
The Senedd and Administrative Justice (Part 1)

Public Administration, Rights, Principles and Administrative Law

Research Briefing

July 2020



The Welsh Parliament is the democratically elected body that represents the interests of Wales and its people. Commonly known as the Senedd, it makes laws for Wales, agrees Welsh taxes and holds the Welsh Government to account.

An electronic copy of this document can be found on the Senedd's website:
www.senedd.wales

Copies of this document can also be obtained in accessible formats including Braille, large print, audio or hard copy from:

Welsh Parliament
Tŷ Hywel
Cardiff Bay
CF99 1SN

Tel: **0300 200 6313**

Email: **Nia.Moss@senedd.wales**

Twitter: **[@SeneddResearch](https://twitter.com/SeneddResearch)**

Blog: **SeneddResearch.blog**

© Senedd Commission Copyright 2020

The text of this document may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not used in a misleading or derogatory context. The material must be acknowledged as copyright of the Senedd Commission and the title of the document specified.

The Senedd and Administrative Justice (Part 1)

Public Administration, Rights, Principles and Administrative Law

Research Briefing

July 2020

Author:

Dr Sarah Nason



Contents

1. Introduction	1
2. What is Administrative Justice?.....	2
3. The ‘Rise and Fall’ of Administrative Justice	3
4. Administrative Justice in Wales	5
5. Public Administration and Social Justice in Wales: Administrative Justice Gets Lost?.....	6
6. The ‘New Administrative Law’ of Wales: Sustainability, Human Rights, and Equality	9
6.1. Sustainability.....	9
6.2. Human Rights	12
6.3. Equality	14
7. Conclusions About General Administrative Law	15
8. Topic-specific Substantive Administrative Law.....	16
9. Clarification, Consolidation and Codification	17

1. Introduction

This Report is the first of two reports from my Senedd Academic Research Fellowship 2019/20 focusing on the role of the Senedd in administrative justice. In this first Report I explain the concept of administrative justice, and examine how it has been approached in Wales, in contrast to broader UK approaches. I focus on the Senedd's law-making role, including the principles underpinning Welsh public administrative law, and the potential for further clarification and consolidation of such administrative law. I also address where administrative justice fits alongside key political concepts in Wales including human rights, equality and sustainability. In the second (Part 2) Report I explain how Senedd Member's constituency work is also an important factor in administrative justice alongside other key sources of advice, information and assistance for people who are dissatisfied with particular public body decisions or concerned about the provision of local services.

2. What is Administrative Justice?

Justice in relationships between individuals and the state is usually referred to as administrative justice. It concerns 'how government and public bodies treat people, the correctness of their decisions, the fairness of their procedures and the opportunities people have to question and challenge decisions made about them'.¹ Administrative justice includes administrative law, procedures for redress against incorrect or poor public decision-making, and mechanisms to learn from those redress procedures to improve decision-making for the future.

1. **UK Administrative Justice Institute: <https://ukaji.org/what-is-administrative-justice/>**

3. The 'Rise and Fall' of Administrative Justice

Attempts had been made (since the 1950s and 60s) to examine the whole landscape of delivering public administration and related law and redress, which was developing 'ad hoc' and unsystematically across England and Wales. Whilst there had been important reforms specifically to the judicial review procedure as a redress mechanism, following work by the Law Commission in the 1960s and 1970s,² administrative justice still received comparatively little attention compared to criminal and civil justice (it was often referred to as the 'Cinderella' system). Things began to change in the early 2000s and for roughly a decade administrative justice seemed to be gaining more prominence at Westminster and within the Ministry of Justice. However, this was comparatively short lived, with reforms (primarily following the election of the Conservative – Liberal Democrat Coalition Government in 2010) leading to a comparative decline in interest in administrative justice. Academics and practitioners have referred to this as the so-called 'rise and fall' of administrative justice.

