillation of grounds having improved understanding and exposed weaknesses in the merits, alongside helping the potential claimant appreciate the limitations on the

authority's own powers and resources. Commercial disputes were sometimes resolved through negotiation or mediation.

Post Issue

Whilst there have been some fluctuations, education, planning and community care have been the most prominent subjects of Welsh judicial review even since before the Administrative Court in Cardiff was established. Unlike our data on 'topics', our data on permission success rates and withdrawals cannot be broken down into Welsh and south west England claims, so the following is approx. 50:50 Wales to England claims. Comparatively fewer judicial review claims in the Administrative Court in Wales are withdrawn post-issue (compared to the Administrative Court average). Permission success rates in total are much the same as the Administrative Court average, but the success rate varies more widely over the years, with the proportion of claims found 'Totally Without Merit' especially high in some years.

Our qualitative evidence suggested that judicial review might generally be used less tactically in Wales than in England, with fewer settlements 'at the door of the court'. Welsh Government was seen by interviewees to approach claims and potential claims conscientiously, with no reluctance to produce information, but more generally there remains some difference in culture and approach across particular types of public body operating in Wales. In terms of claims involving the Welsh Ministers, Welsh Government provided data that out of 56 claims/potential claims (2008 to 2020 inclusive) claimants were successful or partially successful in 9 applications. Most claims related to the environment, planning and education, but success for claimants at court was very low in these areas.

Whilst certain topics of claim remain staples, the caseload overall fluctuates based on different types of public law issues that come to light, whether that is due to new legislation, changes in administrative practice, changes in the litigation strategies of particular lawyers, and the comparative awareness of potential applicants. We note also that the proportion of litigants in person (individuals unrepresented at the time of issuing their claims) has increased significantly across the Administrative Court including in relation to Welsh claims. In Wales, litigants in person were seen by our interviewees and discussants as falling into two classes, repeat claimants with matters bordering on vexatious litigation, and those truly desperate to seek access to justice, unable to secure affordable representation, feeling they had no choice but to go it alone.

Our qualitative evidence suggested perceived inconsistency of judicial decision-making at the permission stage. Some of our participants associated inconsistent decision-making with less experienced circuit judges/deputy judges. Others praised local judges with experience of Welsh law and context. Others considered that the application of general public law principles is a skill honed through experience, especially of statutory interpretation, with a regular stream of public law cases being more important than broad practice across Welsh law. This said, we came across many examples of inapplicable English law (especially guidance) being referred to in Welsh applications.

Experiences of the Administrative Court in Wales are generally positive, noting swift service, helpful, knowledgeable staff and expeditious determination of claims.

However, the apparent lack of user group meetings dedicated to Wales in recent years and the curtailment of the annual Administrative Court in Wales Lecture, were noted.

Whilst there is some diversity in substantive caseloads, a large proportion of substantive hearings involving at least one Welsh public body defendant related to planning (three times as many cases as the next most common topic which is education). In planning, the most common grounds of review are irrationality/failure to give reasons. Claimant success is most often associated with legal errors on the part of the public body that are more straightforward to demonstrate objectively. Whilst planning cases are more likely to involve corporations or other organisations, education cases are more likely to be brought in the name of an individual (albeit often involving a wider support network). Education cases tend to turn on narrow illegality (interpretation of statute, guidance and policy). Common matters include school reorganisation/closure, school transport and special educational needs. Environment cases are usually issued by organisations/pressure groups and turn, at least in part, on European law; they tend to have a lower chance of success.

Individuals are the most common type of claimant (about half of all claimants in substantive hearings against Welsh defendants), with one quarter of claimants being private corporations or other organisations, and the final quarter including charities, pressure groups and public bodies. Many claims involve multiple defendants including Welsh Ministers and local authorities, or Welsh Ministers and UK Government Ministers with a degree of concurrent responsibility.

Applications from commercial entities, charities and pressure groups appear to be more common in claims against Welsh public bodies than the Administrative Court average, they have broader significance, but the majority turn on 'routine' grounds of irrationality and error in statutory interpretation rather than on what are seen as more innovative grounds of substantive review. Success rates for claimants in substantive hearings involving at least one Welsh public body defendant stood at 33% (2009 to 2020 inclusive).

On our shared interpretation, judges determining substantive claims show considerable deference/respect to the expertise and constitutional position of initial decision-makers and to the legislation by which they are bound. Notably IRAL suggests the same is true of the judicial ethos in both Scotland and Northern Ireland. Further research could consider whether there is a potentially more deferential attitude to judicial review in the devolved nations, or indeed in general outside London.

The Value, Effects and Future of Judicial Review in Wales

Across our evidence the importance of judicial review as a strong check on government 'legality' was seen as judicial review's most significant purpose and value, over and above its impact in individual cases. Participants associated the value of legality specifically to Wales with the comparative youth and evolution of Welsh institutions of government. However, this more general, and perhaps narrower sense of legality within devolved Wales, also seemed to be combined with support for a broader principle of constitutional legality. This can also be seen in the Welsh Government's own use of judicial review to challenge the United Kingdom Internal Market Act 2020. This is on grounds that the Act: purports to impliedly repeal areas of Senedd Cymru/Welsh Parliament competence and confers powers that could be used

by UK Ministers to substantively amend the Government of Wales Act 2006 such as to cut down the devolution settlement. Both grounds were in effect based on the constitutional principle of legality; that if Parliament intends to legislate contrarily to fundamental constitutional norms, it must do so expressly and not impliedly. The case, *R* (*Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy [2021] EWHC 950 (Admin)* was refused permission, with Lewis LJ finding it to be premature absent the context of any specific legislation made or purported to be made under the 2020 Act. The judge however expressed no views as to the arguability of the grounds, and as such the door remains open to future litigation. The case has generated significant press coverage, and debate, in a sense further demonstrating the constitutional significance of judicial review, even in claims not granted permission to proceed.

However, alongside the constitutional value of judicial review, both the use, and threat of use, of judicial review were also seen as powerful means to ensure swift resolution for individuals of specific grievances, with judicial review commonly seen as being used to secure satisfactory access to public services for those who are legally entitled to them, and most in need.

Judicial review is seen as important to keeping public bodies in Wales honest and transparent, ensuring proper procedures are followed, corners are not cut, and public bodies slow down and take stock. Specific examples were given of where judicial review had catalysed forensic examination of law and administrative practice, instigating improvements in the quality of policy and strategic decision-making. These benefits were noted by respondents largely working with claimants and those largely working with defendants, and even where the same decision was ultimately made 'on the merits'. It was also noted that where the law in England is identical or similar to that in Wales, legal exposition in Welsh claims has led to improved practice across the single jurisdiction of England and Wales.

After our more nuanced research we were less clear that there had in fact been a decrease in Welsh judicial review, but certainly saw no increase. Around half of our research respondents perceived a decrease in litigation activity. They put this down to potentially improved public body practice (sometimes associated with the outcomes of previous litigation), increasing maturity of the devolved institutions, and increased clarity of legislation as a result of bilingual drafting. On the other hand, legal aid reforms limiting access to justice were again raised, and there was no evidence of reduced demand for specialist public law legal services, but rather of reduced capacity to meet that demand.

The suggestion that judicial ethos in devolved, and 'regionalised', judicial review is cautious and deferential can be contrasted to a more 'activist' attitude which some suggest judges in Wales should adopt to social welfare claims, especially in the context of Welsh equality and human rights policy, increasingly supported by legislation and guidance. More 'unique' Welsh public law, relating to rights, equality and well-being, barely features in substantive judgments and it seems that the majority of claims issued raising these points have been refused permission. IRAL notes that the different 'Scottish trajectory' on human rights should be considered in the context of judicial review reform; the same might be increasingly true in Wales, but with the added complication of a single jurisdiction and the reservation of judicial review. These

matters, including lack of awareness of ‘unique’ Welsh public law, the nature of its drafting, and judicial and other attitudes to it, are recognised beyond our research. With various initiatives, in particular involving the Equality and Human Rights Commission, seeking to bring together lawyers and other advice providers, charities, pressure groups and academics, to identify and progress ‘strategic litigation’ based on new Welsh law duties; those involved see such litigation as necessary to explore whether, and how, unique legal frameworks can be harnessed to improve the lives of people in Wales.

Across our evidence, it was agreed that there could be a more significant future role for devolved welsh tribunals, and the current Law Commission project seeking to bring greater coherence to the structure of these bodies was welcomed. There was support for ensuring that access to justice is available as locally and informally as possible, but scepticism about whether this could be achieved by creating additional public law appeal or review rights to devolved Welsh tribunals. Scepticism related to the status of tribunals as compared to the Administrative Court, and concerns that legal aid funded advice and representation would not be available in tribunal claims. Whilst our research did not specifically aim to consider the impact of Covid-19 on judicial review in Wales, across our evidence there was a broad consensus that courts in Wales had coped well with moving online during the pandemic and that there could be opportunities to improve access to justice through use of technology.

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Background: The 'Regionalisation' of Judicial Review

Establishing what was initially known as an Administrative Court Centre in Cardiff was part of reforms to 'regionalise' judicial review. Centres were also established in Leeds, Manchester and Birmingham. For some there was no need to establish 'regional' centres; the interests of local claimants, they argued, could be well served by the use of video links and other technology such as filing documents by email (views noted in Nason and Sunkin 2011). Others argued that this was not sufficient to ensure access to justice (Judicial Executive Board, Civil Sub-Committee 2007). Research had shown, for example, that the London and south east England centricity of public law legal practitioners meant there was a disproportionate lack of access to justice outside these areas, marked by much lower numbers of judicial review claims (Bridges, Mezaros and Sunkin 1995; Review of the Crown Office List 2000). The precise case for regionalisation varied across the regions affected. However, a central aim was to improve access to justice by ensuring that claims be issued and heard in the most appropriate location; thus, saving costs for claimants and their lawyers, and potentially catalysing better local provision of public law advice services.

The factors going to 'appropriate' location of issuing Administrative Court claims are contained in Civil Procedure Rules Practice Direction 54 and include the location of the parties and their legal advisers. There is a specific amendment for Welsh claims such that from October 2020 claims against Welsh public bodies must be issued and heard in Wales as a *rule*, replacing the previous combined CPR and case law *presumption* that this should be the case.[2] The CPR change was a recommendation of the Commission on Justice in Wales (CoJ) (CoJ 2019: recommendation 24).

