UNDERSTANDING ADMINISTRATIVE JUSTICE IN WALES:
EXECUTIVE SUMMARY

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Foreword

Although it is generally not widely understood as a concept, administrative justice is the part of the justice system most likely to impact upon the lives of people in Wales. It is best understood as a component of a broader conception of social justice and it concerns initial decision-making in local and central government and other public bodies; the work of ombudsmen, regulators and independent complaint handlers, tribunals, some inquiries and judicial review. The administrative justice system in Wales is becoming increasingly distinctive as the result of devolution, a developing separate Welsh legal jurisdiction, and recent efforts to reform local government and public service delivery.

The first body with a formal role to oversee the system in Wales was the Welsh Committee of the Administrative Justice and Tribunals Council (AJTC) set up in 2008. The Committee was abolished along with the AJTC itself by the Westminster government in 2013 but in its short life it had a significant impact in highlighting the particular challenges in administrative justice faced in Wales and in promoting reform. It was succeeded in 2013 by the present committee, the Committee for Administrative Justice and Tribunals Wales (CAJTW), set up by Welsh Ministers to ensure that expert advice remained in place in Wales, and that the needs of the user of the system in Wales continue to be paramount.

This Report is the culmination of a research project commissioned from Bangor Law School by the CAJTW in December 2014. The research included a stakeholder analysis, literature review and a series of workshops and conferences for the policy, practice and research communities. The research was commissioned in support of the CAJTW's two key objectives: to create a community of interest in tribunal reform and administrative justice issues in Wales which can be supported over the long term; and to provide advice, guidance and commentary that will continue to promote the development of the administrative justice system in Wales.

The project has already proved to be extremely valuable. The workshop and conference series has led to increased awareness in the policy, practice and research communities of the potential breadth of administrative justice as a subject area and the distinctiveness of the Welsh context. New networks have been established in Wales which we expect will prove valuable in maintaining an impetus for on-going reform and development tailored to the particular needs of the people of Wales. The depth of analysis and the range of the recommendations contained in this final research Report mean that it will be an important resource for those working in, or seeking to understand, the field into the future.

I am grateful to Dr Sarah Nason and her colleagues at Bangor Law School for their impressive work on this project. They have demonstrated that administrative justice in Wales is an area worthy of specific and sustained attention and I fully expect that it will also act as a stimulus for further research.

Professor Sir Adrian Webb
Chair, Committee for Administrative Justice and Tribunals Wales

November 2015

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UNDERSTANDING ADMINISTRATIVE JUSTICE IN WALES: EXECUTIVE SUMMARY

Introduction

- Administrative justice is, 'the justice inherent in administrative decision-making.'[1] It extends from ensuring that decisions taken by public bodies are correct at first instance, to ensuring that where incorrect, unlawful or poor decision-making occurs there are avenues to have this redressed in as swift and appropriate manner as possible, and that where things have gone wrong, public bodies and others learn and improve. Administrative justice in Wales should be seen in light of devolution, a developing separate Welsh legal jurisdiction, and reform of local government and public service delivery.

- The UK has at least three systems of justice: private civil justice (relationships between private individuals, and between corporate bodies), criminal justice, and administrative justice (relationships between individuals and the state). Whilst private civil justice and criminal justice remain non-devolved (with law and administration largely shared with England) much of administrative justice is devolved. The National Assembly for Wales (the Assembly) has competence to make laws in 21 devolved subjects,[2] each of which concerns the relationship between citizens and the state. Alongside these competencies the Assembly and Welsh Government have developed various redress mechanisms to ensure that laws are enforced and that maladministration is addressed. In areas such as housing, education, health and planning, Wales now largely has its own administrative law and the Welsh Government has responsibility for relevant justice policy and daily administration. Some areas of administrative justice remain non-devolved, most significant (in terms of impact on citizens) are welfare and asylum and immigration.

- This research project supports the Committee for Administrative Justice and Tribunals Wales (CAJTW) in developing foundational principles of administrative justice for Wales, bringing together stakeholders, outlining the roles of core institutions and relevant challenges and opportunities, and developing a sustainable future research agenda.

Key Findings

1. There is a lack of understanding about the breadth of administrative justice across the UK. It is often seen to include only administrative law and the courts and tribunals interpreting and applying such law. However, administrative justice extends to the roles of public bodies, ombudsmen, commissioners, statutory complaint handlers, politicians and advice service providers (among others).

[1] M Adler, 'A Socio-Legal Approach to Administrative Justice' (2003) 25 Law and Policy 323-324 and M. Adler, 'Understanding and Analysing Administrative Justice' in M. Adler (ed), *Administrative Justice in Context* (Hart 2010) 129.

[2] See Part 4 and Schedule 7 to the GoWA 2006. The 21st subject relates to some areas of taxation.

2. In Wales this lack of awareness includes a limited appreciation (among professionals as well as the wider public) of which aspects of the administrative justice system are devolved and which are not. It is necessary to raise awareness of administrative justice in Wales as part of a broader account of social justice defining relationships between citizens and the state. This is particularly important due to specific characteristics of Wales such as its comparatively large public sector, political commitments, demographic make-up and the as yet limited development of its public administrative law advice services sector.

3. *Twelve Principles of Administrative Justice for Wales* are proposed to promote Wales as a progressive nation demonstrating a commitment to high standards of public decision-making, social justice and human rights.

