



PUBLIC LAW WALES

SUBMISSION TO THE COMMISSION ON JUSTICE IN WALES

1. Public Law Wales (The Wales Public Law and Human Rights Association) was founded in 1998 and is one of the specialist associations established as part of the legal profession in Wales' response to devolution. Its membership now includes members of the judiciary, and individual and corporate members representing lawyers in private practice, the public sector, and academia. The aim of the association is to promote, in Wales, discussion, education and research relating to public law and human rights; and promote expertise amongst lawyers practising in Wales in the fields of public law and human rights. It regularly holds meetings and events on practice and academic matters of public law, human rights, and administrative justice, and arranges the public law strand at the annual Legal Wales conference.¹
2. Public law has been at the forefront of divergence in Wales in terms of substantive law and institutional arrangements. Landmark Welsh legislation in health, social care, housing, and planning require Welsh lawyers and expertise. Over the last few years, there has also been growing understanding of the distinctive role of administrative justice in Wales in areas such as initial decision making by public authorities and alternative forms of dispute resolution.² Proposals for codification of Welsh law will further enhance the distinctiveness of public law in Wales.
3. We are grateful for the opportunity to highlight and reflect on some of the key reforms to date in public law and administrative justice in Wales. We make recommendations that arise from these and hope that they will be useful case studies for your consultation. We encourage the Commission to give due regard to the experience of public law and administrative justice as part of its enquiry.
4. Our submission mainly engages with the following consultation questions. Other consultation questions are referenced at relevant points of the submission.

¹ Public Law Wales website <<http://www.legalwales.org/public-law-wales.php>> Members of the Executive Committee: Huw Williams (Geldards, Chair), Keith Bush QC (Swansea University), David Gardner (No5 Barristers' Chambers), David Hughes (30 Park Place) Michael Imperato (Watkins & Gunn), Nia James (Welsh Government), Elisabeth Jones (National Assembly for Wales), Professor Tim Jones (Swansea University), Dr Sarah Nason (Bangor University), Dr Huw Pritchard (Cardiff University), Rhodri Williams QC (30 Park Place).

² Nason S, *Understanding Administrative Justice in Wales* (2015); Committee on Administrative Justice & Tribunals Wales, *Administrative Justice: A Cornerstone of Social Justice in Wales* (March 2016).

1. What is working well in the justice system in Wales? What is not working well? Are there examples of innovation and good practice, both in and beyond Wales, which should be adopted and shared?

5. What impact has devolution had on the justice system in Wales? What impact do you believe devolution will have in the future?

10. What steps do you think need to be taken to facilitate positive change in the justice system in Wales?

The Administrative Court in Wales and the Administrative Court Office in Wales

5. The process of establishing the Administrative Court in Wales highlights the core understanding that, following devolution, Wales needed to ‘have its own indigenous institutions operating locally and meeting the needs of citizens.’³ The process of putting that into practice since 1999 is a valuable case study of developing access to justice in Wales.⁴
6. The 1999 *Practice Direction (Supreme Court: Devolution)*⁵ allowed cases to be heard in Wales. However, as noted by Public Law Wales and Legal Wales in 2006,⁶ this had not achieved the ‘full potential’ of the Court as there remained practical matters that were missing; such as, the ability to challenge UK bodies locally, the lack of a strong presumption that a claim would be heard in Wales, and that administrative support remained centralised in London. In essence, this meant that the Administrative Court in Wales was no more than a ‘post box’ at the time.⁷
7. The *Justice Outside London* report, chaired by May LJ, was established to consider arrangements to sit outside London.⁸ It concluded that ‘proper access to justice is not achieved’ if claimants can only bring claims in London.⁹ It recommended the establishment of a fully operational court office in Wales. The constitutional

³ Lord Bingham (May 2000) quoted in Public Law Wales & Legal Wales, *Strengthening the Administrative Court in Wales* (October 2006) [15] <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Justice+Outside+London/appendix_g.pdf>

⁴ The process of establishing the Administrative Court in Wales and the Administrative Court Office in Wales is documented by David Gardner. Gardner D, *Administrative Law and the Administrative Court in Wales* (UWP, 2016) 33.

