

**UNDERSTANDING ADMINISTRATIVE JUSTICE IN WALES:  
FULL REPORT INCLUDING EXECUTIVE SUMMARY**



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**Dr. Sarah Nason (November 2015)**

## **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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## **GLOSSARY OF KEY TERMS**

**Administrative Justice and Tribunals Council - AJTC**

**Australian Administrative Review Council – ARC**

**Committee for Administrative Justice and Tribunals Wales – CAJTW**

**Discretionary Assistance Fund for Wales – DAF, Welsh system providing payments to meet special needs (primarily of claimants receiving means tested benefits)**

**Government of Wales Act 2006 – GoWA 2006**

**Her Majesty’s Courts and Tribunals Service – HMCTS**

**Judicial Appointments Commission – JAC**

**Mandatory Reconsideration – MR, A statutory UK Department for Work and Pensions process of compulsory internal review relating to some benefit decisions**

**National Assembly for Wales – Assembly**

**National Assembly for Wales Finance Committee – Assembly Finance Committee**

**National Association of Welfare Rights Advisers - NAWRA**

**Northern Ireland Ombudsman - NIO**

**Public Services Ombudsman for Wales – PSOW**

**Putting Things Right – PTR (the statutory ‘concerns’ process operating in the Welsh NHS)**

**Scottish Public Services Ombudsman – SPSO**

**Tribunals Courts and Enforcement Act 2007 – TCEA 2007**

**United Kingdom Administrative Justice Institute – UKAJI**

**Welsh Language Commissioner – WLC**

**Welsh Language Tribunal - WLT**

**Devolved Welsh Tribunals – All those tribunals noted at para 7.2 of this Report**

**Welsh Tribunals Unit – WTU, Welsh Government body administering eight of the Devolved Welsh Tribunals**

## **UNDERSTANDING ADMINISTRATIVE JUSTICE IN WALES: EXECUTIVE SUMMARY**

### **Introduction**

- Administrative justice is, ‘the justice inherent in administrative decision-making.’<sup>1</sup> 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,<sup>2</sup> 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).**

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<sup>1</sup> 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.

<sup>2</sup> See Part 4 and Schedule 7 to the GoWA 2006. The 21<sup>st</sup> 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'.<sup>3</sup> It also suggested that there was, 'a culture of defensiveness and passivity'<sup>4</sup> 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.<sup>5</sup> 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.

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<sup>3</sup> Williams Commission, para 1.52.

<sup>4</sup> Williams Commission, para 4.26.

<sup>5</sup> 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 relieve 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<sup>6</sup> 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.

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<sup>6</sup> 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 Assembly 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 initiate 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 public 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’.<sup>7</sup> 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’.<sup>8</sup> 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).<sup>9</sup> 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 redress mechanisms in Wales are incoherent, too numerous, and too burdensome, and whether particular mechanisms are disconnected and non-complementary.

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<sup>7</sup> AJTC, *The Developing Administrative Justice Landscape* (2009), para 11.

<sup>8</sup> Williams Commission, Para 1.28.

<sup>9</sup> 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).

- 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.<sup>10</sup> 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'.<sup>11</sup> 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*.<sup>12</sup> 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

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<sup>10</sup> Daniel Greenberg, 'Dangerous trends in modern legislation' [2015] Public Law 96.

<sup>11</sup> Williams Commission, Para 2.37.

<sup>12</sup> 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.<sup>13</sup>

- 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.<sup>14</sup> 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

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<sup>13</sup> 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

<sup>14</sup> 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 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 issues 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.
- 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,<sup>15</sup> 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 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

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<sup>15</sup> Based on an analysis of claimant, solicitor and defendant addresses.

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 public, 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 policies 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 public 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.

## CHAPTER ONE: INTRODUCTION AND BACKGROUND TO THE RESEARCH

### Administrative Justice in Wales: Devolution and Constitutional Context

- 1.1** Administrative justice is ‘the justice inherent in administrative decision-making.’<sup>1</sup> It extends from ensuring that decisions taken by bodies exercising public powers are correct at first instance, to ensuring that where incorrect, unlawful or simply 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 from the problems and make improvements.
- 1.2** Lord Denning argued that doing justice between man and the administration is as important as doing justice between man and man.<sup>2</sup> Doing justice between man and the administration is the preserve of administrative justice and its importance in Wales with its significant state sector and public service culture should not be overlooked.
- 1.3** There is evidence that good administrative justice redress mechanisms can lead to improvements in public decision-making for the benefit of individual citizens and the broader public,<sup>3</sup> and that getting administrative decisions ‘right first time’ can lead to significant financial savings for public bodies in the longer-term.<sup>4</sup>
- 1.4** The UK has at least three systems of justice: private civil justice (various relationships between private individuals, and between corporate bodies), criminal justice, and administrative justice (relationships between individuals and the state). Whereas private civil justice and criminal justice remain non-devolved (with law and administration largely shared with England)<sup>5</sup> much of administrative justice has already been devolved. The Assembly has competence to make laws in 21 devolved subjects,<sup>6</sup> each of which is largely concerned with the relationship between citizens and the state (such legislation is then part of the administrative law applicable to Wales). Alongside these competencies the Assembly and Welsh Government have developed redress mechanisms to ensure that laws are properly enforced and that maladministration is addressed. There are also instances where

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<sup>1</sup> 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.

<sup>2</sup> Lord Denning, *Freedom Under the Law* (London 1949) 96.

<sup>3</sup> See e.g., Tony Prosser, *Test Cases for the Poor* (Child Poverty Action Group 1983) 83-85; Marc Hertogh and Simon Halliday, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (CUP 2004); Lucinda Platt, Maurice Sunkin, and Kerman Calvo, ‘Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales’ (2010) 20 (suppl 2) J Public Adm Res Theory 243; Jeff King, *Judging Social Rights* (CUP 2012) 70-76.

<sup>4</sup> E.g., Robert Thomas in, ‘Administrative Justice, Better Decisions and Organisational Learning’ [2015] PL 111.

<sup>5</sup> However, ‘...the National Assembly already has powers to legislate for matters that relate to the civil or criminal law when they are used as mechanism for implementation or enforcement of provisions that relate substantively to devolved subjects’ see Section 108(5) GoWA 2006. Cardiff University Wales Governance Centre and UCL Constitution Unit, *Delivering a Reserved Powers Model of Devolution for Wales* (September 2015) 19.

<sup>6</sup> See Part 4 and Schedule 7 to the GoWA 2006, there are some exceptions and restrictions to devolved competence set out in Schedule 7 and section 108. The 20 areas in which the Assembly can legislate cover the delivery of local services – education and training, fire and rescue services, health services, highways and transport, housing, local government, social welfare, planning (except major energy infrastructure) and water supplies – agriculture, fisheries, forestry, culture, including the Welsh language and ancient monuments, economic development and the environment. The 21<sup>st</sup> subject relates to some areas of taxation, Wales Act 2014.

the law and associated redress applicable only to England has been reformed, whereas Wales has chosen to keep the law and redress that was once shared. In core areas such as housing, education, health and planning, Wales now largely has its own administrative law<sup>7</sup> and the Welsh Government has responsibility for relevant justice policy and day-to-day administration. However, some key areas of administrative law and justice remain non-devolved, the most significant of which (in terms of impact on citizens) being welfare and asylum and immigration.

**1.5** In evidence to the Silk Commission on Devolution in Wales, the Welsh Government noted: 'The Assembly should have legislative competence in respect of Administrative Justice issues within areas of devolved competence, and the Assembly and the Welsh Ministers together should have powers enabling coherence to be created in relation to devolved Administrative Justice in Wales',<sup>8</sup> and: 'The Assembly should continue to have legislative competence for most Public Administration in Wales, and this should extend to (i.e. no new Reservation imposed in respect of) Administrative Justice in relation to matters within the Assembly's devolved competence (for example, creation of complaints and redress systems, and administrative tribunals dealing with matters within that devolved competence)',<sup>9</sup>

**1.6** Alongside the evolving devolution settlement, the sister question of the pros and cons of establishing a separate legal jurisdiction for Wales has been increasingly explored in consultation and evidence.<sup>10</sup> It has been said on many occasions that in order to have a separate legal jurisdiction one must have a defined territory over which a defined body of law is applicable administered by its own legal institutions. Wales has a defined territory, and there is an increasing body of law that is only applicable in that territory.<sup>11</sup> As the divergences between the laws of England and Wales continue to grow (not just because Wales is developing differently but because England is innovating as well) combined court and tribunal structures and a combined legal profession might no longer be sustainable. The administrative justice system has already started down this road with a set of Devolved Welsh Tribunals (which are largely the responsibility of the Welsh Government) and an Administrative Court for Wales that looks increasingly different to its English counterparts

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<sup>7</sup> Alongside legislation (both primary and secondary) there are administrative law principles developed by the common law courts of England and Wales. These primarily concern legality, reasonableness (or rationality) and the procedural fairness of public decision-making. There is academic and judicial debate as to the possible expansion of these grounds in the context of whether the courts should reject the traditional account of unreasonableness and replace this with more searching, but variable, standards of substantive review including a wholesale adoption of the proportionality test applicable in most European Convention rights cases.

<sup>8</sup> Welsh Government, Evidence Submitted by the Welsh Government to the Commission on Devolution in Wales (February 2013) 2-3.

<sup>9</sup> *ibid*, para 13(viii).

<sup>10</sup> See e.g., National Assembly for Wales Constitutional and Legislative Affairs Committee, *Inquiry into a Separate Welsh Jurisdiction* (December 2012) and Silk Commission on Devolution in Wales, Part II Report: *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (March 2014).

<sup>11</sup> However, despite some law being only applicable in Wales, since the sixteenth century the administrative law of Wales has been the administrative law of England and Wales, not just Wales. Law made by the UK Parliament that only affects England is part of the law of England and Wales, law made by the National Assembly for Wales is part of the law of England and Wales, even a bye law that only affects a single street is part of the law of England and Wales. Henry VIII enacted the Act for Law and Justice to be Ministered in Wales in like Form as it is in this Realm of 1535/6 and the Act for Certain Ordinances in the King's Dominion and Principality of Wales of 1542/3, commonly known as the Acts of Union. See Thomas Watkin, *The Legal History of Wales* (UWP 2012) and David Gardner, *Public Law Challenges in Wales: the Past and the Present* [2013] PL 1.

(though technically still under control of Her Majesty's Courts and Tribunals Service (HMCTS) England and Wales). Significant reforms to separate combined pillars of a legal jurisdiction require political will, and it is political leadership that will substantially shape any future developments. Under the current devolution settlement, the Assembly is not looking at justice issues directly, which means it is not scrutinising justice issues directly. This is concerning given that much of administrative justice is already devolved.

**1.7** The St David's Day consensus, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020 February 2015) recommends a reserved powers devolution model for Wales. Within the detailed drafting of the reservations of powers there is scope for structuring the future shape of administrative justice in Wales, and of Devolved Welsh Tribunals in particular. However, Annex A to this document records 'no consensus' in the following areas; devolution of policing, devolution of youth justice, devolution of criminal justice, the establishment of a High Court office in Wales, reviewing the case for devolving the courts service, sentencing, legal aid, CPS and the judiciary within the next 10 years, periodic reports on access to justice and the administration of justice, and devolving competence on accountability of the Equality and Human Rights Commission. It has been argued that *Powers for a Purpose* represents an *ad hoc* political bargain underpinned by short-term considerations without due regard for any wider set of principles about how a devolved UK should work.<sup>12</sup> It has also been suggested that the current reservations will not produce a robust, stable and lasting settlement. It has been stressed that civil law (which in this case appears to include administrative law and private civil law) and criminal law, are not subjects in their own right, but mechanisms through which policy is delivered, it is argued that it would be hard to pass reservations in relation to civil law that would not undermine the effectiveness of the Assembly.<sup>13</sup> It is then important to ensure that the drafting of any reservations does not work to remove administrative justice powers that are already being exercised on a devolved basis in Wales.

**1.8** Administrative justice also needs to be seen in light of recent efforts to reform local government and public service delivery in Wales. The so-called 'Perfect Storm',<sup>14</sup> of austerity, demographic change and evolving expectations on the part of citizen users of public services will increase the demands on public bodies, and in turn the stress upon first-instance decision-makers, complaints, review and appeal mechanisms. Cuts to legal aid, an area largely outside Welsh competence, are also having an impact on the provision of appropriate advice services for users of the administrative justice system in Wales.

**1.9** The final report of the *Williams Commission on Public Service Governance and Delivery in Wales* (January 2014) set out a vision of 'one public service' for Wales, glued together by culture and underpinned by values, as essential in order for Wales to achieve world-class public services.<sup>15</sup> It is through the current research that the case for one coherent and rationalised system of administrative justice for Wales and what that vision might incorporate begins to be examined. Administrative justice is better understood as part of social justice, being of primary importance to the political landscape in Wales.

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<sup>12</sup> See *Delivering a Reserved Powers Model of Devolution for Wales* (n 5) 1.

<sup>13</sup> *ibid*, Chapters 3 and 4.

<sup>14</sup> See e.g., Wales Public Services 2025 'Weathering the Storm' available online: <http://www.walespublicservices2025.org.uk/papers/>

<sup>15</sup> See especially Chapter 5: Leadership, Culture and Values, and Annex I on Public Service Values.



## The Current Research

**1.10** The former Administrative Justice and Tribunals Council (AJTC) was at the centre of a new UK-wide initiative aiming to develop a vision and system of administrative justice, it played a pivotal role in the oversight of coherent systems of administrative justice and dispute resolution; promoting values such as openness, transparency, impartiality, proportionality, equality and access to justice.<sup>16</sup> In Wales a specific AJTC Welsh Committee performed this function. The Committee for Administrative Justice and Tribunals Wales (CAJTW) has now taken on this role.

## The Aims of the Research

**1.11** The broad aim of the research has been to support the CAJTW in developing foundational principles of administrative justice for Wales, bringing together stakeholders within the system, outlining the roles of core institutions and the challenges and opportunities they currently face, alongside developing a sustainable administrative justice research agenda for Wales.

**1.12** This project has also enhanced Bangor Law School's contribution to the aims of the United Kingdom Administrative Justice Institute (UKAJI)<sup>17</sup> to link the policy, practice and research communities, and to develop a future research agenda for administrative justice across the UK and further afield.

**1.13** The following more specific aims, extracted and adapted from the AJTC's paper, *The Developing Administrative Justice Landscape* (2009), have been pursued:

- Demonstrate the potential breadth of administrative justice as a subject area
- Promote awareness and understanding of administrative justice as an area worthy of specific and sustained attention
- Foster links among actual and potential stakeholders
- Provide a base document which helps the CAJTW to focus on component parts of administrative justice and the relationships between them
- Help identify some relationships, overlaps and gaps in relation to redress provision
- Help identify where further research work is needed
- Encourage cross-border research over UK jurisdictional boundaries

## Methodology

**1.14** The current Report is based on the findings of various research activities:

- Desk-based research – literature and data review (see Bibliography)
- Identification of key stakeholders
- Workshops – one in Bangor, one in Cardiff, drawing together policy-makers, practitioners and researchers

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<sup>16</sup> The AJTC was initially established by the Tribunals Courts and Enforcement Act 2007, it was formally abolished on 19 August 2013.

<sup>17</sup> <http://ukaji.org>

- *A Comparative Perspectives Conference* examining administrative justice across a range of legal jurisdictions both UK, European and international
- Interviews and other informal discussions with key stakeholders
- Various meetings, conferences and debates (e.g. UKAJI meetings in London & Glasgow, Administrative Justice Forum (Ministry of Justice), Westminster Policy Forum on the Future of Judicial Review, Institute for Welsh Affairs Debate on the Future of Welsh Public Services, Legal Wales Conferences, PLP Wales Conferences, Public Law Wales meetings and seminars, and Administrative Court User Group meetings)

## **Administrative Justice for Living People in Wales**

**1.15** The title of this section, ‘for living people’ is taken from an article written by Dame Sian Elias examining administrative law in New Zealand and how important it is to fit that law to the lives of the people living under it.<sup>18</sup> Law and justice ought to be constructed from the bottom-up. Our first concern should be with the experiences of people using the administrative justice system and subject to administrative law. The following are real-life examples collated for the research which show the practical concerns of administrative justice in Wales and its impacts on citizens.

### **CASE STUDIES**

**Ms A was a detained patient at a private hospital, similar to a care home but specifically for detained patients. She has life-long learning disabilities and challenging behaviour. She had been in her current placement for some time and her family were happy with her care. Her mental health later deteriorated and though her family continued to be supportive of the existing arrangements, social services decided to move her to a registered care home which was not a hospital but a locked unit. The proposal to move her came at extremely short notice and without her family’s support, she would also receive a lower level of care in the new placement. A lawyer was contacted who explained to social services that the family were deeply opposed to the move and to the lack of prior consultation. The lawyer took steps to obtain an emergency injunction from an out of hours duty judge, but was able ultimately to explain to the local authority that proceedings would be issued with costs unless Ms A remained in her current placement until a meeting could be held on the following day. The local authority then properly looked at the issue with an independent advocate. The initial decision-making process was inadequate and a formal complaint against the relevant health and social services department of the local authority was upheld.**

**Mrs B complained about the way her local council dealt with her homelessness and housing application, in particular she felt that the council had failed to take her reports of domestic violence seriously and failed to identify her housing needs, she also complained that the council’s poor handling of her complaint had delayed the process of her being re-housed. Her complaint was upheld.**

<sup>18</sup> Sian Elias, ‘Administrative Law for “Living People”’ (2009) 68(1) CLJ 47.

Ms C complained that her local education authority had failed to properly assess her son's education needs from when he first moved into its area. Her son was a number of years behind his peers on entering secondary school four years later. There were found to be a number of shortcomings in the way the local education authority had implemented its special educational needs strategy, there were also found to be shortcomings in recording and other processes, evidence consequently suggested that Ms C's son had not received the additional support he needed during his primary years. The complainant received an apology and financial compensation.

Mr D, a taxi driver, complained that the relevant council had set its fees for the licensing of hackney carriages at too high a level in an unlawful manner. Ultimately the council accepted that at least some of its decisions were unlawfully made.

Mr E challenged the decision of the relevant health board to cease providing in-patient beds at one of its hospitals on the basis that the health board had failed to properly consult on the closure. Many in the area, including GPs, local politicians, and members of the public did not agree with the decision to close the in-patient facility, but it was found that the health board had not failed in its relevant legal duty to consult.

Mr F complained that the relevant council had failed to empty his wheelie bin, the council argued that it was his own fault for compacting the rubbish down too tightly, a point disputed by Mr F. Ultimately the council agreed that a representative from its recycling service should contact Mr F to further discuss the issue and to establish whether there was anything else the council could do to help.

Mr G challenged a refusal of planning permission for an extension to his house, arguing that he had not received a fair hearing (in breach of common law and of his human rights under European law), and that he had not been provided with adequate reasons for this decision.

Mr F, a single male living with his brother was not able to manage his own affairs with confidence. His Employment Support Allowance had been unfairly stopped, leaving him with virtually no money and a dependency on food banks. With advice support a relevant (non-devolved) tribunal appeal was successful and his benefit was reinstated, though a dispute remained about the level of support. Following the death of F's father, F's condition worsened and he became totally unable to cope, his memory and concentration deteriorated dramatically, again with advice an appeal was instigated and resulted in a considerable weekly income gain for F.

A catalogue of errors had occurred in a local authority's treatment of X young person, X claimed that the authority had not responded to their complaints, and when it did finally respond it was slow in dealing both with the complaints and in providing requested support. Relevant information about support had been sent to the wrong address, necessitating the involvement of the Information Commissioner. Initial responses received from the council were not adequate and the matter was on-going for well over a year.

**The Welsh Language Commissioner sought to challenge the decision of National Savings and Investment (NS&I) to revoke their Welsh Language Scheme, whilst the revocation was found to be lawful, it was held that the NS&I had failed to consult with the Welsh Language Commissioner before removing her power under the Scheme to object to any amendments. This case was conducted in the Administrative Court for Wales through the medium of both Welsh and English (with written evidence and oral proceedings being conducted through the medium of Welsh).<sup>19</sup>**

**1.16** The purview of administrative justice extends from appropriate social and medical care of the physically and mentally ill, to the care needs of vulnerable children, to special educational needs, housing and homelessness. It also extends to issues such as licensing, which may initially seem less significant, but which can have a tremendous impact on individual livelihoods, and planning (be that for residential or business use) being issues of major import for the applicant and the broader community. The matter of rubbish collection appears trivial, but can impact on the quality of life of those affected and is reflective of day-to-day problems individuals experience with public service delivery. Administrative justice also extends to something as fundamental as Welsh language. These examples illustrate the breadth of administrative justice and its impact on people's care, education, livelihood, health, liberty, benefits, and national language.

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<sup>19</sup> *R (Welsh Language Commissioner) v National Savings and Investments* [2014] EWHC 488 (Admin).

## CHAPTER TWO: THE NATURE OF ADMINISTRATIVE JUSTICE: CONCEPTS AND A SET OF ADMINISTRATIVE JUSTICE PRINCIPLES FOR WALES

### Chapter Two: Key Points

Administrative justice is a contested concept incorporating traditional legal values and values of public service and good governance. How we understand administrative justice in Wales is linked to history, culture and broader conceptions of social justice. This Chapter draws upon attempts to define administrative justice within the UK, Europe, and internationally in order to develop a set of *Administrative Justice Principles for Wales*.

Administrative justice is concerned with public decision-making at all levels within 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.**

## **Concepts of Administrative Justice**

**2.1** Administrative justice might be best described as an ‘essentially contested’<sup>1</sup> or ‘interpretive’<sup>2</sup> concept as although there appears to be some degree of imagined consensus as to its meaning, there is room for debate. Administrative justice takes its meaning both from the facts of relevant social practices and from the values those social practices are designed to realise. On this basis it is hard to draw a tight and uncontested definition of the meaning of administrative justice.

**2.2** A good starting point is the work of Michael Adler, who defines the concept as, ‘the justice inherent in administrative decision-making’.<sup>3</sup> Jerry Mashaw takes this further by proposing that administrative justice constitutes, ‘the qualities of a decision process that provide arguments for the acceptability of its decisions’.<sup>4</sup> Both definitions are based on the justness of the decision-making process; they are if anything more focused on initial decision-making than on later redress mechanisms such as courts, tribunals and ombudsmen. Though the decision process as a whole can be said to include relevant complaints and appeal mechanisms.

**2.3** UKAJI has attempted to define administrative justice.<sup>5</sup> Proposed definitions include:

- ‘The inter-action between citizen and state, from rule-making to decision-making to challenge to resolution’.
- ‘Decision-making by public bodies’.
- ‘Citizen-versus-state conflicts’.
- ‘Administrative justice includes initial decision-making, dispute resolution, and feedback processes related to the interaction between citizen and state’.
- ‘The means by which good administration is ensured for citizens’.
- ‘The idea that citizens should be treated fairly by those in power and the processes that make this aspiration a reality’.

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<sup>1</sup> An idea first developed in W B Gallie, ‘Essentially Contested Concepts’ (1955-1956) 56 *Proceedings of the Aristotelian Society* 167.

<sup>2</sup> E.g., for Ronald Dworkin, societies develop interpretive attitudes towards concepts. This has two components. The first is that the social practice does not merely just exist but also that it has some value, serves some interest or purpose, in short that it has a point (or numerous points). The second is that the behaviour required by the practice is not necessarily or exclusively what it has always been but instead is sensitive to its point, so that rules must be applied, extended or modified by that point. People then try to impose meaning and value on the practice and to continually restructure it in light of that value. Ronald Dworkin, *Law’s Empire* (new edn, Hart 1998) 47. I

<sup>3</sup> Michael 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.

<sup>4</sup> Jerry Mashaw, *Bureaucratic Justice: Managing Social Security and Disability Claims* (Yale University Press 1983) 24.

<sup>5</sup> UKAJI Wider Core Team Meeting Paper 3 March 2015, *What is administrative justice? A discussion paper*.

Some of these proposals are descriptive, e.g. decision-making by public bodies, whereas others include values, e.g. ensuring good administration for citizens and fair treatment by those in power.

- 2.4 Another ‘snappy’ definition is that proposed by the AJTC in its *Landscape Paper*.<sup>6</sup> ‘Administrative justice is conventionally regarded as that aspect of the justice system that is concerned with disputes between the citizen and the state’.
- 2.5 In terms of a concept of administrative justice it is perhaps best to avoid value-laden language as values can be subject to different interpretations. I suggest that the better concept is that proposed by Mashaw, administrative justice constitutes, **‘the qualities of a decision process that provide arguments for the acceptability of its decisions’**.<sup>7</sup> This concept notes that we are interested in the qualities of a decision process, but does not tie us to any specific qualities. Specifically it doesn’t attempt to define administrative justice by reference to the word justice which is itself contested. It can also apply to all areas of public decision-making and relevant redress processes.

### Administrative Justice and Administrative Law

- 2.6 A traditional approach has been to associate administrative justice specifically with administrative law. In this sense the ‘qualities’ of the decision-making process that we are interested in are primarily that it complies with certain requirements of legality.
- 2.7 Under a traditional *administrative law conception* of administrative justice we would look from the ‘top-down’ focusing on the decisions of senior courts and to a lesser extent those of tribunals (which hear the majority of appeals) and ombudsmen (handling complaints of maladministration).<sup>8</sup> In Wales our focus then should be on the Administrative Court (with its Office based in Cardiff), and to a lesser extent, the various Devolved Welsh Tribunals, the PSOW and Welsh Commissioners. Under the *administrative law conception* there is a sense in which the Administrative Court would be considered the apex, as a number of the Devolved Welsh Tribunals have appeal rights to the Administrative Court, and decisions of the PSOW may ultimately be subject to an application for judicial review, which would most likely be issued in the Administrative Court in Cardiff (though the claim could be heard at any appropriate location across Wales). Whilst the Administrative Court (being part of the Queen’s Bench Division of the High Court) does not necessarily have to follow its own previous decisions, it is subject to common law precedents laid down by the England and Wales Court of Appeal and the United Kingdom Supreme Court. On this traditional *administrative law conception*, then, ultimate authority for administrative justice lies with the broader United Kingdom, not specifically within Wales.
- 2.8 The flaw with the *traditional administrative law conception* is that it focuses on the comparatively extremely small number of cases that come before the senior courts and the highest echelons of other relevant redress mechanisms. An alternative conception extends from the ‘bottom-up’, grounding administrative justice in the compass of routine

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<sup>6</sup> AJTC, *The Developing Administrative Justice Landscape* (2009) para 12.

<sup>7</sup> J Mashaw (n 4) 24.

<sup>8</sup> M. Adler, ‘Understanding and Analysing Administrative Justice’ (n 3) 154; ‘Those who adopt the traditional administrative law approach assume that the principles formulated by courts and other redress mechanisms are applied and put into effect by first-instance decision makers and that administrative justice is achieved in this way’.

administrative decision-making. This *justice in administration conception* is concerned with the day-to-day activities and huge number of decisions made by the (approx.) 935 Welsh public bodies,<sup>9</sup> and those other non-devolved public bodies operating in Wales.<sup>10</sup>

- 2.9** A better conception is one that appreciates the merits of both and seeks to combine them, in particular by strengthening feedback relationships between the senior courts and top-tiers of other redress mechanisms, and initial public decision-makers. This kind of integrated approach was evident in the Westminster Government White Paper, *Transforming Public Services: Complaints, Redress and Tribunals* (Secretary of State for Constitutional Affairs 2004) and in the Tribunals Courts and Enforcement Act 2007.

## **Background to a Welsh Conception of Administrative Justice**

- 2.10** During the Cardiff Workshop, delegates discussed the background of policy and legislation related to public administration in Wales, especially in light of the need to ensure that decisions are made 'right first time' by public bodies. Delegates likened the problems arising in implementing rules across particular organisations to the context of sport. For example, we no longer rely only on umpires to make calls in tennis matches but also examine computer-assisted images; the technology then constitutes a second pair of eyes.
- 2.11** In the Welsh context delegates noted a general change in societal attitudes and perhaps some loss of innate deference to those who make public decisions. The analogy that the referee is always right might no longer hold in contemporary Welsh society. In the broader administrative justice context, the growth of administrative redress systems and of defined principles of administrative law is both constitutive and reflective of the notion that the public decision-maker is not 'always right'.
- 2.12** It was noted that there is a history of public decisions being taken by those at a particular level within society, referring to the traditional role of the Petty Sessions which historically handled the least serious legal cases, both civil and criminal. They were presided over by Justices of the Peace who often had no formal legal training. The position was unpaid and tended to be taken up by those with a private income, such as prominent landowners and members of the gentry. It was also noted that traditional accountability for decision-making has tended upwards towards superiors (again of a particular level in society) rather than downwards to the people ultimately affected by public decision-making. It was stressed that historically this picture starts to change as elected bodies take on more decisions, though again relevant accountability is still upwards to superiors.
- 2.13** It was noted that Wales has a tradition of challenging the way in which public administrative decision-making has taken place. This includes a number of tribunals of inquiry taking place in the 1960s (for example, the Tribunal of Inquiry into the Aberfan Disaster, appointed on 26<sup>th</sup> October 1966 following resolutions of both Houses of Parliament). Such inquiries were staffed by eminent lawyers largely from South Wales

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<sup>9</sup> This figure comes from the Williams Commission Report (2014), para 1.30 though it should be noted that 736 of these bodies are town and community councils.

