

Commission on Justice in Wales: Submission of Bangor Law School Public Law Research Group

1. This submission concerns public law and administrative justice in Wales, and legal education.

Administrative Justice

2. In his Foreword to a 2015 Bangor Law School Research Report Sir Adrian Webb, then Chair of the Committee for Administrative Justice and Tribunals Wales (CAJTW) stated:

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.¹

3. The Welsh Assembly, Welsh Government, and Welsh public bodies, have considerable responsibility for administrative justice and there has been a clear understanding that this represents a significant devolution of power over 'justice' that should not be reversed.²
4. However, across the UK there has been a recent decline in administrative justice,³ in particular there seems to be less support for the view that administrative justice can (and should) be seen as a coherent fourth system of justice alongside criminal, civil and family counterparts. One difficulty is that the political and research agenda of administrative justice as concerned with all the law relating to public body decision-making, avenues for redress and learning from these (the so-called 'virtuous circle'), is so large at UK level, it risks collapsing under its own weight. One possible advantage for Wales is that as a smaller nation (when compared specifically to England, for example), it has the potential to develop and sustain a more coherent approach to its devolved responsibility for administrative justice (a 'holistic' account). A rational and consistent administrative justice system has potential to improve access to justice, to achieve proportionate dispute resolution, and to enhance the overall quality of public body decision-making, with particular impacts for the most disadvantaged in society.

¹ Sarah Nason, *Understanding Administrative Justice in Wales* (Bangor 2015) <http://adminjustice2015.bangor.ac.uk/documents/full-report.pdf>

² See Welsh Government evidence to the Silk Commission on Devolution in Wales.

³ See e.g., Michael Adler, 'The Rise and Fall of Administrative Justice: A Cautionary Tale' (2012) 8 *Socio-Legal Review* 28 and Tom Mullen, 'Access to Justice in Administrative Law and Administrative Justice' in Palmer, Cornford, Marique and Guinchard (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016).

5. In 2015 Bangor research found evidence of limited awareness of administrative justice in Wales, including amongst elected representatives, legal professionals and academic researchers. There have since been significant improvements; administrative justice is now a regular feature of the Legal Wales Conference programme, and academic/practitioner books and articles have now been published.⁴ A community of stakeholders (academic, policy and practice) exists, and a number of future research projects are at various stages of development. This work would be supported by the establishment of some form of Institute for Welsh Law and Justice, assisting in the co-ordination of research and engagement activity (such would also likely bolster research funding applications). This would progress CAJTW's Legacy Report recommendations⁵ – R1 to encourage establishing a centre of expertise for Welsh administrative justice and R2 to promote future research.

6. However, awareness of administrative justice across the Welsh Assembly and broader Welsh Government (beyond the Justice Policy Team) could be improved. The 2015 Bangor research produced two sets of Principles – (1) Principles of Administrative Justice for Wales and (2) Principles for designing redress in relation to Welsh public body decision-making. The Principles of Administrative Justice for Wales were given further more practical expression in CAJTW's Legacy Report. There is no clear evidence of either set of Principles having been *explicitly* referred to in the recent development or reform of administrative justice redress mechanisms (for example in the context of the Additional Learning Needs and Education Tribunal (Wales) Act 2018, or in proposals to abolish and replace the Office of the Welsh Language Commissioner). Though, the Welsh Language Tribunal requested and received training on the application of the Principles.

7. A 2016 Welsh Government guide – *Making Good Decisions* - makes no reference to the concept of administrative justice as furnishing principles to guide public decision-making. It outlines the requirements of common law administrative law and some specific statutory duties on public bodies in Wales (though not all of these). Whilst the aim of the document appears to be to explain a traditional administrative law conception of administrative justice, it is perhaps disappointing that it barely mentions broader matters of good administration – an integrated conception of administrative justice.

8. A March 2016 Report to the Minister for Public Services by the Justice Stakeholder Group, *Law and Justice in Wales: Some Issues for the Next Assembly*, noted in the context of administrative justice that: 'There are some basic principles which it will be important to adopt before considering the next steps in terms of the practicalities of any changes which may be needed in either the short or long term'.⁶ It further stated:

⁴ See e.g., the University of Wales Press Series on *The Public Law of Wales*.

⁵ CAJTW, *Administrative Justice: A Cornerstone of Social Justice In Wales: Reform priorities for the Fifth Assembly* (March 2016);

<https://gov.wales/docs/cabinetstatements/2016/160729cornerstoneofsocialjustice.pdf>

⁶ At para 86 – online at:

<https://gov.wales/docs/cabinetstatements/2016/160321Justicestakeholdergroupepreopen.pdf>

If there is to be any coherence to a Welsh approach to the administration of justice going forward, it will be necessary to review each of the devolved tribunals and ensure that they follow this set of principles in the appointment of their members, their methodology for operation and their approach to individual complaints. It is recommended that once the principles have been agreed, the devolved tribunals are reviewed against them and that when any new devolved legislation is envisaged the principles are taken into account in the drafting and setting up of any new redress or appeal systems. In undertaking such a review, it will be important to reflect on the approach and principles envisaged and to reflect on the impact of the differences in devolved and non-devolved tribunals, including accessibility, digitisation of operation and services and approach.⁷

9. The Welsh Government's (August 2016) response to CAJTW's proposed Principles of Administrative Justice stated that 'they [the Principles] closely reflect existing values and legislative provisions that inform working practices', but that they would 'provide a useful source of guidance to Government'. The Principles were not intended to be transformative, however as recognised by the Justice Stakeholder Group, they provide a checklist and framework for discussion ensuring that all relevant matters of administrative justice are expressly taken into consideration. They also provide the beginnings of benchmarking the performance of Welsh administrative justice institutions, including the Devolved Welsh Tribunals. The suggestion that the Principles reflect existing values and legislative provisions perhaps may partially miss their aim to provide a Code of Administrative Justice considerations, which inheres with the broader Welsh Government project to codify areas of public administrative law as a means of improving the accessibility of law, and with its access to justice.
10. Bangor research and CAJTW recommendations supported the establishment of senior judicial leadership for Welsh Tribunals, now incorporated in the guise of the President of Welsh Tribunals (s.60, Wales Act 2017). In carrying out the functions of that Office, the President could then consider the Principles developed by Bangor and CAJTW, including determining whether there is a case for incorporating an agreed set of Principles into provisions governing the practice and procedure of the Welsh Tribunals. Evidence from other jurisdictions, in particular Australia, demonstrates how important senior judicial leadership is to the formation of a distinctive identity and principled approach to tribunal systems.⁸ Some respondents to Bangor research suggested that the then proposed President of Welsh Tribunals role could be usefully expanded to give the President a degree of oversight responsibility across the broader developing Welsh administrative justice system.
11. The Bangor/CAJTW work, which seems to be supported by the Justice Stakeholder Group, also goes further in recommending that a coherent (and principled) approach be taken whenever new redress mechanisms (complaint

⁷ Ibid para 88.

⁸ For detailed comparative law research see Sarah Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press 2017).

and appeals processes) are developed by Assembly legislation. This is particularly important in the context of ad hoc schemes of redress to deal with particular, and often time limited issues (CAJTW cited as examples; redress in the context of the Discretionary Assistance Fund for Wales, the Independent Review of Determination Panels, Independent Appeals Process for Farmers and Forest Owners, and Continuing NHS Healthcare (CHC) Review Panels).

12. CAJTW recommended that: 'The Welsh Government introduces general guidance, standards for the operation of ad hoc redress schemes, that new redress schemes are reviewed by the Welsh Government's Justice Policy Team with legal support and that monitoring is in place to ensure conformity and consistency' (R28), and that there should be 'Straightforward, clear, consistent Wales-wide basis governance arrangements for ad hoc schemes' (R29). Welsh Government responded that providing means for fair, effective and proportionate redress is embedded into the initial stages of policy assessment involving the Justice Policy and Legal Services teams. However, it accepted that further consideration needs to be given to the benefits of developing and implementing Wales-wide standards and that whilst there are monitoring systems in place to review the operation of particular schemes, there is no mapped overview and it is not possible to be certain that all arrangements are monitored. Welsh Government concluded that CAJTW recommendations would need further exploration involving costs-benefit analysis.
13. Bangor/CAJTW work also noted a lack of awareness of administrative justice among elected representatives. CAJTW invited Welsh Ministers to communicate some recommendations of its Legacy Report to the National Assembly and Assembly Commission: (R32) that professional development in administrative justice issues is available for Committee chairs and supporting commission staff, that cross-party focus groups be offered for AMs (particularly about the link between administrative justice and constituency work), that Assembly Commission advice to members supports a coherent, principle-based approach to new and existing redress and appeal mechanisms, and that the National Assembly considers nominating a Committee to scrutinise the operation of Devolved Welsh Tribunals and ad hoc appeal schemes. The new Assembly Cross Party Group on Law would likely be a good forum for progressing the communication of these recommendations. Similarly the recently established Assembly Research Service Academic Fellowship Scheme could provide opportunities for further engagement on administrative justice issues.
14. Both CAJTW and the Justice Stakeholder Group recommended that a specialist advisory body on administrative justice should be retained, or at least be specifically considered for retention at the completion of CAJTW's tenure. Welsh Government noted that CAJTW's work was funded by the Ministry of Justice, with no current budget available to establish a successor body. There is perhaps something to take away from the fact that it was UK Ministry of Justice funding, via CAJTW, and networking assistance from the UK Administrative Justice Institute (UKAJI), that led to the development of an extensive and connected research community in the field of administrative

justice in Wales. That said, in terms of engagement with Welsh Government and access for researchers, the picture is a positive one of developing mutual co-operation, which appears somewhat contrary to the broader UK experience.⁹

15. The UK Administrative Justice and Tribunals Council (AJTC) Welsh Committee was succeeded in Wales by the CAJTW, and in the UK more broadly by an Administrative Justice Forum (AJF) hosted by the Ministry of Justice. The AJF has now been replaced with an Administrative Justice Council (AJC), a partnership between the Ministry of Justice and the charity JUSTICE. The AJC has an Academic Panel including academics from North and South Wales. However, the AJC remit is extremely broad and its resources are limited; the impact of devolution on administrative justice is one of many areas for examination. It is doubtful whether the AJC itself could devote significant resources to systematic oversight of administrative justice in Wales (and it has no statutory responsibility to do so, unlike the former AJTC).