There is evident constitutional importance in ensuring that claims against Welsh public bodies be determined in Wales, and the Administrative Court *in* Wales has generally had a distinctive presence over the years: acting as a partial catalyst to academic and practitioner engagement with public administrative law and administrative justice in Wales (See e.g., Gardner 2016 and 2021; Nason (ed) 2017). Research has been conducted into the impact of opening the Administrative Court in Wales (Nason and Sunkin 2011; Nason 2014 and 2016), the most recent findings of which can be found in the submission of Nason and the Public Law Project (PLP) to the Commission on Justice in Wales (Nason and PLP 2018).

There are numerous ways to identify 'Welsh' judicial review claims that we won't detail here (for information see Nason and PLP 2018), but they include the address of the claimant, the location of the lawyers when claimants are legally represented, the

[2] Civil Procedure (Amendment No. 3) Rules 2020 amend Part 7 including the following provisions: Claims against Welsh public bodies to be issued and heard in Wales: 7.1A. Unless required otherwise by any enactment, rule or practice direction, any claim against Welsh public bodies which challenges the lawfulness of their decisions must be issued and heard in Wales. Claims against Welsh public bodies to be forwarded for issue in Wales: 7.1B. If a court or centre in England receives a claim which should pursuant to paragraph (1) be issued in Wales a court officer shall forward it for issue in the Administrative Court Office in Wales or other appropriate court office in Wales. CPR Part 54 amended as follows: 1.3 This Practice Direction is subject to the requirement in rule 7.1A that any claim against Welsh public bodies which challenge the lawfulness of their decisions must be issued and heard in Wales.

identity of the defendant, and the issues in the case (where these are reported). From our previous analysis of Administrative Court Office data from 1 May 2007 (two years prior to regionalisation) up to and including 30 April 2018, the number of Welsh claimants in other civil (non-immigration) judicial reviews in the Administrative Court, and the number of solicitors firms based in Wales instructed to represent claimants in these proceedings had fluctuated but seemed to have reduced in recent years. We note here that our research focuses only on 'other civil claims', and not immigration claims or criminal judicial review. The vast majority of judicial review claims relating to Wales are 'other civil claims', in contrast to the overall Administrative Court and Upper Tribunal judicial review caseload (some 90% of this total judicial review caseload concerns immigration (Independent Review of Administrative Law 'IRAL' 2021; para 12)).

Our more detailed Welsh data can be contrasted, to an extent, against general data (in Figure One below) which shows that whilst the number of claims issued in the Administrative Court in Cardiff has fluctuated over the years, there is no downward trend. This disparity between Welsh claims and overall claims may be due in part to the fact that in 2012 the Cardiff Administrative Court Office gained formal responsibility for administering claims relating to the geographical area of the Western Circuit (the south west of England) and even before then a significant proportion of claims issued in Cardiff concerned south west England (based on location of claimants, their lawyers and the defendants). Roughly half of the other civil judicial review claims issued in the Cardiff Administrative Court Office relate to south west England, and these claims are usually heard on Circuit in Bristol or at Exeter Combined Court.

The starting off point for this current research has been to investigate why there seems to have been a decrease in judicial review activity relating to Wales, or at least no increase, in a period where the legislative competence of the Senedd and Welsh Ministers has increased and where there has been an increased volume of Welsh law (particularly including regulations, and statutory and non-statutory guidance).

As Figure One shows, the number and proportion of claims issued in Cardiff has been variable but there is no obvious trend of either increase or decrease. As we were finalising our report, data for claims issued in 2020 was published and is noted in Figure Two. We can see here a notable decrease in the number and proportion of claims issued in Leeds and Manchester, both have more than halved, contributing to an overall decrease in judicial review outside London. This reduction in regional judicial review generally may be a cause for concern, suggesting that access to justice has decreased, especially in northern England. This is a matter that requires further research, not least as our own research in this report shows there can be various inter-locking reasons to explain apparent, and actual, declines in judicial review litigation.

Figure One: Other Civil Judicial Review by Location of Issue[3]										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
	No/%	No/%	No/%	No/%	No/%	No/%	No/%	No/%	No/%	No/%
Leeds	224 (11%)	211 (10%)	220 (11%)	182 (8%)	165 (9%)	125 (7%)	82 (5%)	77 (4%)	84 (5%)	88 (6%)
Manchester	222 (11%)	214 (10%)	243 (12%)	261 (12%)	167 (9%)	149 (9%)	111 (7%)	121 (7%)	130 (8%)	100 (6%)
Birmingham	146 (7%)	185 (9%)	149 (7%)	159 (7%)	140 (7%)	138 (8%)	117 (7%)	130 (8%)	141 (9%)	114 (7%)
Cardiff	68 (3%)	80 (4%)	73 (4%)	96 (4%)	82 (4%)	67 (4%)	76 (5%)	81 (5%)	67 (4%)	76 (5%)
Sub Total Outside London	660 (33%)	690 (33%)	685 (33%)	698 (32%)	554 (29%)	479 (27%)	386 (24%)	409 (24%)	422 (27%)	378 (24%)
London	1366 (67%)	1430 (67%)	1395 (67%)	1480 (68%)	1345 (71%)	1272 (73%)	1211 (76%)	1311 (76%)	1162 (73%)	1185 (76%)
Total	2026	2120	2080	2178	1899	1751	1597	1720	1584	1563

Figure Two: Other Civil Judicial Review by Location of Issue January to September 2020		
Location	Number	% of total
Leeds	65	4%
Manchester	64	4%
Birmingham	118	8%
Cardiff	63	4%
Sub Total Outside London	310	20%
London	1,232	80%
Total	1542	

The data clearly demonstrates an overall downward trend in other civil judicial review claims issued outside London. However, 2020 in particular might be considered a unique year in light of the impact of the Covid-19 pandemic. Across our evidence it was suggested that the pandemic could mean many people have had less contact with public services providers (whilst some of course may have had more), and also that there is a reluctance to challenge emanations of the state in times of crisis. On the other hand, claims relating to coronavirus regulations, including lockdown regulations and other matters such as furlough arrangements, are more likely to have been issued in London, in part linked to the fact that the majority of specialist practitioners (especially those specialised in matters of high constitutional principle) are based in London.

It seems in general that access to justice outside London remains of concern, and that this could well be due to costs and other difficulties in accessing judicial review, in particular reductions in legal aid. The difficulties of accessing and funding judicial review have been described as 'public law's disgrace'. As Tom Hickman puts it:

[3] This table is based on location of issue so does not take into account claims issued in one location which are subsequently transferred to another under the CPR.

> Public law is squarely directed at protecting individuals. Public lawyers, both in court and outside it, debate endlessly the best form of substantive rules to achieve this end. Yet despite the fact that those who work in public law are supposed to be attuned to the importance of substance over form, public law is merrily carried on with very little concern for the fact that for most people judicial review is simply not available (Hickman 2017).

Further, Joe Tomlinson describes accessing legal aid funding for judicial review as 'byzantine' and exposes that whilst in 2001, 36.7% of applications for judicial review were supported by legal aid, in 2015 just 4.4% were (Tomlinson 2019).

Evidence to the Commission on Justice in Wales shows that Wales has been disproportionately affected by legal aid cuts, with a real terms reduction in expenditure between 2011/12 to 2018/19 of 37% in Wales, as compared to a 28% reduction in England (CoJ 2019: para 3.11). The Welsh Government is funding the continued provision of advice services by Citizens Advice/Cyngor ar Bopeth and Shelter Cymru (Wales' two biggest advice providers) that would have been discontinued due to reforms brought in under the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012. A National Advice Network Wales (NAN) was established by the Welsh Government in March 2015 consisting of key stakeholders including funders, advice providers, representative organisations, and other partners. It is tasked with providing expert advice, guidance and support to Welsh Ministers on how to strategically develop the provision of social welfare information and advice services throughout Wales. Six Regional Advice Networks (RANs) have also been established across Wales. Despite these mitigations, the Commission on Justice in Wales concluded that a far reaching and radical plan is needed to address the advice deficit caused by LASPO and that people in Wales are currently being let down by the existing devolution settlement so far as access to justice is concerned (CoJ 2019).

Many evidence submissions to the recent Independent Review of Administrative Law (IRAL) expressed concern about access to justice in judicial review claims. The Welsh Government raised legal aid in its own letter to IRAL:

> We also recognise the need to strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government. But the current arrangements do not achieve this balance, in particular due to cuts in legal aid in England and Wales under the reforms introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. These have severely limited access to specialist legal advice and there are 'advice deserts' across Wales and England in public law generally and in particular fields such as social care. In Wales the Welsh Government has stepped into the breach in an effort to mitigate this through our Single Advice Fund, but we cannot replace what has been lost in an area where the UK Government currently has responsibility for policy and delivery.
>
> There is therefore a clear barrier to people legitimately accessing judicial review through lack of means. Any further limitation on the availability of judicial review

> would serve only to exacerbate this obstacle to redress. (Welsh Government (Jeremy Miles AS/MS) letter to Lord Faulks, October 2020).

IRAL concluded that: 'More should be done to make the procedures for bringing claims for judicial review accessible to ordinary individuals' (IRAL 2021; para 4.173). IRAL noted 'the concerns that have been expressed to us on all sides about the impact of the current costs regime and the costs of conducting judicial review claims' (IRAL 2021; para 4.11). However, it avoided making any specific recommendations about costs.

Our project was conceived before the IRAL was established and should not be considered as a response to IRAL, or to the subsequent UK Government further consultation. We note that IRAL was tasked to examine 'trends in judicial review of executive action…in particular in relation to the policies and decision making of the Government' (IRAL ToR 2020). It was also asked to 'bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can properly be balanced with the role of the executive to govern effectively under the law' (IRAL ToR 2020). IRAL's report was published just as we were finalising our own research. We have examined submissions to IRAL published on the website of the UK Administrative Justice Institute. If anything, these submissions suggest that the scales of judicial review are appropriately balanced or more likely weighted against individuals (Zander 2021). IRAL itself concluded that none of the responses it received suggested that judicial review seriously impedes the proper or effective discharge of central or local government functions (IRAL 202; para 35).

There are specific devolution issues raised by the prospect of further judicial review reform. In its IRAL submission, Public Law Wales (PLW) pointed out concerns about implications for Wales:

> Parliament has specifically reserved judicial review from the legislative competence of the Senedd Cymru (Welsh Parliament) 'judicial review of administrative action'. As far as the subject matter of the Panel's deliberations is concerned, the UK Parliament is therefore the only legislature that Wales has. For a reform of judicial review to be contemplated without full and proper consideration of how such reform might impact, even if only consequentially, on the exercise of devolved powers in Wales would mean that Parliament was being invited to neglect its responsibilities to Wales as the relevant legislature in relation to such matters. (PLW 2020: para 25).