⁵ [1999] 1 WLR 1592.

⁶ Public Law Wales & Legal Wales, *Strengthening the Administrative Court in Wales* (October 2006) [15] <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Justice+Outside+London/appendix_g.pdf>

⁷ PLW & LW (n 6) [36].

⁸ *Justice Outside London* (2010) <<https://www.judiciary.uk/publications/summary-of-main-recommendations/>>

⁹ *ibid* [51].

consideration, that judicial review challenges of decisions in relation to Wales that are made in Wales should be heard in Wales, was of central importance.¹⁰ However, emphasis was also given to practical considerations; namely, the potential for increasing divergence in secondary legislation and upcoming primary legislative powers (at the time), the right to speak Welsh in any legal proceedings in Wales, and geographical considerations that would ensure that access to justice was to be decentralised for the whole of Wales.

8. Crucially, May LJ made his recommendation regardless of whether the substantive law differed in Wales or not and on the understanding that other measures, such as number of cases, could be lower.¹¹ Such considerations are not exclusive to public law and should be considered relevant for the wider purposes of the Commission's enquiry.
9. The Administrative Court Office in Wales opened in April 2009. As well as claims for judicial review, the Office now also deals with applications to the Planning Court and manages the judicial review jurisdiction of the Upper Tribunal (Immigration and Asylum Chamber) in Wales.¹²
10. The rules regarding venue of proceedings are contained in CPR PD 54D. This emphasises that proceedings will be 'administered and determined in the region with which the claimant has the closest connection' and then lists circumstances that may qualify that presumption. Gardner suggests that this ultimately places more importance on the decentralisation of access to justice, rather than the constitutional justification originally noted in the May report.¹³
11. The Practice Direction gives no jurisdictional exclusivity for Welsh cases to be heard in Wales.¹⁴ Therefore, any administrative change of this type does not necessarily bring substantial change on its own. Co-ordination between administrative court offices in transferring cases has facilitated filing and listing cases in Cardiff.¹⁵ Judicial encouragement and support has also ensured that the presumption in favour of cases from Wales being heard in Wales has been given effect, wherever in Wales was most appropriate to conduct the hearing.¹⁶ Finally, alongside the establishment of the

¹⁰ *ibid* [60].

¹¹ *ibid* [60]-[66], [90]; Gardner (n 4) 36-39.

¹² Nason S & Sunkin M, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76(2) MLR 223, 239.

¹³ Gardner (n 4) 42.

¹⁴ Nason S & Gardner D, 'The Administrative Court and Administrative Law in Wales and Comparative Perspectives' in Nason S (ed) *Administrative Justice in Wales and Comparative Perspectives* (UWP 2017) 250.

¹⁵ Gardner (n 4) 48.

¹⁶ *R (Condrón) v The National Assembly for Wales* [2006] EWCA Civ 1573, [110]; *R (Deepdock) v The Welsh Ministers* [2007] EWHC 3347 (Admin); *Jones v The Director of Public Prosecutions* [2012] RTR 3.

Administrative Court Office were several initiatives, such as workshops in Llandudno and Cardiff,¹⁷ to promote the new services and to encourage the profession to file cases in Cardiff. More generally, national conferences by the Public Law Project and Legal Wales have also been avenues to publicise reforms.