A key element in the rise of administrative justice was the formation of a UK Administrative Justice and Tribunals Council (AJTC) in 2007, this was established under the Tribunals Courts and Enforcement Act (TCEA). The TCEA itself followed a 2000/01 review of tribunals by Sir Andrew Leggatt, which the UK Government also partially responded to in a 2004 White Paper, *Transforming Public Services: Complaints, Redress and Tribunals*. The AJTC was meant to 'act as the hub of the wheel of administrative justice', co-ordinating the various parts of the system. To aid the AJTC in this role, the TCEA defined an 'administrative justice system' as:

- 'the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including—
- (a) the procedures for making such decisions,
 - (b) the law under which such decisions are made, and
 - (c) the systems for resolving disputes and airing grievances in relation to such decisions.

There were some tensions between the AJTC's understanding of administrative justice, and that of the UK Government (reflected in the UK Government 2004 White Paper pursuing Proportionate Dispute Resolution (PDR)). The UK Government associated PDR with improving the experiences of individual users of dispute resolution systems, whilst also prioritising costs and efficiency savings.

2 Especially in its 1976 Report on Remedies in Administrative Law (Law Com No. 73).

In its 2009 *Principles of Administrative Justice*, the AJTC set out a broader vision of PDR encapsulating public services standards, good governance values, rule of law attributes and human rights.

For many, the 'rise' of administrative justice, culminating in the work of the AJTC, has been followed by a significant 'fall' (at UK, and England and Wales level). The 2010 UK General Election is seen as a watershed; the AJTC was abolished by the UK Government in 2013.³ Subsequently, academics and practitioners have argued that administrative justice has been undermined for what they consider to be the following reasons: reforms to judicial review that have made the procedure more difficult to access for ordinary people; cuts to legal aid; removing existing rights of appeal including in immigration and asylum, and social security decision-making; new bureaucratic redress routes which the UK Government both designs, operates and is the main defendant in; restricting access to tribunals through insertion of compulsory administrative review procedures (which evidence suggests are of variable quality);⁴ and failing to address areas of social policy where remedies were already inadequate.

Despite the concerns listed above, and the apparent 'fall' in the currency of administrative justice at UK level, the Ministry of Justice has continued to have Administrative Justice and Tribunals Strategic Work Programmes,⁵ and co-funds an oversight body, the UK Administrative Justice Council.⁶ Academic interest in administrative justice is growing, including with the forthcoming publication of an authoritative 'Oxford Handbook' of administrative justice, and there has been significant comparative research with other legal systems, including examining good administration and administrative law across European legal jurisdictions, both from an EU and a Council of Europe perspective.

3 See Tom Mullen (n 2) and M Adler, 'The Rise and Fall of Administrative Justice: A Cautionary Tale' (2012) 8 *Socio-Legal Review* 28.

4 See e.g., Robert Thomas and Joe Tomlinson, 'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) *Journal of Social Welfare and Family Law* 380.

5 See e.g., Westminster Coalition Government, *Administrative Justice and Tribunals: A Strategic Work Programme 2013-16* (Ministry of Justice 2012).

6 <https://justice.org.uk/ajc/>

4. Administrative Justice in Wales

The first body with a formal role in overseeing the administrative justice system in Wales was the Welsh Committee of the AJTC, set up in 2008. Before being abolished in 2013, it had a significant impact in highlighting the particular administrative justice challenges faced in Wales and in promoting reform.⁷ It was succeeded in 2013 by the Committee for Administrative Justice and Tribunals Wales (CAJTW). This was set up by Welsh Ministers to ensure that expert advice remained in place in Wales and that the needs of users of the system in Wales continued to be paramount. CAJTW's initial two-year funding was from the Ministry of Justice. It operated for an additional six months with further funding from Welsh Government but was ultimately disbanded in 2016. A successor body has not been created.

CAJTW's work facilitated the development of a community of stakeholders, including academic researchers, to continue providing evidence-based research and advice on the administrative justice system in Wales. From being behind its counterparts in Northern Ireland and Scotland, the study of administrative justice in Wales is now often seen as leading the field. However, in my view the lack of a formal oversight body limits political and administrative accountability.

