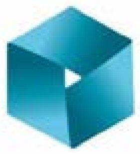

Public Law Project

Cynhadledd Prosiect Cyfraith Gyhoeddus Cymru 4-6 Mai

Public Law Project Wales conference 4-6 May

2021

Public Law Project

Public Law project (PLP) was set up to ensure those marginalised through poverty, discrimination or disadvantage have access to public law remedies and can hold the state to account.

Our vision is a world in which individual rights are respected and public bodies act fairly and lawfully.

Our priorities are to:

- Promote and preserve the Rule of Law
- Ensure fair systems
- Improve access to justice

PLP is committed to working in Wales with Civil Society and Government to address these priorities.

Sefydlwyd y Prosiect Cyfraith Gyhoeddus (PLP) i sicrhau bod y rheini sydd wedi'u hymyleiddio oherwydd tlodi, gwahaniaethu neu anfantais yn gallu cael gafael ar rwymedïau cyfraith gyhoeddus a'u bod yn gallu dal y wladwriaeth i gyfrif.
Ein gweledigaeth yw byd lle mae hawliau unigol yn cael eu parchu a lle mae cyrff cyhoeddus yn gweithredu'n deg ac yn gyfreithlon.

Ein blaenoriaethau yw:
- Hyrwyddo a diogelu Rheolaeth y Gyfraith
- Sicrhau systemau teg
- Gwella mynediad at gyfiawnder

Mae PLP wedi ymrwymo i weithio gyda Chymdeithas Sifil a'r Llywodraeth yng Nghymru i fynd i'r afael â'r blaenoriaethau hyn.

www.publiclawproject.org.uk

PLEASE NOTE: The conference will be held in English, and we apologise that there will be no translation facilities.

SYLWER: Cynhelir y gynhadledd yn Saesneg ac ymddiheurwn na fydd unrhyw gyfleusterau cyfieithu ar gael.

DELEGATE PACK

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Speaker biographies

Professor Dermot Cahill, Director of Procurement Strategies, HelpUsTrade

With over 25 years' experience specialising on procurement modernisation projects, Professor Dermot Cahill serves as HelpUsTrade's Director of Procurement Strategies around the world for Governments undertaking procurement reform sponsored by the European Union and the World Bank. A recognised international expert, his latest articles are published in leading global journals: *Harvard Colloquium* (2019); *Public Contract Law Journal* (2019); *European Procurement & Public Private Partnership Law Review* (2020); *Fordham Journal of International Law* (2021); *European Public Law Journal* (2021). His books are published by *Oxford and Cambridge University Presses*.

Prof Cahill has served as Expert Member of House of Commons Parliamentary Inquiries, e.g., into industry's readiness to adapt to E-Invoicing (for the Conservative Party); and drafted Parliamentary Questions on procurement transparency (for the Labour Party). Prior to Brexit, he has rendered significant assistance to several North Wales Councils to help them develop legal strategies to "Buy Local and Save Money", compliantly with EU procurement law prior to Brexit, and also served on the Wales Business Procurement Taskforce and advised Plaid Cymru.

In this Conference's Procurement session, Prof Cahill shall discuss recent research on judicial review trends in public procurement in the UK, which shows worrying patterns in Public Procurement Judicial Review, along with suggestions on how the Draft Social Partnership and Public Procurement (Wales) Bill 2021, currently out to consultation, may represent a missed opportunity to provide for an alternative and more effective form of review better suited to Wales, namely a Procurement Ombudsman along the model used in other countries, to provide for directive, effective, speedy resolving of procurement disputes. Professor Cahill first made this suggestion in the *Barriers to Procurement Opportunity Report* (co-written with Clifford, Evans and Ringwald, 2009), and will suggest how this could also as a possible guide to future action for those seeking to mainstream the Future Generations Act into public sector and Welsh Government procurement practice.

A graduate of the College of Europe, Professor Cahill established the Institute for Competition & Procurement Studies in 2010, attracting procurement students to Bangor University from around the world, including multiple Chevening Scholars. As Chair in EU Law & Procurement Strategy, under his leadership Bangor Law School was ranked in the Top 20 UK Law Schools 2019 for the first time (2019, *Guardian* rankings). Prof Cahill now serves as Head of Strategic Procurement Strategies with HelpUsTrade, advising clients how to align practice with policy goals, implement professionalisation and establish good governance.

Prof Cahill's EPPPLR 2020 article (co-written with Clifford, Clear & Allen) proposing new methodologies to help SMEs succeed in cross-border procurement was the 4th most read EPPPLR article of 2020. His article in *European Public Law* on UK procurement Judicial Review Trends (2021, with Clear) has attracted significant attention recently, revealing new empirical data on procurement judicial review trends across the UK's 4 nations.

Joanne Clement, 11KBW

Joanne is a leading junior, practicing in all areas of public and procurement law. She is ranked by the directories as a leading junior in six practice areas (Administrative & Public Law, Civil Liberties & Human Rights, Local Government, Education, Community Care and Court of Protection).

She was the Chambers and Partners Public Law and Human Rights Junior of the Year in 2018/19.

Joanne is a member of the Attorney General's "A" Panel of Counsel and the Welsh Government's "A" Panel of Junior Counsel.

Ruth Coombs, Equality and Human Rights Commission Wales

As the Head of the EHRC in Wales, Ruth is responsible for the strategic coordination and collaboration of the different strands of the Commissions work in Wales to maximise impact. This includes monitoring and regulation of public sector statutory duties with regard to equalities and human rights, and that due regard is paid to international treaties as they apply in Wales. Ruth has over 12 years' experience in bringing third sector expertise and patient experience to the development of health and social care policy and legislation in Wales, and mental health research. Prior to this, she worked in the education sector for 15 years, as a primary teacher and head teacher, and as a LEA contact point for primary PE.

She has also spent time on sabbatical in Zambia, supporting a women's association to strengthen their monitoring and evaluation.

In her spare time she is an unpaid priest for the Anglican Church in a parish near the centre of Cardiff, covering a socio-economically diverse community.

Matthew Court, Public Law Project
Matthew is a lawyer who joined Public Law Project's casework team in 2020.Before coming to Public Law Project, Matthew worked as a solicitor at GT Stewart Solicitors, where he acted for a wide range of clients including migrants, looked after children and care leavers. He assisted clients to bring judicial review challenges against public bodies, often on an urgent basis, and regularly acted for parents in Court of Protection proceedings relating to their children. Prior to qualifying as a solicitor, Matthew worked for over 10 years in the charity sector supporting refugees and asylum seekers, including unaccompanied children, at organisations such as the Refugee Council and the Manor Gardens Advocacy Project.

Christian Davies, Public Law Project
Christian coordinates PLP's EU Settlement Scheme support hub. His role includes providing second-tier advice to frontline organisations who assist vulnerable and disadvantaged applicants to the EUSS, and conducting related strategic casework. Before joining PLP, Christian trained and qualified as a solicitor at Slaughter and May. He has also provided pro bono advice on a wide range of legal issues as a volunteer at the Islington Law Centre and the Legal Advice Centre (University House).

Rhys Davies, Independent Monitoring Authority for Citizens' Rights Agreement
Rhys is responsible for leading the legal team at the Independent Monitoring Authority. The Team advises the IMA Board and staff on all aspects of the functions of the IMA under the European Union (Withdrawal Agreement) Act 2020. Rhys previously worked at the Welsh Government Legal Services Department, most recently leading the Europe and International Trade Team.

Professor Lina Dencik, Data Justice Lab at Cardiff University
Lina Dencik is Professor in Digital Communication and Society at Cardiff University's School of Journalism, Media and Culture and Co-Director of the Data Justice Lab. She has published widely on digital media, resistance and the politics of data and is currently Principal Investigator of the DATAJUSTICE project funded by an ERC Starting Grant. Her most recent publications include *Digital Citizenship in a Datafied Society* (with Arne Hintz and Karin Wahl-Jorgensen, Polity, 2018) and *The Media Manifesto* (with Natalie Fenton, Des Freedman and Justin Schlosberg, Polity, 2020).

Dr Ama Eyo, Bangor University
Dr Eyo is Programme Director for the LLM in Public Procurement Law & Strategy at Bangor University, North Wales, United Kingdom, where she is responsible for designing, teaching and facilitating various modules on national, regional and international procurement law and strategy. She is also the Law School's Director of Teaching and Learning. Her excellent teaching skills in this field led to her nomination and shortlisting as one of the six finalists for the Oxford University Press Law Teacher of the Year in 2015 and the award of Bangor University Teaching Fellowship 2019. She teaches legal modules on the Chartered Institute for Purchasing and Supply (CIPS) course at the Management Centre, Bangor University. She is also a Research Fellow at the African Public Procurement Unit, Stellenbosch University, South Africa.
A specialist in public sector procurement, Ama has significant experiences leading sustainable and strategic procurement transformation programmes, capacity building projects and achieving efficiency savings through public procurement in different organisations including at the Training and Development Agency for Schools (now part of the Department for Education). More recently, Ama has worked on various donor-funded procurement professionalization projects in different countries, for the World Bank, the African Development Bank, and the European Commission. Currently, she is working with the National Universities Commission in her home country – Nigeria, to integrate public procurement training in the undergraduate and postgraduate curriculum in Nigerian universities. She is editor of the Public Procurement Law Review, the African Public Procurement Law Journal and the Public Procurement Law & Practice (Sweet & Maxwell, 2021), and has authored various publications and reports on public procurement.

David Gardner, No5 Chambers
David has represented Claimants and Defendant in judicial reviews in the Court of Appeal and the Administrative Court. He appears regularly in the Court of Protection and in the Immigration Tribunals (both First-Tier and Upper Tribunals). David has also appeared in a number of other jurisdictions including in education cases, criminal cases, and parole hearings.
Before starting at No5, David was the sole Administrative Court Office Lawyer for Wales and the South West of England between March 2009 and October 2017. In that role he has gained considerable experience in judicial review and administrative law and was responsible for case management of Court and Upper Tribunal cases, including resolving disputes as to procedure between parties and advising Judges on public law cases. From 2005-2009 he was a legal adviser in the Magistrates' Court.

Helen Gill, Sinclairs Law
Helen specialises in public law, discrimination, human rights, education and community care, and has acted for individuals in a wide range of judicial review cases, including cases which have gone to the Court of Appeal, the Supreme Court and the European Court of Human Rights, and is ranked in Chambers & Partners and the Legal 500. Reported cases include R(CP) v. North East Lincolnshire Council [2019] EWCA Civ 1614; R (Mackenzie) v. The Chancellor, Masters and Scholars of the University of Cambridge [2019] EWHC Civ 1060, 2019 WL 02526272; (R(B) v. The Office of the Independent Adjudicator for Higher Education [2018] EWHC 1971 (Admin; R(JF) v. London Borough of Merton [2017] EWHC 1519 (Admin); R(Logan) v. London Borough of Havering [2015] EWHC 3193 (Admin)).
Helen has been involved in judicial reviews of community care decisions and failures against local authorities in England and Wales.
Helen is also regularly instructed in appeals on behalf of parents and young people to the First-tier Tribunal (Special Educational Needs and Disability); appeals and challenges in the higher education field including appeals, complaints to the Office of the Independent Adjudicator for Higher Education, breach of contract and discrimination claims against universities and challenges to decisions about student finance made by the Student Loans Company; appeals, complaints and judicial reviews concerning Clinical Commissioning Group decisions; statutory appeals; and Human Rights Act claims.
Helen co-authored the 4th edition of the book "Education Law and Practice" along with John Ford, Mary Hughes, Karen May and Marian Shaughnessy.

Jo Hickman, Director, Public Law Project
Jo Hickman was appointed PLP's Director in 2015. She is a public law specialist with a background in both the private and voluntary sectors. Immediately prior to her appointment Jo was Head of PLP's Casework team where she developed and led the pioneering legal aid project, and acted in a number of seminal cases. She is widely recognised for her strategic expertise, having been historically named Legal Aid Lawyer of the Year and Times Lawyer of the Week. Most recently she was shortlisted as 2017 Lawyer of the Year at both the Legal Business and Solicitor Journal awards.
She is a member of the Law Society Access to Justice Committee, a Board member of the Legal Aid Practitioners Group, and sits on the Civil Justice Council.

Alice Horn, Office of the Future Generations Commissioner
Alice studied Business Management at Cardiff University before joining the Office of the Future Generations Commissioner for Wales in 2019. As an Analyst Officer, Alice supports members of the team with research and analysis, particularly focusing on procurement. In collaboration with Cardiff University, Alice has been working on the Commissioner's first Section 20 Review, establishing the extent to which the Well-being of Future Generations (Wales) Act 2015 has been informing procurement decisions across the public bodies in Wales since 2016 (when the Act came into force). The Commissioner's Report - Procuring well-being in Wales - was published in February 2021 outlining the findings and recommendations from the Review.

Christian Howells, 30 Park Place
Christian J Howells is a public law specialist. He is on the Attorney General's Regional A Panel and the Counsel General for Wales' A Panel. He is ranked in Chambers and Partners and the Legal 500 as a leading junior. He has extensive experience in the higher courts, including the Administrative Court, Court of Appeal and Supreme Court. He is currently instructed on behalf of the Counsel General for Wales in a judicial review of the UK Internal Market Act 2020 which seeks declarations that UKIMA cannot curtail the legislative competence of the Senedd by implication or secondary legislation.

Michael Imperato, Watkins and Gunn
Michael is a Partner at Watkins & Gunn solicitors and heads the firms Pubic/Administrative law department. Michael has undertaken a number of high profile claimant judicial review challenges. He has been involved in several legal challenges testing the devolved settlement in Wales. Many of Michael's cases have been in respect of service closures and downgrades such as hospital, schools, libraries, acing for communities challenging local and national government. Michael has also challenged on behalf of vulnerable individuals and families. He has experience in acting for children with special educational needs and in admission, exclusion, transport and school closure cases. Michael is also recognised as a leader in the field in claimant personal injury work . He is the principle solicitor acting for the Trade Union, Community, in Wales and the West Country. Michael is a former president of the Cardiff & District Law Society, a member of the Law Society Human Rights Committee, a committee member of the Public Law Wales Association and a visiting scholar at Swansea University. He is a longstanding school governor and a trustee of several charities.

Owain Rhys James, Civitas Law
Owain specialises in commercial and construction; chancery, property and trusts; public law; and employment. He is ranked across all of his core practice areas in the directories. He often acts in cases which involve an overlap between those areas.
He appears at all levels up to and including the Court of Appeal.He has been instructed post-trial in appeals in the County Court and the Employment Appeals Tribunal.
Owain has been instructed to draft statutory guidance (bilingually) and has experience of drafting policies for Local Government. He has also conducted independent reviews. He has experience of sitting in a judicial/disciplinary capacity having been appointed as a World Rugby and Football Association of Wales Judicial Officer; a member of the International Paralympic Committee's Board of Appeal of Classification; a member of Sports Resolution's Arbitrator and Mediator panel; appointed to the Legal Aid Review Panel; and is appointed as a Deputy District Judge.
Owain has a truly bilingual practice and has acted through the medium of Welsh in the High and County Courts, the Employment Tribunal, and the Welsh Language Tribunal. He recently appeared before the Court of Appeal (for the first time in its hitory) through the medium of Welsh. He is also happy to conduct conferences and advise in Welsh.

Dr Nerys Llewellyn Jones, Agri Advisors
Dr Llewelyn Jones is Managing Partner of Agri Advisor in Carmarthenshire, which she founded in 2011 to provide specialist legal and advocacy services to farmers, landowners and people living in rural areas. She has first-hand knowledge of the farming industry and a PhD in Sustainable Agriculture and its Implementation at an International, European and regional level. She is an accredited mediator and a fellow of the Agricultural Law Association.

Lee Marsons, Public Law Project
Lee Marsons joined PLP in February 2021 as a Research Fellow focusing on post Covid and Brexit public law matters. He is currently finishing a PhD at the University of Essex, a socio-legal project concerning the impact of emotions on appellate court hearings and decisions. Lee is also editor of the UK Administrative Justice Institute (UKAJI) blog and co-editor of Public Law's Current Survey.

Jack Maxwell, Public Law Project
Jack is a researcher at PLP. He is particularly interested in how technology is changing the way government makes decisions about people and the channels by which they can challenge those decisions. Jack has a Bachelor of Civil Law from the University of Oxford, and degrees in law and philosophy from the University of Melbourne in Australia. Before coming to the UK, Jack worked as a government lawyer in Australia, specialising in administrative and constitutional law. He was also a policy committee member at Liberty Victoria, one of Australia's leading civil liberties organisations.

Chris Minnoch, Legal Aid Practitioners Group
Chris is CEO of Legal Aid Practitioners Group (LAPG), a membership body representing the interests of all those delivering legal aid services in England & Wales – solicitors, barristers, legal executives, caseworkers, costs lawyers and support staff. LAPG is a statutory consultee body with the Ministry of Justice and the Legal Aid Agency on all matters relating to legal aid policy and operational aspects of the legal aid scheme. LAPG advocates on behalf of practitioners and campaigns for improvements to the legal aid scheme, working collaboratively with other representative, membership and policy groups. LAPG also provides a range of service tailored to the needs of legal aid practitioners. Chris has been CEO of LAPG since 2018, having joined the organisation as Operations Director in 2016. Prior to that Chris worked in the third sector for 15 years, delivering legal advice services, providing training and running a specialist legal advice charity in London. Chris is an independent member of the MOJ's Legal Support Advisory Group and sits on the Advice Sector sub-group of the Administrative Justice Council. He is a regular public speaker on issues of legal aid policy and access to justice.

Hayley Morgan, Travelling Ahead: Gypsy, Roma and Traveller Advice and Advocacy Service
Hayley Morgan manages the Roma support service for TGP Cymru's Travelling Ahead project. Travelling Ahead runs the all-Wales advice and advocacy project for Gypsy, Roma and Traveller communities and the Roma service includes EUSS application support and advice to the Roma community across Wales.
Hayley has worked with Travelling Ahead since 2018, after working for a number of years in the humanitarian sector in global public health and migration. Her focus lies in the challenges associated with migration, the EUSS, community engagement and ensuring people have access to services, justice and a safe life.
Hayley's EUSS work centres on the impact of the scheme on the Roma community and ensuring that all people have access to information and support to make their application, and can use their status once obtained. The EUSS team at Travelling Ahead works to ensure that systemic barriers are overcome or that these barriers are taken down, enabling people to have fair and equal access to services and quality of life.

Olivia Mowll, Public Law Project
Olivia coordinates PLP's Welfare Rights Support Hub. Her role is intended to increase the availability and accessibility of legal information and specialist social welfare and public law advice, working with Law Centres and Crisis Skylights to provide training and second-tier advice on complex cases with a view to bringing strategic litigation. Olivia joined PLP from Bristol Law Centre where she was a caseworker in the Welfare Benefits team.

Dr Sarah Nason, Bangor University
Dr Sarah Nason has a BA Law 1st Class from the University of Cambridge and a PhD Laws from University College London. Her research interests are in public law, administrative justice, devolution, comparative public law and jurisprudence (legal philosophy). Sarah is a member of the editorial board of the journal Public Law, an executive committee member of Public Law Wales and a member of the UK Administrative Justice Council Academic Panel. Sarah has recently been appointed a National Assembly for Wales Academic Fellow for 2019. Sarah welcomes PhD supervision in any of her research areas.

Warren Palmer, Speakeasy Law Centre
Warren Palmer is the Director of the Speakeasy Law Centre.

Alicia Percival, Newfields Law
Alicia is an immigration paralegal working specifically within commercial sport and EU immigration. Alicia is regularly instructed by sporting clubs and representatives, governing bodies, and private clients. As well as the Welsh Government and charities in cases relating to the EU Settlement Scheme. Alicia is currently acting as a Lead Operation Manager for the firm's Welsh Government contract to deliver advice and application support to those applying to the EU Settlement Scheme, covering all of Wales.
Much of Alicia's work concerns applications to the EU Settlement Scheme. She also has been appointed as the Lead Advisor for 'Women in Sport' within Newfields commercial sport team. Alicia previously studied Law and Criminology LLB at Cardiff University and graduated in June 2020.

Alison Pickup, Public Law Project
Alison is a barrister, and PLP's legal director, overseeing the work of our casework and events teams. Alison is responsible for PLP's legal strategy and leads our work on benefit sanctions and on upholding the rule of law. As well as advising and representing PLP and its clients, Alison regularly speaks, trains and writes on public law and access to justice. Before joining PLP, Alison was in private practice at Doughty Street Chambers where she had a claimant-focused public law practice with a particular focus on migrants' rights. Alison was awarded the Outstanding Employed Barrister in an NGO award by the Bar Council in 2020.

