



## Evidence from Public Law Wales

1. Public Law Wales (previously the Wales Public Law and Human Rights Association) is an organisation 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. This submission focuses on the general principles of the Legislation (Wales) Bill from the perspective of public administrative law and the administrative justice system in Wales.
2. As the significant body of evidence to the Law Commission's initial consultation on the *Form and Accessibility of Welsh Law*, published responses to the current *Commission on Justice in Wales* and the *Counsel General's Consultation on the Draft Legislation (Wales) Bill* demonstrate, there is no question that people in Wales find it difficult to access the law applicable to Wales, and to understand their rights (and also in some cases, their obligations) under it.
3. The body of evidence in essence speaks for itself as to the need to make Welsh law 'more accessible, clear and straightforward to use' and we therefore support this general purpose of the Bill. In particular we highlight some examples from public administrative law research showing that at present people in Wales appear less likely to utilise statutory and common law rights to seek appeal and/or review of public body decision-making, when compared to their English counterparts. For example:
  - a. The *Public Law Project and Dr Sarah Nason's submission to the Commission on Justice in Wales* provides evidence that rates of judicial review challenge originating in Wales per-head of population are consistently lower than in England (including across various English regions). The research also found that only 15% of litigants in judicial review cases in the Administrative Court in Wales who instruct Counsel are represented by Counsel based at chambers located in Wales. This research also found that 'regionalising' the Administrative Court has had no significant long-term impact on the involvement of solicitors based in Wales in Administrative Court litigation.<sup>1</sup>
  - b. Recent research by Shelter Cymru,<sup>2</sup> and by Salford University<sup>3</sup> discloses that there are only two to four appeals to the County Court per-annum on a point of law relating to homelessness duties under the Housing (Wales) Act 2014. Judicial interpretation of the law here is limited to *obiter dicta* statements in English cases in the England and Wales Court of Appeal.

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<sup>1</sup> <https://beta.gov.wales/sites/default/files/publications/2018-11/submission-to-the-justice-commission-from-public-law-project-sarah-nason.pdf>

<sup>2</sup> As yet unpublished presented to Wales Housing Research Conference 10 January 2019:

<sup>3</sup> A. Ahmed, M. Wilding, A. Gibbons, K. Jones, M. Rogers, I. Madoc-Jones (2018). Cardiff: Welsh Government, GSR report number 46/2018.

Available at: <https://gov.wales/statistics-and-research/evaluation-homelessness-legislation/?lang=en>

- c. In various workshops involving a range of ‘stakeholders’ in the administrative justice system, the view has been expressed that people in Wales (especially the most vulnerable, and most likely to come into regular contact with administrative justice) are not aware of their rights, and most specifically not aware of their rights under Welsh law. There are particular difficulties in the field of education law. The research (which is still in its comparatively early stages) has found examples of statutory rights to redress (e.g., under housing law applicable to Wales) that are barely ever used.<sup>4</sup>
4. This is from the perspective of individuals, but there are also problems of accessibility, clarity and simplicity from the perspective of public bodies in Wales. 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’.<sup>5</sup> Welsh public administrative law is difficult to navigate, both for individuals and for public bodies.
  5. Public administrative law is often seen as a Cinderella area of law (and often barely seen as a system of justice at all) despite affecting more people, more regularly, than criminal justice.<sup>6</sup> Administrative justice is also significantly devolved to Wales, in light of this the proposed taxonomy of Codes of Welsh Law, is significantly a taxonomy of Welsh public administrative law.
  6. We submit that a statutory duty to keep Welsh law under review is especially important here, as areas of administrative law and administrative justice are particularly susceptible to political short-termism (and so-called ‘ad hocery’), to the detriment of articulating a principled and clear approach to public administration (and consequentially to social justice).<sup>7</sup> However, there are a number of issues we wish to raise that are particularly important in the context of public administrative law.