12. As indicated by Gardner, 'the availability of local administration and local hearings appears to be providing greater local access to justice.'¹⁸ Our professional experience is that applications are dealt with more expeditiously than would be the case without local access and there is improved assistance for practitioners and their clients through access to a local administrative court office in Cardiff. There have also been positive steps forward in conducting hearings through the medium of Welsh. For example, landmark cases such as, *R (Welsh Language Commissioner) v NS&I*¹⁹ and *R (Jones) v Denbighshire County Council*.²⁰

Tribunals in Wales

13. Tribunals in Wales hold a very important place as a relevant case study for several reasons.²¹ The National Assembly has legislative competence to establish new tribunals, or confer additional functions on existing tribunals. Crucially, devolved tribunals are judicial bodies with exclusive Welsh jurisdiction that are largely administered under justice functions of the Welsh Government. They also now have statutory recognition following the Wales Act 2017. The development of administration for Tribunals in Wales again demonstrates a process of challenges and reform that have improved the arrangements for the administration of justice in Wales, in line with principles of local access to justice and judicial independence.
14. Under the provisions of the Government of Wales Act 1998, the National Assembly (and subsequently the Welsh Government), inherited an ad-hoc collection of administrative tribunals in devolved policy areas. Such tribunals were outside the rationalised tribunal structure of the Tribunals, Courts and Enforcement Act 2007. The Welsh Committee of the Administrative Justice and Tribunals Council (AJTC) highlighted key concerns regarding independence and impartiality of tribunals from

¹⁷ Bangor University, *The Regionalisation of Public Law* (2014)
<<https://impact.ref.ac.uk/CaseStudies/CaseStudy.aspx?Id=25451>>

¹⁸ Gardner (n 4) 39.

¹⁹ [2014] EWHC 488 (Admin).

²⁰ [2016] EWHC 2074 (Admin).

²¹ For further background see, Nason S, *Understanding Administrative Justice in Wales* (2015) Chapter 7; Pritchard H 'Building a Welsh Jurisdiction through Administrative Justice' in Nason S (Ed.) *Administrative Justice in Wales and Comparative Perspectives* (UWP 2017) 218.

sponsoring departments, rationalisation of tribunals, accessibility, improved communication between tribunals, efficiency and effectiveness, and coherence.²²

15. With recommendations from the AJTC, the Welsh Government have undertaken a process of reforming the administration of tribunals. As a starting point, establishing a Welsh Tribunals Unit in the Welsh Government has removed the administration of most tribunals from sponsoring departments and created what has been termed as an emerging 'Welsh Tribunals Service'.²³
16. Although there may be statutory duties on England and Wales justice bodies for some aspects of individual devolved tribunals, they largely sit outside non-devolved arrangements for appointments, training, conduct and discipline.²⁴ The Welsh Government have therefore had to make their own arrangements (such as those for the appointment of the President and Members of the Welsh Language Tribunal, a body created under uniquely Welsh legislation) or, increasingly, to enter into arrangements with England and Wales justice bodies to undertake those roles on its behalf.²⁵ The provisions relating to the Welsh Language Tribunal (WLT) also illustrate the emergence of appeal mechanisms unique to Wales - an appeal from the WLT is direct to the High Court on a point of law only - which, by their nature, call for special skills (in this case the ability to deal with appeals in cases conducted entirely through the medium of Welsh) which are not required by the Administrative Court in England.
17. The most significant reform in this regard is the establishment of the role of President of Welsh Tribunals under the Wales Act 2017. As the first overarching judicial leadership role specifically for Wales, this is a significant development that further places crucial foundations in terms of judicial independence and leadership in Wales.²⁶
18. We highlight administrative tribunals as a case study as developments in this area have real potential to influence and overlap with reform in other fields of justice. The Welsh Government have established a new tribunal (the Welsh Language Tribunal) and made changes to the jurisdiction of existing tribunals, including placing new civil judicial functions on existing tribunals.²⁷ As Welsh judicial institutions, with a Welsh jurisdiction, there are opportunities to enhance devolved tribunals in ways that could

²² Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) 2-8.

²³ Senior President of Tribunals, *Annual Report 2015/16* (February 2016) 93.

²⁴ The Committee for Administrative Justice and Tribunals Wales, *Administrative Justice: A Cornerstone of Social Justice in Wales* (March 2016) 7.