Conclusions on Administrative Justice

16. A recent UKAJI blog post, reacting Ministry of Justice proposals for a new reconsideration mechanism to be introduced as a means of challenging Parole Board decisions, stated that:

Administrative justice is a way of examining how justice is accessed and administered, and using it as a lens through which to scrutinise issues of design helps us to read across the justice system and consider how principles of transparency, accountability, fairness, and human rights can be applied consistently. In that sense, the introduction of new appeal rights (or the loss of appeal rights) or new systems of internal review are ones to be considered through the lens of administrative justice.¹⁰

17. This is sage advice for the broader development of justice in Wales in the longer-term. Our recommendations should be understood in light of the importance of working with the grain of particular public bodies and legal specialities¹¹ (such as matters of housing, education and planning, but also in certain areas of criminal law or civil law), whilst also maximising the potential for learning across the piste. This is not to go so far as recommending a single administrative justice policy for Wales, or a completely codified administrative justice system (a single-system single-service, or purely one-stop shop type approach) but to advocate synergies where appropriate and to avoid unnecessary duplication of redress routes.

⁹ For access and engagement difficulties faced by UK researchers see, UK Administrative Justice Institute, *A Research Roadmap for Administrative Justice* (February 2018) - <https://ukaji.org/ukaji-research-roadmap-consultation/>

¹⁰ UKAJI, An example of how administrative justice design considerations apply across the justice system (1 May 2018) - <https://ukaji.org/2018/05/01/an-example-of-how-administrative-justice-design-considerations-apply-across-the-justice-system/>

¹¹ See Brian Thompson, 'Opportunities and Constraints: Reflections on Reforming Administrative Justice Within and Across the United Kingdom' (in *Administrative Justice in Wales and Comparative Perspectives*).

18. In this submission it is suggested that there are a number of practical measures that could improve awareness, principled consistency and coherence, in a Welsh approach to administrative justice without the need for a detailed root and branch Government review that would be costly and likely impracticable.

- There should be a permanent stakeholder group/committee of some form concerned with Justice in Wales, which should meet regularly and include explicit representation for the interests of administrative justice. Its work, including relevant publications and minutes of proceedings (where appropriate), should be published expeditiously and clearly accessible online. This group should also explicitly engage with the UK AJC.
- Consideration should be given to whether a particular National Assembly Committee could have a role in scrutinising the Devolved Welsh Tribunals and possibly other ad hoc Welsh appeal systems.
- The President of Welsh Tribunals could consider the case for incorporating some form of statement of Principles of Administrative Justice for Wales as part of his role in determining practice and procedure of Devolved Welsh Tribunals.
- The introduction of Justice Impact Assessments (s.11, Wales Act 2017) is an important step forward in potentially improving awareness of administrative justice concerns. Principles of Administrative Justice for Wales and Principles of redress design could be expressly taken into account in conducting such assessments.
- The recently established Assembly Cross Party Group on Law should be invited to receive regular information/presentations from the academic administrative justice research community in Wales (and comparative experts), particularly concerning the links between administrative justice and constituency work, and the importance of coherence and consistency in developing administrative redress mechanisms.
- Links between the Law Commission, Welsh Government, National Assembly and academic researchers in Wales should be maintained and where possible strengthened (perhaps through more formal knowledge exchange programmes). This would be particularly helpful in co-ordinating current research agendas on the subjects of internal administrative reviews within Welsh public bodies, and the Devolved Welsh Tribunals.
- Many of the recommendations above could be progressed and/or supported by the establishment of some form of Institute for Law and Justice in Wales. This would be a permanent body building on the work of the Legal Wales Foundation. At least some of its objectives could mirror (for justice in Wales as a whole not only administrative justice) the aims of UKAJI with respect to administrative justice. These are: to link policy, practice and research communities; to develop a coordinated research agenda; and to identify and tackle capacity constraints (the latter relating to a range of issues such as researcher expertise, accessibility of funding, access to Government departments and other bodies for research purposes, and constraints of the Research Excellence Framework (REF)). The Institute could be responsible for producing regular updates on Welsh law and Justice (similar to those provided for Northern Ireland by the Servicing the Legal System (SLS))

Programme established in 1980 at the Queen's University of Belfast which produced publications on various aspects of the law and legal system of Northern Ireland). However, this also provides a cautionary tale, as the SLS project seems to have been discontinued, and discussions with legal academics in Northern Ireland suggest that this is in part due to domestic legal analysis not being seen to meet the highest standards of significance under the REF (hence academics are disincentivised from doing this work).

Codification

19. The current project to consolidate/codify particular areas of Welsh public administrative law can be seen as central to improving access to administrative justice in Wales. This submission is not the forum for detailed discussion of these matters, but a crucial point is that codification should proceed by giving primacy to the concerns of the end users of legislation; specifically individuals as recipients of public body duties, and the public bodies on whom those duties are imposed. Administrative justice design thinking can be incorporated, particularly when consolidating/rationalising/codifying routes to administrative redress. There is great potential to improve access to justice, and the recommendations above would promote mutually beneficial engagement between academic researchers, legislators and other key stakeholders concerned with these issues.
20. There has been some discussion of whether Wales should ultimately adopt its own Administrative Procedure Code.¹² England and Wales remains one of few legal jurisdictions worldwide without an explicit Administrative Procedure Act (though there is key legislation (both primary and secondary) governing various aspects of administrative procedure). Advantages of such an Administrative Procedure Code for Wales could be to enhance efficiency and effectiveness of public body decision-making by ensuring the range of legal requirements are clearer and more easily accessible, it could improve coherence in decision-making and redress, and impact on the culture of public services decision-making. Difficulties lie in the degree of specificity with which such Code provisions should be stated, their inter-action with common law principles of administrative law applicable in Wales and England, and the devolution context (with the Administrative Procedure Code likely applying to Devolved Welsh Authorities but not to non-devolved public bodies operating in Wales). None of these difficulties are insurmountable.

Tribunals

21. There has been significant progress in the development of a more coherent approach to tribunal justice in Wales. The work of the AJTC Welsh Committee, CAJTW, the Welsh Tribunals Unit (WTU), the Justice Stakeholder

¹² See Nason and Gardner, 'The Administrative Court and Administrative Law in Wales and Comparative Perspectives' (in *Administrative Justice in Wales and Comparative Perspectives*) and David Gardner, 'An Administrative Law Code for Wales: Benefits to Reap and Obstacles to Overcome' (2018) *Statute Law Review*.

Group, Welsh Government Justice Policy Team, Bangor Law School, and the Wales Governance Centre, has led to substantial change. For example, the 2015 Bangor Research Report recommended the use of 'cross-ticketing' and assignment across the Welsh tribunals, innovative approaches to tribunal practices and procedures (specifically, greater use of inquisitorial method where appropriate), and supported continuing work to develop a more coherent approach to judicial appointments, training, administration, and practice and procedure where necessary. Many of these recommendations have been implemented either by Welsh Government and/or by legislative enactment in the Wales Act 2017.

22. The performance of the Devolved Welsh Tribunals, measured against yardsticks of fairness, accessibility, efficiency, effectiveness and professionalism, will be central to determining how successfully Wales could manage the further devolution of responsibility for the administration of justice.¹³ In that regard the recently proposed Law Commission project on Devolved Welsh Tribunals is to be welcomed. Some further findings of Bangor research into tribunal justice in Wales that may warrant more consideration are:

- Research respondents reported a perceived lack of confidence in the ability of the justice system as devolved to Wales to deliver processes and outcomes of comparable quality to those delivered by England and Wales combined institutions. It was also argued that a career as a tribunal judge in Wales is not often as attractive to the widest range of excellent candidates as a comparable career in England (and Wales) given the comparatively low caseload in Wales. Is there any evidence that this is still the case? What impacts might the Wales Act 2017 reforms have had in this regard?
- Respondents noted the importance of developing co-operative relationships not just across the Devolved Welsh Tribunals but also between devolved and non-devolved tribunals, what progress has been made in this regard?
- Respondents suggested that Devolved Welsh Tribunals have the capacity to take a more proactive role in engagement with public bodies, but it was argued that they sometimes lack sufficient teeth in terms of powers and procedures relating to enforcement of their orders and that this can damage a successful litigant's chances of realising any remedy they may have been awarded. Is this still the case? Can Devolved Welsh Tribunals be given more enforcement powers?