4. The administrative justice 'system' in Wales has developed in an *ad hoc* manner in response to the evolving devolution settlement and immediate demands of public administration. Developing Administrative justice systems across a range of jurisdictions (both UK, European and international) have to grapple with particular tensions. These include tensions between the demands of legal justice and legal rights on the one hand and administrative expertise on the other, and the need to rationalise routes to redress ensuring accessibility to users, efficiency and cost effectiveness (especially in times of austerity) against the unique and specialised demands of particular fields of public administration. There are also tensions among the roles performed by redress providers, particularly whether so-called 'fire-fighter' roles (redressing individual grievances against public bodies) can be appropriately combined alongside 'fire-watcher' roles (working systematically to improve public decision-making).

5. In designing a future system of administrative justice for Wales consideration needs to be given to standards of first-instance decision-making within public bodies, the business case for making decisions that affect citizens right first time, and developing redress mechanisms that can best provide feedback to improve public body performance. These redress mechanisms also need sufficient teeth to effectively enforce their decisions.

6. There is insufficient standardised and publicly available data about aspects of administrative justice in Wales, particularly including complaints and internal reviews within public bodies, and quantitative and qualitative data about 'Welsh' claims across a range of devolved and non-devolved tribunals. We know very little about user experiences of the administrative justice system and what barriers people face in accessing it. A future priority is to collect and interpret such data.

7. It should be user experiences which inform the development of an improved administrative justice system. It is increasingly difficult to fit redress providers (such as ombudsmen, commissioners and some tribunals) within the traditional legislative, executive and judicial account of the state. Wales can innovate by developing an administrative justice system from the ground-up where citizens needs rather than traditional hierarchical relationships define the roles and responsibilities of particular institutions.

8. The Report proposes some specific and some more general considerations to take into account when designing redress mechanisms. It proposes immediate and longer-term potential reforms to particular institutions such as Devolved Welsh Tribunals, enhancing the role of the tribunal judiciary and public law advice providers in Wales, broadening the powers of the PSOW, and examining the role of the Administrative Court in Wales.

Chapter Two: The nature of administrative justice: Concepts and a set of *Administrative Justice Principles for Wales*

- Wales should adopt an integrated conception of administrative justice concerned both with the values of good administration (including principles of good governance) and with more specifically legal values (such as procedural propriety and independence).

- It should adopt a set of *Administrative Justice Principles*, developing and expanding those initially proposed by the Administrative Justice and Tribunals Council (AJTC) in 2010. These could help move Wales away from a common view that administrative justice aligns primarily with administrative law (and highly legalistic values). It can also be a signal that Wales is adopting particular conceptions of administrative justice whilst rejecting others as unsuitable given the political and demographic characteristics of the nation. Adopting a set of principles also allows Wales to base its account on conceptions of administrative justice that are more modern and suited to a nation that displays commitments to social justice and individual rights. Whilst there may be conflicts between the particular principles, the set of principles as a whole outlines core issues (including the core areas where disagreement will likely arise).

- The current principles impose higher standards than those of the 2010 AJTC list; they are a starting point for further debate (including political debate). They aim to promote Wales as a progressive nation in the development of its administrative justice system.

Administrative Justice Principles for Wales

Administrative justice is concerned with public decision-making at all levels in Wales. The Welsh administrative justice system should…

1. Make citizens and their rights and needs central, treating them with fairness and respect at all times
2. Ensure that decisions are based on appropriate procedures, and that people have a right to challenge such decisions including seeking redress using procedures that are accessible, independent, impartial, open and appropriate for the matter involved
3. Ensure people are treated as partners in the resolution of their disputes, keeping them fully informed and enabling them to resolve their problems as quickly and comprehensively as possible
4. Ensure that decisions are well-reasoned, lawful and adequately democratic, and that outcomes are communicated in an appropriate and timely manner
5. Ensure that decisions are coherent, consistent and of sufficient clarity. The system itself must also be coherent from the citizen perspective and ensure that these principles of administrative justice are applied consistently throughout
6. Work proportionately, efficiently and effectively
7. Adopt the highest standards of integrity, public administration and good governance, and be designed to learn from experience and continuously improve, including fostering communication between various decision-makers and redress mechanisms
8. Where possible, provide an opportunity for informal dispute resolution, which may include online dispute resolution where appropriate
9. Minimise any disadvantages to unrepresented parties

10. Ensure that decisions are taken by those with appropriate expertise and encourage accurate and accountable decision-making
11. Ensure respect for human rights, equality, sustainability and the protection of vulnerable groups including children and older people
12. Ensure appropriate respect for the Welsh language including compliance with Welsh Language Standards where applicable

Chapter Three: Making decisions right first time in Wales and internal complaints and reviews within public bodies

- Administrative justice begins with good initial public decision-making. It is important to individuals that decisions are right first time, especially given recent cuts to legal aid funding and the limitation of appeal rights in some areas of non-devolved public decision-making (such as removing the right to appeal in many immigration cases and mandatory internal review in welfare claims). Good decisions are required so that public bodies and government can achieve their policy objectives, as well as saving costs and time in terms of further complaints and appeals. Trust in government is already low across much of Europe and poor decision-making undermines confidence in public bodies; this may lead to even higher rates of complaints and appeals.