The Commission on Justice in Wales ['the Justice Commission'] concluded that: 'Administrative justice is the part of the justice system most likely to impact upon the lives of people in Wales'.⁸ It also noted that: 'Whatever the current state of divergence [between Welsh and English law], it seems safe to conclude that it is in the field of substantive administrative law that the scope for divergence has the most potential in the short term'.⁹ Whilst issues constituting a 'fall' in administrative justice (in particular reserved areas such as reforms to legal aid and to redress in the area of social security decision-making) have had an impact in Wales, devolution has enabled Welsh Government and the Senedd to take a different approach in other areas that may well have improved the quality of administration and administrative justice.

7 AJTC Welsh Committee, *Review of Tribunals Operating in Wales (2010)*.

8 Commission on Justice in Wales, *Justice in Wales for the People of Wales (October 2019)* para 6.1.

9 Commission on Justice in Wales, para 6.15.

5. Public Administration and Social Justice in Wales: Administrative Justice Gets Lost?

Welsh Government and the Senedd have developed innovative policies and legislation relating to sustainability, well-being, equalities and human rights, all matters that promote and support good initial administrative decision-making that is central to the broader achievement of administrative justice. However, matters of public services reform, sustainability, and even equalities and human rights, have not been expressly connected to the concept (and system) of administrative justice in Wales. The notion specifically of administrative ‘justice’ in addition to, and aligned with, ‘good administration’ has tended to get lost.

CAJTW referred to administrative justice as a cornerstone to social justice (something of great importance on which everything else depends).¹⁰ First Minister Mark Drakeford AS has in the past, described good administration as the first principle of social justice in a devolved Wales, proposing a set of core principles including the value of good governance, an ethic of participation, and improving equality of outcome.¹¹

A difficulty for administrative justice has been that in the absence of any Senedd Committee, or Government Minister, with specific responsibility for ‘justice’ there has been no political body to champion the concept. As the Justice Commission notes, ‘it is difficult to discern a coherent leadership structure for justice within the Welsh Government and the Assembly’ and this can ‘adversely affect policy formation and delivery’.¹² This is so despite that many aspects of administrative law, and some aspects of administrative justice, are devolved.

In some countries the nature of administrative justice is affirmed in legislation. For example, the Québec Act Respecting Administrative Justice aims to ‘affirm the specific character of administrative justice, to ensure its quality, promptness and accessibility and to safeguard the fundamental rights of citizens’. This framing has had an impact on the culture of public administration and tribunal practice, in particular around the content of training provided to practitioners and officials, and

10 **Committee on Administrative Justice and Tribunals Wales, *Administrative Justice: A Cornerstone of Social Justice in Wales; Reform priorities for the Fifth Senedd (2016)* [‘Legacy report’] <<https://gov.wales/docs/cabinetstatements/2016/160729cornerstoneofsocialjustice.pdf>>.**

11 **M Drakeford, ‘Social Justice in a Devolved Wales’ (2007) 15(2) *Journal of Public Finance and Public Choice* 171.**

12 **Commission on Justice in Wales, paras 12.27 and 12.28.**

on how administrative justice is addressed within legal education.¹³ In many other countries the concept (and system) of administrative justice is either recognised in legislation, or at least in government policy, and in general principles, frameworks or standards governing the operation of key bodies such as tribunals.

Research has consistently disclosed limited awareness of administrative justice in Wales,¹⁴ including among legislators and public officials, and the concerns of administrative justice have sometimes been considered matters purely of public administration, rather than issues of justice for individuals and groups.¹⁵ According to CAJTW this has (at least in the past) had implications for core constitutional principles such as separation of powers, and the rule of law; for some this continues to be a problem, in particular that some Welsh administrative law may lack sufficient clarity to be enforced in a court, tribunal or by another body,¹⁶ and that most devolved Welsh tribunals are administered by a department of Welsh Government.¹⁷

13 <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/J-3> and Prof Dr Pierre Issalys, Université Laval (Québec) ‘Codification of Administrative Law’ workshop, Universität Zürich, 23rd & 24th January 2020 (publication forthcoming).