Isobel Rorison, Data Justice Lab at Cardiff University
Isobel is a PhD candidate at the Data Justice Lab in Cardiff University's School of Journalism, Media and Culture. Working in the field of Critical Data Studies, her research investigates the implementation of novel data-driven technologies such as Artificial Intelligence (AI) in the NHS. Focussing on the alignment of health and industrial policy which promotes data-intensive research and innovation in the health sector, Isobel's research seeks to better understand the nature of emergent partnerships between the NHS, academia and technology companies, and the impact of this collaboration on citizens. Isobel has also undertaken research on the role of big data technologies in medical research, and journalists' response to the sharing of NHS data across government and technology companies such as Google DeepMind.
Prior to her PhD, Isobel worked in the NHS including with Clinical Networks and Senates, the West of England Academic Health Science Network, and the national Specialised Commissioning team.

Katrin Shaw, Wales Ombudsman for Public Services
Katrin was brought up in Cardigan in West Wales, attended Sheffield Hallam University where she gained a BA in law. She was admitted as Solicitor in 1996 and worked as a local government lawyer before she joined the Ombudsman's office as an Investigator in 2001. Since then, Katrin has held managerial roles in the office and is now the PSOW's Chief Legal Adviser & Director of Investigations.
Katrin was Chair of the Ombudsman Association's Legal Interest Group from 2016 until 2019 and is a member of the UK's Administrative Justice Council.
She was appointed as Acting Standards Commissioner by the Northern Ireland Local Government Commissioner for Standards in October 2020 and volunteers for Neath Port Talbot Age Connects.

The Right Honourable Lord Thomas of Cymgiedd
Lord John Thomas practiced at the Commercial Bar in London from 1972 to 1996, becoming a QC in 1984. He was appointed to the High Court of England and Wales in 1996 and was Lord Chief Justice of England and Wales (2013-2017). He is currently President of the Qatar International Court, an arbitrator at 24 Lincoln's Inn Fields (London), Chairman of the Steering Group of the Standing International Forum of Commercial Courts, Chairman of the Financial Markets Law Committee (London), First Vice-President of the European Law Institute (Vienna) and Chancellor of Aberystwyth University. He participates in the business of the House of Lords. He chaired the Welsh Government's Commission which reported in October 2019 "*Justice in Wales for the People of Wales*".

Katy Watts, Liberty
Katy is a lawyer at Liberty, where her work focuses on surveillance, privacy and protest. She also leads Liberty's legal work on constitutional reform. Katy joined Liberty in 2020 from the Public Law Project, where she specialised in judicial review litigation concerning access to justice and migrants' rights.

Katie White, Shelter Cymru
Katie was born and raised in Cardiff and has worked in England and Wales in roles including Avon & Bristol Law Centre and Ealing Law Centre. Since June 2017 Katie has been Senior Solicitor at Shelter Cymru. Shelter Cymru campaigns for better housing for people in Wales and provides specialist legal advice throughout Wales to those in housing need. Katie advises on issues including homeless appeals, Judicial Review, possession proceedings injunctions and disrepair.
Following implementation of the Housing (Wales) Act 2014 Shelter Cymru has taken a leading role in litigation concerning possession proceedings. Shelter Cymru represented the tenants in two County Court cases: Evans v Fleri [2019] EW Misc 12 and Jardine and Burgess v Rees and Another (DJ Sandercock, Methyr Tydfil County Court) where the court considered the provisions of the Housing (Wales) Act 2014 in relation to the serving of notices. This led to Shelter Cymru successfully intervening in the Court of Appeal case of *Jarvis v Evans & Anor* (2020) EWCA Civ 854 which clarified that a landlord in Wales must have complied with the licensing and registering requirements of Rent Smart Wales for a s8 notice to be valid.

Charles Whitmore, Cardiff University
Charles is a research associate with a background in the concept of mutual recognition in EU Internal Market Law. He has also worked in the voluntary sector in the field of health and social care and is currently based jointly in Cardiff University's Wales Governance Centre (WGC) and Wales Council for Voluntary Action (WCVA). His research interests focus on the implications of the UK's withdrawal from the EU and its impact on the voluntary sector in Wales. He is particularly interested in the impact that Brexit is having on the territorial governance of the sector and how this is changing relationships domestically and internationally. He coordinates the Wales Civil Society Forum on Brexit – a partnership project between the WGC and WCVA funded by The Legal Education Foundation to provide a coordinating role and information on the law and policy of Brexit tailored to voluntary organisations in Wales.

Rhodri Williams QC, 30 Park Place and Linenhall Chambers
Rhodri Williams QC practises in European Union law and local government and administrative law. He specialises in the law of the internal market as it affects the public sector, and, in particular, the EU public procurement regime and State Aid, but also deals with a wide range of local government issues, including judicial review of post office closures, school re-organisation plans and school transport decisions. He deals with cases involving both local and regional government, including advising the Welsh Assembly Government and other Government Departments and local authorities, in England, Wales and in Northern Ireland. In 2000, he was appointed to the Attorney General's list of approved Counsel and to the list of the Counsel General to the National Assembly for Wales and has represented the United Kingdom Government on several occasions before the Court of Justice of the European Union in Luxemburg. He was called to the Bar in Northern Ireland in 2009.
Between 1992-1997 he worked with the European Commission in Brussels where he was predominantly responsible for the enforcement of the EU internal market legislation in the UK and Ireland. Since his return he has maintained a particular interest in all aspects of the enforcement of internal market. He also advises the Welsh Government in relation to procurement obligations and strategies for local and regional government and the situation of devolved legislation in Wales. He was a founding member of the Public Law Wales and is currently its Chair.

Victoria Winckler, Director, Bevan Foundation
Victoria is Director of the Bevan Foundation - Wales' most influential think tank. Victoria specialises in policy analysis and development to reduce poverty and inequality in Wales, and is a widely respected contributor to public policy. She provides independent advice to the Welsh Government, Welsh Parliament and other public and private sector bodies on issues such as devolved taxation, the Welsh budget, the regeneration of the South Wales valleys and action to reduce poverty. She also regularly comments in the Welsh media (and occasionally in UK media), writes articles and reports, and edits the Bevan Foundation's magazine.
Victoria has served on a number of Welsh Government committees and working groups, and is a board member of Traveline Cymru. She previously worked in Welsh local government where she led on economic regeneration and EU funding for a large local authority and then the Welsh Local Government Association, and has also been an academic researcher. She holds a PhD, MSc and BA.

Reviewing Judicial Review in Wales

Liam Edwards and Sarah Nason (Both of Bangor University)

April 2021[1]

Executive Summary

The Administrative Court Centre in Cardiff was part of reforms to 'regionalise' judicial review. Centres were also established in Leeds, Manchester and Birmingham, with the aim of improving access to public law justice outside London and southern England. Over time the 'Administrative Court in Wales' has been hailed as a constitutional success and a jurisdictional improvement, but its overall impact on access to justice has been less clear. The constitutional position, and jurisdictional improvement, has been further cemented by reforms to the Civil Procedure Rules in October 2020: claims against Welsh public bodies *must* be issued and heard in Wales. This can be contrasted to the 'regionalisation' Practice Direction under which location of the defendant is just one factor going to the most 'appropriate' location for issue and hearing.

Research had shown an initial post-regionalisation increase in 'Welsh' judicial review claims (claims issued by applicants with a given address in Wales, and/or where the claimant solicitor is based in Wales, and/or where the defendant is a devolved Welsh public body). However, this has since waivered and appeared to reduce, notably in terms of the number of solicitors based in Wales issuing Administrative Court judicial review. This can be contrasted with an eventual, and much overdue, increase in the proportion of barristers based at Chambers in Wales appearing in the Court in recent years.

Our research has focused on what are called 'other civil judicial reviews' (that is non immigration civil judicial review claims). According to the Independent Review of Administrative Law (IRAL 2021) some 90% of the total judicial review caseload in England and Wales (Administrative Court and Upper Tribunal) concerns immigration. Conversely, Welsh judicial reviews are overwhelmingly other civil judicial reviews (the main areas being planning, education, social care, and the environment).

Roughly half of the judicial review claims issued in the Administrative Court Office in Cardiff concern south west England (being heard in Bristol or Exeter). Ministry of Justice data shows that whilst the caseload of the Administrative Court Office in Wales (which includes these south west England claims) has remained relatively stable over the years, conversely, the number of other civil judicial reviews issued in the north of England (both Leeds and Manchester) had, by 2019, fallen to one-third of the number issued in 2010, with a further decrease for claims issued in 2020. Birmingham claims are also down, though to a lesser extent. The downward trend in other civil judicial reviews outside London requires further consideration.

Our current research initially aimed to investigate why there seemed to be a decrease, or at least no increase, in judicial review activity relating to Wales specifically in a

[1] This research was funded by a British Academy / Leverhulme small research grant, views expressed in this report are those of the researchers and research participants, not those of the British Academy.

period where both the competence of the Senedd Cymru/Welsh Parliament and Welsh Government, and the volume of Welsh legislation and guidance, had increased. Our research was conceived before IRAL, and this report is not intended as a specific response to IRAL. Nevertheless, it is worth pointing out that many submissions to IRAL expressed concern over access to justice in judicial review claims, noting the difficulties of accessing specialist advice especially outside London including in fields such as social care. IRAL concluded: 'More should be done to make the procedures for bringing claims for judicial review accessible to ordinary individuals'. Published submissions to IRAL conclude that the scales of judicial review are either appropriately balanced between public bodies (including central Government) and individuals, or weighted against individuals. IRAL itself concluded that none of the responses it received suggested judicial review seriously impedes the proper or effective discharge of central or local government functions.

IRAL was challenged on its approach to devolution and confirmed that 'Wales only' judicial review was outside its terms of reference. It took this to mean review of powers that may be exercised only in Wales, including powers exercised by either Welsh Ministers, UK Government Ministers, or both concurrently. However, in recognising that judicial review is a reserved matter, IRAL concluded that its recommendations would apply equally to 'Wales only' judicial review, despite having stated that examination of the nature and conduct of such disputes fell outside its terms of reference. IRAL did, however, stress the importance of further consultation on reform proposals, that a two-tier system of devolved and reserved judicial review would be undesirable, and that all devolved nation respondents saw no case for reform especially if such would curtail access to justice. Our research then fills the gap by specifically considering judicial review in Wales: its dynamics, substantive grounds, values and effects. We adopted a mixed methods approach collating quantitative data on potential and issued claims and their outcomes, and qualitative data, including from semi-structured interviews with solicitors and barristers acting for both claimants and defendants, and from group discussions with experts, alongside a literature review and case law analysis of judicial review claims involving devolved Welsh public bodies.

Our Findings: The Dynamics of Judicial Review in Wales

<u>Pre-Issue</u>

Public bodies in Wales (including health boards, local authorities and Welsh Government) are increasingly alert to the 'threat' of judicial review and are proactive in conscientiously seeking to ensure the lawfulness of their polices, strategies and decisions from the outset, including through seeking external legal advice in the policy development and implementation stage. Whilst this seeking of early advice is related in part to public body culture, our evidence suggests it is also associated with the majority of Welsh local authorities likely having had less experience of the threat of judicial review particularly as compared to many English local authorities, and comparatively less experience of responding to pre-action correspondence. Importantly, this proactivity is seen as contributing to the avoidance of disputes.

The size of governance in Wales, and comparative ease of communication between public bodies is associated with greater knowledge sharing and a more consistent approach to threatened and actual judicial review. However, this communication is also perceived as a means to encourage settlement to prevent controversial legal

issues being determined by a court. The closeness of some charities and other organisations to Welsh Government is also seen as part positive, enabling persuasion and influence in policy development, but with a part possible negative corollary of reluctance to issue, or to otherwise be involved with, litigation.

There was a majority view among our participants that people in certain areas of Wales are less likely than people in most areas of England to seek to use *legal* methods to resolve concerns/disputes with public bodies. It was difficult to pinpoint precise reasons for this. There was a perception at least that such reluctance could be linked to a culture of greater deference to authority, and to the proportion of the population receiving some form of state social security or welfare benefit and/or receiving care services and related concern that legal challenge specifically would cause problems for future interaction with public bodies providing benefits and/or services. A perceived lack of general public awareness and understanding of public law was also consistently raised.

Other reasons for a reluctance to seek legal action included the prominence of other administrative justice institutions in Wales that are comparatively better known and well used, and that are free to access, especially the Public Services Ombudsman for Wales. Our participants suggested that there might be greater trust and confidence in the political branch of state in Wales, including through complaining to local council members, Members of the Senedd and Members of the UK Parliament, and that political representatives might be both more visible and more accessible as compared to England in light of devolution, contributing to a greater sense of political 'efficacy'.

Across the evidence the difficulties accessing legal aid were stressed, alongside a reduction in the number of solicitors able to offer legal aid funded advice in Wales in relation to matters impacting on individuals in their daily experience of public services, especially social welfare, community care and housing. The concept of 'advice deserts' was repeatedly raised especially alongside concerns about the sustainability of specialist practices.

Word of mouth, the intervention of local authorities themselves, and other front-line service providers such as GPs and social workers, were seen as key to people being able to access legal advice. Claims involving strategic local issues affecting a community, and matters of wider legal principle or practice, are more likely to proceed.

In terms of the 'dynamics' of judicial review, we found that out of 41 letters before claim received by a total of 15 Welsh local authorities in a two-year period, only one resulted in 'success' for the claimant at a final substantive hearing. On the other hand, we determined that at least 33 seem to have resulted in some form of benefit to the potential claimant. The most common issues raised at pre-action with local authorities are education, planning and social care. The majority of matters seem to be resolved early with at least some benefit to the potential claimant, few claims are withdrawn after issue and permission success rates in these applications against local authorities are much higher than the Administrative Court average. The most common reason for withdrawal is a negotiated benefit to the applicant/potential applicant, followed by distillation of grounds having improved understanding and exposed weaknesses in the merits, alongside helping the potential claimant appreciate the limitations on the

authority's own powers and resources. Commercial disputes were sometimes resolved through negotiation or mediation.

Post Issue

Whilst there have been some fluctuations, education, planning and community care have been the most prominent subjects of Welsh judicial review even since before the Administrative Court in Cardiff was established. Unlike our data on 'topics', our data on permission success rates and withdrawals cannot be broken down into Welsh and south west England claims, so the following is approx. 50:50 Wales to England claims. Comparatively fewer judicial review claims in the Administrative Court in Wales are withdrawn post-issue (compared to the Administrative Court average). Permission success rates in total are much the same as the Administrative Court average, but the success rate varies more widely over the years, with the proportion of claims found 'Totally Without Merit' especially high in some years.

Our qualitative evidence suggested that judicial review might generally be used less tactically in Wales than in England, with fewer settlements 'at the door of the court'. Welsh Government was seen by interviewees to approach claims and potential claims conscientiously, with no reluctance to produce information, but more generally there remains some difference in culture and approach across particular types of public body operating in Wales. In terms of claims involving the Welsh Ministers, Welsh Government provided data that out of 56 claims/potential claims (2008 to 2020 inclusive) claimants were successful or partially successful in 9 applications. Most claims related to the environment, planning and education, but success for claimants at court was very low in these areas.

Whilst certain topics of claim remain staples, the caseload overall fluctuates based on different types of public law issues that come to light, whether that is due to new legislation, changes in administrative practice, changes in the litigation strategies of particular lawyers, and the comparative awareness of potential applicants. We note also that the proportion of litigants in person (individuals unrepresented at the time of issuing their claims) has increased significantly across the Administrative Court including in relation to Welsh claims. In Wales, litigants in person were seen by our interviewees and discussants as falling into two classes, repeat claimants with matters bordering on vexatious litigation, and those truly desperate to seek access to justice, unable to secure affordable representation, feeling they had no choice but to go it alone.

Our qualitative evidence suggested perceived inconsistency of judicial decision-making at the permission stage. Some of our participants associated inconsistent decision-making with less experienced circuit judges/deputy judges. Others praised local judges with experience of Welsh law and context. Others considered that the application of general public law principles is a skill honed through experience, especially of statutory interpretation, with a regular stream of public law cases being more important than broad practice across Welsh law. This said, we came across many examples of inapplicable English law (especially guidance) being referred to in Welsh applications.

Experiences of the Administrative Court in Wales are generally positive, noting swift service, helpful, knowledgeable staff and expeditious determination of claims.

However, the apparent lack of user group meetings dedicated to Wales in recent years and the curtailment of the annual Administrative Court in Wales Lecture, were noted.

Whilst there is some diversity in substantive caseloads, a large proportion of substantive hearings involving at least one Welsh public body defendant related to planning (three times as many cases as the next most common topic which is education). In planning, the most common grounds of review are irrationality/failure to give reasons. Claimant success is most often associated with legal errors on the part of the public body that are more straightforward to demonstrate objectively. Whilst planning cases are more likely to involve corporations or other organisations, education cases are more likely to be brought in the name of an individual (albeit often involving a wider support network). Education cases tend to turn on narrow illegality (interpretation of statute, guidance and policy). Common matters include school reorganisation/closure, school transport and special educational needs. Environment cases are usually issued by organisations/pressure groups and turn, at least in part, on European law; they tend to have a lower chance of success.

Individuals are the most common type of claimant (about half of all claimants in substantive hearings against Welsh defendants), with one quarter of claimants being private corporations or other organisations, and the final quarter including charities, pressure groups and public bodies. Many claims involve multiple defendants including Welsh Ministers and local authorities, or Welsh Ministers and UK Government Ministers with a degree of concurrent responsibility.

Applications from commercial entities, charities and pressure groups appear to be more common in claims against Welsh public bodies than the Administrative Court average, they have broader significance, but the majority turn on ‘routine’ grounds of irrationality and error in statutory interpretation rather than on what are seen as more innovative grounds of substantive review. Success rates for claimants in substantive hearings involving at least one Welsh public body defendant stood at 33% (2009 to 2020 inclusive).

On our shared interpretation, judges determining substantive claims show considerable deference/respect to the expertise and constitutional position of initial decision-makers and to the legislation by which they are bound. Notably IRAL suggests the same is true of the judicial ethos in both Scotland and Northern Ireland. Further research could consider whether there is a potentially more deferential attitude to judicial review in the devolved nations, or indeed in general outside London.

The Value, Effects and Future of Judicial Review in Wales

Across our evidence the importance of judicial review as a strong check on government ‘legality’ was seen as judicial review’s most significant purpose and value, over and above its impact in individual cases. Participants associated the value of legality specifically to Wales with the comparative youth and evolution of Welsh institutions of government. However, this more general, and perhaps narrower sense of legality within devolved Wales, also seemed to be combined with support for a broader principle of constitutional legality. This can also be seen in the Welsh Government’s own use of judicial review to challenge the United Kingdom Internal Market Act 2020. This is on grounds that the Act: purports to impliedly repeal areas of Senedd Cymru/Welsh Parliament competence and confers powers that could be used

by UK Ministers to substantively amend the Government of Wales Act 2006 such as to cut down the devolution settlement. Both grounds were in effect based on the constitutional principle of legality; that if Parliament intends to legislate contrarily to fundamental constitutional norms, it must do so expressly and not impliedly. The case, *R* (*Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy [2021] EWHC 950 (Admin)* was refused permission, with Lewis LJ finding it to be premature absent the context of any specific legislation made or purported to be made under the 2020 Act. The judge however expressed no views as to the arguability of the grounds, and as such the door remains open to future litigation. The case has generated significant press coverage, and debate, in a sense further demonstrating the constitutional significance of judicial review, even in claims not granted permission to proceed.

However, alongside the constitutional value of judicial review, both the use, and threat of use, of judicial review were also seen as powerful means to ensure swift resolution for individuals of specific grievances, with judicial review commonly seen as being used to secure satisfactory access to public services for those who are legally entitled to them, and most in need.

Judicial review is seen as important to keeping public bodies in Wales honest and transparent, ensuring proper procedures are followed, corners are not cut, and public bodies slow down and take stock. Specific examples were given of where judicial review had catalysed forensic examination of law and administrative practice, instigating improvements in the quality of policy and strategic decision-making. These benefits were noted by respondents largely working with claimants and those largely working with defendants, and even where the same decision was ultimately made 'on the merits'. It was also noted that where the law in England is identical or similar to that in Wales, legal exposition in Welsh claims has led to improved practice across the single jurisdiction of England and Wales.

After our more nuanced research we were less clear that there had in fact been a decrease in Welsh judicial review, but certainly saw no increase. Around half of our research respondents perceived a decrease in litigation activity. They put this down to potentially improved public body practice (sometimes associated with the outcomes of previous litigation), increasing maturity of the devolved institutions, and increased clarity of legislation as a result of bilingual drafting. On the other hand, legal aid reforms limiting access to justice were again raised, and there was no evidence of reduced demand for specialist public law legal services, but rather of reduced capacity to meet that demand.