PLW also point out that the IRAL Call for Evidence presupposes that entitlement to judicial review could depend on the *nature of the power being exercised*, which implies (in particular because of the impact of devolution) that entitlement to judicial review might depend on the *identity of the decision-maker* (PLW 2019: para 19). Most fundamentally PLW considers that this demonstrates a misunderstanding of judicial review; it is a procedure for challenging the lawfulness of executive action not a substantive legal right. In general, the entitlement to seek judicial review does not and should not depend on the identity of the decision-maker. If it did, as PLW stress, the IRAL Call for Evidence opens up the possibility that the availability of the judicial review procedure for challenging acts of the Welsh Ministers might be materially different from

that relating to acts of UK Ministers even though the nature of the acts was identical. Further to this, where Welsh Ministers and UK Ministers have concurrent powers, IRAL contemplates that the rights of affected persons to seek judicial review could differ depending on which administration had exercised the powers.

In its report the IRAL Panel clarifies that it has taken the reference to 'UK wide' powers to mean powers that may be exercised across the whole of the United Kingdom, and that this does not include powers in respect of matters that are devolved or transferred under one of the UK's devolution settlements. The IRAL Panel take 'England and Wales' to mean powers that may be exercised in England and Wales as distinct from powers that may be exercised only in England or only in Wales. It includes England only powers within its terms of reference, but excludes Wales only powers, which it takes to include powers exercisable only in relation to Wales by Welsh Ministers and powers exercisable only in relation to Wales by UK Ministers (whether or not these are concurrent with powers of the Welsh Ministers). Whilst IRAL considered these Wales only powers to be outside its terms of reference, nevertheless, as judicial review is reserved, implementation of its recommendations will equally affect Wales only powers (unless specific exceptions are made). The upshot seems to be the production of reform proposals that impact equally on Wales, whilst specifically excluding Wales from the terms of reference of the review that led to those proposals. In fairness, IRAL agrees 'that it would be highly undesirable were statutory intervention to result in a "dual" or "two-tier" system', in which 'UK wide' reserved or excepted matters and 'other' matters are treated differently'. It also notes that respondents across all three devolved nations raised concerns about this matter and stresses the 'importance of consultation over any proposals for reform that might emerge' (IRAL 2021; pp.127-128). IRAL urges not to underestimate the risk of statutory intervention in judicial review becoming a matter of serious dispute between the UK Government and devolved administrations (IRAL 2021; para 5.49).

IRAL also concludes that responses from all three devolved nations were either opposed to, or not persuaded of, the need for reforms to judicial review, and in particular respondents were opposed to any curtailment of access to judicial review. This opposition to reform is reflected in the Counsel General for Wales, Jeremy Miles AS/MS statement to the Annual Legal Wales Conference on 9 October 2020: 'Access to the supervisory jurisdiction is a key principle of administrative justice, there is no case for a diminution in the availability and scope of judicial review'. This point is repeated in terms in the Welsh Government's letter to IRAL's Chairman Lord Faulks.

The UK Government has since responded to IRAL, accepting the Panel's two recommendations for legislative reform, and its other recommendations to reform the Civil Procedure Rules.[4] However, the Government also proposes further reforms, all of which have potential to limit access to, or the impact of, remedies obtained through

[4] The recommendations were summarised as follows in the UK Government's response to IRAL: a. legislating for the introduction of Suspended Quashing Orders; b. legislating to reverse the effect of the Supreme Court decision in Cart and re-affirm that decisions of the Upper Tribunal to refuse permission to appeal are not subject to the supervisory jurisdiction of the High Court; c. changes in procedure to be considered and taken forward by the Civil Procedure Rule Committee (CPRC): i. removing the requirement for a clam to be issued "promptly", but retaining the 3-month time limit; ii. providing further guidance on intervenors; iii. providing for an extra step in the procedure of a Reply, to be filed within seven days of receipt of the Acknowledgement of Service.

the judicial review procedure.[5] It has not been the aim of our research to evaluate IRAL or to respond to the Government's current consultation (any response we make will be published in due course). Rather our research has aimed to specifically consider what judicial review looks like in Wales, in particular: to supplement existing quantitative data and analysis with qualitative data from semi-structured interviews and various groups and forums to understand the 'dynamics' of judicial review in Wales (resolution of challenges and potential challenges before final hearing); to understand the nature of substantive judicial decision-making at final hearing stage and on appeal; and to understand the value and effects of judicial review specifically in Wales.

Methodology

Our research was planned pre-Covid-19. Our initial intention had been to adapt previous survey tools developed by academics in association with PLP, to conduct a quantitative and qualitative study into the dynamics of judicial review litigation affecting Wales (resolution of challenges before final hearing) and the value and effects of judicial review (its positive and negative impacts on claimants and defendants). It became clear on discussion with practitioners, that as the size of the caseload per-annum is small, collecting reliable quantitative data would require many years of case information and a very high response rate. The context of Covid-19 made it especially difficult for practitioners to access data from their files and information systems. We instead conducted semi-structured interviews using Microsoft Teams: with 11 interviewees having extensive experience advising and representing both claimants and defendants in judicial review in Wales, and local authorities (Interview questions at Annex One). Interviewees were selected based on their experience of judicial review in Wales, including at the Administrative Court in Wales, and included a mix of solicitors and barristers, most with experience across England as well as Wales.

We made Freedom of Information requests to obtain data about pre-action activity in local authorities and received data from Welsh Government on its involvement in judicial review proceedings. We attended and participated in various events and discussion forums, during which we took contemporaneous notes. In particular: Young Legal Aid Lawyers Cymru (Access to Justice and Legal Advice Deserts in Wales, and Spotlight on Asylum and Immigration); EHRC and Swansea University 'Strategic Litigation in Wales'; the Legal Wales Foundation Legal Wales Conference; Legal News Wales St David's Day Celebration Events (inc EHRC, 'Making Change Happen'; Cheshire & North Wales Law Society, 'Use of Welsh in the Legal System'; and Public Law Wales, 'The Unique Nature of Public Law in Wales'). We held discussion events on our research questions, and early findings, with the Wales Governance Centre and Public Law Wales (PLW) (our research has been a standing matter in PLW Committee meetings). We analysed substantive judicial review judgments, including judgments on appeal where relevant, in claims against Welsh public bodies, and conducted a comprehensive literature and data review.

[5] The Government's proposals include: a. legislating to clarify the effect of statutory ouster clauses; b. legislating to introduce remedies which are of prospective effect only, to be used by the courts on a discretionary basis; c. legislating that, for challenges of Statutory Instruments, there is a presumption, or a mandatory requirement for any remedy to be prospective only; d. legislating for suspended quashing orders to be presumed or required; e. legislating on the principles which lead to a decision being a nullity by operation of law; f. making further procedural reforms (which would need to be considered by the CPRC).

The Dynamics of Judicial Review

Judicial review is an area with high rate of settlement. A large proportion of potential claims settle pre-issue, with research estimating this at around half of all matters (Bondy and Sunkin 2009b; Nason and Sunkin 2011). Claims settle for a range of reasons; including public bodies wishing to save the time and costs of litigation and/or recognising on reflection that the matter had legal merit. Pre-issue settlement is usually in favour of the claimant, at least in part (Bondy and Sunkin 2009a). Post issue, a significant proportion of claims are withdrawn, and more still 'drop out' after a permission decision (usually due to settlement); settlement rates at various stages differ across topics (e.g., homelessness, immigration and actions against the police). In our research we focus only on civil other (non-immigration and asylum) claims, though we note some issues raised about differences in asylum and immigration judicial review in Wales as compared to England. Unique factors apply to immigration and asylum claims which are mainly issued against central UK Government departments (these factors include immigration detention and the role of the Upper Tribunal Immigration and Asylum Chamber) (for a comprehensive analysis see Thomas and Tomlinson 2019).

Around 33% of other civil judicial review claims are granted permission at initial paper permission stage, with permission grant rates at oral renewal being somewhat higher (up to around 50% (Nason 2016)). Permission grant rates vary according to subject matter, and research demonstrates inconsistency in judicial decisions, with evidence of some judges more likely to grant permission in particular subject areas, exposing quite stark differences in grant rate by judge over the years (Bondy and Sunkin 2008 and 2009a). Permission grant rates have varied more widely over the years in the regional Administrative Courts as compared to the RCJ in London (Nason 2016 and 2021). This is in part due to the different mix of topics issued across the regions.

Research suggests that up to three quarters of judicial review claims are brought by individuals, with other claimants being representative organisations, charities, commercial organisations, and other public bodies (such as local authorities) (Bondy, Platt and Sunkin 2015; Nason 2021). It also shows that the number and proportion of other civil non-immigration claims issued by unrepresented litigants has increased (from around 9% in the mid 1980s and 1990s, to 21% in 2007/08 to 37% in 2017/18).[6] Many judicial review claims involve people who are vulnerable and/or disadvantaged, and there is a link between social deprivation, the incidence of judicial review claims, and (in some subject areas) the likely success of those claims (Sunkin *et al* 2007 and 2010; Bondy, Platt and Sunkin 2015). Research also draws attention to the 'critical role of access to legal services in enabling the bringing of challenges' (Sunkin *et al* 2007: 566) and that restrictions on legal aid funding to support judicial reviews have likely had a disproportionately adverse effect on those forced to resort to litigation to obtain services to which they are legally entitled (Bondy, Platt and Sunkin 2015).

Other civil judicial review claims issued per head of population in Wales have been consistently lower than the England and Wales average and *had* been lower than

[6] Our initial research compared years before and after regionalisation of the Administrative Court, with date ranges therefore from 1 May to 30 April in any given year (reflecting that the regional courts began operating towards the very end of April 2009).

claims per head of population originating in northern England, until very recently. For claims issued in the Cardiff Administrative Court (which includes both Welsh and south west England claims) other civil judicial reviews are less likely to be withdrawn pre-permission than the Administrative Court average, however, while figures vary over the years, claims issued in Wales have roughly the same chance of permission success as the Administrative Court average. In Cardiff a smaller percentage of claims are withdrawn post-permission, and claimant success rates are slightly lower than the Administrative Court average (Nason and PLP 2018).

The Dynamics of Judicial Review: Evidence

In the following sections we discuss the issues raised on the dynamics of judicial review across our evidence (interviews, data, forum and discussion minutes, and events).