<sup>10</sup> According to the Williams Commission there are 21 non-devolved public bodies with a separate presence in Wales, para 1.30.



(many of whom went on to hold high judicial office). An aspect of these inquiries was the assurance that those questioned had appropriate publicly funded legal support.

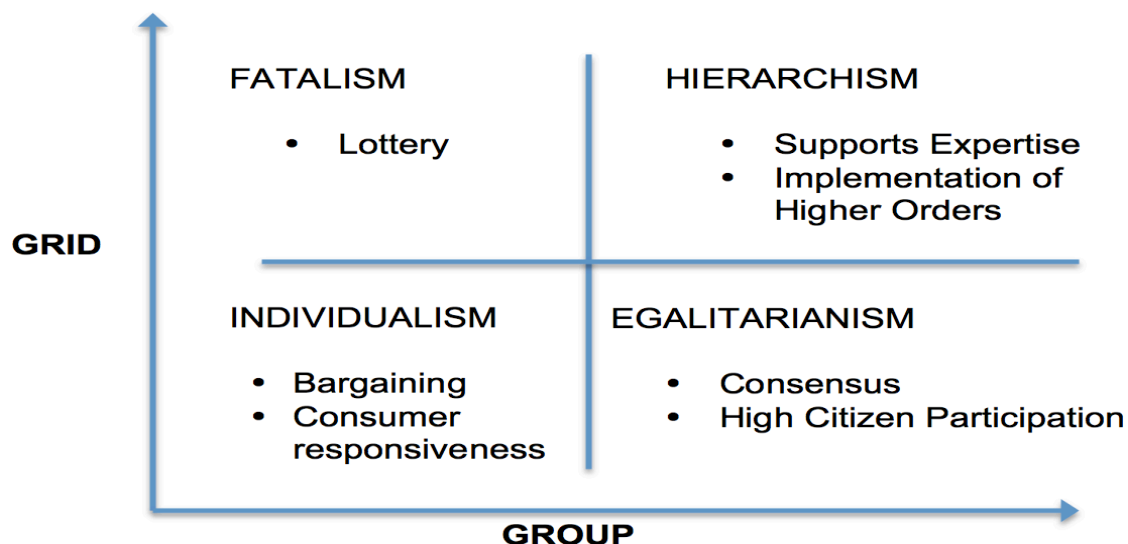
**2.14** Another example given was of Geoffrey Howe's inquiry into the treatment of mentally ill patients in a Cardiff hospital<sup>11</sup> stressing the importance of having counsel to the inquiry as a separate role from that of the inquisitor. Lord Howe suggested changes to the relevant Inquiries Act based on experiences conducted in Wales and these changes have informed the development of inquiries and of administrative justice culture more broadly. Though it might be suggested that some of these changes have led to inquiries becoming overly 'legalistic'. This may explain the prevalence of the *administrative law* conception of administrative justice in Wales. Emphasis on administrative justice stemming from historic Welsh involvement in legalistic tribunals has not yet meshed with a public service culture more inclusive of a range of values reflecting a *justice in administration* conception.

### Administrative Justice and Culture

**2.15** Simon Halliday and Colin Scott have produced a cultural typology of administrative justice useful in understanding Welsh perspectives<sup>12</sup> and reproduced in Figure One.

**Figure One**

#### **A Cultural Typology of Administrative Justice**



**2.16** In Figure One *fatalism* is associated with citizens feeling constrained and controlled by societal norms and issues of rank, role and status. There is a sense of powerlessness which tends to play out in very limited challenge of public decision-making. There may be such a culture within Wales stemming from the historical notion of public servants as superiors. *Individualism*, on the other hand is characterised by empowered citizens who

<sup>11</sup> See *Report of the Commission of Enquiry into Allegations of Ill-Treatment of Patients and other Irregularities at the Ely Hospital Cardiff* Cmnd 3975 HMSO (1969)

<sup>12</sup> Simon Halliday and Colin Scott, 'A Cultural Analysis of Administrative Justice' M Adler (eds), *Administrative Justice in Context* (Hart 2010) 183.

feel emboldened to help themselves in terms of problems experienced with administration, taking personal responsibility, it is suggested that this approach fits well with a more *marketised* system of public administration. Under a *hierarchical* approach there is respect for the authority and expertise of public decision-makers which tends to expression in a more *bureaucratic* form of administrative justice based on following rules set down by superiors with limited room for discretion. Finally, the *egalitarian* conception is more concerned with fair treatment than with bureaucratic administration, the citizen is seen as a partner in the decision-making process and there is less deference to specialist expertise and authority.

- 2.17** It is likely that each of these conceptions is evident in Wales, but that the *fatalist* and *hierarchical* accounts may be predominant. An aspiration is to move towards promoting a more *egalitarian* culture of partnership between public decision-makers and citizens and it is suggested that such an approach fits with the recommendations of the Williams Commission Report in terms of improving public service culture, alongside its traditional hierarchical focus on accountability through audit, inspection and regulation.

## **New Conceptions of Administrative Justice**

- 2.18** It was noted during the Cardiff Workshop that there might be more foundational issues with the way we produce and define concepts used in understanding administrative justice. The typologies of Mashaw and Alder have been extended and contested.<sup>13</sup> Whilst more modern conceptions of administrative justice focus on the user of services as a market-based consumer, a conception that arguably does not fit well with Welsh public service culture, it was suggested that this notion itself is outmoded and we should be focusing on a conception of individuals as *citizens with rights*, rather than consumers with voices (or indeed with choices – such as a choice to exit the market). It may be that the user or consumer conception diminishes the status of both citizens and public administrators by classifying their interactions as only a service and dispute resolution relationship, when really their modes of engagement are also characteristic of approaches to social justice, rights, equality, and liberty within the state.<sup>14</sup> When we focus on this *rights* conception our concern should be with finding ways for citizens to be supported in enforcing their rights where necessary. Given the vast range of activities that public services deal with it may be that even the concept of citizens with rights is not fully inclusive (though it was noted that this depends on how broadly one defines citizenship).
- 2.19** There is a larger conceptual debate as to whether an entire administrative justice system can be understood in terms of citizens and rights, or whether it also requires traditional references to consumers (or at least to users) of services; can it truly be said that a person has a ‘right’ to a certain level of service provision and is this a legal right or merely a moral right, or both? Another suggestion is that we should conceptualise users as citizens with entitlements, including entitlement to a particular level of public services provision, good decision-making, and redress. However, these entitlements may be conditional based on a number of factors such as scarce resources and the

<sup>13</sup> See e.g., R Sainsbury, ‘Administrative Justice, Discretion and the “Welfare to Work” Project’ (2008) 30 *Journal of Social Welfare and Family Law*, 323, 327; Peter Cane, *Administrative Tribunals and Administrative Adjudication* (Hart 2009) 216.

<sup>14</sup> Nick O’Brien, ‘Administrative Justice: A Libertarian Cinderella in Search of an Egalitarian Prince’ (2012) 83(3) *The Political Quarterly* 494, 496.

complainant's own behaviour. But it can then be difficult to determine whether someone truly does have a legal right, which may be defeasible based on balancing other rights and interests, or whether one merely has a conditional entitlement, which on the current spectrum might appear in some way to be less weighty than a right.<sup>15</sup>

**2.20** It may also be the case that we need to re-question the meaning of 'public' and the idea of a 'public body'. Many decisions that are assumed to be 'public' such as in relation to social care and housing, are now made by non-traditional bodies such as private and voluntary sector organisations. For example, the Low Commission (*Developing a strategy for access to advice and support on social welfare law in England and Wales*) notes in its recent update; '...in an increasingly mixed economy of contracted out or privately operated public services, it can be difficult to know exactly where accountability lies, and what checks and balances operate over millions of decisions that affect people's lives'.<sup>16</sup> Whilst there might be comparatively less contracting out of public services in Wales than in other UK jurisdictions, this statement still rings true here.

## **Administrative Justice and Values**

**2.21** On a broader *justice in administration* conception of administrative justice we should be concerned both with the values of good administration (including principles of good governance) as well as with more specifically legal values.

## **Principles of Administrative Justice**

**2.22** A key starting point for developing principles of administrative justice for the Welsh system is the work of the AJTC. Its principles of administrative justice are as follows:

A good administrative justice system should:<sup>17</sup>

1. Make users and their needs central, treating them with fairness and respect at all times;
2. Enable people to challenge decisions and seek redress using procedures that are independent, open and appropriate for the matter involved;
3. Keep people fully informed and empower them to resolve their problems as quickly and comprehensively as possible;
4. Lead to well-reasoned, lawful and timely outcomes;

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<sup>15</sup> The meaning of what constitutes a right is subject to debate, especially in the context of balancing rights against other rights and weighty interests. See e.g., Grégoire Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Can J L & Juris 179; Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 140; 'We sometimes say that we need to 'balance' all the morally relevant considerations, and what we mean by that is that we have to develop a moral argument...Balancing then is a synonym for practical reasoning'; Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16(2) *Ratio Juris* 131; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012); Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 315-316.

<sup>16</sup> The Low Commission, *Getting it Right in Social Welfare Law* (March 2015) available online: <http://www.lowcommission.org.uk/dyn/1425469623929/Low-Commission-Report-Text-Proof-207050-.pdf>

<sup>17</sup> Using the epithet 'good' suggests that these principles are aspirations for a good system rather than necessary requirements for a purported system to function as an administrative justice system at all. Perhaps the 'good' should be left out in any future statements, enhancing the forcefulness of the principles, indicating that they are not just desirable but necessary.

5. Be coherent and consistent;
6. Work proportionately and efficiently;
7. Adopt the highest standards of behaviour, seek to learn from experience and continuously improve

These principles were developed in light of analysing a wide range of sources<sup>18</sup> through a process that need not be repeated within the current Report. However, there are some additional sources that were not referenced by the AJTC that are worth examining.

**2.23** In its *Review of Tribunals Operating in Wales* (2010) the Welsh Committee of the AJTC laid down a number of principles for Devolved Welsh Tribunals focusing on: independence and impartiality, accessibility to users, efficiency and effectiveness, and coherence.

**2.24** The Williams Commission drew on a number of accounts of good governance including that of the Independent Commission on Good Governance in Public Services.<sup>19</sup> This Commission emphasises six principles:

- Focusing on the organisation's purpose and on outcomes for citizens and service users
- Performing effectively in clearly defined functions and roles
- Promoting values for the whole organisation and demonstrating the values of good governance through behavior
- Taking informed, transparent decisions and managing risk
- Developing the capacity and capability of the governing body to be effective
- Engaging stakeholders and making accountability real

These principles of good governance ought to be taken into consideration under an *integrated conception* of administrative justice.

**2.25** Another example to be drawn upon are the Principles of Good Administration applied by the PSOW; Getting it right, being consumer focused, being open and accountable, and acting fairly and proportionately.

**2.26** On the question of whether there might be some principles or values of administrative justice unique to Wales, during the Bangor Workshop it was noted that globally people have similar expectations when they talk about justice in administrative procedures. People want to be taken seriously, to have their values respected, to be given a voice,

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<sup>18</sup> AJTC, *Developing Principles of Administrative Justice* (2010), references included for example: Committee of the Council of Europe, Resolution 77[3] (1977) *On the Protection of the Individual in Relation to Acts of Administrative Authorities*; Committee of the Justice All-Souls Review: *Administrative Justice: Some Necessary Reforms* (1988); Council on Tribunals, *Framework Standards for Tribunals* (November 2002); Council of Europe, *Recommendation of the Committee of Ministers to Member States on Good Administration* and related *Code of Good Administration* (2007); Parliamentary and Health Service Ombudsman (PHSO) *Principles of Good Administration* (2007); Cabinet Office, *The Customer Service Excellence Standard* (2007); The Australian Administrative Review Council, *Best practice Guides* (2007); British and Irish Ombudsman Association (BIOA), *Guide to Principles of Good Governance* (2009).

<sup>19</sup> Office for Public Management and the Chartered Institute of Finance and Accountancy, The Independent Commission on Good Governance in Public Services, *The Good Governance Standard for Public Services* (2004).

and more specifically to be given an opportunity to state their case and their view. This is well reflected in the common law principles of natural justice (or procedural fairness), alongside Article 6 of the European Convention on Human Rights (ECHR). Ultimately people want to be treated with dignity.

- 2.27** One issue that was prominent in both Bangor and Cardiff Workshops was the importance of complainants specifically being heard by somebody independent of their problem or issue. It was stressed that the trend towards providing advice online, a ‘digital by default’ culture is worrying in this context. It was argued that online services must be in addition to state funded public support giving advice in person. The digital by default agenda can cause specific barriers to access to justice in Wales (for example in relation to ageing, economically disadvantaged, and rural populations).
- 2.28** It was stressed in the Cardiff Workshop, that a key issue for the provision of redress mechanisms is that they are independent. It was suggested that a formal, adversarial procedure, is rarely the most appropriate given that often the main concern from the complainant’s perspective is that they are listened to by someone whose independence is beyond question. It was suggested that the core concern for complainants might not be with the nature and complexity of the rightness or wrongness of the decision, points that occupy legal experts, but rather with the opportunity to be heard. Advice services providers are often the first people who have truly listened to the complainant’s problem and are vital in that respect.
- 2.29** Other matters for consideration within a developing set of administrative justice principles for Wales could include:
- A commitment to human rights protection
  - A commitment to sustainability
  - A commitment to appropriate respect for the Welsh language within the administrative justice system
  - A commitment to equality<sup>20</sup>

## **Lessons from other Legal Jurisdictions<sup>21</sup>**

- 2.30** In developing principles of administrative justice for Wales, CAJTW and Welsh Government can also draw on statements of principles adopted in other jurisdictions.

### **Canada**

- 2.31** The Council of Canadian Administrative Tribunals/Conseil des Tribunaux Administratifs Canadiens adopts the following principles in relation to all Administrative Tribunals, their Adjudicators and Staff.

1. Requires that Tribunals be independent in matters of governance and that adjudicators be independent in decision-making

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<sup>20</sup> The Welsh Government was the first government to bring in equality duties for local authorities, health boards and other public sector organisations to ensure that they delivered on the Equality Act 2010 public sector duty.

<sup>21</sup> These paragraphs do not purport to be an extensive study of comparative law.

2. Requires that Tribunals, adjudicators and staff be impartial and free from improper influence and interference
3. Requires that Tribunals, adjudicators and staff be without conflicts of interest and act in a manner which precludes any conflict of interest
4. Requires that adjudicators and staff be qualified in their subject matter and administrative justice processes
5. Requires that adjudicators and all participants treat each other with dignity, respect and courtesy
6. Should ensure that the dispute resolution process is accessible, affordable, understandable and proportionate to the abilities and sensibilities of users
7. Should be transparent and accountable
8. Should apply the rules of natural justice
9. Should be expeditious both in process and in rendering decisions, with reasons to be given where appropriate
10. Should where possible, provide an opportunity for informal dispute resolution
11. Should minimise any disadvantages to unrepresented parties
12. Should provide consistency in procedure and adjudicative outcomes

## Europe and European Jurisdictions

**2.32** The Organisation for Security and Co-operation in Europe has developed a *Handbook for Monitoring Administrative Justice*,<sup>22</sup> providing an overview of main fair trial rights and commitments applicable to judicial hearings alongside practical information for establishing and running a trial monitoring operation in the field of administrative justice. This work is useful, but centred on the court and tribunal based aspects of administrative justice, a *traditional administrative law conception*.

**2.33** Various European countries have produced reports on their administrative justice systems. For example, Spain specifically notes that the purpose of its administrative justice system is the, 'conciliation of two mandates: legality of activities of authorities and the guarantee of protection of rights and protective interests of citizens'.<sup>23</sup> Ireland focuses its submission almost entirely on judicial review,<sup>24</sup> and France stresses its independent system of specialist administrative courts.<sup>25</sup>

**2.34** In 1996 the Council of Europe published a handbook entitled, *The Administration and You: Principles of administrative law concerning the relations between administrative authorities and private persons*. The core principles in this handbook include:<sup>26</sup>

- Lawfulness
- Equality before the law

<sup>22</sup> Available online at: <https://fba.se/contentassets/dc864f5f60bb4847ad98fda5eafb7bbc/handbook-for-monitoring-administrative-justice-en.pdf>

<sup>23</sup> Available online at: [http://www.juradmin.eu/en/eurtour/i/countries/spain/spain\\_en.pdf](http://www.juradmin.eu/en/eurtour/i/countries/spain/spain_en.pdf)

<sup>24</sup> Available online at: [http://www.juradmin.eu/en/eurtour/i/countries/ireland/ireland\\_en.pdf](http://www.juradmin.eu/en/eurtour/i/countries/ireland/ireland_en.pdf)

<sup>25</sup> Available online at: [http://www.juradmin.eu/en/eurtour/i/countries/france/france\\_en.pdf](http://www.juradmin.eu/en/eurtour/i/countries/france/france_en.pdf)

<sup>26</sup> Available online at: <http://www.coe.int/t/dghl/standardsetting/cdcj/Handbook%20on%20Administration%20and%20You/Admin%20and%20youE.pdf>. These principles were developed from an extensive examination of various sources including the case law of the European Court of Human Rights, domestic legislation from various EU nations, and Council of Europe documents including, Conventions, Resolutions, and Recommendations.

- Conformity to statutory aim
- Proportionality
- Objectivity and impartiality
- Protection of legitimate trust and vested rights
- Openness
- Access to public services
- Right to be heard
- Representation and assistance
- Appropriate time-limits
- Notification, statement of reasons and indication of remedies
- Provisions for internal and external review

**2.35** In 2015 the European Parliament, Directorate General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, published; *The General Principles of EU Administrative Procedural Law (in-depth analysis for the JURI Committee)*.<sup>27</sup> This document aims to put forward drafting proposals for general principles of EU administrative procedural law to be included in the Recitals of a draft Regulation on EU Administrative Procedures. Specifically it seeks to clarify the content of general principles of EU administrative law. The following general principles are included (they relate to the right to good administration embedded in Article 41 of the Charter and to the principle of an open, efficient and independent European administration enunciated in Art 289 of the Treaty on the Functioning of the European Union):

- Access to information and access to documents
- Access to the file
- Duty of care
- Data protection
- Data quality
- Effective remedy
- Equal treatment and non-discrimination
- Fair hearing
- Fairness
- Good administration
- Impartiality
- Legal certainty
- Legality
- Legitimate expectations
- Participatory democracy
- Proportionality
- Reason giving
- Rule of law
- Timeliness
- Transparency

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<sup>27</sup> Available online at:

[http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL\\_IDA\(2015\)519224\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA(2015)519224_EN.pdf)

There are also various European principles of good governance where detailed analysis is beyond the scope of the current Report.<sup>28</sup>

## Australia

- 2.36** With respect to administrative justice in Australia, Professor Matthew Groves has noted, 'Administrative justice was the theme of the 1999 Australian Institute of Administrative Law annual conference. The speakers at that conference adopted a novel approach to the different possible definitions or conceptions of administrative justice. They side-stepped them. No speaker offered a detailed or perhaps even working definition of administrative justice'.<sup>29</sup> The conference papers discuss attributes that might be ascribed to administrative justice, but they do not present a definition or working principles. The Administrative Review Council (ARC) (Australia's equivalent body to the AJTC) has not developed a set of administrative justice principles. It has developed a set of public law values, these include: fairness, lawfulness, rationality, openness (or transparency) and efficiency.<sup>30</sup> The ARC has also issued a series of Best Practice Guides covering: Lawfulness, Natural Justice, Evidence, Facts and Findings, Reasons and Accountability. The ARC was recently disbanded (2015).
- 2.37** The resounding basis of administrative justice in Australia remains that expressed by the Kerr Committee (whose report led to the establishment of much of what remains as the Federal administrative law system, and which has also be taken up in various State systems).<sup>31</sup> This is that Federal institutions were intended to reconcile the requirements of efficiency and administration, and justice to the citizen. In short administrative justice is what you get when this balancing exercise is working well. Of course to say that administrative justice is the result does not take us any further in establishing principles to guide the achievement of that result, or in understanding how complex the balancing process can be. A key focus in Australia is on balancing the distributive justice focus of public administration as against ensuring individual rights are protected.<sup>32</sup>
- 2.38** There is also more focus in Australia (than in England and Wales at least) on the notion that the individual who accesses the administrative justice system is looking for a particular substantive outcome (a benefit granted, a penalty reduced or waived for example); they are less interested in the fairness of the procedure. Hence the Kerr Committee recommended the establishment of 'merits' review, a tribunal process which involves re-taking the initial decision in a way that is designed to add value to the administrative process as opposed to providing a legal check on that process. In this regard tribunals at the Federal level in Australia are part of the machinery of administration, not the machinery of adjudication. This mean that in Australia there is more controversy over the respective roles of tribunals and courts, especially in relation to court-based legal review of tribunal procedures, than there is in England and Wales

<sup>28</sup> E.g. Council of Europe, *12 Principles for Good Governance at Local Level*, OECD/SIGMA *European Principles of Public Administration*. They key principles can be access online here: <http://www.sigmaweb.org/publications/principles-public-administration-november-2014.htm>

<sup>29</sup> Matthew Groves, *Administrative Justice in Australian Administrative Law* (2011) 66 *Australian Institute of Administrative Law* 18.

<sup>30</sup> Administrative Review Council, *The Scope of Judicial Review* (Report No 47, 2006) 30.

<sup>31</sup> The Commonwealth Administrative Review Committee (1971).

<sup>32</sup> Robin Creyke, *Administrative Justice – Towards Integrity in Government* (2006) 31 *Melbourne University Law Review* 705 and 'Administrative Justice in Australia' in M Adler (ed) *Administrative Justice in Context* (Hart 2010).



where tribunals are largely regarded as courts under another name. This is perhaps why there has not been a general statement of administrative justice principles; the strict constitutional separation of powers at the Federal level with tribunals being part of the executive and courts part of the judiciary suggests that the two ought perhaps to be adopting different sets of principles. Hence the focus in the Australian literature on balancing between principles of good administration; (distributive justice, expediency, efficiency, informality), versus legal values (openness, legal procedure, impartiality).

**2.39** The Australian literature also highlights the role of the individual in administrative justice. It can be argued that since 'justice' focuses on the recipient, the recipient's interests should take prominence. On this basis administrative justice should be equated with 'justice for the individual'.<sup>33</sup> This fits well with a possible developing right to administrative justice and the conception suggested earlier where administrative justice is seen as a citizen's right, or at least some form of important (if defeasible entitlement). Of course the difficulty here is that this focus on individuals does not appear to encompass the broader system-fixing roles of institutions such as ombudsmen and commissioners (and to a lesser extent some courts and tribunals). We could perhaps reconcile the two roles by saying that ombudsmen and commissioners are only capable of suggesting improvements to systematic design so far as these align with ensuring that individual rights are guaranteed, but it seems unlikely that they would see their role as limited to this degree and not also involving broader improvements to systems that are for the common good and not necessarily required as a matter of right.

## South Africa

**2.40** South Africa can be regarded as one of the originator jurisdictions for the concept of 'justification' in administrative law more generally. The idea of moving from a 'culture of authority' to a 'culture of justification' was first purported by South African scholar Etienne Mureinik.<sup>34</sup> On this account public bodies are required to 'justify' their decisions with reasons of adequate quality. This shifts away from more traditional administrative law conception focused on notions of jurisdiction and authority.

**2.41** Section 33 of the South African Constitution 1996, provides that; 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair' and 'Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons'. These can be seen as traditional administrative law requirements,

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<sup>33</sup> See Matthew Groves (n 29). In England and Wales Sunstein et al have described judicial review as providing a kind of 'individualised administrative justice' that specifically focuses on the 'quality' of public decision-making in a way that other grievance measures do not. Lucinda Platt, Maurice Sunstein, and Kerman Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' (2010) 20 (suppl 2) J Public Adm Res Theory 243, 248. Peter Cane takes a similar approach; '...the distinctively judicial public-law task, expressed in common-law principles of judicial review and statutory interpretation, is the protection of *individual* rights and interests against undue encroachment in the name of social interests'. Peter Cane, 'Theory and Values in Public Law' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays for Carol Harlow* (OUP 2003) 3, 15.

<sup>34</sup> Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 S Afr J on Hum Rts 31, 32-33. It has been taken up and modified by David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 S Afr J on Hum Rts 11 and Michael Taggart, 'Reinventing Administrative Law' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-layered Constitution* (Hart 2003) 332-335.

rather than relating to broader good public administration. Again, this is an approach that prioritises the individual in a legalistic conception of administrative justice.

**2.42** As part of a national conversation on a British Bill of Rights and Responsibilities, the AJTC proposed a right to administrative justice that would be, 'founded not only on the rule of law and the general principles of legality and legal certainty but also on the principles of good administration, democratic accountability, equality of treatment and citizen empowerment'.<sup>35</sup> This goes further than the right contained in the South Africa Constitution by referencing principles of good administration as well as legalistic principles.

**2.43** The AJTC noted that whether a right to administrative justice should be an explicit justiciable right ought to be further debated, but it was clear in its contention that such a right could provide a secure basis for the establishment of generally applicable principles of good governance across the wider administrative justice landscape. The thrust of this view may then also be that whilst more legally flavoured principles (or values) already have significant purchase, the more administratively flavoured principles (or values) need to be put on an equal footing. Thus perhaps taking a step towards the Australian approach where balancing is more specifically at the heart of administrative justice, but inviting concerns over the degree of certainty with which such principles could be expressed.<sup>36</sup>

## **Global Administrative Law Values**

**2.44** Debates at global level focus on developing a set of global administrative law values; there has been no detailed discussion of a global conception of administrative justice. In this sense global law is behind in adopting a traditional *administrative law conception* of administrative justice, though the values suggested for global administrative law extend beyond traditional legalistic values adopted by various states.

**2.45** In 2006 Carol Harlow argued that there could be various sources of global administrative law.<sup>37</sup> First, the largely procedural principles emerging from national administrative law systems (those I have referred to as more 'legalistic' or 'rule of law' values). Second, the set of rule of law values promoted by proponents of free trade and economic liberalism. Third, the good governance, transparency, accountability, and participation values promoted by the World Bank and International Monetary Fund. Finally, human rights values.<sup>38</sup> She concludes, however, that a universal set of administrative law values would be difficult to identify and may not be especially desirable. This is because administrative law is primarily a Western construct that is protective of Western, liberal, individualistic

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<sup>35</sup> AJTC, *British Bill of Rights and Responsibilities: A Right to Administrative Justice* available online at: [http://ajtc.justice.gov.uk/adjust/articles/ajtc\\_bill\\_rights.htm](http://ajtc.justice.gov.uk/adjust/articles/ajtc_bill_rights.htm)

<sup>36</sup> See Mark Elliott and Christopher Forsyth, who express concerns over entrenchment as providing only minimum standards that lack clarity and are not open to sufficient incremental common law development. M. Elliott and C. Forsyth, 'A Right to Administrative Justice?' UK Const. L. Blog (10th October 2012) (available at <http://ukconstitutionallaw.org>)

<sup>37</sup> Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *The European Journal of International Law* 187.

<sup>38</sup> More recent works have included the following among global administrative law values; due process of law, freedom of information, accountability, the public interest, public goods, global citizenship, global legitimacy, equality, fundamental rights, access to justice, legal certainty, and economic rationality. See, Gordon Anthony, Jean-Bernard Auby and John Morrison (eds), *Values in Global Administrative Law* (Hart 2011).

and capitalist interests. A set of principles reflecting these interests might be damaging to developing economies. She also argues that the evolution of administrative law in global adjudicative forums is leading to an undesirable 'juridification of the political process'.

- 2.46** In various section of this Report, I note a concern with the over judicialisation or juridification of administrative justice, this can also be expressed as an excessive legalism or excessive emphasis on procedural fairness at the expense of the substantive justness of particular decisions. This has been felt in legal jurisdictions including Australia and various European jurisdictions such as the Netherlands. In this regard if Wales is to develop its own set of administrative justice principles it should avoid excessive focus on formal procedural values. Another lesson for Wales may be that as administrative law values are seen in a global light there is a tendency towards their reflecting free trade and economic liberalism; these may not sit well with more socialist commitments in Wales.

### **Conclusions – Administrative Justice Principles for Wales?**

- 2.47** There are concerns that a set of administrative justice principles for Wales could be under-inclusive, lack clarity and invite conflicts between specific individual principles. There is also concern that producing standardised principles can lead to over-judicialisation, juridification or excessive legalism within an administrative justice system.
- 2.48** However, there are benefits to adopting general statements. Properly drafted these could help move Wales away from a seemingly common adherence to the idea 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 polity that shows considerable commitment 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) and it is these disagreements or conflicts that shape social practice.

### **Principles for Wales**

- 2.49** Given the research underpinning them, the AJTC principles are a good place to start, but they should be expanded upon in contemporary context. The proposed amendments and additions are developed from considering contemporary context across a range of jurisdictions (other UK nations, the European system and emerging global system) and from examining administrative justice within a specifically Welsh context. The principles overall impose higher standards than those contained in the AJTC account; they are a starting point for further debate (including political debate). The aim is to promote Wales as a progressive nation in the development of its administrative justice system, and as a nation demonstrating the highest commitment to standards of public decision-making, human rights, and the protection of vulnerable groups within society.