- Various studies propose that first-instance decision-making within public bodies is poor across the UK. In Wales the Final Report of the Williams *Commission on Public Service Governance and Delivery* (January 2014) considered some public service performance to be 'poor and patchy'.[3] It also suggested that there was, 'a culture of defensiveness and passivity'[4] in some areas of Welsh public service. However, the Report was wide-ranging and complex and identified areas of good practice and examples where public sector performance exceeded the needs of local communities.[5] Reforms proposed by the Commission to address particular concerns have since been taken forward, though respondents to the current research also gave some anecdotal examples of defensiveness by public bodies; the most commonly cited relating to health, education, local government and the police.

- Public bodies operating in Wales must take a central role in developing a right first time agenda. They must ensure a business case is made for how directing resources to improve initial decision-making can lead to budget savings in the longer term (for example, reducing the costs of responding to complaints and defending appeals).

- There is currently insufficient standardised data about internal complaints handling within public bodies in Wales. Though this is also a problem across a range of legal jurisdictions, both within the UK, Europe and internationally. Further information about the proportion of decisions that are complained about and appealed against and the outcomes of such processes is essential to gain a deeper understanding of whether administrative justice is being achieved in Wales.

[3] Williams Commission, para 1.52.
[4] Williams Commission, para 4.26.
[5] Williams Commission, para 1.52.

- Given the large number of public bodies operating in Wales there are likely to be a broad and diverse range of internal complaints mechanisms. These may be standardised across particular types of public body (such as local authorities and the NHS in Wales) but research suggests that even standard complaints mechanisms are implemented and operated variably across the same types of public body. There are concerns around the number of different versions of a particular complaints process that are in play across a supposedly standardised system (such as the NHS in Wales). Users find it difficult to navigate systems (in particular in determining which point to access and when, and when complaints revert to legal processes), it is also suggested that learning from complaints is not being universally achieved.

- There is an increasing trend across much of the UK, Europe and internationally, towards the adoption of internal review. Here the reviewer is re-examining the substance of the issue (such as whether to award a particular benefit or curtail a particular service) as opposed to considering complaints of maladministration such as delay or lack of respect on the part of the administrator.

- Much current scepticism surrounding internal review stems from the belief that it has been adopted across various public bodies as a cost saving exercise without due consideration of the impacts on administrative justice. It is arguably sometimes adopted to relive pressure on external courts and tribunals without due regard to the status and impact of the procedure as part of a coherent system of redress. There is also sometimes an ambivalent relationship between internal review and first instance decision-making, especially where internal review comes to be seen as a second chance opportunity to cure poor quality decision-making which in itself is caused by the drive to meet efficiency targets. Given the number of public bodies operating in Wales there is a general lack of awareness of the range of internal complaint and review mechanisms on offer (especially in areas outside the newly standardised processes statutorily regulated in the field of health and social care).

- One particular contentious area issue is, 'mandatory reconsideration' (MR) taking place in the UK Department for Work and Pensions (DWP). Welfare is a non-devolved area of administrative justice, but of key importance to people in Wales. Under MR people aggrieved by government decisions concerning 22 different types of benefits[6] are required to ask for MR (within one month of the date of the initial decision) before pursuing any other redress mechanism. Under this process the claimant asks the DWP to reconsider and reverse its original decision. As yet there is no data on the number of claims having been through the MR process that are subsequently overturned on appeal to the non-devolved Social Security and Child Support Chamber (SSCS) of the First-tier Tribunal. The data so far released does not tell us how well the system is working in terms of resolving disputes and increasing the quality of decisions. Some inferences can be drawn in terms of the number of appeals. For example, the number of Welsh cases issued in the SSCS dropped from 10,483 in the second quarter of 2013 to 2,138 in the final quarter of 2014 (echoing similar trends for claims from England and Scotland). However, 'Welsh' claims had risen to 3,049 in the second quarter of 2015.

[6] For example, child benefit, child maintenance, income support, jobseekers allowance, personal independence payments (PIP) and employment and support allowance (ESA).

- It is recommended that the Assembly, Welsh Government and public bodies in Wales think carefully about the pros and cons before introducing new internal review processes (especially compulsory processes) and that those internal review processes already adopted in devolved and non-devolved public-bodies operating in Wales be continually monitored especially in terms of their impacts on access to justice.

Chapter Four: The Public Services Ombudsman for Wales (PSOW) and Welsh Commissioners'

- Responses to the current research focused on the constitutional roles of ombudsmen and commissioners within administrative justice systems, including proposals to increase their powers. Discussion concerning the PSOW focused on the Assembly Finance Committee recommendation to extend the role to include powers to initiate own investigations. The conferral of a similar power on the Northern Ireland Ombudsman (NIO) is currently in the process of being enacted.

- The National Assembly for Wales Finance Committee also recommended that the PSOW should have a statutory complaints handling role including provisions to; publish a model complaints handling policy for listed authorities, require regular consultation with relevant stakeholders, require public bodies to collect and analyse data on complaints, and ensure standardised language is used by public bodies when collecting data so that comparisons can be made. This recommendation would bring the PSOW role further into line with that of Northern Irish and Scottish counterparts. However, it would require careful implementation ensuring powers are used in a way that is complementary to any existing statutory responsibilities to operate complaints procedures.