Judicial Review Pre-Action

Across our evidence there was a view that public bodies in Wales (including health boards, local authorities and Welsh Government) are increasingly alert to the 'threat' of judicial review and are proactive in conscientiously seeking to ensure the lawfulness of their polices, strategies and decisions from the outset, including through seeking external legal advice in the policy development and implementation stage. Whilst interviewees related this seeking of early advice in part to public body culture, they also associated it with the majority of Welsh local authorities likely having had less experience of the threat of judicial review particularly as compared to many English local authorities, and comparatively less experience of responding to pre-action correspondence. Interviewees saw the seeking of expert advice early on in the process of responding to matters arising as contributing to the avoidance of disputes.

Another reason given for why comparatively few disputes arise, or that few reach the courts, was the size of governance in Wales, and in particular the comparative ease of communication between local authorities themselves, and across other public bodies. The evidence suggests that there is knowledge-sharing and co-ordination in approaches across local government in Wales in particular. The role of the Welsh Local Government Association was seen as important in terms of raising awareness and organising training and information sharing, but also (and perhaps negatively) it was perceived as encouraging settlement in part to prevent controversial legal issues being determined by a court.

From interviewees and discussion events, it was noted that whilst local authorities in Wales may face unique challenges, they do not perhaps face the same extent or kinds of challenges faced by some London Boroughs (among the most judicially reviewed bodies in England and Wales) operating under severe resource constraints. Whilst local authorities in Wales have seen significant funding cuts, in general there was felt to have been more ring-fencing in Wales of funding for key public services. Though in this respect, the various reports of the Wales Governance Centre Fiscal Analysis Team are worth examining and suggest potentially more difficult times ahead (see e.g., Wales Governance Centre, Fiscal Analysis Team 2021).

Our interviews and other engagement events disclosed a majority view that people in certain areas of Wales are less likely than people in most areas of England to seek to use *legal* methods to resolve concerns/disputes with public bodies. Participants found

it difficult to pinpoint precise reasons for this, and it is an area that would benefit from further multi-disciplinary research. There was a perception at least that such reluctance could be linked to a culture of greater deference to authority, and to the proportion of the population receiving some form of state social security or welfare benefit and/or receiving care services and related concern that legal challenge specifically would cause problems for future interaction with public bodies providing benefits and/or services. A perceived lack of general public awareness and understanding of public law was also consistently raised across the various forums and events, and in interviews.

Other reasons for a reluctance to seek legal action included the prominence of other administrative justice institutions in Wales that are comparatively better known and well used, and that are free to access, especially the Public Services Ombudsman for Wales. The extent to which the ombud is publicly recognised as a 'one stop shop' for complaints against public bodies in Wales was also noted. Our participants suggested that there might be greater trust and confidence in the political branch of state in Wales, including through complaining to local council members, Members of the Senedd and Members of the UK Parliament, and that political representatives might be both more visible and more accessible as compared to England in light of devolution. This might be linked to a greater sense of political 'efficacy' in Wales (Henderson and Wyn Jones 2021).

More generally, a lack of awareness and education around public law legal rights was cited as a reason for comparatively lower rates of judicial review challenge per head of population, as compared to England, and to the overall England and Wales average. The impact of legal aid cuts in Wales was noted by all participants across all evidence sources. To an extent this is borne out by empirical evidence. The number of claims issued by claimants with addresses in Wales, and the involvement of solicitors based in Wales (on the claimant side at least) decreased around the time that LASPO came into effect. However, as the overall number of claims is small, and other factors are at play, it is difficult to be clear of a causal connection. Nevertheless, LASPO was cited across our evidence as a reason for the reduction in claims.

Across the evidence it was suggested that a significant factor impacting judicial review caseloads has been a reduction in the number of solicitors able to offer legal aid funded advice in Wales in relation to matters that impact individuals in their daily experience of public services, especially in relation to social welfare, community care and housing. The means test for legal aid was cited as a concern, and the low rates of remuneration for legal aid services. Our interviewees on the whole seemed to be doing less legal aid funded work and more private work over the years and finding it somewhat difficult to navigate access to legal aid funding. A regular occurrence was securing legal aid in light of there being children involved in the matter, and this seems to be one reason why education claims in Wales are comparatively more common. However, lack of awareness that legal aid could be secured in cases involving children was also noted alongside potentially broader misconceptions about the scope of legal aid withdrawn post LASPO.

The view was expressed across the evidence, that charities and pressure groups based in Wales are particularly close to Welsh Government, including in terms of their funding streams, and are used to being involved in policy and strategy development

with significant potential to influence and persuade. It was said that the corollary may be a reluctance to issue, or be otherwise involved in, litigation against the Government and/or other public bodies.

The evidence suggests that potential claims involving strategic local issues affecting a community and matters of wider legal principle, practice or constitutional importance, are more likely to proceed to issue, and indeed to final resolution through the courts. This seems to be because in these cases local people group together and collectively have greater capacity to navigate channels for accessing specialist legal advice, including legal aid funded advice, or exploring 'crowd funding' options. That said, even in relation to these cases, there is an initial lack of awareness of how public body decisions could be challenged. We heard both in relation to claims involving individual grievances, and in relation to wider community challenges, that word of mouth, the intervention of local authorities themselves, and other front-line service providers such as GPs and social workers, were sometimes crucial in people being made aware of and being able to access specialist legal advice.

Whilst across the evidence it was suggested that changes to legal aid funding for work done at the permission stage focuses minds on the strength of an application, there was also a significant view that practice in Wales has generally been comparatively cautious, and few participants thought that new funding regulations alone would be a reason for not progressing claims that might otherwise have been issued.

Whilst public bodies in Wales may often be cautious in addressing the legal implications of strategies and policies early on, we cannot glean from our evidence whether the standard of individual decision-making (so-called 'street-level bureaucratic' decisions) is necessarily better than that say of the average local authority in England. Our evidence suggests that there is poor decision-making in Wales, especially in the fields of health and social care (backed up by ombuds complaint data and regulatory outcomes, for example) and that a comparative lack of advice and advocacy infrastructure is a reason for lower Welsh claims per head of population in these areas. This might be surprising given the advocacy provisions in the Social Services and Well-being (Wales) Act 2014. However, it is worth noting that these statutory requirements do not extend to legal advocacy (or advice).

A more specific infrastructure of legal advice and advocacy in relation to judicial review, has had many years to develop in other areas, for example across various London Boroughs. Nevertheless, even given the long-standing London-centricity of the Administrative Court, there remain areas in Greater London where information, advice and advocacy structures are less well-developed. In Wales the infrastructure development post 'regionalisation' has largely taken place in urban south Wales, and the progress of this development has been impacted by legal aid cuts.

Whilst our evidence from interviews, events and forums suggests that the most controversial decisions do drive people (eventually) to specialist legal advice, the more day-to-day injustices are less likely to be recognised as such, and the network of bodies like Citizens Advice, Law Centres, charities and so on, could still benefit from greater development and connection, and ultimately exhibits less of a 'litigation culture' compared to that which exists in parts of England. The importance of individual lawyers was noted across the evidence, in particular that in some parts of Wales there

may be only one or two specialist lawyers covering a large population raising concerns over sustainability that have also been noted in the context of criminal law defence services.

The interview evidence suggests that the most common origin of instruction to give advice in relation to potential judicial review claims on the claimant side, is through word of mouth including recommendation from generalist advice providers such as Citizens Advice, charities, and other solicitors. On the defendant public body side, there is often a pre-existing relationship either between the body and a particular law firm, or with a particular lawyer, but again reputation and word of mouth also feature. The 'Panel' system for counsel was noted as key to instructions received in Wales, and the proportion of counsel based at chambers in Wales appointed to the Welsh Government Panel has increased in recent years especially at Junior level.

Judicial Review and Local Authorities in Wales

We sought to understand more about the pre-action stage by making Freedom of Information requests to local authorities in Wales. Local authorities are common defendants in Welsh judicial review, with other bodies being Welsh Ministers, health authorities, police forces, inferior courts and tribunals, and occasionally central UK Government departments. Our evidence shows that Welsh claims often involve multiple defendants, particularly where Welsh Ministers are joined as having some concurrent responsibility alongside UK Government Ministers or local authorities in relation to particular issues, or where the claim is one of important legal principle of practice and representative groups intervene.

We asked local authorities various questions about letters before action and judicial review proceedings commenced in a two-year period from 1 April 2018 to 30 March 2020. Our FOI requests received full substantive responses from 15 local authorities and 2 partial responses. Of the partial responses, one authority invoked s.12 of the FOI Act and did not respond fully on the basis of the costs involved in collecting the data, but it did inform us that it received 19 letters before claim in the two-year period. The other noted that letters before action and their responses are not recorded in any specific database and are dealt with by a variety of staff within the authority's legal section and as such it would be too costly of staff time to provide information on all letters before claim. Intriguingly, the authority responded that a search of emails for the phrase 'judicial review' turned up 250 results in a five-month period. Of course, many of these results would not have related to letters before action, but the information is useful nonetheless. The authority did provide information on the 5 claims that had proceeded to issue. In the two-year period, most authorities had received between 1-3 letters before claim, two had received 8. Both authorities receiving 8 letters before claim, the authority that received 19, and the authority that could not tell us how many it received, were councils in urban south Wales.

In the two years from 1 April 2018 to 30 March 2020, 15 authorities received in total 41 letters before action relating to potential judicial review. These constituted:

- 11 letters before action relating to education, and a further 2 relating specifically to school re-organisation

- 6 relating to social care or social services, and a further 4 relating specifically to children's social services or childcare
- 1 relating to safeguarding/family support (which could in effect be another children's social services claim).
- 6 relating to planning, 1 to land, 1 to property and 1 to construction.
- 2 relating to council tax
- 3 relating to community libraries
- 1 relating to coroners
- 1 relating to homelessness
- 1 relating to parking

The highest area of pre-action correspondence was education and other matters relating to children (18 of the letters before action); followed by planning (land, property and construction) and social care.

Of the 41 letters before action, proceedings were issued in relation to 16. We can add here that for the authority which was not able to tell us how many letters before claim it had received, it could tell us that proceedings had been issued on 5 occasions, and that 4 claims related to housing with 1 relating to children's services. So, proceedings were issued in a total of 21 claims relating to 16 local authorities. Proceedings were withdrawn in relation to 7 claims before a permission decision. For 3 of those claims this was because agreement was reached by consent between the parties. The 4 other withdrawn claims related to the local authority that could not give us pre-action information, or other details, so we don't know the reasons for withdrawal of these claims.