23. Since the previous AJTC Welsh Committee, CAJTW and Bangor recommendations there has been a notable improvement in the timely presentation of information about the individual Devolved Welsh Tribunals online. However, there appears to be no information about the Welsh Tribunals Unit (WTU), which is said to effectively provide a Tribunals Service for the Devolved Welsh Tribunals within its remit. Unlike HMCTS, and the Scottish and Northern Irish Courts and Tribunals Service, there is no specific WTU website (and no detailed information on the Welsh Government Justice

¹³ See e.g., Huw Pritchard, 'Building A Welsh Jurisdiction Through Administrative Justice' (in *Administrative Justice in Wales and Comparative Perspectives*).

page or the LawWales website). Whilst the WTU does not provide for the highest form of independence from Government, similar executive units have operated in other UK devolved jurisdictions, primarily as transitional provisions prior to the establishment of an independent tribunals' service. Some respondents to Bangor research expressed concern about the appearance of independence of the WTU, including its location in central Welsh Government offices (though no concerns were expressed as to its independence of operation in fact).

It is suggested that a website could be developed for the WTU clearly explaining its functions, structure and governance, and thought could be given to the presentation of annual (or quarterly) Devolved Welsh Tribunal statistics.

24. There are broader questions for the future about the structure of Welsh tribunals, in particular considering whether other tribunals operating in Wales (for example those administered by local authorities) could eventually be transferred-in to the WTU. Further consideration could also be given to the current appeal routes from Devolved Welsh Tribunals, in particular whether some appeals currently determined by the England and Wales Upper Tribunal could potentially be handled in the longer-term by the Administrative Court in Wales. As discussed below, the Court has potential to hear more Welsh cases, but there would be a range of concerns around ensuring the appropriate degree of legal specialisation (with tribunals having perhaps greater specific subject-matter expertise than can be offered by the Administrative Court – though transfer of judges goes some way to addressing this), and of not changing existing arrangements if they are considered to provide proportionate and efficient access to justice. Longer-term thought could also be given to the feasibility of establishing civil and administrative tribunals in Wales (along the lines of Australian 'CATs'), were responsibility for the administration of some aspects of civil justice to be devolved.

Welsh Public Law, Internal and External Complaints and Reviews

25. Much of the developing public law of Wales is designed to nudge individual behaviour for people's own benefit and for that of society. Various legislative developments have imposed new duties on public bodies in Wales to have 'due regard' to, or to 'take into account', specific considerations (most notably the rights of children and older persons, sustainable development, well-being and health impacts). Whilst there is no express administrative justice policy behind this legislation there are notable themes: protection of individuals through enhanced regulation rather than endowing them with specifically enforceable legal rights, an emphasis on internal review/complaints within public bodies, roles for various Commissioners' as the main administrative justice institutions with responsibility for enforcing duties, emphasising the importance of improving cultures within public body decision-making, programmatic learning from systematic investigations, and engaging civil society.

26. The ‘integrity’ branch institutions (including the Public Services Ombudsman for Wales (PSOW)) are key to this agenda and there is ongoing research into their functions that will not be examined in detail here. The Public Services Ombudsman (Wales) Bill is welcomed and many of its provisions were supported by Bangor research. There has, however, been an ongoing increase in enquiries/concerns to the PSOW, with some Welsh Commissioners also reporting an increased demand for individual casework. According to a presentation at the Public Law Project Wales Conference, a major issue for the Future Generations Commissioner has been fielding the large number of requests to deal with individual complaints that are not actually within the competence of the institution. Research relating to the Children’s Commissioner for Wales and Older Person’s Commissioner for Wales suggests that a significant proportion of complaints received appear to have been capable of being resolved within existing internal public body complaints/review procedures. These Commissioners also play a key role in signposting people to more relevant sources of assistance.¹⁴ Such evidence raises some doubts about the effectiveness and accessibility of existing internal complaint/review mechanisms, and about access to and awareness of relevant advice services.

27. The multiplicity of statutory public law duties and current lack of any mapped understanding of the terrain of internal administrative redress could be tackled in part by the process of codifying Welsh Law. For example, the 2014 Williams Report on *Public Service Governance and Delivery in Wales* recommended that the Assembly: ‘Review existing legislation to ensure that it simplifies and streamlines public-sector decision-making rather than imposing undue constraints on it or creating complexity; and either repeal such provisions or clarify their meaning and interaction’.¹⁵ Since then it is not clear whether such a review of legislation has taken place, and there have been a significant number of new duties imposed on public-body decision-making. In its response to the Williams Commission the Welsh Government noted that it would aim to ensure that ‘legislation brought forward in the Assembly...takes opportunities to simplify where possible and, where new duties are placed on public service partners, we are clear the benefits are a priority and justify that action. As part of developing our future legislative programme we will work with the Law Commission to explore opportunities to consolidate and simplify existing legislation in key areas’.

We suggest that the Law Commission proposals to examine internal administrative review practices (across England and Wales) are particularly important to administrative justice in Wales, as there is no mapped overview of administrative review (and complaint) processes in Wales despite their increasing prevalence. The Law Commission and Counsel General could engage with academic researchers and other stakeholders to develop a mapped overview which could then feed into codification programme proposals.

¹⁴ Ann Sherlock and John Williams, ‘The Children’s Commission for Wales and Older People’s Commissioner for Wales and the Administrative Justice System’ in *Administrative Justice and Comparative Perspectives*.

¹⁵ Para 2.37 online at: <https://www.lgcplus.com/Journals/2014/01/21/d/r/x/Commission-on-Public-Service-Governance-and-Delivery-Wales.pdf>

The Administrative Court in Wales and Public Law Legal Practice

28. The capacity to challenge Welsh public bodies in Wales, and to understand administrative law from a Welsh perspective, is constitutionally important,¹⁶ though judicial review in the Administrative Court is just the tip of the iceberg of public law redress.
29. According to Bangor research¹⁷ into civil judicial review applications, the Administrative Court Office (ACO) in Cardiff handled 1,029 applications between 1 May 2009 and 30 April 2016 (this is based on the 'current region' of the application at the time the research data was gathered so it includes claims issued in other ACOs and subsequently transferred to the Cardiff ACO). Of these applications, 391 (38%) concerned asylum and immigration issues. Other significant topics were town and country planning 133 (13%) police, prisons and parole 84 (8%), community care 45 (4%) and education 43 (4%).
30. Given the nuances involved in judicial review litigation, care must be taken not to draw conclusions that are too speculative, especially when the number of applications is comparatively small, as it is in Wales. There are unique considerations in the context of asylum and immigration judicial review and the majority of these claims are now determined by the Upper Tribunal Immigration and Asylum Chamber (UTIAC) not the Administrative Court. A large proportion of claimants in asylum and immigration claims are detained, meaning that different matters arise concerning the location of issuing their claims. The remainder of this submission focuses on ordinary civil judicial review (non-asylum and immigration claims).
31. Looking just at the number of issued claims handled by the Cardiff ACO only gives a partial picture of judicial review activity. Research suggests that at least 50% of enquiries to solicitors about possible public law illegality do not result in the issue of a judicial review application (for a range of reasons, including lack of legal merit, that the matter has been resolved by a range of alternative means, or that the costs and stress of litigation are considered too high).¹⁸ Many claims are also settled and withdrawn before final determination. Of the 605 ordinary civil judicial review applications handled by the Cardiff ACO between 2009 to 2015,¹⁹ Ministry of Justice data shows that 103 resulted in a final substantive hearing.²⁰ Some 20% were withdrawn

¹⁶ See e.g., David Gardner, *Administrative Law and the Administrative Court in Wales* (University of Wales Press 2016).

¹⁷ Based on Administrative Court Office (ACO) data extracted from the Crown Office Information Network (COINS) on various dates across the years.

¹⁸ See e.g., Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing* (Public Law Project 2009) and Sarah Nason and Maurice Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76(2) *MLR* 223

¹⁹ Looking also at 2016 and 2017 data here would likely be misleading as a larger proportion of claims for these years are still active – the data analysis above only includes closed claims.

²⁰ From Ministry of Justice Statistics - <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly>

before a permission decision (compared to 26% across the Administrative Court as a whole), 68% were refused permission either at first instance or on renewal (compared 67% across the Administrative Court as a whole), 34% were withdrawn after permission and prior to a substantive hearing (compared to 50% across the Administrative Court as a whole) and 33% of claimants were granted a remedy (compared to 37% across the Administrative Court as a whole). It seems then that when claims are handled by the Cardiff ACO they are less likely with be withdrawn either pre or post-permission than the average for the whole Administrative Court, and that claimant success rates at final substantive hearing in Cardiff have been slightly lower than the Administrative Court average. This data should be understood alongside previous research findings that the majority of Administrative Court ordinary civil judicial review claims withdrawn at various stages are settled in favour of the claimant (though there is no up to date Wales specific evidence on the outcomes of withdrawn claims).²¹ It is possible that these lower withdrawal rates in Wales could be linked to a potentially higher proportion of unrepresented litigants who might find it more difficult to bargain for earlier settlement of their claims, or that lawyers have less experience of negotiating settlement, and/or perhaps this can be explained in part by public body cultures. This is clearly an area in need of further research.