## **Preamble**

AJTC Preamble: *A good administrative justice system should...*

It is submitted that the 'good' should be removed, noting that the focus is on what all administrative justice systems should endeavour to achieve to be properly regarded as systems of administrative justice.

**Suggested Preamble: *Administrative justice is concerned with public decision-making at all levels within Wales. The Welsh administrative justice system should...***

## **Principles**

AJTC Principle One: *Make users and their needs central, treating them with fairness and respect at all times*

The discussions above indicate the importance of making 'users' central to our understanding of administrative justice. Users have been described variously as consumers, customers, participants and right-holders. The notion that users are consumers or customers does not fit well with the more social democratic non-marketised commitments of Wales and recent and ongoing reforms to public services. It has been suggested that a better conception of administrative justice (especially based upon international as well as domestic comparisons) could be of the user as a citizen right-holder.

**Wales Principle One: *Make citizens and their rights and needs central, treating them with fairness and respect at all times***

This catches the idea that the administrative justice system may be primarily concerned with rights, but certainly not wholly concerned with rights; 'needs' captures other important interests. It would be hard to be against the retention of both fairness and respect, and these appear in many of the various statements of principles and values referenced in this Report. However, it must be borne in mind that both fairness and respect can be subject to competing interpretations.

AJTC Principle Two: *Enable people to challenge decisions and seek redress using procedures that are independent, open and appropriate for the matter involved*

The discussion above of various conceptions of administrative justice implies that not only should people be able to seek redress using procedures that are appropriate, but also that initial public decision-making should be based on appropriate procedures. One can add into Principle Two an assurance that administrators take initial decisions using appropriate procedures.

Enabling of challenges and enabling of redress can be stated more strongly. For example, foregoing discussions suggest a right to be heard as a bare minimum and a right to appropriate redress as opposed to the enablement of redress. Redress procedures ought also to be accessible.

Many of the statements of principles and values noted above include both independence and impartiality, whilst someone who is independent is most likely to be impartial, it may be worth taking a belt and braces approach and using both values (it can be argued there are slight but important differences between the two).

**Wales Principle Two: *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***

*AJTC Principle Three: Keep people fully informed and empower them to resolve their problems as quickly and comprehensively as possible*

It was noted above (discussing culture in administrative justice) that citizens in Wales may have felt historically disempowered from accessing administrative justice redress mechanisms, and that predominant culture may have been hierarchical as opposed to egalitarian. One suggestion here could be specifically to state that ‘people’ or citizens are participants in the process. Discussions above also noted the importance of taking steps to enable people to resolve disputes (such as the provision of advice services) as opposed merely to empowering them through information. Substituting empowering for enabling here may give a stronger sense that the administrative justice system is there to support people through their disputes, as well as to equip them with the information and tools to fend for themselves.

**Wales Principle Three: *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***

*AJTC Principle Four: Lead to well-reasoned, lawful and timely outcomes*

The simple word ‘lawful’ is capable of encompassing all the more legalistic values noted above, such as clarity, consistency, and transparency. However, there is contestation between wider accounts of legal constitutional values, which also include values such as liberty, dignity and democracy, compared to less expansive accounts which focus primarily on procedures. If Wales wants to adopt the broader account of legal constitutional values it may be worth doing so on the face of at least one of the principles of administrative justice.

Timeliness is clearly an important principle stemming from the range of sources surveyed above, however, it might also be worth adding an expectation that outcomes will also be specifically communicated to relevant parties, this adds to the sense of participation and respect within the system, as well as the provision of information.

Any extension to the notion of decisions being ‘well-reasoned’ is more problematic. Some jurisdictions (e.g., South Africa and Australia) provide a statutory right to written reasons supporting public decision-making. Whilst it may be a progressive step to develop such a requirement for written reasons in Welsh decision-making, the common administrative law of England and Wales does not yet recognise such a general right (although reasons are legally required in some contexts).

**Wales Principle Four: *Ensure that decisions are well-reasoned, lawful and adequately democratic and that outcomes are communicated in an appropriate and timely manner***

AJTC Principle Five: *Be coherent and consistent*

This principle may be slightly confusing as it is not entirely clear what must be coherent and consistent (is this just the machinery of the administrative redress system or also the specific decisions taken at various levels within it?) It may be worth stressing that there must also be consistency in the application of the principles themselves.

**Wales Principle Five: *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***

AJTC Principle Six: *Work proportionately and efficiently*

The notion of proportionate dispute resolution is important to contemporary systems of administrative justice, and the explicit mention of efficiency here is a nod to the inclusion of more administratively flavoured as opposed to legalistic values. In a similar vein to ensuring that outcomes are specifically communicated, one could add in here that an administrative justice system must be effective (in achieving whatever goals are set for it).

**Wales Principle Six: *Work proportionately, efficiently and effectively***

AJTC Principle Seven: *Adopt the highest standards of behaviour, seek to learn from experience and continuously improve*

It may be advisable here (given the sources cited above) to make a specific reference to public administration and good governance values. Learning from experience is key, as is designing the system in a way that encourages learning and that specifically encourages feedback between various levels (including between redress mechanisms). Finally, the value of 'integrity' is cited in many of the sources discussed above, but not yet evident in the AJTC principles.

**Wales Principle Seven: *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***

### ***Additional Principles for Wales?***

Based on various policy commitments and characteristics of Welsh governance, as well as in the interests of progressive development of principles in light of comparisons from other jurisdictions it is suggested that further principles have particular resonance in Wales.

**Wales Principle Eight: *Where possible, provide an opportunity for informal dispute resolution, which may include online dispute resolution where appropriate***

This suggestion is based on the progressive development of administrative justice methods and mechanisms and evidence from various jurisdictions about the importance of informal

resolution (especially Australia and Canada – in the latter jurisdiction informal resolution is a specific commitment of the principles for Canadian tribunals). Online resolution should not be a default position, but ought to be available where appropriate in the interests of efficiency, cost-effectiveness and access to justice.

**Wales Principle Nine: *Minimise any disadvantages to unrepresented parties***

Given the trend towards unrepresented litigation across the administrative justice systems of a range of legal jurisdictions it is suggested that the potential for disadvantage to unrepresented parties ought to be specifically noted and a commitment established to minimising those disadvantages. This principle is also found in the principles for Canadian tribunals.

**Wales Principle Ten: *Ensure that decisions are taken by those with appropriate expertise and encourage accurate and accountable decision-making***

Some values noted in the sources cited above not reflected by the current AJTC principles. One of these is the importance of ensuring that decisions are taken by those with appropriate expertise (this may be especially important in Wales given the presence of devolved and non-devolved mechanisms, and devolved and non-devolved law). It is also important as there are concerns around specialist expertise across Welsh tribunals and the Administrative Court in Wales given the comparatively small caseloads and limited opportunities for members of the judiciary to sit. Other prevalent values are the importance of accuracy and of ensuring that decision-makers are accountable. The latter value of accountability may also be especially important in Wales as there is still some confusion (both amongst the general public and professionals within the system), as to the precise routes to accountability of various public decision-makers.

**Wales Principle Eleven: *Ensure respect for human rights, equality, sustainability and the protection of vulnerable groups including children and older people***

Even though all these elements are technically included within the word ‘lawful’ in Principle Four (because they are enshrined in various legal sources be these Welsh, UK, European or international) it is suggested that it is worth reiterating them as specific commitments as a means of raising awareness and empowering citizens. Spelling these matters out also enhances the idea that administrative justice principles can be both reflective and constitutive of the nation’s commitment to social justice.

**Wales Principle Twelve: *Ensure appropriate respect for the Welsh language including compliance with Welsh Language Standards where applicable.***

Again this requirement is technically covered by the word ‘lawful’ in Principle Four, but is worth spelling out to raise awareness and underscoring the importance of the Welsh language.

## CHAPTER THREE: MAKING DECISIONS RIGHT FIRST TIME IN WALES AND INTERNAL COMPLAINTS AND REVIEWS WITHIN PUBLIC BODIES

### Chapter Three: Key Points

1. Administrative justice begins with good initial decision-making, yet there is evidence that the quality of public decision-making across Wales, the UK and Europe is poor in places, and that trust in administration is weak.
2. Reforms to public services provision and local government organisation in Wales must be conducted with the demands of administrative justice in mind (including the 12 Principles outlined in Chapter Two of this Report).
3. Public bodies in Wales should be able to propose a business case for making decisions 'right first time'.
4. The Public Services Ombudsman for Wales (PSOW) should have a statutory complaints handling role.
5. Further publicly available and standardised information on the proportion of Welsh public body decisions that are complained about and appealed against and the outcomes of complaints and appeal processes is essential to understanding administrative justice in Wales, and to assessing the true extent of incorrect and poor decision making.
6. Internal complaints and review mechanisms must be clear, visible and consistent in their application. Relevant roles in the process must also be clear and there should be suitable advocacy and support services alongside appropriate infrastructure to address the level of complaints within particular bodies.
7. The Assembly, Welsh Government and public bodies in Wales should think carefully about the pros and cons before introducing new internal review processes (especially compulsory processes) and those internal review processes already adopted in devolved and non-devolved public-bodies operating in Wales should be continually monitored especially in terms of their impacts on access to justice.

### Right First Time

- 3.1 Administrative justice begins with good initial public decision-making. There is an obvious appeal of the right first time agenda, as Professor Robert Thomas puts it: 'If government could make good initial decisions, then this would mean better results for individuals and less work for tribunals; it would speed up decision-making and reduce costs'.<sup>1</sup> As noted in Chapter Two, right first time has perhaps only recently been considered as within the broader purview of administrative justice under the *justice in administration conception*.
- 3.2 It is important to individuals that decisions are right first time, especially given recent limitation of appeal rights across non-devolved tribunals operating in Wales (especially in the case of asylum and immigration appeals)<sup>2</sup> and cuts to legal aid funding. Good

<sup>1</sup> Robert Thomas, 'Administrative Justice, Better Decisions and Organisational Learning' [2015] PL 111.

<sup>2</sup> See e.g., Robert Thomas, 'Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis' [2015] PL 652.



decisions are required so that the public body, (and ultimately the Wales or Westminster Government) can achieve its policy objectives, as well as saving costs and time in terms of further complaints and appeals. Poor decision-making can undermine confidence in public bodies, which may itself lead to higher rates of complaints and appeals. It has been suggested, for example by delegates presenting at the *Comparative Perspectives Conference*, that trust in government is low across much of Europe. This is supported by UK surveys.<sup>3</sup>

- 3.3** Professor Michael Adler considers that across the UK, 'the quality of first instance decision-making is, at best, indifferent and error rates are frequently unacceptably high'.<sup>4</sup> The UK Public Administration Select Committee has noted that it, 'regards the high level of successful appeals and complaints against decisions by government departments as an indication of widespread administrative failure. Government should aim to produce decisions which are right first time and command a high degree of confidence. The scale of injustice and the cost to the taxpayer caused by this poor decision-making are wholly unacceptable'.<sup>5</sup> 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'.<sup>6</sup> It also suggested that there was, 'a culture of defensiveness and passivity'<sup>7</sup> in Welsh public services. 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.<sup>8</sup> 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.
- 3.4** The context of local government reform is important, and it was suggested in the Bangor Workshop that improvements in initial public decision-making in the future are likely to be closely linked to the success of impending local authority re-organisation in Wales.<sup>9</sup>
- 3.5** Public bodies must take a central role in developing any right first time agenda. Factors such as overall attitudes within public bodies, their acceptance of responsibility for their decisions, the quality of leadership and management, and related political pressure and scrutiny are important. As an example, improvements in first instance decision-making in the UK Department for Work and Pensions (DWP) were noted by a number of research respondents. These were seen to stem from political pressure (as well as caseloads and court decisions). The DWP was able to make a business case for how directing resources

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<sup>3</sup> See e.g., IPSOS Mori's 'Veracity Index' available online at: <https://www.ipsos-mori.com/researchpublications/researcharchive/3504/Politicians-trusted-less-than-estate-agents-bankers-and-journalists.aspx> and Edelman's Trust Barometer 2015 - [http://www.slideshare.net/Edelman\\_UK/trust-barometer-media-deck-uk-no-embargo](http://www.slideshare.net/Edelman_UK/trust-barometer-media-deck-uk-no-embargo)

<sup>4</sup> Michael Adler, "From Tribunal Reform to the Reform of Administrative Justice" in Robin Creyke (ed.), *Tribunals in the Common Law World* (The Federation Press 2008) 164.

<sup>5</sup> Public Administration Select Committee, *Complaints and Ombudsman* (2012).

<sup>6</sup> Williams Commission, para 1.52.

<sup>7</sup> Williams Commission, para 4.26.

<sup>8</sup> Williams Commission, para 1.52.

<sup>9</sup> See e.g., Welsh Government, *Devolution, Democracy and Delivery White Paper – Reforming Local Government: Power to Local People* (Consultation paper and responses).

to improve initial decision-making would lead to budget savings in the longer term (for example, the cost of defending appeals would be reduced).<sup>10</sup>

**3.6** One problem here is transparency; without appropriate access to information it is difficult to assess the performance of public bodies. The Williams Commission, for example, recommended that NHS Wales complaints should be published quarterly, both as to their volume, outcomes, and the time taken to resolve them.<sup>11</sup> The view that there is insufficient standardised data about internal complaints handling within public bodies in Wales (such as time frames, outcomes and so on) was reiterated by the PSOW during the current research, he noted that this makes it difficult to compare performance across the public sector.<sup>12</sup> During the *Comparative Perspectives Conference* it was noted that this lack of open access to sufficient and standardised data is a problem across a range of legal jurisdictions, both UK, European and international. A recent Assembly Finance Committee Report proposing extending the powers of the PSOW has made recommendations in this regard. It recommends 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 to ensure comparisons can be made (recommendation 9).<sup>13</sup>

**3.7** If we are to measure improvements in governance and accountability by considering the volume of initial decisions that are right first time we have to have some sense of how the quality, or correctness, of decisions can be ascertained. Some possible indicators are:

- High numbers of successful appeals (to tribunals primarily or other external review and appeal mechanisms)
- High numbers of successful complaints (even if these are primarily about maladministration rather than incorrect adjudication over claims of right they may still be indicative of poor quality (as opposed to incorrect) decision-making.

**3.8** These methods of examining the correctness of decisions have limitations. Given the very small proportion of people who appeal, such appealed decisions cannot be seen as representative of the whole compass of decision-making. There are barriers to appeals, not least cost, lack of information or appropriate advice, lack of confidence (either from the individual themselves or lack of confidence in the appeal system as a whole). As Terence Ison puts it: 'the total volume of injustice is likely to be much greater among those who accept initial decisions than among those who complain or appeal'.<sup>14</sup> The success rate in appeals can also be affected by factors that do not relate to the quality of initial decision-

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<sup>10</sup> See Robert Thomas, *Organisational Learning* (n 1) 113-118.

<sup>11</sup> Williams Commission, para 6.130. So far as the author is aware this recommendation has not yet been implemented.

<sup>12</sup> It appears that the last full data set on health complaints in Wales was published by Welsh Government, Knowledge and Analytical Services in 2011, following the introduction of the *Putting Things Right* concerns process the data set collection was terminated. There have since been specific Freedom of Information requests and some disclosures by various Health Boards, but no systematic data collection across health bodies in Wales.

<sup>13</sup> National Assembly for Wales Finance Committee, *Consideration of Powers: Public Services Ombudsman for Wales* (May 2015).

<sup>14</sup> T.G. Ison, "Administrative Justice: Is It Such a Good Idea?" in M. Harris and M. Partington (eds), *Administrative Justice in the 21st Century* (Hart 1999) 23.

making, notably where new evidence that was not available to the initial decision-maker is collected under a tribunal's inquisitorial process.

- 3.9** Appeals only lie against negative decisions; incorrect decisions that are favourable to an individual will likely go unchallenged but could damage the public body's pursuit of its policy goals.
- 3.10** Despite the difficulties it is suggested that information on the proportion of decisions that are complained about and appealed against and the outcomes of complaints and appeal processes is essential to understanding administrative justice in Wales, and to getting a better sense of the extent of incorrect and poor decision making.

## **Internal Complaints**

- 3.11** Aside from ensuring that decisions are made right first time, most citizen's experiences of the administrative justice system are likely to begin with an internal complaint handled by the public body that made the initial decision of concern.
- 3.12** 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.
- 3.13** In 2010 Susan Lambert conducted a *Scoping Study of Complaints in Wales* for the Older People's Commissioner for Wales.<sup>15</sup> The aims of the Study were to explore statutory complaints arrangements in local authorities, the NHS, and care providers in Wales with the aim of setting out issues for the Older People's Commissioner. The Study provided an overview of guidance and outcomes of complaints handling together with a discussion about developments and reforms that were underway. It concluded that there were variations in procedures between health and social care that were particularly significant for older people whose complaints can span both sectors. The lack of any requirement for local authorities to submit standardised complaints reports was also noted.
- 3.14** More recently, The Social Services Complaints Procedure (Wales) Regulations 2014 have been enacted. These regulations, and NHS Wales regulations (noted below), adopt a three-stage approach to the resolution of complaints. First, local and informal resolution, second, formal investigation conducted by an independent investigator (to be appointed by the relevant public body), and third, if the other methods do not resolve the issue, a complaint can be made to the PSOW.
- 3.15** The NHS Wales concerns process, *Putting Things Right* (PTR) 2011, is based on the principle of 'investigate once, investigate well'. The process has recently been subject to review. PTR was introduced largely by The National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011. The Regulations support the process of managing and investigating concerns especially by ensuring (among other things) that:

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<sup>15</sup> Available online at: <http://www.olderpeoplewales.com/en/reviews/advocacy/research.aspx>

- There is a common method of investigating concerns which is proportionate to the issue raised
- The person raising the concern is properly supported (especially by Community Health Council (CHC) advocates and specialist advocacy services where needed)
- Concerns are consistently, thoroughly and appropriately investigated
- Responsible bodies demonstrate that learning and improvements have resulted from the process

**3.16** The introduction of PTR via the 2011 Regulations also has the further impact of altering civil liability in relation to claims of clinical negligence against the NHS in Wales as compared with England (despite civil law generally being non-devolved).

**3.17** Keith Evans recently conducted, *A Review of Complaints (Concerns) Handling in the NHS: "Using the Gift of Complaints"* (2014).<sup>16</sup> His aims were to review the current process determining what is working well and what improvements are needed, to consider if there is sufficiently clear leadership, accountability and openness within the process, to identify how the NHS in Wales can learn from other service industries, and to identify how the NHS can demonstrate its learning from patient feedback.

In relation to PTR the 2014 Review notes:<sup>17</sup>

'The introduction of PTR closely followed a major strategic reorganisation of NHS structure across Wales which had led...to the formation of the current seven health Boards and three Trusts...in my view and despite good intention, adequate resource has not been made available to allow the effective management of PTR on a local and national level. Currently, I would reflect that there are potentially **at least ten different versions in play** as Trusts and Health Boards have taken it upon themselves to implement PTR in their own way according to their budgetary means, respecting the individual accountability of each organisation...this has meant that complainants have potentially struggled within the process as PTR has positively been successful in generating the ability to complain and therefore receive higher numbers of complaints, but not necessarily had the complementary infrastructure to keep pace with this'.

And...<sup>18</sup>

'In analysis of approximately three hundred pieces of correspondence requested and received within the Review process, the number of complainants actually feeling dissatisfied with their experience of the PTR process or the care they have received is quite disturbing to see'.

'...**navigation through the complaints system – and which point to access when – and when a complaint reverts to a legal process** – and when independent investigation acts to support – is not easy for either the users or indeed staff to describe'.

<sup>16</sup> available online at: <http://gov.wales/docs/dhss/publications/140702complaintsen.pdf>

<sup>17</sup> Para 17 (emphasis own).

<sup>18</sup> Para 18 (emphasis own).

And on learning from complaints...<sup>19</sup>

‘Certainly, it seems that learning is not being applied as broadly as it could be above the individual complaint; and this becomes particularly difficult when assessing whether NHS organisations themselves share their learning across the structure in NHS Wales as a matter of routine’.

**3.18** The Review makes the following recommendations:<sup>20</sup>

- Make the existing PTR scheme clearer and more visible – address variable implementation
- Address the lack of infrastructure to address the current level of complaints
- Increase the profile of the analysis of incidents, concerns and complaints
- Better clarify the roles in support of complaints across existing organisation, patient groups and regulators (including establishing a national complaints regulator)
- Improve availability and consistency of information available nationally
- Develop the concept of Board and executive complaints champions and further strengthen this with suitable advocacy and support services

**3.19** A range of research respondents echoed the concerns of the 2014 PTR Report and suggested that complaints are not being properly dealt with due to a lack of resources and specifically that health boards have reduced their investment in complaints. It was noted that dealing with cases quickly and informally, largely as a means to try and save resources, can paradoxically prove more costly in the long run since the complaints process itself could be subject to challenge on grounds of not complying with administrative justice principles, such as giving all parties full information and the time to make representations and have those seriously considered by relevant experts. Mental health in particular provides an example of clashes between various values relevant to administrative justice, such as a clash between the need for speedy resolution and protecting the broader public good, alongside respecting the individual dignity of the patient and the interests of their family members.

## **Internal Review**

**3.20** Discussions and presentations during the *Comparative Perspectives Conference* disclosed an increasing trend across much of the UK, Europe and internationally, towards the adoption of internal review. This differs from an internal complaint in that 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. Research participants were particularly concerned about the trend towards increased use of compulsory rather than optional internal review before a claimant can go onwards to an external tribunal or court process.

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<sup>19</sup> Para 19.

<sup>20</sup> The author is not currently aware of the stage of implementation of any of these recommendations.

**3.21** There has been some previous research examining internal review, but it remains an under-explored and therefore relatively poorly understood area. Notable previous research focused on experiences in homelessness reviews under the Housing Act 1996.<sup>21</sup> Much of this research was dedicated to the reasons why individuals do not take up internal review opportunities. This was expressed to be due to a combination of both personal and bureaucratic factors including lack of knowledge and information, scepticism and distrust in the process, including distrust as to the levels of discretion actually open to administrators. The authors noted that the availability of internal review as a compulsory first step deters applicants from pursuing external review (e.g., through a court or tribunal). 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. The authors found that the very presence of internal review deters applicants from seeking external review (even where this may be necessary and appropriate). 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. In this regard internal review can negatively impact upon a right first time agenda (it is seen as a safety valve part of the first instance process as opposed to a second tier of review).

**3.22** Research conducted for the Northern Ireland Ombudsman's Office 'mapping' some aspects of the administrative justice system<sup>22</sup> included a survey of internal complaints mechanisms within public bodies and processes of internal review. The research focused on the user's journey within each redress mechanism, noting in particular that users rarely understand the dichotomy between complaints and appeals. The internal complaints aspect was undertaken over seven months in 2011 by way of a survey questionnaire and a follow up survey conducted over three months in 2013. The Report highlighted the need for greater clarity for users in the context of internal complaint and review procedures. It also welcomed a later initiative, undertaken by the Inter-departmental Steering Group on Complaints, to implement a standardised complaints procedure across all public bodies in Northern Ireland. Internal mechanisms were assessed on their accessibility, clarity, independence and outcomes (remedy for the user). This research provides information about how users begin a redress journey and how issues are often resolved informally at an internal and local level, it provides examples of both good and poor practice and suggests reforms, in particular the standardised reporting of complaints.

**3.23** Current research participants expressed various concerns in relation to internal complaint and review mechanisms; in particular 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 fields of health and social care).

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<sup>21</sup> David Cowan and Simon Halliday, *The Appeal of Internal Review: Law, Administrative Justice and the (Non-) Emergence of Disputes* (Hart 2003).

<sup>22</sup> M Anderson, A McIlroy, M McAleer, *Mapping the Administrative Justice Landscape in Northern Ireland* (2014).

**3.24** There are also concerns around the relationships between internal complaints and internal reviews and other aspects of the administrative justice system, especially a lack of clarity as to when a concern crystallises into a legal issue that requires the cognisance of a court or tribunal. This was particularly evident in the recent Review of the PTR process in the Welsh NHS.

### **Mandatory Reconsiderations**

**3.25** Welfare is a non-devolved area of administrative justice of key importance to people in Wales. In its July 2015 Report, *Responding to Welfare Reform in Wales*, the Assembly Public Accounts Committee noted that, 'Although welfare is not currently devolved, the outcome of welfare reform affects many devolved public services'.<sup>23</sup> Research conducted for the Assembly showed that in 2010 nearly 19% of the working age population in Wales received some type of benefit, compared with a British average of 14.5%. The percentage of people claiming out of work benefits was approx. 16% in Wales compared to 13% in Great Britain.<sup>24</sup> Later research by the Bevan Foundation found that in 2012, 15.7% of the working age population of Wales claimed out of work benefit.<sup>25</sup>

**3.26** One particular contentious area of internal review is, 'mandatory reconsideration' (MR) taking place in the UK Department for Work and Pensions (DWP). Under MR people aggrieved by government decisions concerned with 22 different types of benefits<sup>26</sup> are required to ask for MR (within one month of the date of the initial decision) before pursuing any other redress mechanism. The claimant effectively asks the DWP to reconsider and reverse its original decision. Claimants are also required to lodge their appeals directly with HMCTS ('direct lodgement') whereas, under the previous system, claimants had submitted their appeals to the DWP which then transmitted them to HMCTS. MR was introduced by section 102 of the Welfare Reform Act 2012 and further regulations followed shortly after.<sup>27</sup> The aims of introducing MR included, resolving disputes as early as possible and reducing unnecessary demand on HMCTS by resolving more disputes internally. MR has been contentious from the start, with concerns centred on proposals to withhold benefits whilst the review process was underway, and the length and fairness of the review process.

**3.27** The highest number of MRs concern Employment and Support Allowance (ESA) and Jobseekers Allowance (JSA). Since the MR scheme began (in October 2013) up to 31<sup>st</sup> October 2014 there had been 177,000 MR requests in relation to ESA decisions (accounting for 49% of all requests made), 90% of these were in relation to Work Capability Assessment decisions. A further 108,000 requests related to JSA (30% of the

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<sup>23</sup> At para 3.

<sup>24</sup> National assembly for Wales, *Welfare in Wales Series: Welfare Statistics* (2010), available online at: <http://www.assembly.wales/Research%20Documents/Welfare%20in%20Wales%20series%20Welfare%20statistics%20-%20Quick%20guide-22092011-224068/qg11-0033-English.pdf>

<sup>25</sup> Cuts Watch Cymru, *Benefits Briefing* (October 2012).

<sup>26</sup> For example, child benefit, child maintenance, income support, jobseekers allowance, personal independence payments (PIP) and employment support allowance (ESA).

<sup>27</sup> The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment Support Allowance (Decisions and Appeals) Regulations 2013.

total number of requests for MR).<sup>28</sup> At present it is not known how many of these applications came from Welsh claimants. Based on the population of Wales accounting for approx. 5% of the population of Great Britain, we can say that some 14,250 of the total number of MRs relating to ESA and JSA combined could have originated with Welsh claimants. According to most recent data, in February 2015 some 150,450 people in Wales were claiming ESA and 48,500 were claiming JSA.

- 3.28** A release of 'Experimental Official Statistics' published by the DWP in December 2014 noted that the number of MR requests peaked in March 2014.<sup>29</sup> However, as yet there is no data on the number of claims that have been through the MR process but 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 really working in terms of resolving disputes and increasing the quality of decisions. Some inferences can be drawn in terms of the number of appeals to the SSCS. For example, the number of Welsh cases issued in the SSCS dropped from 10,483 in the second quarter of 2013, down to 2,138 in the final quarter of 2014 (echoing similar trends for claims from England). However, these have risen again to 3,049 in the second quarter of 2015. MR has been successful assuming that success is based on preventing claimants from appealing. On the other hand, research studies have found considerable claimant and adviser dissatisfaction with the process.
- 3.29** Citizens Advice Bureaux (CAB) research found that 34% of people visiting a CAB about MRs between April and October 2014 reported that this extra layer of 'red tape' had left them without any money.<sup>30</sup> Research for the National Association of Welfare Rights Advisers (NAWRA) concludes that MR is 'highly dysfunctional'.<sup>31</sup> For example, 75% of NAWRA members disagreed with the statement; 'disputed decisions are resolved as early as possible'. It has been argued that the process was specifically erected as a barrier to put people off making legitimate appeals. There were concerns about lack of sufficient information enabling claimants to know where they are in the process, records and evidence being lost, trepidation about a verbal explanation of reasons, delivering results by telephone putting claimants under pressure, and the attitudes of DWP decision-makers (including high pressure tactics, and generalised, biased and partial interpretations of information and evidence). The research notes that improvements are in train, such as the decreased use of the verbal explanation call and the proposed issue of new guidance to relevant departments.
- 3.30** The NAWRA research also noted that the provision of relevant advice services is variable across the UK nations and recommended that relevant agencies can (and many already do) tailor their advice such as developing self-help guides and making more effective use of local statutory support services.

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<sup>28</sup> DWP, Mandatory reconsiderations of DWP benefit decisions: Data to October 2014, Available online; <https://www.gov.uk/government/statistics/mandatory-reconsiderations-of-dwp-benefit-decisions-data-to-october-2014>

<sup>29</sup> This release also includes data on the average time to process MR requests.

<sup>30</sup> CAB, *The Cost of a Second Opinion: The impact of mandatory reconsideration in Employment Support Allowance on CAB Clients* (July 2014).