Of the 14 matters going to a permission decision, paper permission was granted in relation to 10. This permission success rate of 71% is much higher than the England and Wales Administrative Court average of around 33%.

Of the 10 claims that succeeded at paper permission stage, 4 were withdrawn (from what we can see due to agreement between the parties). In 3 claims there was an oral renewal of permission, 2 were granted permission the other refused. In 6 claims the substantive case was decided in favour of the defendant. In 1 it was decided in favour of the claimant initially and the defendant on appeal. In only 1 case was the claimant successful at substantive hearing and then only in part. In a two-year period, 15 authorities received in total 41 letters before claim, and one local authority whilst not able to tell us how many letters before claim, was subject to 5 issued claims, but there was only 1 case in which a claimant was successful at a substantive hearing, even then only in part.

The above is of course not reflective of the 25 potential claims in which proceedings were never issued, those where agreement was recorded as having been reached by consent before permission, and those withdrawn by agreement after permission. It may be then, adding the 1 substantive claim where the claimant succeeded partially at full hearing, that 33 out of 41 incidences resulted in some kind of benefit to the individual or organisation submitting the initial letter before action. We also do not know what happened in relation to the comparatively large number of letters before claim received by the authorities that were not able to provide full information.

From our interview evidence, a number of reasons were given for potential proceedings being resolved pre-action. The most common was that the complainant had received at least some sort of benefit, especially in relation to individual public services matters such as updated (usually enhanced) special educational needs or care needs provision. Other reasons were that the distillation of the issues into specific legal grounds had improved understanding, focused the minds of both sides, and led to some resolution of the dispute which would not necessarily be seen as an obvious 'win' or 'loss' for either party. The involvement of defendant lawyers, even at pre-action stage, and their engagement with claimant lawyers, were also raised as matters contributing to resolution. Another reason was that the public body's response to the letter before action demonstrated the weakness in the legal merits of the grounds for challenge, and in particular helped the complainant understand the legal limitations on the public body's own powers and use of resources. In cases with a commercial dimension, the matter was subsequently addressed through another form of dispute resolution such as mediation or arbitration or withdrawn due to negotiated agreement. In some instances, the matter was reformulated as a complaint to the Public Services Ombudsman for Wales.

Judicial Review: Post Issue

The data shows that comparatively fewer judicial review claims issued in the Administrative Court in Wales, as compared to England, are withdrawn after issue and before a permission decision. This may be in part due for reasons explored above including a cautious attitude to decision-making, some form of pre-issue resolution, and the lack of a more litigious culture, as compared to some areas of England and some types of public body. There was a general sense from the evidence that judicial review is used less tactically in relation to Welsh public bodies, as compared to some English public bodies and UK Government departments, and there is less evidence of settlement 'at the door of the court'. Evidence to IRAL suggests in general, though no means exclusively, a difference between local authority and central UK Government Department approaches to judicial review, with central Government less likely to engage productively in pre-action resolution, more likely to defend cases with weak merits, and raising concerns over interpretation of the duty of candour. IRAL considered there to be a need to clarify the scope of the duty of candour (IRAL 2021; para 4.130). Our evidence suggests that this 'government' approach does not extend to Welsh Government, and interviewees acting for claimants and defendants agreed that Welsh Government generally approaches judicial reviews and potential judicial reviews in a conscientious manner, demonstrating no reluctance to produce information. Our evidence does, however, suggest some difference of culture and approach across particular types of public body operating in Wales, and between devolved and non-devolved bodies.

Where claims are withdrawn after issue but before permission, this is most commonly because the claimant has secured a satisfactory outcome through post-issue negotiations with the defendant. Other reasons were that through receiving more detailed grounds of defence, the claimant reconsidered the merits of their case, and that growing awareness of the costs of litigation, and other negative effects such as potential stress and anxiety, dissuade some claimants from continuing. IRAL considered that as devolution has been described as a 'policy laboratory' in some respects, there could be a case for England and Wales considering the recent emphasis placed on 'consensual resolution' of judicial review in Northern Ireland (IRAL

2021; para 5.32). Our evidence suggests that such an approach may already exist informally in Wales but could be worth further exploration.

Judicial Review: The Permission Stage

Among claims issued by claimants with addresses in Wales between early 2007 and early 2018, the most prevalent topic of 'other civil' (non-immigration) claim was town and country planning (55 claims), followed by judicial review of the decision's of county court judges (42 claims), followed by education (35 claims), disciplinary bodies (at 28 claims), and community care and claims against police forces (at 23 claims each). For claims issued by solicitors based in Wales (whether or not the claimant was also based in Wales) the most prevalent topic was education (61 claims), followed by town and country planning (29 claims), followed by community care (26 claims). Homelessness and non-disciplinary public health matters (usually service re-organisation) also ranked highly. In relation to homelessness almost all representation is from Shelter Cymru, and in relation to public health these matters are usually of broader public concern where expert private advice has been obtained.

In summary, education, town and country planning and community care have been the most prominent subjects of Welsh judicial review claims, even since before the Administrative Court in Cardiff was established. There have been some fluctuations in topics of claim over the years, as we would expect. For example, while non-disciplinary public health claims quite often arise, they had been less prevalent in recent years. This is backed up by interviewee evidence that what we might call a series of reorganisation of services has been substantially completed, and that health authorities have learnt lessons from related litigation around issues such as proper consultation. The key legal issues arose, were (arguably) addressed in a series of cases, and administrative procedure has been improved as a result. However, both public health and care standards claims to the Administrative Court as a whole have increased in 2020, potentially related to Covid-19.

In terms of 'success' at the permission stage, grant rates in other civil (non-immigration) judicial review in the Administrative Court in Wales are almost equivalent to the England and Wales average (32% in Cardiff compared to 33% as the Administrative Court average). That said, the permission grant rate varies more widely from year to year in Cardiff as compared to the Administrative Court average, and the proportion of claims found to be Totally Without Merit has been especially high in Cardiff in some years. One difficulty here in understanding the data, is that whilst on the one hand we are able to break down data on the topics of claims and legal representation by whether the case is Welsh or English, on the other hand, in relation to permission and substantive success rates, the Ministry of Justice figures include all claims issued in Cardiff (so some 50% of them are likely to relate to south west England).

A matter that had been puzzling us from the data was that from 1 May 2013 to 30 April 2014 there was a high number of claims under the topic 'county court' issued by claimants with addressed in Wales, and also a high proportion of claims issued by unrepresented litigants. As the number of 'Welsh' claims is so small, this one topic skewed the overall number of claims in that year to register a significance increase, followed by a notable decrease. This is instructive for two reasons, one is that while certain topics of claim largely remain staples, the overall caseload can fluctuate

significantly based on different types of public law legal issues that come to light over time, whether that is due to new legislation, changes in administrative practice, or changes in the litigation strategies of lawyers and to the awareness of potential applicants. The second reason is that these county court claims look to have primarily involved unrepresented litigants issuing multiple claims.

The number of claims issued by claimants with addresses in Wales acting as unrepresented litigants has increased (for example up from 19 claimants in the period 1 May 2007 to 30 April 2008 to 36 claimants in the period 1 May 2017 to 30 April 2018). The classification Litigant in Person is used in the Administrative Court Office data to refer to claimants who are unrepresented at the time of issuing their claims. But we cannot be sure of what, if any, legal support or indeed legal advice, claimants in this category might have received at various stages including after issue. Most of our interviewees did not have recent experience of assisting, or of acting on the other side, in litigation involving an unrepresented litigant. But most had experience, whether in relation to judicial review or to other types of claim, of acting against unrepresented litigants, and noted the additional pressure this situation places on court staff, members of the judiciary, and defendant lawyers in assisting unrepresented litigants to navigate procedures fairly. Those with experience of litigants in person in judicial review, felt that some could be repeat claimants, bordering on vexatious litigation, though with no suggestion that 'regionalisation' had itself led to any increase in ill thought-out or vexatious litigation. Other litigants in person were seen to be those truly desperate to seek justice who had been unable to secure affordable legal representation, feeling they had no choice but to proceed on their own.

Looking at permission stage decision making itself, the majority of our interviewees considered that previous research findings about inconsistency of permission decisions in relation to particular areas of law remain true in general. But there was some difference of opinion as to how much this impacted on the Administrative Court in Wales. Whilst some interviewees considered there to have been quite widely inconsistent decision-making, in particular by less experienced circuit judges and deputy High Court judges, others did not perceive this same cause for concern. Another matter of division was between those who thought that local judges, generally spending more time determining cases in Wales, were better equipped to appreciate the nuances of devolved Welsh law and context, than judges primarily sitting in England 'travelling out', or more recently 'zooming in' to Wales. Others considered that the application of general public law principles is a skill honed through practice and experience especially of statutory interpretation; a regular stream of public law cases is more important than broad practice across Welsh law. Still, most of our interviewees had experience of inapplicable English law (especially guidance) being referred to by lawyers, and this was also an issue raised across discussions, meetings and conferences.

The length of some permission hearings was noted, with research participants explaining that sometimes the best part of a day could be spent arguing about whether a claim was 'arguable'. This aligns with longer-term research evidence about the changing nature of the permission stage and its use as a judicial case-management tool (Bondy and Sunkin 2009b; Nason 2016 and 2021), and judicial concerns expressed about the length and clarity of judicial review applications, but we would not

be able to determine from our evidence any particular difference between practitioner and/or judicial practice in England and Wales respectively.

Experiences of the Administrative Court in Wales are generally positive. Across our evidence, it was noted that service in the Administrative Court in Wales is generally swift, staff are helpful and knowledgeable, and claims are dealt with expeditiously. In one forum we attended it was suggested that Black and Minority Ethnic (BAME) litigants, and BAME lawyers, sometimes face discrimination or hostility in the Administrative Court in England and in some tribunals in England (especially in the context of immigration or asylum disputes), whereas such is not the case in the Administrative Court in Wales or in tribunals based in Wales. There were some very recent concerns expressed about service during the Covid-19 pandemic and that more work seemed to be being done by Administrative Court Office Lawyers based in London; this was seen to be to the detriment of court users based in Wales. Concerns were also expressed that no Administrative Court User Group had been convened for Wales since 2018 and it wasn't clear whether the Welsh user group had in fact been replaced by a broader user group including south west England.

Moving to the post-permission stage, Ministry of Justice data shows that a higher proportion of claims issued in England are withdrawn post-permission than is the case for claims issued in Wales. Our interviewees considered that withdrawal post successful permission would only occur if the claimant has received some satisfactory benefit through a negotiated settlement. Again, this lower proportion of claims withdrawn in Wales fits with the picture of public bodies generally engaging conscientiously at the pre-action stage, and disputes being avoided where possible. However, we need to be cautious here as this data also includes claims from south west England.

