

Administrative Justice at the 2016 Legal Wales Conference

By Sarah Nason

Administrative justice is now becoming a regular feature on the programme of the annual Legal Wales Conference. This year's conference, in Bangor on 7 October, included a panel discussion of a range of key administrative justice issues relevant to Wales, and to the broader UK.

The Chair was Carolyn Kirby (President of the Mental Health Review Tribunal for Wales), other members were; Ann Sherlock (Aberystwyth University); Katrin Shaw (Public Services Ombudsman for Wales), Andrew Felton (Welsh Government Justice Policy team), Dr. Huw Pritchard (Cardiff University and Wales Governance Centre) and Dr. Sarah Nason (Bangor University). The Chair began the session by pointing out the size and scale of the topic and the diversity of aspects of administrative justice in Wales. The aim of the session was to improve awareness and stimulate discussion especially in light of a number of recent consultations and reports and other materials relevant to the future of administrative justice in Wales.

A key document has come to be known as the legacy report of the Committee for Administrative Justice and Tribunals Wales (CAJTW); which operated between November 2013 and March 2016. This was the subject of a previous blog post; the report and the Welsh Government's response can be found here:

<http://gov.wales/about/cabinet/cabinetstatements/2016-new/cajtwlegacyreport/?lang=en>

Other materials specifically relating to Wales include; the Report of the Justice Stakeholder Group to the Minister for Public Services, *Law and Justice in Wales: Some Issues for the Next Assembly* (March 2016) <http://gov.wales/about/cabinet/cabinetstatements/previous-administration/2016/justicestakeholder/?lang=en> and a Report by Cardiff University's Wales Governance Centre, *Justice in Wales: Principles, Progress and Next Steps* (September 2016) <http://sites.cardiff.ac.uk/wgc/files/2016/09/Justice-in-Wales-Sept-2016.pdf>

Materials that may have unique implications for Wales include, the consultation published by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals on 15

September, *Transforming Our Justice System* (consultation closing 27 October) <https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/> and the consultation published by the Ministry of Justice on 15 September, *Modernising Judicial Terms and Conditions* (closing 10 November) <https://consult.justice.gov.uk/digital-communications/modernising-judicial-terms-and-conditions/>

Welsh Commissioners

The discussion began with a reminder, that despite their importance, the administrative justice system in Wales is about more than courts and tribunals. Ann Sherlock explained her work in relation to the Older People's Commissioner for Wales and the Children's Commissioner for Wales (Wales being the first of the UK nations to create the role of children's commissioner). Commissioners are an important part of the broader administrative justice system in Wales. Looking at their work, especially from the 'bottom-up' user perspective is important because they may be relevant in resolving issues that might otherwise have to be dealt with by more formal elements of the administrative justice system. This is likely to be increasingly important as the two open Consultations (noted above) both effectively recommend reducing the availability of more traditional tribunal and court redress.

A further point of interest is the extent to which the Commissioners' role is to signpost to other bodies and what this might say about the existence and visibility of appropriate advice and redress. A research question remains whether even these relatively accessible Commissioners are receiving complaints from society's most vulnerable groups or simply providing another avenue of redress for the well-informed and well-resourced. It was noted that some cases cannot be resolved without broader policy change and that the Commissioners' ability to bring issues to the attention of Welsh Government is important in improving the quality of services offered and therefore reducing complaints for the future. However, it was noted that questions can be raised around public bodies' internal complaints systems; it seems that the Children's Commissioner's identification of an error within a particular local authority can provide resolution when the individual's having pursued the local authority's internal scheme does not. Is it that the Commissioner can articulate the problem more clearly, or is it something to do with the power to name and shame?

The Public Services Ombudsman for Wales

Again, an area where Wales has been at the cutting edge is in the role of the Public Services Ombudsman for Wales (PSOW), especially in the office's ability to provide a form of 'one stop shop' for concerns and complaints spanning a range of issues across all devolved public services in Wales. Katrin Shaw noted that the office is currently working on a thematic report from its casework evidence on complaint handling that will give examples of what happens when things go badly wrong. This should be issued in the New Year. It was noted that all too often problems come down to cultural issues within the public body, including a fear or refusal to admit that mistakes have been made; that the person or department that is the subject of the complaint had had a role in formulating the public body's response to it; and a lack of objectivity by senior officers responsible for signing off complaints.