²⁵ This is possible under s.83 Government of Wales Act 2006; Judicial Appointments Commission, *Annual Report 2014/15* (HC263, 16 July 2015) 11. This is likely to increase in line with the new Concordat between the Welsh Government and Ministry of Justice.

²⁶ See further, <<https://gov.wales/about/cabinet/cabinetstatements/2017/independence/?lang=en>>

²⁷ Residential Property Tribunal for Wales under the Mobile Homes (Wales) Act 2013, s.54.

be of benefit for the justice system as a whole.²⁸ As a matter of principle, where the National Assembly legislates on a non-reserved matter, any administrative remedies created should be by recourse to the Welsh Tribunals system. We welcome the announcement that the Law Commission will be undertaking a project on Tribunals in Wales in 2019.

Oversight and Accountability

19. Oversight and advisory bodies in the field of public law have provided a positive legacy that should be considered by the Commission. There are a number of areas where oversight bodies can play a positive role and influence an emerging legal system. Such examples have already played pivotal roles in reforming the Welsh justice system. The Welsh Committee of the Administrative Justice and Tribunals Council (AJTC), followed by the Committee on Administrative Justice and Tribunals Wales (CAJTW), provide suitable models for the Commission to consider in its enquiry.
20. The Welsh Committee of the AJTC laid the foundations of tribunal reform in Wales through their influential *Tribunals Operating in Wales* report.²⁹ It also made a number of constructive suggestions on the drafting of the Welsh Language Tribunal Rules 2015.
21. CAJTW was established by Welsh Ministers, following the abolition of the AJTC, to continue to provide oversight of the administrative justice system in Wales. Although of limited lifespan, it prepared a legacy report, *Administrative Justice: A Cornerstone of Social Justice in Wales*, which provides a framework for Welsh Government to work with.³⁰ This was also supported by a research project, conducted by Bangor University, which informed CAJTW's work.
22. As displayed above in the field of administrative justice, oversight bodies in Wales can have a positive impact. For example, they can:
 - provide a bridging point between stakeholders and government (in Wales and the UK);
 - provide independent scrutiny of the justice system and promote accountability;
 - highlight and collaborate on areas of research;
 - provide a focal point for growing a network of practitioners, academics, and users that have an interest in the operation and reform of the justice system;and,

²⁸ See further, evidence submitted to the Commission on Justice in Wales by Keith Bush QC.

²⁹ AJTC Wales (n 22).

³⁰ See further, evidence submitted to the Commission on Justice in Wales by Mr. Bob Chapman.

- provide constructive advice on Tribunal procedures, based on expertise extending across all Tribunal functions.

23. To understand the distinctive character of justice in Wales, in light of distinctive Welsh law and policy, there should be a specialist oversight body/ies with expertise of Welsh law and society. The Commission should consider the value of having a permanent oversight body for administrative justice in Wales as well as establishing oversight bodies for other areas of justice. This would provide a suitable immediate legacy for the Commission, as well as providing a forum for building expertise, scrutiny, and research for the future.

Education and Publications

12. To what extent do current university curriculum and vocational and professional development courses reflect the law in Wales and the need to deal with the digital revolution and how should they be further developed?

13. What is the current provision for the Welsh language within the justice system and legal education in Wales? How should Welsh language provision within the justice system and legal education in Wales be improved?

14. Is access to Welsh law properly available?

24. Provisions at universities in Wales are increasingly teaching Welsh public law as part of core and optional provisions. The constitutional arrangements are well established as part of core constitutional and administrative law modules at Welsh law schools. Administrative law, or administrative justice, modules are increasing in popularity among students who wish to pursue careers in public law. Elements of Welsh administrative justice are increasingly presented as part of those modules to ensure that full English and Welsh law is taught. Other specialist modules, such as childcare law in Wales, and constitutional modules on Welsh devolution, at undergraduate and postgraduate levels, are taught across Wales.