The suggestion that judicial ethos in devolved, and 'regionalised', judicial review is cautious and deferential can be contrasted to a more 'activist' attitude which some suggest judges in Wales should adopt to social welfare claims, especially in the context of Welsh equality and human rights policy, increasingly supported by legislation and guidance. More 'unique' Welsh public law, relating to rights, equality and well-being, barely features in substantive judgments and it seems that the majority of claims issued raising these points have been refused permission. IRAL notes that the different 'Scottish trajectory' on human rights should be considered in the context of judicial review reform; the same might be increasingly true in Wales, but with the added complication of a single jurisdiction and the reservation of judicial review. These

matters, including lack of awareness of 'unique' Welsh public law, the nature of its drafting, and judicial and other attitudes to it, are recognised beyond our research. With various initiatives, in particular involving the Equality and Human Rights Commission, seeking to bring together lawyers and other advice providers, charities, pressure groups and academics, to identify and progress 'strategic litigation' based on new Welsh law duties; those involved see such litigation as necessary to explore whether, and how, unique legal frameworks can be harnessed to improve the lives of people in Wales.

Across our evidence, it was agreed that there could be a more significant future role for devolved welsh tribunals, and the current Law Commission project seeking to bring greater coherence to the structure of these bodies was welcomed. There was support for ensuring that access to justice is available as locally and informally as possible, but scepticism about whether this could be achieved by creating additional public law appeal or review rights to devolved Welsh tribunals. Scepticism related to the status of tribunals as compared to the Administrative Court, and concerns that legal aid funded advice and representation would not be available in tribunal claims. Whilst our research did not specifically aim to consider the impact of Covid-19 on judicial review in Wales, across our evidence there was a broad consensus that courts in Wales had coped well with moving online during the pandemic and that there could be opportunities to improve access to justice through use of technology.

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Reviewing Judicial Review in Wales

Background: The 'Regionalisation' of Judicial Review

Establishing what was initially known as an Administrative Court Centre in Cardiff was part of reforms to 'regionalise' judicial review. Centres were also established in Leeds, Manchester and Birmingham. For some there was no need to establish 'regional' centres; the interests of local claimants, they argued, could be well served by the use of video links and other technology such as filing documents by email (views noted in Nason and Sunkin 2011). Others argued that this was not sufficient to ensure access to justice (Judicial Executive Board, Civil Sub-Committee 2007). Research had shown, for example, that the London and south east England centricity of public law legal practitioners meant there was a disproportionate lack of access to justice outside these areas, marked by much lower numbers of judicial review claims (Bridges, Mezaros and Sunkin 1995; Review of the Crown Office List 2000). The precise case for regionalisation varied across the regions affected. However, a central aim was to improve access to justice by ensuring that claims be issued and heard in the most appropriate location; thus, saving costs for claimants and their lawyers, and potentially catalysing better local provision of public law advice services.

The factors going to 'appropriate' location of issuing Administrative Court claims are contained in Civil Procedure Rules Practice Direction 54 and include the location of the parties and their legal advisers. There is a specific amendment for Welsh claims such that from October 2020 claims against Welsh public bodies must be issued and heard in Wales as a *rule*, replacing the previous combined CPR and case law *presumption* that this should be the case.[2] The CPR change was a recommendation of the Commission on Justice in Wales (CoJ) (CoJ 2019: recommendation 24).

There is evident constitutional importance in ensuring that claims against Welsh public bodies be determined in Wales, and the Administrative Court *in* Wales has generally had a distinctive presence over the years: acting as a partial catalyst to academic and practitioner engagement with public administrative law and administrative justice in Wales (See e.g., Gardner 2016 and 2021; Nason (ed) 2017). Research has been conducted into the impact of opening the Administrative Court in Wales (Nason and Sunkin 2011; Nason 2014 and 2016), the most recent findings of which can be found in the submission of Nason and the Public Law Project (PLP) to the Commission on Justice in Wales (Nason and PLP 2018).

There are numerous ways to identify 'Welsh' judicial review claims that we won't detail here (for information see Nason and PLP 2018), but they include the address of the claimant, the location of the lawyers when claimants are legally represented, the

[2] Civil Procedure (Amendment No. 3) Rules 2020 amend Part 7 including the following provisions: Claims against Welsh public bodies to be issued and heard in Wales: 7.1A. Unless required otherwise by any enactment, rule or practice direction, any claim against Welsh public bodies which challenges the lawfulness of their decisions must be issued and heard in Wales. Claims against Welsh public bodies to be forwarded for issue in Wales: 7.1B. If a court or centre in England receives a claim which should pursuant to paragraph (1) be issued in Wales a court officer shall forward it for issue in the Administrative Court Office in Wales or other appropriate court office in Wales. CPR Part 54 amended as follows: 1.3 This Practice Direction is subject to the requirement in rule 7.1A that any claim against Welsh public bodies which challenge the lawfulness of their decisions must be issued and heard in Wales.

identity of the defendant, and the issues in the case (where these are reported). From our previous analysis of Administrative Court Office data from 1 May 2007 (two years prior to regionalisation) up to and including 30 April 2018, the number of Welsh claimants in other civil (non-immigration) judicial reviews in the Administrative Court, and the number of solicitors firms based in Wales instructed to represent claimants in these proceedings had fluctuated but seemed to have reduced in recent years. We note here that our research focuses only on 'other civil claims', and not immigration claims or criminal judicial review. The vast majority of judicial review claims relating to Wales are 'other civil claims', in contrast to the overall Administrative Court and Upper Tribunal judicial review caseload (some 90% of this total judicial review caseload concerns immigration (Independent Review of Administrative Law 'IRAL' 2021; para 12)).

Our more detailed Welsh data can be contrasted, to an extent, against general data (in Figure One below) which shows that whilst the number of claims issued in the Administrative Court in Cardiff has fluctuated over the years, there is no downward trend. This disparity between Welsh claims and overall claims may be due in part to the fact that in 2012 the Cardiff Administrative Court Office gained formal responsibility for administering claims relating to the geographical area of the Western Circuit (the south west of England) and even before then a significant proportion of claims issued in Cardiff concerned south west England (based on location of claimants, their lawyers and the defendants). Roughly half of the other civil judicial review claims issued in the Cardiff Administrative Court Office relate to south west England, and these claims are usually heard on Circuit in Bristol or at Exeter Combined Court.

The starting off point for this current research has been to investigate why there seems to have been a decrease in judicial review activity relating to Wales, or at least no increase, in a period where the legislative competence of the Senedd and Welsh Ministers has increased and where there has been an increased volume of Welsh law (particularly including regulations, and statutory and non-statutory guidance).

As Figure One shows, the number and proportion of claims issued in Cardiff has been variable but there is no obvious trend of either increase or decrease. As we were finalising our report, data for claims issued in 2020 was published and is noted in Figure Two. We can see here a notable decrease in the number and proportion of claims issued in Leeds and Manchester, both have more than halved, contributing to an overall decrease in judicial review outside London. This reduction in regional judicial review generally may be a cause for concern, suggesting that access to justice has decreased, especially in northern England. This is a matter that requires further research, not least as our own research in this report shows there can be various inter-locking reasons to explain apparent, and actual, declines in judicial review litigation.

Figure One: Other Civil Judicial Review by Location of Issue[3]										
	2010 No/%	2011 No/%	2012 No/%	2013 No/%	2014 No/%	2015 No/%	2016 No/%	2017 No/%	2018 No/%	2019 No/%
Leeds	224 (11%)	211 (10%)	220 (11%)	182 (8%)	165 (9%)	125 (7%)	82 (5%)	77 (4%)	84 (5%)	88 (6%)
Manchester	222 (11%)	214 (10%)	243 (12%)	261 (12%)	167 (9%)	149 (9%)	111 (7%)	121 (7%)	130 (8%)	100 (6%)
Birmingham	146 (7%)	185 (9%)	149 (7%)	159 (7%)	140 (7%)	138 (8%)	117 (7%)	130 (8%)	141 (9%)	114 (7%)
Cardiff	68 (3%)	80 (4%)	73 (4%)	96 (4%)	82 (4%)	67 (4%)	76 (5%)	81 (5%)	67 (4%)	76 (5%)
Sub Total Outside London	660 (33%)	690 (33%)	685 (33%)	698 (32%)	554 (29%)	479 (27%)	386 (24%)	409 (24%)	422 (27%)	378 (24%)
London	1366 (67%)	1430 (67%)	1395 (67%)	1480 (68%)	1345 (71%)	1272 (73%)	1211 (76%)	1311 (76%)	1162 (73%)	1185 (76%)
Total	2026	2120	2080	2178	1899	1751	1597	1720	1584	1563

Figure Two: Other Civil Judicial Review by Location of Issue January to September 2020		
Location	Number	% of total
Leeds	65	4%
Manchester	64	4%
Birmingham	118	8%
Cardiff	63	4%
Sub Total Outside London	310	20%
London	1,232	80%
Total	1542	

The data clearly demonstrates an overall downward trend in other civil judicial review claims issued outside London. However, 2020 in particular might be considered a unique year in light of the impact of the Covid-19 pandemic. Across our evidence it was suggested that the pandemic could mean many people have had less contact with public services providers (whilst some of course may have had more), and also that there is a reluctance to challenge emanations of the state in times of crisis. On the other hand, claims relating to coronavirus regulations, including lockdown regulations and other matters such as furlough arrangements, are more likely to have been issued in London, in part linked to the fact that the majority of specialist practitioners (especially those specialised in matters of high constitutional principle) are based in London.

It seems in general that access to justice outside London remains of concern, and that this could well be due to costs and other difficulties in accessing judicial review, in particular reductions in legal aid. The difficulties of accessing and funding judicial review have been described as 'public law's disgrace'. As Tom Hickman puts it:

[3] This table is based on location of issue so does not take into account claims issued in one location which are subsequently transferred to another under the CPR.

> Public law is squarely directed at protecting individuals. Public lawyers, both in court and outside it, debate endlessly the best form of substantive rules to achieve this end. Yet despite the fact that those who work in public law are supposed to be attuned to the importance of substance over form, public law is merrily carried on with very little concern for the fact that for most people judicial review is simply not available (Hickman 2017).

Further, Joe Tomlinson describes accessing legal aid funding for judicial review as 'byzantine' and exposes that whilst in 2001, 36.7% of applications for judicial review were supported by legal aid, in 2015 just 4.4% were (Tomlinson 2019).

Evidence to the Commission on Justice in Wales shows that Wales has been disproportionately affected by legal aid cuts, with a real terms reduction in expenditure between 2011/12 to 2018/19 of 37% in Wales, as compared to a 28% reduction in England (CoJ 2019: para 3.11). The Welsh Government is funding the continued provision of advice services by Citizens Advice/Cyngor ar Bopeth and Shelter Cymru (Wales' two biggest advice providers) that would have been discontinued due to reforms brought in under the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012. A National Advice Network Wales (NAN) was established by the Welsh Government in March 2015 consisting of key stakeholders including funders, advice providers, representative organisations, and other partners. It is tasked with providing expert advice, guidance and support to Welsh Ministers on how to strategically develop the provision of social welfare information and advice services throughout Wales. Six Regional Advice Networks (RANs) have also been established across Wales. Despite these mitigations, the Commission on Justice in Wales concluded that a far reaching and radical plan is needed to address the advice deficit caused by LASPO and that people in Wales are currently being let down by the existing devolution settlement so far as access to justice is concerned (CoJ 2019).

Many evidence submissions to the recent Independent Review of Administrative Law (IRAL) expressed concern about access to justice in judicial review claims. The Welsh Government raised legal aid in its own letter to IRAL:

> We also recognise the need to strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government. But the current arrangements do not achieve this balance, in particular due to cuts in legal aid in England and Wales under the reforms introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. These have severely limited access to specialist legal advice and there are 'advice deserts' across Wales and England in public law generally and in particular fields such as social care. In Wales the Welsh Government has stepped into the breach in an effort to mitigate this through our Single Advice Fund, but we cannot replace what has been lost in an area where the UK Government currently has responsibility for policy and delivery.
>
> There is therefore a clear barrier to people legitimately accessing judicial review through lack of means. Any further limitation on the availability of judicial review

> would serve only to exacerbate this obstacle to redress. (Welsh Government (Jeremy Miles AS/MS) letter to Lord Faulks, October 2020).

IRAL concluded that: 'More should be done to make the procedures for bringing claims for judicial review accessible to ordinary individuals' (IRAL 2021; para 4.173). IRAL noted 'the concerns that have been expressed to us on all sides about the impact of the current costs regime and the costs of conducting judicial review claims' (IRAL 2021; para 4.11). However, it avoided making any specific recommendations about costs.

Our project was conceived before the IRAL was established and should not be considered as a response to IRAL, or to the subsequent UK Government further consultation. We note that IRAL was tasked to examine 'trends in judicial review of executive action…in particular in relation to the policies and decision making of the Government' (IRAL ToR 2020). It was also asked to 'bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can properly be balanced with the role of the executive to govern effectively under the law' (IRAL ToR 2020). IRAL's report was published just as we were finalising our own research. We have examined submissions to IRAL published on the website of the UK Administrative Justice Institute. If anything, these submissions suggest that the scales of judicial review are appropriately balanced or more likely weighted against individuals (Zander 2021). IRAL itself concluded that none of the responses it received suggested that judicial review seriously impedes the proper or effective discharge of central or local government functions (IRAL 202; para 35).

There are specific devolution issues raised by the prospect of further judicial review reform. In its IRAL submission, Public Law Wales (PLW) pointed out concerns about implications for Wales:

> Parliament has specifically reserved judicial review from the legislative competence of the Senedd Cymru (Welsh Parliament) 'judicial review of administrative action'. As far as the subject matter of the Panel's deliberations is concerned, the UK Parliament is therefore the only legislature that Wales has. For a reform of judicial review to be contemplated without full and proper consideration of how such reform might impact, even if only consequentially, on the exercise of devolved powers in Wales would mean that Parliament was being invited to neglect its responsibilities to Wales as the relevant legislature in relation to such matters. (PLW 2020: para 25).

PLW also point out that the IRAL Call for Evidence presupposes that entitlement to judicial review could depend on the *nature of the power being exercised*, which implies (in particular because of the impact of devolution) that entitlement to judicial review might depend on the *identity of the decision-maker* (PLW 2019: para 19). Most fundamentally PLW considers that this demonstrates a misunderstanding of judicial review; it is a procedure for challenging the lawfulness of executive action not a substantive legal right. In general, the entitlement to seek judicial review does not and should not depend on the identity of the decision-maker. If it did, as PLW stress, the IRAL Call for Evidence opens up the possibility that the availability of the judicial review procedure for challenging acts of the Welsh Ministers might be materially different from

that relating to acts of UK Ministers even though the nature of the acts was identical. Further to this, where Welsh Ministers and UK Ministers have concurrent powers, IRAL contemplates that the rights of affected persons to seek judicial review could differ depending on which administration had exercised the powers.

In its report the IRAL Panel clarifies that it has taken the reference to 'UK wide' powers to mean powers that may be exercised across the whole of the United Kingdom, and that this does not include powers in respect of matters that are devolved or transferred under one of the UK's devolution settlements. The IRAL Panel take 'England and Wales' to mean powers that may be exercised in England and Wales as distinct from powers that may be exercised only in England or only in Wales. It includes England only powers within its terms of reference, but excludes Wales only powers, which it takes to include powers exercisable only in relation to Wales by Welsh Ministers and powers exercisable only in relation to Wales by UK Ministers (whether or not these are concurrent with powers of the Welsh Ministers). Whilst IRAL considered these Wales only powers to be outside its terms of reference, nevertheless, as judicial review is reserved, implementation of its recommendations will equally affect Wales only powers (unless specific exceptions are made). The upshot seems to be the production of reform proposals that impact equally on Wales, whilst specifically excluding Wales from the terms of reference of the review that led to those proposals. In fairness, IRAL agrees 'that it would be highly undesirable were statutory intervention to result in a "dual" or "two-tier" system', in which 'UK wide' reserved or excepted matters and 'other' matters are treated differently'. It also notes that respondents across all three devolved nations raised concerns about this matter and stresses the 'importance of consultation over any proposals for reform that might emerge' (IRAL 2021; pp.127-128). IRAL urges not to underestimate the risk of statutory intervention in judicial review becoming a matter of serious dispute between the UK Government and devolved administrations (IRAL 2021; para 5.49).

IRAL also concludes that responses from all three devolved nations were either opposed to, or not persuaded of, the need for reforms to judicial review, and in particular respondents were opposed to any curtailment of access to judicial review. This opposition to reform is reflected in the Counsel General for Wales, Jeremy Miles AS/MS statement to the Annual Legal Wales Conference on 9 October 2020: 'Access to the supervisory jurisdiction is a key principle of administrative justice, there is no case for a diminution in the availability and scope of judicial review'. This point is repeated in terms in the Welsh Government's letter to IRAL's Chairman Lord Faulks.

The UK Government has since responded to IRAL, accepting the Panel's two recommendations for legislative reform, and its other recommendations to reform the Civil Procedure Rules.[4] However, the Government also proposes further reforms, all of which have potential to limit access to, or the impact of, remedies obtained through

[4] The recommendations were summarised as follows in the UK Government's response to IRAL: a. legislating for the introduction of Suspended Quashing Orders; b. legislating to reverse the effect of the Supreme Court decision in Cart and re-affirm that decisions of the Upper Tribunal to refuse permission to appeal are not subject to the supervisory jurisdiction of the High Court; c. changes in procedure to be considered and taken forward by the Civil Procedure Rule Committee (CPRC): i. removing the requirement for a clam to be issued "promptly", but retaining the 3-month time limit; ii. providing further guidance on intervenors; iii. providing for an extra step in the procedure of a Reply, to be filed within seven days of receipt of the Acknowledgement of Service.

the judicial review procedure.[5] It has not been the aim of our research to evaluate IRAL or to respond to the Government's current consultation (any response we make will be published in due course). Rather our research has aimed to specifically consider what judicial review looks like in Wales, in particular: to supplement existing quantitative data and analysis with qualitative data from semi-structured interviews and various groups and forums to understand the 'dynamics' of judicial review in Wales (resolution of challenges and potential challenges before final hearing); to understand the nature of substantive judicial decision-making at final hearing stage and on appeal; and to understand the value and effects of judicial review specifically in Wales.

Methodology

Our research was planned pre-Covid-19. Our initial intention had been to adapt previous survey tools developed by academics in association with PLP, to conduct a quantitative and qualitative study into the dynamics of judicial review litigation affecting Wales (resolution of challenges before final hearing) and the value and effects of judicial review (its positive and negative impacts on claimants and defendants). It became clear on discussion with practitioners, that as the size of the caseload per-annum is small, collecting reliable quantitative data would require many years of case information and a very high response rate. The context of Covid-19 made it especially difficult for practitioners to access data from their files and information systems. We instead conducted semi-structured interviews using Microsoft Teams: with 11 interviewees having extensive experience advising and representing both claimants and defendants in judicial review in Wales, and local authorities (Interview questions at Annex One). Interviewees were selected based on their experience of judicial review in Wales, including at the Administrative Court in Wales, and included a mix of solicitors and barristers, most with experience across England as well as Wales.

We made Freedom of Information requests to obtain data about pre-action activity in local authorities and received data from Welsh Government on its involvement in judicial review proceedings. We attended and participated in various events and discussion forums, during which we took contemporaneous notes. In particular: Young Legal Aid Lawyers Cymru (Access to Justice and Legal Advice Deserts in Wales, and Spotlight on Asylum and Immigration); EHRC and Swansea University 'Strategic Litigation in Wales'; the Legal Wales Foundation Legal Wales Conference; Legal News Wales St David's Day Celebration Events (inc EHRC, 'Making Change Happen'; Cheshire & North Wales Law Society, 'Use of Welsh in the Legal System'; and Public Law Wales, 'The Unique Nature of Public Law in Wales'). We held discussion events on our research questions, and early findings, with the Wales Governance Centre and Public Law Wales (PLW) (our research has been a standing matter in PLW Committee meetings). We analysed substantive judicial review judgments, including judgments on appeal where relevant, in claims against Welsh public bodies, and conducted a comprehensive literature and data review.

[5] The Government's proposals include: a. legislating to clarify the effect of statutory ouster clauses; b. legislating to introduce remedies which are of prospective effect only, to be used by the courts on a discretionary basis; c. legislating that, for challenges of Statutory Instruments, there is a presumption, or a mandatory requirement for any remedy to be prospective only; d. legislating for suspended quashing orders to be presumed or required; e. legislating on the principles which lead to a decision being a nullity by operation of law; f. making further procedural reforms (which would need to be considered by the CPRC).