<sup>31</sup> Adviser Magazine, *The revolving doors of mandatory reconsideration* (May/June 2015).



- 3.31** Views expressed during the *Comparative Perspectives Conference* displayed considerable worries about how the MR process is operating and the lack of empirical evidence. Similar concerns and anecdotal evidence from advice providers and claimant representative organisations were also raised in a recent workshop examining administrative justice in Scotland. Delegates expressed particular worries about the impact of internal review on vulnerable claimants, and heavy-handed tactics by reviewers leading to the curtailment of legitimate claims.<sup>32</sup> A general consensus appears to be that the process is denying claimants their legitimate right to appeal without sufficient evidence of improved decision-making.
- 3.32** In this context it is recommended that the Assembly, Welsh Government and public bodies in Wales think carefully about the pros and cons before introducing any 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 impacts on access to justice. For example, In 2013 discretionary payments under the Social Fund (created by the Social Security Act 1986) were abolished and replaced by a new scheme under which payments to meet special needs (primarily of claimants receiving means tested benefits) would become the responsibility of local authorities. In Wales the relevant Discretionary Assistance Fund (DAF), is administered by a private contractor (Northgate Public Services). Unsatisfied claimants must first seek an internal review by the DAF team. A second stage review can then be sought and this will be determined by the Family Fund Trust (a UK wide registered charity formed in 1973 to give practical help to families with severely disabled children under the age of 16). In the first two quarters of its most recent year of operation Northgate Public Services recorded that 22,115 applications were made to the DAF resulting in 15,129 awards. It received 65,065 telephone contacts, 5,240 online contacts and 1,206 postal contacts. This gives some sense of the extent of emergency financial difficulties faced by citizens in Wales. At present however, this research does not have information on the number of cases in which an applicant seeks an internal review or a further review by the Family Fund Trust and the outcomes and rates of satisfaction with these processes.

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<sup>32</sup> Note available online at; <http://ukaji.org/2015/06/25/workshop-on-administrative-justice-research-in-scotland/>

## **CHAPTER FOUR: THE PUBLIC SERVICES OMBUDSMAN FOR WALES (PSOW) AND WELSH COMMISSIONERS'**

### **Chapter Four: Key Points**

- 1. This research endorses recommendations made by the Assembly Finance Committee that the PSOW should have own initiative powers and full discretion to decide how complaints can be made (including oral complaints), and the recommended establishment of a complaints standards authority within the PSOW's office. This brings the office into line with developments in Scotland and Northern Ireland.**
- 2. The number of complaints received by the PSOW is increasing and evidence submitted to the research suggests that dissatisfaction with public services in Wales may be significantly higher than is reflected in the number of complaints received by the PSOW and the Welsh Commissioners'.**
- 3. There are tensions between the role of resolving individual complaints, and the extent to which ombudsmen can be proactive in engaging in a 'system-fixing' function of investigating systemic failings in public bodies and recommending improvements. 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). Success in the first two roles, which largely depict ombudsmen as citizen champions, may undermine success in the third role which requires co-operation with public bodies. An issue to monitor is whether the PSOW can successfully combine fire-fighting and fire-watching roles or does success in one role inevitably undermine the other?**
- 4. Commissioners in Wales also have roles in handling individual complaints as well as having powers to initiate 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 signpost to other relevant services, but there are concerns in relation to the strategic use of resources and the broader 'system-fixing' roles of Commissioners.**
- 5. 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 'integrity' branch. There are concerns around the growth of this 'integrity' branch, in particular that rather than being an additional route to improving administrative justice it provides a cheap alternative to traditional court-based adjudication over matters of legal right. Questions remain whether the integrity branch performs a unique and proportionate function, or whether it provides an attenuated form of access to justice in times of austerity. There are also concerns over to whom the 'integrity' branch should be accountable whilst maintaining independence; is it, and should it be, accountable to the Welsh Government to the Assembly, to the courts or to all these institutions in varying respects?**

- 4.1** If an internal complaint or review procedure within a particular public body in Wales fails to satisfy the complainant then often the next port of call is a complaint to the PSOW. The PSOW has legal powers to look into complaints about public services and independent care providers in Wales. He can also look into complaints that local authority members have broken their authority's code of conduct. The PSOW's vision is: 'To put things right

for users of public services and to drive improvement in those services and in standards in public life using the learning from the complaints we consider'.<sup>1</sup>

- 4.2** The PSOW's role was discussed in the Bangor Workshop, noting key characteristics such as accountability to the Assembly, and that the PSOW's appointment is for a fixed term of seven years. It was noted that the role is primarily directed to complaints of maladministration, and to balance between doing justice for individuals whilst also advising on measures to improve the systematic efficiency and fairness of public decision-making where these arise from complaints that have been investigated.
- 4.3** The PSOW noted that there are two public bodies in Wales for every supermarket, giving some sense of the scale of public decision-making and therefore of the reach of administrative justice. One can also note here the Williams Commission commentary that there is one public body for every 3,200 persons in Wales (in contrast for example to Scotland where there is one public body for every 3,900 persons).<sup>2</sup>
- 4.4** The PSOW noted that enquiries had been as high as 3,000 per-annum (with numbers having tripled in the last decade). The PSOW is receiving approximately 2,000 complaints per-annum. Approximately 35% relate to healthcare (this figure having risen from 15% in earlier years). A further 40% related to local government, with 4% in the field of housing. In both Bangor and Cardiff Workshops it was noted that the number of complaints to the PSOW is increasing, particularly in relation to health, but even so there is a sense that not all voices are being heard and that the number of complaints does not represent the full scale of dissatisfaction with various public services. According to the 2014/15 Annual Report, the PSOW received 3,470 enquiries, 2,065 public body complaints (a 7% increase from 2013/14) and 231 code of conduct complaints.
- 4.6** The PSOW focused on some specific elements of a recent Assembly Finance Committee Consultation considering his powers. The most important perhaps being the possible granting of 'own initiative' powers. Under these powers ombudsmen can investigate concerns that have come to light within specific public bodies without having to first receive an individual complaint. It was noted that approximately 45 ombudsmen within the Council of Europe have some degree of own-initiative powers. These enable them to deal with more systematic problems within particular public bodies. In its May 2015 Report the Assembly Finance Committee recommended that a Bill is introduced to extend the role of the PSOW and that this includes powers to initiate own investigations (recommendation 3).
- 4.7** The conferral of a similar power on the Northern Ireland Ombudsman (NIO) is currently in the process of being enacted. At present there are two statutory offices of the NIO; the Assembly Ombudsman for Northern Ireland (AONI) and the Northern Ireland Commissioner for Complaints (NICC). The former deals specifically with complaints about services provided by the Northern Ireland Executive, the latter with local government, health, social care and other public bodies such as the Northern Ireland Housing Executive. Following a Consultation Paper, issued by the Northern Ireland Assembly Committee for the Office of the First Minister and Deputy First Minister a report proposing reform was debated and approved by the Northern Ireland Assembly in September 2013.

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<sup>1</sup> <http://www.ombudsman-wales.org.uk/en/about-us.aspx>

<sup>2</sup> Williams Commission, Para 1.30.

This report recommended, amongst other matters, merging the two offices, and conferring on the NIO a power of systematic review, more widely referred to as ‘own initiative powers’ to conduct investigations in the absence of specific complaints. A Bill is expected to make these and other changes.

- 4.8** There are multiple power centres in devolved jurisdictions and it is important to encourage co-operation between them. For example, the Office of the First Minister and Deputy First Minister (OFMDFM) in Northern Ireland first considered proposals to reform the NIO’s role, but did not take these forward due to resource constraints and competing priorities, instead the work was taken on by a Committee.
- 4.9** The different jurisdictions within the UK tend to ‘piggy back’ in relation to new initiatives, often the adoption of an innovative approach in one or more of the component jurisdictions makes it much easier for that power or process to be accepted by others.
- 4.10** It was noted during the Bangor Workshop, giving the example of Northern Ireland, that ombudsmen and politicians may have different understandings of the nature and extent of own-initiative, (also known as own-motion) powers. Own-initiative investigations do not necessarily have to relate to more systemic issues, they can relate to individuals who lack the capacity or inclination to complain. The poor treatment of an individual can undermine administrative justice within a society and the overall legitimacy of public decision-making, even if that individual does not wish to pursue the matter.
- 4.11** In that regard it was noted that some broader research has been conducted into the empirical impact of the work of certain ombudsmen,<sup>3</sup> but getting the user voice into the system remains a big challenge. It was noted in general that it is difficult to get a reliable assessment of user perspectives beyond occasional customer satisfaction surveys.
- 4.12** The PSOW noted the difficulties those who have low attainment in reading and writing have in accessing his service. The PSOW can receive oral complaints, but when this happens his staff must ensure that the complaint is properly recorded in writing and have this verified by the complainant. The recent Assembly Finance Committee Report recommended that the PSOW has full discretion to decide how complaints can be made and must issue guidance specifying accepted methods (recommendation 7) and that there should be a mechanism to ensure that where complaints are made orally the complainant is made fully aware that a complaint has been initiated and understand the implications of this (recommendation 8).
- 4.13** The third newly proposed power is to deal with healthcare provided by the private sector in Wales. This is particularly important in the case of patients who receive part of their treatment within the NHS, but then chose private providers for other aspects. A proposal was accepted by the Assembly Finance Committee which recommended that the PSOW should have jurisdiction to investigate the whole complaint when a combination of treatment has been received by public and private healthcare providers and when that treatment has been initiated in the NHS (recommendation 11).

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<sup>3</sup> See e.g., Chris Gill, Jane Williams, Carol Brennan and Nick O'Brien, *The Future of ombudsman schemes: drivers for change and strategic responses* (Queen Margaret University 2013).

- 4.14** The Scottish Public Services Ombudsman (SPSO) provides a similar one-stop shop role to that performed by the PSOW (under powers established by the Scottish Public Services Ombudsman Act 2002). There are some notable differences when comparing the SPSO and the PSOW. For example, in 2010 the SPSO established the Complaints Standards Authority (CSA) in Scotland to work closely with public bodies to standardise and simplify complaints handling procedures and to help drive improvement. The CSA took forward new responsibilities provided to the SPSO by the Public Services Reform (Scotland) Act 2010 which gives the SPSO the power to publish standardised complaints handling procedures for certain listed authorities (including local authorities, the NHS, registered social landlords and the Scottish Government and Scottish Parliament). In Wales, the PSOW has developed *Model Concerns and Complaints Policy and Guidance* (issued by the Welsh Government in 2011), but this is not mandatory, whereas the guidance produced by the CSA in association with the SPSO is mandatory in relation to listed public bodies in Scotland. The SPSO can make a declaration of non-compliance before the Scottish Parliament under section 16D of the Scottish Public Services Ombudsman Act 2002 (as amended by the Scottish Public Services Reform (Scotland) Act 2010). Again the Assembly Finance Committee Report recommends that the PSOW should in future 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 to ensure comparisons can be made (recommendation 9). This recommendation would require careful implementation making sure these powers are used in a way that is complementary to other statutory responsibilities to have complaints procedures in place.
- 4.15** A further difference between Wales and Scotland is a proposal to give the SPSO the power to determine appeals (specifically considering the merits) in relation to decisions reached under the Scottish Welfare Fund. In 2013 discretionary payments under the previous Social Fund (created by the Social Security Act 1986) were abolished and replaced by a new scheme under which payments to meet special needs (primarily of claimants receiving means tested benefits) would become the responsibility of local authorities. In Scotland there is now a national scheme, The Scottish Welfare Fund (SWF), and this is administered by local authorities. Giving the SPSO the competence to determine appeals under the SWF is a significant departure from the traditional role of ombudsmen in relation to maladministration as opposed to determining specific legal appeals. In Wales the similar scheme, the Discretionary Assistance Fund (DAF), is administered by a private contractor (Northgate Public Services).
- 4.16** Overall ombudsmen can be seen as the buckle of the belt of remedies in administrative justice, and this characterisation fits well with the difficulty of siting ombudsmen generally within any one of the specific legislative, executive, and judicial arms of the state. For example, it has been noted that: 'The literature is replete with typologies, taxonomies and metaphors that seek to account for the multifaceted nature of the ombudsman institution'.<sup>4</sup> This is largely because 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

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<sup>4</sup> Chris Gill, 'The evolving role of the ombudsman: a conceptual and constitutional analysis of the "Scottish Solution" to administrative justice' [2014] Public Law 662, 667.

particular public bodies and making recommendations for improvement. For example, the New South Wales Ombudsman in Australia notes that it does not have the resources to pursue all complaints and will only investigate serious matters likely to affect a broader range of people. The danger of moving to this more system-fixing approach is that the ombudsman would no longer be seen as a citizen's champion, rather as coming closer to being part of the machinery for government self-scrutiny, such as central government monitoring of local government, audit, inspection and regulation processes.

- 4.17** During the *Comparative Perspectives Conference* an empirical case study was presented examining the National Ombudsman in the Netherlands, arguing that the Ombudsman has been highly successful as a criticiser (publicly criticising policies and legislation) and as a 'fire-fighter' (handling individual complaints), but that he has been less successful in his role as a 'fire-watcher' (working more systematically to improve the quality of public decision-making). It was suggested that success in the first two roles which largely depict the Ombudsman as a citizens champion have undermined his success in the third role which requires more co-operation with public bodies. The case study provides evidence that the prevalence of quick and informal resolution of individual complaints paints a picture of the Ombudsman as somewhat biased towards individuals against public bodies and the lack of more systematic investigations with following recommendations weakens the Ombudsman's performance of his broader role of improving public trust in administration. For Wales the key lesson is, 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?
- 4.18** Various taxonomies attempting to conceptualise the role of ombudsmen can be simplified into four categories. That it is an adjunct of the relevant parliament, that it is an institution aligned to the executive branch, that it is an institution aligned to the judicial branch, or that it is an institution forming part of a new branch of state known as the 'integrity' branch. The integrity branch includes recent and more innovative un-elected methods of accountability, such as commissioners and regulators. There are concerns around the possible growth of this 'integrity', in particular that rather than being an additional route to improving administrative justice it could be seen as a cheaper alternative to traditional court-based adjudication over matters of legal right. In this sense it is access to justice on the cheap in times of austerity.
- 4.19** For present purposes, Chris Gill's alternative approach is favoured, under this account: 'The ombudsman's hybrid position between legal and political control allows it to complete an administrative justice system that is predicated on executive, judicial and political controls each fulfilling core tasks in pursuit of the fundamental constitutional goal of achieving administrative justice'.<sup>5</sup>

### **The Welsh Commissioners'**

- 4.20** Research continues to be conducted across Welsh Universities as to the roles of various Welsh Commissioners.<sup>6</sup> The current Report focuses on outlining the basic functions of

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<sup>5</sup> *ibid* at 678-679.

<sup>6</sup> See e.g., Centre for Welsh Legal Affairs and Institute of Welsh Politics, Aberystwyth University, *Commissioners and the Ombudsman and the infrastructure of Welsh Governance: lessons from Wales and lessons for Wales* (Spring 2014).

the core Welsh Commissioners to the extent that they were discussed as part of responses to the present research. The role of the Welsh Language Commissioner is discussed in more detail in Chapter Five. The Welsh Commissioners include:

- The Children's Commissioner for Wales

The Children's Commissioner is an independent children's rights institution established to safeguard and promote the rights and welfare of children and young people in Wales. It was established in 2001 under Part V of the Care Standards Act 2001 and the Children's Commissioner for Wales Act 2001. Roles include providing advice and information to children and young people, offering support, examining cases where services have potentially failed a child or children and assisting children and young people whose rights have not been respected (including providing financial assistance and advice in legal proceedings). According to the Children's Commissioner for Wales Annual Report 2014/15, the Commissioner's office received enquiries in relation to 540 issues in that year.

- The Older People's Commissioner for Wales

The Older People's Commissioner was established as an independent institution under the Commissioner for Older People (Wales) Act 2006. Functions include, promoting awareness of the interests of older people in Wales and the need to safeguard those interests, promoting the provision of opportunities for, and the elimination of discrimination against, older people in Wales, encouraging best practice treatment of older people in Wales and keeping under review the adequacy and effectiveness of law affecting the interests of older people in Wales. In her 2014/15 *Impact and Reach Report* the Older People's Commissioner reports providing help, support, advocacy and assistance to 525 older people.

- The Welsh Language Commissioner (WLC)

The office of the WLC was established by the Welsh Language Measure 2007 as a product of the Legislative Competence Order (LCO) method of legislation. Some of the WLC's roles emanate from the Welsh Language Act 1993, in particular those dealing with Welsh language planning. Other roles are conferred by the Welsh Language (Wales) Measure 2011, including the setting of Welsh language standards to be complied with by public bodies.

- The Wales Commissioner for Sustainable Futures'

Following the 2011 closure of the Sustainable Development Commission (a UK wide organisation) the new role of Commissioner for Sustainable Futures was developed to provide advice to the Welsh Government and leadership for sustainable development across Wales. The Commissioner for Sustainable Futures' role is different to the other Commissioners' in that it is not a statutory appointment, it is an appointment made by the Welsh Government with the primary aim of working in partnership with relevant stakeholders to advise the Welsh Government on policies and approaches required to promote sustainable development in Wales.

- The Future Generations Commissioner for Wales'

The newest of the Welsh Commissioners has a role established by Part 3 of the Well-being of Future Generations (Wales) Act 2015 to act as a guardian for the interests of future generations in Wales and to support bodies listed in the Act to work towards achieving well-being goals. The Commissioner is appointed by Welsh Ministers following consultation with the relevant Assembly Committee. Alongside advisory, promotion and research roles the Commissioner can carry out reviews and make recommendations to public bodies about the steps they have taken in relation to the long-term impact of their decisions. Public bodies must take all reasonable steps to follow the Commissioner's recommendations (section 22 of the Act).

**4.21** During the *Comparative Perspectives Conference* it was noted that Commissioners in Wales (as in other UK, European and international jurisdictions) have a role in relation to handling specific individual complaints as well as having powers to initiate broader investigations. There may be advantages to this in terms of specialist expertise, in acting as advocate for the complainant or in the Commissioner's ability to sign-post to other relevant services, but there are concerns 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 the administrative justice system, (do they align closer to the executive or to the legislative branch, or could they form an aspect of a fourth so-called 'integrity' branch of state also incorporating ombudsmen). To whom should Commissioners' be accountable whilst maintaining an appropriate degree of independence? These are areas for further monitoring and research.



## CHAPTER FIVE: BILINGUAL ADMINISTRATIVE JUSTICE

### Chapter Five: Key points

1. A key aspect of administrative justice in Wales is ensuring that procedural and substantive concepts of justice are given equal status in Welsh and English in initial legislative drafting.
2. There may be tensions between the demands of linguistic justice and administrative justice. 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 shifted to language commissioners in the context of person versus person dispute resolution. The increasing use of commissioners to resolve individual 'legal' disputes may provide a cheap and proportionate alternative to court redress, but also runs the risks of not providing adequate protection for legal rights due to the relatively informal process.
3. Now that the Welsh Language Commissioner (WLC) is setting standards and regulations the role is in transition from primarily a monitoring body to a regulatory body with the power to take specific steps to ensure that relevant public bodies are complying with standards, and to rectify the situation if they are not. 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).
4. Whilst there are relevant provisions concerning the right to use oral and written Welsh in the Administrative Court for Wales, and one case has now been heard in Welsh, there is no direct precedent outlining how the Court should interpret bilingual legislation and there is no specific right to a bilingual judge. If such a right were established it is unlikely that there would be enough Administrative Court ticketed judges to facilitate the right in practice.

**5.1** Under section 1(1) of the Welsh Language (Wales) Measure 2011, the Welsh language has official status in Wales. The Assembly and the Welsh Ministers produce legislation in both Welsh and English. Those English and Welsh texts are to be treated for all purposes as being of equal standing (by virtue of s.156(1) of the GoWA 2006). During the current research, the WLC noted that the pace of legislative developments in Wales is only likely to increase within the next Assembly. It is important that principles of administrative justice, including especially bilingual justice, are incorporated within the drafting of new legislation.

### **The Welsh Language Commissioner (WLC)**

**5.2** During the Bangor Workshop, the WLC noted how important consideration of administrative justice principles is in Wales at present given that many of the issues raised are practically active in terms of Welsh Government policy, Assembly legislation, and public sector governance more broadly. The Office of the WLC was established by the Welsh Language Measure 2007 as a product of the Legislative Competence Order (LCO) method. The WLC is appointed for a fixed period of seven years and she faces a number of daily challenges, especially the interpretation of lengthy bilingual legislation.

- 5.3** Some of the WLC's roles emanate from the Welsh Language Act 1993, in particular those dealing with Welsh language planning. Others are conferred by the Welsh Language (Wales) Measure 2011, including the setting of Welsh language standards to be complied with by public bodies. The first set of standards developed by the WLC relates to the Welsh Ministers, Local Authorities and National Parks. The Assembly approved these standards on the 24 March 2015. The WLC has now submitted the conclusions of her second investigation, this time proposing standards specifically applicable to 119 organisations (including health boards and bodies, police forces, further and higher education institutions and other public service providers). The Welsh Government aims to draft regulations implementing this second set of standards during autumn 2015. The WLC has now begun a third investigation to develop standards applicable to a further 64 public bodies (including providers of social housing, UK Government departments, water companies, Royal Mail Group Plc and the Post Office).
- 5.4** It is with the setting of these standards and regulations that the role of the WLC begins to transition from primarily a monitoring body to a regulatory body with the power to take specific steps to ensure that public 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.
- 5.5** Since the WLC is 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).
- 5.6** In comparative perspective the WLC noted that there are at least 10 language commissioners globally with a similar status to her own. For example, in Ireland, Kosovo and Sri Lanka, and a number of commissioners in Canada (both a federal commissioner and commissioners representing specific provinces). A strong relationship has developed between the commissioners across the world as they face the same challenges in terms of developing the best relationship between communities and citizens.
- 5.7** In 2014/15 the WLC received 136 complaints about public bodies, plus a further 102 in relation to Crown bodies and 3 under private statutory duties. She also instigated two statutory investigations following complaints from members of the public, and five under her own initiative powers.

### **Linguistic Justice and the use of Welsh in Court**

- 5.8** During the *Comparative Perspectives Conference* it was noted that there are tensions between the broader demands of linguistic justice and administrative justice. 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 was 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 adequate protection especially in the case of constitutionally prescribed languages. Does

the increasing use of commissioners to resolve individual 'legal' disputes provide a proportionate alternative to court redress, but also run the risks of not providing adequate protection for legal rights due to relatively informal processes?

- 5.9** The Administrative Court in Wales is a key component of the Welsh system of administrative justice (discussed further in Chapter Eight). A hearing before the Court is subject to the provisions of s.22 of the Welsh Language Act 1993 and as such any person addressing the Court may exercise their right to speak in Welsh. Under the Practice Direction Relating to the Use of the Welsh Language in Cases in the Civil Courts in Wales, the Court may hear any person in Welsh on an *ad hoc* basis and without notice of the wish to speak in Welsh, providing all parties and the Court consent.<sup>1</sup> In practice, the parties should inform the Court as soon as possible,<sup>2</sup> preferably when lodging the claim to allow a judge or an Administrative Court Office lawyer to make proper directions and allow the Administrative Court Office to make practical arrangements.
- 5.10** There are bi-lingual judges, but nonetheless, it is likely that an order will be made for simultaneous translation.<sup>3</sup> The reason for this is that judicial reviews are public hearings which anyone may attend. The numbers of judges who are bilingual is relatively small and, the number of bilingual judges who are ticketed to consider Administrative Court claims is in the single digits. Where the claim is in Welsh, but does not relate to Welsh language issues, the lack of bilingual judges can be, on the whole, compensated for with the use of simultaneous translation. However, where the claim involves the analysis and interpretation of Welsh, be that in the form of the interpretation of a bilingual statute or otherwise, then a bilingual judge will be a necessity. There are two key reasons behind this. First, it is dangerous to assume that one word in one language equals another word in another language. The true meaning may be context dependant or there may be no direct translation. A bilingual judge would be best placed to deal with these issues over a translator or expert adviser on languages. Second, where a judge is not bilingual, but requires evidence as to the meanings of words or phrases in one language but not the other, it is questionable whether the two versions could properly be said to have been treated as of equal validity for the purposes of their interpretation, thus contravening the intention behind s.1(1) of the Welsh Language (Wales) Measure 2011 and s.156(1) of the GoWA 2006.
- 5.11** To date, the Administrative Court in Wales has only heard one case in Welsh<sup>4</sup> and that case did not deal with the interpretation of bilingual legislation. As such, there is no direct precedent outlining how the Court would go about interpreting bilingual legislation.<sup>5</sup> To consider a possible scheme the use of English and French in Canada can provide guidance.

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<sup>1</sup> Paragraph 1.2 of the Practice Direction Relating to the Use of the Welsh Language in Cases in the Civil Courts in Wales.

<sup>2</sup> Ibid para 1.3.

<sup>3</sup> This was the format ordered in the only judicial review to date where the claimant requested the hearing be conducted in Welsh; *R. (Welsh Language Commissioner) v National Savings and Investments* [2014] PTSR D8 and is in line with HMCTS's Welsh language scheme 2013-2016, paragraph 5.26.

<sup>4</sup> *R. (Welsh Language Commissioner) v National Savings and Investments* [2014] PTSR D8

<sup>5</sup> Although there is precedent concerning the use of the other language in a bilingual text where the meaning of the English text is ambiguous. See, *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141.

- 5.12** In Canada legislation is published in English and French (both official languages). The use of either language in court is a constitutional right. There is a statutory method of redress if language rights are not adhered to, and the situation is not adequately remedied by the Commissioner of Official Languages of Canada, by way of an application to the Canadian Federal Court.<sup>6</sup> This method is similar to the procedure introduced by the Welsh Language (Wales) Measure 2011, where appeal lies to the Administrative Court in Wales.
- 5.13** This legislative background has been interpreted by the Canadian Supreme Court to guarantee a right to a bilingual judge (and jury). In *R. v Beaulac*<sup>7</sup> the accused was charged with first-degree murder and applied for a trial before a judge and jury who spoke both English and French. The judge dismissed the application, the trial proceeded in English, and the accused was convicted. The Supreme Court ordered a new trial before a judge and jury who spoke both official languages. Bastarache J held that ‘Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada’.<sup>8</sup> The purpose of the relevant criminal legislation was, ‘to provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity’.<sup>9</sup> As a result, it was held that; ‘Absent evidence that the accused does not speak the language chosen, an accused is free to make his or her choice of the official language spoken by the judge or judge and jury by whom he or she will be tried, providing his or her application is timely’.<sup>10</sup>
- 5.14** It can be argued that the use of one’s own language before a judge fluent in that language is a ‘language right’ and a ‘fundamental right’.<sup>11</sup> At present, in Wales, there is no equivalent right to that outlined in *Beaulac*. The criminal courts’ duty only extends to ensuring that a case in which the Welsh language may be used is listed, wherever practicable, before a Welsh-speaking judge and in a court in Wales with simultaneous translation facilities.<sup>12</sup> Were there a right to have one’s case heard before a bilingual judge, rather than via simultaneous translation and/or with other expert assistance, then Wales may struggle to ensure that there are sufficient bilingual judges to practically facilitate it.

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<sup>6</sup> Part X, Official Languages Act 1985.

<sup>7</sup> [1999] 1 SCR 768.

<sup>8</sup> *Ibid* para 25.

<sup>9</sup> *Ibid* para 34.

<sup>10</sup> *Ibid* para 52. Bastarache J, at para 39, also stated that, “*administrative inconvenience is not a relevant factor*”.

<sup>11</sup> See, for example, P Chan, *Official Languages and Bilingualism in the Courtroom: Hong Kong, Canada, the Republic of Ireland, and International Law*, (2007) 11(1-2) *The International Journal of Human Rights* 199.

<sup>12</sup> Para 3K.8, Practice Direction (CA (Crim Div): Criminal Proceedings: General Matters) [2013] EWCA Crim 1631.