32. Unlike the other England and Wales ACOs, the Cardiff ACO is explicitly responsible for administering claims originating from two geographical Court Circuit regions, the Wales Circuit, and the geographical region covered by the Western HMCTS Circuit. We estimate that some 50% of ordinary civil judicial review applications received by the ACO in Cardiff relate to legal matters originating outside Wales, primarily from the Western Circuit with some originating from the Midlands and other regions.
33. There is no single reliable method for estimating what proportion of claims in the Cardiff ACO relate to Wales as claimant addresses are not recorded for all applications, and even where they are they cannot be taken as determinative of the location of the legal issues arising. This data should also be treated with caution as claimant addresses are more likely to be recorded where the claimant issues as an unrepresented litigant – a Litigant in Person (LIP). In ordinary civil judicial review claims handled by the Cardiff ACO across the Bangor research period (1 May 2009 to 30 April 2016), 33% of applications (211 claims) were issued by claimants who remained as LIPs throughout. This is higher than the average figure for the Administrative Court as a whole of 26% across that period - the highest LIP numbers in Cardiff were recorded in 2011/12 to 2013/14 with a maximum of 43% of applications involving LIPs in 2013/14. These figures have since fallen to 20% in 2014/15 and 28% in 2015/16 - lower than the Administrative Court averages of 30% and 32% respectively in those years. Of all the ordinary civil LIP claims handled by the Cardiff ACO, 66% of claimant addresses (a total of 140 applications) were within Wales. It does seem then that Welsh claimants in the Cardiff ACO are more likely to be unrepresented than their South West of England counterparts. However, it is difficult to get a clear picture of whether Welsh

²¹ See Bondy and Sunkin, *Dynamics* (n 18).

claimants are any more or less likely to be unrepresented than English litigants across the Administrative Court, as where a claimant is represented often it is only their solicitor's details and not their own address that is recorded so we cannot be certain of the total number of Welsh claimants (or indeed claimants from particular English regions) in order to determine what proportion are unrepresented.

34. The details of the defendant also do not provide an accurate picture of whether a claim relates to Wales, as often only the defendant solicitor's details are recorded. Nevertheless, here we attempt to build a picture by looking at the number of claims across the Administrative Court issued by claimants with addresses in Wales, and the number of claims in which solicitors based in Wales have been instructed to act for claimants.
35. Between 1 May 2009 and 30 April 2016, the addresses of claimants with ordinary civil judicial review applications handled by the Cardiff ACO were available for 470 out of 639 applications.²² Based on this data 53% (249 claimants) gave addresses in Wales, the majority of the remainder came from the South West of England. In this same period, 67 claimants with given addresses in Wales issued in other ACOs, most notably in London and Manchester (certain topics of claim can only be determined in London). Only 17 of these 67 applications appear to have been subsequently transferred to Cardiff based on the Bangor data. This does not then suggest that there is a widespread practice of claimants with addresses in Wales issuing their cases in an inappropriate location, at least as far as ordinary civil judicial review claims where claimant addresses are available are concerned. However, the ACO in Cardiff may have more sophisticated data on this and the picture could look different when cases where claimant address details are not available, criminal judicial review cases, and asylum and immigration judicial review cases, are also taken into account.
36. Of all the claimants in ordinary civil judicial review across the Administrative Court with given addresses in Wales (those issuing in Wales and those issuing in other locations); 142 (48%) remained as LIPs, 96 (32%) instructed solicitors based in Wales and 58 (20)% instructed solicitors based elsewhere.
37. Looking in more detail at legal representatives, from 1 May 2009 to 30 April 2016, a total of 252 different firms of solicitors and organisations (the latter mostly being charities) represented claimants in 398 ordinary civil judicial review applications in the Cardiff ACO. Of these claims, 37% (149 applications) were handled by solicitors based in Wales (a total of 57 different Welsh firms and organisations). Across the Administrative Court as a whole, 244 claims involved solicitors based in Wales acting for claimants – therefore Welsh solicitors were instructed in 95 claims handled by ACOs outside Wales. If we look back to 2007/2008, before a fully operative Administrative Court was established in Cardiff, solicitors based in Wales were instructed in 30 ordinary civil judicial review claims issued in the Administrative Court in

²² This does not include claimants detained in prisons or young offenders institutes where, as with asylum and immigration detained claimants, different considerations arise around the location of issue and determination of the application.

London in that year. In 2015/16, the 7th year after the Cardiff Administrative Court was established, Welsh solicitors were instructed by claimants in 25 ordinary civil judicial review applications across the whole Administrative Court. These are very small numbers, but we can at least say that there has been no significant increase in the specific judicial review litigation activity of Welsh lawyers since 2007/08. However, much has been done more recently to raise awareness of the public law of Wales, including the renaissance of Public Law Wales,²³ by the ACO in Wales (with Administrative Court in Wales Lectures and User Group Meetings), and by a series of University of Wales Press publications. It may be that public law practice in Wales (short of final recourse to the Administrative Court) is more well-developed than court data alone suggests. Many public lawyers are keen to avoid litigation so far as possible and to resolve their client's issues before resort to the courts.

38. A comparative assessment of the number of judicial review claims issued per head of population across Wales and the English regions may help in assessing access to administrative justice in Wales. However, this is difficult to determine accurately because where the claimant is represented their address is often not recorded, the location of issue is not always determinative of the location of the claim, and defendant information is not always sufficient to fill in any gaps. Broadly, however, if we conclude that approximately 50% of Cardiff ACO business relates to Wales and that all business in the London ACO relates to London and the South East of England, then the number of claims per head of the adult (over 18) population from London and South East England are roughly 6 times as high as claims per head of the adult population of Wales. This is an over estimate of London and South East claims as a proportion of London ACO business will necessarily stem from the other English regions and Wales, but nevertheless we can still conclude that claim rates in Wales per head of population are much smaller. Again, assuming that all Leeds, Manchester and Birmingham ACO claims stem from their allied geographical Circuit regions (which we know is not quite the case), these areas of England also produce more claims per head of population than Wales, though the difference is far less stark than when comparing Wales to London and the South East of England.

39. In general, we can conclude that there has been an increase in Welsh judicial review claims since the earliest findings of Bangor research in 2007/08, but much of this seems to come from an increase in the number of claims issued by LIPs in Wales (at least up until 2013/14). Though it is hard to conclude accurately, and the picture changes over time, there is some evidence to suggest that in particular years the proportion of Welsh claimants who were unrepresented has been higher than across the Administrative Court as a whole. When this is coupled with expressed concerns about comparatively limited provision of legal aid funded public law advice in Wales (see for example separate evidence to the Justice Commission from Ian Winrow – Bangor Law School/CAB Cymru) it may indicate an access to justice problem

²³ A society promoting in Wales, discussion, education and research relating to public law and human rights; and promoting expertise amongst lawyers practising in Wales in the fields of public law and human rights.

that could be tackled by further developing access to public law legal services in Wales.

40. There has been a reduction in the number of ordinary civil judicial review claims issued across the Administrative Court as a whole since around 2013/14, though numbers have picked up again slightly since 2015/16. We can speculate that this is at least partly due to legal aid reforms introduced by the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012, related regulations, and reforms to judicial review procedure. Further research is needed here, particularly to determine whether these changes have had differential impacts across the various Court Service regions in England, and in Wales.
41. Wales specific public law duties are yet to be litigated in the Administrative Court. There has been no successful judicial review concerning the duty to have 'due regard' to the UNCRC. Michael Imperato (of Watkins and Gunn) noted to the Public Law Project Wales Conference that he has not yet been granted permission to raise the issue in judicial review proceedings.²⁴ There has been no reported case in which Welsh-specific equality regulations have been litigated. A sample of Administrative Court in Wales substantive judgments analysed for this submission²⁵ demonstrates that cases reaching final hearings largely relate to public service issues such as local authority care (and closure of care homes), public libraries, hospital and pharmacy closures (and hospital reorganisation), schools reorganisation and closures, and planning issues (notably environmental issues concerning the protection of habitats). Compared to the England and Wales Administrative Court as a whole there are understandably fewer immigration and asylum cases (which are a large part of the whole Court's caseload). However, there are also fewer examples of what can be called 'individualised administrative justice'; challenges relating to single instances of decision-making affecting a sole claimant, usually confined to their own facts and often turning either on the interpretation of a specific statutory provision or the substantive 'reasonableness' of the defendant's decision.²⁶ Without wanting to speculate too much, there is a concern then that people in Wales are less able to successfully use the judicial review procedure to secure a remedy for specific individual grievances, than is the case for use of judicial review across the Administrative Court as a whole.
42. This more limited use of judicial review also appears to be reflected in the specific case of public procurement. Quantitative research for the period 2009-2015 throws light on the frequency and distribution of public procurement law legal challenges instigated in Wales, in comparison to the

²⁴ Public Law Project Wales Conference, *Promoting Equalities for a Fairer and More Equal Wales*, 26 March 2018.

²⁵ Searching Westlaw for cases decided by the Administrative Court in Wales results in 24 substantive judgments (there have in fact been over 100 substantive decisions of the Administrative Court in Wales since its establishment in 2009, many of these are reported on Westlaw but are not explicitly recorded as Administrative Court in Wales judgments – a little more research time is required to analyse all these).

²⁶ A category I develop in Sarah Nason, *Reconstructing Judicial Review* (Hart Publishing 2016) chapter 7.

rest of the UK.²⁷ During this exploratory study Freedom of Information (FOI) requests were issued to every local government body in England, Wales, Scotland and Northern Ireland, requesting data from 2009 to October 2015. A total of 370 bodies responded within the confines of an FOI request (amounting to a response rate of 91%). The findings of this research indicate that Wales, compared to other regions in the UK, has amongst the fewest challenges to its public procurement award decisions within local government. When collectively accounting for the responses from all regions as to the number of all public procurement challenges they had received, for all years between 2009 and 2015; Scotland had 89 legal challenges, the highest region nationally, followed by London with 54 challenges; and East Midlands with 52 challenges. By contrast, according to the data received, the regions with comparatively few legal challenges are Wales with 12 challenges; the West Midlands with 20 challenges; and the North West of England with 23.