14 S Nason, *Understanding Administrative Justice in Wales* (Bangor University 2015). S Nason, A Sherlock, H Pritchard and H Taylor, *Public Administration and a Just Wales* (Bangor University/Nuffield Foundation 2020).

15 CAJTW ‘Legacy Report’ (n 9) and see S Nason and H Pritchard, ‘Administrative Justice and the Legacy of Executive Devolution: Establishing a Tribunals System for Wales’ (2020) *Australian Journal of Administrative Law*.

16 AJTC Welsh Committee (n 8), CAJTW (n 11), and Rt Hon. The Lord Thomas of Cwmgiedd PC *Thinking policy through before legislating – aspirational legislation* (Statute Law Society, Annual Renton Lecture, November 2019).

17 President of Welsh Tribunals, *Annual Report (2019)*: <https://gov.wales/president-welsh-tribunals-first-annual-report-2019>

A 2016 Public Policy Institute for Wales (PPIW) Report concluded that there is a lack of systematic research about public service improvement in Wales. It found that more thought needs to be given to understanding different frameworks for evaluating outcomes and there are too many overlapping accountability frameworks covering the same citizens and outcomes.¹⁸ In the context of equality, well-being and human rights in particular, work is being done to consider how accountability mechanisms could be better integrated or at least aligned (through combined reporting and harmonising timescales for reporting).¹⁹ Earlier, the 2014 Williams Commission on Public Services Governance and Delivery had recommended that the Senedd: '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'.²⁰

Outside the context of equality, sustainability and human rights, it is not clear exactly what attempts have been made to review overlapping accountability frameworks, or to examine whether the compass of existing audit and inspection processes is excessive. It is also not clear whether there has been a review aimed at simplifying and streamlining legislation that applies to public decision-making in Wales. Indeed, new legislation and new accountability regimes have since been established. **If these matters were considered to be issues of justice as well as public administration, a more coherent approach to public administrative law, individual citizen redress, and learning from redress could be taken.**

18 PPIW, *Improving Public Services: Existing Evidence and Evidence Needs* (2016) p.8.

19 Through Welsh Government's Gender Equality Review work programme and Welsh Government funded research into 'Strengthening and Advancing Equality and Human Rights in Wales'.

20 Williams Commission, *Commission on Public Service Governance and Delivery in Wales* (January 2014) : <https://gov.wales/sites/default/files/publications/2019-01/commission-public-service-governance-delivery-full-report.pdf> [Recommendation 7, para 2.37].

6. The ‘New Administrative Law’ of Wales: Sustainability, Human Rights, and Equality

I have written of what I consider to be the key characteristics of a nascent ‘egalitarian’ Welsh approach to administrative justice.²¹ In Welsh Government policy and Senedd legislation there is a focus on engaging and involving citizens in public administration; co-design and co-production of public services; social partnership; promoting policy and strategic decision-making that respects rights, equality and well-being; and increasing co-ordination between existing bodies that can be recognised as parts of the administrative justice system (for example between the Public Services Ombudsman for Wales and Welsh Commissioners). I have ‘constructed’ these elements as together providing the foundations for a more explicit and distinctly Welsh approach to administrative justice policy, but this is an after the fact interpretation, as there is no express Welsh Government administrative justice policy.