### **A permanent change to our law-making process**

7. As the earlier oral and written evidence of constitutional and legislative experts has proposed, it is not clear that the Bill as drafted can achieve the objective of making a permanent change to the law-making process. The Explanatory Notes to the Bill state: ‘The Code is not intended to be a legal instrument in its own right but rather a means of collating and publishing the law more effectively’. The proposed taxonomy anticipates that this is to be done by collecting and collating existing law under the specific topic-based Codes (Education, Housing, Planning etc). The Code will not (generally) be a single

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<sup>4</sup> From research workshops under Nuffield Foundation funded research: Paths to Administrative Justice in Wales (Sept 2018 to Feb 2020): <http://www.nuffieldfoundation.org/paths-administrative-justice-wales> and see Sarah Nason, *Administrative Justice: Wales’ First Devolved Justice System* (December 2018) <http://adminjustice.bangor.ac.uk/research-report.php.en>

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<sup>6</sup> See e.g., Nason (n 4) and Committee for Administrative Justice and Tribunals in Wales (CAJTW) in its 2016 *Legacy Report: Administrative Justice, A Cornerstone of Social Justice in Wales: Reform priorities for the Fifth Assembly* <https://gov.wales/docs/cabinetstatements/2016/160729cornerstoneofsocialjustice.pdf>

<sup>7</sup> Michael Adler, ‘The rise and fall of administrative justice: A cautionary tale’ 8(2) *Socio-Legal Review* (2012) 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).

legislative instrument but a collection of existing enactments, retaining distinctions between primary and secondary legislation and guidance. To effect permanent change to processes, something more will be needed, for example in terms of the Assembly's role in scrutinising how legislation, including new legislation, is being incorporated into Codes, and/or further provisions intended to tackle the proliferation of secondary legislation.

### **Codification - only the first step towards accessibility**

8. There is great value to legal professionals in having a collection of legislative sources, and this could over time begin to compensate for the difficulties of having few (if any) academic and practitioner texts across the topics of Welsh law. However, based on our collective research into the experiences of 'users' of the administrative justice system in Wales, this would not render the law more accessible to non-professionals – especially for example homeless persons and particular social housing tenants, or parents of children with additional learning needs and healthcare needs. One reason for this is of course is legislative language, another is that users of the administrative justice system tend to have multiple problems that could easily cut across for example, Codes of Education, Health, Housing and Public Administration. People will need something more than a collected Code of legislation in order to be able to properly navigate and seek enforcement of their public administrative law rights.
9. The Bill does not impose a duty to seek simplification of the law in terms of drafting styles, and indeed such a duty would likely be unrealistic given that legislation which has the most impact on ordinary people's lives (entailing a balance say between individual rights/interests and the broader public interest) may be necessarily complex. Likewise, as has been recognised by other evidence submissions, the Codes are not primarily directed at ordinary people, but at legal and other professionals.
10. Our concern here is that, again from research workshops/user feedback, attempts to simplify Welsh law (especially in the areas of housing and homelessness, and additional learning needs) have been used, or are proposed to be used, as justification for cutting advice and advocacy services. In the area of public administrative law, where there can already be a significant power imbalance between individuals and public bodies (to some extent actual, to some extent perceived), reduction in the availability of publicly funded suitably independent advice/advocacy services is especially detrimental. In many cases the system for seeking redress against public body decision-making only functions effectively because of access to independent intermediaries. Various evidence draws a correlation between access to affordable legal advice, the incidence of public law challenges and resultant improvements to public administration.<sup>8</sup> There is potential for codification to reduce costs by making the law more accessible to professionals, but for individual people the need for assistance, advice and advocacy will still be very real.

### **Codes, cases and commentary**

11. There is a notable dearth of academic and practitioner commentary on Welsh law. As Bargenda and Wilson-Stark have put it: 'Welsh lawyers have a dearth of textbooks to look

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<sup>8</sup> See e.g., L. Platt, M. Sunkin and K. Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' (2010) 20 (supp 2) *Journal of Public Administration Research and Theory* 243 and C. Hunter, D.S. Cowan, A. Dymond and S. Halliday, Reconsidering Mandatory Reconsideration [2017] *Public Law* 215.

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.’<sup>9</sup> Whilst a Code itself may not be particularly accessible to ordinary people, a modern clearly worded textbook (with the addition of online resources as is nowadays common) can prove crucial. However, the lack of incentive (and indeed the significant disincentive) for academics to develop textbooks on Welsh law, and to write commentaries for platforms such as the ‘Law Wales’ website has already been well-discussed.