Judicial Review: The Welsh Ministers

The Welsh Government provided us with information about judicial review litigation involving the Welsh Ministers since September 2008.

Figure Four Judicial Review Claims Involving the Welsh Ministers					
	Application Successful	Application Dismissed	Application Withdrawn	Ongoing	Other
Rural Affairs	3	2	1		
Environment	1	8		2	
Planning		6			
Animal welfare		1			
Health	1	4	1	2	1 - Did not progress beyond pre-action protocol
Education		7		1	1 (partially successful but no remedy granted)
Local government	1	1			
Transport		1	3		
Social care	1	1			1 (permission refused on papers, claimants withdrew before oral renewal)
Economy		1	1		
Pensions	1				

Counting the 1 application that was partially successful with no remedy granted, applicants were successful in 9 claims (16% of the total incidences – those interested can compare this success rate to those estimated by UK Government Departments – see Appendix D of IRAL). Of the 56 claims, 6 also involved at least one relevant Secretary of State (1 related to local government, 3 related to the environment, 1 related to pensions and 1 related to health and social care). The number of incidences varied over the years as shown in Figure Four below.

Figure Four: Incidences of Judicial Review Involving the Welsh Ministers by Year	
2009	3
2010	5
2011	6
2012	3
2013	4
2014	7
2015	3
2016	1
2017	4
2018	1
2019	9
2020	7

The figures are too small to draw conclusions, but it is interesting that the numbers are comparatively low in the years where our previous research perceived a decrease in overall Welsh judicial reviews.

Substantive Judicial Review

Research published in 2015 identified that out of 502 judgments (including both immigration, other civil and criminal judicial reviews) issued from July 2010 to February 2012 inclusive, 12 substantive judicial reviews were heard in Cardiff (but 2 did not concern Wales). A further 5 cases concerning Wales were heard in London. Only 2 of 9 claims against Welsh local authorities were brought by individuals, with the others brought by corporations/legal persons. This was a strikingly low proportion for individuals as compared to the England and Wales average. The researchers considered the reasons for this were 'unclear, but may be indicative of a low level of awareness of JR as a form of redress among potential claimants and legal advisers' (Bondy, Platt and Sunkin 2015: 17). In the study, 4 judgments related to community care, all of which were commercial judicial reviews regarding payments to care homes by local authorities in Wales, and all involved the same Bristol firm of solicitors. The second largest topic of claim was planning, 2 cases issued by firms outside Wales, and 1 by a firm with offices in Wales. Next were 2 cases concerning school closures, one issued by school governors, another by an individual, each represented by solicitors in Wales but with London-based counsel (Bondy, Platt and Sunkin 2015: 16-17).

In evidence to the Commission on Justice in Wales, Nason and PLP concluded that the substantive judicial review caseload pertaining to Wales over the years since the Administrative Court in Cardiff was established has been quite diverse, involving a mixture of devolved and non-devolved law and policy, relevant to particular claims in a variety of different ways. They noted that this presents both challenges and opportunities for legal education, legal practice and justice in Wales (Nason and PLP 2018). They also reflected that out of 82 judgments analysed (handed down in Cardiff from and including 2010 to and including 2017), only 26 referenced Welsh law and/or policy.

The Administrative Court in Wales is seen as a 'constitutional success' for Wales on the basis that the Court has heard a number of claims of constitutional significance to Wales (Nason and Gardner 2019). Including, for example: *R (Governors of Brynmawr Foundation School) v Welsh Ministers [2011] EWHC 519 (Admin),* where Beatson J stressed the 'constitutional status' of the Government of Wales Act 2006; *R (Welsh Language Commissioner) v National Savings and Investments [2014] EWHC 488 (Admin)*, where the Commissioner challenged NS&Is decision to withdraw its Welsh Language Scheme. This was the first Administrative Court case to be issued and heard in Welsh and included interpretation of the Welsh Language Act 1993; and *R (Sargeant) v The First Minister of Wales [2019] EWHC 739 (Admin)* which held that the First Minister's control of the Operational Protocol governing the investigation into the death of Carl Sargeant AM, breached a legitimate expectation (founded on a press statement) that the investigation would be independent.

Substantive Judicial Review: Evidence

From our current research, Figure Five below shows the number of reported substantive hearings recorded as having taken place in the Administrative Court in Wales that included at least one Welsh public body as a defendant.

Figure Five: Substantive Cases in the Administrative Court in Wales Against Welsh Public Bodies	
2009	**4**
2010	**6**
2011	**5**
2012	**4**
2013	**1**
2014	**4**
2015	**10**
2016	**7**
2017	**4**
2018	**2**
2019	**3**
2020	**6**

We found that whilst there is evidence of diversity in caseloads, still a large proportion of those proceeding to substantive hearing are planning cases; three times as many cases concern planning as the next most common topic (which is education). The majority of these claims follow a pattern; challenging a planning inspector's decision to grant or deny planning permission on grounds of irrationality, in some cases there are linked judicial review and statutory appeal claims. Administrative Court judgments evidence deference/respect for specialist public body decision making, with many of these cases involving planning inspectors having been found to show consideration for various policies and requirements sufficiently to rebut an irrationality challenge. In cases where the claimant was successful, such as *R (Jedwell) v Denbighshire County Council [2016] EWHC 458 (Admin)*, it is usually because the defendant is unable to offer a reasoned justification for their decision (some shade of *Wednesbury* unreasonableness or failure to comply with a specific duty to provide reasons). Even then, remedies are of course discretionary, for example in *Jedwell* adequate reasoning had been provided ex-post, and the remedy awarded was a declaration to the effect that the Council had been in breach of its duty to provide reasons at a particular stage

in the decision-making process. Other case examples in the area of planning include failing to factor in expert evidence or failing to account for highway safety.

Our interviewees also noted that claimant success is usually associated with legal errors on the part of the public body that are more straightforward to demonstrate objectively, and that legal tests in judicial review are hard for claimants to surmount, especially in the field of planning.

Education was the second most common topic of claim, and here cases were more likely to be formally issued by individuals, even if there may well have been a broader interest group and support structure around the claim. The most common ground in education cases tended to be illegality, centring on interpretation of statute, guidance and related policy (such as in *R (on the application of Driver) v Rhondda Cynon Taf CBC [2020] EWHC 2071 (Admin)*). Another case, *R (on the application of DJ) v Welsh Ministers [2018] EWHC 2735 (Admin)* concerned the availability of special needs education for 16-25 year olds, this entitlement under the Learning and Skills Act 2000 was not taken to extend to a duty to provide education for that entire age range.

The case of *R (on the application of the Diocese of Menevia) v Swansea City Council [2015] EWHC 1436* (Admin) turned on the Equality Act 2010, with Wyn Williams J quashing a free school transport policy on the basis that it was discriminatory against black and ethnic minority children who were statistically more likely to attend faith schools; the policy withdrew provision of discretionary free transport from pupils attending voluntary-aided faith schools, whilst continuing to provide free transport for pupils attending Welsh language schools. Matters relating to school closures, alongside school transport and special educational needs provision, seem to be the primary focus of education claims, and also constitute many of the most publicised claims to have been issued in the Administrative Court in Wales. *Driver* in particular is a poignant case, in that it not only concerned a distinctly Welsh topic, that of Welsh-medium education in schools, but also because a key ground of challenge was the potential disparity between the Welsh language legislation and the English language version (of the School Standards and Organisation (Wales) Act 2013). Due to the statutory equivalence of the Welsh and English languages in Wales, the court had to interpret the legislation in a way that aligned with both languages, in the first instance adopting the clearer Welsh version. However, when heard at the Court of Appeal the decision was reversed, specifically turning on explanatory guidance by the Senedd Cymru/Welsh Parliament with respect to the 2013 Act, which supported the defendant's interpretation. We found ultimately that in claims from our data set which were appealed from the Administrative Court in Wales, 5 out of the 6 appeals were successful, but this is likely too small a sample to draw any reliable conclusions from.

The third most common topic of claim at substantive hearing is the environment, with cases usually either issued by organisations and pressure groups or supported by them as interested parties. Environmental cases have most commonly featured European law and have tended to have even lower chances of success at substantive hearing. The most recent example being *Wild Justice v Natural Resources Wales [2021] EWHC 35 (Admin)* where the relevant European law did not render licences to kill wild birds unlawful. There is also a significant overlap in cases involving the environment alongside planning, such as *R (on the application of Plant) v Pembrokeshire County Council [2014] EWHC 1040* where there was a conflict

between sustainability policies and environmental destruction as part of the challenge to the grant of planning permission. It was found that while the erection of wind turbines did impact the locality of an ancient monument, this was of lesser effect than the environmental gain of additional green energy supply. Given that 20% of Wales' land area is dedicated National Park, as compared to 9% of England's, it is not surprising that environmental matters are more common in Welsh judicial review (this may also be linked to differing sustainability policies, but we did not look into this in detail).

In our review of claims against Welsh public bodies reaching a substantive hearing in the Administrative Court in Wales, we found individuals to be the most common class of claimant, accounting for around a half of claims proceeding to substantive hearings. This is a notably higher proportion than in the previous research (from 2010 to 2012) but still lower than the Administrative Court average (which studies have put at between 2/3^{rds} (Nason 2016) to 3/4^{ths} (Bondy, Platt and Sunkin 2015) – however, each of these studies recognises that simply because a claim is fought in the name of an individual does not mean that the issue is non-recurrent or confined to its own facts). Private corporations and other organisations follow, accounting for roughly 25% of substantive cases, and these types of claimants are particularly common in planning cases. With the final 25% of cases brought by public bodies, pressure groups and charities or where it is otherwise unclear from the judgment precisely who the claimant is. Despite our analysis above suggesting comparatively less well-developed structures to support public law litigation in some areas of Wales, it seems that claims involving bodies like charities and pressure groups are significant in number (or at least proportion) and are more likely to pass the permission stage.

We also note that many claims involve multiple defendants, including Welsh Ministers and local authorities, or claims involving Welsh Ministers and UK Government departments where there is a degree of concurrent responsibility. Yet, as noted above, the recent IRAL considered these latter kinds of judicial reviews to be outside its terms of reference.