The Welsh approach that I have constructed emphasises good initial administrative decision-making, and ‘enforcement’, accountability and redress outside the courts. However, it is not clear whether these elements are the result entirely of deliberate policy choices to avoid court (and in some cases tribunal) based redress for individuals, or if these choices also partially result from the fact that Welsh Government does not have practical control over alternative (or complementary) court (and some tribunal) processes to enforce individual rights and entitlements under administrative law. **In my view a more explicit administrative justice policy could help to explain why these choices have been made, and also enable them to be more effectively scrutinised.**

6.1. Sustainability

Sustainability is now the ‘central organising principle’ of public administration in Wales, finding expression through Well-being duties in the Well-being of Future Generations (Wales) Act 2015 (WFGA). The Commission on Justice in Wales proposed that:

21 S Nason, ‘Administrative justice in Wales: a new egalitarianism?’ (2017) 39(1) *Journal of Social Welfare and Family Law*.

Wales has far sighted policies on future generations, sustainability, and international standards on human rights. These are, however, not integrated with the justice system. The distinctive legal framework being developed to underpin these policies, including the creation of independent public officers whose role is to promote and protect rights, is not aligned to the justice system.²²

The Justice Commission does not define its two key terms of not 'integrated' with and not 'aligned' to the justice system, but it does go on to say that Wales lacks sufficient machinery for implementation of its law through courts and tribunals. This suggests that the small devolved tribunal judiciary, whilst important, adds to fragmentation and complexity.

As part of the proliferation of rights, equality and sustainability-based legal norms, Welsh legislation has created new duties on public authorities, requiring them variously to have 'due regard', to 'take into account', to 'take into consideration' and to 'take all reasonable steps to comply with' these duties. Some of these are legal terms of art. However, academics, practitioners, and judges have begun to question whether the implications of particular wording have been fully understood on some occasions of enactment into Welsh law.²³ Even accepting that the implications of individual phrases have always been understood, the framework developed is complex. As Emyr Lewis (Head of Law and Criminology at Aberystwyth University) has put it in the context of the duty to 'take into account' Health Impact Assessments, this creates 'a further layer of high-level soft law regulation governing the activities of public authorities in Wales, which could further complicate the processes of decision-making'.²⁴

Some of the legislation – mostly notably WFGA - is more aspirational in nature, promoting and encouraging good administration. It can be seen to be as seeking to facilitate changes in public body culture, rather than developing new compliance regimes.

A norm expressed in 'aspirational' legislation can be a legal norm of the system, even if is not justiciable in a court or tribunal. As David Feldman notes, the meaning of 'legislative' is that legislation 'carries law', even if it is not law itself. As such, Feldman supposes that: 'Legislation which is non-law-bearing hovers on the

22 Commission on Justice in Wales, para 12.21.

23 See e.g., Lord Thomas (n 17).

24 E Lewis, *Public Health (Wales) Act 2017 - making Wales a leader in public health* (Lexis 26/07/2017) https://www.blakemorgan.co.uk/media/filer_public/80/ec/80ece5c2-1556-4d44-bfb8-a4f3b4fbee7/public_health_wales_act_2017making_wales_a_leader_in_public_health.pdf

boundary between law, politics and morality'.²⁵ Feldman also notes that such non-law-bearing legislation clearly has effects in the real world, and potentially more significant effects than traditionally worded statutes. As he states:

To legislate is to assert a special type of authority. It is impersonal and institutional. It taps into a reservoir of respect for the legitimacy of the state and its institutions. It is most effective when not relying on coercive force to secure obedience; subjects' loyalty produces more reliable compliance than enforcement.²⁶

Feldman concludes that despite the potential positive impacts of aspirational legislation there are also disadvantages. The first is confusion over whether particular provisions are indeed law-bearing or not (whether they are legally enforceable through some means or not). For all its good intentions WFGA can be seen as suffering from this problem. Participants in Bangor University-led research generally took the view that WFGA lacks clarity with regard to administrative justice implications, with various duties being layered through the Act itself and within subsequent guidance.²⁷ The claimant's barrister in the first case seeking to enforce duties under WFGA (*R(B) v Neath and Port Talbot*)²⁸ described the legislation as 'particularly badly drafted';²⁹ the defence team also noted that the provisions explaining how the Five Ways of Working should be used when 'doing something in accordance with the sustainable development principle' (section 2 and section 5) lead to a scheme that is 'hard to follow'. Lambert J in *R(B)* criticised the drafting of Welsh Government Guidance. The Future Generations Commissioner has also noted anomalies in the promotion and scrutiny roles between her office and that of the Auditor General for Wales.³⁰ At the time of writing, Welsh Government and the Future Generations Commissioner are yet to openly agree on aspects of the legal interpretation of WFGA and related Guidance.³¹