25. The proposed establishment of the Solicitor's Qualification Examination by the Solicitors Regulation Authority (SRA) to centralise assessments for future solicitors could bring challenges to teaching Welsh public law in the England and Wales jurisdiction. The SQE is designed on the SRA Statement of Solicitor Competence, Knowledge Statement and Threshold Standard.³¹ However, there is no specific

³¹ Solicitors Regulation Authority, *Application by the Solicitors Regulation Authority to the Legal Services Board under Part 3 of schedule 4 to the Legal Services Act 2007* (12 January 2018) [72].

requirement for knowledge of devolved institutions or devolved sources of primary and secondary law in the Statement of Legal Knowledge or proposed Assessment Objectives of Legal Knowledge for the SQE.³² There has also been deep concern, which has been raised by the Legal Services Board, regarding the availability of the assessments through the medium of Welsh.³³

26. The need for a Welsh dimension to academic and professional education should not be seen as relevant only to those who intend to practise in Wales. As long as England and Wales share a common legal jurisdiction, lawyers who practice in England will need to have at least a basic knowledge of the character and sources of Welsh law.
27. Individual institutions will have flexibility in how they respond to these reforms through the design of their individual curriculum. The SRA and law schools should be encouraged to consider implications of their decisions on the teaching and knowledge of Welsh public law, and teaching through the medium of Welsh, as they reform their provisions and set future assessments.
28. The Law Commission have previously highlighted the challenges for publishing textbooks on Welsh law.³⁴ Public law scholarship in Wales has greatly valued from the *Public Law of Wales* series published by the University of Wales Press.³⁵ This series has given a vital opportunity to publish substantive new work on law and practice in Wales since devolution. Undergraduate study of public law through the medium of Welsh has also been given a boost by the online publication (by Bangor University and the Coleg Cymraeg Cenedlaethol) of a student textbook on public law *Sylfeini'r Gyfraith Gyhoeddus*.³⁶
29. A stronger textbook and monograph culture encourages more engagement in research and teaching from Welsh, and international, universities. Crucially, opportunities to publish makes academic research much more viable and opens opportunities to place Wales in an international context.

<http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2018/SQE_LSB_application_January_2018__v_1.0_FINAL.pdf>

³² Solicitors Regulation Authority, *Solicitors Qualifying Examination: Draft Assessment Specification* (October 2016) 11-16.

³³ Legal Services Board, *Summary of Decision* (26 March 2018) [26]

<http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2018/FINAL_decision_notice.pdf>

³⁴ Law Commission, *Form and Accessibility of the Law Applicable in Wales* (Law Com No 366, HC469-I, 2016) [15.17]-[15.30].

³⁵ The Public Law of Wales (University of Wales Press) <<http://www.uwp.co.uk/series/the-public-law-of-wales/>>

³⁶ Bush K, *Sylfeini'r Gyfraith Gyhoeddus* (Coleg Cymraeg Cenedlaethol 2016)

<<https://llyfrgell.porth.ac.uk/View.aspx?id=2433~4m~m0FVpghn>>

30. Public Legal Education is also an important consideration as law and practice in Wales develops. Academic and practitioner publications should not be the only consideration and the public should have improved access to legal information. The Law Wales website provides a suitable platform for this purpose and strengthening relationships between the Law Wales website and potential contributors should be encouraged.

Conclusion and Recommendations

31. The experience of public law in Wales is valuable for the justice system as a whole. It is possible to see how institutions and organisations have adapted to change and to accommodate diverging law and practice since devolution.

32. In light of our submission we make the following recommendations:

- The adoption of a presumption that administrative remedies in devolved legislation should be to the Welsh Tribunals;
- That a stakeholder body, as a successor to CAJTW, has particular value in a period when Welsh Tribunals are evolving and establishing their place in the devolved constitution. Also, that a stakeholder, or oversight, body would be of value to other fields of justice in Wales as a distinct Welsh approach to justice emerges;
- The importance of the teaching of the Welsh dimension of public and administrative law should be recognised as a core element at all levels of legal education, including in the requirements of the SQE.