## **CHAPTER SIX: THE ADMINISTRATIVE JUSTICE 'SYSTEM' IN WALES: CORE INSTITUTIONS, REDRESS MECHANISMS AND AREAS OF POTENTIAL REFORM**

### **Chapter Six: Key Points**

- 1. Administrative justice has developed on an *ad hoc* basis in Wales and largely does not form a coherent system. More research work needs to be done to map redress mechanisms and to propose optimal models of system design for the future. Maps should be developed analysing the institutions of administrative justice in key areas of policy and legislative competence. These should identify gaps and overlaps in redress design and where mechanisms are inappropriate, too numerous and/or too burdensome, or where access to appropriate redress is insufficient.**
- 2. Institutions of administrative justice should be looked at holistically in light of the increasing difficulty of siting bodies (such as ombudsmen, commissioners, independent and statutory complaints handlers, contracted out complaint handlers, and some tribunals) within a traditional tripartite legislative, executive and judicial account of the state. User experiences and needs should define the characteristics of particular institutions, not traditional hierarchical models of the state. Administrative justice may be a constitutional principle alongside separation of powers, judicial independence and the rule of law.**
- 3. There are identifiable trends in the design of administrative justice systems across many legal jurisdictions. These include moves towards the rationalisation of redress mechanisms, including amalgamation of specialised tribunals into generalised 'super tribunals'. Rationalisation of devolved tribunals in Wales may have benefits in terms of efficiency, expertise, accessibility and flexibility. However, there are disadvantages such as insufficient specialisation, excessive formality and procedural complexity, and the favouring of larger bodies within the conglomerate. There has been little research examining the success of 'super tribunals' and other forms of rationalised redress.**
- 4. On the other hand moves to create new, more accessible and efficient routes to redress, can have unintended consequences, leading to the proliferation of a range of fragmented procedures especially given that access to judicial review by the High Court remains in most cases as a matter of constitutional right.**
- 5. There may be scope for codification of some relevant laws relating to administrative justice in Wales. In general any review of legislation relating to public-sector decision-making in Wales must take into account foundational principles of administrative justice.**

**In designing administrative justice redress mechanisms for public bodies operating in Wales the following principles should be taken into account:**

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

**6.1** This Chapter focuses on the main institutions of the administrative justice ‘system’ in Wales and what factors need to be taken into account when developing and reforming them, it provides a descriptive account of administrative justice alongside the normative account offered in Chapter Two. A statutory definition of an administrative justice system can be found in the Tribunals Courts and Enforcement Act 2007:

The administrative justice system means the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including:

- (a) The procedure for making such decisions;
- (b) The law under which such decisions are made; and
- (c) The systems for resolving disputes and airing grievances in relation to such decisions

**6.2** Trevor Buck, Richard Kirkham and Brian Thompson provide a helpful summary definition in their book, *The Ombudsman Enterprise and Administrative Justice*:<sup>1</sup>

‘We can now summarise our working definition of the administrative justice system as inclusive of the following:

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<sup>1</sup> (Ashgate 2010).

1. All initial decision-making by public bodies impacting on citizens – this will include the relevant statutory regimes and the procedures used to make such decisions ('getting it right');
2. All redress mechanisms available in relation to the initial decision-making ('putting it right');
3. The network of governance and accountability relationships surrounding public bodies tasked with decision-making impacting upon citizens and those tasked with providing remedies ('setting it right').

**6.3** In its Consultation on Administrative Redress: *Public Bodies and the Citizen*, the Law Commission set out four 'pillars' of redress within the administrative justice system:<sup>2</sup>

'The first pillar consists of internal mechanisms for redress, such as formal complaint procedures. The second pillar is composed of external non-court avenues of redress, such as public inquiries and tribunals. The third pillar consists of the public sector ombudsmen. Finally, the fourth pillar is formed by the remedies available in public and private law by way of a court action'.

**6.4** According to Professor Tom Mullen, administrative justice systems have three aims:<sup>3</sup>

- Getting it right first time
- Effective redress
- Learning from mistakes

**6.5** The National Audit Office has described public redress as follows:<sup>4</sup>

'The various systems of public redress allow citizens to seek remedies for what they perceive to be poor treatment, mistakes, faults or injustices in their dealings with departments or agencies. They are arrangements for getting things put right, remedying grievances, securing a second view or appealing a disputed decision and, where compensation is appropriate, the means through which this can be sought. Even where no fault is found, people should benefit from the assurance that they have been fairly treated and that decisions have been correctly made under the relevant rules'.

**6.6** In its 2009 *Landscape Paper* the AJTC noted that; 'Administrative justice is conventionally regarded as that aspect of justice concerned with disputes between the citizen and the state'. It also proposed that the 'system' should operate as a 'virtuous circle'.

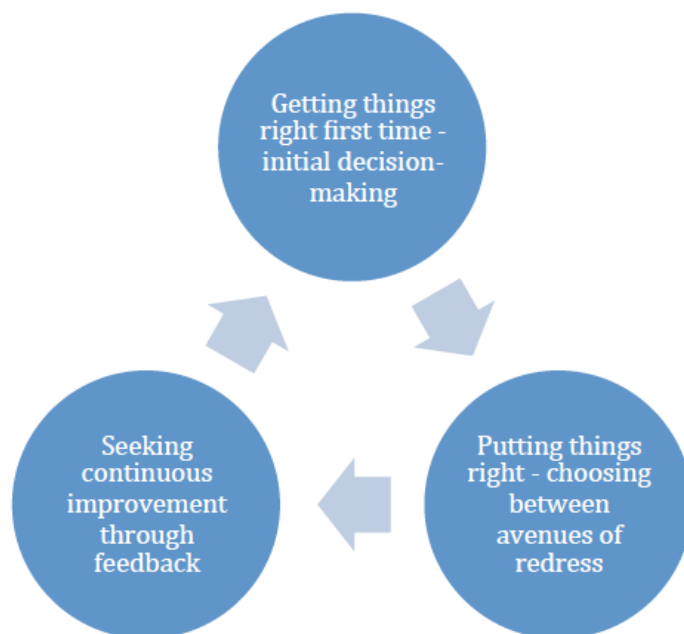
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<sup>2</sup> Law Com 322, available online at: <http://www.lawcom.gov.uk/project/administrative-redress-public-bodies-and-the-citizen/>

<sup>3</sup> Administrative Justice in Scotland – The Way Forward – The Final Report of the Administrative Justice Steering Group (Consumer Focus Scotland 2009) paras. 5.1-5.9.

<sup>4</sup> *Citizen Redress: What citizens can do if things go wrong with public services* (National Audit Office 2005).

**Figure Two: Virtuous Circle**



**6.7** None of the definitions proposed above specifically references the role of advice and support (including legal advice), and of mediation and other methods of alternative dispute resolution as part of the administrative justice system. It may be thought that these aspects can be covered by the broader concept of ‘redress’, but given their importance, and to raise awareness of their value, it is important to specifically include these in a working definition of the administrative justice system in Wales.

**6.8** Despite these attempts at defining what an administrative justice system constitutes and what it should do, the 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’.<sup>5</sup> 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’.<sup>6</sup> If this is true of the Welsh public sector it could equally be true of the administrative redress mechanisms within it. Respondents to the current research were of the opinion that administrative justice (both in terms of the quality of first instance decision-making and later redress mechanisms) has developed on an *ad hoc* basis in Wales.

**6.9** Given the large number of devolved and non-devolved institutions forming part of the administrative justice ‘system’ in Wales, it is not possible to list them all in this Report, or to show all the complex relationships between them. In order to fully understand ‘systems’ of administrative justice, it is submitted that the better method is to approach the issue sectorally by mapping all the institutions, procedures and support services relevant to

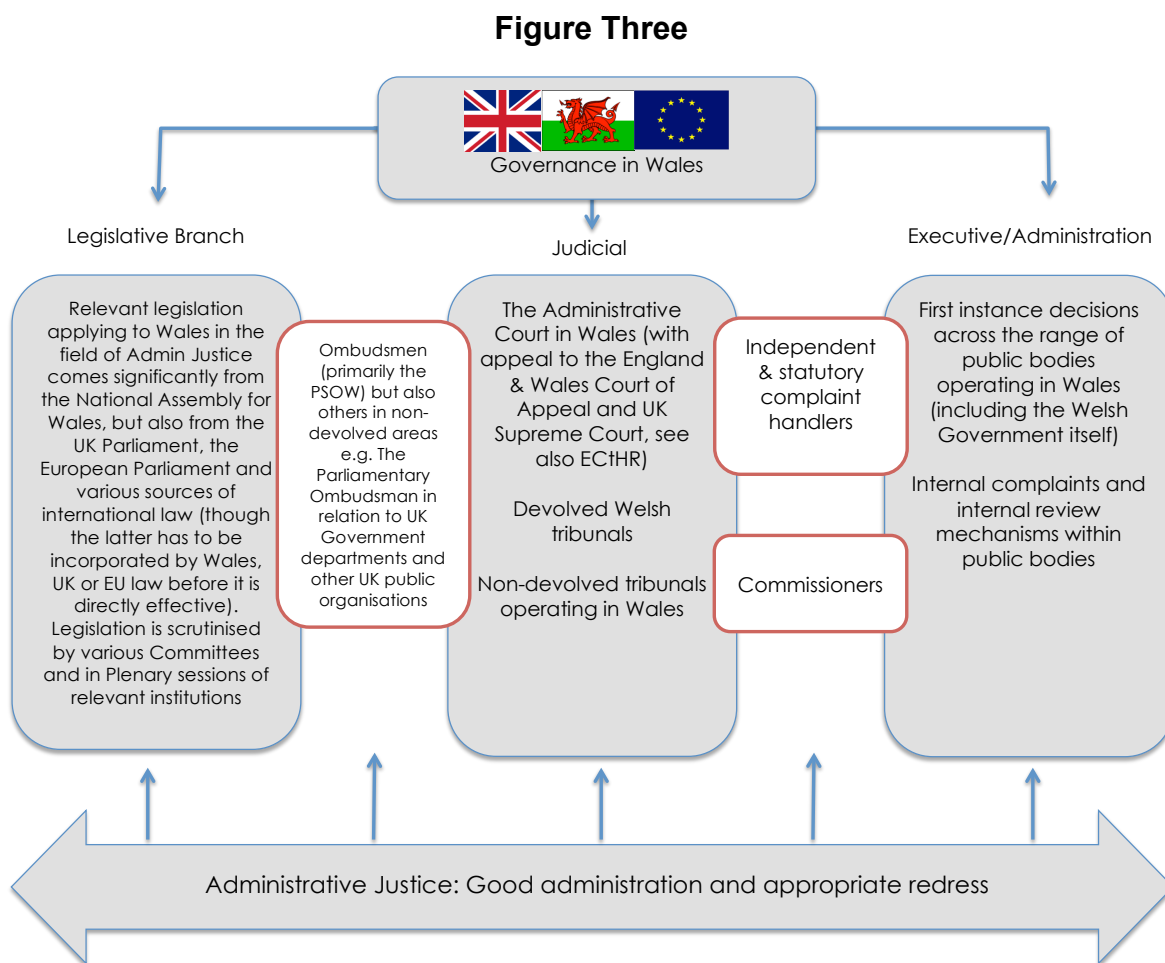
<sup>5</sup> AJTC, *The Developing Administrative Justice Landscape* (2009), para 11.

<sup>6</sup> Williams Commission, Para 1.28.



particular subject areas (such as education, health, planning, asylum and immigration and so on). This is a significant task, and one that has now been undertaken with respect to Scotland in work for the Scottish Tribunals & Administrative Justice Advisory Committee (STAJAC) and some similar work has previously been conducted in relation to Northern Ireland.<sup>7</sup> It is suggested that this would be a valuable exercise to conduct for Wales.

**6.10** Figure Three, below, denotes that administrative justice, both in terms of its core principles and appropriate redress mechanisms, is a concept that runs across the legislative, executive and judicial branches of state. It might be argued that administrative justice could have the same foundational constitutional status as other key principles, namely the sovereignty (or supremacy) of the legislative branch, separation of powers, and the rule of law. This links back to the principles developed in Chapter Two; which could come to be seen as principles to be complied with as a matter of constitutional right (noting for example the AJTC's endorsement of a right to administrative justice).



<sup>7</sup> 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).

## Blurred Boundaries: A Holistic Approach to Administrative Justice

- 6.11** A theme of the Workshops, the *Comparative Perspectives Conference* and recent literature relating to administrative justice is that the relevant system should be looked at holistically and that there is a degree of convergence among redress mechanisms. Many of the boundaries in the Figure Three above are blurry in practice and some mechanisms do not fit neatly within the executive, legislative or judicial branches, or indeed within the traditional four pillars of redress developed by the Law Commission. Figure Three purports to site ombudsmen primarily as accountable to the legislative branch, whilst performing a role in terms of redressing individual grievances that is somewhat judicial in nature. Commissioners are currently placed between the judiciary and the executive/administration to denote that they also have individual grievance handling roles that align them partially to the judicial branch, whilst performing broader policy and regulatory functions that place them closer to the executive. Neither of these placements are ideal, hence why it has been argued that both ombudsmen and commissioners ought to be grouped together as part of a fourth 'integrity' branch of state.
- 6.12** In a similar vein, it can be argued that courts have become more like tribunals following Lord Woolf's access to justice reforms in the 1990s and the subsequent new Civil Procedure Rules which have encouraged judges to adopt a flexible and less formalistic approach especially with regard to procedural matters. In recent years courts have had to contend with a rise in unrepresented litigation, and treating unrepresented litigants fairly tends to require the judge to adopt a more inquisitorial stance. On the other hand, while the Franks Committee<sup>8</sup> confirmed that tribunals are part of the machinery of adjudication as opposed to administration, tribunals have arguably become more court-like than was originally intended. There has been an increasing degree of judicialisation and formality that has been further cemented by the TCEA 2007.<sup>9</sup>
- 6.13** In the Bangor Workshop it was 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. In this regard research has supported the view that unrepresented appellants are at a disadvantage in tribunals and that in practice an inquisitorial approach does not make up for the absence of representation, especially in tribunals, such as asylum and immigration, which remain highly adversarial.<sup>10</sup> In Wales it was noted that there is funding for specialist legal advice in relation to the Special Educational Needs Tribunal for Wales (SENTW) and there is universal representation in the Mental Health Review Tribunal for Wales (MHRTW). Nevertheless, it was suggested that even such universal free legal representation does not prevent onward appeals.

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<sup>8</sup> *The Report of the Committee on Administrative Tribunals and Enquiries* 1957 (Cmnd, 21B, 5s).

<sup>9</sup> E.g., the requirement for chairs to be legally qualified has been extended to tribunals that had previously been chaired by lay-persons, the use of lay 'wing members' has been reduced and there is an increasing use of paper hearings. The TCEA 2007 extends the guarantee of judicial independence (section 3 of the Constitutional Reform Act 2005) to tribunals, applying the title 'judge' to all legally qualified members, and the recruitment of chairs and members is carried out by the Judicial Appointments Commission.

<sup>10</sup> See e.g., H Genn and Y Genn, *Representation at Tribunals* (Lord Chancellor's Department 1989); H Genn, B Lever and L Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs 2006).

**6.14** Another example of this blurring of boundaries is the recent creation of a specific statutory judicial review jurisdiction within the England and Wales Upper Tribunal. This caused considerable controversy during and following its enactment in the TCEA 2007, with debate over the appropriate relationship between the Upper Tribunal and the High Court (especially in relation to the High Court's common law supervisory jurisdiction exercised in non-statutory judicial review claims).<sup>11</sup> There is also a much broader debate about the conceptual distinction between judicial review and a legal appeal. In this regard it may be possible in future to direct some judicial review claims that arise in devolved fields to devolved tribunals, as opposed to being determined in the Administrative Court. For example, when the Westminster Government consulted on the possible diversion of judicial review claims into an England and Wales Upper Tribunal planning chamber, respondents noted that since planning is a devolved field it would be for Wales to decide whether such claims ought to be determined in an existing devolved or non-devolved tribunal, in a newly created devolved Welsh tribunal, or within the Administrative Court for Wales.

**6.15** A noted distinction between courts and tribunals has historically been their respective capacity to lay down general guidance to first instance public decision-makers. It is still perhaps unusual for the Administrative Court to lay down general guidance. Likewise, the Administrative Court cannot deal with claims that are un-ripe or 'hypothetical', where an injustice has come to light but has not yet affected a specific individual in the manner necessary to allow them to instigate High Court proceedings. On the other hand some tribunals (the non-devolved Upper Tribunal Administrative Appeals Chamber was given as an example) have examined claims that would be considered hypothetical and non-justiciable by the Administrative Court. It was argued during the Bangor Workshop that there should be more utility for the Administrative Court to adopt a broader function of laying down standards and determining pressing if still hypothetical cases (administrative courts in other European jurisdictions have this function).

**6.16** Professor Tom Mullen has noted that:

'...the UK has neither evolved nor applied consistently clear principles for the allocation of jurisdiction to different grievance mechanisms, and that there has been significant convergence among the various institutions in certain respects...these points raise the question of whether existing arrangements make sense and whether the current institutional boundaries and differences of approach are sustainable. Do we, for example, need such a variety of grievance redress mechanisms? Is there scope for rationalisation either within types of redress mechanisms as is already happening with tribunals or across them? Are some better at resolving citizen's grievances than others? What is the way forward in the UK context?'<sup>12</sup>

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<sup>11</sup> Emma Laurie, 'Assessing the Upper Tribunal's Potential to Deliver Administrative Justice' [2012] PL 288; Mark Elliott and Robert Thomas, 'Tribunal Justice and Proportionate Dispute Resolution (2012) 71(2) CLJ 297, Sarah Nason, 'The Administrative Court, the Upper Tribunal and Permission To Seek Judicial Review' (2012) 21 Nottingham Law Journal 1.

<sup>12</sup> Tom Mullen, 'A Holistic Approach to Administrative Justice?' in Michael Adler (eds) *Administrative Justice in Context* (Hart 2010) 383, 409.

- 6.17** Given devolution we should ask: 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, what is the way forward for Wales?
- 6.18** Without further research, it is difficult to appreciate whether there might be gaps and overlaps within the provision of redress mechanisms in Wales. In relation to public services the Williams Commission received evidence that accountability mechanisms (such as audit and inspection, and oversight by the Welsh Government), ‘are too numerous, too incoherent and too burdensome’.<sup>13</sup> More research is needed to consider if administrative justice redress mechanisms are incoherent, too numerous, and too burdensome, and whether particular mechanisms are disconnected and non-complementary.
- 6.19** For the Williams Commission a starting point was to recommend that the Welsh Government create and maintain a register of devolved public bodies in Wales. It should be noted that the current research does not attempt to provide a ‘map’ of administrative justice institutions in Wales, noting all relevant mechanisms and how these fit together, including onward avenues for appeal, transfer of claims, and feedback loops between redress mechanisms and initial decision-makers, but recommends this should be done as part of future research.

### **Comparative Perspectives on Holistic Administrative Justice**

- 6.20** 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. These jurisdictions provide instructive comparisons on how to develop and manage a system that has blurred boundaries but also meets the needs of users and complies with basic administrative justice principles. However, these jurisdictions are experiencing their own difficulties.
- 6.21** During the *Comparative Perspectives Conference* it was suggested in relation to tribunals in Australia (both at Federal and State level) that they are institutions defined more by what they are not than 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, legislative and judiciary. 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 a 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.
- 6.22** 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

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<sup>13</sup> Para 2.18.

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. Financial savings (such as those generated by economies of scale) are often a key driving force in tribunal and court amalgamation. That said the harmonisation of procedures (and of locations) has the potential to lead to improvements in access to justice.

- 6.23** There has been a lack of research (especially empirical studies) assessing whether amalgamated tribunals bring the benefits proposed. It was argued at the *Comparative Perspectives Conference* that moves to codify tribunal procedure across a range of jurisdictions in Australia have been a 'spectacular failure' leading to increasingly complex litigation on points of law.
- 6.24** There are various concerns surrounding amalgamated 'super tribunals'. When many 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 (for example what calibre of judge or other panel member ought to be determining certain types of application). On this matter it was suggested that practically there is little of what we would call 'cross ticketing' across particular tribunal specialisms in Australian tribunals at State and Federal level and that members largely consider themselves to be specialists within a particular area and act wholly or mainly within that area despite the harmonised structures. It was suggested that Australian 'super tribunals' might give a mirage of generalisation to what is in effect a clustering of highly specialised jurisdictions.
- 6.25** Other disadvantages of amalgamation include: the potential for 'creeping-legalism', an over formalisation of procedures, increased administrative and procedural complexity, and the possible favouring of larger bodies within the conglomerate organisation. All these aspects could combine to create either a sense, or indeed a reality, of power imbalance between citizen and state (in both is administrative and judicial guises). When it comes to the matter of trust in the state, redress mechanisms can be part of the problem as well as part of the solution.
- 6.26** This picture is complicated further in Australia by the growth of 'CATs' (Civil and Administrative Tribunals) which combine administrative jurisdictions with minor civil law matters. Again there may be advantages in terms of access to justice and efficiency, but disadvantages also not least in terms of what can be described as 'function creep', where amalgamated bodies perform a range of constitutional roles from administrative review, to determining legal appeals, to judicial review, these should be kept suitably separate. There may be advantages to some rationalisation of tribunals in Wales, but whether amalgamation into a 'super tribunal' structure is desirable requires further research. England and Wales have already experimented with co-location of various civil and criminal courts in larger justice centres; the question of whether various administrative tribunals and courts dealing with minor civil matters could be co-located in this way is worth further examination. But as civil justice remains a non-devolved subject the idea of a possible amalgamated civil and administrative tribunal for Wales is a prospect for the much longer term.

## Administrative Justice: Legislating and Institution Building

- 6.27** The lack of consensus on most justice issues in the recent St David's Day Consensus (*Powers for a Purpose*) suggests that further responsibility for justice policy will not be devolved for some time. That said it is important that all Assembly legislation takes into account basic principles of administrative justice.
- 6.28** The process of developing the administrative justice landscape in Wales is likely to require both primary and secondary legislative change. In this context the WLC has noted that legislation is often rich in terms of procedures and processes, but poor when it comes to delineating substantive concepts of justice and making provision for the citizen voice. A continuing challenge is the development of legislation that creates procedures that do not lose the important focus on the individual rights holder and/or the end user of that legislative provision.<sup>14</sup> This applies to legislation generally, but also to that specific legislation establishing the office of the WLC and expanding her role, and that pertaining to the WLT to which her decisions can be appealed.
- 6.29** The complexity of initial legislation affects the quality of public decision-making; the length and complexity of some rules can make it appear as if they were adopted specifically to encourage disputes. Examples given to the current research were taxation and social security legislation stemming from the Westminster Parliament (these are two of the biggest areas of non-devolved administrative justice in terms of their impact on citizens in Wales). There must be proper scrutiny of relevant legislation which frames the key questions guiding public decision-makers.
- 6.30** It was noted during the research Workshops that 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. This would involve more focus on legislation and initial decision-making, compared to the current emphasis on compulsory internal review (as examined in Chapter Three). Daniel Greenberg perceives there to be 'dangerous trends' in modern legislation stemming from the Westminster Parliament and Government.<sup>15</sup> He puts many of these down to the relaxation of restraint and a resultant increase in the degree of control which the executive exercises over the application and construal of legislation after it has been enacted. He argues that this is in part due to sub-standard training of legislative drafters and a lack of collegiality and restraint among them, and insufficient Parliamentary time devoted to the scrutiny of legislation. Other concerns are a trend towards increased use of quasi-legislation (in particular express statutory powers for Ministers and others to give guidance to recipients of statutory functions) and transferring responsibility for interpreting legislation onto the citizen by using general anti-avoidance rules.<sup>16</sup> It is beyond the scope of the current research to examine whether

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<sup>14</sup> In one presentation to the *Comparative Perspectives Conference*, the Welsh Language (Wales) Measure 2011 was specifically argued to be an example of legislation that has lost focus on the perspective individual right-holders.

<sup>15</sup> Daniel Greenberg, 'Dangerous trends in modern legislation' [2015] PL 96.

<sup>16</sup> These are legislative provisions which add up to the proposition that if the drafter and executive fail to provide sufficient clarity to achieve their intended objectives within legislation they can absolve themselves of responsibility and transfer this onto the citizen who may then be penalized for abuse of a statutory purpose purely

such practices are also becoming increasingly common within the Assembly and Welsh Government, but there is clearly a need for further examination. Research participants suggested that one way for Wales to innovate is to utilise various existing Committees (such as the Assembly Constitutional and Legislative Affairs Committee) to provide proper scrutiny with respect to administrative justice principles in legislation. It was also suggested that an additional more specifically dedicated committee (or committees) could be established.

- 6.31** 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’.<sup>17</sup> This suggestion brings with it the prospect of some degree of codification. In this regard the Law Commission has recently completed a Consultation on *The Form and Accessibility of the Law Applicable in Wales*.<sup>18</sup> 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.
- 6.32** Other legal jurisdictions (primarily civil law jurisdictions) have codified administrative law standards that apply across a broad range of public bodies. The Netherlands as a civil law jurisdiction has a General Administrative Law Act GALA (*Algemene wet bestuursrecht* or *Awb*) which regulates who can claim against whom and with respect to what. It has open standards about how administrative authorities must interact procedurally with citizens. These standards leave room for administrative discretion, and clarification through case law therefore remains important. It has been argued that the GALA has instituted a ‘cultural revolution’ in administrative justice providing structure that renders administrative law and redress easier to navigate from the claimant perspective.
- 6.33** 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. In the Netherlands what has been codified is a range of specialist legislation including both substantive legal principles and procedures for claiming against administrative authorities. One could argue that in general it is easier to codify procedures as opposed to substantive legal principles, and also that it is easier to codify existing legislation than it is to codify common law principles.
- 6.34** A question for Wales surrounds the extent to which it has legislative competence to codify various standards applicable to public decision-making. To the extent that codification

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because that purpose and how it was meant to be achieved were not clearly stated on the face of the legislation. Ibid 100-103.

<sup>17</sup> Williams Commission, Para 2.37.

<sup>18</sup> CP223 available online at: <http://www.lawcom.gov.uk/project/the-form-and-accessibility-of-the-law-applicable-to-wales/#related>

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 only 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.

- 6.35** However, the Netherlands experience has shown that there are disadvantages to codification. Concerns surrounding the GALA are; first that general rules leave insufficient room for decision-making to be shaped based on the special characteristics of the particular field of law concerned. Second, that the GALA was developed at a time when focus was on administrative law's ability to provide individuals with legal protection. Some argue that the pendulum should now be swinging in a different direction, with more focus on administrative law as an instrument to improve the efficiency and cost effectiveness of public administration during times of austerity. This is not necessarily incompatible with protecting the individual, but these two objectives often conflict. It is thirdly argued that whatever its orientation, the presence of an overarching Act such as the GALA limits the flexible development of administrative law. Fourth, the emphasis on procedure is said to 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. Many of these drawbacks combine to create a system that is increasingly complex and hard to navigate, breaching the general Netherlands law principle that compulsory legal representation should not be necessary. This is especially true as the Dutch Government tries to limit access to individual legal redress via a series of legislative amendments to the GALA, and correspondingly, specialist lawyers debate the precise interpretation of these provisions leading to complicated case law.
- 6.36** Whilst the administrative (public decision-making) procedure requirements in current Assembly Measures and Acts could likely be codified, the Assembly does not have devolved competence in a field of general administrative procedure or general administrative law. It seems unlikely that the Assembly could then enact a new administrative procedure act for Wales which includes provisions (both substantive and procedural) not already existing in current legislation and intended to apply to all public bodies operating only in Wales. Such an act could be seen as going beyond that which would be merely subsidiary or consequential to ensuring the proper implementation or enforcement of legislative powers over public body decision-making in devolved fields.<sup>19</sup>
- 6.37** This issue 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 have developed incrementally and apply both to Wales and England (and in many cases to the broader UK). These are primarily that public body decisions must be compliant with relevant law, procedurally fair, and reasonable.<sup>20</sup> The three specific headings conceal a large and growing amount of individuation and

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<sup>19</sup> See section 108(5) GoWA 2006.

<sup>20</sup> Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.



explication within case law. Since this law currently applies across England and Wales there would be practical difficulties if it were codified only in Wales.

- 6.38** Many of the legal provisions that apply in relation to public bodies operating only in Wales stem from outside Wales. For example, the UK wide Human Rights Act 1998 and Equality Act 2010, the European Habitats Directives, and international conventions such as UN Convention on the Rights of the Child (though now incorporated into Welsh law) and the UN Principles for Older Persons (stemming from UN General Assembly Resolution 46/91). When streamlining any legislation one can argue that it would be a retrograde step to reverse commitments to at least have due regard to international principles that are not directly legally binding on public bodies in Wales (such as those contained in General Assembly Resolutions). It is recommended that any review of legislation relating to public sector decision-making must have regard to foundational principles of administrative justice including those stemming from European and international law, and European and international standards and guidance which may not be specifically legally binding but which are important in a progressive country committed to just and fair public decision-making.
- 6.39** Whilst civil law jurisdictions such as the Netherlands have codified both substantive law applicable to public body decision-making and the procedures for seeking court redress against public bodies, common law jurisdictions have at least tended to codify some aspects of the inherent common law procedure for seeking judicial review of administrative authority decision-making. For example, in the 1970s and 80s both England and Wales and Australia (at the Federal level) enacted legislative provisions to harmonise various historic routes to claiming remedies against the unlawful action and inaction of public bodies. However, in Australia the legislation went further and also codified some of the developing common law grounds of judicial review. In Australia the enactment of the Administrative Decisions (Judicial Review) Act 1976 was supposed to quell the use of an alternative constitutional route and become the primary mechanism for accessing judicial review. However, for various reasons this has not happened and there remain three different routes for accessing judicial review at Federal level, incorporating different grounds (some codified some common law), different standing tests, and different remedies. This fragmentation causes confusion and may damage access to justice. One research respondent described it as an, ‘interesting disappointment’.
- 6.40** The cautionary tale around codification in Australia 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, as with Australia, judicial review is likely to have the status of a constitutional right which can be sought wherever other procedures for challenging the legality of public body action and inaction are either unavailable or are considered to be inadequate in the specific context.

## **Designing Redress Mechanisms**

- 6.41** Public Law Project (PLP) research has proposed nine principles that should be taken into consideration when designing new systems of redress 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 when creating new mechanisms.<sup>21</sup> The following analysis adopts these principles and builds on them to provide an early account of suggested principles for designing redress in relation to public bodies in Wales. This is an area where further research would be welcome and the set of principles is not intended to be exhaustive. Many of these Principles should be read in conjunction with the set of *Administrative Justice Principles for Wales* developed in Chapter Two.