After his tenure as Chair of the Commission on Justice in Wales, Lord Thomas

25 David Feldman, 'Legislation as Aspiration: Statutory Expression of Policy Goals' (IALS 2015): <http://www.statutelawsociety.co.uk/wp-content/uploads/2015/03/Feldman-Legislation-as-Aspiration.pdf>

26 Ibid.

27 Nason, Sherlock, Pritchard and Taylor (n 15).

28 *R (B) v Neath Port Talbot Council* (30 January 2019) CO147470/3018.

29 <https://www.bbc.co.uk/news/uk-wales-48272470>

30 Senedd, ELGC Committee - (7 November 2019) paras 47 and 48: <https://record.Senedd.wales/Committee/5746#A54152>

31 See, <https://record.Senedd.wales/Committee/5746#A54152> and <http://senedd.Senedd.wales/documents/s96601/ELGC5-35-19%20Paper%209.pdf>

was critical of aspirational legislation, including WFGA, as raising false hopes and undermining the rule of law.³² His central interrelated conclusions were: first, that legislation which seeks to improve administrative decision-making must be drafted with sufficient precision to enable an appropriate court, tribunal or other enforcement body to determine whether relevant duties have been discharged on the basis of objective evidence; second, that the use of different enforcement mechanisms should be explored, which could include a court or tribunal, but also potentially an ombud with an adjudicative role, or a commissioner with enforcement powers (that is, beyond those of the Future Generations Commissioner for Wales, which have been described as ‘name and shame’ powers).

It may be useful for the Senedd to draw on these two ‘tests’ from Lord Thomas when legislating for new administrative law rights and duties. The *Principles of Administrative Justice* developed by CAJTW, and *Principles of Redress design* collated by researchers,³³ could also assist the Senedd when legislating for new administrative law rights and duties, and when scrutinising existing practices.

6.2. Human Rights

Administrative justice institutions, such as courts and tribunals, are the main forum for enforcing human rights norms in Wales, yet the importance of this relationship - between rights and administrative justice - is rarely explicitly recognised by elected representatives.

The most significant method of incorporating international human rights norms into national law is direct incorporation. This involves transforming an international treaty into domestic law by making it part of national legislation. This approach means human rights become binding on governments and public authorities, and individuals are able to rely on their rights before national courts or tribunals. The Human Rights Act 1998 comes close to direct incorporation, as the ECHR rights included in Schedule 1 to the Act are directly enforceable through domestic courts in light of section 6 which imposes specific duties on public bodies to comply with those rights. Section 6 is regarded as having had a significant impact on public administration and administrative law. There are no examples of Welsh law that have followed this direct incorporation model. This may be what the Justice Commission meant when it stated that Welsh policies on international human rights are not ‘integrated’ with the justice system.

32 Lord Thomas, ‘aspirational legislation’ (n 17).

33 Nason, Sherlock, Pritchard and Taylor (n 15).

Another model of integration is indirect incorporation. Under this model, human rights are not expressed to bind government or public authorities, but have some indirect impact. For example, they may require government or public authorities to take particular human rights into account when making policy decisions.

An example is the Rights of Children and Young Persons (Wales) Measure 2011 (RCYPWM), which requires Welsh Ministers and some other public bodies to have 'due regard' to children's rights protected by the UN Convention on the Rights of the Child in particular circumstances. Indirect incorporation in this manner does not provide individuals with a specific cause of action in a court or tribunal where a breach of a relevant right is alleged. However, failure to have 'due regard' could align to various grounds of judicial review, such as illegality (failure to comply with a legally prescribed process – that of having 'due regard'). As far as I am aware, at the time of writing there had been no judicial review application that had been successful on the basis of lack of due regard under the RCYPWM.