The Dynamics of Judicial Review

Judicial review is an area with high rate of settlement. A large proportion of potential claims settle pre-issue, with research estimating this at around half of all matters (Bondy and Sunkin 2009b; Nason and Sunkin 2011). Claims settle for a range of reasons; including public bodies wishing to save the time and costs of litigation and/or recognising on reflection that the matter had legal merit. Pre-issue settlement is usually in favour of the claimant, at least in part (Bondy and Sunkin 2009a). Post issue, a significant proportion of claims are withdrawn, and more still 'drop out' after a permission decision (usually due to settlement); settlement rates at various stages differ across topics (e.g., homelessness, immigration and actions against the police). In our research we focus only on civil other (non-immigration and asylum) claims, though we note some issues raised about differences in asylum and immigration judicial review in Wales as compared to England. Unique factors apply to immigration and asylum claims which are mainly issued against central UK Government departments (these factors include immigration detention and the role of the Upper Tribunal Immigration and Asylum Chamber) (for a comprehensive analysis see Thomas and Tomlinson 2019).

Around 33% of other civil judicial review claims are granted permission at initial paper permission stage, with permission grant rates at oral renewal being somewhat higher (up to around 50% (Nason 2016)). Permission grant rates vary according to subject matter, and research demonstrates inconsistency in judicial decisions, with evidence of some judges more likely to grant permission in particular subject areas, exposing quite stark differences in grant rate by judge over the years (Bondy and Sunkin 2008 and 2009a). Permission grant rates have varied more widely over the years in the regional Administrative Courts as compared to the RCJ in London (Nason 2016 and 2021). This is in part due to the different mix of topics issued across the regions.

Research suggests that up to three quarters of judicial review claims are brought by individuals, with other claimants being representative organisations, charities, commercial organisations, and other public bodies (such as local authorities) (Bondy, Platt and Sunkin 2015; Nason 2021). It also shows that the number and proportion of other civil non-immigration claims issued by unrepresented litigants has increased (from around 9% in the mid 1980s and 1990s, to 21% in 2007/08 to 37% in 2017/18).[6] Many judicial review claims involve people who are vulnerable and/or disadvantaged, and there is a link between social deprivation, the incidence of judicial review claims, and (in some subject areas) the likely success of those claims (Sunkin *et al* 2007 and 2010; Bondy, Platt and Sunkin 2015). Research also draws attention to the 'critical role of access to legal services in enabling the bringing of challenges' (Sunkin *et al* 2007: 566) and that restrictions on legal aid funding to support judicial reviews have likely had a disproportionately adverse effect on those forced to resort to litigation to obtain services to which they are legally entitled (Bondy, Platt and Sunkin 2015).

Other civil judicial review claims issued per head of population in Wales have been consistently lower than the England and Wales average and *had* been lower than

[6] Our initial research compared years before and after regionalisation of the Administrative Court, with date ranges therefore from 1 May to 30 April in any given year (reflecting that the regional courts began operating towards the very end of April 2009).

claims per head of population originating in northern England, until very recently. For claims issued in the Cardiff Administrative Court (which includes both Welsh and south west England claims) other civil judicial reviews are less likely to be withdrawn pre-permission than the Administrative Court average, however, while figures vary over the years, claims issued in Wales have roughly the same chance of permission success as the Administrative Court average. In Cardiff a smaller percentage of claims are withdrawn post-permission, and claimant success rates are slightly lower than the Administrative Court average (Nason and PLP 2018).

The Dynamics of Judicial Review: Evidence

In the following sections we discuss the issues raised on the dynamics of judicial review across our evidence (interviews, data, forum and discussion minutes, and events).

Judicial Review Pre-Action

Across our evidence there was a view that public bodies in Wales (including health boards, local authorities and Welsh Government) are increasingly alert to the 'threat' of judicial review and are proactive in conscientiously seeking to ensure the lawfulness of their polices, strategies and decisions from the outset, including through seeking external legal advice in the policy development and implementation stage. Whilst interviewees related this seeking of early advice in part to public body culture, they also associated it with the majority of Welsh local authorities likely having had less experience of the threat of judicial review particularly as compared to many English local authorities, and comparatively less experience of responding to pre-action correspondence. Interviewees saw the seeking of expert advice early on in the process of responding to matters arising as contributing to the avoidance of disputes.

Another reason given for why comparatively few disputes arise, or that few reach the courts, was the size of governance in Wales, and in particular the comparative ease of communication between local authorities themselves, and across other public bodies. The evidence suggests that there is knowledge-sharing and co-ordination in approaches across local government in Wales in particular. The role of the Welsh Local Government Association was seen as important in terms of raising awareness and organising training and information sharing, but also (and perhaps negatively) it was perceived as encouraging settlement in part to prevent controversial legal issues being determined by a court.

From interviewees and discussion events, it was noted that whilst local authorities in Wales may face unique challenges, they do not perhaps face the same extent or kinds of challenges faced by some London Boroughs (among the most judicially reviewed bodies in England and Wales) operating under severe resource constraints. Whilst local authorities in Wales have seen significant funding cuts, in general there was felt to have been more ring-fencing in Wales of funding for key public services. Though in this respect, the various reports of the Wales Governance Centre Fiscal Analysis Team are worth examining and suggest potentially more difficult times ahead (see e.g., Wales Governance Centre, Fiscal Analysis Team 2021).

Our interviews and other engagement events disclosed a majority view that people in certain areas of Wales are less likely than people in most areas of England to seek to use *legal* methods to resolve concerns/disputes with public bodies. Participants found

it difficult to pinpoint precise reasons for this, and it is an area that would benefit from further multi-disciplinary research. There was a perception at least that such reluctance could be linked to a culture of greater deference to authority, and to the proportion of the population receiving some form of state social security or welfare benefit and/or receiving care services and related concern that legal challenge specifically would cause problems for future interaction with public bodies providing benefits and/or services. A perceived lack of general public awareness and understanding of public law was also consistently raised across the various forums and events, and in interviews.

Other reasons for a reluctance to seek legal action included the prominence of other administrative justice institutions in Wales that are comparatively better known and well used, and that are free to access, especially the Public Services Ombudsman for Wales. The extent to which the ombud is publicly recognised as a 'one stop shop' for complaints against public bodies in Wales was also noted. Our participants suggested that there might be greater trust and confidence in the political branch of state in Wales, including through complaining to local council members, Members of the Senedd and Members of the UK Parliament, and that political representatives might be both more visible and more accessible as compared to England in light of devolution. This might be linked to a greater sense of political 'efficacy' in Wales (Henderson and Wyn Jones 2021).

More generally, a lack of awareness and education around public law legal rights was cited as a reason for comparatively lower rates of judicial review challenge per head of population, as compared to England, and to the overall England and Wales average. The impact of legal aid cuts in Wales was noted by all participants across all evidence sources. To an extent this is borne out by empirical evidence. The number of claims issued by claimants with addresses in Wales, and the involvement of solicitors based in Wales (on the claimant side at least) decreased around the time that LASPO came into effect. However, as the overall number of claims is small, and other factors are at play, it is difficult to be clear of a causal connection. Nevertheless, LASPO was cited across our evidence as a reason for the reduction in claims.

Across the evidence it was suggested that a significant factor impacting judicial review caseloads has been a reduction in the number of solicitors able to offer legal aid funded advice in Wales in relation to matters that impact individuals in their daily experience of public services, especially in relation to social welfare, community care and housing. The means test for legal aid was cited as a concern, and the low rates of remuneration for legal aid services. Our interviewees on the whole seemed to be doing less legal aid funded work and more private work over the years and finding it somewhat difficult to navigate access to legal aid funding. A regular occurrence was securing legal aid in light of there being children involved in the matter, and this seems to be one reason why education claims in Wales are comparatively more common. However, lack of awareness that legal aid could be secured in cases involving children was also noted alongside potentially broader misconceptions about the scope of legal aid withdrawn post LASPO.

The view was expressed across the evidence, that charities and pressure groups based in Wales are particularly close to Welsh Government, including in terms of their funding streams, and are used to being involved in policy and strategy development

with significant potential to influence and persuade. It was said that the corollary may be a reluctance to issue, or be otherwise involved in, litigation against the Government and/or other public bodies.

The evidence suggests that potential claims involving strategic local issues affecting a community and matters of wider legal principle, practice or constitutional importance, are more likely to proceed to issue, and indeed to final resolution through the courts. This seems to be because in these cases local people group together and collectively have greater capacity to navigate channels for accessing specialist legal advice, including legal aid funded advice, or exploring 'crowd funding' options. That said, even in relation to these cases, there is an initial lack of awareness of how public body decisions could be challenged. We heard both in relation to claims involving individual grievances, and in relation to wider community challenges, that word of mouth, the intervention of local authorities themselves, and other front-line service providers such as GPs and social workers, were sometimes crucial in people being made aware of and being able to access specialist legal advice.

Whilst across the evidence it was suggested that changes to legal aid funding for work done at the permission stage focuses minds on the strength of an application, there was also a significant view that practice in Wales has generally been comparatively cautious, and few participants thought that new funding regulations alone would be a reason for not progressing claims that might otherwise have been issued.

Whilst public bodies in Wales may often be cautious in addressing the legal implications of strategies and policies early on, we cannot glean from our evidence whether the standard of individual decision-making (so-called 'street-level bureaucratic' decisions) is necessarily better than that say of the average local authority in England. Our evidence suggests that there is poor decision-making in Wales, especially in the fields of health and social care (backed up by ombuds complaint data and regulatory outcomes, for example) and that a comparative lack of advice and advocacy infrastructure is a reason for lower Welsh claims per head of population in these areas. This might be surprising given the advocacy provisions in the Social Services and Well-being (Wales) Act 2014. However, it is worth noting that these statutory requirements do not extend to legal advocacy (or advice).

A more specific infrastructure of legal advice and advocacy in relation to judicial review, has had many years to develop in other areas, for example across various London Boroughs. Nevertheless, even given the long-standing London-centricity of the Administrative Court, there remain areas in Greater London where information, advice and advocacy structures are less well-developed. In Wales the infrastructure development post 'regionalisation' has largely taken place in urban south Wales, and the progress of this development has been impacted by legal aid cuts.

Whilst our evidence from interviews, events and forums suggests that the most controversial decisions do drive people (eventually) to specialist legal advice, the more day-to-day injustices are less likely to be recognised as such, and the network of bodies like Citizens Advice, Law Centres, charities and so on, could still benefit from greater development and connection, and ultimately exhibits less of a 'litigation culture' compared to that which exists in parts of England. The importance of individual lawyers was noted across the evidence, in particular that in some parts of Wales there

may be only one or two specialist lawyers covering a large population raising concerns over sustainability that have also been noted in the context of criminal law defence services.

The interview evidence suggests that the most common origin of instruction to give advice in relation to potential judicial review claims on the claimant side, is through word of mouth including recommendation from generalist advice providers such as Citizens Advice, charities, and other solicitors. On the defendant public body side, there is often a pre-existing relationship either between the body and a particular law firm, or with a particular lawyer, but again reputation and word of mouth also feature. The 'Panel' system for counsel was noted as key to instructions received in Wales, and the proportion of counsel based at chambers in Wales appointed to the Welsh Government Panel has increased in recent years especially at Junior level.

Judicial Review and Local Authorities in Wales

We sought to understand more about the pre-action stage by making Freedom of Information requests to local authorities in Wales. Local authorities are common defendants in Welsh judicial review, with other bodies being Welsh Ministers, health authorities, police forces, inferior courts and tribunals, and occasionally central UK Government departments. Our evidence shows that Welsh claims often involve multiple defendants, particularly where Welsh Ministers are joined as having some concurrent responsibility alongside UK Government Ministers or local authorities in relation to particular issues, or where the claim is one of important legal principle of practice and representative groups intervene.

We asked local authorities various questions about letters before action and judicial review proceedings commenced in a two-year period from 1 April 2018 to 30 March 2020. Our FOI requests received full substantive responses from 15 local authorities and 2 partial responses. Of the partial responses, one authority invoked s.12 of the FOI Act and did not respond fully on the basis of the costs involved in collecting the data, but it did inform us that it received 19 letters before claim in the two-year period. The other noted that letters before action and their responses are not recorded in any specific database and are dealt with by a variety of staff within the authority's legal section and as such it would be too costly of staff time to provide information on all letters before claim. Intriguingly, the authority responded that a search of emails for the phrase 'judicial review' turned up 250 results in a five-month period. Of course, many of these results would not have related to letters before action, but the information is useful nonetheless. The authority did provide information on the 5 claims that had proceeded to issue. In the two-year period, most authorities had received between 1-3 letters before claim, two had received 8. Both authorities receiving 8 letters before claim, the authority that received 19, and the authority that could not tell us how many it received, were councils in urban south Wales.

In the two years from 1 April 2018 to 30 March 2020, 15 authorities received in total 41 letters before action relating to potential judicial review. These constituted:

- 11 letters before action relating to education, and a further 2 relating specifically to school re-organisation

- 6 relating to social care or social services, and a further 4 relating specifically to children's social services or childcare
- 1 relating to safeguarding/family support (which could in effect be another children's social services claim).
- 6 relating to planning, 1 to land, 1 to property and 1 to construction.
- 2 relating to council tax
- 3 relating to community libraries
- 1 relating to coroners
- 1 relating to homelessness
- 1 relating to parking

The highest area of pre-action correspondence was education and other matters relating to children (18 of the letters before action); followed by planning (land, property and construction) and social care.

Of the 41 letters before action, proceedings were issued in relation to 16. We can add here that for the authority which was not able to tell us how many letters before claim it had received, it could tell us that proceedings had been issued on 5 occasions, and that 4 claims related to housing with 1 relating to children's services. So, proceedings were issued in a total of 21 claims relating to 16 local authorities. Proceedings were withdrawn in relation to 7 claims before a permission decision. For 3 of those claims this was because agreement was reached by consent between the parties. The 4 other withdrawn claims related to the local authority that could not give us pre-action information, or other details, so we don't know the reasons for withdrawal of these claims.

Of the 14 matters going to a permission decision, paper permission was granted in relation to 10. This permission success rate of 71% is much higher than the England and Wales Administrative Court average of around 33%.

Of the 10 claims that succeeded at paper permission stage, 4 were withdrawn (from what we can see due to agreement between the parties). In 3 claims there was an oral renewal of permission, 2 were granted permission the other refused. In 6 claims the substantive case was decided in favour of the defendant. In 1 it was decided in favour of the claimant initially and the defendant on appeal. In only 1 case was the claimant successful at substantive hearing and then only in part. In a two-year period, 15 authorities received in total 41 letters before claim, and one local authority whilst not able to tell us how many letters before claim, was subject to 5 issued claims, but there was only 1 case in which a claimant was successful at a substantive hearing, even then only in part.

The above is of course not reflective of the 25 potential claims in which proceedings were never issued, those where agreement was recorded as having been reached by consent before permission, and those withdrawn by agreement after permission. It may be then, adding the 1 substantive claim where the claimant succeeded partially at full hearing, that 33 out of 41 incidences resulted in some kind of benefit to the individual or organisation submitting the initial letter before action. We also do not know what happened in relation to the comparatively large number of letters before claim received by the authorities that were not able to provide full information.

From our interview evidence, a number of reasons were given for potential proceedings being resolved pre-action. The most common was that the complainant had received at least some sort of benefit, especially in relation to individual public services matters such as updated (usually enhanced) special educational needs or care needs provision. Other reasons were that the distillation of the issues into specific legal grounds had improved understanding, focused the minds of both sides, and led to some resolution of the dispute which would not necessarily be seen as an obvious 'win' or 'loss' for either party. The involvement of defendant lawyers, even at pre-action stage, and their engagement with claimant lawyers, were also raised as matters contributing to resolution. Another reason was that the public body's response to the letter before action demonstrated the weakness in the legal merits of the grounds for challenge, and in particular helped the complainant understand the legal limitations on the public body's own powers and use of resources. In cases with a commercial dimension, the matter was subsequently addressed through another form of dispute resolution such as mediation or arbitration or withdrawn due to negotiated agreement. In some instances, the matter was reformulated as a complaint to the Public Services Ombudsman for Wales.

Judicial Review: Post Issue

The data shows that comparatively fewer judicial review claims issued in the Administrative Court in Wales, as compared to England, are withdrawn after issue and before a permission decision. This may be in part due for reasons explored above including a cautious attitude to decision-making, some form of pre-issue resolution, and the lack of a more litigious culture, as compared to some areas of England and some types of public body. There was a general sense from the evidence that judicial review is used less tactically in relation to Welsh public bodies, as compared to some English public bodies and UK Government departments, and there is less evidence of settlement 'at the door of the court'. Evidence to IRAL suggests in general, though no means exclusively, a difference between local authority and central UK Government Department approaches to judicial review, with central Government less likely to engage productively in pre-action resolution, more likely to defend cases with weak merits, and raising concerns over interpretation of the duty of candour. IRAL considered there to be a need to clarify the scope of the duty of candour (IRAL 2021; para 4.130). Our evidence suggests that this 'government' approach does not extend to Welsh Government, and interviewees acting for claimants and defendants agreed that Welsh Government generally approaches judicial reviews and potential judicial reviews in a conscientious manner, demonstrating no reluctance to produce information. Our evidence does, however, suggest some difference of culture and approach across particular types of public body operating in Wales, and between devolved and non-devolved bodies.

Where claims are withdrawn after issue but before permission, this is most commonly because the claimant has secured a satisfactory outcome through post-issue negotiations with the defendant. Other reasons were that through receiving more detailed grounds of defence, the claimant reconsidered the merits of their case, and that growing awareness of the costs of litigation, and other negative effects such as potential stress and anxiety, dissuade some claimants from continuing. IRAL considered that as devolution has been described as a 'policy laboratory' in some respects, there could be a case for England and Wales considering the recent emphasis placed on 'consensual resolution' of judicial review in Northern Ireland (IRAL

2021; para 5.32). Our evidence suggests that such an approach may already exist informally in Wales but could be worth further exploration.

Judicial Review: The Permission Stage

Among claims issued by claimants with addresses in Wales between early 2007 and early 2018, the most prevalent topic of 'other civil' (non-immigration) claim was town and country planning (55 claims), followed by judicial review of the decision's of county court judges (42 claims), followed by education (35 claims), disciplinary bodies (at 28 claims), and community care and claims against police forces (at 23 claims each). For claims issued by solicitors based in Wales (whether or not the claimant was also based in Wales) the most prevalent topic was education (61 claims), followed by town and country planning (29 claims), followed by community care (26 claims). Homelessness and non-disciplinary public health matters (usually service re-organisation) also ranked highly. In relation to homelessness almost all representation is from Shelter Cymru, and in relation to public health these matters are usually of broader public concern where expert private advice has been obtained.

In summary, education, town and country planning and community care have been the most prominent subjects of Welsh judicial review claims, even since before the Administrative Court in Cardiff was established. There have been some fluctuations in topics of claim over the years, as we would expect. For example, while non-disciplinary public health claims quite often arise, they had been less prevalent in recent years. This is backed up by interviewee evidence that what we might call a series of reorganisation of services has been substantially completed, and that health authorities have learnt lessons from related litigation around issues such as proper consultation. The key legal issues arose, were (arguably) addressed in a series of cases, and administrative procedure has been improved as a result. However, both public health and care standards claims to the Administrative Court as a whole have increased in 2020, potentially related to Covid-19.

In terms of 'success' at the permission stage, grant rates in other civil (non-immigration) judicial review in the Administrative Court in Wales are almost equivalent to the England and Wales average (32% in Cardiff compared to 33% as the Administrative Court average). That said, the permission grant rate varies more widely from year to year in Cardiff as compared to the Administrative Court average, and the proportion of claims found to be Totally Without Merit has been especially high in Cardiff in some years. One difficulty here in understanding the data, is that whilst on the one hand we are able to break down data on the topics of claims and legal representation by whether the case is Welsh or English, on the other hand, in relation to permission and substantive success rates, the Ministry of Justice figures include all claims issued in Cardiff (so some 50% of them are likely to relate to south west England).

A matter that had been puzzling us from the data was that from 1 May 2013 to 30 April 2014 there was a high number of claims under the topic 'county court' issued by claimants with addressed in Wales, and also a high proportion of claims issued by unrepresented litigants. As the number of 'Welsh' claims is so small, this one topic skewed the overall number of claims in that year to register a significance increase, followed by a notable decrease. This is instructive for two reasons, one is that while certain topics of claim largely remain staples, the overall caseload can fluctuate

significantly based on different types of public law legal issues that come to light over time, whether that is due to new legislation, changes in administrative practice, or changes in the litigation strategies of lawyers and to the awareness of potential applicants. The second reason is that these county court claims look to have primarily involved unrepresented litigants issuing multiple claims.