- Ombudsmen are the buckle of the belt of remedies in administrative justice, and this characterisation fits well with the difficulty of siting them within any one of the specific legislative, executive, and judicial arms of the state. There is some tension between the role of resolving individual complaints, and the extent to which any specific ombudsman can be proactive in engaging in a more 'system-fixing' function of investigating systemic failings in particular public bodies and making recommendations for improvement. Ombudsmen have roles as criticisers (publicly criticising policies and legislation) and as 'fire-fighters' (handling individual complaints), but they can also be 'fire-watchers' (working systematically to improve the quality of public decision-making). It is suggested that success in the first two roles, which largely depict ombudsmen as citizen champions, can undermine success in the third role which requires more co-operation with public bodies. The prevalence of quick and informal resolution of individual complaints paints a picture of ombudsmen as somewhat biased towards individuals and the lack of more systematic investigations with following recommendations may limit an ombudsman's performance of the broader role of improving public trust in administration. In short, can the PSOW successfully combine his fire-fighting and fire-watching roles (the latter being specifically characterised by the future grant of own initiative powers) or does success in one role inevitably undermine the other?

- Commissioners in Wales (as in other legal jurisdictions) have a role in handling specific individual complaints as well as having powers to initiative broader investigations. There may be advantages to this in terms of specialist expertise, in acting as advocate for the

complainant or in the specific commissioner's ability to sign-post to other relevant services, but there are concerns here especially in relation to the strategic use of resources and the broader 'system-fixing' roles of commissioners. These concerns do not just relate to expertise and resources but also to what ought to be the proper constitutional role of commissioners as part of an administrative justice system.

- Both ombudsmen and commissioners could be variously aligned to the legislative, executive or judicial branches of state. They have also been conceptualised as forming part of a new branch of state, the 'integrity' branch. This also includes other innovative un-elected methods of accountability, such as regulators. There are concerns around the possible growth of this fourth 'integrity' branch, in particular that rather than being an additional and proportionate route to improving administrative justice it could be seen as a cheap alternative to traditional court-based adjudication over matters of legal right. In this sense it might be viewed as access to justice on the cheap in times of austerity.

Chapter Five: Bilingual administrative justice

- One key commissioner is the Welsh Language Commissioner (WLC). Some of the WLC's roles emanate from the Welsh Language Act 1993, e.g., those dealing with Welsh language planning. Other roles are conferred by the Welsh Language (Wales) Measure 2011, including the setting of Welsh language standards. It is with the setting of these standards and regulations that the role begins to transition from primarily a monitoring body to a regulatory body with the power to take specific steps to ensure that relevant pubic bodies are complying with standards, and rectify the situation if they are not. Alongside these powers we see the establishment of the Welsh Language Tribunal (WLT), to which decisions of the WLC can be appealed. Since the WLC is now scrutinising the Welsh Government, it may no longer be constitutionally appropriate for her to be accountable to the Welsh Government as this compromises perceptions of independence; it has been suggested that accountability ought to lie with the Assembly (as it does in the case of the PSOW).

- There are tensions between theories of linguistic justice and the goals of administrative justice (specifically the goal of resolving individual grievances efficiently). Research shows that the general public largely regard language commissioners as ombudsmen, despite their enabling powers often casting them in a role more akin to a regulator. It has been suggested that both within a range of jurisdictions, and within international law, emergent systems of administrative justice are catalysing a shift from regimes based on linguistic rights determined by courts, to systems where the protection of citizen's rights is being instead shifted to language commissioners in the context of person versus person dispute resolution. There are then concerns surrounding the extent to which this provides for adequate protection especially in the case of constitutionally prescribed languages. This relates back to commissioners as part of the 'integrity' branch. Does the increasing use of this branch to resolve individual 'legal' disputes provide a proportionate alternative to court redress, but also run the risk of not providing adequate protection for legal rights due to relatively informal processes?

- Whilst legislation and Practice Directions require the use of translation (including simultaneous translation) and expert assistance where necessary to ensure respect for the use of Welsh in court, there is no specific right to a bilingual judge. If this right were

established (as has been done in other jurisdictions such as Canada) various courts and tribunals operating as part of the administrative justice system in Wales would struggle to provide enough judges to practically facilitate it.

Chapter Six: The administrative justice 'system' in Wales: Core institutions, redress mechanisms, and areas of potential reform

- This Chapter focuses on the main institutions of the administrative justice 'system' in Wales and the factors to be taken into account when developing and reforming them.

- Despite various attempts to define what constitutes an administrative justice system and what it should do, the has AJTC noted: 'In practice, one of the difficulties faced by the citizen is that there is at present no coherent system of administrative justice. Rather, the 'system' comprises a large number of disparate elements that have to a great extent developed separately to perform different functions'.[7] In relation to the Welsh public sector, the Williams Commission Report notes: 'There is no clear and agreed definition, however, of exactly what the Welsh public sector is or which organisations it includes…That alone demonstrates that the sector has evolved and that its structure lacks coherence'.[8] If this is true of the Welsh public sector it could equally be true of the administrative redress mechanisms within in. Respondents to the current research felt that administrative justice (in terms of the quality of first instance decision-making and redress mechanisms) has developed on an *ad hoc* basis in Wales.