What our evidence suggests is that claims involving commercial entities, charities and other interest organisations are more common in Welsh substantive judicial review hearings as against the Administrative Court average for other civil (non immigration) judicial review. Whilst these claims may have 'significant' impacts on local communities, legally most still turn on 'routine' grounds of irrationality and error in statutory interpretation, rather than what tend to be seen as more innovative grounds of substantive review.

From our data specifically relating to claims involving at least one Welsh public body defendant, we found that in substantive hearings claimants are successful around 33% of the time. We also consider from our reading of the judgments, that judges determining cases in the Administrative Court in Wales show considerable deference/respect to the expertise and constitutional position of initial government decision-makers and to legislation. IRAL suggests the same is true of judicial review in Scotland and Northern Ireland. In relation to Scotland, it suggests: 'The underlying ethos, however, is one of judicial self-restraint in the exercise of the power of review' (IRAL 2021; para 5.13). In relation to Northern Ireland, IRAL notes various references stressing that the merits of administrative action are matters for the public authority, including the submission of the Northern Ireland Bar Council noting that the High Court

of Northern Ireland uses its supervisory jurisdiction sparingly and that judges very clearly respect boundaries between the courts and the Executive (IRAL 2021; paras 5.24-5.26). We suggest further research could consider whether there is overall a more deferential/respectful attitude to judicial review in the devolved nations, or indeed in general outside London.

The Values and Effects of Judicial Review

'Success', understood as being awarded a specific remedy following a substantive judicial review hearing, is only a small part of the value and impacts of judicial review. Only a tiny percentage of claims issued (somewhere between 2%-5% depending on selection of figures) result in a substantive 'win' for the claimant. The number of remedies awarded per-annum in judicial review proceedings has barely changed since the 1980s when the modern form procedure was first introduced (Nason 2021). On average the success rate is slightly in favour of defendants, with Ministry of Justice statistics for 2019 showing an overall defendant success rate of 56% (for all judicial reviews including immigration and asylum). Research suggests that on average in the years since regionalisation, claimant success rates in final hearing for cases issued in Wales have been lower than the Administrative Court average (Nason and PLP 2018).

The value and effects of judicial review are diverse. Claimants and their lawyers consider it a fast and effective means to have their concerns listened to and addressed by public bodies, often leading to substantive resolution, a service restored or benefit granted, even prior to issue (Bondy and Sunkin 2009a). The benefits of judicial review more broadly include clarification of the law, setting a helpful precedent, improved policy/procedure and better human rights protection (Bondy, Platt and Sunkin 2015). Our discussions above of key Welsh claims show the value of judicial review in articulating local public law values and constitutional standards. Some of these benefits accrue (perhaps in different ways) to either or both parties regardless of the substantive 'winner'. Judicial review claims provide useful guidance to public bodies to improve their procedures, and the incidence of successful claims has been causally linked to improvements in local authority performance, especially for authorities in areas of high deprivation (Sunkin et al 2007 and 2010).

There are of course some negative effects associated with judicial review, it can be a draw on scarce resources for public bodies (especially local authorities) and can delay implementation (or even in rare cases prohibit implementation) of policies and procedures felt by public bodies to be genuinely in the best interests of those they serve. Also, what might be seen as negative for one part of a public body could be positive for another part, such as where a judicial review decision improves clarity for individual case work officials in a particular area, but at a cost that leads to challenging resource allocation decisions for budget holders. Judicial review can also be stressful, time-consuming and expensive for all involved (Bondy, Platt and Sunkin 2015; Hickman 2017).

The Values and Effects of Judicial Review: Discussion and Evidence

Empirically from our substantive judgment data set 20 claimants were granted a remedy (from 2009 to 2020 inclusive), the most common of which being a quashing order. None of our interviewees had been involved in Welsh claims where the only remedy granted was a declaration of unlawfulness, though we can see from our

analysis of substantive judgments that declarations have been awarded in Welsh claims.

Our interviewees were clear that judicial review, and specifically the threat of judicial review, can be a powerful means to ensure swift resolution for individuals of specific grievances relating to, for example, the legally inadequate content of care or educational plans, unlawful decisions relating to professional discipline, or unlawful exercise of police powers or even lower-level judicial powers. A common use of judicial review was to secure access to public services for those who are legally entitled to them, and who need them the most. Many potential claims of this type were settled either wholly or partially in favour of individuals even before a permission application was issued. However, our interviewees also saw problems with this picture. A number of interviewees noted examples of cases that had settled, with claimants benefiting substantively, but where subsequently an important broader matter of legal principle (especially in relation to newer and more innovative Welsh law) was not then addressed by the courts such as to lay down a precedent for the future. This has also been noted in Shelter Cymru research relating to the lack of issued legal challenges under Welsh housing and homelessness law (Shelter Cymru 2020).

Cases more likely to proceed to final resolution are those brought by organisations of various kinds, raising broader points of local public interest, administrative practice, and legal principle, even if the grounds are often 'routine' ones of more traditionally conceived irrationality and narrow illegality. The extent to which litigation activity in Wales involves corporations is also notable and suggests a significant proportion of claims being issued for commercial reasons. A picture is depicted where private organisations, having greater awareness and resources, are comparatively more able than individuals to access the Administrative Court in Wales.

Our interviewees recognised, and were able to give specific examples of, where going through the process of judicial review had led to forensic expert examination of law and administrative practice, seen to catalyse improvements in the quality of public body strategic and policy decision-making. These benefits were appreciated even in claims where the public body retook the same decision 'on the merits' after having followed improved processes, though we have not been able in our research to collect data on how often public bodies retake the same decision 'on the merits'. Our interviewees recognised that whilst claimants could well be disappointed where the same decision was taken 'on the merits' there was still value and some degree of satisfaction in having felt justice to have been done and to have been seen to be done. Interviewees also noted claims against Welsh public bodies in areas where the law is either identical or significantly similar in England, and where the improved practice flowing from legal exposition had been felt beyond Wales.

Our interviewees commented on the importance of judicial review to keeping public bodies honest and transparent, and that the process can be of value when communication has largely broken down between individuals (and organisations) and public bodies, as it forces both sides to consider the other's argument. Judicial review is seen as important to public bodies in Wales, especially to ensure proper procedures are followed and corners are not cut. It requires public bodies to slow down and take stock. This benefit was recognised by public bodies engaged with our research and

by lawyers acting primarily for defendants, as well as by claimant lawyers, and organisations largely representing claimants.

All interviewees noted the fundamental constitutional value of judicial review, both in general, and specifically to Wales where devolved governance structures are comparatively young, as a check on 'legality', with strong support for the principle that government is not above the law. For many this seemed to be the most significant 'value' of judicial review, in a sense over and above the outcomes of individual cases. The broader value of constitutional legality can be illustrated by the Welsh Government's own use of judicial review to challenge the United Kingdom Internal Market Act 2020. The Government is challenging the Act on the grounds that it: purports to impliedly repeal areas of Senedd Cymru/Welsh Parliament competence, and confers powers on UK Government that could be used by UK Ministers to substantively amend the Government of Wales Act 2006 in a way that could cut down the devolution settlement. Both grounds are in effect based on the constitutional principle of legality; that if Parliament intends to legislate contrarily to fundamental constitutional norms, it must do so expressly and not impliedly. The case, *Counsel General for Wales v Secretary of State for Business, Energy and Industrial Strategy [2021] EWHC 950 (Admin)* was refused permission, with Lewis LJ finding it to be premature absent the context of any specific legislation made or purported to be made under the 2020 Act. The judge however expressed no views as to the arguability of the grounds, and as such the door remains open to future litigation. The case has generated significant press coverage, and debate, in a sense further demonstrating the constitutional significance of judicial review, even in claims not granted permission to proceed.

Across our interviews and other forums and discussions it was suggested that the Administrative Court in Wales as part of the Queen's bench Division of the High Court is seen as bringing a degree of authority or gravitas that resolution through a tribunal, complaint procedure, or indeed through the intervention of an ombud or a commissioner, could not bestow in the same way.

Has there been a reduction in Welsh claims and why?

The initial impetus for this research was that there seemed to be a reduction in Welsh judicial reviews, and certainly no increase, during a time period when the volume and the uniqueness of Welsh public law had expanded. Some headline figures are that in 2007/08, 25 other civil judicial review claims were issued by claimants with addresses in Wales (constituting 4% of all claims in which a claimant address was known). This had increased to 57 claims and 6.5% of address known claims in 2013/14; but reduced to 34 claims and 3.8% in 2016/17 and 34 claims again (this time at 3.5% of address known claims) in 2017/18. However, accounting for our now more nuanced data analysis and qualitative discussions, the evidence suggests that the figures for 2013/14 are skewed by a specific topic of claim and type of claimant. On the whole the number of applications per-annum from claimants with addresses in Wales remains slightly higher than it was before the Administrative Court in Cardiff was established. On the other hand, when we look at claims involving solicitors located in Wales instructed to act for claimants, the number does seem to have reduced.

We are talking about very small numbers here and it is important not to generalise. These figures also don't include criminal judicial review or immigration and asylum

judicial review. In our interview evidence, around half of our interviewees perceived there to have been a drop off in the number of Welsh claims issued. Reasons given included that there may be increased focus on settlement in some areas, in part this is due to local authorities being more open to settle after having experience of unsuccessfully defending litigation, and concerns about the costs defending litigation. Another reflection was that key subjects impacting most on people's lives (and where there is often a public interest element as well) such as education, health, planning and the environment, have been devolved for some time, arguably this means particular legal issues may have been 'ironed out' and the implications of potential or actual claims addressed (even if these still remain among the most commonly litigated topics). Some of our interviewees suggested that the need to draft law bilingually could have improved the overall clarity of legislation, thus leading to fewer challenges.

Legal aid reforms were noted as a potential issue contributing to the decrease in the number of claims issued by solicitors based in Wales. None of our interviewees suggested they had experienced any less 'demand' for specialist public law legal advice (either on the claimant or defendant side), the issues seemed more around capacity to meet that demand (especially on the claimant side), legal aid access and entitlement issues, and the insufficiency of legal aid remuneration.