The number of claims issued by claimants with addresses in Wales acting as unrepresented litigants has increased (for example up from 19 claimants in the period 1 May 2007 to 30 April 2008 to 36 claimants in the period 1 May 2017 to 30 April 2018). The classification Litigant in Person is used in the Administrative Court Office data to refer to claimants who are unrepresented at the time of issuing their claims. But we cannot be sure of what, if any, legal support or indeed legal advice, claimants in this category might have received at various stages including after issue. Most of our interviewees did not have recent experience of assisting, or of acting on the other side, in litigation involving an unrepresented litigant. But most had experience, whether in relation to judicial review or to other types of claim, of acting against unrepresented litigants, and noted the additional pressure this situation places on court staff, members of the judiciary, and defendant lawyers in assisting unrepresented litigants to navigate procedures fairly. Those with experience of litigants in person in judicial review, felt that some could be repeat claimants, bordering on vexatious litigation, though with no suggestion that 'regionalisation' had itself led to any increase in ill thought-out or vexatious litigation. Other litigants in person were seen to be those truly desperate to seek justice who had been unable to secure affordable legal representation, feeling they had no choice but to proceed on their own.

Looking at permission stage decision making itself, the majority of our interviewees considered that previous research findings about inconsistency of permission decisions in relation to particular areas of law remain true in general. But there was some difference of opinion as to how much this impacted on the Administrative Court in Wales. Whilst some interviewees considered there to have been quite widely inconsistent decision-making, in particular by less experienced circuit judges and deputy High Court judges, others did not perceive this same cause for concern. Another matter of division was between those who thought that local judges, generally spending more time determining cases in Wales, were better equipped to appreciate the nuances of devolved Welsh law and context, than judges primarily sitting in England 'travelling out', or more recently 'zooming in' to Wales. Others considered that the application of general public law principles is a skill honed through practice and experience especially of statutory interpretation; a regular stream of public law cases is more important than broad practice across Welsh law. Still, most of our interviewees had experience of inapplicable English law (especially guidance) being referred to by lawyers, and this was also an issue raised across discussions, meetings and conferences.

The length of some permission hearings was noted, with research participants explaining that sometimes the best part of a day could be spent arguing about whether a claim was 'arguable'. This aligns with longer-term research evidence about the changing nature of the permission stage and its use as a judicial case-management tool (Bondy and Sunkin 2009b; Nason 2016 and 2021), and judicial concerns expressed about the length and clarity of judicial review applications, but we would not

be able to determine from our evidence any particular difference between practitioner and/or judicial practice in England and Wales respectively.

Experiences of the Administrative Court in Wales are generally positive. Across our evidence, it was noted that service in the Administrative Court in Wales is generally swift, staff are helpful and knowledgeable, and claims are dealt with expeditiously. In one forum we attended it was suggested that Black and Minority Ethnic (BAME) litigants, and BAME lawyers, sometimes face discrimination or hostility in the Administrative Court in England and in some tribunals in England (especially in the context of immigration or asylum disputes), whereas such is not the case in the Administrative Court in Wales or in tribunals based in Wales. There were some very recent concerns expressed about service during the Covid-19 pandemic and that more work seemed to be being done by Administrative Court Office Lawyers based in London; this was seen to be to the detriment of court users based in Wales. Concerns were also expressed that no Administrative Court User Group had been convened for Wales since 2018 and it wasn't clear whether the Welsh user group had in fact been replaced by a broader user group including south west England.

Moving to the post-permission stage, Ministry of Justice data shows that a higher proportion of claims issued in England are withdrawn post-permission than is the case for claims issued in Wales. Our interviewees considered that withdrawal post successful permission would only occur if the claimant has received some satisfactory benefit through a negotiated settlement. Again, this lower proportion of claims withdrawn in Wales fits with the picture of public bodies generally engaging conscientiously at the pre-action stage, and disputes being avoided where possible. However, we need to be cautious here as this data also includes claims from south west England.

Judicial Review: The Welsh Ministers

The Welsh Government provided us with information about judicial review litigation involving the Welsh Ministers since September 2008.

Figure Four Judicial Review Claims Involving the Welsh Ministers					
	Application Successful	Application Dismissed	Application Withdrawn	Ongoing	Other
Rural Affairs	3	2	1		
Environment	1	8		2	
Planning		6			
Animal welfare		1			
Health	1	4	1	2	1 - Did not progress beyond pre-action protocol
Education		7		1	1 (partially successful but no remedy granted)
Local government	1	1			
Transport		1	3		
Social care	1	1			1 (permission refused on papers, claimants withdrew before oral renewal)
Economy		1	1		
Pensions	1				

Counting the 1 application that was partially successful with no remedy granted, applicants were successful in 9 claims (16% of the total incidences – those interested can compare this success rate to those estimated by UK Government Departments – see Appendix D of IRAL). Of the 56 claims, 6 also involved at least one relevant Secretary of State (1 related to local government, 3 related to the environment, 1 related to pensions and 1 related to health and social care). The number of incidences varied over the years as shown in Figure Four below.

Figure Four: Incidences of Judicial Review Involving the Welsh Ministers by Year	
2009	3
2010	5
2011	6
2012	3
2013	4
2014	7
2015	3
2016	1
2017	4
2018	1
2019	9
2020	7

The figures are too small to draw conclusions, but it is interesting that the numbers are comparatively low in the years where our previous research perceived a decrease in overall Welsh judicial reviews.

Substantive Judicial Review

Research published in 2015 identified that out of 502 judgments (including both immigration, other civil and criminal judicial reviews) issued from July 2010 to February 2012 inclusive, 12 substantive judicial reviews were heard in Cardiff (but 2 did not concern Wales). A further 5 cases concerning Wales were heard in London. Only 2 of 9 claims against Welsh local authorities were brought by individuals, with the others brought by corporations/legal persons. This was a strikingly low proportion for individuals as compared to the England and Wales average. The researchers considered the reasons for this were 'unclear, but may be indicative of a low level of awareness of JR as a form of redress among potential claimants and legal advisers' (Bondy, Platt and Sunkin 2015: 17). In the study, 4 judgments related to community care, all of which were commercial judicial reviews regarding payments to care homes by local authorities in Wales, and all involved the same Bristol firm of solicitors. The second largest topic of claim was planning, 2 cases issued by firms outside Wales, and 1 by a firm with offices in Wales. Next were 2 cases concerning school closures, one issued by school governors, another by an individual, each represented by solicitors in Wales but with London-based counsel (Bondy, Platt and Sunkin 2015: 16-17).

In evidence to the Commission on Justice in Wales, Nason and PLP concluded that the substantive judicial review caseload pertaining to Wales over the years since the Administrative Court in Cardiff was established has been quite diverse, involving a mixture of devolved and non-devolved law and policy, relevant to particular claims in a variety of different ways. They noted that this presents both challenges and opportunities for legal education, legal practice and justice in Wales (Nason and PLP 2018). They also reflected that out of 82 judgments analysed (handed down in Cardiff from and including 2010 to and including 2017), only 26 referenced Welsh law and/or policy.

The Administrative Court in Wales is seen as a 'constitutional success' for Wales on the basis that the Court has heard a number of claims of constitutional significance to Wales (Nason and Gardner 2019). Including, for example: *R (Governors of Brynmawr Foundation School) v Welsh Ministers [2011] EWHC 519 (Admin),* where Beatson J stressed the 'constitutional status' of the Government of Wales Act 2006; *R (Welsh Language Commissioner) v National Savings and Investments [2014] EWHC 488 (Admin)*, where the Commissioner challenged NS&Is decision to withdraw its Welsh Language Scheme. This was the first Administrative Court case to be issued and heard in Welsh and included interpretation of the Welsh Language Act 1993; and *R (Sargeant) v The First Minister of Wales [2019] EWHC 739 (Admin)* which held that the First Minister's control of the Operational Protocol governing the investigation into the death of Carl Sargeant AM, breached a legitimate expectation (founded on a press statement) that the investigation would be independent.

Substantive Judicial Review: Evidence

From our current research, Figure Five below shows the number of reported substantive hearings recorded as having taken place in the Administrative Court in Wales that included at least one Welsh public body as a defendant.

Figure Five: Substantive Cases in the Administrative Court in Wales Against Welsh Public Bodies	
2009	4
2010	6
2011	5
2012	4
2013	1
2014	4
2015	10
2016	7
2017	4
2018	2
2019	3
2020	6

We found that whilst there is evidence of diversity in caseloads, still a large proportion of those proceeding to substantive hearing are planning cases; three times as many cases concern planning as the next most common topic (which is education). The majority of these claims follow a pattern; challenging a planning inspector's decision to grant or deny planning permission on grounds of irrationality, in some cases there are linked judicial review and statutory appeal claims. Administrative Court judgments evidence deference/respect for specialist public body decision making, with many of these cases involving planning inspectors having been found to show consideration for various policies and requirements sufficiently to rebut an irrationality challenge. In cases where the claimant was successful, such as *R (Jedwell) v Denbighshire County Council [2016] EWHC 458 (Admin)*, it is usually because the defendant is unable to offer a reasoned justification for their decision (some shade of *Wednesbury* unreasonableness or failure to comply with a specific duty to provide reasons). Even then, remedies are of course discretionary, for example in *Jedwell* adequate reasoning had been provided ex-post, and the remedy awarded was a declaration to the effect that the Council had been in breach of its duty to provide reasons at a particular stage

in the decision-making process. Other case examples in the area of planning include failing to factor in expert evidence or failing to account for highway safety.

Our interviewees also noted that claimant success is usually associated with legal errors on the part of the public body that are more straightforward to demonstrate objectively, and that legal tests in judicial review are hard for claimants to surmount, especially in the field of planning.

Education was the second most common topic of claim, and here cases were more likely to be formally issued by individuals, even if there may well have been a broader interest group and support structure around the claim. The most common ground in education cases tended to be illegality, centring on interpretation of statute, guidance and related policy (such as in *R (on the application of Driver) v Rhondda Cynon Taf CBC [2020] EWHC 2071 (Admin)*). Another case, *R (on the application of DJ) v Welsh Ministers [2018] EWHC 2735 (Admin)* concerned the availability of special needs education for 16-25 year olds, this entitlement under the Learning and Skills Act 2000 was not taken to extend to a duty to provide education for that entire age range.

The case of *R (on the application of the Diocese of Menevia) v Swansea City Council [2015] EWHC 1436* (Admin) turned on the Equality Act 2010, with Wyn Williams J quashing a free school transport policy on the basis that it was discriminatory against black and ethnic minority children who were statistically more likely to attend faith schools; the policy withdrew provision of discretionary free transport from pupils attending voluntary-aided faith schools, whilst continuing to provide free transport for pupils attending Welsh language schools. Matters relating to school closures, alongside school transport and special educational needs provision, seem to be the primary focus of education claims, and also constitute many of the most publicised claims to have been issued in the Administrative Court in Wales. *Driver* in particular is a poignant case, in that it not only concerned a distinctly Welsh topic, that of Welsh-medium education in schools, but also because a key ground of challenge was the potential disparity between the Welsh language legislation and the English language version (of the School Standards and Organisation (Wales) Act 2013). Due to the statutory equivalence of the Welsh and English languages in Wales, the court had to interpret the legislation in a way that aligned with both languages, in the first instance adopting the clearer Welsh version. However, when heard at the Court of Appeal the decision was reversed, specifically turning on explanatory guidance by the Senedd Cymru/Welsh Parliament with respect to the 2013 Act, which supported the defendant's interpretation. We found ultimately that in claims from our data set which were appealed from the Administrative Court in Wales, 5 out of the 6 appeals were successful, but this is likely too small a sample to draw any reliable conclusions from.

The third most common topic of claim at substantive hearing is the environment, with cases usually either issued by organisations and pressure groups or supported by them as interested parties. Environmental cases have most commonly featured European law and have tended to have even lower chances of success at substantive hearing. The most recent example being *Wild Justice v Natural Resources Wales [2021] EWHC 35 (Admin)* where the relevant European law did not render licences to kill wild birds unlawful. There is also a significant overlap in cases involving the environment alongside planning, such as *R (on the application of Plant) v Pembrokeshire County Council [2014] EWHC 1040* where there was a conflict

between sustainability policies and environmental destruction as part of the challenge to the grant of planning permission. It was found that while the erection of wind turbines did impact the locality of an ancient monument, this was of lesser effect than the environmental gain of additional green energy supply. Given that 20% of Wales' land area is dedicated National Park, as compared to 9% of England's, it is not surprising that environmental matters are more common in Welsh judicial review (this may also be linked to differing sustainability policies, but we did not look into this in detail).

In our review of claims against Welsh public bodies reaching a substantive hearing in the Administrative Court in Wales, we found individuals to be the most common class of claimant, accounting for around a half of claims proceeding to substantive hearings. This is a notably higher proportion than in the previous research (from 2010 to 2012) but still lower than the Administrative Court average (which studies have put at between 2/3rds (Nason 2016) to 3/4ths (Bondy, Platt and Sunkin 2015) – however, each of these studies recognises that simply because a claim is fought in the name of an individual does not mean that the issue is non-recurrent or confined to its own facts). Private corporations and other organisations follow, accounting for roughly 25% of substantive cases, and these types of claimants are particularly common in planning cases. With the final 25% of cases brought by public bodies, pressure groups and charities or where it is otherwise unclear from the judgment precisely who the claimant is. Despite our analysis above suggesting comparatively less well-developed structures to support public law litigation in some areas of Wales, it seems that claims involving bodies like charities and pressure groups are significant in number (or at least proportion) and are more likely to pass the permission stage.

We also note that many claims involve multiple defendants, including Welsh Ministers and local authorities, or claims involving Welsh Ministers and UK Government departments where there is a degree of concurrent responsibility. Yet, as noted above, the recent IRAL considered these latter kinds of judicial reviews to be outside its terms of reference.

What our evidence suggests is that claims involving commercial entities, charities and other interest organisations are more common in Welsh substantive judicial review hearings as against the Administrative Court average for other civil (non immigration) judicial review. Whilst these claims may have 'significant' impacts on local communities, legally most still turn on 'routine' grounds of irrationality and error in statutory interpretation, rather than what tend to be seen as more innovative grounds of substantive review.

From our data specifically relating to claims involving at least one Welsh public body defendant, we found that in substantive hearings claimants are successful around 33% of the time. We also consider from our reading of the judgments, that judges determining cases in the Administrative Court in Wales show considerable deference/respect to the expertise and constitutional position of initial government decision-makers and to legislation. IRAL suggests the same is true of judicial review in Scotland and Northern Ireland. In relation to Scotland, it suggests: 'The underlying ethos, however, is one of judicial self-restraint in the exercise of the power of review' (IRAL 2021; para 5.13). In relation to Northern Ireland, IRAL notes various references stressing that the merits of administrative action are matters for the public authority, including the submission of the Northern Ireland Bar Council noting that the High Court

of Northern Ireland uses its supervisory jurisdiction sparingly and that judges very clearly respect boundaries between the courts and the Executive (IRAL 2021; paras 5.24-5.26). We suggest further research could consider whether there is overall a more deferential/respectful attitude to judicial review in the devolved nations, or indeed in general outside London.

The Values and Effects of Judicial Review

'Success', understood as being awarded a specific remedy following a substantive judicial review hearing, is only a small part of the value and impacts of judicial review. Only a tiny percentage of claims issued (somewhere between 2%-5% depending on selection of figures) result in a substantive 'win' for the claimant. The number of remedies awarded per-annum in judicial review proceedings has barely changed since the 1980s when the modern form procedure was first introduced (Nason 2021). On average the success rate is slightly in favour of defendants, with Ministry of Justice statistics for 2019 showing an overall defendant success rate of 56% (for all judicial reviews including immigration and asylum). Research suggests that on average in the years since regionalisation, claimant success rates in final hearing for cases issued in Wales have been lower than the Administrative Court average (Nason and PLP 2018).

The value and effects of judicial review are diverse. Claimants and their lawyers consider it a fast and effective means to have their concerns listened to and addressed by public bodies, often leading to substantive resolution, a service restored or benefit granted, even prior to issue (Bondy and Sunkin 2009a). The benefits of judicial review more broadly include clarification of the law, setting a helpful precedent, improved policy/procedure and better human rights protection (Bondy, Platt and Sunkin 2015). Our discussions above of key Welsh claims show the value of judicial review in articulating local public law values and constitutional standards. Some of these benefits accrue (perhaps in different ways) to either or both parties regardless of the substantive 'winner'. Judicial review claims provide useful guidance to public bodies to improve their procedures, and the incidence of successful claims has been causally linked to improvements in local authority performance, especially for authorities in areas of high deprivation (Sunkin et al 2007 and 2010).

There are of course some negative effects associated with judicial review, it can be a draw on scarce resources for public bodies (especially local authorities) and can delay implementation (or even in rare cases prohibit implementation) of policies and procedures felt by public bodies to be genuinely in the best interests of those they serve. Also, what might be seen as negative for one part of a public body could be positive for another part, such as where a judicial review decision improves clarity for individual case work officials in a particular area, but at a cost that leads to challenging resource allocation decisions for budget holders. Judicial review can also be stressful, time-consuming and expensive for all involved (Bondy, Platt and Sunkin 2015; Hickman 2017).

The Values and Effects of Judicial Review: Discussion and Evidence

Empirically from our substantive judgment data set 20 claimants were granted a remedy (from 2009 to 2020 inclusive), the most common of which being a quashing order. None of our interviewees had been involved in Welsh claims where the only remedy granted was a declaration of unlawfulness, though we can see from our

analysis of substantive judgments that declarations have been awarded in Welsh claims.

Our interviewees were clear that judicial review, and specifically the threat of judicial review, can be a powerful means to ensure swift resolution for individuals of specific grievances relating to, for example, the legally inadequate content of care or educational plans, unlawful decisions relating to professional discipline, or unlawful exercise of police powers or even lower-level judicial powers. A common use of judicial review was to secure access to public services for those who are legally entitled to them, and who need them the most. Many potential claims of this type were settled either wholly or partially in favour of individuals even before a permission application was issued. However, our interviewees also saw problems with this picture. A number of interviewees noted examples of cases that had settled, with claimants benefiting substantively, but where subsequently an important broader matter of legal principle (especially in relation to newer and more innovative Welsh law) was not then addressed by the courts such as to lay down a precedent for the future. This has also been noted in Shelter Cymru research relating to the lack of issued legal challenges under Welsh housing and homelessness law (Shelter Cymru 2020).

Cases more likely to proceed to final resolution are those brought by organisations of various kinds, raising broader points of local public interest, administrative practice, and legal principle, even if the grounds are often ‘routine’ ones of more traditionally conceived irrationality and narrow illegality. The extent to which litigation activity in Wales involves corporations is also notable and suggests a significant proportion of claims being issued for commercial reasons. A picture is depicted where private organisations, having greater awareness and resources, are comparatively more able than individuals to access the Administrative Court in Wales.

Our interviewees recognised, and were able to give specific examples of, where going through the process of judicial review had led to forensic expert examination of law and administrative practice, seen to catalyse improvements in the quality of public body strategic and policy decision-making. These benefits were appreciated even in claims where the public body retook the same decision ‘on the merits’ after having followed improved processes, though we have not been able in our research to collect data on how often public bodies retake the same decision ‘on the merits’. Our interviewees recognised that whilst claimants could well be disappointed where the same decision was taken ‘on the merits’ there was still value and some degree of satisfaction in having felt justice to have been done and to have been seen to be done. Interviewees also noted claims against Welsh public bodies in areas where the law is either identical or significantly similar in England, and where the improved practice flowing from legal exposition had been felt beyond Wales.

Our interviewees commented on the importance of judicial review to keeping public bodies honest and transparent, and that the process can be of value when communication has largely broken down between individuals (and organisations) and public bodies, as it forces both sides to consider the other’s argument. Judicial review is seen as important to public bodies in Wales, especially to ensure proper procedures are followed and corners are not cut. It requires public bodies to slow down and take stock. This benefit was recognised by public bodies engaged with our research and

by lawyers acting primarily for defendants, as well as by claimant lawyers, and organisations largely representing claimants.