It was noted that the PSOW's caseload has continually increased over the last ten years, not least due to austerity and an ageing population. One of the ways the office is responding to this is with the draft Public Services Ombudsman (Wales) Bill issued by the National Assembly for Wales Finance Committee during the Fourth Assembly. This would result in a more citizen-centred approach to complaints handling by; developing a Complaints Standards Authority (as already exists in Scotland), simplifying arrangements for complaints to be made orally, and giving the PSOW own initiative powers of investigation (such powers being commonplace among much of Europe) allowing the PSOW to investigate suspected systematic failures without having to wait for a specific individual complaint. This more systematic role links the work of commissioners and ombudsmen more generally and again raises the broader point that these institutions have more power to 'name and shame' than individual complainants.

It may be that it is in these non-court and tribunal based areas of accountability where administrative justice in Wales has developed more significantly, given that whereas public services responsibilities are devolved, the broader justice remit is not yet fully devolved. That said, Wales is increasingly developing its own justice policy and identity.

Welsh Government Justice Policy Team and Reforms to Administrative Justice in Wales

Andrew Felton noted that the Welsh Government operates a number of tribunals in Wales, in areas such as education, mental health, residential property and Welsh language. In recent years, significant progress has been made through business improvements and reforming policies and procedures to improve user experience and bring consistency between devolved tribunals and their HMCTS counterparts.

Following a report of the Welsh Committee of the Administrative Justice and Tribunals Council in 2010, http://ajtc.justice.gov.uk/docs/RTOW_English_t.pdf a Welsh Tribunals Unit was set up to bring together the administration of tribunals under the First Minister, separate from policy departments and Ministerial portfolio responsibilities.

The pace and scale of reform increased in 2014, after a Welsh Government review of the devolved tribunals and a Justice Policy team was set up. Justice Policy and the Tribunals Unit are working on a joint reform programme, in collaboration with the judicial arm's length bodies. In 2015 arrangements were made for the Judicial Appointments Commission (JAC) to conduct tribunal appointments on behalf of the Welsh Ministers, mirroring the arrangement for JAC appointments for the Lord Chancellor.

The mix of Welsh Ministers and Lord Chancellor appointment functions forms part of the complex constitutional and governance context in which the devolved tribunals operate. There isn't a separate Welsh JAC, Judicial College or Judicial Conduct Investigations Office, but excellent working relationships have been developed with these bodies; and with the support of the Lord Chief Justice (LCJ) and his office, tailored arrangements are being developed for the devolved tribunals.

Two key issues currently being addressed with the LCJ are; legislating for a senior judicial leader of the devolved tribunals, and cross deployment between the devolved tribunals and HMCTS tribunals. The reports and consultations cited above have provided a strong evidence base to continue the momentum of reform and improvement for the devolved tribunals, and the development of justice in Wales more widely.

The Administrative Justice Landscape (...and Judicial Review)

Most of Dr. Sarah Nason's contribution focused on these broader challenges to administrative justice in Wales, but she began with a few comments on judicial review, often taken to be a barometer of the general health of an administrative justice system, despite the very small caseloads. It was noted that there has been a general decrease in non asylum and immigration civil judicial review claims across the whole Administrative Court in the last two years, but that this reduction has been more marked outside London, including in Wales. It was noted that fewer judicial review claims are now issued outside London than was the case in 2009 when Administrative Court centres were opened in Birmingham, Cardiff, Leeds and Manchester. Corroboration by other evidence suggests that this is in large part due to reforms to legal aid and judicial review procedures that may have had a disproportionate effect on access to relevant legal services outside London. At least from the claimant side, the market for public law legal services in Wales appears to have shrunk just at a time in the progress of devolution that one might expect it to be expanding.