43. Across the 370 Local Councils who responded to the request, the average number of challenges per year, per region was six challenges, equating to 0.2 legal challenges per Local Council per year. The highest number of legal challenges received within a single year was 22 which occurred in Scotland in 2014, closely followed by 18 challenges in Scotland again in 2013, and a similar figure in London and the East Midlands in 2014. The reason for this high density of legal challenges in specific regions with large cities could be explained by the high concentration of public procurement legal expertise, and in turn the appropriate specialist legal advice an aggrieved party can receive, within these regions. By contrast challenges to Welsh local government consistently fell below the UK average (year on year) for the number of challenges received. The *Winning in Tendering* project conducted empirical investigations to understand the experiences of economic operators in Wales. These findings go some way to explaining the lack of challenge culture in Wales.²⁸ Based on this research, some reasons for comparatively fewer public procurement legal challenges in Wales could be:

- a. Lack of awareness as to the legal possibilities and processes involved.
- b. An absence of public procurement law expertise across Wales; specialist lawyers are largely based in Cardiff, or the big cities across the border in England. Wales does have a specialist centre of academic expertise (Bangor's Institute for Competition and Procurement Studies, which offers an LLM in Procurement Law studies), yet neither the solicitors profession nor the Welsh bar is currently taking any effective steps to develop this field in Wales.
- c. Concern about the cost of challenging a public procurement decision: for SMEs the time and potential financial outlay for challenging a

²⁷ S Clear and D Cahill, 'Mapping the Frequency and Distribution of Judicial Review in Resolving Public Procurement Disputes' (2018 – *Publication forthcoming*, email s.clear@bangor.ac.uk for details).

²⁸ See e.g., the 'Public Procurement Remedies Regime Package' offered as part of the Institute for Competition and Procurement Studies (Bangor University)'s INTERREG Winning in Tendering project. Details available at: <<http://www.icps.bangor.ac.uk/public-procurement-remedies-regimes.php>>

decision might be unsustainable; particularly when the outcome is highly speculative.

- d. Concern about 'biting the hand that feeds you', is still prevalent in Wales. In the absence of procurement specialist lawyers offering reassurance that economic operators cannot be subject to future discriminatory treatment for choosing to challenge a procurement decision, the prevailing thought may be one of being better to err on the side of caution (and not challenge), even when the company may feel the outcome is unfair.

Conclusions on public law legal challenge rates

A general public service culture and deference to public bodies might be a partial reason for lower rates of public law legal challenges in Wales, as might issues around lack of access to affordable legal advice and lack of awareness of relevant law. On the other hand, satisfaction with public services provision in Wales is slightly higher than the UK average, this might imply that people in Wales have less reason to challenge decisions, though the number of enquiries/concerns raised with the PSOW and Welsh Commissioners seems to undercut this point. Proposals to address these issues could include a revised approach to public law legal aid provision in Wales, and continuing to improve awareness of Welsh public law.

Some 'Jagged-edges' of Devolution

Administrative redress: regulation rather than rights, advice and legal aid

44. Administrative justice in Wales has taken a regulatory rather than legal rights framework, though it is hard to say whether this has any specific connection to the fact that responsibility for the administration of the courts is not devolved. The choice to create new integrity branch institutions rather than to task courts with the enforcement of new duties on public bodies may be a policy choice not especially connected to the broader reservation of 'justice'. As can be seen from the evidence above it appears to be broadly the case that the courts are little used institutions as far as administrative justice in Wales is concerned (see the Administrative Court above, but also for example, local authority respondents to Salford University research reported only four appeals to the County Courts regarding housing and homelessness decisions under the Housing (Wales) Act 2014 from the Act's implementation in April 2015 to the Salford research period (4 July 2016 - 25 August 2016)).²⁹
45. Another 'jagged-edge' cited by respondents to various Bangor research is non-devolved legal aid. It has been argued that the legal aid system in public law has in the past been largely based on the needs of Southern England.³⁰ Whilst legal aid remains available for judicial review claims, regulations surrounding when payments will be made and for what work, are likely to

²⁹ Anya Ahmed et al, *Post-implementation evaluation of Part 2 of the Housing Act (Wales) 2014: Interim Report* (August 2017) 104-106. <https://gov.wales/docs/caecd/research/2017/170808-post-implementation-evaluation-homelessness-legislation-interim-en.pdf>

³⁰ See the Bangor Research Report 2015 and also Nason and Sunkin, *Regionalisation* (n 20) above.

have disincentivised some lawyers from taking on legal aid funded judicial review claimants (especially in more complex cases). Legal aid can be linked more specifically to adversarial procedures and it could be argued that the more the Devolved Welsh Tribunals develop inquisitorial procedures the less important legal aid will be at least to these institutions. However, research (in England) has suggested that even in internal public body administrative reviews (where legal advice is not thought to be necessary) represented claimants are either more likely to be successful, and/or there are advantages for the public body of having lawyers present in terms of improving its performance for the future (there is no research of this kind relating to Welsh public bodies).

Addressing some of the judicial gatekeeping gaps in the slow walk from devolved to federal government

46. The direction and future shape of the Wales' constitutional settlement is the subject of considerable and worthy academic discourse, but in the meantime some Wales based citizens continue to campaign for better judicial responses to historical grievances that predated, and have continued under devolved arrangements. *In Search for Accountability*,³¹ frequently referred to as either the Flynn³² or Jasmine Report,³³ examined a series of events and allegations of abuse at Care and Nursing Homes in south east Wales. Despite the publicity and concerns which the Report engendered, the *Justice for Jasmine* families are still having to carry on the 'good fight' in the hope that they, like their Liverpool counterparts in relation to Hillsborough,³⁴ can someday access effective and responsive adjudication (a number of Jasmine families, are still waiting and fighting for the prospect of Inquests). Though the south Wales families have had some assistance from a London-based firm working *pro bono*, they are still all but 'Walking Alone'!
47. The Report has had a significant impact on practice in medical/nursing care (e.g., new protocols have been adopted across the UK in relation to the management and recording of pressure sores). It has also impacted on inspection practice,³⁵ with the subsequent introduction of legislation (the Regulation and Inspection of Social Care (Wales) Act 2016), but to date its

³¹ *In Search of Accountability*; A review of the neglect of older people in care homes investigated as Operation Jasmine, Margaret Flynn, OGL, WG5658, May 2015. Full and Executive summaries are available See: <https://gov.wales/topics/health/publications/socialcare/reports/accountability/?lang=en>

³² Dr Margaret Flynn currently Chairs the Safeguarding Board set up to oversee the protection of adults and children in Wales Health and Social Services.

³³ Operation Jasmine was a major investigation by Gwent Police into historical events and alleged abuses in care and nursing homes for older people in South East Wales. It began in 2005 and ended with a halted trial in 2013.

³⁴ Similarities can be drawn in relation to the experiences of the families who have been campaigning for justice. A total of 93 people died as a result of the injuries sustained at Hillsborough. In relation to Jasmine, Gwent Police identified 63 people whose deaths were deemed suspicious. See, *In Search of Accountability*, p.228.

³⁵ See e.g. Care Inspectorate Wales, 'Response to Flynn Report', 14, July, 2015.

impact on mainstream judicial intervention has been underwhelming. The legal issues are discussed in some detail in Chapter 12 of the Report. The content not only includes comments and discussion relating to potential criminal and civil remedies, but also makes suggestions in relation to corporate social responsibility in view of the obvious public interest and stakeholder contribution to adult social care and protection. Some of the unaddressed frustrations and deficits highlighted in the Report have relevance to the political and judicial challenges engendered by the traditional divisions of judicial intervention (public/private & criminal/civil). Moreover, it is arguable that the limited and somewhat disappointing impact of the Report to date provides strong indirect evidence for the claim that the fault lines between the legal systems are confined to remain underground because of the fractured political and judicial landscape that characterises devolution, particularly in the form provided for under a conferred powers model.³⁶ The misery that Jasmine exposed should have been the earthquake that reminds onlookers of the need for co-ordinated emergency aid, and the need for urgent action to mitigate the possibility of future disasters. The shift towards a reserved powers model, which essentially represents a half-way house between federal and devolved arrangements, could conceivably speed up and facilitate mitigation measures so that the adaptability of frail individuals and their relatives is not tested to destruction. A presumption in favour of freedom for a devolved body to legislate, as suggested elsewhere,³⁷ closes down the list of 'silent subjects'.³⁸ Be that as it may, there will always be a need to manage the interface between the legal issues and/or the judicial infrastructure. Discourse in relation to structural issues is ongoing with some momentum, for instance, in promoting increased Codification. Another, but more remote possibility, might be the recognition of the advantages of establishing supervisory Constitutional Courts.³⁹ In essence the fundamental need is to bridge the crossover binary boundary issues, and in reality the solution may be multi-faceted. In some cases, however, the issues are substantive and require consideration of expert jurists. Jasmine for instance, advocated changes in law which straddled public and private law across commercial and welfare law provisions.⁴⁰ Indeed, it seems that Carwyn Jones as First Minister, was probably persuaded of the need, as the matter was referred to the Law Commission (of England and Wales) for consideration.⁴¹

³⁶ See e.g. Richard Rawlings 'The strange reconstitution of Wales' [2018] *Public Law* 62.