All interviewees noted the fundamental constitutional value of judicial review, both in general, and specifically to Wales where devolved governance structures are comparatively young, as a check on 'legality', with strong support for the principle that government is not above the law. For many this seemed to be the most significant 'value' of judicial review, in a sense over and above the outcomes of individual cases. The broader value of constitutional legality can be illustrated by the Welsh Government's own use of judicial review to challenge the United Kingdom Internal Market Act 2020. The Government is challenging the Act on the grounds that it: purports to impliedly repeal areas of Senedd Cymru/Welsh Parliament competence, and confers powers on UK Government that could be used by UK Ministers to substantively amend the Government of Wales Act 2006 in a way that could cut down the devolution settlement. Both grounds are in effect based on the constitutional principle of legality; that if Parliament intends to legislate contrarily to fundamental constitutional norms, it must do so expressly and not impliedly. The case, *Counsel General for Wales v Secretary of State for Business, Energy and Industrial Strategy [2021] EWHC 950 (Admin)* was refused permission, with Lewis LJ finding it to be premature absent the context of any specific legislation made or purported to be made under the 2020 Act. The judge however expressed no views as to the arguability of the grounds, and as such the door remains open to future litigation. The case has generated significant press coverage, and debate, in a sense further demonstrating the constitutional significance of judicial review, even in claims not granted permission to proceed.

Across our interviews and other forums and discussions it was suggested that the Administrative Court in Wales as part of the Queen's bench Division of the High Court is seen as bringing a degree of authority or gravitas that resolution through a tribunal, complaint procedure, or indeed through the intervention of an ombud or a commissioner, could not bestow in the same way.

Has there been a reduction in Welsh claims and why?

The initial impetus for this research was that there seemed to be a reduction in Welsh judicial reviews, and certainly no increase, during a time period when the volume and the uniqueness of Welsh public law had expanded. Some headline figures are that in 2007/08, 25 other civil judicial review claims were issued by claimants with addresses in Wales (constituting 4% of all claims in which a claimant address was known). This had increased to 57 claims and 6.5% of address known claims in 2013/14; but reduced to 34 claims and 3.8% in 2016/17 and 34 claims again (this time at 3.5% of address known claims) in 2017/18. However, accounting for our now more nuanced data analysis and qualitative discussions, the evidence suggests that the figures for 2013/14 are skewed by a specific topic of claim and type of claimant. On the whole the number of applications per-annum from claimants with addresses in Wales remains slightly higher than it was before the Administrative Court in Cardiff was established. On the other hand, when we look at claims involving solicitors located in Wales instructed to act for claimants, the number does seem to have reduced.

We are talking about very small numbers here and it is important not to generalise. These figures also don't include criminal judicial review or immigration and asylum

judicial review. In our interview evidence, around half of our interviewees perceived there to have been a drop off in the number of Welsh claims issued. Reasons given included that there may be increased focus on settlement in some areas, in part this is due to local authorities being more open to settle after having experience of unsuccessfully defending litigation, and concerns about the costs defending litigation. Another reflection was that key subjects impacting most on people's lives (and where there is often a public interest element as well) such as education, health, planning and the environment, have been devolved for some time, arguably this means particular legal issues may have been 'ironed out' and the implications of potential or actual claims addressed (even if these still remain among the most commonly litigated topics). Some of our interviewees suggested that the need to draft law bilingually could have improved the overall clarity of legislation, thus leading to fewer challenges.

Legal aid reforms were noted as a potential issue contributing to the decrease in the number of claims issued by solicitors based in Wales. None of our interviewees suggested they had experienced any less 'demand' for specialist public law legal advice (either on the claimant or defendant side), the issues seemed more around capacity to meet that demand (especially on the claimant side), legal aid access and entitlement issues, and the insufficiency of legal aid remuneration.

Judicial Review and Justice in Wales

The 'expansion' of Welsh public law, on the one hand, relates to specific topics such as planning, education and housing. As our interviewees noted, however, these areas have been devolved for some time, they would have to be regulated in some way, whether by English and Welsh, or by Welsh law, and the common law grounds of judicial review remain the same: illegality, procedural impropriety and irrationality. That legislative competence has changed hands wouldn't necessarily precipitate a growth in judicial review claims. However, the unique Welsh law that we refer to is more overarching legislation imposing a series of rights, equality, and wellbeing-based duties on types of Welsh public bodies in performance of some of their functions. These duties are to have 'due regard' to particular international human rights standards, and to equality principles, imposing additional procedural requirements in relation to performance of equality duties, introducing new obligations around well-being (both individual and collective) and sustainability. Some of these duties also condition the practical exercise of powers largely regulated by reserved England and Wales or UK legislation and guidance, such that additional avenues to legal challenge might be available in Wales, for example to older people and children as asylum seekers or immigrants receiving services from Welsh local authorities. As Professor Simon Hoffman put it in his submission to the Commission on Justice in Wales:

> The Welsh approach to regulation of public governance is distinctive; introducing new and unique duties on Welsh Ministers and public bodies. Welsh legislation has established new rules of engagement between governance institutions and citizens; and therefore, for administrative justice in Wales. Social rights have been woven to the framework of public governance, with potential to ensure good governance, fairness and accountability (Hoffman 2018; para 3).

Hoffman notes that the Administrative Court in Wales has not yet had a full opportunity to engage with these matters, but that if it were to make a 'significant contribution to

social justice' this could be fostered by: 'Adjudication which departs from the traditional approach to judicial review in social welfare fields, to allow (encourage) more judicial activism on substantive human rights issues' (Hoffman 2018; para 6). As yet we have found no evidence of the Administrative Court in Wales embracing this approach. But it is notable that IRAL received evidence from the Scottish Human Rights Committee that Scotland is on a different 'human rights trajectory' from the rest of the United Kingdom, and that having a dual or twin-track approach to judicial review could mean remedies for human rights breaches might be different depending on whether the breach related to a devolved or reserved matter. Wales is increasingly taking an approach much more in line with the Scottish trajectory than that of the broader UK, and the specific implications of the single jurisdiction and reservation of judicial review could lead to even further complexity for Wales, perhaps fostering a judicial attitude of caution and reluctance to explore the implications of new progressive Welsh law.

So far there have been few attempts to litigate these new Welsh law duties, and those claims which have been issued have been refused permission. Various reasons for this were evident from our research; some participants queried whether judges appropriately experienced in Welsh law and context were being listed to determine those claims which have arisen, another suggestion was that the duties imposed are comparatively 'weak' procedural compliance duties as opposed to giving individuals substantive rights and as such the legal tests involved are hard to surmount. Another concern was lack of awareness of the new duties and the difficulty for anyone other than specialist practitioners in recognising potential non-compliance, and in keeping up with changes in guidance. The lack of litigation in this area is clearly recognised as an issue beyond our research project, with various initiatives (especially instigated by the EHRC) seeking to bring together lawyers and other advice providers, charities, and pressure groups, to identify and progress 'strategic litigation' based on new Welsh law duties relating to equality and human rights. Such initiatives see strategic litigation as a necessary element in exploring whether, and how, distinct legal frameworks can be harnessed to improve the lives of people in Wales, and in particular that such litigation has the potential to provide a stronger form of accountability for outcomes than that provided by other mechanisms across the administrative justice sector (EHRC/Swansea University Strategic Litigation Event 2021).[7]

In our interviews we also outlined the Commission on Justice in Wales' recommendations regarding administrative justice, with most interviewees agreeing that there could be a more important future role for devolved Welsh tribunals (as recommended by the CoJ 2019: para 6.34-6.42). However, interviewees noted that there are issues of 'critical mass', highlighting the current caseload of Welsh tribunals, and the diversity of topics, with mental health dealing with approx. 2,000 claims per annum and other tribunals just two or three claims. Interviewees welcomed the Law Commission project seeking to bring greater coherence to the structure of devolved Welsh tribunals, laying foundations for future development and providing for eventual expansion of Welsh tribunal work (Law Commission 2020). Whilst there was clear support for ensuring that access to justice is available as locally and informally as possible, there was scepticism about whether this could be achieved by creating additional public law appeal rights to devolved Welsh tribunals. Scepticism related to

[7] More information on the work of the EHRC in Wales can be found here: https://www.equalityhumanrights.com/en/our-work-wales

the comparative status of tribunals as compared to the Administrative Court, and that if legal aid funded advice and representation were not available in public law tribunal claims access to justice barriers for individuals would remain. There was also a concern that creating appeal rights would risk closing off access to judicial review even further, when it is precisely the clout and precedent setting capacity of the High Court that would have the most value to the transparent interpretation and enforcement of public law in Wales.

Covid-19

We did not seek to examine in detail the impacts of the Covid-19 pandemic on judicial review in Wales. Research by the PLP showed that by the end of May 2020, there had been 63 incidences of judicial review relating to the pandemic across England and Wales. Of these, 49 were challenges to UK central Government departments, others were to local authorities, health boards, and devolved institutions. Our information from Welsh Government shows there have been two judicial reviews raised with Welsh Ministers, one did not progress beyond pre-action protocol, and the other was refused permission on paper and withdrawn prior to a renewed oral permission hearing.

Across our evidence there seems to be a broad consensus that the courts in Wales (across all areas of justice) have coped well with moving online, and that there are no backlogs in hearings. We have noted some concerns about the recent service provided by the Administrative Court in Wales, but no evidence that this is specifically linked to the impact of Covid-19. The longer-term impacts of online justice in judicial review claims remain to be seen, and there could well be opportunities to improve access to justice especially in rural Wales. However, our research suggests that provision of accessible and affordable advice and advocacy services is central to increasing access to justice in Wales, so the success of online judicial review will be heavily dependent on the success of online access to specialist legal advice.

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Annex One: Judicial Review – Semi Structured Interview Questions

These were semi-structured interviews, and some additional points were raised across the interviews that are not covered by these specific questions. Our approach to analysing the data was to reflexively code answers to these specific lines of questioning alongside other emerging themes across the interview transcripts.

Although there is official data available about the topics of claims issued in the Administrative Court in Wales, we would be interested to hear about the topics of claim you are most regularly involved with (representing a claimant, defendant or intervener) and about the types of public body defendants challenged.

1. In your experience what would you say are the most common topics of judicial review in claims which have been, or which could have been, issued in the Administrative Court in Wales? ('Could have been' is intended to include potential claims relating to Wales that did not proceed to issue). Topics include for example; education, health, planning and so on.

2. In your experience, what are the most common types of bodies against which judicial review is issued in the Administrative Court in Wales? For example, Welsh Ministers, local authorities, central UK Government departments. If you also act in the Administrative Court in England, to what extent do you think the most common type of defendants varies between Wales and England?

3. Do you have any experience of either supporting or acting against litigants in person (unrepresented litigants) in the Administrative Court in Wales? If so can you explain a bit about that experience and how, if at all, it affected the overall proceedings?

Our next set of questions are around what can be called the 'Dynamics' of judicial review litigation, in particular the proportion of claims that are withdrawn at various stages of the process, and the outcomes of these claims.

4. In your experience of claims that could have been issued in the Administrative Court in Wales, how regularly would you say these claims are resolved prior to issue, and for claims that have been issued, how regularly would you say such claims are resolved and withdrawn post issue but before a permission decision? When claims are resolved (otherwise withdrawn) at these stages, what would you say are the most common reasons for resolution? (For example; negotiation between the parties, mediation, resort to an alternative mechanism such as a tribunal appeal or ombudsman complaint). In your experience, would you say claims resolved at this stage are resolved more often in favour of the claimant, the defendant, or roughly equally between the two?

5. Particularly when representing claimants, what would you say are the effects of claims that are resolved or otherwise withdrawn either pre issue or post issue but before a permission decision? For example, are claimants (and potential claimants) generally satisfied/unsatisfied with the experience, does resolution lead them to secure or retain a substantive benefit or entitlement,

does the experience have a detrimental impact on ongoing relationships with the defendant, have administrative practices within the defendant body improved as a result?

6. We are interested in your experience of permission stage decision-making in the Administrative Court in Wales. In your experience would you say that permission applications are dealt with in a reasonable time, would you say that there is consistency or inconsistency in decisions made, and is sufficient information made available about the reasons for refusing permission? Would you say that Welsh public body defendants generally comply with the duty of candour?

7. A significant number of claims are withdrawn after a permission decision. What, in your experience, are the main reasons for withdrawal after a permission decision? And what would you say are the most common effects in claims withdrawn post-permission? For example, the claimant retains or is granted a benefit or entitlement, the defendant public body amends its policy or practice, are losing parties generally satisfied or dissatisfied with the experience?

A key aim of our research is to understand the impact, value, and effects of judicial review specifically in the Administrative Court in Wales.

8. For claims that have proceeded to a substantive judgment, what would you say are the main impacts/effects for both claimants and defendants? What kinds of tangible benefits do you see, for example; a claimant having a benefit or entitlement restored, clarification of a point of legal principle or practice, changes in public body procedures? What are the disadvantages/negative impacts? Are these impacts/effects (both positive and negative) mostly relevant to Wales, or are there cases with broader England and Wales or UK ramifications?

9. Professor Mark Elliott once noted there are no ‘pyrrhic’ victories in judicial review claims, do you have experience of claims where tangible benefits (to either party) were either non-existent or minimal, but nevertheless the process and its outcomes were important in principle? Do you have any reflections on how often, in your experience, decisions that are quashed are re-taken in favour of a successful claimant?

Our final questions are also more specifically about the context of Wales. Our data and other evidence (from 2007 to 2018) shows that the number of civil (non immigration) judicial reviews issued by solicitors firms based in Wales has fallen over the years. Also, whilst the numbers are comparatively small and variable (so it is difficult to be sure of longer-term trends), there have been fewer judicial review claims issued in the Administrative Court in Cardiff in 2017, 2018 and 2019, than were issued in earlier years (most especially 2010 and 2011).

10. Given the increased legislative competence of the Senedd and Welsh Government and the growth in volume of devolved Welsh law, why might it be

the case that the incidence of judicial review challenges pertaining to Wales and Welsh public bodies seems to be decreasing?

11. What would you say is the main value of judicial review to Wales in particular? For example, do you think the procedure is an efficient and effective means of resolving individual grievances for people in Wales, and/or of clarifying Welsh law points of legal principle or practice, and/or as a mechanism for so-called ‘public interest litigation’?

12. Welsh law passed by the Senedd and/or Welsh Ministers often does not include a specific redress mechanism on breach (such as an appeal to a court or tribunal), judicial review is then (sometimes quite explicitly) said to be the core mechanism for resolving disputes. Would you accept the Commission on Justice in Wales’ recommendation of a presumption that redress under Welsh public law should, in the first instance, be through an appeal right to an appropriate devolved Welsh tribunal?

Reported Cases – Public Law Challenges in Wales

R (on the application of Lloyd v Pembrokeshire County Council [2004] EWHC 2312 (Hermon School Closure case) – High Court

Ceredigion CC v Jones & Others [2007] UKHL 24 – House of Lords – School Transport

R (on the application of Roberts) v The Welsh Ministers (2011) EWHC 3416 (admin) – School Closure.

R (on the application of Flatley) v Hywel Dda UHB [2014] EWHC 655 (Admin) – Hospital closure/downgrade

R (On the application of Thomas) v Hywel Dda University Health Board [2014] EWHC 4044 (Admin); (2015) PLLR 018 - Hospital closure/downgrade

R (On the application of Tilley) v Vale of Glamorgan Council [2015] All ER (D) 64 (Nov) – Library Closure.

R (On the application of Edwards) v Flintshire County Council [2016] EWHC 459 (Admin) (2016) E.L.R 208 – School Closure.

R (On the application of Tilley 2) v Vale of Glamorgan Council (2016) EWHC 2272, *Law Society Gazette*, 16 January 2017 – Library Closure.

R (On the application of LB) v Independent Appeals Panel of Newport City Council (2017) EWHC 2216 (Admin) – School Exclusion

R (B) v Neath Port Talbot County Borough Council CO/4740/2018 - Future Generations Act case

R on the application of Shane Williams v Caerphilly County Borough Council [2019] EWHC 1618 (Admin); [2019] 6 WLUK 352 – Leisure Centre Closure

R (DJ) v Welsh Ministers [2019] EWCA 1349 – Court of Appeal - Specialist Further Education

R (Driver) v Rhondda Cynon Taf County Borough Council [2020] EWCA 1759 12 WLUK 348 Court of Appeal – School Reorganisation – Welsh Language in Statutory Interpretation.

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June 2020

Implementing the Housing (Wales) Act 2014: the role of homelessness reviews and litigation

Registered charity no. 515902

Executive summary

This report analyses the role of homelessness reviews in Wales since implementation of the Housing (Wales) Act 2014. Reviews are an important but little-researched aspect of the homelessness system: they safeguard applicants' rights, and they support the correct day-to-day implementation of the legislation.

Since the Act was commenced there has been a handful of first instance court judgments but to date there have still not been any higher court decisions. This report asks why that is the case. What is happening with reviews and litigation? How are councils handling them and can the system be improved?

The research is based on data from two Freedom of Information requests to local authorities, as well as key informant interviews with five Shelter Cymru Housing Law Caseworkers and five local authority Reviewing Officers. The report includes detailed explanations of the law on homelessness reviews and the legal processes that must be followed.

Key points

- Across 20 authorities that returned figures, a total of 406 reviews were recorded as being carried out in 2017/18. Of these, 155 (38%) resulted in a decision being overturned. Although most councils are recording some data on reviews, there are indications that figures are not always collected consistently in a comparable way.
- Numbers of recorded reviews have remained relatively static pre- and post-legislative change. Numbers reduced slightly during 2014/15, the first year of implementation of the Act, but quickly regained a level comparable to pre-2015.
- The figures show wide variation between councils in the proportion of reviews that result in an overturned decision, from 11% overturned in Caerphilly and 0% in Monmouthshire and Torfaen, to 50% in Cardiff and 75% in Neath Port Talbot.
- Although numbers of formal reviews appear low, there is a high level of informal activity taking place to resolve issues. This is in line with the spirit of the Act, which stresses person-centred joint working and collaboration between services. For example, Shelter Cymru has worked with a number of local authorities to develop protocols to guide relations around homelessness casework.
- Applicant awareness was also cited as a reason why review numbers are not higher. Although authorities do inform applicants of their right to review, this may not always be understood due to a number of factors including the complexity of the legislation.
- The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) has reduced the number of firms that specialise in housing law due to cuts in legal aid funding. In 2019 nearly half the population of Wales lived in a local authority that has only one legal aid housing provider. Limited access to advice means fewer people can be assisted at an early enough opportunity to exercise their rights of review and appeal.

- The reasons for review have remained relatively consistent pre- and post-legislative change, with suitability of accommodation remaining the most common type of review request.
- On 'reasonable steps' (a key innovation in the new legislation) there have been only low numbers of reviews. This was felt to be because reasonable steps usually appear as an ancillary issue rather than the primary reason for a review. A lack of recording of reasonable steps in homelessness files was cited as a further reason why formal reviews may not often take place.
- There is no clear evidence that learning from reviews is systematically shared either within or between local authorities. Although outcomes of some reviews have been discussed collectively this does not happen in a regular, formal way. This is leading to issues arising time and time again.
- There was evidence that resource pressures are a key factor in the lack of binding case law so far. The cost of litigation is felt to be prohibitive by some local authorities. Some respondents felt that authorities may on occasion re-consider a case not because they felt the original decision to be deficient, but because they lack resources to defend an appeal or judicial review.

Recommendations

- The Welsh Government should enter into dialogue with local authorities over the best ways of supporting them, whether through finance or policy/legal support, so that they feel able to defend homelessness decisions in court.
- The Welsh Government should collect and monitor data on homelessness reviews and litigation.
- The Welsh Government should consider whether establishing a Homelessness Regulator would be an effective way of securing desired improvements to the system.
- Local authorities should pool resources to employ shared Reviewing Officers.
- Local authorities and Shelter Cymru should work together to share and publish the results of formal reviews, informal resolution, and litigation.
- Local authorities should ensure that review rights are communicated not only in decision letters but also face-to-face where possible.

1. Introduction

Most decisions made by a local housing authority in respect of an application for homelessness assistance are subject to a statutory right of review.

Such reviews are an important but little-researched aspect of the homelessness system and are significant for two main reasons:

- For people using homelessness services, they help to safeguard the rights of the individual; and
- For the system as a whole, they are a key mechanism for supporting correct day-to-day implementation of the Housing (Wales) Act 2014 ('H(W)A 2014') by the relevant local housing authority.

Should an individual remain dissatisfied with a decision following a homelessness review they may have a right of appeal on a point of law to the county court. In more limited circumstances, they may have an alternative recourse to the high court by way of judicial review. These legal remedies bring independent, external, judicial oversight to the decision making process and may result in the creation of binding case law which has an immediate nationwide influence on how local authority homelessness services operate.

Welsh homelessness law changed in April 2015 with the implementation of the H(W)A 2014 and, whilst there has been a handful of first instance court judgments, to date there have still not been any higher court decisions made under the Act. Why is this the case? What is happening with reviews and litigation? How are councils handling them and can the system be improved?

This exploratory study, carried out by Shelter Cymru with financial support from the Oak Foundation, examines the role of homelessness reviews in Wales since implementation of the H(W)A 2014.

Methodology

The investigation was carried out using a combination of quantitative and qualitative methods.