In any event these issues must be understood in the context of reforms to the UK justice system. All involve trade-offs on issues like; caseload pressures, delays, limited judicial and other resources, efficiency, accessibility, constitutional legitimacy and political pressures. Many reforms are ostensibly underpinned by proportionate dispute resolution (PDR). Within courts and tribunals proposed reforms include; use of case officers not judges for routine tasks; decisions made on the papers; virtual hearings; encouraging cases to be resolved outside court (by encouraging ADR/mediation, but also by mandatory internal review, increased tribunal fees and reduced/abolished appeal rights (especially in the context of immigration)); simplifying processes by 'digitising' tribunals (alongside the 'Online Court' for civil court cases). The Social Security and Child Support Tribunal will be first to pilot digitisation (of all the devolved and non-devolved tribunal jurisdictions this has the largest number of Welsh claimants). Other reforms include giving the Senior President of Tribunals more power to determine panel composition in tribunals (including the use of one member panels), this must be understood alongside reforms to judicial contracts and likely has unique impacts in Wales where the pool of applicants for judicial posts is smaller.

It was submitted that one person's PDR is another's means to reduce costs under austerity politics (or even to make profits out of disputes) and at the same time to insulate (what appears to be mainly central government given the scope of current reforms) from the scrutiny of tribunals and courts. It was further suggested that such reforms have sometimes

lacked a solid evidence base (for example there is limited data on the comparative costs of designing and operating particular systems or models of administrative justice); lacked a joined up approach between government departments; and sometimes lost sight of the idea of ‘holistic’ administrative justice (administrative justice as a process or system of feedback/learning between constituent elements rather than being purely about ‘triaging’ and/or ‘gatekeeping’ between redress levels in a hierarchy). In whatever manner these and other reforms come to be implemented in Wales it was suggested that evidence, and a joined-up and holistic approach, ought to be a hallmark of the Welsh strategy, and could more realistically be achieved in Wales given its comparative size.

Looking to the Future of Justice in Wales

Dr. Huw Pritchard noted that recent reports, including the 2010 AJTC Welsh Committee Report, the 2016 CAJTW Report and a November 2015 Bangor Law School Report, *Understanding Administrative Justice in Wales*

<http://adminjustice2015.bangor.ac.uk/documents/full-report.pdf>,

help to set the scene for the future landscape of administrative justice in Wales; in particular, for the ongoing reform of Welsh tribunals and developing an increasingly ‘user’ or ‘citizen’ centric approach.

It was submitted that these reports show how focus is moving to a more holistic view of administrative justice and how different forms of redress are related. Recommendations in the CAJTW’s report show how different aspects of the system can work to support and improve each other’s procedures and decisions. This includes promoting ‘right first time’, leadership training on administrative justice for decision-makers, strengthening scrutiny by the Welsh Assembly, and making separate data concerning Wales available.

The oversight of the system in particular is an important concern. Losing the force of the Welsh Committee of AJTC, and now CAJTW, makes it important to consider how stakeholders can continue to contribute to the development of administrative justice in Wales.

Administrative justice has also been used as a foundation for considering a distinct Welsh approach to justice more generally. Both the Justice Stakeholder Group Report and the *Justice in Wales* Report from the Wales Governance Centre use administrative justice to

show how Wales has already adapted to distinct justice matters in Wales, and how that can be extended to other areas of justice. The ongoing review undertaken by a UK Government working group on Justice in Wales, looking into how Welsh law can be accommodated within the single jurisdiction of England and Wales should look at how administrative justice has already done this to various degrees. This would be a useful starting point from which to show how distinct arrangements are possible.