³⁷ Gwynedd Parry argues that: "...there is no underlying principle which determines in a rational or logical way what matters could be legislated for by the National Assembly in Cardiff, and what should be reserved for the Westminster Parliament. For example, one cannot detect in the Wales Act 2017 a presumption in favour of devolution unless a matter is more appropriately legislated by a Parliament or the state. The subsidiarity principle would have offered a sound and principled basis for the devolution of legislative powers, a principle which implicitly appears to operate in the context of Scotland and Northern Ireland." 'Is breaking up hard to do? The case for a separate Welsh jurisdiction' (2017) 57 *Irish Jurist* 61.

³⁸ Re Agricultural Sector (Wales) Bill, [2014] UKSC 43 per Lord Thomas.

³⁹ See e.g. Charles Manga Fomba, 'Designing institutions and mechanisms for the implementation and enforcement of the constitution changing perspectives in Africa' (2017) 25(1) *AJICL* 66.

⁴⁰ In Search of Accountability, pp.199-202.

⁴¹ Welsh Government Response to the Flynn Report, 06/October, 2015. Recommendation 12 - the Law Commission reviews the current legal position in relation to private companies with particular relevance to the corporate governance of the residential and nursing care sector.

48. Whilst conscious of the need not to trespass into politics, it would be naïve not to ground and comment on some of the difficulties and disappointments relating to both the investigation and subsequent follow up. The separate binary responsibilities for justice at Westminster and health and social care at Cardiff may have had an impact. Others have commented on the constrained nature of Inquiries, including Public Inquiries undertaken by devolved governments,⁴² and a reading of the Flynn Report illustrates how difficult it was to engage non-devolved agencies in the investigation process. See, for instance page 73 and Appendix 4, where it is noted that the Crown Prosecution declined to meet the investigator and outlined their position in correspondence. The cost of the Police investigation was high⁴³ and no estimates are available as to the substantial costs that would have been incurred had any prosecutions been undertaken. Suffice it to note that recent annual reports have commented on the overall reduction of CPS budgets over a period of years,⁴⁴ and that it is not currently within the gift of devolved government in Wales to agree to virements to promote justice irrespective of the sense of grievance and widespread public concern.

Jurisdiction and the growth of diverse substantive law post devolution

49. Much has been written by acknowledged expert academics about the concept and progress in the direction of separate jurisdiction,⁴⁵ including the suggestion that Codification may be a partial solution to the 'patchwork' of law from diverging sources and the difficulties associated with navigating the scattered nature of the provisions. Bangor academic experiences of writing, publishing and teaching in the field of health and social care confirms the complexity and diversity of law in this context,⁴⁶ and the danger that in future students, and legal, health, health/social care practitioners in Wales, may be left bereft of informative academic texts in this crucially important and culturally sensitive area of law. The previous practice of publishing dual and comparative texts in this context has been abandoned on the basis of viability and practicality.⁴⁷ Clements, for instance, author of the leading and most detailed text on Community Care in his latest edition, (6th 2017) simply notes in the preface that the publication does not cover Wales. Earlier editions had done so, with the 5th edition, for instance including no less than four pages of index references to divergent provisions between England and Wales. The breadth of difference is only properly understood on realisation that the earlier

⁴² Jack Simson Caird and Mark Sandford, 'Statutory commissions: the Inquiries Act 2005', Briefing Paper, number SN064 10, 30 January 2018. See for instance, the Penrose Inquiry (2008-15), it could not compel witnesses outside Scotland to attend.

⁴³ The Police Investigation deployed 75 officers at a cost of £15 million pounds.

⁴⁴ Jaqueline Beard and Grahame Allen, 'Funding of Crown Prosecution Service', House of Commons, Debate Pack, number CDP-2017-0002, 9 January 2017.

⁴⁵ See e.g., 'Evidence to the Assembly Constitutional and Legislative Affairs Committee, Inquiry into the establishment of a separate Welsh jurisdiction,' by Professor Thomas Glyn Watkin (CLA WJ 16).

⁴⁶ See Gofal 1 & 2, (2008), Care Council of Wales; Aled Griffiths and Carys Aaron, 'Measuring a Measure: Much Ado about £50 a week?', 33(2) *Statute Law Review* 281. The authors argue that in the important field of social care, Wales has shown great ambition and determination in "cultivating its own legal landscape". The impact and complexity associated with quasi-law in this context are also discussed.

⁴⁷ Clements and Thompson, *Community Care and the Law*, 5th edn (LAG 2011).

edition was published prior to the separate enactments of major legislation; in Wales, the Social Services and Well-being (Wales) Act 2014 and, in England, the Care Act 2014. Other Wales based authors, writing about Adult Social Care, have confined their focus to England.⁴⁸ Similar developments are likely to arise in relation to child care and other key areas of devolved law-making. In a recent article, Julia Anna Bargenda and Shona Wilson Stark note that there may be some connection between the pull of codification and the lack of relevant legal commentary. They propose:

In Wales, the case for codification to carve out a national identity is more compelling because it could be said that Wales now has its own “living system of law” after losing its legal identity centuries ago. In addition, Welsh lawyers have a dearth of textbooks to look to for guidance when the law is unclear. Having “so many excellent textbooks” has been cited as a reason why codification is not needed in Scotland. The best textbooks provide accessible digests of the law which cut down the time needed to wade through all the primary sources.⁴⁹

To ensure that Wales benefits from the best of both worlds (and doesn't suffer from the worst of them) in terms of the relationship between legislative codes and academic/practitioner commentary, there has to be a clear partnership between legislators, practitioners and academic lawyers going forward. We stress that the pressing need to facilitate and fund academic writing about Legal Wales must be addressed, and that creative solutions should be explored.

Reporting mechanisms in international human rights law

50. A specific ‘jagged-edge’ exposed by Bangor Law School research is the context of public international law. A distinctive aspect of Welsh public law is the incorporation of specific public international law based duties (e.g., to have due regard to the UNCRC and the UN Convention on the Rights of Older Persons), this also relates also to administrative justice as these duties are largely enforced by Welsh Commissioners.

51. More generally, as the sovereign State, the UK can ratify international agreements on behalf of the devolved countries. This provides that it may sometimes ratify agreements that relate to or impact devolved matters. In such cases, proper consultation with the devolved countries is essential to ensure that their interests are represented and that the constitutionality of the devolution settlement is not thrown off balance. In order to carry out such consultation, a full appreciation of the devolution settlement is required. It is essential that the UK Government have knowledge of devolved powers, how things may operate differently in the devolved countries, and the ability to collaborate effectively with the institutions in those countries.

⁴⁸ John Williams, Gwyneth Roberts, and Aled Griffiths, *Adult Social Care in England* (Palgrave-macmillan 2014).

⁴⁹ Bargenda and Wilson Stark, ‘The Legal Holy Grail? German lessons on codification for a fragmented Britain’ (2018) 22(2) *Edinburgh Law Review* 183.

52. As the State party, the UK also ultimately holds the responsibility to ensure compliance with any resulting obligations from ratified agreements. This is true of any treaty, but many UN human rights treaties in particular have a specific monitoring and reporting processes to ensure States meet their obligations. In the UK, the practical execution of many of these obligations may be devolved, therefore when reporting it is vital that the UK Government accurately represents the complete UK situation to the relevant UN supervisory committee so that the committee may form appropriate observations/recommendations. It is the responsibility of the UK Government, as the State party to a treaty, to ensure that it establishes and follows a procedure that allows for this to take place.
53. A Bangor Law School project specifically examined the recent review of the UK's performance under the UNCRC, but its findings have relevance to the monitoring of other international human rights treaties. The UK is required to report (in written form and orally) to the Committee on the Rights of the Child, which then issues a set of concluding observations. Initial findings suggest that the final written State party report, while more robust in this regard than earlier draft versions, continued to misrepresent specific England and Wales matters as being UK-wide.⁵⁰ During the oral evidence stage, initial research findings suggest two areas of concern. First, replies to Committee questions were at times disproportionately England-focussed,⁵¹ for example, Ofsted is mentioned numerous times in the oral evidence as an example of good practice - monitoring policies or holding schools to account - when the body relates only to England. The performance of the Education and Training Inspectorate in Northern Ireland, Her Majesty's Inspectorate of Education in Scotland, and Estyn in Wales in similar areas, however, went unmentioned. The Children's Commissioners for Scotland and Northern Ireland both expressed disappointment at the imbalance in oral evidence presented by the UK delegation. Second, the UK Delegation appeared on at least one occasion to be ill-informed as to the breakdown of responsibilities between UK/devolved institutions. An example of this is illustrated by the delegation's handling of a question on S4C, the Welsh language broadcaster. Broadcasting is a non-devolved area and budget cuts were decided on by the UK Government. The question should therefore have been answered by a UK official with knowledge of the policy and decisions of the Department of Culture, Media and Sport. However, the Chair of the UK Delegation erroneously fielded this question to the sole Welsh Government representative in the delegation, Jo-Anne Daniel (Director for Communities and Tackling Poverty, Education and Public Services Group). Ms Daniel did point out that funding for S4C was the responsibility of the UK Government before proceeding with a vague reply about the Welsh Government's support

⁵⁰ Together, *Submission to the UK Parliamentary Joint Committee on Human Rights Inquiry into the UK's compliance with the UN Convention on the Rights of the Child*, ROC (14-15) 021.