Firstly, a Freedom of Information request (FOI) was sent out to all 22 local authorities to gather basic information on homelessness reviews for 2012/13 to 2016/17 including number received, most common grounds of challenge, and number overturned. Data was requested for the previous five years in an attempt to build a picture of how the review procedure is working now in comparison to the system under the previous legislation. For the year 2017/18 a mixture of online questionnaires and FOIs were sent to all local authorities.

Housing Law Caseworkers
Housing Law Caseworkers (HLCs) are employed by Shelter Cymru as experts in housing legislation, including homelessness provisions. Among a number of frontline duties their role includes providing advice and information to Shelter Cymru clients in their dealings with local authorities and assisting them with navigating the legislation.

HLC input was invaluable for this investigation, as they were able to not only comment on the review procedure and its apparent effectiveness, but also provide some insight into the way the process ultimately impacts on people using services.

Reviewing Officers
Reviewing officers (ROs) are local authority employees responsible for carrying out a comprehensive re-examination of those cases submitted for review. Most ROs incorporate reviews into an already busy workload, with many of them holding senior positions within their respective departments. Regulations provide that ROs must not have been involved in the original decision.

ROs may uphold or amend the original decision. If ROs consider that there was a deficiency or irregularity in the original decision, or in the way it was made, but are minded nonetheless to make a decision against the interests of the individual, they must inform the individual and give them the opportunity to make further representations.

In this study, ROs were able to discuss the workings of the review process in detail, as well as highlighting key difficulties for them and comment on the resources required to carry out the review procedure from a local authority perspective.

In addition, interviews were carried out with five local authority Reviewing Officers and five Shelter Cymru Housing Law Caseworkers. Participants within each group held responsibilities in different areas across Wales in order to obtain an overview of the workings of the review procedure. Where possible, there was an attempt to interview at least one member of each group from the same local authority area.

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2. The statutory framework

This chapter summarises how reviews, appeals and judicial reviews operate under Welsh law.

Internal review

The obligation on a local housing authority in Wales to carry out an internal review of a decision made on a homelessness application, is a statutory requirement under section 85 of the H(W)A 2014.

Applicants who wish to exercise their right to request a review have a timescale of 21 days from written notification of a decision to make their request. The local housing authority has a discretion to allow a longer timescale should it wish to do so. Regulations provide that, within five working days of receiving a request for a review, the local housing authority must invite the applicant, or someone acting on their behalf, to make submissions (either orally or in writing, or both) in support of the review[1].

The Reviewing Officer (RO) must consider any representations and must notify the applicant of their decision on review[2] within 56 days of the request for the review being made. Regulations allow the applicant and the RO to agree a longer period in writing[3] and so, in practice, reviews can, on occasion, take longer than the permitted eight weeks.

The local housing authority has a power, but not a duty, to provide suitable accommodation whilst the review is being carried out[4].

The decision on review must be communicated to the applicant in writing. If the decision confirms the original decision on any issue against the interests of the applicant then the local housing authority must include in the notification any relevant reasons for that decision[5].

County court appeals

If an original decision is upheld by internal review, applicants might be able to issue a statutory appeal in the county court under section 88 of the H(W)A 2014[6]. County court homelessness appeals can only be issued on a point of law arising from the decision that was made on the internal review (unless the applicant was not notified of a review decision within the required timescale, in which case, the appeal will be issued on a point of law arising from the original decision).[7]

An appeal under s.88 H(W)Act 2014 must be issued within 21 days of the applicant being notified of the decision on review. The county court has a power to extend that timescale for 'good reason', together with a power to provide accommodation to an applicant whilst the appeal is ongoing.

1 Reg. 2 (2) The Homelessness (Review Procedure)(Wales) Regulations 2015 SI No 1266
2 Reg 6(1)(a) The Homelessness (Review Procedure)(Wales) Regulations 2015 SI No. 1266
3 Reg 6(2) The Homelessness (Review Procedure)(Wales) Regulations 2015 SI No. 1266
4 S.69(11) H(W)A 2014
5 S.86 (4) H(W)A 2014
6 Prior to commencement of the H(W)A 2014, county court appeals were issued pursuant to s204 of the 1996 Act
7 s.88(1)(b) H(W)A 2014

The applicant, or their advisor, should write a pre-action letter to the local housing authority before issuing a county court appeal.

A decision made at first instance in the county court does not create binding case law but does provide a public judgment which can be considered in future challenges and can assist in promoting consistency across decision making.

Judicial review

There are some circumstances in which the internal review process under s.85 and / or the statutory appeal process under s.88 are not available to an applicant. In such circumstances, an applicant might have an alternative form of redress in judicial review. This might include where a local housing authority:

- has refused to take a homelessness application
- has refused to provide accommodation whilst an internal review of a decision is being carried out.

Judicial review is the High Court function by which an aggrieved individual may seek legal remedy in dealings with any public body providing a public function.[8]

The Civil Procedure Rules require that claimants must comply with a pre-action protocol before issuing any claim for judicial review[9]. This means that claimants must send a 'letter before claim' to the local housing authority setting out the decision or act or omission that is being challenged.

Unlike a county court appeal, a claimant must be granted permission by the High Court to bring a challenge by way of judicial review. An application for permission must be made 'promptly' and, at the very latest, within three months from the date of the decision, act or omission being challenged.

Data on homelessness court proceedings are not routinely gathered by the Ministry of Justice or the Welsh Government. On the basis of Shelter Cymru casework and inquiries with other organisations it appears that, since commencement of the H(W)A 2014, there have to date been two judicial reviews issued in Wales on homelessness cases with a number of further cases resolved prior to issue.

8 G. Richardson in 'Judicial Review and Bureaucratic Impact' (eds. Marc Hertog and Simon Halliday, Cambridge Studies in Law Society, 2004), p104.

9 Part 54 Civil Procedure Rules (CPR)

3. Review numbers and outcomes

The data on review numbers is not a complete picture. For 2017/18, FOI data for 20 authorities was provided while for the period 2012/13 to 2016/17, data was returned by 16 authorities.

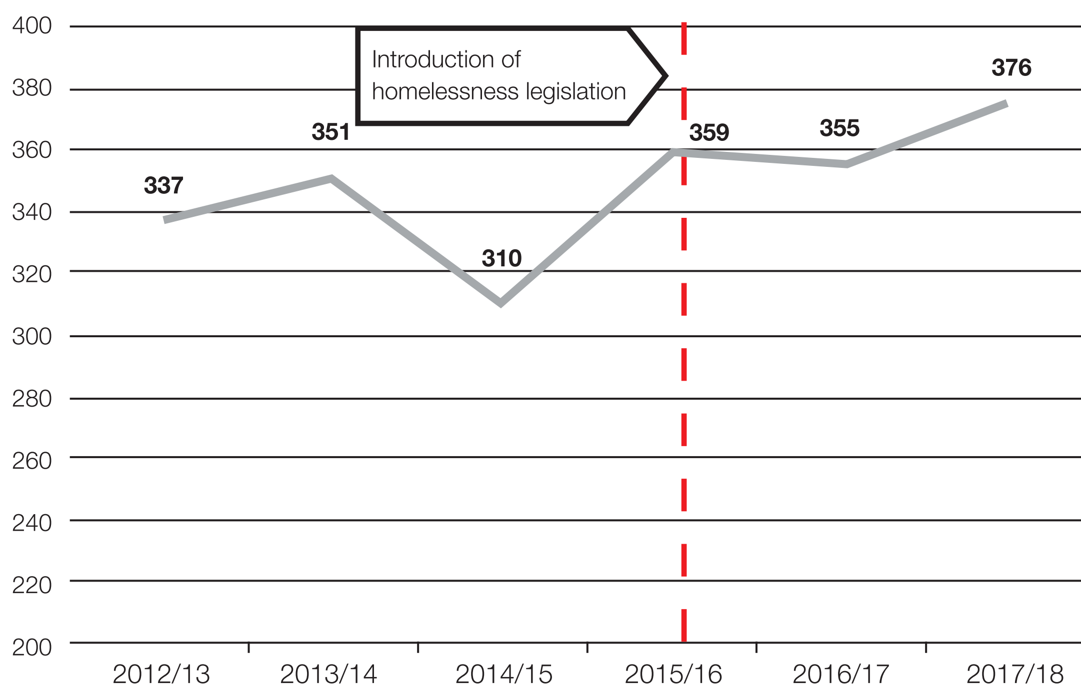
This incomplete picture is due to a) inconsistent return rates to the two FOI requests and b) in some authorities, a failure to monitor review numbers. One authority in 2017/18 said they didn't record numbers of reviews, while three authorities were unable to provide data earlier than 2015/16.

Review numbers

Across the 20 authorities, a total of 406 reviews were recorded as being carried out in 2017/18. Of these, 155 (38%) resulted in a decision being overturned.

The data suggests that numbers of recorded reviews have remained relatively static. Numbers reduced slightly during the first year of implementation of the H(W)A 2014 but quickly regained a level comparable to pre-2015. Figure 1 presents figures for the 16 authorities that provided data to both FOIs.

Figure 1: Recorded review numbers, 2012/13* to 2017/18



* Three authorities were unable to provide data prior to 2016/17

Differences by local authority

The below table shows the total number of homelessness review requests reported by responding local authorities across six years. The figures in brackets indicate the number of cases where a review found that the original decision was overturned.

Table 1: Reviews and those leading to overturned decisions, 2012/13 to 2017/18

Local Authority	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18
Blaenau Gwent	2 (1)	2 (1)	0	0	1 (0)	0
Bridgend	2 (2)	19 (9)	21 (12)	19 (3)	14 (1)	26 (9)
Caerphilly	3 (1)	3 (1)	10 (3)	1 (0)	1 (0)	9 (1)
Cardiff	157 (81)	183 (87)	161 (85)	223 (106)	199 (103)	185 (93)
Conwy	*	*	*	*	*	9 (2)
Ceredigion	U	U	U	7 (2)	5 (1)	3 (0)
Denbighshire	U	U	U	2 (2)	2 (1)	1 (1)
Flintshire	U	U	U	5 (2)	17 (12)	49 (18)
Gwynedd	34 (5)	34 (6)	18 (6)	22 (10)	17 (7)	13 (6)
Merthyr Tydfil	*	*	*	*	*	2 (0)
Monmouthshire	15 (5)	17 (1)	7 (0)	14 (1)	9 (1)	5 (0)
Neath Port Talbot	*	*	*	*	*	8 (6)
Newport	25 (4)	19 (4)	15 (5)	12 (2)	13 (3)	16 (4)
Pembrokeshire	6 (3)	5 (1)	2 (1)	1 (0)	2 (0)	1 (0)
Powys	5 (2)_	5 (2)	4 (1)	3 (1)	2 (0)	4 (2)
Rhondda Cynon Taf	9 (2)	1 (0)	0	1 (0)	0	0
Swansea	11 (0)	7 (1)	9 (0)	5 (0)	4 (0)	5 (1)
Torfaen	9 (1)	15 (2)	15 (2)	12 (0)	17 (1)	9 (0)
Vale of Glamorgan	*	*	*	*	*	11 (5)
Wrexham	59 (12)	41 (13)	48 (6)	32 (9)	52 (7)	50 (7)

U – Unrecorded
( ) – Overturned reviews
* Did not provide data to first FOI request

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Where reviews are undertaken, some authorities do overturn a significant number of decisions. The below table gives the percentage of overturned reviews reported in 2017/18 for those authorities that reported having carried out more than five reviews in this period.

Table 2: Overturned decisions following review 2017/18

Local Authority	Reviews	Number Overturned	%
Bridgend	26	9	35%
Caerphilly	9	1	11%
Cardiff	185	93	50%
Conwy	9	2	22%
Flintshire	49	18	37%
Gwynedd	13	6	46%
Monmouthshire	5	0	0%
Neath Port Talbot	8	6	75%
Newport	16	4	25%
Swansea	5	1	20%
Torfaen	9	0	0%
Vale of Glamorgan	11	5	45%
Wrexham	50	7	14%

The figures show wide variation from 11% overturned in Caerphilly and 0% in Monmouthshire and Torfaen, to 50% in Cardiff and 75% in Neath Port Talbot.

Why do review numbers appear so low?

With the exception of Cardiff, Wrexham and Flintshire, the number of review requests is relatively low. There are a number of possible factors contributing to these low figures which are worth exploring in more depth.

Recording methods

This study did not examine the methodology used by each local authority to record review numbers. It is recognised that there might be a lack of consistency in the recording methods utilised by each authority which could result in an under or over reporting of the true figures.

The 'person centred' approach

In line with the intention and spirit of the H(W)A 2014, Shelter Cymru has worked with a number of local authorities to develop protocols to guide relations around homelessness casework.

These protocols emphasise that resolution should be sought informally wherever possible prior to requesting a formal review. Such an informal approach can contribute to the efficiency of the procedure both for local authorities and people using services, often resulting in an early resolution well before the 56 days that it could take for a formal review to be completed. While informal resolution was practised pre-H(W)A 2014, it is more strongly emphasised under the new legislation[10].

Feedback from HLCs and ROs suggest that addressing potential challenges informally is common. It is impossible, however, to know exactly how often this happens and for what reasons given that steps to resolve these issues in this manner are not necessarily recorded.

> *'I can't really say how often problems are solved informally because that's down to the officers themselves. It happens frequently though. I know that our Team Leader is in frequent contact with the Shelter [Cymru] officers.'*
>
> – Reviewing Officer

Applicants' awareness and capacity to engage

Many people using homelessness services may not be aware of their right to request a review. Low awareness has been a significant factor in previous investigations[11]. Although authorities do include information about review rights in decision letters, as required by section 84(1) of the Act, letters may not always be understood, or may not always be delivered to the applicant particularly if they are homeless and have no address[12].

HLCs report that some clients have not been given any written notification of decisions. In the absence of such notification the individual's statutory review rights under section 85 H(W)A 2014 are not engaged meaning a review cannot take place[13].

Ideally, in addition to written notification, decisions and review rights should be explained face to face. Interviewee feedback however suggested that in some cases, authorities may be failing to fully explain the legislation to people.

> *'I do have concerns that correct notifications are not being provided. I don't know that people are being made aware of their right to challenge.'*
>
> – Reviewing Officer

10 See Chapter 5, paras 5.15-5.16 of the Welsh Government Code of Guidance for Local Authorities on Allocation of Accommodation and Homelessness (2016)

11 Shelter Cymru (2016) Reasonable Steps: Experiences of Homelessness Services Under the Housing (Wales) Act 2014

12 s.84(4) stipulates that if the applicant does not receive the notice, the applicant may be treated as having been notified under this section if the notice is made available at the local authority's office for a reasonable period for collection.

13 A failure to provide written notification of a decision by a local authority is in itself challengeable by way of judicial review

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'A lot of the people we see just haven't had it [the legislation] explained to them.'

– Housing Law Caseworker

Feedback also suggests that the subject of awareness runs deeper, and that factors such as language barriers, substance dependency, mental health problems, vulnerability, and learning difficulties all contribute as potential barriers to applicants being fully informed and confident enough to challenge authority.

'With the client group we deal with who are typically very vulnerable and complex, they're not going to read an eight-page decision letter.'

– Reviewing Officer

'Clients might not understand the legislation… which is reasonable because it's so complicated.'

– Reviewing Officer

Even if people are fully aware of their right to review, their ability to participate is likely to be severely restricted if they are homeless. Where people are street homeless or 'hidden' homeless – living in unsuitable accommodation, vehicles, or sofa-surfing – engaging in a formal process within a rigid timescale can be difficult.

Availability of public funding and access to specialist advisers

The availability of good quality, specialist, advice to individuals faced with an unfavourable homelessness decision is essential to ensure that such vulnerable clients are aware of, and are able to, exercise their review rights.

Since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) there has been a reduction in firms who specialise in housing law due to cuts in legal aid funding – creating areas in the UK referred to as 'advice deserts'[14]. In 2019, The Law Society, analysing data from the Legal Aid Agency and the Office of National Statistics, calculated that 49% of the population in Wales live in a local authority area that only has only one legal aid housing provider.

Such low level of provision means that vulnerable people, often on low incomes, have to travel long distances to find providers who can assist them, only to find that those providers are themselves struggling to cope with demand.

This reduction, coupled with increasing requirements on providers to provide information to support eligibility to the Legal Aid Agency, and to justify the grant of funding for appeals and judicial reviews, has meant that fewer people are able to be assisted at an early enough opportunity to exercise their rights of review and appeal against unfavourable homelessness decisions.

There is little point in having the right to challenge adverse decisions if a person cannot also secure adequate funding and access specialist advice to enable them to navigate the complex legal system.

14 https://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/end-legal-aid-deserts/

The 56-day time limit

HLCs described how the 56-day time limit on responses to review requests can have a significant impact on individuals.

The FOI responses show that most reviews in 2017/2018 were completed within 56 days with the exception of five authorities as listed in Table 4.

Table 4: Reviews completed within 56 days, 2017/18

Local Authority	Reviews	Number completed within 56 days	% completed within 56 days
Blaenau Gwent	0	0	-
Bridgend	26	26	100%
Caerphilly	9	6	67%
Cardiff	185	95	51%
Ceredigion	3	2	67%
Conwy	9	9	100%
Denbighshire	1	1	100%
Flintshire	49	49	100%
Gwynedd	13	10	77%
Merthyr Tydfil	2	2	100%
Monmouthshire	5	5	100%
Neath Port Talbot	8	8	100%
Newport	16	13	81%
Pembrokeshire	1	1	100%
Powys	4	4	100%
Rhondda Cynon Taf	0	0	-
Swansea	5	5	100%
Torfaen	9	9	100%
Vale of Glamorgan	11	11	100%
Wrexham	50	50	100%
TOTAL	**376**	**276**	**73%**

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Potential reasons given for missing this deadline include low departmental resources and the complexity of the case in question. Evidence can sometimes be required from outside agencies, and requests for this can take a long time. There is no data to show how often delayed investigations have resulted in correspondence with the client to seek an extension to the 56-day period.

4. Reasons for reviews

This chapter examines which type of homelessness decisions are being reviewed and asks how these have changed since the introduction of the H(W)A 2014.

The Act placed new duties on local housing authorities to carry out ‘reasonable steps' to prevent or relieve homelessness for all eligible households. This extension of duties increased the potential number of decisions which may be subject to a review and it was widely anticipated that the number of reviews would increase in the years following implementation.

Table 5: Reasons for review requests 2017/18

	Not eligible	Ending Duty	Failure to take reasonable steps	Failure to co-operate	Suitability	Priority Need	Intentionality	Other
Bridgend	1			2	13	2	8	
Caerphilly		1			6		2	
Cardiff (see Table 6)								
Ceredigion		1			2			
Conwy		1			6		3	
Denbighshire		1						
Flintshire			4	3	27		11	14
Gwynedd		6			6			5
Merthyr Tydfil						1	1	
Monmouthshire		1			1		3	
Neath Port Talbot		5		3			3	
Newport					9	5	2	
Pembrokeshire						1		
Powys		3				1		
Rhondda								
Cynon Taf								
Swansea		5						
Torfaen					4		5	

Vale of Glamorgan		5			11		1	
Wrexham		15			30	3	2	

Table 6: Cardiff Council reasons for review requests 2017/18

Type	Overturned	Upheld	Request withdrawn, applicant's request	Request withdrawn, Change in Circumstances	Revised decision, no full duty accepted	Total
Discharge of s66 duty	5	3		1		9
Discharge of s68 duty	2	3				5
Eligibility	2	1				3
End of duty to help to secure	9	2	1			12
End of final duty	2	4				6
Intentionally homeless	10	14	2	1	1	28
No interim accommodation	2		1		1	4
No s75 duty		2				2
Not homeless	6	7	2	2		17
Suitability of interim accommodation	8	10				18
Suitability of permanent offer	47	30	2	2		81
Total	**93**	**76**	**8**	**6**	**2**	**185**

Tables 5 and 6 present reasons for review requests in 2017/18. Note that totals do not always correspond with the total number of reviews as some authorities included figures for reviews that were subsequently withdrawn. Cardiff's figures are presented separately as they categorise theirs differently from other authorities.

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The figures suggest that by and large, the reasons for review have remained consistent pre and post the new legislation, notwithstanding the potential for new grounds introduced by the H(W)A 2014.

Caseworkers and ROs reported that although the reasons for challenge can vary greatly between authorities, suitability of accommodation generally appears to be the most common type of review request, with two ROs stating that they seem to 'do more suitability than anything else'.

> *'Generally the most common [review requests] are suitability of offers.'*
>
> – Reviewing Officer

> *'Nearly all of my cases have been on suitability.'*
>
> – Housing Law Caseworker

Reasonable steps reviews

The data for 2017/18 show only four reviews on reasonable steps, all of which were brought in the same local authority (Flintshire)[15].

