

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a
Deddfwriaethol
Bil deddfwriaeth (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Legislation (Wales) Bill

CLA(5) LW12
Ymateb gan Cyfraith Gyhoeddus
Cymru

Evidence from Public Law Wales

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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 can 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, and that over time people from both Wales and England have been increasingly less likely to be legally represented when they do issue challenges:
 - 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.¹ The proportion of people representing themselves in civil (non asylum and immigration) judicial review claims in the Administrative Court (across England and Wales) has increased from 20% in 2007/08 to 37% in 2017/18. It should be noted here in particular that many (likely the majority) of judicial review claims are issued on the basis that a public body has failed to properly apply relevant law (these cases generally do not involve reconsideration of facts).

- b. Recent research by Shelter Cymru,² and by Salford University³ 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.
 - 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.⁴
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 Commission 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;

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

² As yet unpublished presented to Wales Housing Research Conference 10 January 2019:

³ 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>

⁴ 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>

and either repeal such provisions or clarify their meaning and interaction'.⁵ Welsh public administrative law can be 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.⁶ 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).⁷

Codification - the first step towards accessibility

7. 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 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 on its own render the law more accessible to many groups of non-professionals – especially for example homeless persons and some social housing tenants, or parents of children with additional learning needs and healthcare needs. One reason for this 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.
8. 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

⁵ Para [2.37] online at: <https://www.lgcplus.com/Journals/2014/01/21/d/r/x/Commission-on-Public-Service-Governance-and-Delivery-Wales.pdf>

⁶ 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>

⁷ 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).

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.

9. 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.⁸ 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

10. 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 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.’⁹ 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

⁸ 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.

⁹ 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.

textbooks on Welsh law, and to write commentaries for platforms such as the 'Law Wales' website has already been well-discussed.

11. 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).
12. 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.¹⁰
13. 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.'

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¹⁰ See references at (n 4).

¹¹ See (n 1).

14. 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.

Accommodating innovation and cross-cutting issues

15. 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.¹² We have further comments to make about the proposed taxonomy at a more appropriate juncture, our point here is that there appears to be a grey area between minor amendments and wholesale reform, and it will be important to consider further how to accommodate issues, and make people aware of issues, that cut across various Codes.

Cultural change and collaboration

16. 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

¹² 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*.

the production of user-friendly materials (by academics, legal professionals, 3rd sector and others) that; bridge the gap between statutory language and everyday understanding of the law/rights, raise awareness of issues cutting across Codes, and provide additional reference to and interpretation of common law precedents. There is a case for saying that there 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.

Proposals to strengthen the Bill

17. In light of the points we raise we suggest some possible proposals to strengthen the Bill. In its 2011 Legacy Report, at the end of the Third Assembly, the Children and Young Persons Committee remarked that, 'Wales is policy rich but implementation poor'.¹³ We suggest that further consideration could be given to imposing on Ministers not only an obligation to prepare a programme to improve accessibility of Welsh law, but also an obligation to give effect to such a programme (understandably this latter obligation would need to be qualified in some way). This would give greater assurance that programmes will be implemented.
18. We also suggest that in preparing a programme to improve accessibility of law, Ministers be required to state key priority areas, for example research has highlighted that the accessibility of education law applying to Wales is a major concern and can negatively impact achievement of other policy priorities in particular relating to children's rights.
19. As we have noted, success in improving accessibility will likely depend heavily in practice on the programme of activities that are intended to promote awareness and understanding of Welsh law. In order to strengthen this aspect of the Bill, and to redress concerns around disincentives for academics to produce materials on Welsh law, a specific reference could be added to s.2(4) that the programme; may include proposed activities fostering collaboration with universities and the legal profession in Wales to improve the accessibility of Welsh law, including a power to give financial support to such activities.
20. As the Explanatory Memorandum notes: 'In preparing a programme it will be important to take the views of the public. The main purpose of such an exercise would be to ensure focus on those areas of law most in need of consolidation and which have most impact on users of legislation (be they public bodies, business or the citizen). It is anticipated that a programme will

¹³ Para [179].

be prepared in draft and consulted upon, before being agreed by the Welsh Ministers and Counsel General and laid before the National Assembly'. This provides an opportunity to identify the key priority areas (as we have referred to in our para 18). However, we note also that 'the approach to consultation will be a matter for the Government of the time'. Consideration could be given to making specific reference to consultation within the Bill itself. In particular that when preparing a programme Ministers be required to consult with a specified body (or bodies) representing the legal professions in Wales, universities, public authorities and third sector organisations.