Academics, including Simon Hoffman of Swansea University, have argued in favour of direct incorporation in Welsh law, on the basis that: 'When it comes to protection of individual and group rights the courts represent a bastion of accountability, and a powerful force to ensure socio-economic policy is human rights compliant'.³⁴ For Hoffman 'the statutory framework in Wales does not incorporate socio-economic rights. This means they are less likely to feature as an aspect of government decision-making in Wales, and accountability for these rights is very weak'.³⁵ By thinking more specifically in terms of administrative justice governments and legislatures can treat matters of accountability and enforcement as matters of justice during policy development and legislative scrutiny.

6.3. Equality

In addition to the UK Public Sector Equality Duties, there are Wales Specific Equality Duties (WSEDs) which include a duty to publish 'equality objectives' or to provide reasons for not doing so. Authorities are also required to comply with 'engagement' provisions and have due regard to 'relevant information' when considering and designing their equality objectives.³⁶ Witnesses to a 2016 House of Lords Select Committee on the Equality Act 2010 and Disability, examining *The Equality Act 2010: the impact on disabled people*,³⁷ gave evidence that the

34 Hoffman, *Human Rights: Accountability and Enforcement* (Bevan Foundation 2019) p.5.

35 Hoffman, *Incorporation of International Human Rights* (Bevan Foundation 2019) p.8.

36 Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011

37 House of Lords Select Committee on the Equality Act 2010 and Disability, Report of Sessions 2015-16, *The Equality Act 2010: the impact on disabled people*: <https://publications.parliament.uk/pa/ld201516/ldselect/ldseqact/117/117.pdf>

Welsh duties have had more positive impact than their English counterparts. Rebecca Hilsenrath (Chief Legal Officer, Equality and Human Rights Commission) stated that 'the specific duties give greater clarity in relation to the work of public authorities...We found that their consultation and engagement work had improved, and that was including the disability sector'.³⁸

Despite this progress, the 2018 EHRC Report, *Is Wales Fairer*³⁹ found significant challenges alongside some improvements. Whilst the Welsh approach may have advantages over its English counterpart, it is worth noting that according to an Administrative Court Lawyer for Wales, the WSEDs are rarely raised in the Court, and when they are this is as a secondary, and apparently poorly argued, ground. This suggests that the duties are not translating into specific individual redress, limiting their role in holding public bodies to account.

38 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/equality-act-2010-and-disability-committee/equality-act-2010-and-disability/oral/18810.html>

39 **EHRC, *Is Wales Fairer? The state of equality and human rights 2018*: <https://www.equalityhumanrights.com/sites/default/files/is-britain-fairer-2018-is-wales-fairer.pdf>**

7. Conclusions About General Administrative Law

My research conclusions about general administrative law are that:

- It is important to recognise that aspirational legislation which seeks to encourage behavioural change also needs to be delivered through administrative, and specifically through administrative justice, processes.
- Legislation and guidance about what these processes require should be sufficiently worded to ensure that public bodies are held accountable for the outcomes of their decision-making.
- Duties on public bodies (on well-being, equality and human rights) can sometimes lack clarity in their content.
- Some Welsh administrative procedure legislation is distinctive in its heavy dependence upon how public bodies chose to implement it. It sets out aims that public bodies are required to complete through their own administrative processes. Often the only method of legal enforcement here is judicial review on ordinary common law grounds, which is a weak means of protecting individual rights.
- Legislation and guidance sometimes lack clarity (and in some cases also coherence) in the accountability methods that are to apply. There is also sometimes a lack coherence around the division of functions between particular public officials (Commissioners, regulators etc).
- The provisions of Welsh administrative law are, in effect, 'quasi constitutional': expressed in the language of constitutions and/or bills of rights, but without constitutional status and usually without explicit rights of enforcement for individuals and groups.