Discussion Points

Questions raised from the floor began with non-court-based avenues for redress including the powers and procedures of the PSOW and Welsh Commissioners. It was questioned whether the PSOW has sufficient powers given the broad remit of the office. In response it was noted that the PSOW has many powers equivalent to the High Court in terms of conducting investigations, such as when requiring relevant documents to be produced, and also that the PSOW can refer cases to the High Court where appropriate. The grant of an own initiative function would also strengthen the powers of the office to investigate potential systematic failures. The broader problem for both the PSOW and Commissioners is a matter of resources in light of increasing caseloads (at least in the case of the former). It was noted that ombudsmen complaints in general can take a comparatively long time to resolve given the potential alternative of, say a judicial review application with the potential for immediate consideration by an ‘out of hours’ judge and the grant of interim measures where appropriate.

It was noted that improving and maintaining access to non-court and tribunal avenues for redress is especially important in light of relevant consultations on transforming the justice system. Access to relevant advice and assistance in Wales, whether from private law firms, and increasingly from charities and other voluntary organisations, will be especially important in the future. This is both in terms of navigating and making the most of traditional court and tribunal based redress, but also of avoiding it where possible and appropriate. In this regard the development of a National Advice Network for Wales, which includes an Information and Advice Quality Framework for Wales, was noted. More information can be found here; <http://gov.wales/topics/people-and-communities/communities/advice-services/information-advice-quality-framework/?lang=en>

Many of the challenges facing administrative justice in Wales in the future surround austerity measures and the need to ensure that the system is as effective as possible in light of reduced resources. In that regard the potential for increased online dispute resolution and other aspects of ‘digitisation’ was seen as a good thing for Wales, bearing in mind always that appropriate resources should be assigned to those digitally disadvantaged or excluded, and to those cases which by their nature require a day in court/tribunal. This includes appropriate resources to identify relevant people and relevant cases.

Other opportunities for Wales include utilising the comparative size of governance to build on the idea of a ‘one stop shop’ for complainants, which already includes the PSOW and the role of the Administrative Court Lawyer for Wales (the latter assists in directing queries to the appropriate avenue be that judicial review, a statutory appeal in the Administrative Court itself or to a relevant tribunal, and other avenues where court or tribunal adjudication is not appropriate).

The role of internal review within public bodies was noted and concerns remain about the sufficiency of such processes. At the broader UK level, the function of Mandatory Reconsideration in social security cases has been much discussed, and the lack of any sufficient regulation or a set of guiding principles governing internal review in general has been raised. Wales could innovate here by developing overarching principles for internal review and ensuring that administrative justice redress mechanisms develop in a principled and consistent, as opposed to *ad hoc*, manner.

Wales also has the potential to improve first instance public decision making especially alongside reforms to local government, and the importance of good mechanisms for feedback between first instance decision makers and redress mechanisms was noted.

In terms of the public administrative law of Wales, this is developing differently to England in particular devolved areas such as education, planning, community care and local government. In its recent report on the *Form and Accessibility of the Law Applicable in Wales* http://www.lawcom.gov.uk/wp-content/uploads/2016/06/lc366_form_accessibility_wales_English.pdf,

the Law Commission recommended the codification of particular areas of Welsh law (all of which are primarily public law subjects). In the past there has perhaps been little appetite for

the codification of general principles of administrative law, or of the grounds of judicial review, but more recently there has been renewed support for the benefits of such proposals, if not through legislation then through some form of soft law guidance. It was noted that since these general principles are part of the law of England and Wales there may not be legislative competence or practicability in codification for Wales alone. That said, general principles of good administration could be laid down in some overarching document to be utilised by the Assembly.

All these potential future innovations for Wales will take resources, both financial and other, and that such a programme is ambitious given the unprecedented range of political issues on the agenda. The panel understood such constraints. One way ahead may be to focus on incremental reforms backed by a reliable evidence base as to their specific value in improving particular aspects of administrative justice especially from the user perspective.

The issue of oversight of the administrative justice system in Wales was also raised. Since the work of CAJTW and the Ministerial Justice Stakeholder Group came to an end in March 2016, there remains no formal oversight body in Wales with a wide remit. However, there are networks of key stakeholders whose interactions have been facilitated by the CAJTW, Welsh Government, and of course UKAJI. Their continued engagement could be secured by convening a forum of stakeholders from the justice sector and the legal sector, and a focus on administrative justice within Welsh university law schools.