⁵¹ See Letter (and response) from the Chair to Tam Baillie, Children and Young People's Commissioner, Scotland, regarding Children's Rights, 23 August 2016, <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/childrens-rights-16-17/>, Letter (and response) from the Chair to Kouilla Yiasouma, Commissioner for Children and Young People, Northern Ireland, regarding Children's Rights, 23 August 2016, <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/childrens-rights-16-17/>

for S4C and the Welsh language generally. The response thus failed to address the question posed by the Committee and allowed the UK officials to avoid offering an explanation for how the UK Government intends to ensure protection for the rights of children in Wales in this important area. The implications of failing to give evidence pertaining to the way that a particular devolved matter is dealt with by the devolved administrations are clear. Should there be areas in the devolved nations where the UNCRC is not appropriately complied with, then these matters will not be brought to the attention of the Committee. This in turn could skew the Concluding Observations of the Committee where a possibly necessary recommendation relating to the rights of Northern Ireland, Scottish or Welsh children would not be made. The Bangor research recommended that the UK Government establish a robust and comprehensive procedure to ensure each country in the UK is fully engaged and represented in terms of international human rights reporting mechanisms. We can see here that failure to fully appreciate the devolution context can impact on securing justice in Wales based on Wales' performance of its international obligations.

Legal Education

54. Our discussion of legal education focuses mainly on the possible impacts of Brexit and the importance of an internationalised outlook to legal education in Wales. There are understandable student concerns that were the curricula of Welsh University Law Schools to devote additional space to reflecting the law in Wales, such should not be achieved at the expense of more European and internationally focused subject matter. The introduction of the Solicitors Qualifying Exam (SQE) also requires University Law Schools to rethink the distinctiveness of their offerings and this will clearly be an ongoing process.
55. Bangor Law School was established with the vision that its courses would be significantly focused on reflecting developing Welsh law (primarily in relation to public law subjects in the first year of the degree), expanding to European law in the second year, and Public International Law in the final year (Public International Law was originally a compulsory subject on the Bangor Law degree and remains a highly popular module).⁵² Whilst the demands of the market for legal services, professional regulation and technological developments have altered the make-up of Bangor's provision (with a broad range of new modules on offer) the ethos of commitment to reflecting the concerns of Wales in Europe and of Wales in the international community remains. This commitment to reflecting Welsh concerns need not necessarily conflict with providing an internationalised legal education which is a major asset to the Welsh economy.
56. Recent commissioned work by Universities UK indicates that universities generate approximately £95 billion towards the UK's economy, and support more than 940,000 jobs (both directly and indirectly).⁵³ Direct contributions are estimated to account for £21.5 billion (or 1.2 percent of GDP); such is a 22

⁵² This was the vision of the School's founding professor, Professor Thomas Glyn Watkin.

⁵³ Andy Logan, 'The Economic Impact of Universities in 2014-15' (Oxford Economics and Universities UK, October 2017)

percent greater contribution than that produced by the whole UK accountancy sector, and almost 50 percent more than the contribution made by the advertising and marketing research industries.⁵⁴ Of this £95 billion, it is estimated that £25 billion is directly attributable to international students, both other EU, and international (non-EU) learners.⁵⁵ Universities UK analysis claims that students from the rest of the EU, spend money and create jobs in all corners of the UK, including Wales.⁵⁶ This is in addition to the estimated £730 million a year of EU money that is spent on research and development via universities.⁵⁷ This equates to 15% more funding from the EU, in addition to that provided to universities by the UK Government (this represents at least 2.6% of the total income of UK universities, or around 16% of their total research income). In quantifying such financial contributions, HESA statistics show that of the 2,317,800 students studying in the UK; 134,835, or 6%, are from other European Union countries; with a further 307,540, or 13%, from elsewhere in the world. Specifically in Wales, between 2012/13 and 2016/17 HE student enrolment has fluctuated around 100,000 students per year, with latest figures totalling 98,485.⁵⁸ Of this 6,235, or 6.3%, are from other European Union countries; and 14,970, or 15.2%, from elsewhere worldwide. Combined, Welsh universities have 21.5% non-UK students directly contributing to their income (a figure which is higher than the overall UK average).

57. Amongst these numbers, law, and law related studies, are consistently acknowledged as one of the top ten subjects to study at university in the UK (collectively by home, other EU and international learners). In Wales, law is often ranked the second most popular choice for school leavers (second only to medical sciences).⁵⁹ Whilst the study of law is often assumed to be jurisdiction specific; there are significant reasons why Wales should, and has, taken an internationalised approach to the delivery of legal education. All Law Schools in Wales offer a variety of electives, both at undergraduate and postgraduate level, beyond just the qualifying law degree foundation subjects. Subjects such as international public and private law; as well as emerging specialist centres within Law Schools, covering areas such as international public procurement law (e.g., the Institute for Competition and Procurement Studies at Bangor Law School which has received over four million Euros of research funding for its projects from INTERREG; and attracts students from across the EU and further afield as part of its LLM in Public Procurement Law and Strategy). There are also strategic partnerships with other leading EU law schools, which widen the appeal and reputation of Wales' law schools as centres of excellence (e.g., the joint French Law and English Law double degree programme offered by Bangor University and Universite Toulouse 1

⁵⁴ E Bothwell, 'Universities 'Generate £95 billion for UK Economy' (Times Higher Education, 16 October 2017)

⁵⁵ G Morgan and C Plackett, 'The Economic Impact of International Students' (UUK 6 March 2017)

⁵⁶ E Bothwell, 'EU Students Generate £3.7 billion for UK Economy, says UUK' (Times Higher Education, 8 April 2016)

⁵⁷ Full Fact, 'How Much Money Do British Universities Get From the EU?' (The UK's Independent Factchecking Charity, 5th October 2015)

⁵⁸ HESA, 'Higher Education Student Statistics: UK, 2016-17 – Where students come from and go to study' (HESA, 11 January 2018)

⁵⁹ The Complete University Guide 'Top 10 Most Popular Courses in the UK' (2018)

Capitole (France), which was awarded the Prix Universitaire Robertson-Horsington award by the Franco-British Lawyers Society). These programmes have attracted more EU and international law students. In return home (Welsh and other UK) students benefit for an 'internationalised outlook' through opportunities to mix with a more diverse group of peers; a wider mix of lecturers, teaching a vast array of specialisms and international subjects; greater opportunities to travel abroad as part of their degree, including via the Erasmus Plus exchange programme; as well as enhanced employability skills and career prospects post-graduation (with a greater awareness of the opportunities available for Welsh law students both overseas and at home). However in the coming years, Wales' internationalised legal education is set to face significant challenges, including (but not limited to): threats to the current qualifying law degree LLB programme (in a move towards the SQE model, which does not place such high value on knowledge of European Union law); the marketisation of higher education which ranks pass rates, retention and progression above other traditional University values (via Teaching Excellence Framework (TEF) metrics); as well as the current political climate of Brexit. Under such pressures, we submit that the benefits and value of an internationalised legal education to the future generation of lawyers in Wales are under threat.

Brexit and Legal Education in Wales

58. Given the current focus on trade as part of Brexit negotiations, and the significance of Welsh universities to Welsh economic prosperity, it is somewhat surprising that there is only one reference to higher education in the Welsh Government's *Trade Policy: The Issues for Wales, Securing Wales' Future*. It notes that:
59. The consequence of leaving the EU (particularly in a 'no deal' scenario) for higher education in Wales could have a significant impact on the Welsh economy. This could materialise as the direct impacts of reduced spending on research and development make their way through the economy and have a negative impact on investment and productivity more generally. Wales' higher education institutions benefit from the research funds they have access to as a result of our membership of the EU, Horizon 2020 being the most significant. Exclusion from this collaborative research could impact directly on Wales; ability to maintain and attract new companies and to develop new industries...Withdrawal from the European Union may also affect the ability of Welsh universities and colleges to attract staff and students from other member states...In combination these changes could limit the availability of highly skilled staff working in the UK and have a negative impact on growth and living standards.⁶⁰

⁶⁰ Welsh Government, 'Trade Policy: The Issues for Wales, Securing Wales' Future' (Welsh Government Policy Documents, 2018) 17.