**6.42 Principle One: 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**

This Principle underpins the importance that wherever a public body has power to make decisions affecting people, there should be a presumption that there will be effective pathways and remedies for handling grievances. The concern here is that some sort of express provision must be made on the face of the legislative (or other enabling) framework. This Principle has a number of advantages, it steers people away from the ultimate backstop of judicial review and allows the express creation of a more proportionate procedure, it ensures compliance with human rights law regarding the provision of remedies, and public confidence in the scheme is likely to be enhanced by express provision. The downsides may be that it limits public bodies from developing their own innovative redress schemes, and it could delay implementation of relevant legislation and redress schemes. In some cases it may be that allowing a person to make representations in advance of the particular type of decision is more important than providing express routes to challenge after the event. It can be argued that this Principle also ought specifically to require there to be appropriate appeal routes onwards from first instance redress procedures, for example an assurance that internal review will be subject to an external review or appeal.

***Principle Two: Institutional design should respect constitutional principles***

It seems fairly clear from the outset that institutions and their procedures ought to be compliant with constitutional standards such as the rule of law, separation of powers, judicial independence and respect for human rights. Whilst it seems unlikely anyone would reject this as a general principle, the absence of a codified constitution makes it difficult to determine the constitutional status of a particular principle. For example there is debate over the constitutionality of various human rights standards (both at common law and under the Human Rights Act 1998). Some would argue that administrative justice itself 'ought' to be seen as a constitutional principle. Even if a certain principle is undoubtedly part of the UK constitution, the precise extent of what is required to comply with it may be uncertain (see especially debates surrounding the content of the rule of law principle). Despite the complexities, specific reference to constitutional principle at least requires redress designers to ensure that they have examined what might be the relevant (if contested) principles and to give evidence and argument for their preferred interpretations of them.

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<sup>21</sup> Varda Bondy and Andrew Le Sueur, *Designing redress: A study about grievances against public bodies* (PLP 2012).

***Principle Three: There should be public accountability for the operation of grievance handling***

Again this seems self-evident, but invites questions around exactly who grievance institutions should be accountable to (the Assembly, Welsh Government, PSOW, Administrative Court, to users of the system, to the Welsh public at large)? And how accountability is facilitated, through reporting, audit, inspection, further appeal or judicial review rights? Accountability can be defined as, ‘a principle which requires public authorities to explain their actions and be subject to scrutiny’.<sup>22</sup>

***Principle Four: Evidence and research should inform the creation of new redress mechanisms and the reform of existing ones***

The PLP Report gives various examples of mechanisms that were developed without a rigorous assessment of existing research, or without commissioning new research where insufficient information was currently available.<sup>23</sup> This can lead to the development of mechanisms that are not fit for purpose, not compliant with constitutional principles and which do not achieve their stated aims. It is particularly important that research be independent and impartial, and that methods are rigorous and transparent.

***Principle Five: There should be opportunities for grassroots innovations***

The PLP Report notes that, ‘When designing redress mechanisms a body should be able to innovate within its statutory powers’. There are benefits both to initial decisions and later redress decisions being taken as close to the people they affect as possible and allowing those public bodies with specialist experience to have a participatory role in the development of redress (so far as all other Principles are complied with). The grass-roots sense of ownership might also lead to improved performance in the operation of the redress system and less defensiveness by public bodies subject to it.

***Principle Six: Mechanisms should ensure value for money and proportionality***

This Principle relates back to core values of administrative justice. Public and private costs of creating, running and using grievance mechanisms should be proportionate to rights and interests at stake. The PLP Report notes challenges in this regard; it is difficult to quantify the costs of dealing with grievances in various ways, from whose perspective is the proportionality assessment to be conducted, how to improve efficiency without compromising quality, and the impact of restricting access for cost efficiency purposes (especially in relation to broader societal impacts of unresolved grievances e.g., physical and mental health, solvency, education and crime).

***Principle Seven: There should be a good ‘fit’ between the type of grievance and the redress mechanism***

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<sup>22</sup> ‘Accountability’ in P Cane and J Conaghan, *The New Oxford Companion to Law* (OUP 2008) 7.

<sup>23</sup> E.g., Ministry of Justice, ‘Legal Aid: Refocusing on Priority Cases’ (2009); and ‘Proposal for the Reform of Legal Aid in England and Wales’ (2010); Local Government Ombudsman, ‘Council First’ policy. One can perhaps add to this the Mandatory Reconsiderations procedure discussed in Chapter Three of this Report.

The PLP Report notes the importance of matching the mechanism to the type of grievances likely to arise. Related matters include, the necessary degree of formality, the required expertise of the decision-maker, the appropriate route to accountability, appropriate time limits, the degree of participation available to (or required of) the user, and the appropriateness of mediation. Another aspect of this principle is to look at the nature of the decision being challenged, does it concern legality or merits, maladministration or a claim of legal right, are core questions about law, fact or discretion, does the decision relate to high-policy, what kind of outcome is being sought, are binding decisions needed or just recommendation, is professional judgment required, is legal advice or representation available, is an inquisitorial or adversarial method required (or more realistically some mixture of the two). In this regard I also recommend specific reference to normative models of administrative justice as initially developed by Michael Adler. Figure Four below shows some core conceptions of administrative justice, including their respective goals and appropriate redress mechanisms.

**Figure Four: Normative Models of Administrative Justice**

<b>Model</b>	<b>Mode of Decision making</b>	<b>Legitimizing Goal</b>	<b>Mode of Accountability</b>	<b>Mode of redress</b>
Bureaucratic	Applying rules	Accuracy	Hierarchical	Administrative review
Professional	Applying knowledge	Public service	Interpersonal	Second opinion or complaint to a professional body
Legal	Asserting rights	Legality	Independent	Appeal to a court or tribunal (public law)
Managerial	Managerial autonomy	Improved performance	Performance indicators and audit	None, except adverse publicity or complaints that result in sanctions
Consumerist	Consumer participation	Consumer satisfaction	Consumer Charters	'Voice' and/or compensation through Consumer Charters
Market	Matching supply and demand	Economic efficiency	Competition	'Exit' and/or court action (private law)

These models are unlikely to be exhaustive and there is overlap between them. In particular Chapter Two of this Report examines whether there ought to be a more citizen-centered rights-based model. The precise ramifications of this remain contested. For example, it could apply across a range of redress mechanisms (both court and tribunal based, and commissioners and ombudsmenry). It seems unlikely that the traditional legal model would fit exactly here. Under a revamped citizenship model there should be more focus on citizen participation and citizen needs, resulting in a conception where legitimacy is based on particular rights aligned specifically to social justice (e.g., equality) but where the mode of accountability need not be as formally independent as court-based adjudication and where more informal methods (including mediation) could be usefully applied. Arguably this modified legal rights model would be more applicable to Wales than to England especially given Welsh political commitments to social justice and relative rejection of market-based models.

***Principle Eight: Fair and rational criteria and processes should be used to ‘filter’ inappropriate grievances***

Redress mechanisms are inevitably subject to claims from those whose concerns are without substance and those who have accessed the wrong procedure. Filtering out of these groups is an important part of designing redress mechanisms. Filtering can involve facilities for sign-posting the complainant to the alternative appropriate redress mechanism, a swift process for rejecting claims where there is no merit, and a built in filter process such as the permission stage in judicial review. Appropriate mechanisms of internal review can also be part of the filtering process of wider systems.

***Principle Nine: As well as dealing with individual grievances, redress mechanisms should contribute to improvements in public services***

Redress mechanisms must be ‘designed for learning’. The system should make provisions for whether and how complaints handlers should identify systemic problems and bring these to the attention of relevant persons and other institutions. For example, during the *Comparative Perspectives Conference* delegates were reminded of the role of tribunals in organisational learning and the importance of establishing and developing appropriate feedback loops between tribunals and initial decision-makers. The appropriateness of tribunal feedback and the most efficient route for delivering it cannot be understood as one-size fits all, much will depend on the specific characteristics of the tribunal such as its size, caseload, the expertise and experience of its members and the respective size, expertise and experience of the public bodies most affected by its decisions. The same can be said of other forms of redress mechanism.

It was suggested that tribunals, courts and ombudsmen could learn from literature on the application of systematic design principles to design and redesign institutions and systems of justice. A broad question cutting across many areas is then how can individual redress mechanisms and the administrative justice system be designed to maximize the chances of bringing about improvements in administrative decision-making? This is an important question for Wales to consider especially in light of ongoing reforms to public services provision and local government.

**Possible additional principles for wales**

The following Principles are tentatively proposed for Wales in addition to those developed by the PLP Report.

***Principle Ten: 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***

Research and comment discussed variously in this Report suggests that redress mechanisms are in danger of becoming unnecessarily numerous and diverse, with some mechanisms created on an *ad hoc* basis without due thought given to how they could be appropriately performed by existing institutions and procedures. The proliferation and fragmentation of redress mechanisms would be particularly problematic in Wales where

caseloads will be comparatively low (compared to other jurisdictions such as England). On this basis increased fragmentation of new routes in Wales could go against proportionality and cost-effectiveness. Existing institutions have at least relatively well defined jurisdictions and powers, creating a new institution or giving novel powers to an existing institution raises the risk of function or mission creep that could be avoided. In this regard Workshop delegates expressed particular concerns with some recently developed procedures. Specifically doubts were expressed over the Continuing NHS Healthcare Retrospective Review Process (conducted by the All Wales Retrospective Review Team). Relevant literature states that this 'is not a legal process',<sup>24</sup> and there is no need to instruct a solicitor, but that assumption is open to question given that the process involves a determination of an individual's right to continuing NHS healthcare, and many claimants have felt the need to instruct legal advisers to navigate the process.<sup>25</sup> Another example given was the determination of some welfare benefit claims under the Discretionary Assistance Fund (DAF) by a private body (Northgate Public Services) under contract to the Welsh Government. Neither the DAF process nor the Continuing Healthcare Retrospective Review fits neatly within the legislative, executive and judicial branches of state or within the Law Commissions four pillars of administrative justice.

***Principle Eleven: Redress mechanisms should be designed primarily from the users perspective***

Although the notion of accountability to users could be covered by Principle Three above, it is submitted that the perspectives of users navigating the system of mechanisms should be front and centre in the minds of institutional designers. It was suggested in both research Workshops that there needs to be more thought given as to how to involve users specifically when considering the broader systematic design of redress mechanisms. At present the debate is often dictated by those at the professional and service provider level, this expertise is important but it must be informed by the experience of users when brought to bear on designing new redress mechanisms or, for example, when allocating complaints, appeals and reviews in relation to newly devolved functions to existing redress procedures and institutions.

During the *Comparative Perspectives Conference* delegates heard about empirical research from Northern Ireland tribunals where the support needs of users were re-conceptualised as participative needs. Based on a seminal model of political participation a 'ladder' of legal participation was developed linking users experiences with a range of operational indicators to measure participation. The research evidence links with a growing trend of thinking that the differences between particular redress mechanisms are not so much marked by their designation (court or tribunal) but by people's lived experiences of the process. The research found that the degree of participative experience was not dictated by classifications such as formal/informal, inquisitorial/adversarial, but rather by operational factors such as delay, access to information, the level of support available and user expectations of the process. By focusing on these more experiential features we may be able to re-clarify characteristics and relationships between courts and tribunals as institutions of administrative justice.

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<sup>24</sup> <http://www.wales.nhs.uk/sitesplus/861/opensdoc/243403> p.9

<sup>25</sup> See especially the work of law firm Hugh James in this regard.

***Principle Twelve: Redress mechanisms should be designed with due regard to the context of devolution in the UK and membership of the European Union***

When redress mechanisms are designed specifically in relation to devolved policy, thought should be given to whether there are reasons of efficiency or effectiveness in favour of sharing redress mechanisms on an England and Wales or UK wide basis, or whether there is a clear case for utilising existing devolved institutions or creating new devolved institutions or procedures. Due regard must also be paid to the wider European Union context as in some cases the appropriateness of certain redress mechanisms is largely determined by EU law. Some specific examples of designing redress mechanisms in light of devolution and membership of the EU are discussed further in Chapter Seven.

***Principle Thirteen: The design and delivery of redress mechanisms must be accompanied by appropriate publicity and information***

A redress mechanism is of little use if people don't know about it. There is still a lack of knowledge surrounding devolution in Wales (which aspects of policy are devolved and which are not) and a general lack of awareness of administrative justice and administrative redress procedures. New mechanisms must be accompanied by sufficient publicity and information to enable the people most affected to use them.

**Administrative Justice – A One-Stop Shop?**

**6.43** Perhaps an ideal picture of administrative justice for Wales would be that local resolution is first encouraged and supported (including with financial resources) so that issues are resolved closest to the circumstances in which they have arisen. But where this fails, all complainants would have one specific entry point to lodge their concern and work to identify the appropriate redress mechanism including the logistics of allocation would be done 'behind the scenes'. This method appreciates the need to direct claims to the most appropriate method of resolution, be that court based or tribunal adjudication (devolved and non-devolved), the PSOW, a Commissioner, or a specific statutorily-based independent investigator, and so on. The method could also acknowledge blurred boundaries between specific redress mechanisms and the process for allocating claims could then be based on the particular circumstances of the case and broad principles of procedural justice (rather than any concrete jurisdictional rules on allocation).<sup>26</sup>

**6.44** Expediency should be a core value of administrative justice; that concerns should be dealt with quickly and efficiently is of benefit to all players within the system of public administration and redress. In this regard the one-stop shop need not be 'real' in the sense of a distinct service, with a distinct identity and location. It was suggested that there is no reason why the administrative justice system in Wales needs to be what it appears to be.

**6.45** The telephone helpline 'Complaints Wales' already functions as a form of one-stop shop for those who have concerns over a wide range of public decision-making. However, it has been noted anecdotally that this service is 'hardly ringing off the hook' (although it does

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<sup>26</sup> There is a sense in which the Administrative Court Office already functions as a form of one stop shop for various claims, and this is discussed further in Chapter Eight.

also have a web-based presence). This is interesting given that it has been championed as an example of good practice for other jurisdictions (researchers have recommended that Northern Ireland adopt the approach). It is a reminder that the provision of advice services and redress mechanisms must be accompanied by appropriate publicity.



## CHAPTER SEVEN: DEVOLVED WELSH TRIBUNALS AND COMPARATIVE PERSPECTIVES

### Chapter Seven: Key Points

1. Immediate priorities for continued reform of Devolved Welsh Tribunals include; consideration of the efficient and effective appointment and deployment of judges (using mechanisms such as assignment), reforming some judicial appointments processes, improving the quality and accessibility of judicial training, and further examining the effective use of administrative resources.
2. There should be empirical research examining the advantages and disadvantages of rationalising some Devolved Welsh Tribunals and further consideration should be given to harmonising appeal routes from Devolved Welsh Tribunals.
3. Steps should be taken to improve co-operation, co-ordination and collaboration amongst the Devolved Welsh Tribunals, as well as between these institutions and combined England and Wales and UK tribunals.
4. Appeals in relation to rights and obligations arising under devolved legislation ought to lie in the first instance to Devolved Welsh Tribunals or the Administrative Court in Wales unless there are good reasons otherwise (such as concerns around proportionate dispute resolution, efficiency or expertise).
5. The following are trends affecting tribunals in Wales, the UK, Europe and internationally:
  - The pros and cons of amalgamating various specialist tribunal jurisdictions
  - The fragmentation or proliferation of routes to challenging administrative decisions and the unintended consequences of developing new routes
  - The appropriate procedures and modes of operation of tribunals, the degree of inquisitorial versus adversarial procedure, the relative level of formality and the range of tribunal members (including non-legal members)
  - Trends towards excessive formality and focus on procedure (otherwise known as excessive legalism, judicialisation or juridification)
  - Lack of data, especially about the characteristics and experiences of tribunal users (including presumed benefits of amalgamation not backed up by research)

7.1 This Chapter focuses primarily on Devolved Welsh Tribunals (noted at para 7.2 below). Since the Franks Report in 1957 tribunals in the UK have been recognised as part of the 'machinery of adjudication'. The *ad hoc* development of administrative tribunals in the UK has been a perennial issue. Reforms following the Leggatt Report, *Tribunals for Users – One System, One Service*, in 2001 and implemented through the Tribunals, Courts and Enforcement Act (TCEA) 2007 sought to improve the independence and impartiality of the tribunal system. However, the UK reform following the Leggatt Report did not apply to devolved tribunals. This meant that many Welsh, Scottish, and Northern Irish tribunals with jurisdiction for devolved functions remained outside the two-tier system. The Leggatt Report did not analyse the impact on devolved administrations and tribunals in detail but noted that it would be important to establish 'close co-operation' between the UK and devolved administrations to ensure 'appropriate input on devolution issues'.

**7.2** In 2010 the Welsh Committee of the AJTC published a *Review of Tribunals Operating in Wales*. It made several recommendations on how to develop the Welsh tribunal system. The core recommendations included securing independence and impartiality for tribunals through establishing an 'Administrative Justice Focal Point'. The focal point was established as the Administrative Justice and Tribunals Unit (AJTU) now the Welsh Tribunals Unit (WTU) within the Welsh Government, and since April 2011 there has been a process of transferring the administration of Devolved Welsh Tribunals into the WTU. Under the 2010 Review the AJTC Welsh Committee examined tribunals under the Administrative Justice and Tribunals Council (Listed Tribunals) (Wales) Order 2007 and three other tribunals with a Welsh jurisdiction. The following can now be highlighted as devolved tribunals:

- Adjudication Panel for Wales
- Agricultural Land Tribunal for Wales
- Board of Medical Referees
- Forestry Committees for Wales<sup>1</sup>
- 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

**7.3** The structures supporting and administering these tribunals are varied. For example, some are administered by the WTU, others are administered by local authorities, and some are sponsored by the Welsh Government or are contracted out.

**7.4** The 2010 Review recommended considering the rationalisation of some tribunals by combining their jurisdictions due to the low caseload in Wales and opportunities to achieve economies of scale. It was suggested that potential jurisdictions could include creating an 'Education Tribunal' or a 'Land and Local Taxation Tribunal' by combining existing jurisdictions of Devolved Welsh Tribunals.

**7.5** The Silk Commission in its second report, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (March 2014), recognised the importance of tribunals and that Welsh Ministers should continue to be the 'authority responsible' for the administration and management of Devolved Welsh Tribunals. It suggested the possibilities of co-ordination on an England and Wales or Great Britain basis for matters such as training and that other services could be 'bought in'. The Silk Commission also noted several areas in

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<sup>1</sup> Although there is some discussion about whether the FCW in fact constitutes 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.

need of consideration including consistent appointment, remuneration, and disciplinary processes which would strengthen independence from the Welsh Government.

- 7.6** In its evidence to the Silk Commission the Welsh Government was clear of its long-term aim to ‘develop a coherent system of tribunals in Wales to hear appeals on all matters falling within devolved areas’.<sup>2</sup> Subsequently the Welsh Government could then adapt the tribunal system by expanding the jurisdiction of some tribunals or creating new tribunals. However, the Welsh Government highlighted a number of practical and constitutional issues hampering its ability to do so. For example, in some cases jurisdiction has been given to the First-tier tribunal for England and Wales, rather than establishing a new Welsh tribunal and some executive powers have remained with the Lord Chancellor.
- 7.7** The Welsh Government is still reviewing devolved tribunals. Its response to the Silk Commission stressed: ‘We have consulted on a programme of fundamental reforms of the devolved tribunals in Wales, with a view to putting our arrangements on a sustainable footing for the long term, and with the possibility of primary legislation coming forward in the next Assembly. The proposed reforms will strengthen access to justice and ensure effective redress’.<sup>3</sup>
- 7.8** Workshop delegates suggested that Devolved Welsh Tribunals face problems at two levels: immediate problems and structural reform of the entire tribunal ‘system’ (if it is a system at present). The immediate areas for consideration were suggested to be: ‘cross-ticketing’ (assignment) of judges, judicial appointments and training, and administrative resources for tribunals generally. It was suggested that each of these aspects has developed in a ‘rag bag’ way that is wasteful of resources and lacks rationality. A proposed solution was the continuing need to consider rationalising some processes into a genuinely unified approach, in particular to develop common training structures, common appointments processes, and common administration throughout the devolved tribunals.

## **The Tribunal Judiciary in Wales**

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

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<sup>2</sup> Welsh Government, *Evidence Submitted by the Welsh Government to the Commission on Devolution in Wales* (February 2013) para 20.

<sup>3</sup> Welsh Government, *Devolution, Democracy, and delivery: Powers to achieve our aspirations for Wales* (2014) para 79.

- 7.10** It was argued that the cross-ticketing of judges between particular tribunals would be a way to ensure more sittings and that the available pool of talent in Wales is better utilised whilst providing a practical solution to the problem of small caseloads. It should be noted that the phrase cross-ticketing originated with the 2007 reforms to create a two-tier chamber based structure for UK and England and Wales tribunals. Cross-ticketing denotes where judges are authorised to sit within a range of jurisdictions *within* one particular tribunal Chamber (e.g. where they can determine cases across a range of subject matters that are connected). 'Assignment' is used to denote where a judge authorised to sit in one Chamber is also authorised to sit in a different Chamber dealing with a different subject matters which may not be connected. In this regard what is actually desired in Wales is assignment rather than cross-ticketin'.
- 7.11** Despite the potential value of assignment there are also associated risks especially in relation to the possible lack of necessary specialisation. One of the long perceived advantages of tribunal justice has been the degree of specialisation and closeness of expert tribunal judges to the specific law and policy at issue. One of the arguments against the Leggatt reforms to tribunals operating in England and Wales and the UK was that the 'chamber' system could lead to the dilution of specialist expertise as a broad range of tribunals could be drawn into a particular chamber. Workshop delegates noted that any rationalisation of Welsh tribunal jurisdictions, and/or provisions of 'cross-ticketing' and assignment, must not be achieved at the expense of specialisation, where such specialisation is needed to ensure the quality and prestige of judicial decision-making. Practical issues such as the number of judicial sitting days per-annum must also be taken into consideration. There are also concerns surrounding the judicial appointments process. For example, if the England and Wales Judicial Appointments Commission (JAC) were looking to appoint a particular number of say residential property specialists it will have certain characteristics in mind in terms of the adjudicative approach and judge-craft qualities required (alongside the need for specialist legal knowledge). Quite apart from specialist legal knowledge, even these judge-craft qualities may not be the same when seeking to appoint education or mental health specialists, for example. Also were the relevant court and/or tribunals' service to assign judges across tribunals as opposed to requesting the JAC (or a similar body) to conduct a competitive appointments process for new judges then the best talent may not be secured and broader career opportunities (and potentially also the diversity of the judiciary) would be affected. Even in countries like Australia with its large amalgamated tribunals it has been suggested that judicial and other members are more a collection of specialists under one conglomerate umbrella than generalists regularly cross-ticketed or assigned across a wide range of jurisdictions.
- 7.12** It was suggested that whilst there is some merit to having Welsh badged solutions to Welsh problems, it could be more efficient to replicate the broader England and Wales approach to judicial appointments, utilising the JAC and confirmation by Welsh Ministers. The same approach and the same standards should be adopted.
- 7.13** Judicial appointments in Wales take a variety of forms with some judges being formally appointed by the Lord Chancellor, whereas others are now appointed by the 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. The recent process to appoint members of

the WLT (incorporating JAC processes and Welsh Ministers) has been given as an example of good practice to be followed in future. The JAC has at least one member with specialist knowledge of Wales at any one time.

- 7.14** The costs of advertising judicial appointments in a relatively small jurisdiction were noted. For example, the RPTW might need only to appoint half a dozen Chairmen, but it would have to go through the same process as for example, a call to appoint 50 District Judges, many of the costs are the same despite the much smaller number of judges required.
- 7.15** It was noted in both Workshops that the provision of training for Devolved Welsh Tribunal judges is variable. For example, training in relation to residential property is once a year for two days. It was suggested that most training is provided by English counterparts, especially in relation to general judge-craft. Understandably the provision of training specifically in relation to Welsh law is becoming more challenging over time; as yet there is no specific judicial training market in Wales, though there is a clear opportunity to procure judicial training on a Wales-wide basis. It was suggested during both Workshops that training available through the Judicial College is inevitably linked to financial resources and that the College uses these resources to train judges specifically within the two-tier structure system resulting from the Leggatt reforms.
- 7.16** On the question of whether appropriate training could be ‘brought in’, it was noted that this requires financing. For example, there are approximately 40 members of the RPTW and once training on specific current Welsh legal issues had been delivered to them this is not something that would need to be repeated to other cohorts. Developing training resources would be costly for what is effectively a one off event for 40 people.
- 7.17** It was suggested that tribunal users themselves could be customers of training services. For example, managing agents in housing associations need to be aware of changing regulations just as much as the judges who determine appeals against their decisions, (an example given was regulations relating to the payment of service charge demands). Other stakeholders, such as service users, service providers, and advice providers, could also ‘buy’ appropriate training in relation to devolved legal provisions and procedures; this can also be seen as part of an agenda of ensuring that public body decisions are right first time. Of course in times of austerity there are limitations to how much training can be bought in and how it can be delivered cost effectively.
- 7.18** It was suggested that there needs to be a continuing dialogue about how best to provide training that is appropriate and good value for money in Wales, bearing in mind the smaller pool of relevant training recipients as compared to larger jurisdictions such as England. Some judges utilise online resources including those provided by CAB Cymru to train its own advisers, again this suggests that there are links between the legal training needs of judges and advice providers and that shared training could be provided, especially in relation to devolved law and policy as opposed to judge-craft which could (arguably) be delivered more efficiently on a England and Wales or UK wide basis.
- 7.19** 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.

- 7.20** Research respondents argued that there is a perceived lack of confidence in the ability of the justice system devolved to Wales to deliver processes and outcomes of comparable quality to those delivered by England and Wales combined institutions. In the context of both specialisation and access to training it was noted that the Welsh judiciary must be recognised as having parity with judges in England and Wales; Welsh posts should be universally acknowledged as having equal status and there should be some level of recognition in relation to both the sharing of expertise and the sharing of jurisdictions.
- 7.21** It was argued during the Bangor Workshop that if administrative justice in Wales is to be addressed holistically and coherently, this vision must also include the concept of an explicitly Welsh judiciary. Support was expressed for proposals to develop senior judicial leadership of tribunals operating in Wales, (a role that could be combined with the current post of Presiding Judge for Wales). It was further argued that this role could extend to overall responsibility for administrative justice in Wales (including courts and tribunals). A judicial leader/or leaders would then 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.

### **Advantages and Opportunities of Welsh Tribunals**

- 7.22** Workshop delegates noted that Devolved Welsh Tribunals can and do operate flexibly and it was suggested that from the consumer perspective there are many aspects of existing procedures within Devolved Welsh Tribunals that are examples of good practice. For example, use of IT, video links and case management by telephone are important tools especially in light of the growing number of unrepresented litigants.
- 7.23** During the Workshops, delegates noted that courts and tribunals need not sit in court buildings. For example, the devolved Agricultural Land Tribunal for Wales had utilised hotels, village halls, and local pubs for its sittings. Given the climate of austerity and future court closures in Wales,<sup>4</sup> it was stressed that tribunals and courts can potentially sit in a range of other public buildings. However, it appears that current operational instructions from HMCTS are that courts and tribunals should use only HMCTS venues. In terms of flexible use of venues for Devolved Welsh Tribunals in the future, it can be argued that access to justice and the overall quality of decision-making may be improved when cases are heard and judgments delivered closest to the people they affect in venues that are more accessible than court buildings. That said it is also vital to maintain independence, for example it would not be appropriate to hold a school admission or exclusion appeal in a school building or in a council building also housing the relevant education department.
- 7.24** Devolved Welsh Tribunals might have the potential to develop more co-operative relationships with public bodies, including Welsh Government departments. It was suggested that Devolved Welsh Tribunals have the capacity to be proactive in encouraging settlement. It was argued that some Devolved Welsh Tribunals, in particular

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<sup>4</sup> See e.g., Ministry of Justice, *Proposal on the provision of court and tribunal estate in England and Wales*.

SENTW have produced few, if any, appeals to the Upper Tribunal. In response it was noted that settlement aided by SENTW itself is quite common. This may be an example of a Devolved Welsh Tribunal taking a more proactive role in terms of assisting parties in reaching a settlement and therefore avoiding the expense and stress of onward appeal. However, it perhaps raises some issues around the formality and transparency of relevant settlements. For example, it was also suggested that there is a high withdrawal rate of SENTW appeals, which could indicate that Local Authorities will routinely provide requested assessments on commencement of an appeal. This may be part of a culture of defensiveness noted by many research participants where public bodies will adopt a default defensive position resisting informal resolution, but capitulate relatively quickly once formal proceedings are issued.