12. On balance it may be that codification could catalyse an increase in academic commentary (less wading through primary sources is needed prior to developing an accessible commentary/critique). On the other hand, the presence of Welsh Codes ‘might’ be postulated as yet another disincentive for academics to devote time to analysing Welsh law (a possible reverse of Bargenda and Wilson-Stark’s view of the Scottish position).
13. The lack of academic, and to an extent also practitioner, commentary is compounded by a dearth of case law where public administrative law duties under Welsh legislation are given clear, authoritative, independent and impartial judicial interpretation. Again, research is beginning to uncover an informal approach to public law dispute resolution in Wales, whilst this can reduce costs and lead to early and satisfactory resolution of issues for individuals and public bodies, a side-effect can be lack of transparency and binding future precedents.<sup>10</sup>
14. In the area of public administrative law, the main body of generally applicable legal principles are still to be found in the common law of England and Wales. *The Public Law Project and Dr Sarah Nason’s submission to the Commission on Justice in Wales* (looking specifically at judicial review claims) notes:

‘...any attempt to categorise [judicial review] claims precisely as turning on matters of Welsh law and/or devolved Welsh policy, was fraught with difficulties. This is significantly due to the nature of public administrative law, where the general principles - that public body decisions must be lawful, procedurally fair, and reasonable - stem from the common law of England and Wales. Whilst these common law principles have often been described as generalised principles of statutory interpretation, the precise significance of the relevant statutory provisions to the case at hand varies greatly. Judicial review claims rarely ever include just one ground, more often than not multiple common law grounds are argued (including illegality, procedural impropriety and irrationality), regularly accompanied by particular forms of statutory illegality – breach of the UK wide Human Rights Act 1998 or Equality Act 2010, or of a particular piece of EU law.’<sup>11</sup>
15. The issue here, again as others have noted, is that the Welsh Codes will not seek to codify case law, yet they risk being seen as a fully comprehensive statement of the law on a particular subject area.

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<sup>9</sup> A. Bargenda and S. Wilson Stark, ‘The Legal Holy Grail? German lessons on codification for a fragmented Britain’ (2018) 22(2) *Edinburgh Law Review* 183.

<sup>10</sup> See references at (n 4).

<sup>11</sup> See (n 1).

## Accommodating Innovation

16. As is understandable the proposed taxonomy of Codes is effectively based around the powers originally devolved to Wales as part of a culture of executive devolution. As envisaged consolidation ‘involves no or only minor amendments to the substance of the law consolidated’. On the other hand, it is stated that: ‘A “Code” of Welsh law would generally be published once some or all of the primary legislation on a particular subject...has been consolidated, or has been created afresh following wholesale reform’. It is not then clear how substantive amendments short of ‘wholesale reform’ could be accommodated. For example, researchers have proposed a possible Administrative Procedure Code for Wales, the contents of which would largely be a consolidation of existing duties applying to various public bodies in Wales, but still the creation of such a Code, either as a freestanding Welsh Code, or as a specific aspect of the proposed Public Administration (or Public Administration and Human Rights) Code, would be more than a minor amendment to existing law.<sup>12</sup> We have further comments to make about the proposed taxonomy at a more appropriate juncture, our point here is that there is a significant grey area between minor amendments and wholesale reform.

## Cultural Change and Collaboration

17. As the Explanatory Memorandum states, the success of consolidation and codification depends upon a cultural shift. Most importantly this evolving culture must be embraced by a range of ‘stakeholders’ including law-makers, legal professionals and other advice/advocacy providers, academics, and judges (to name a few). Rationalisation of the statute book only goes part of the way to improve the accessibility of law and facilitate people’s exercise of their legal rights. In this regard s.2(4)(a) of the Bill noting that the programme ‘may also include proposed activities – (a) that are intended to promote awareness and understanding of Welsh law’ is especially important. The success of Welsh Codes in improving the accessibility of law for ordinary people (and in facilitating exercise of their rights) will depend largely on initiatives to promote awareness and understanding, significantly through the production of user-friendly materials (by academics, legal professionals, 3<sup>rd</sup> sector and others) that bridge the gap between statutory language and everyday understanding of the law/rights. There is a case for saying that this should be a ‘must’ duty to include such activities as opposed to a ‘may’ power, if the Bill is to achieve its stated policy objectives.

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<sup>12</sup> See e.g., S. Nason and D. Gardner, ‘The Administrative Court and Administrative Law in Wales and Comparative Perspectives’ (in *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press 2017)) and David Gardner, ‘An Administrative Law Code for Wales: Benefits to Reap and Obstacles to Overcome’ (2018) *Statute Law Review*.