- In order to fully understand 'systems' of administrative justice, a good method may be to approach the issue by sector, mapping all the institutions, procedures and support services relevant to particular subject areas (such as education, health, planning, asylum and immigration and so on). This is a significant task, and one that has recently been undertaken with for Scotland (similar work has previously been conducted in Northern Ireland).[9] This would be a valuable exercise to conduct for Wales.

- Systems should be looked at holistically; across many legal jurisdictions there is a degree of convergence among particular redress mechanisms (including those which do not fit neatly into legislative, executive or judicial branches of state). It has been suggested that the traditional distinctions between courts and tribunals have been rendered largely obsolete. Such fluidity raises concerns, especially where tribunals are becoming more court-like, this goes against the traditional inquisitorial and informal nature of tribunal adjudication where litigants are ideally supposed to be able to represent themselves without legal advice or the instruction of an advocate.

- Given the devolution context, we ought to be asking specifically, does Wales need such a variety of grievance redress mechanisms, is there scope for rationalisation between them or across them, are some better at resolving grievances than others, and what is the way forward for Wales? More research is needed to consider if administrative justice

[7] AJTC, *The Developing Administrative Justice Landscape* (2009), para 11.
[8] Williams Commission, Para 1.28.
[9] Publication of the Scottish work is forthcoming, expected November 2015. M Anderson, A McIlroy, M McAleer, *Mapping the Administrative Justice Landscape in Northern Ireland* (Northern Ireland Ombudsman 2014).

redress mechanisms in Wales are incoherent, too numerous, and too burdensome, and whether particular mechanisms are disconnected and non-complementary.

- In 2009 the AJTC noted that the sense of nurturing a more holistic administrative justice system is arguably more developed outside the UK particularly in other European jurisdictions and Australia. However, these jurisdictions are also experiencing difficulties. In relation to tribunals in Australia (both at Federal and State level), they are institutions defined more by what they are not than by what they are, and what they are definitely not, are courts. The innovative process of merits review (administrative not judicial decision-making) marks out Australian tribunals that adopt it as very different to courts. It has been suggested that they should be seen as forming a fourth branch of state alongside the executive, legislature and judiciary. In this sense administrative justice is catalysing a re-designing of the constitutional landscape, e.g., if tribunals are a fourth branch of state and ombudsmen and commissioners are then seen as an fifth 'integrity' branch. This is a radical shift from the traditional tripartite model; it has benefits in terms of properly recognising the unique characteristics of particular institutions but arguably leads to a more fragmented state.

- Another broad trend across a range of jurisdictions is a move towards greater amalgamation of various institutions within the administrative justice system. For example, across many jurisdictions there has been an impetus to bring tribunals into a single structure. Developments in England and Wales, Scotland, the UK, Canada and Australia are testament to this, as are proposed reforms in Northern Ireland and New Zealand. Similar reforms have been proposed in the Netherlands to amalgamate various administrative courts. The expressed advantages of amalgamation are that it may enhance the independence of the then established 'super tribunal' (or super court), providing a structure that is more efficient, expert, accessible and flexible.

- However, there has been a notable lack of research (especially empirical studies) assessing whether amalgamated tribunals bring the benefits proposed. When different subject matter tribunals are brought together under a tier and/or chamber structure issues arise around maintaining the necessary degree of expertise (specialisation) and the appropriate level of decision-making (e.g., what calibre of judge or other panel member ought to be determining certain types of application). Other disadvantages include: the potential for 'creeping-legalism', an over formalisation of procedures, increased administrative and procedural complexity, and the favouring of larger bodies within the conglomerate organisation. These aspects combine to create a power imbalance between the citizen and the state. There may be advantages to some rationalisation of tribunals in Wales, but whether amalgamation into a 'super tribunal' structure is desirable requires further research.

- The complexity of initial legislation affects the quality of public decision-making. Examples given to the current research were taxation and social security legislation stemming from the Westminster Parliament. Much of the current climate (across the broader UK) in relation to administrative justice has been focused on restricting access to legal challenges before courts and tribunals, when instead perhaps the best way to avoid such challenges is to ensure that initial legislation is drafted in a manner which leads to decisions that are just and correct.

- There are those who perceive 'dangerous trends in modern legislation' stemming from the Westminster Parliament and Government.[10] Many of these are put down to the relaxation of restraint and a resultant increase in the degree of control which the executive exercises over the application of legislation after enactment. Research participants suggested that one way for Wales to innovate is to utilise various existing Assembly Committees to provide proper scrutiny with respect to administrative justice principles in legislation. It was also suggested that an additional more specialist committee (or committees) could be established.

- The Williams Commission recommended that that the Assembly; 'Review existing legislation to ensure that it simplifies and streamlines public-sector decision-making rather than imposing undue constraints on it or creating complexity; and either repeal such provisions or clarify their meaning and interaction'.[11] This suggestion brings with it the prospect of codification.

- In this regard the Law Commission has recently completed a Consultation on *The Form and Accessibility of the Law Applicable in Wales*.[12] The Consultation considers the potential for consolidation or codification of parts of the law applicable to Wales, measures for the Assembly to put in place to ensure effective law-making systems, establishing processes within the Welsh Government and Assembly to allow policy and law-makers to take a more considered view of the law as a whole, how to ensure that legislation is truly bilingual and how to make such law accessible to the public. The Commission is due to publish its advice to Welsh Government in advance of the May 2016 Assembly elections.