- 7.25** Looking at the specific powers of certain Devolved Welsh Tribunals, especially in the context of their broader contribution to improving public decision-making, it was noted that users sometimes face difficulties in ensuring that devolved Welsh tribunal orders are complied with. For example, in SENTW once the litigant has received an order they may then have to navigate through Welsh Government departments to get those orders complied with. This can be both complex and distressing for all involved, whereas if the tribunal were given further powers, for example to communicate with the Welsh Government in some manner on the litigant's behalf, the stress would be reduced and those with the specialist knowledge of the circumstances could be better involved in ensuring appropriate enforcement of the order. Nevertheless, there may be some tension here if Welsh Government departments consider this to constitute an erosion of their enforcement powers. It was suggested in this context that tribunals are ultimately toothless if their orders are not enforced, Wales could be proactive (and innovative) in looking at developing the teeth of Devolved Welsh Tribunals. For tribunals awarding damages there can be some powers for the tribunal to directly recover financial sums or property from the defendant on the claimant's behalf, but for other remedies such as directing the re-taking of an initial decision or the conferral of a specific benefit, enforcement powers are less clear and it is not unusual for claimants to have to resort to judicial review in the Administrative Court to enforce the public body to comply.

## **Tribunals and Devolution**

- 7.26** Devolved Welsh Tribunals have developed to address specific legislative schemes over decades. It was suggested that had the Leggatt Reforms come earlier, there may not be any Devolved Welsh Tribunals because it would have been arguably easier to fit specific Welsh jurisdictions into particular chambers of the First or Upper Tier Tribunals than to have created new Devolved Welsh Tribunals. However, this pragmatism must be balanced against both principled and pragmatic reasons for ensuring that claims are dealt with as locally as possible. Diverting Welsh claims into First or Upper Tier Tribunals could lead to claimants having to travel to London or other English venues as opposed to having their claims dealt with in Wales.
- 7.27** It was noted during both Workshops that issues posed by devolution in relation to tribunals continue to grow. This also impacts upon non-devolved tribunals where administration is conducted on an England and Wales, Great Britain, or UK wide basis, but in some instances relevant legal provisions are different across the four UK nations. These concerns also relate back to the issue of designing administrative justice redress

mechanisms discussed in Chapter Six, paras 6.41 to 6.43, and suggested Redress Design *Principle Twelve: Redress mechanisms should be designed with due regard to the context of devolution in the UK and membership of the European Union*. An example given was of recent legislation in relation to Mobile Homes. Under the Mobile Homes (Wales) Act 2013, which came into effect in October 2014, and various Residential Property Tribunal for Wales (RPTW) Procedure regulations, the RPTW will determine relevant appeals. On the other hand for rights (primarily against housing associations) arising under the Housing (Wales) Act 2014, complainants must first seek a review by a person of appropriate seniority (the appropriate person/body to be determined by Welsh Ministers), and may then appeal on a point of law to the county courts.

- 7.28** The Welsh Government increasingly has to grapple with questions about where to direct appeals in relation to newly devolved powers. For example, the issues posed by the proposal to replace stamp duty with a specific Welsh Land Transaction Tax. Stamp duty predates the Union with Scotland and for decades Welsh cases have been determined by the High Court Chancery Division. Cases are all now determined initially by the non-devolved First-tier Tribunal (Tax Chamber). Consideration needs to be given to whether appeals in relation to a new Welsh Land Transaction Tax ought to be determined by the High Court, or by a particular reserved or devolved tribunal (either an existing one such as the RPTW or a newly created institution).
- 7.29** Another example given was the case of *Fish Legal v The Information Commissioner, United Utilities, Yorkshire Water and Southern Water* (Fish Legal). Fish Legal involved a challenge to three English water authorities in relation to the European Environmental Information Regulations 2004 (EIRs). The obligation to disclose certain environmental information is established by EU Directive 2003/4/EC which is then implemented into UK law by the EIRs (and their Scottish equivalent). In England the Information Commissioner was involved specifically in the dispute, which went next to the General Regulatory Chamber of the First-tier Tribunal. The Upper Tribunal then referred the matter of how to interpret the EIRs to the European Court of Justice (ECJ). The primary legal issue raised in this case was when is a water company a 'public authority' for the purposes of the EIRs? The ECJ noted that the question of whether a body falls within the definition of 'public authority' for the purposes of access to environmental information should be subject to the same conditions throughout the EU. The ECJ provided some guidance on how to interpret the relevant provisions of the Directive noting that the mere fact that an entity is a commercial company and subject to a sector specific system of regulation does not exclude it from being within the control of a government body and therefore from being a public authority. The matter of whether the relevant water authorities were indeed public authorities was then remitted back to the Upper Tribunal. The Upper Tribunal enlisted the help of the Westminster Government Department for Environment, and ultimately decided that this ought to be an issue for judicial review not a tribunal appeal. This matter was then sent back to the First Tier Tribunal (which can be seen as closest to the facts of the specific cases). Ultimately the Upper Tribunal itself determined both the appeal and the judicial review at the same time (given that the Upper Tribunal now has its own statutory judicial review jurisdiction). In Wales this would be an issue for Natural Resources Wales and it is solely a European Law concern, there is no relevant UK legislation. The European legislation requires there to be a relevant tribunal to determine appeals in relation to the decisions of Natural Resources Wales (NRW) (as a devolved public body), while the authority behind NRW is the GoWA 2006. There are



relevant questions around which of these legislative requirements is superior, that of EU law, or the GoWA 2006, and what impact would this have upon the practical allocation of disputes to a particular tribunal?

- 7.30** Another example was of a case challenging tax credits and certain childcare arrangements as being in breach of human rights. The judge required counsel to produce a memo explaining how the relevant legislative provisions apply in the four different UK nations, to see if the alleged breach occurred throughout the UK. This was because tax credits are a UK provision administered by a UK government department, whereas childcare is devolved to the four nations. In such cases judges are required to look at all areas of the UK to identify relevant differences and this relates to procedural rules as well as substantive law.
- 7.31** It was noted in general that there is currently a patchwork of onward appeals from 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 model (discussed in Chapter One).
- 7.32** Wales has no control over non-devolved tribunals, for example in relation to fees charged (such having a major impact on access to justice). 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. There is also the UK Supreme Court with ultimate responsibility for judge-made common law.

### **Devolved Welsh Tribunal Priorities**

- 7.33** The current priority should be to improve co-operation, co-ordination, and collaboration amongst the Devolved Welsh Tribunals, but also between these institutions and non-devolved tribunals determining ‘Welsh’ cases. The Devolved Welsh Tribunals could benefit from engaging in greater dialogue with each other and it was argued during research Workshops that individual tribunals could be building bridges and inter-acting better than they do at present. From conference discussions and elsewhere there appears to be a continuing sense of inertia in the reform of some Devolved Welsh Tribunals and reluctance to adopt harmonised procedures and practices across a range of jurisdictions that have perhaps been without substantial oversight for some time. The efficiency and effectiveness of some tribunals (especially in terms use of resources) has been questioned as part of proposals for reform and there remain difficulties concerning the appropriate degree of standardisation across tribunal procedures and practices.
- 7.34** It was noted in the Cardiff Workshop that there could be wastage within the Devolved Welsh Tribunals, particularly in relation to resources directed to the appointment and training of judges and in relation to the day-to-day administration of various tribunals. Judicial employment and deployment are important areas to examine, it was suggested for example that the turnover of judicial and administrative staff is higher in some areas than others. At least part of this is due to the unpredictability of caseloads, and in this

sense similar problems are experienced within non-devolved tribunals (for example a recent major decline in the caseload of the Social Security and Child Support Chamber of the First-tier Tribunal has led to wastage in terms of judicial and administrative resources). There are related budgetary issues; some tribunals are at least perceived to be short staffed with underemployment in other areas. From an administrative point of view there would be value to researching how best to make use of estates, venues and other resources, how to improve business structures and staff development. Efficiency savings can be explored, especially in light of sharing administration, including sharing administration with non-devolved tribunals if this can be appropriately facilitated.

- 7.35** The jurisdiction of specific tribunals and cost effectiveness also needs to be examined. For example, it was noted that the Agricultural Land Tribunal for Wales (established in 1948 and currently operating under powers given in the Agricultural Holdings Act 1996) has the power to deal with certain limited issues such as drainage disputes, but has inadequate jurisdiction for the broader needs affecting the farming community in Wales. In this context many farming disputes are then determined by arbitrators, and the arbitrators fee alone can cost in the region of £60,000, up to £100,000.
- 7.36** During the *Comparative Perspectives Conference* research was presented comparing Special Educational Needs (SEN) tribunals in Wales and Northern Ireland highlighting the importance of understanding tribunals as unique institutions with context sensitive characteristics. The generally heralded qualities of tribunals, such as informality, inquisitorial jurisdiction, accessibility and user-friendliness were not always experienced as such by 'users'. Qualitative research with parents, children with special educational needs, tribunal staff and judiciary, and policy makers, has identified barriers to justice including: the exclusion from the process of those from poorer backgrounds, with lower confidence, and/or communication skills; a pervasive inequality of legal arms and difficulty in identifying and accessing support and advice. In relation to children's participation, findings highlight resistance to their voice being heard within the process, compounded by attitudinal and procedural barriers. In particular the tribunal process, as experienced by parents, has exacerbated notions of protectionism and the need to shield the child from the process. This latter concern was found in both Wales (where the UN Convention on the Rights of the Child UNCRC has been incorporated into legislation) and in Northern Ireland (where the UNCRC is not so incorporated).
- 7.37** Specific issues raised included scepticism about Alternative Dispute Resolution (ADR), difficulties accessing support, legalistic, formal and intimidating process, inequality of legal arms (or at least perception of this) and the approach of the panel and legal representatives. It was noted (during the *Comparative Perspectives Conference* and surrounding discussions) that despite standardisation of procedures much still turns upon the attitudes and abilities of particular tribunal panel members. The research also found significant dissatisfaction with the tribunal process even in cases where the litigant considered they had received a favourable outcome.
- 7.38** It was noted that such proceedings are very sensitive and issues arise surrounding the degree of participation of the child, the degree to which they should be made aware of nature of proceedings and how heavily they should be involved in them (raising concerns around hearings being too lengthy, too court like, and involving cross examination). It was found that families in Northern Ireland and Wales experienced similar difficulties when

engaging with SEN tribunals and relayed the same attitudinal position in terms of child participation in the process. The research made various recommendations around adapting processes to better meet the needs of users, improving available information and pre-hearing advice and support, alongside raising awareness of the tribunal, addressing the inequality of legal arms and improving monitoring of decisions. It was also noted that there needs to be better acknowledgement of children as rights-holders and exploring innovative methods to collect their voice as responsive to their needs.

## Caseload of Tribunals Operating in Wales

**7.39** Figure Five below purports to give a tentative account of the caseload of Devolved Welsh Tribunals. It is primarily based on data that is publicly available online, with some other data being gleaned from CAJTW meeting papers and Welsh Government feasibility studies that are not publicly available. Figure Five goes to show that data which is publicly available (online in any event) is limited in relation to some tribunals and non-existent in relation to others. Red text indicates that data is either not available at all, out of date or derived from non-publicly available sources.

**Figure Five: Devolved Welsh Tribunals**

<b>Devolved Tribunals</b>	<b>Applications Received</b>
<b>Adjudication Panel for Wales</b> <i>(in 2013/14 only one reference was received (references are submitted by the PSOW) and no appeals, though 6 cases were decided during 2013/14, the tribunal website appears to indicate that two tribunals have been held so far in 2014/15) The Annual Report for 2014/15 is not yet publicly available online</i>	<b>1</b>
<b>Agricultural Land Tribunal for Wales (ALT)</b> <i>(based on 2013/14 data - The Annual Report for 2014/15 is not yet publicly available online)</i>	
Succession on Death	8
Succession on Retirement	2
Consent to Notice to Quit	3
Certificate of Bad Husbandry	1
<b>ALT Total</b>	<b>14</b>
<b>Board of Medical Referees</b>	
<b>Forestry Committee for Wales</b>	
<b>Independent Review of Determination Panels (Independent Review Mechanism IRM) figures for 2012/13 based on British Adoption and Fostering (BAAF) Overview Report covering 2010-2013</b>	<b>12</b>
<b>Mental Health Review Tribunal for Wales</b> <i>(data comes from CAJTW meeting papers 2013/14 – not publicly available)</i>	<b>1,636</b>
<b>Registered Nursery Education Inspectors Appeal Tribunal</b>	
<b>Registered Inspectors of Schools Appeal Tribunal</b>	

<b>Devolved Tribunals</b>	<b>Applications Received</b>
<b>Residential Property Tribunal for Wales (RPTW)</b> <i>(based on 2013/14 data - The Annual Report for 2014/15 is not yet publicly available online)</i>	
Leasehold Valuation Tribunals	82
Rent Assessment Committee	41
Residential Property Tribunal	16
<b>RPTW Total</b>	<b>139</b>
<b>School Admission Appeal Panels</b> <i>(based on estimate contained in Feasibility Study on transferring administrative functions into the Welsh Government – not publicly available)</i>	<b>600</b>
<b>School Exclusion Appeal Panels</b> <i>(based on estimate contained in Feasibility Study on transferring administrative functions into the Welsh Government – not publicly available)</i>	<b>30</b>
<b>Special Educational Needs Tribunal for Wales (SENTW)</b> - Annual report available online only for 2013/14	
<b>Registered appeals received</b>	78
<b>Unregistered appeals received</b>	15 (8 were struck out and 7 withdrawn prior to registration)
<b>SENTW Total</b>	<b>93</b>
<b>Traffic Penalty Tribunal (Penalty Charge Notices referred to the tribunal for councils in Wales)</b> <i>only available 2013/14</i>	<b>772</b>
<b>Valuation Tribunal for Wales (VTW) (2014/15 Annual Report)</b>	
Council Tax Valuation Appeals	1,700
Non-Domestic Rating List 2010	4,198
Misc (e.g. Liability/Penalties)	97
<b>VTW Total</b> - The data for the VTW has been questioned since the majority of 'appeals' are not issued by citizens. A more reliable figure for estimating the relationship specifically between citizen and state has been suggested to be the total number of appeals upheld. In 2014/15 this was 184.	<b>5,995 (or 184 upheld appeals)</b>
<b>TENTATIVE TOTAL</b>	<b>3,481</b>

**7.40** In terms of non-devolved tribunals, data on Welsh claims is not currently reported. However, data gained for this research in relation to a key tribunal (Social Security and Child Support SSCS) shows that the number of Welsh cases issued in the SSCS dropped from 10,483 in the second quarter of 2013, down to 2,138 in the final quarter of 2014 (echoing similar trends for claims from England and Scotland). However, these

have risen again to 3,049 in the second quarter of 2015. Separate data on Welsh cases ought to be made publicly available in relation to all non-devolved tribunals.

## **Tribunal Reform in Comparative Perspectives**

### **Scotland**

**7.41** The Final Report of the Scottish Administrative Justice Steering Group (established in 2006 by the Scottish Public Services Ombudsman) (*Administrative Justice in Scotland – The Way Forward*) 2009, noted that the Scottish system was fragmented, lacked independence from government, and that there were problems with judicial appointments to tribunals, with tribunal administration, and with the performance and overarching value of the administrative justice system across the board.

**7.42** The Scottish Government sought to modernise tribunals culminating in the Tribunals Scotland Act 2014 (which received Royal Assent in April 2014). The Act creates a two-tier framework for tribunal reform (along similar lines to that created for tribunals operating in England and Wales and on a Great Britain and UK-wide basis in the Tribunals Courts and Enforcement Act 2007). The aim was to establish an efficient and effective Scottish Tribunals Service by merging the administration of devolved tribunals and through the further devolution of reserved tribunals. This was envisaged to take place in three phases. Phase One would see the creation of the new structure and the transfer in of certain judicial functions, including the first chamber to be created (likely to be a housing chamber), it was originally envisaged that this would be in place by December 2016. Phase Two was to be the transfer into the new structure of certain devolved tribunals such as the Mental Health Tribunal for Scotland and the Lands Tribunal for Scotland (by 2019). Phase Three would see the transfer in of all other tribunals listed in the 2014 Act (to take place by 2023). It was noted during the Cardiff Workshop that numerically the vast majority of cases are still those within reserved tribunals. It was estimated that devolved tribunals determine approximately 5,000 cases per-annum, compared to an estimated 40,000 cases per-annum in the reserved tribunals.

**7.43** The devolved tribunals in Scotland are:

- The Additional Support Needs Tribunals for Scotland (ASNTS)
- The Lands Tribunal for Scotland (LTS)
- The Mental Health Tribunal for Scotland (MHTS)
- The Pensions Appeal Tribunal Scotland (PATs)
- The Scottish Charity Appeals Panel (SCAP)
- The Private Rented Housing Panel (PRHP)
- The Homeowner Housing Panel (HOHP)
- The Council Tax Reduction Review Panel (CTRRP)

**7.44** The Courts Reform (Scotland) Act 2014 created a new combined Scottish Courts and Tribunals Service (SCTS) (section 130), into which administrative support for the Scottish tribunals and their members is to be transferred. These reforms have now been affected by the conclusions of the Smith Commission established following the 'No' vote in the Scottish independence referendum. The Smith Commission remit was to facilitate an inclusive engagement process and produce Heads of Agreement with recommendations

for further devolution of powers to the Scottish Parliament. The Commission proposed under Heads of Agreement para 63, that, 'All powers over the management and operation of all reserved tribunals (which includes administrative, judicial and legislative powers) will be devolved to the Scottish Parliament other than Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission'. This has been taken forward in clause 25 of a UK Government Command Paper, *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990, January 2015). The Paper notes that the transfer of tribunal responsibility will enable the Scottish Parliament to exercise powers including in relation to rules of procedure, membership, administration and funding. However, it is also noted that in order to ensure the effective delivery of overarching policy, some powers may be subject to specific constraints and requirements (what these might include is not stated). The clause provides for an Order of Council to be made to give effect to the transfer of functions from specific reserved tribunals to specific Scottish tribunals according to an implementation timetable to be agreed by the UK and Scottish Governments. One issue specifically noted in the Cardiff Workshop was that it is not yet clear how autonomous the budget of the Scottish Courts and Tribunals' Service will be, the extent it must be approved by the Scottish Parliament, and the degree of involvement of the judiciary in running the service. For example, it was noted that in the Republic of Ireland, the separate courts service has separate and distinct funding.

## Northern Ireland

- 7.45** Responsibility for policing and justice was devolved to Northern Ireland in 2010. There have been a number of research reports examining tribunals in Northern Ireland. A 2010 Report, commissioned by the Law Centre (NI) and funded by the Nuffield Foundation, made a number of recommendations for tribunal reform in Northern Ireland (Grainne McKeever and Brian Thompson, *Redressing User's Disadvantage: Proposals for Reform in Northern Ireland*). One of the recommendations of this Report was to conduct further research into user awareness and experience of advice, information and support services, the findings of such further research being presented in a 2011 Report (Grainne McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland*). Both Reports noted that users can find the tribunals system confusing and difficult to navigate, in particular there can be confusion over the framing of problems, for example social security issues were sometimes seen by claimants as medical rather than legal matters. The research Reports suggested there was a need for wholesale reform of tribunals in Northern Ireland. Some reforms were proposed in a further Report (Brian Thompson, *Structural Tribunal Reform in Northern Ireland* 2011). These reforms envisaged a flexible Northern Ireland Amalgamated Tribunal with the power to review its own decisions and a Northern Ireland Upper Tribunal, similar to the tier and chamber structure established for England and Wales and UK tribunals following the *Leggatt Review* of tribunals culminating in the TCEA 2007.
- 7.46** In 2013 the Northern Ireland Department of Justice issued a Consultative Document, *Future Administration and Structure of Tribunals in Northern Ireland*. The paper set out proposals to bring together the majority of devolved tribunals in Northern Ireland into a new integrated structure, bringing their leadership under the Lord Chief Justice of Northern Ireland. However, the reform process has been paused as the Department of Justice had more urgent priorities. Implementation may be pushed back as far as 2017/18 or even 2018/19. It was suggested that there is a sense in which reform in

Northern Ireland had been further ahead than in Scotland, and now it is much further behind. When justice was devolved to Northern Ireland the combined courts and tribunals service continued to make arrangements for ensuring appropriate hearing venues of non-devolved tribunals, but listing continued to be managed by HMCTS. If Wales were to eventually gain its own devolved courts and tribunals service questions would arise around whether some services could be 'brought in' from England at least in the shorter term. Similar questions around buying in services have already arisen in relation to Devolved Welsh Tribunals.

## **Other Jurisdictions**

**7.47** Issues affecting tribunals in other jurisdictions (most notably Australia) have been discussed elsewhere in this Report. In particular at paras 2.36-2.43 of Chapter Two looking at developing principles of administrative justice and at paras 6.32-6.40 of Chapter Six looking at administrative justice systems and designing redress mechanisms. In summary these concerns include:

- The pros and cons of amalgamating various specialist tribunal (and court) jurisdictions
- The fragmentation or proliferation of various routes to challenging administrative decisions and the unintended consequences of developing new routes to challenge
- The appropriate procedures and modes of operation of tribunals, the degree of inquisitorial versus adversarial procedure, the relative level of formality and the range of tribunal members (including non-legal members)
- Trends towards excessive formality and focus on procedure (otherwise known as excessive legalism, judicialisation or juridification)
- Lack of data, especially about the characteristics and experiences of tribunal users (presumed benefits of amalgamation not backed up by research evidence)

## CHAPTER EIGHT: THE ADMINISTRATIVE COURT IN WALES

### Chapter Eight: Key Points

1. 80%-90% of the caseload of the Administrative Court in Wales consists of judicial review claims. Judicial review provides an important constitutional oversight to any system of administrative justice and the impacts of a few cases can be profound and wide. Access to judicial review matters, both for the admittedly small number of cases that develop into remedies given by the Court, and for the much larger number of cases that don't (which act as a catalyst for remedial settlements of individual cases).
2. Despite a relevant Practice Direction and judicial precedents, there is still no *specific requirement* that judicial review claims and other Administrative Court cases pertaining to public bodies operating in Wales must be issued and heard in Wales.
3. Around half of all claims issued in the Administrative Court in Wales relate to English claimants and defendants (primarily from the South West of England). In these cases the parties generally instruct legal advisers based in England. The majority of 'Welsh' claimants now instruct solicitors based in Wales, however, barristers based in Wales are comparatively rarely instructed, with just 14% of barristers appearing before the Administrative Court in Cardiff being based at chambers located in Wales.
4. Judicial review claims per head of population in Wales remain low compared to claims per head of population in London and South East England. However, whilst Welsh figures had been low also in relation to English regions outside London and the South East, there has been a recent drop in claims per head of population across Northern England. This is likely due to the impact of reforms to judicial review procedure and legal aid.
5. When the Administrative Court Centres were established outside London it was assumed that they would be carbon copies of the centralised court based at the Royal Courts of Justice. However, the Administrative Court in Wales hears certain classes of appeals that only apply to Wales (as a consequence of devolution), the Administrative Court Office for Wales has developed its own Listing Policy, has heard one case in Welsh, and also has competence to determine certain devolution issues.

- 8.1 In April 2009 four Administrative Court Centres were established in Birmingham, Cardiff, Leeds, and Manchester to deal with judicial review claims and other aspects of the Administrative Court's jurisdiction, such as statutory appeals including those under planning law. Some public law claims could be issued in Cardiff prior to the opening of the specific Administrative Court Centre, but the earlier facility had come to be seen as little more than a 'post box' and many claims issued in Cardiff continued to be heard in London.
- 8.2 In its final report, *Justice Outside London*, a Judicial Working Group (convened by the Civil Sub-Committee of the Judicial Executive Board) concluded that the clustering of public law legal services around the Royal Courts of Justice (RCJ) in London was, 'prejudicial to those who do not live and work in London and the South East'.<sup>1</sup> It noted that: 'Nearly all judicial review and other claims in the Administrative Court have to be brought in London,

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<sup>1</sup> Para 48.



with the obvious inconvenience and additional expense that this causes for claimants, defendants, interested parties and their lawyers'.<sup>2</sup> In addition to such access to justice concerns, which affect both Wales and English regions (beyond the South East), there was the devolution agenda, including both principled and pragmatic reasons why administrative law claims pertaining to Wales ought to be issued and determined in Wales.

- 8.3** The Administrative Court in Wales is now more than six years old, with cases being administered from the Administrative Court Office in Cardiff throughout that time. The Administrative Court in Wales has been recognised as a good example of operating a High Court Division in Wales, research suggests generally good levels of user satisfaction, and Administrative Court Office data shows that waiting times at various stages of the legal process (for example time from issue to permission and time from permission to substantive hearing in judicial review claims) have generally been shorter in Cardiff when compared to the Administrative Court average.<sup>3</sup>
- 8.4** The relevant Practice Direction, CPR PD 54D Administrative Court (Venue), has also been considered as a good 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 at the outset: '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'. However, it should be noted that the Practice Direction does not *specifically require* cases pertaining to Wales to be issued and determined in Wales. A number of considerations are taken into account including the region in which the defendant is based (for example where a claimant in Wales issues a claim against a UK Central Government body), and the region within which the claimant's legal representatives are based.
- 8.5** As well as the presumption that claimants should issue in the location with which they have the closest connection, the case of *R (on the application of Deepdock Ltd.) v Welsh Ministers*,<sup>4</sup> also lays down a presumption that decisions from devolved bodies in Wales will be accountable to the Administrative Court in Wales. However, even with both presumptions operating together there is still no requirement that cases pertaining to Welsh public bodies *must* be issued and determined in Wales.
- 8.6** It was noted in the Bangor Workshop that the Administrative Court in Wales is in a unique position in that the case for claims involving Welsh public bodies to be issued and determined in Wales is so strong that it overrides any business argument that the caseload of the Court is too small to warrant the resources devoted to it (a claim that was made by some quarters prior to the Court's establishment). For example, some 50% of claims issued in the Court do not pertain to Wales (with the largest proportion relating to the South West of England). This relates to the issue of a separate legal jurisdiction for Wales. For example, in some claims issued in the Court the claimant is based in South West England with their legal adviser being based in Wales (however, research suggests this is only

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<sup>2</sup> Id.

<sup>3</sup> See e.g., S Nason, 'Justice Outside London? Five Years of "Regional" Administrative Courts (2014) Judicial Review 188; S Nason and M Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Legal Services in Public Law' (2013) *Modern Law Review* 76(2) 223.

<sup>4</sup> [2007] EWHC 3347 (Admin).

evident in 6% of claims, compared to 15% of claims where solicitors from England act for Welsh claimants). This implies that cross-fertilisation and a shared profession is currently working more to the advantage of English solicitors than Welsh solicitors.

**8.7** Despite neither the relevant Practice Direction nor the *Deepdock* and recent precedents<sup>5</sup> mandating that Welsh cases be issued and determined in Wales, it is generally now inconceivable that a case involving a Welsh public body would be determined outside Wales. The only exception might be a case of major national importance across England and Wales, involving parties from both jurisdictions, joined together and heard most likely in London. Expediency is a value of administrative justice and it is understandable that when cases involve a large number of interested parties from across England and Wales, Cardiff might not be the most expedient location.

**8.8** When the Administrative Court Centres were established outside London it was largely assumed that they would be carbon copies of the Administrative Court based at the RCJ in London and operate in the same way. However, it is to be noted that the RCJ suffers from its own difficulties; not least the antiquated (if beautiful) building in which it is based. 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.

**8.9** Some 80%-90% of claims issued in the Administrative Court in Wales are judicial review applications. The Court also handles three discrete forms of appeal that apply only in Wales:

- Appeals against decisions of the Adjudication Panel for Wales, which determines disciplinary proceedings against local authority councillors brought by the PSOW, under s.79(15) of the Local Government Act 2000;<sup>6</sup>
- Appeals against decisions of the General Teaching Council for Wales to make a disciplinary order under r.24 of the General Teaching Council for Wales (Disciplinary Functions) Regulations 2001;<sup>7</sup> and
- Appeals against decisions of the Welsh Language Tribunal under s.59 of the Welsh Language (Wales) Measure 2011.

The Administrative Court in Wales may also be called upon to determine a 'devolution issue'<sup>8</sup> after a reference in accordance with part 2, schedule 9 of the GoWA 2006<sup>9</sup> (although to date it never has been). These provisions outline the procedure for raising

<sup>5</sup> *R. (on the application of Condron) v National Assembly for Wales* [2006] EWCA Civ 1573

<sup>6</sup> See e.g., *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin). When the procedure for disciplining local authority councillors changed in England under the Local Government and Public Involvement in Health Act 2007 and subsequently the Localism Act 2011 the changes did not affect Wales as the powers and duties of local authorities and their members is devolved.

<sup>7</sup> The General Teaching Council was abolished in England by the Education Act 2011 and its functions were transferred to the Teaching Agency, an executive agency of the Department of Education. However, this change did not affect proceedings in Wales and the General Teaching Council for Wales as Education is devolved.

<sup>8</sup> paragraph 1, part 2, schedule 9 of the GoWA 2006.

<sup>9</sup> s.149 of the GoWA 2006

such issues in the inferior court, and referring them for determination to a higher court, in some instances that court being the Administrative Court.

**8.10** As Figures Six and Seven below demonstrate, the number of judicial review claims issued in the Administrative Court in Wales is comparatively small compared to the 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,<sup>10</sup> 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 consistently substantially higher, but has been 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. Over the same period 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. More detailed analysis of this data is beyond the scope of the current Report, but it can be speculated that the reductions in cases per head of population are due to reforms to judicial review procedure and to legal aid which have combined to make the process less accessible.