60. These points are not based on specific empirical evidence and there is no attempt to quantify (in terms of financial contribution of numbers of people) the potential direct or indirect impact of Brexit on Higher Education in Wales.
61. In February 2018, it was widely reported that the number of other EU students applying to UK universities had increased, despite 'Brexit' fears. However, the precarious headlines came against the backdrop of a devalued pound (making the UK a more financially viable place to study). Furthermore, whilst it was reported that the number of EU students applying to UK universities rose by 3.4% this year,⁶¹ this was against the previous year's figures, which saw a fall by 7%, thereby leading to an overall artificial inflation in 2018 compared to 2017. Furthermore it should also be cautiously noted that these figures are pre-Brexit; at a time when the UK still remains a Member State and enjoys all EU freedoms.⁶² In addition, analysing HESA figures in greater depth, and comparing data between 2012/13 and 2016/17, it is known that students coming from Germany, Ireland, Greece, Cyprus and Bulgaria, to study in the UK, have already steadily decreased in recent years.⁶³ Whilst the UK Government has provided some, albeit limited, reassurance for EU students, in terms of fees and access to loans in 2017/18 and 2018/19, there is growing need for urgent clarity beyond the transition period.
62. Without this clarification legal education, not least in Wales, stands to be amongst one of the worst affected disciplines post-Brexit. HESA statistics indicate that 26% of law research centre funding comes from EU government bodies (placing law as a the fifth 'worse off' discipline in the UK to be financially affected by Brexit).⁶⁴ Furthermore law is consistently ranked within the top ten disciplines that are seeing the highest number of EU lecturers leave following the Brexit referendum.⁶⁵ Given that Wales is recognised as a net beneficiary of EU funds, as well as a region that relies more heavily on EU and international student income than other regions of the UK, more empirical research is needed to understand home, other EU and international students perceptions as to the effects of Brexit on their legal education. Not least in terms of gauging whether they feel Wales will be able to continue to attract high numbers of EU and international students, and lecturers post UK withdrawal from the EU (notably, against a backdrop of less research funding from EU sources).
63. A recent empirical study, which surveyed 336 home, other EU and international law students from the Universities of Aberystwyth, Bangor,

⁶¹ E Busby, 'Number of EU students applying to UK universities surge despite Brexit fears' (The Independent, 5 February 2018)

⁶² R Pells, 'Number of EU students applying to UK universities falls by 7% since Brexit, latest figures reveal' (The Independent, 2 February 2017)

⁶³ HESA, 'Higher Education Student Statistics: UK, 2016-17 – Where students come from and go to study' (HESA, 11 January 2018)

⁶⁴ Technopolis Group, 'The role of EU funding in UK research and innovation' (The Royal Society, May 2017).

⁶⁵ L Buch, 'Brexit: More than 2,300 EU academics resign amid warning over UK university 'Brexodus'' (Independent, 6 January 2018)

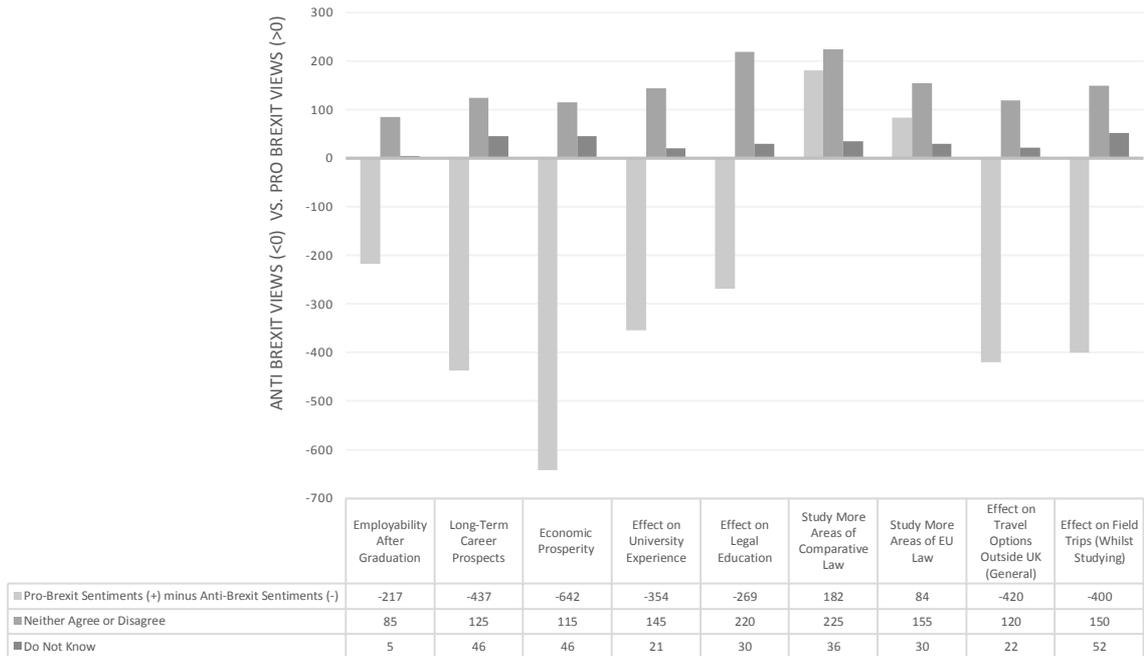
Cardiff, South Wales and Swansea sought to achieve this aim.⁶⁶ Preliminary findings from this group of current law students in Wales found that 84.2% of them believed that Wales would become a less attractive place for EU students to come and study law. Similarly, 81.6% of respondents believed that Wales was going to become a less attractive place for EU lecturers to teach and research law. Whilst collectively the group felt that Brexit would have less of an impact on non-EU students and lecturers (with 42.1% believing less non-EU students would come to study law in Wales, and 29% believing Wales would become a less attractive place for non-EU lecturers) interestingly the survey findings documented that, when focusing on just the responses of non-EU international students, 95.6% of them felt that Wales was going to become a less attractive place to come and study law.

64. Beyond the obvious further financial implications this will have for Law Schools in Wales; fewer other EU and international law students studying in our universities could have damaging implications for the future generation of Welsh lawyers' exposure to an international learning environment; their awareness of international career opportunities; as well as their international outlook. So as to quantify and rank students' perceptions as to their immediate concerns regarding the effects of Brexit; a series of 14 fixed-end statements (relating to their programme of study; University experience; future economic prosperity, career prospects and employability; and future travel options); were given, inviting respondents to state whether they strongly agree, agree, neither agree nor disagree, disagree, strongly disagree, with a series of statements.⁶⁷ The authors of the study conclude that the most pertinent concerns held by law students in Wales in relation to Brexit are: the effect the decision will have on their travel options outside the UK; the impact on their long-term career prospects; and most pertinently, the effect Brexit will have on their economic prosperity. See Figure One below:

Figure One

⁶⁶ S Clear, D Cahill and G Clifford, 'The Effects of Brexit on Legal Education in Wales: Mapping and Addressing Students' Concerns' (Publication forthcoming in summer 2018, email s.clear@bangor.ac.uk for details).

⁶⁷ The don't know option was also given. A positive value +2 was attributed to a statement which indicated **strongly agree** to a pro-Brexit stance; and a value of +1 to a statement which indicated the respondent **agreed** with a pro-Brexit statement. Negative values of -2 and -1 were attributed to statements which strongly disagreed and disagreed with an anti-Brexit stance. Values of '0' were attributed to responses that indicated 'neither agree or disagree' and 'do not know'.



65. Collectively law students across all Welsh Law Schools took a strong anti-Brexit stance with two exceptions. The responses to the fixed end questions as well as the opportunity for open end text comments, indicated that, particularly UK home students, felt the study of EU law was going to become less relevant for them; and instead they will pursue interests in studying more areas of international comparative law (beyond EU law). Such indicates that, even though it is highly probable the UK will maintain regulatory alignment with EU rules; the future generation of law students in Wales are, on the whole, already starting to see EU law as a relatively closed off future career path.

The concerns of law students in Wales in relation to Brexit, need to be addressed so as to enable Welsh Universities to continue to recruit high numbers of other EU and international law students; empower Welsh law schools to recruit and retain the best Professors for teaching within our institutions; and ensure that our home students continue to enjoy access to, and benefit from an internationalised law curriculum.

Misc. Points on Legal Education

66. Mooting is an important part of the legal education experience and we are concerned that, despite our efforts, there are currently no proposals for a bilingual Welsh Law Moot Competition (primarily due to funding complications) and that 'Welsh' moots (including moots through the medium of Welsh) tend to concern the law of England and Wales (for example criminal law) and not Welsh law issues. However, Bangor Law School recently became the first Welsh Law School to host an internal competition in the Supreme Court before Lord Lloyd-Jones, exploring a fictitious case about what could happen if Wales took an increasingly divergent approach to England in the context of public law surrounding health issues. An Institute of Welsh Law and Justice

could work with a collegiate group of representative academics to establish a Welsh mooted academy, progressing towards establishing a national bi-lingual moot competition (helping address concerns about funding and the availability of guest judges from the profession).

67. More can be done to inculcate technology into the legal curriculum, for example by the development of Law With Computer Science programmes. A collaboration between Bangor Law School and Bangor School of Computer Sciences has recently led to the development of a prototype research tool for automated content analysis (machine learning) of judgments in judicial review cases, and students from both Schools were involved in developing this tool. Academics and their students could work together to create applications for use on personal computers, tablet devices and smartphones. Creating user-friendly apps (from a design perspective and having the law explained in plain language) with various interactive activities to test and assess the knowledge of the users could serve three key functions; it would increase general knowledge of Welsh law, leading to increased compliance, and testing and assessment tools contained within the apps could provide direct feedback on how well laws are understood by the general population.
68. At Bangor, small group teaching in all core modules and in some optional modules is offered through the medium of Welsh and students may submit work and take exams in Welsh or English. There has recently been increased support and encouragement for staff members who wish to learn Welsh or improve their standard of Welsh. However, this does not carry through to the professional stage of training where greater provision for use of the Welsh language could be made, including in assessment processes. A range of bodies (including the Welsh Language Commissioner) have raised concerns about the new SQE not being available in Welsh. The Solicitors Regulation Authority (SRA) state that they are open to working with Welsh Law Schools on this, but little progress has been made; the lack of Welsh provision has been related to the expense involved, but there appears to be no specific estimate of these precise costs. This is clearly an extremely important matter of access to justice in Wales that must be addressed.

**Bangor Law School Public Law Research Group, June 2018
Dr Sarah Nason, Stephen Clear, Dr Hayley Roberts, Aled Griffiths**