- In general codification can lead to simplification and harmonisation, where general concepts and principles can be found in one place rather than across a range of special branches of law. It enables stakeholders (legislators, government officials, administrators, lawyers, judges, other advisers and citizens) to be speaking one language in respect of core principles of administrative justice. To the extent that codification does not change the law, but rather simplifies and streamlines existing legislation relating to public sector decision-making (as recommended by the Williams Commission); this is likely to be both desirable and within legislative competence. It would leave individuals and public bodies operating in Wales with clearer and more uniform guidance about what each can expect from the other in terms of public decision-making. It would allow administrative lawyers and public servants in Wales to use the same vocabulary to explain various rules and principles.

- However, there are disadvantages to codification. General rules may leave insufficient room for decision-making to be shaped based on the special characteristics of the particular field of law concerned. The presence of an overarching Act limits the flexible development of administrative law and the emphasis on procedure may result in 'juridification' which sometimes limits the potential to reach quick and informal solutions, and which may side line the substantive expertise of administrative agencies. These

[10] Daniel Greenberg, 'Dangerous trends in modern legislation' [2015] Public Law 96.
[11] Williams Commission, Para 2.37.
[12] CP223 available online at: http://www.lawcom.gov.uk/project/the-form-and-accessibility-of-the-law-applicable-to-wales/#related

drawbacks combine to create a system that is increasingly complex and hard to navigate. The matter is further complicated because whilst legislation (and related policy and guidance) can impose specific substantive and procedural duties on public bodies that are only applicable in Wales, there remain general common law principles of administrative law that apply both to Wales and England.[13]

- A cautionary tale surrounding codification is that unexpected consequences may follow, with many, possibly even the majority of applicants, using non-codified routes if these remain open and become favourable in the changing legal and policy climate. If Wales were to codify any of its Measures and Acts relating to procedures for enforcing legal rights against public bodies this potential for fragmentation must be borne in mind. In particular because common law judicial review is likely to have the status of a constitutional right which can be sought wherever other procedures for challenging public bodies are either unavailable or inadequate in context.

- Public Law Project (PLP) research has proposed nine principles to be taken into consideration when designing new systems of redress in the field of administrative justice and it is suggested that the Assembly, Welsh Government (and any other bodies with redress design responsibilities in Wales) ought to take these into account.[14] The following analysis adopts these first nine principles and builds on them to provide an early account of suggested principles for designing redress in relation to public bodies operating in Wales.

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

[13] These are primarily that public body decisions must be compliant with relevant law, procedurally fair, and reasonable Lord Diplock in *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374

[14] Varda Bondy and Andrew Le Sueur, *Designing redress: A study about grievances against public bodies* (PLP 2012).

13. The design and delivery of redress mechanisms must be accompanied by appropriate publicity and information

Chapter Seven: Devolved Welsh Tribunals[15] and comparative perspectives

- Publicly available data surrounding tribunal caseloads and user experiences both in relation to the Devolved Welsh Tribunals and to Welsh claims in non-devolved tribunals is limited.

- Devolved Welsh Tribunals face problems at two levels: certain immediate problems and structural reform of the entire tribunal 'system' (if it is a system at present). The immediate areas are: cross-ticketing (assignment) of judges, judicial appointments and training, and administrative resources. Research respondents argued that each of these aspects has developed in a way that is wasteful of resources and lacks rationality. There is a need to consider rationalising processes into a genuinely unified approach, in particular developing common training structures, common appointments processes, and common administration across Devolved Welsh Tribunals. The Welsh Tribunals Unit (WTU), with responsibility for administering eight of the Devolved Welsh Tribunals, is making progress addressing some of these concerns. One further issue is the position of the WTU itself, it is within the purview of the Welsh Government Department for Constitutional Affairs and Inter-governmental Relations and located largely at Welsh Government offices in Cardiff, it may not appear sufficiently independent.

- Cross-ticketing (better termed assignment) of judges between particular tribunals could ensure more sittings and make better use of the available pool of talent in Wales, it could also help resolve issuing arising from small caseloads. However, there are risks especially in relation to the possible lack of necessary judicial specialisation and practical issues such as the number of judicial sitting days per-annum.

- Judicial appointments in Devolved Welsh Tribunals take a variety of forms with some judges being formally appointed by the Lord Chancellor, whereas others are appointed by Welsh Ministers. There needs to be greater clarity and uniformity in the system, and it is suggested that in the longer-term Welsh Ministers should take responsibility for all appointments to Devolved Welsh Tribunals. There is merit to having Welsh badged solutions to Welsh problems, it could be more efficient and appropriate to replicate the broader England and Wales approach. The recent process to appoint members of the WLT (incorporating Judicial Appointments Commission (JAC) processes and Welsh Ministers) was given as an example of good practice to be followed in future.

[15] For present purposes these include: Adjudication Panel for Wales, Agricultural Land Tribunal for Wales, Board of Medical Referees, Independent Review of Determination Panels, Mental Health Review Tribunal for Wales, Registered Nursery Education Inspectors Appeal Tribunal, Registered Inspectors of Schools Appeal Tribunal, Residential Property Tribunal for Wales, School Admission Appeal Panels, School Exclusion Appeal Panels, Special Educational Needs Tribunal for Wales, Traffic Penalty Tribunal, Valuation Tribunals for Wales, Welsh Language Tribunal, Forestry Committees for Wales (although there is some discussion about whether the Forestry Committees for Wales in fact constitute a tribunal or is more of an internal review mechanism given its adjudicative function is by way of making a recommendation of its findings to the Welsh Ministers as opposed to independently determining the dispute).