**Figure Six: Ordinary Civil Judicial Review by Centre**

Centre	2009/10		2010/11		2011/12		2012/13		2013/14		2014/15	
	No	%	No	%	No	%	No	%	No	%	No	%
Birmingham	137	6.5	178	8.4	162	7.8	176	8.2	118	5.6	148	8.5
Cardiff	61	2.9	80	3.8	68	3.3	86	4	101	4.8	70	4.1
Leeds	221	10.5	238	11.2	199	9.5	198	9.2	214	10.2	130	7.5
Manchester	215	10.2	212	9.9	231	11.1	281	13.1	213	10.1	148	8.5
<b>Sub-total outside London</b>	<b>634</b>	<b>30.1</b>	<b>708</b>	<b>33.2</b>	<b>660</b>	<b>31.6</b>	<b>741</b>	<b>34.4</b>	<b>646</b>	<b>30.8</b>	<b>496</b>	<b>28.7</b>
London	1,476	70	1,425	66.8	1,431	68.4	1,412	65.6	1,454	69.2	1,236	71.3
<b>Total</b>	<b>2,110</b>		<b>2,133</b>		<b>2,091</b>		<b>2,153</b>		<b>2,100</b>		<b>1,732</b>	

<sup>10</sup> Based on an analysis of claimant, solicitor and defendant addresses.

**Figure Seven: Asylum and Immigration Civil Judicial Review by Centre**

Centre	2009/10		2010/11		2011/12		2012/13		2013/14		2014/15	
	No	%	No	%	No	%	No	%	No	%	No	%
Birmingham	334	4.4	517	6.3	547	5.8	538	5.1	518	5.2	77	5.2
Cardiff	59	0.8	69	0.8	64	0.7	88	0.8	78	0.8	17	1.1
Leeds	154	2.0	244	3.0	238	2.5	264	2.5	188	1.9	32	2.2
Manchester	186	2.4	284	3.5	288	3.1	419	4.0	422	4.2	75	5
<b>Sub-total outside London</b>	<b>733</b>	<b>9.6</b>	<b>1,114</b>	<b>13.7</b>	<b>1,137</b>	<b>12.1</b>	<b>1,309</b>	<b>12.5</b>	<b>1,206</b>	<b>12</b>	<b>201</b>	<b>13.5</b>
London	6,895	90.4	7,033	86.3	8,209	87.2	9,039	86.1	8,762	87.2	1,287	86.5
UTIAC	-	-	-	-	71	0.8	150	1.4	76	0.8		
Total	8,361		9,261		10,554		11,657		11,250		1,488	

## **Administrative Court Claims as a Barometer of Administrative Justice**

**8.11** Some research participants argued that judicial review claims (and indeed the sum total of Administrative Court claims) constitute a tiny proportion of the full spectrum of administrative justice concerns, they are in a sense an, ‘elite’ activity; judicial reviews are specifically a claim of last resort. For example, a Workshop delegate who had spent eight years working for CAB was only involved in two judicial review claims during that time. However, it was also suggested that the incidence of judicial review litigation functions as broader evidence of how well a particular administrative justice system is working, and how satisfied citizens are with their public services. Judicial review provides an important constitutional oversight to any system of administrative justice and the 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 Court, and for the much larger number of cases that don’t (which act as a catalyst for remedial settlements of individual cases). Judicial review is of key constitutional significance in safeguarding the rule of law and in that sense there are no ‘pyrrhic victories’ in judicial review litigation.<sup>11</sup> In this regard we ought to be worried about the low rates of claim per head of population in Wales and also across England.

**8.12** Another concerning set of statistics relate to the proportion of claims issued in the Administrative Court in Wales involving lawyers based in Wales. Approximately 40% of all Welsh claimants issuing in the Cardiff Administrative Court instruct solicitors based in Wales, another 35% instruct solicitors based outside Wales and 25% represent themselves. On the other hand when it comes to the instruction of barristers, 86% of Welsh claimants who instruct a barrister, 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 support the idea of an advice services gap, notable on the

<sup>11</sup> Mark Elliott, ‘Judicial review – why the Ministry of Justice doesn’t get it’ UK Const L Blog (16 December 2012) <<http://ukconstitutionallaw.org>>

claimant side of the equation and especially notable at the specialist level of instructing a barrister. Similar views have been expressed in other forums, including by the Lord Chief Justice of England and Wales addressing the Administrative Court in Wales User Group. Nevertheless, we should be cautious of relying too much on specific data, especially when the overall number of claims is so small. In particular the Crown Office Information Network (COINS) system is unlikely to record an advocate as being instructed in all cases where advice from an advocate has been received, for example where that advice is to discontinue with the case, or where the claimant may receive some initial advice and decide to continue as a litigant in person (an unrepresented litigant).

- 8.13** Welsh judicial review claims are comprised of a variety of issues (with a more variable caseload than the other Administrative Court Centres outside London where caseloads are driven significantly by the specialist expertise of the local legal profession such as in relation to prisons law in Northern England). There is also a varied picture in terms of the geographical origin of claims across Welsh local authorities, though on average at least 25% of claims per-annum originate from the Cardiff area. In terms of decided cases, recent research examining substantive judicial review hearings over a 20-month period (from July 2010 to February 2012 inclusive) identified 14 hearings relating to Wales (10 of which were heard in Cardiff).<sup>12</sup> Eight of these cases were brought against Welsh local authorities. Only two of these claims were brought by individuals, the rest being issued by corporations/legal persons. The research notes that although the number of cases is very small this is still quite striking given that within the whole data set for England and Wales (a total of 502 cases) 78% were brought by individuals. This may be further evidence of lack of awareness of administrative justice issues among the population of Wales (and among legal advisers) and corroborates other evidence suggesting a comparative reluctance to claim and/or complain.
- 8.14** Workshop delegates noted that high rates of judicial review do not always correspond to poor decision-making across public bodies. We need to look at the success rate of these claims (and litigation strategies of specific law firms are also relevant here). It was also noted that the majority of judicial review claims do not make it to a full substantive hearing, many are withdrawn before a permission decision. For example, previous Public Law Project (PLP) research from 2009 found that 60% of potential judicial review claims were resolved by dialogue between lawyers before proceedings were commenced and a further 34% of claims were withdrawn before reaching the permission stage.<sup>13</sup> It also found that 56% of claims that are granted permission settle before a final hearing. The PLP research concluded that in all these stages of claim the matter is most likely to have been resolved in favour of the claimant, suggesting that success rates in judicial review are far higher than might be supposed given the small number that are upheld at a final substantive hearing. From more recent research concerning the permission stage, based on data from April 2014 to March 2015, overall 21.3% of judicial review claims were granted permission (for asylum and immigration related cases the grant rate was 13.9% and for other topics it was 29.6%). In Wales the success rate for asylum and immigration claims was 27.3% and for other civil claims it was 30.6%. The asylum and immigration

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<sup>12</sup> V Bondy, L Platt, and M Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (PLP, University of Essex, LSE 2015) 16-18.

<sup>13</sup> Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing* (Public Law Project 2009) 33

success rate in Wales higher than the overall Administrative Court average, but this is most likely due to the comparatively tiny number of such claims issued in Wales.

- 8.15** Research also indicates that judicial review claims are often an accurate barometer of broader problems within the administrative justice system. For example, high rates of claim have been linked to poor performance within relevant local authorities,<sup>14</sup> whilst low rates of claim can in part be attributed to lack of appropriate and affordable advice services.<sup>15</sup> Low rates of challenge may at least be indicative of lack of both private and voluntary sector support for claimants.
- 8.16** It was noted during the Cardiff Workshop that PLP had previously raised the idea of creating some form of public fund to promote (or perhaps better put to support) the use of judicial review in Wales. Whilst an objection can be raised that this public funding would ultimately lead to the Welsh Government funding challenges to itself and other public bodies, of course this is precisely the way legal aid systems in general function. A broader point here is the matter of legal aid itself, for example it can be argued that Wales could not have a fully effective separate legal jurisdiction without having responsibility for its own legal aid budget.

### **Judicial Review in Comparative Perspective**

- 8.17** It was noted during the Workshops that the number of judicial review claims per head of population in Northern Ireland is most likely higher than in Wales or in Scotland. The make-up of judicial review claims has links to core issues affecting the population, for example the majority of claims in Northern Ireland involve prisons and policing. It was noted from previous Bangor University research (and this was accepted by Administrative Court representatives), that the caseload in Wales covers a broader and more diverse range of issues than in other Administrative Court Centres across England. This is likely due, at least in part, to the high number of unrepresented litigants, thereby litigation in the Administrative Court in Wales may be led by the needs of a certain class of unrepresented litigant, and not so much by the availability of affordable specialist legal advice services (such specialisation driving much litigation in northern England).
- 8.18** As concerns asylum and immigration claims (a non-devolved area) and the relationship between tribunals and the Administrative Courts in England and Wales, recent legislation will effectively allow for appeals to be ‘abolished’ in many areas of litigation. This is likely to lead to further judicial review claims across England and Wales, although the vast majority of these would be determined by the Upper Tribunal there is still recourse to judicial review in the Administrative Court in cases that arguably raise an important issue of principle or practice or that are otherwise compelling. Given that the Upper Tribunal operates on an England and Wales basis it may be that the increasing diversion of judicial review claims into that body will require more claimants based in Wales to travel outside Wales to attend hearings in English venues. This is a consequence of transferring more judicial review claims to various Chambers of the Upper Tribunal that has not been specifically addressed in reform proposals.

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<sup>14</sup> Lucinda Platt, Maurice Sunkin, and Kerman Calvo, ‘Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales’ (2010) 20 (suppl 2) J Public Adm Res Theory 243.

<sup>15</sup> Maurice Sunkin and others, ‘Mapping the Use of Judicial Review to Challenge Local Authorities in England and Wales’ [2007] PL 545.

## **Unrepresented Litigants**

**8.19** Research evidence, and anecdotal judicial experiences noted during the two Workshops, demonstrate that the proportion of judicial review (and other Administrative Court claims) involving unrepresented litigants (known as Litigants in Person (LIPs)) has been increasing.). LIPs should not be treated as a homogenous group. Some may be individuals, but in Wales they are more likely to be voluntary sector organisations acting in person (such as Shelter Cymru and CAB Cymru) or Welsh local authorities acting in person through their in-house legal departments in claims against Welsh Ministers or Westminster Government departments. Among individual LIPs there is likely to be a broad range of knowledge, experience and understanding of relevant legal rights and processes, and a range of different advice and support that may have been received (this information is not available to the Administrative Court which only records the formal instruction of an advocate). It was suggested during the Workshops that there is a broader sense in which LIPs may be just the tip of the iceberg of those who have legitimate concerns but are able to help themselves.

## **A Conundrum for Further Research**

**8.20** Given that research indicates rates of judicial review claim (for example per head of population) have been comparatively low in Wales compared to various English regions; are we to assume that this is because people are generally well satisfied with the performance of Welsh public bodies, or is it due to the existence of a gap in advice provision, limited general awareness (a lack of public legal education), and/or some sense of cultural reluctance to claim?

## **The Administrative Court as a ‘One Stop Shop’**

**8.21** The Administrative Court in Wales could function as a good example of an institution providing a ‘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 these lawyers must have adequate powers to case manage properly. 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.

## **CHAPTER NINE: ADMINISTRATIVE JUSTICE ADVICE SERVICES IN WALES AND USER PERSPECTIVES OF THE ADMINISTRATIVE JUSTICE SYSTEM**

### **Chapter Nine: Key Points**

- 1. 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.**
- 2. Wales still appears to lack a well-developed public administrative law advice services sector (especially among private providers) despite the increased issue of specifically Welsh public administrative law as a consequence of devolution.**
- 3. Funding 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 is especially so as legal aid policies tend to favour providers with high caseloads and to discourage expansion into new specialisations. Given the comparatively small populations served by many firms in Wales, there is a tendency towards generalisation across a broad spectrum of civil, criminal and public law work, the loss of a legal aid contract in just one of these areas can easily lead to the closure of a firm.**
- 4. The lack of awareness of administrative justice in Wales may relate to the limited development of a public law advice sector, as well as to cultural matters such as assuming the benevolence of public bodies, and economic factors such as high levels of deprivation and higher rates of claiming in relation to both in and out of work benefits as compared to Great Britain as a whole.**
- 5. We know little about what people in Wales think and do about administrative justice issues and 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 on user perspectives, especially in relation to barriers to accessing administrative justice.**

**9.1** 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. A review of advice services in Wales was instigated in the context of financial challenges facing Not for Profit (NfP) advice providers in Wales with the aim of developing measures to mitigate the rising demand for advice services. The Final Research Report was published in March 2013 and its key recommendation was 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. The NAN includes a cross-section of representatives from the advice sector, key funders and representative bodies. The NAN is to provide strategic oversight working with Regional Advice Networks (which are to be responsible for the strategic direction of advice services at a regional level). The Final Report also recommended the development of a Framework of Standards for Advice and Information through the NAN based on existing quality marks and standards. It was noted during the Cardiff Workshop that this process should lead to quality provision and the clear branding of quality assured advice. Independent research



has been commissioned on Quality Standards and is expected to report in the first quarter of 2015/16.

**9.2** As part of the 2013 Review attempts were made to map advice provision in Wales, though it was noted that the results were based on self-selecting participants and reflected a picture which will most likely have fundamentally changed by now in light of various funding cuts.

**9.3** More broadly across England and Wales, the Low Commission was established in light of various issues affecting access to social welfare advice, including specifically the impact of reforms to legal aid contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and broader cuts to local government funding. The Low Commission final report, *Tackling the Advice Deficit*, proposed a strategy for access to advice and legal support on social welfare law in England and Wales. The Commission made six overarching recommendations:

- Public legal education should be given higher priority, both in the school alongside financial literacy, and in education for life, so that people know their rights and know where to go for help
- Central and local government should do more to reduce preventable demand (for example, by requiring the DWP to pay costs on upheld appeals)
- Courts and tribunals should review how they can operate more efficiently and effectively (for example, through adapting their model of dispute resolution at every stage to meet the needs of litigants with little or no support)
- The next UK government should develop a National Strategy for Advice and Legal Support in England for 2015–20, preferably with all-party support, and the Welsh Government should develop a similar strategy for Wales<sup>1</sup>
- There should be a Minister for Advice and Legal Support, within the MoJ, with a cross-departmental brief for leading the development of this strategy
- Local authorities, or groups of local authorities, should co-produce or commission local advice and legal support plans with local not-for-profit and commercial advice agencies
- The next UK government should establish a ten-year National Advice and Legal Support Fund of £50m pa, to be administered by the Big Lottery Fund, to help develop provision of information, advice and legal support on social welfare law in line with local plans

**9.4** The Low Commission has produced a recent update on the implementation of its strategy, noting the following concerns:<sup>2</sup>

- Despite initiatives from Government to improve customer experience of public services there is a growing ‘redress gap’ which makes it harder to challenge and access basic rights or services
- The lack of timely, early, quality advice and information feeds this gap and makes services less accountable to their users

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<sup>1</sup> It should be noted this has now been achieved with the development of the NAN noted above.

<sup>2</sup> Available online at: [http://www.lowcommission.org.uk/dyn/1435772523695/Getting\\_it\\_Right\\_Report\\_web.pdf](http://www.lowcommission.org.uk/dyn/1435772523695/Getting_it_Right_Report_web.pdf)

- The welfare system is a case in point, vulnerable claimants are not always getting access to basic support due to blockages and poor system design
- The effects of LASPO have gone beyond what was intended and are impacting adversely on access, and on the advice economy, with a multiplier of other cuts, and with knock-on consequences and costs elsewhere in the system
- Opportunities to address these issues, such as joined up advice and wellbeing plans, are being missed due to the lack of any joined up strategic approach

These concerns suggest that there is a serious advice deficit across England and Wales in relation to social welfare law, which is numerically one of the largest areas of administrative justice.

**9.5** In Wales, the Public Law Project (PLP) also plays an important role in promoting awareness of public administrative law and administrative justice. PLP is a voluntary sector body in operation for 25 years providing advice and undertaking strategic litigation, among other roles (<http://www.publiclawproject.org.uk>). PLP has been organising a regular Public Law Conference in Wales since 2009. During the Cardiff Workshop a PLP representative expressed the view that if one organised a series of administrative justice workshops in England, many, perhaps the majority, of attendees, would be from the voluntary sector. It was argued that in England (or one can add in at least certain areas in England) there are well developed administrative justice networks including organisations directed towards claimant representation (such as the Child Poverty Action Group, Mind, and Liberty) and practitioner representatives organisations such as the Immigration Law Practitioners Association (ILPA) and Constitutional and Administrative Law Bar Association (ALBA). This is alongside specifically human rights oriented organisations and individual barristers and solicitors who are specialists in public administrative law and often act on a *pro bono* basis in addition to their legally aided and privately funded work. It was stressed, on the other hand, that those contributing to the organisation of the PLP Wales conferences, and the majority of those attending the conferences, represent public bodies.

**9.6** It was suggested that this evidence implies that Wales lacks a developed public administrative law related advice services sector particularly from the complainant's perspective. However, it was contrarily argued during the Cardiff Workshop 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 (as opposed to a more significant lack of advice services). The view was expressed that most of the actors who identify themselves as being part of the Welsh administrative justice system are ultimately part of the government (being part of the executive and administrative branches of state) and that awareness of the full extent and nature of the system and its various actors is currently unbalanced with a notable gap on the side of complainants (ultimately on the side of the citizen). It was argued that in order to create a more vibrant public law scene in Wales a first step is to accept that there is a gap both in awareness and potentially also advice provision on the side of complainants.

**9.7** Some Workshop delegates responded that in the 2000's the Welsh Government had an extensive programme of supporting advice agencies in a way that was not happening more broadly across England and Wales and that therefore any advice gap on the complainant side may not be as significant as perceived.

## **CAB Cymru**

**9.8** One of the biggest advice providers in Wales is CAB Cymru. Advice agencies have a role to play in influencing policy, practice and legislative change. In that regard it was stressed that CAB Cymru's own capacity in relation to policy, and influencing and reviewing legislation, is quite new and limited, and includes only a small research budget. CAB Cymru is particularly interested in looking at the citizen's journey through their complaint, how the parties respectively understand the role of the relevant public body, and how that body responds to complaints. A recent exercise of this role has been responding to the National Assembly for Wales Finance Committee consultation identifying whether to review and revise the Public Services Ombudsman (Wales) Act 2005 to give further powers in advance of the 2016 elections.

**9.9** It was noted that CAB Cymru can play an important role in identifying areas for thematic policy review, especially in circumstances where people may be seeking help from CAB but not making formal complaints to any specific redress mechanisms. This role of relating individual problems to inform public service performance not only occurs via CAB's wider policy influencing function, but also within specific cases where individual CAB advisers liaise with relevant public body representatives in relation to particular requests for help. Additionally CAB Cymru has a responsibility to highlight issues affecting clients at a national level. CAB Cymru also has a statutory responsibility (previously undertaken by Consumer Focus) to represent consumers (in the fields of energy and post).

**9.10** It was stressed that many advice agencies operating in Wales receive at least part of their funding from the UK Government and this needs to be borne in mind when considering whether limited funding might be a partial cause of some perceived advice gap in Wales (if there is such a gap).

**9.11** There are three particular issues currently affecting the work of CAB Cymru:

- A major reduction in the legal aid budget for England and Wales (though it was noted that some provision has been made by the Welsh Government specifically in relation to frontline advice and discrimination advice)
- The financial situation for local authorities generally has led to cuts in funding for some Bureaux
- This financial situation has also increased the need for advice services provision in relation to specialist debt, welfare and housing, and the current financial climate in general has impacted upon citizen's abilities to cope financially.

Welfare reform and in particular the introduction of Universal Credit is likely to lead to continuing challenges for citizens and therefore for CAB Cymru in providing advice.

- 9.12** Between 1 April 2014 and 31 March 2015, CAB Cymru helped more than 106,000 clients with nearly 384,000 problems (an increase of 14% compared with 2013/14).<sup>3</sup> The Wales section of the Citizens Advice self-help website also had over 630,000 users during 2014/15. Over the last three years benefits-related problems have overtaken debt issues, and in 2014/15 over 45,800 people were helped with a benefits-related problem. The most common concerns (in order of occurrence) related to, Personal Independence Payments and Employment and Support Allowance (non-devolved issues), followed by council tax arrears (a devolved area) and housing benefit (a non-devolved area despite housing in general being a devolved area). It was noted that a significant proportion of these problems relate to the administration of public services, though it is often hard to determine the specific nature of the problem, in particular because most advisees are likely to have approximately 3 related problems; an average of 3.6 problems per client in 2014/15. Around 2/3rds of CAB clients in Wales are living below the poverty line and 41% describe themselves as living with a disability or health problem (compared to a population average of 23%). Over 760 clients were helped with an issue regarding localised social welfare (i.e. the Discretionary Assistance Fund for Wales DAF) up 15% from 2013/14. CAB Cymru have also noted a specific rise in problems related to non-priority debt such as council tax and public body rent arrears, this may tell us something about how public bodies are interacting with citizens (service users) in the current financial climate. Problems involved a broad range of devolved and non-devolved issues. In terms of outcome measurement CAB Cymru records that 2/3rds of those helped have either fully or partially resolved their problems.
- 9.13** In its data and case-management systems CAB Cymru holds significant information about client problems relating to public services in Wales, including detailed breakdowns of the topics of concerns and specific case-studies giving more qualitative information, including relating to the nature of the help given by CAB itself. However, CAB Cymru does not systematically record whether problems have progressed as far as specific complaints, reviews or appeals within the various institutions of administrative justice redress. Future research can draw on the data held by CAB Cymru as well as utilising its ability to access and understand user perspectives (including the perspectives of those who seek advice but who do not then complain, appeal and so on). Working with CAB Cymru (and other organisations such as Shelter Cymru) can help build a vital picture about users (and non-users) of the administrative justice system in Wales.

## **Private Advice Providers**

- 9.14** Both Workshops echoed the conclusions of previous research that there appears to be a lack of specialist public administrative law practitioners (both solicitors and barristers) based in Wales. Research respondents suggested that 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 much smaller number of firms involved many of whom are sole traders. It may be that many firms in Wales are both relatively small and not particularly specialised. The

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<sup>3</sup> CAB Cymru, *Advice Trends in Wales 2014-2015: Client Statistics of the Citizens Advice service in Wales* available online at:  
<https://www.citizensadvice.org.uk/Global/CitizensAdvice/Wales/Advice%20trends%20in%20Wales%202014-15%20final.pdf>

comparatively small population served by individual firms requires that most solicitors firms be generalist across a broad spectrum of both public, civil and criminal law issues.

- 9.15** Previous research has suggested that the impact of legal aid policies may have been disproportionately felt in Wales, in particular because these policies 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. Further to that there are regulations in terms of the critical mass required by a law firm to meet regulatory requirements, so there is not just an issue around having sufficient scale to tender for a legal aid contract, but also around having sufficient scale to operate at all.
- 9.16** It was stressed during both Workshops 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. Practitioners then ultimately flip between jurisdictions (law applicable in Wales only, in England only, or in both England and Wales for example). 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 advice providers, its borders do not reflect the practical reality of legal advice operations. It was noted, especially in the context of devolution and a separate legal jurisdiction for Wales, that the amount of public law legal advice required will likely continue to grow, yet practitioners in Wales have so far been slow to respond. Some Workshop delegates expressed the view that there cannot be a completely separate Welsh legal jurisdiction without Welsh lawyers doing the bulk of the legal work. However, it should be noted on the other hand that whilst the private sector has been slow to respond, voluntary and public sector advice providers such as Shelter Cymru and CAB Cymru have distinct operations in Wales.
- 9.17** Funding for access to justice is a problem, and given that the legal aid budget is not devolved there might be limitations in what can be achieved on a Wales only basis. Research respondents supposed that legal aid is effectively an issue of 'class justice'. That said many aspects of administrative justice, such as claims in most tribunals and some judicial review applications, are no longer eligible for legal aid funding. It was noted anecdotally during the Bangor Workshop, that third sector bodies such as Shelter Cymru and CAB Cymru are struggling to cope with the high caseloads experienced as a result of diminishing legal aid. One example given was of waiting times of up to six weeks for an initial appointment with CAB Cymru. Evidence of increasing workload pressures was also noted by a representative from CAB Cymru. Workshops participants also stressed (in the context of advice services reform generally) that any notion of pooled budgets across particular advice providers can be cynically viewed. It was suggested that wherever greater co-operation or integration between different service providers and redress mechanisms is encouraged there is a concern over budgets; a pooled budget is where I put my hand in your pocket.

**9.18** One statistic that is not clearly available is the number of people who approach providers in private practice in the first instance. The apparent advice gap on the claimant side in Wales may not be as large as supposed when taking into account the number of potential claimants who seek advice and are either discouraged from continuing after legal advice, or where the involvement of a private practitioner has led to some form of negotiated settlement. Bangor University research found that among specialist public law providers across England and Wales, approximately 50% of their time was spent dealing with enquiries that did not lead to any formal response.

### **Public Awareness of Administrative Justice and User Experiences**

**9.19** In the Cardiff Workshop delegates stressed that the Welsh people have historically put great store by the ability of the state to provide for them and have put their trust in the state. Some delegates suggested that there is a culture of assuming the benevolence of public bodies.

**9.20** It was further argued that people in Wales are proud of their public services and want to work with them rather than against them and that this may impact on whether and how people complain. In addition to this the economic environment of Wales was noted, most specifically, high levels of deprivation (with higher rates of both 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 public bodies, especially through formal legal channels. Deprivation could be connected to more limited education and awareness of rights, and less confidence in pursuing complaints or appeals processes.

**9.21** It was noted throughout the research that we know very little about what people think and do about administrative justice issues in Wales (and 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 the nature of administrative justice and how we should design an administrative justice system (including foundational constitutional principles, first instance public decision-making and the design of redress mechanisms).

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## **ANNEX ONE: WORKSHOP DELEGATES**

Rt. Hon Mr. Justice Hickinbottom, Administrative Court  
Judge Meleri Tudur, Deputy President of the Health Education and Social Care Chamber (First-tier Tribunal)  
Judge Rhiannon Ellis Walker, President of the Special Educational Needs Tribunal for Wales  
Judge James Buxton, Chair of the Agricultural Land Tribunal for Wales  
Nick Bennett, Public Services Ombudsman for Wales  
Meri Huws, Welsh Language Commissioner  
David Gardner, Administrative Court Lawyer for Wales  
Andrew Felton, Head of Justice Policy, Welsh Government  
Ray Burningham, CAJTW/UKAJI  
Bob Chapman, CAJTW  
Professor Robert Thomas, Professor of Law, Manchester University  
Brian Thompson, Senior Lecturer in Law, University of Liverpool  
Varda Bondy, UKAJI  
Margaret Doyle, UKAJI  
Mark Evans, Allington Hughes LLP  
Kim Francis, Shelter Cymru  
Dr. Sarah Nason, Lecturer in Law Prifysgol Bangor University  
Huw Pritchard, Tutor in Law Prifysgol Bangor University  
Stephen Clear, Tutor in Law Prifysgol Bangor University  
Gwilym Owen, Lecturer in Law Prifysgol Bangor University/Solicitor Advocate  
Professor Rob Poole, Professor of Social Psychiatry, Prifysgol Bangor University  
Professor Howard Davis, Co-Director Welsh Institute for Social & Economic Research Data and Methods (WISERD)  
Dr. Stefan Machura, Senior Lecturer in Criminology and Criminal Justice, Prifysgol Bangor University  
Dr. Martina Feilzer, Senior Lecturer in Social Sciences, Prifysgol Bangor University  
Dr. Sara Wheeler, WISERD Research Associate  
Professor Cindy Buys, Southern Illinois University  
HHJ Milwyn Jarman QC, Chancery Judge for Wales and Administrative Court  
Judge Andrew Morris, President of the Residential Property Tribunal for Wales  
Judge Carolyn Kirby, Chair of the Mental Health Review Tribunal for Wales  
Keith Bush QC, President of the Welsh Language Tribunal  
Dr. David Williams, Upper Tribunal  
Hugh Simkiss, Head of Civil, Family and Tribunals for Wales, HMCTS  
Rhian Davies-Rees, Senior Operations Manager, Welsh Tribunals Unit, Welsh Government  
Sinéad O'Toole, Justice Policy Manager, Welsh Government  
Elizabeth Price, Justice Policy Officer, Welsh Government  
Erika Helps, Communities Division, Department for Local Government and Communities, Welsh Government  
Lucy Morgan, Lawyer, Welsh Government  
Natalie Lancery, Lawyer, Welsh Government  
Rhian Williams-Flew, CAJTW  
Professor Thomas Watkin, Former First Legislative Counsel for Wales/Emeritus Professor Prifysgol Bangor University  
Katrin Shaw, Investigations and Legal Manager, Public Services Ombudsman for Wales  
Liz Withers, Head of Policy and Campaigns, CAB Cymru

Steven Murphy, Senior Solicitor, Carmarthenshire County Council  
Graham Walters, Barrister, Civitas Law  
Huw Williams, Solicitor, Geldards LLP  
Michael Imperato, Solicitor, Watkins and Gunn  
Kay Powell, Policy Officer, The Law Society Wales  
Ade Lukes, Events and Resources Development Manager, Public Law Project  
Professor Morag McDermott, University of Bristol  
Chris Gill, Lecturer in Administrative Justice, Queen Margaret University/UKAJI  
Dr. John Stanton, Lecturer in Law, City University, Society of Legal Scholars Public Law  
Convenor  
Sarah Lewis, Commissioning Editor, University of Wales Press