Judicial Review and Justice in Wales

The 'expansion' of Welsh public law, on the one hand, relates to specific topics such as planning, education and housing. As our interviewees noted, however, these areas have been devolved for some time, they would have to be regulated in some way, whether by English and Welsh, or by Welsh law, and the common law grounds of judicial review remain the same: illegality, procedural impropriety and irrationality. That legislative competence has changed hands wouldn't necessarily precipitate a growth in judicial review claims. However, the unique Welsh law that we refer to is more overarching legislation imposing a series of rights, equality, and wellbeing-based duties on types of Welsh public bodies in performance of some of their functions. These duties are to have 'due regard' to particular international human rights standards, and to equality principles, imposing additional procedural requirements in relation to performance of equality duties, introducing new obligations around well-being (both individual and collective) and sustainability. Some of these duties also condition the practical exercise of powers largely regulated by reserved England and Wales or UK legislation and guidance, such that additional avenues to legal challenge might be available in Wales, for example to older people and children as asylum seekers or immigrants receiving services from Welsh local authorities. As Professor Simon Hoffman put it in his submission to the Commission on Justice in Wales:

> The Welsh approach to regulation of public governance is distinctive; introducing new and unique duties on Welsh Ministers and public bodies. Welsh legislation has established new rules of engagement between governance institutions and citizens; and therefore, for administrative justice in Wales. Social rights have been woven to the framework of public governance, with potential to ensure good governance, fairness and accountability (Hoffman 2018; para 3).

Hoffman notes that the Administrative Court in Wales has not yet had a full opportunity to engage with these matters, but that if it were to make a 'significant contribution to

social justice' this could be fostered by: 'Adjudication which departs from the traditional approach to judicial review in social welfare fields, to allow (encourage) more judicial activism on substantive human rights issues' (Hoffman 2018; para 6). As yet we have found no evidence of the Administrative Court in Wales embracing this approach. But it is notable that IRAL received evidence from the Scottish Human Rights Committee that Scotland is on a different 'human rights trajectory' from the rest of the United Kingdom, and that having a dual or twin-track approach to judicial review could mean remedies for human rights breaches might be different depending on whether the breach related to a devolved or reserved matter. Wales is increasingly taking an approach much more in line with the Scottish trajectory than that of the broader UK, and the specific implications of the single jurisdiction and reservation of judicial review could lead to even further complexity for Wales, perhaps fostering a judicial attitude of caution and reluctance to explore the implications of new progressive Welsh law.

So far there have been few attempts to litigate these new Welsh law duties, and those claims which have been issued have been refused permission. Various reasons for this were evident from our research; some participants queried whether judges appropriately experienced in Welsh law and context were being listed to determine those claims which have arisen, another suggestion was that the duties imposed are comparatively 'weak' procedural compliance duties as opposed to giving individuals substantive rights and as such the legal tests involved are hard to surmount. Another concern was lack of awareness of the new duties and the difficulty for anyone other than specialist practitioners in recognising potential non-compliance, and in keeping up with changes in guidance. The lack of litigation in this area is clearly recognised as an issue beyond our research project, with various initiatives (especially instigated by the EHRC) seeking to bring together lawyers and other advice providers, charities, and pressure groups, to identify and progress 'strategic litigation' based on new Welsh law duties relating to equality and human rights. Such initiatives see strategic litigation as a necessary element in exploring whether, and how, distinct legal frameworks can be harnessed to improve the lives of people in Wales, and in particular that such litigation has the potential to provide a stronger form of accountability for outcomes than that provided by other mechanisms across the administrative justice sector (EHRC/Swansea University Strategic Litigation Event 2021).[7]

In our interviews we also outlined the Commission on Justice in Wales' recommendations regarding administrative justice, with most interviewees agreeing that there could be a more important future role for devolved Welsh tribunals (as recommended by the CoJ 2019: para 6.34-6.42). However, interviewees noted that there are issues of 'critical mass', highlighting the current caseload of Welsh tribunals, and the diversity of topics, with mental health dealing with approx. 2,000 claims per annum and other tribunals just two or three claims. Interviewees welcomed the Law Commission project seeking to bring greater coherence to the structure of devolved Welsh tribunals, laying foundations for future development and providing for eventual expansion of Welsh tribunal work (Law Commission 2020). Whilst there was clear support for ensuring that access to justice is available as locally and informally as possible, there was scepticism about whether this could be achieved by creating additional public law appeal rights to devolved Welsh tribunals. Scepticism related to

[7] More information on the work of the EHRC in Wales can be found here: https://www.equalityhumanrights.com/en/our-work-wales

the comparative status of tribunals as compared to the Administrative Court, and that if legal aid funded advice and representation were not available in public law tribunal claims access to justice barriers for individuals would remain. There was also a concern that creating appeal rights would risk closing off access to judicial review even further, when it is precisely the clout and precedent setting capacity of the High Court that would have the most value to the transparent interpretation and enforcement of public law in Wales.

Covid-19

We did not seek to examine in detail the impacts of the Covid-19 pandemic on judicial review in Wales. Research by the PLP showed that by the end of May 2020, there had been 63 incidences of judicial review relating to the pandemic across England and Wales. Of these, 49 were challenges to UK central Government departments, others were to local authorities, health boards, and devolved institutions. Our information from Welsh Government shows there have been two judicial reviews raised with Welsh Ministers, one did not progress beyond pre-action protocol, and the other was refused permission on paper and withdrawn prior to a renewed oral permission hearing.

Across our evidence there seems to be a broad consensus that the courts in Wales (across all areas of justice) have coped well with moving online, and that there are no backlogs in hearings. We have noted some concerns about the recent service provided by the Administrative Court in Wales, but no evidence that this is specifically linked to the impact of Covid-19. The longer-term impacts of online justice in judicial review claims remain to be seen, and there could well be opportunities to improve access to justice especially in rural Wales. However, our research suggests that provision of accessible and affordable advice and advocacy services is central to increasing access to justice in Wales, so the success of online judicial review will be heavily dependent on the success of online access to specialist legal advice.

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Annex One: Judicial Review – Semi Structured Interview Questions

These were semi-structured interviews, and some additional points were raised across the interviews that are not covered by these specific questions. Our approach to analysing the data was to reflexively code answers to these specific lines of questioning alongside other emerging themes across the interview transcripts.

Although there is official data available about the topics of claims issued in the Administrative Court in Wales, we would be interested to hear about the topics of claim you are most regularly involved with (representing a claimant, defendant or intervener) and about the types of public body defendants challenged.

1. In your experience what would you say are the most common topics of judicial review in claims which have been, or which could have been, issued in the Administrative Court in Wales? ('Could have been' is intended to include potential claims relating to Wales that did not proceed to issue). Topics include for example; education, health, planning and so on.

2. In your experience, what are the most common types of bodies against which judicial review is issued in the Administrative Court in Wales? For example, Welsh Ministers, local authorities, central UK Government departments. If you also act in the Administrative Court in England, to what extent do you think the most common type of defendants varies between Wales and England?

3. Do you have any experience of either supporting or acting against litigants in person (unrepresented litigants) in the Administrative Court in Wales? If so can you explain a bit about that experience and how, if at all, it affected the overall proceedings?

Our next set of questions are around what can be called the 'Dynamics' of judicial review litigation, in particular the proportion of claims that are withdrawn at various stages of the process, and the outcomes of these claims.

4. In your experience of claims that could have been issued in the Administrative Court in Wales, how regularly would you say these claims are resolved prior to issue, and for claims that have been issued, how regularly would you say such claims are resolved and withdrawn post issue but before a permission decision? When claims are resolved (otherwise withdrawn) at these stages, what would you say are the most common reasons for resolution? (For example; negotiation between the parties, mediation, resort to an alternative mechanism such as a tribunal appeal or ombudsman complaint). In your experience, would you say claims resolved at this stage are resolved more often in favour of the claimant, the defendant, or roughly equally between the two?

5. Particularly when representing claimants, what would you say are the effects of claims that are resolved or otherwise withdrawn either pre issue or post issue but before a permission decision? For example, are claimants (and potential claimants) generally satisfied/unsatisfied with the experience, does resolution lead them to secure or retain a substantive benefit or entitlement,

does the experience have a detrimental impact on ongoing relationships with the defendant, have administrative practices within the defendant body improved as a result?

6. We are interested in your experience of permission stage decision-making in the Administrative Court in Wales. In your experience would you say that permission applications are dealt with in a reasonable time, would you say that there is consistency or inconsistency in decisions made, and is sufficient information made available about the reasons for refusing permission? Would you say that Welsh public body defendants generally comply with the duty of candour?

7. A significant number of claims are withdrawn after a permission decision. What, in your experience, are the main reasons for withdrawal after a permission decision? And what would you say are the most common effects in claims withdrawn post-permission? For example, the claimant retains or is granted a benefit or entitlement, the defendant public body amends its policy or practice, are losing parties generally satisfied or dissatisfied with the experience?

A key aim of our research is to understand the impact, value, and effects of judicial review specifically in the Administrative Court in Wales.

8. For claims that have proceeded to a substantive judgment, what would you say are the main impacts/effects for both claimants and defendants? What kinds of tangible benefits do you see, for example; a claimant having a benefit or entitlement restored, clarification of a point of legal principle or practice, changes in public body procedures? What are the disadvantages/negative impacts? Are these impacts/effects (both positive and negative) mostly relevant to Wales, or are there cases with broader England and Wales or UK ramifications?

9. Professor Mark Elliott once noted there are no ‘pyrrhic’ victories in judicial review claims, do you have experience of claims where tangible benefits (to either party) were either non-existent or minimal, but nevertheless the process and its outcomes were important in principle? Do you have any reflections on how often, in your experience, decisions that are quashed are re-taken in favour of a successful claimant?

Our final questions are also more specifically about the context of Wales. Our data and other evidence (from 2007 to 2018) shows that the number of civil (non immigration) judicial reviews issued by solicitors firms based in Wales has fallen over the years. Also, whilst the numbers are comparatively small and variable (so it is difficult to be sure of longer-term trends), there have been fewer judicial review claims issued in the Administrative Court in Cardiff in 2017, 2018 and 2019, than were issued in earlier years (most especially 2010 and 2011).

10. Given the increased legislative competence of the Senedd and Welsh Government and the growth in volume of devolved Welsh law, why might it be

the case that the incidence of judicial review challenges pertaining to Wales and Welsh public bodies seems to be decreasing?

11. What would you say is the main value of judicial review to Wales in particular? For example, do you think the procedure is an efficient and effective means of resolving individual grievances for people in Wales, and/or of clarifying Welsh law points of legal principle or practice, and/or as a mechanism for so-called 'public interest litigation'?

12. Welsh law passed by the Senedd and/or Welsh Ministers often does not include a specific redress mechanism on breach (such as an appeal to a court or tribunal), judicial review is then (sometimes quite explicitly) said to be the core mechanism for resolving disputes. Would you accept the Commission on Justice in Wales' recommendation of a presumption that redress under Welsh public law should, in the first instance, be through an appeal right to an appropriate devolved Welsh tribunal?