- Wherever services (such as judicial recruitment, selection and training) are 'brought in' from other jurisdictions (including on an England and Wales basis) there must be an assurance of proper regard for Welsh interests. For example, there ought to be either formal contracts or memoranda of understanding to ensure that appropriate resources and expertise are devoted to Welsh work and that Welsh work does not suffer in light of any economic difficulties faced specifically in relation to English work.

- There is some perceived lack of confidence in the ability of the justice system as devolved to Wales to deliver processes and outcomes of comparable quality to those delivered by England and Wales combined institutions. In the context of both specialisation and access to training, the Welsh judiciary must be recognised as having parity with judges in England and Wales; Welsh posts should be universally acknowledged as having equal status and there should be some level of recognition in relation to both the sharing of expertise and the sharing of jurisdictions.

- Support was expressed for proposals to establish senior judicial leadership for Devolved Welsh Tribunals. This could extend to overall responsibility for administrative justice in Wales (including courts and tribunals). A relevant judge or judges could also have responsibility for monitoring Welsh cases within relevant non-devolved courts and tribunals and fostering good relationships between the devolved and non-devolved aspects of administrative justice in Wales.

- Devolved Welsh Tribunals have the potential to develop co-operative relationships with public bodies, including Welsh Government departments. Devolved Welsh Tribunals also have the capacity to take a proactive role in encouraging settlement. Wales could also innovate by developing the teeth of Devolved Welsh Tribunals in terms of relevant powers and procedures relating to enforcement of their orders.

- There is currently a patchwork of onward appeals from Devolved Welsh Tribunals, for example with some appeals going to the High Court (Administrative Court) and others to the Upper Tribunal. When considering structural reform of the entire system this needs to be seen in light of the developing separate Welsh legal jurisdiction and the consensus to move to a reserved powers devolution model.

- The current priority should be to improve relationships between individual Devolved Welsh Tribunals and between the devolved and non-devolved systems, improving co-ordination and co-operation. Wales has no *control* over the non-devolved tribunals, for example in relation to fees charged (such having a major impact on access to justice), but it can at least engage in *dialogue* and share best practices. However, even if further responsibility for the administration of justice were devolved in Wales, this would not solve all the problems identified in the current research. Issues around judicial training and access to specialist legal services in a small jurisdiction would remain, and as is the case in Scotland, some policy areas are unlikely to be devolved leading to continuing complex relationships between devolved and non-devolved areas.

Chapter Eight: The Administrative Court in Wales

- The Administrative Court in Wales has been recognised as a good example of operating a High Court Division in Wales. The relevant Practice Direction, CPR PD 54D

Administrative Court (Venue), has also been considered as an example that could be adopted across other elements of the High Court's jurisdiction to ensure that civil cases pertaining to Wales are determined in Wales. It notes: 'The general expectation is that proceedings will be administered and determined in the region with which the claimant has the closest connection, subject to the following considerations…' one of which is 5.2(10) 'whether the claim raises devolution issues and for that reason whether it should be more appropriately determined in London or Cardiff'. Neither PD 54D nor case law *specifically requires* cases pertaining to Wales to be issued and determined in Wales.

- When the Administrative Court Centres were established outside London it was assumed that they would be carbon copies of the Administrative Court based at the Royal Courts of Justice. However, the Administrative Court in Wales now does some things differently, drawing on the strengths of operating within a small jurisdiction. For example, the Administrative Court Office Wales Listing Policy outlines the listing process the Administrative Court Office in Wales will undergo and which does not apply to the other Administrative Court Offices.

- The Administrative Court in Wales functions as an institution providing a form of 'one stop shop' for administrative justice. This is because many different topics of claims (both judicial review and statutory appeal) are initially directed to that Court and the Administrative Court Office then works to allocate appropriately experienced and specialised judges. Such a system needs appropriate 'gate keepers'. In order for there to be efficient allocation and case management the system needs to have independent lawyer involvement from an early stage and lawyers must have adequate powers to case manage. The term 'gatekeeper' is used in the Family Court where legal advisers have involvement from the beginning of the process. The term 'gate keeper' could similarly characterise the role of the Administrative Court lawyer for Wales.

- The number of judicial review claims issued in the Administrative Court in Wales is comparatively small compared to other Centres. This is understandable given the population of Wales. However, more concerning is the number of claims per head of resident population in Wales. Based on claims we know to be Welsh,[16] there were 1.8 civil judicial review claims per 100,000 Welsh residents in both 2013/14 and 2014/15. On the other hand the number of claims per head of population in other locations has been higher, though falling in recent years. For example, claims per 100,000 residents in London and Southern England have fallen from 5.4 per 100,000 residents to 4.5 per 100,000 residents between 2013/14 and 2014/15. Claims per 100,000 residents in the North West of England were down from 3 to 2.1 and in North East England down from 2.7 to 1.6. On the other hand in the Midlands claims per 100,000 residents have increased from 1.2 to 1.4. It can be speculated that the reductions in cases per head of population are a result of reforms to judicial review procedure and to legal aid which have combined to make the process less accessible.