8. Topic-specific Substantive Administrative Law

Administrative law does not include only 'general' rights and principles-based duties on public bodies. Administrative justice is also about people being able to fully enjoy their substantive rights and entitlements under topic-specific administrative law (such as housing, education and planning), regardless of whether these 'rights' are specifically expressed as protected human rights in legislation.

Human rights are ultimately more likely to be respected if a person is able to enforce their specific administrative law rights, for example a 'right' to be allocated social housing as guaranteed under Welsh law, whether or not this is also framed through the lens of a human right to housing. Likewise, a child should be able to enforce their 'rights' to additional learning needs provision under Welsh law, whether or not this is framed through the language of the rights of the child or of the right to education.

In this regard, the Justice Commission stated that the general 'system of administrative justice [is] undoubtedly difficult for individuals to understand and use'; and that the 'current system of challenging public bodies in Wales is complex'.⁴⁰ The system has developed ad-hoc and people generally do not know where to go to have their disputes resolved. Victoria Winkler of the Bevan Foundation has argued even more starkly that 'it is not clear who takes administrative decisions in Wales', and people 'rarely protest because the whole system of public decision-making can be opaque and set against them'.⁴¹ Redress pathways need to be express and clear in all legislation that creates rights and duties, not just in legislation that incorporates human rights, or creates new equality and well-being duties. Administrative justice isn't only about supporting equality and human rights, for example, it is about all public administrative law and related redress.

40 Commission on Justice in Wales, paras 5.56, 6.16 and 6.60 among others.

41 Bevan Foundation, 'Where next for Social Justice' (Cardiff, 15 November 2018).

9. Clarification, Consolidation and Codification

Some of the concerns raised so far could be addressed within the programme to clarify, consolidate and codify Welsh law. Bangor University's Welsh Law Research Group, of which I am a member, has responded to the Welsh Government's Consultation on the Future of Welsh Law. This response includes recommendations on how the codification process could be used to facilitate improvements in public administrative law and administrative justice. A summary of the recommendations is as follows:

- That the Well-being of Future Generations (Wales) Act 2015, and legislation relating to the Children's Commissioner for Wales and Older People's Commissioner for Wales, should be included within the currently proposed 'Public Administration' Code for Wales.
- That Welsh Government and the Senedd should review the range of human rights, well-being and equality based administrative procedure laws applying to Devolved Welsh Authorities, with a view to achieving greater consistency, simplicity and coherence, and with a view to improving practical impacts on the quality and outcomes of administrative decision-making; and that these legislative provisions should be consolidated (with a view to codification).
- That the proposed 'Public Administration' Code be re-badged as a Public Administration and Administrative Justice Code, in light both of the inclusion of the Devolved Welsh Tribunals (as judicial not administrative bodies) and of the need to take a principled approach which affirms the special character of administrative justice.
- That developing a 'Public Administration', or 'Public Administration and Administrative Justice' Code for Wales provides the opportunity to reconsider the case for greater consistency in the roles and procedures of some of the Welsh Commissioners; and that Commissioners should generally be accountable to the Senedd, rather than Welsh Government.

- That Welsh Government and the Senedd consider the case for future drafting of an Administrative Procedure Act for Wales, to include a consolidated set of human rights, well-being and equality based procedural duties. This could potentially extend to other matters such as 'Ways of Working', the duty to give reasons for administrative decisions, and compensation for wrongful administration not actionable as a civil wrong. An Administrative Procedure Act must contain an express mechanism for seeking redress for breach of its provisions.
- That key case law (especially that interpreting and applying devolved Welsh administrative law) be included, as a matter of presentation and quick accessibility, within a 'Public Administration' or 'Public Administration and Administrative Justice Code' for Wales, but that such common law should not itself be codified.