- Judicial review litigation provides evidence of how well a particular administrative justice system is working, and how satisfied citizens are with their public services. It provides an important constitutional oversight to any system of administrative justice and the

[16] Based on an analysis of claimant, solicitor and defendant addresses.

impacts of a few cases can be profound and wide. Access to judicial review matters, both for the admittedly small number of cases that do develop into remedies given by the courts, and for the much larger number of cases that don't (which act as a catalyst for remedial settlements of individual cases).

- Some 50% of claims issued in the Administrative Court in Wales do not pertain to Wales (with the largest proportion relating to the South West of England). In only 6% of such cases are claimants from outside Wales represented by solicitors based in Wales. This implies that cross-fertilisation and a shared profession is currently working more to the advantage of English solicitors than Welsh solicitors. The same can be said in relation to barristers; 86% of Welsh claimants who instruct a barrister to appear for them in Wales instruct a barrister based in England (only 14% of barristers appearing in the Administrative Court in Wales are from chambers located in Wales). These figures may be evidence of an advice services gap, notable especially on the claimant side of the equation, especially at the more specialist level of instructing a barrister.

- Given that rates of judicial review claim are comparatively low in Wales compared to most English regions; can we assume that people are generally well satisfied with the performance of Welsh public bodies, or is there a gap in advice provision, limited general awareness (a lack of public legal education), and/or some sense of cultural reluctance to claim?

Chapter Nine: Administrative justice advice services in Wales and user perspectives of the administrative justice system

- Advice service providers in Wales face a number of challenges, especially in the context of funding cuts and the economic climate, but also in light of the growing divergence in the public administrative law of Wales and England respectively. Some of these issues are being addressed by the establishment of a National Advice Network (NAN) with the aim of ensuring strategic co-ordination and commissioning of advice services, increasing shared learning and making best use of available resources.

- Research respondents argued that Wales lacks a developed public administrative law advice services sector particularly from the complainant's perspective. However, it was contrarily argued that there is a diverse range of advice services provision in Wales: from smaller agencies providing advice on specialist issues, to more generalist larger scale providers such as CAB Cymru. A range of advice providers who were contacted as part of this research did not want to contribute because they did not see themselves as part of the administrative justice system. The problem here may then be one of awareness and of how we 'package' the idea of administrative justice and an administrative justice system. Many actors who identify themselves as being part of the Welsh administrative justice system are part of the government (being part of the executive and administrative branches of state) and awareness of the full extent and nature of the system and its various actors may be unbalanced with a notable gap on the side of complainants. In order to create a public law culture in Wales a first step is to accept that there may be a gap both in awareness and potentially also advice provision on the side of complainants.

- Many advice agencies operating in Wales receive part of their funding from the UK Government and this should be borne in mind when considering whether limited funding is a cause of some perceived or actual advice gap in Wales. Ultimately funding for access to justice is a problem, and given that the legal aid budget is not devolved there might be limitations on what can be achieved on a Wales only basis.

- This research echoed the conclusions of previous studies that there appears to be a lack of specialist public administrative law practitioners (both solicitors and barristers) based in Wales. Research respondents suggested that vast swathes of rural and dispersed populations in Wales have difficulty accessing private legal advice. In Wales the pattern of private advice provision is different for example to England, as there are a smaller number of firms involved many of whom are sole traders. The comparatively small population served by individual firms requires that many solicitors firms be generalist across a broad spectrum of both pubic, civil and criminal law issues.

- Previous research has suggested that the impact of legal aid policies may have been disproportionately felt in Wales, in particular because these polices have rewarded firms with high caseloads and encouraged mergers whilst discouraging expansion into particular specialisations. Due to the generalist nature of many firms in Wales, the loss of a criminal legal aid contract can have an impact on the provision of public law services, as the generalist firm (which may also have offered some public law competence) might likely close if it loses vital bread and butter criminal work. There are knock on effects to restricting legal aid in criminal and civil matters that can change the broader landscape of legal service provision dramatically.

- Research respondents argued that there might be few private law firms based in Wales operating on a Wales only basis, as there is arguably not enough business to sustain larger private firms and specialist firms in particular. The process of devolution creates specific difficulties at the coalface in the advice context and these are unlikely to be resolved until the separate legal jurisdiction question itself is resolved. Wales may have a defined territory, but at least from the perspective of some private providers, its borders do not reflect the reality of their operations. It was noted that the amount of public law legal advice required will continue to grow, yet practitioners in Wales have so far been slow to respond.

- It was suggested that people in Wales are proud of their public services and want to work with them, which may impact on whether and how people complain. In addition the economic environment of Wales was noted; for example higher rates of in and out of work benefits as compared to Great Britain as a whole. That the Welsh population is comparatively less affluent might also be a factor in low rates of complaining against pubic bodies, especially through formal legal channels. Deprivation could be connected to more limited public legal education and awareness of rights, and less confidence in pursuing complaints or appeals processes.

- We know little about what people think and do about administrative justice in Wales (or indeed across the UK). This is of particular concern given a general theme of this Report that user experiences and needs ought to be central to understanding administrative justice and how we should design an administrative justice system. More

research is needed to collect data and gain an understanding of user perspectives, especially in relation to barriers to accessing administrative justice.