What are the reasons for the small number of reasonable steps reviews? A number of factors were raised by HLCs and ROs.

Reasonable steps dealt with as an ancillary issue

HLCs said that challenges to the reasonableness of steps taken is more likely to appear as an ancillary issue than the primary reason for a review.

Lack of recording

Several HLCs expressed a view that local authorities are not recording steps taken in sufficient detail. Where homelessness files do not contain evidence of steps taken, a local authority may decide to undertake further reasonable steps rather than persist with a formal review.

> *'Of the very few reasonable steps reviews I've done none have been upheld because the steps taken [by the department] haven't been recorded properly.'*
>
> – Reviewing Officer

Lack of interim accommodation

HLCs felt that where an applicant is likely to be in priority need and eligible for interim accommodation under section 68 H(W)A 2014 a review on the basis of reasonable steps is likely to be of less significance than to those who are non-priority need.

Non-priority need applicants are not owed any interim accommodation duty and therefore a successful intervention on the issue of reasonable steps has far greater significance to them.

15 It is possible that reasonable steps reviews were also requested in Cardiff but the data as provided by that authority does not provide this level of breakdown.

5. Learning from reviews

There appears to be no clear evidence that learning is systematically taking place within or between local authorities, either from formal reviews or informal resolution.

ROs said that in some authorities, effort is made to disseminate information from reviews in the form of meetings and internal documents.

> *'I don't do many at all, but I do try to circulate outcomes of reviews I've done during meetings… and internally.'*
>
> – Reviewing Officer

For a period of time, four north Wales authorities shared an RO. Although this post is no longer in place, ROs and HLCs felt it represented good practice. The RO in question produced annual reports consolidating and analysing information from reviews.

Although outcomes of some reviews have been discussed in national meetings of the Local Authority Homelessness Network, this happens in a piecemeal way and there is no formalised, regular sharing of learning.

Interviewees said they saw little evidence of learning, with similar issues arising time and time again.

> *'We keep seeing the same issues. It really is a case of business as usual from our point of view.'*
>
> – Housing Law Caseworker

6. Reviews and resources

The time taken for an RO to complete a review can vary greatly depending on the nature of the case. ROs reported that a 'basic' suitability review may take a day or more, but cases involving complex submissions or a requirement for information from external sources such as the NHS can increase this significantly. Similarly, Shelter Cymru caseworkers reported that preparing submissions for review can often be time-consuming and potentially complex.

Demand on homelessness services has risen year on year since the H(W)A 2014 was implemented, not only because the legislation has given more people rights to assistance but also because austerity and welfare reform have pushed more people into housing crisis[16]. While resources for local authority homelessness services have been increased to meet this challenge, it has also become considerably more difficult to prevent and relieve homelessness because of multiple aspects of welfare reform.

Interviewees described a number of ways in which resource pressures are a factor in the lack of binding case law so far.

Unrecorded interventions

ROs made the point that due to a very busy workload, officers can struggle to record interventions to the required level of detail. There have been occasions whereby, upon re-opening a case file as a result of a review request, certain information has been found to be incomplete. An absence of information, for example, details of phone conversations or face-to-face meetings being left unrecorded, can occasionally hold up a review investigation or lead to an overturned decision.

> *'I suppose that's part of the beast which the Welsh Government have created… it's so technical. It's very difficult for officers to be as black and white as the legislation says they must be in terms of documenting everything… within such a high volume of cases.'*
>
> – Reviewing Officer.

The cost of litigation

A number of HLCs stated it is not uncommon for an upheld review to lead to the threat of a county court appeal, only for the local authority to re-consider the case upon receipt of a pre-action letter.

Some respondents felt that authorities may, on occasion, re-consider the case not because they felt the original decision to be deficient, but because they lack resources to defend an appeal or judicial review. Many Welsh local authorities are small in comparison with English authorities, but the costs of hiring a barrister and meeting the financial risk of an adverse judgment are broadly the same.

A recent case study illustrates how the financial risk of litigation can affect a small local authority service.

16 https://sheltercymru.org.uk/wp-content/uploads/2018/09/Trapped-on-the-Streets-Full-Report.pdf

Case study: Paul's story

Paul contacted Shelter Cymru after becoming homeless since being released from prison following a six-week sentence. Paul has significant mental health issues including depression, anxiety and personality disorder.

On the day he was released from prison he presented as homeless: the local authority decided that Paul was not entitled to make an application as they felt there had been no change of circumstances since he'd made his last application, also on release from prison.

Although there were some differences of opinion within Shelter Cymru as to Paul's entitlement, the consensus view was that this decision was incorrect in law. Shelter Cymru contacted Housing Options to request a new assessment, referring to the relevant section within the Code of Guidance. The authority responded that they were departing from the Code of Guidance due to pressures on resources. Shelter Cymru then sent a Letter Before Claim, advising that unless a new assessment was completed, a claim for judicial review would be commenced. The authority confirmed that they would not make a new assessment.

While Shelter Cymru was preparing the claim for judicial review, the authority calculated the cost of commissioning a barrister and preparing the case, which would have to be met by Housing Options' own budget, potentially diverting resources away from frontline services. The national Homelessness Network explored collectively funding the case but decided this was unfeasible.

At this point the Network consulted Welsh Government directly. Officials advised that Shelter Cymru was correct that a new application should be taken. It also emerged that some authorities in Wales already work on the basis that release from custody should be treated as a change in circumstances, and this is informed by historic case law.

The authority was minded to continue to judicial review, citing the Prisoner Pathway[17] as a reason not to accept an application. However, if they had lost the case it would have effectively cost the authority's total homelessness prevention budget for the year. It was this risk, and the Welsh Government advice, that led the authority finally to accept Paul's homelessness application, feeling that this was a gesture of goodwill and not because they were wrong in law.

The Homelessness Network felt that learning from this case has been taken forward and disseminated to improve practice. More people will be helped as a result, even though the case led to no formal litigation or public judgments.

17 https://gov.wales/sites/default/files/publications/2019-03/homelessness-services-for-children-young-people-and-adults-in-the-secure-estate_0.pdf

Shelter Cymru

7. Conclusions and recommendations

This study has found that, while numbers of homelessness reviews appear to be low, there is activity taking place outside of a formal process to help individuals to get local authority decisions reconsidered.

The ethos of the H(W)A 2014 Part 2 is about person-centred joint working: collaboration between services in order to get the best outcome for the applicant. Issues are being resolved by picking up the phone and having a conversation, rather than by undertaking formal review. This is leading to quicker positive outcomes and better use of resources.

There are however downsides to this approach. Learning is rarely shared either internally or externally; and informal approaches do not lead to litigation which in turn makes binding case law.

Litigation is normal and necessary for the development of good law and to promote consistency in its interpretation. New law cannot predict in advance how the written duties will apply to every potential set of circumstances. It is caselaw that provides consistency in interpreting legal duties where the initial Act does not provide that clarity. However, Welsh local authorities believe they are not in a strong enough position to undertake litigation. Last-minute withdrawals from judicial challenges are taking place not only because authorities are having second thoughts over the legal basis for their actions, but also because the risk of losing the case will directly impact their ability to help other people using services.

Informal resolution is clearly working and this good practice should continue. However, formal reviews and litigation also have their place. The answer perhaps should be a dual or complementary approach where informal intervention takes place alongside more formal action to ensure people's statutory rights remain protected and not prejudiced in any way by any informal process.

The following recommendations are aimed at strengthening the system so that all the activity that is currently taking place, both formally and informally, is as effective as possible both for individuals and for the system as a whole.

Recommendations

- The Welsh Government should enter into dialogue with local authorities over the best ways of supporting them, whether through finance or policy/legal support, so that they feel able to defend homelessness decisions in court.
- The Welsh Government should collect and monitor data on homelessness reviews and litigation.
- The Welsh Government should consider whether establishing a Homelessness Regulator would be an effective way of securing desired improvements to the system.
- Local authorities should pool resources to employ shared Reviewing Officers.
- Local authorities and Shelter Cymru should work together to share and publish the results of formal reviews, informal resolution, and litigation.
- Local authorities should ensure that review rights are communicated not only in decision letters but also face-to-face where possible.

Shelter Cymru

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Cymru

www.sheltercymru.org.uk

Registered charity no. 515902

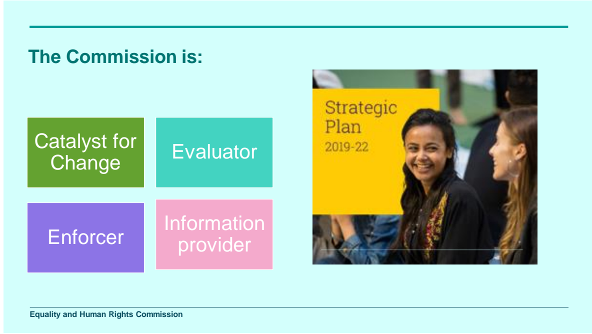
Comisiwn Cydraddoldeb a Hawliau Dynol | Equality and Human Rights Commission

EHRC

Work in Wales

—
Ruth Coombs
Head of Wales
4th May 2021

equalityhumanrights.com



What are we trying to achieve?

Our Core Aim

As Britain faces a future of ever faster and deeper change, human rights and equality laws are more important than ever.

The coronavirus pandemic is deepening existing inequalities and we are entering a recession.

Strong equality and human rights laws, policy and practice protect people and make Wales more equal and fairer.

Equality and Human Rights Commission

Legal Aid for Discrimination claims

2018 Research report looked at the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) since it came into force in 2013.

LASPO introduced funding cuts to legal aid and resulted in fewer people being able to access legal advice and representation.

Equality and Human Rights Commission

Our Access to Justice Aim

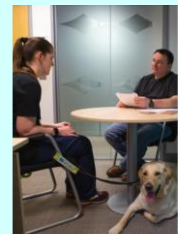
People can access redress when they are wronged and have a fair trial in the criminal justice system.

Equality and Human Rights Commission

Legal Aid for Discrimination

June 2019 – Inquiry into access to legal aid for discrimination cases report published.

Reveals that people are facing unnecessary barriers to justice and vulnerable individuals are not being supported to bring discrimination claims. It also examines the effectiveness of the mandatory telephone gateway and makes recommendations to government to remove it – it was removed from 15th May 2020.



Equality and Human Rights Commission

What is Strategic Litigation

If an individual is unable to access the equality or human rights that they have in law in Wales, they can ultimately take the matter to court or tribunal to enforce these rights.

Where an organisation deliberately takes, or supports an individual to take, legal action on equality and human rights in order to bring about bigger, strategic change on a particular issue.

Disproportionate Impact of Covid-19

- Older people in care homes are not provided with sufficient protection or support
- Covid-19 has a disproportionate impact on Black Asian Minority Ethnic population
- Disabled people are unable to access essential services
- Domestic violence increases
- Workers face discrimination, women and those in gig economy
- Predicted GCSE and A Level results this year are unfair to some groups; SEN/ALN children are not supported during school closures
- Human rights are not protected at a time of restrictions to civil liberties; long term implications of coronavirus

Strategic Litigation Guide

The aim of the guide is to make change happen in Wales.

It is a **step by step guide** for organisations who want to bring about **significant change in law, policy or practice** related to equality and human rights.

It gives an **outline of the issues** organisations should consider, as well as information about some of the **legal terms and processes**.

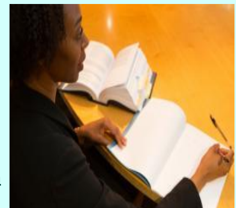
We fund legal cases at the EHRC

- Litigation and Enforcement Policy
- Resources for advisers on our website www.equalityhumanrights.com
- Advisers helpline –

029 2044 7790

legalrequest@equalityhumanrights.com

www.humanrightstracker.com



Comisiwn Cydraddoldeb a Hawliau Dynol | Equality and Human Rights Commission

Thank you

Diolch yn Fawr iawn

equalityhumanrights.com

Using public law to vindicate people's rights and challenge unlawful behaviour
Penally Barracks Challenges

1

Penally Barracks Challenges

- Context
- How and why it happened
- Responses
- Legal challenge
- What's next?

2

Context

- Asylum seekers arriving in UK can apply for support from the Home Office if they are destitute. Are not permitted to work and are ineligible for welfare benefits and local authority housing
- Initial and dispersal accommodation
- Clearsprings Ready Homes Ltd

3

Context

- Penally army barracks

4

How and why it happened

- Global pandemic
- Small boat arrivals
- Hotel accommodation

Response

An inspection of the use of contingency asylum accommodation

- Failing in leadership and management
- Safety issues
- The environment […] was impoverished, run-down and unsuitable for long-term accommodation.

https://www.gov.uk/government/news/an-inspection-of-the-use-of-contingency-asylum-accommodation-key-findings-from-site-visits-to-penally-camp-and-napier-barracks

Response

- "*We are particularly disappointed by the lack of communication and discussion with local stakeholders such as Pembrokeshire County Council and Hywel Dda University Health Board and the local community. Proper consultation would have immediately made it clear that Penally Camp is unsuitable accommodation, particularly for men who may have experienced trauma, great hardship and have been separated from their families*".

Hywel Dda University Health Board & Pembrokeshire CC, 25 September 2020

- "*…the decision by the Home Office to use the Penally military camp as a centre to house asylum seekers is the direct opposite of the Nation of Sanctuary approach*".

- "*The camp does not meet the basic human needs of people seeking a new life in the UK. It places people in accommodation, which is neither designed nor appropriate for long-term use – mainly poorly insulated huts – and risks re-traumatising many vulnerable people who may have been fleeing abuse and torture*".

Jane Hutt MS, Deputy Minister and Chief Whip, 15 October 2020

- "*we warned that to use the camp would be an abdication of the UK Government's duty of care for asylum seekers and for their dignity and human rights to be upheld*".

Liz Saville Roberts, AS/MP and Westminster leader for Plaid Cymru, in a letter to the Chief Inspector Of Borders and Immigration, David Bolt, and the Home secretary, 14 January 2021

Legal Challenge

The key legislative framework

- ss 95 and 96 of the Immigration and Asylum Act 1999
- Regulation 5 of the Asylum Seekers (Reception Conditions) Regulations 2005
- Equality Act 2010

Also

- Asylum Accommodation and Support Contracts (AASC)
- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection
- Planning law

Legal Challenge

- Pre-action letters
- Responses from Home Office
- Intervention
- Return of camp to MoD

9

What's next

- The **New Plan for Immigration**

10

Thank you for listening

m.court@publiclawproject.org.uk

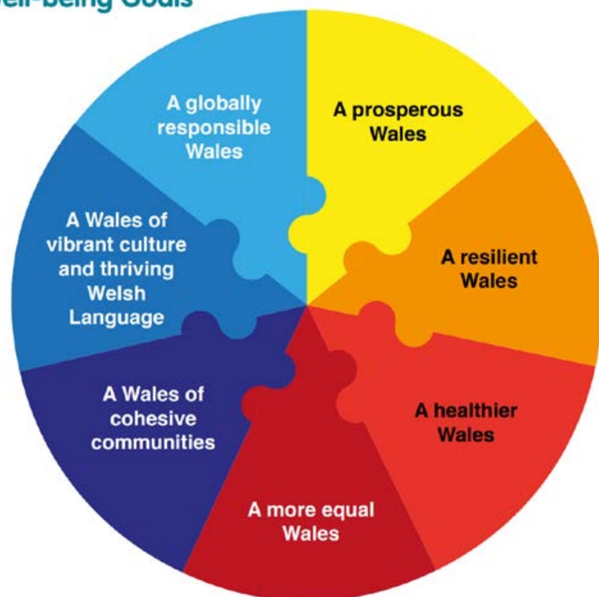
11

Office of the Future Generations Commissioner for Wales

5th May 2021

Comisiynydd Cenedlaethau'r Dyfodol Cymru
Future Generations Commissioner for Wales

Well-being Goals



Well-being Duty

The Act places a duty that the public bodies will be expected to carry out. A duty means they have to do this by law. The well-being duty states:

Each public body must carry out sustainable development.

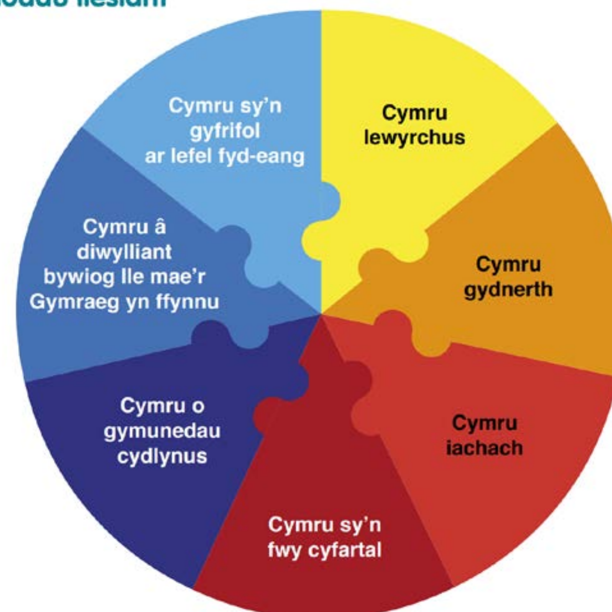
The action a public body takes in carrying out sustainable development must include:

a. setting and publishing objectives ("well-being objectives") that are designed to maximise its contribution to achieving each of the well-being goals, and

b. taking all reasonable steps (in exercising its functions) to meet those objectives.

Part 2 ' Improving Well-being section 3 'well-being duty on public bodies' paragraphs (1) and (2).

Nodau llesiant



Dyletswydd Llesiant

Mae'r Ddeddf yn pennu dyletswydd y bydd disgwyl i gyrff cyhoeddus ei chyflawni. Ystyr dyletswydd yw bod rhaid iddynt wneud hyn yn ôl y gyfraith. Mae'r ddyletswydd llesiant yn dweud:

Rhaid i bob corff cyhoeddus ymgymryd â datblygu cynaliadwy.

Rhaid i weithredoedd corff cyhoeddus wrth ymgymryd â datblygu cynaliadwy gynnwys:

a. gosod a chyhoeddi amcanion ("amcanion llesiant") sy'n cael eu cynllunio i sicrhau ei fod yn cyfrannu i'r eithaf at gyrraedd pob un o'r nodau llesiant, a

b. cymryd pob cam rhesymol (wrth arfer ei swyddogaethau) i gyflawni'r amcanion hynny.

Rhan 2 'Gwella Llesiant', adran 3 'Dyletswydd Llesiant ar gyrff cyhoeddus', paragraffau (1) a (2).

Long term

The importance of balancing short-term needs with the need to safeguard the ability to also meet long-term needs.

Prevention

How acting to prevent problems occurring or getting worse may help public bodies meet their objectives.

Integration

Considering how the public body's well-being objectives may impact upon each of the well-being goals, on their other objectives, or on the objectives of other public bodies.

Collaboration

Acting in collaboration with any other person (or different parts of the body itself) that could help the body to meet its well-being objectives.

Involvement

The importance of involving people with an interest in achieving the well-being goals, and ensuring that those people reflect the diversity of the area which the body serves.

Hirdymor

Pwysigrwydd sicrhau cydbwysedd rhwng anghenion tymor byr a'r angen am ddiogelu'r gallu i ddiwallu anghenion tymor hir hefyd.

Atal

Sut gall gweithredu i atal problemau rhag digwydd neu waethygu helpu cyrff cyhoeddus i gyflawni eu hamcanion.

Integreiddio

Ystyried sut gall amcanion llesiant y corff cyhoeddus effeithio ar bob un o'r nodau llesiant, ar bob un o'u hamcanion eraill, neu ar amcanion cyrff cyhoeddus eraill.

Cydweithio

Gallai cydweithredu ag unrhyw berson arall (neu wahanol adrannau yn y corff ei hun) helpu'r corff i fodloni ei amcanion llesiant.

Cynnwys

Pwysigrwydd cynnwys pobl sydd â diddordeb mewn cyflawni'r nodau llesiant, a sicrhau bod y bobl hynny'n adlewyrchu amrywiaeth yr ardal maent yn ei gwasanaethu.

Section 20 Review:

20 Reviews by the Commissioner

(1) The Commissioner may conduct a review into the extent to which a public body is safeguarding the ability of future generations to meet their needs by taking account of the long term impact of things the body does under section .

(2) In conducting a review, the Commissioner may review—

(a) the steps the body has taken or proposes to take to meet its well-being objectives;

(b) the extent to which the body is meeting its well-being objectives;

(c) whether a body has set well-being objectives and taken steps to meet them in accordance with the sustainable development principle.

Section 20 Review:

We are interested in:

- The extent to which public bodies are embedding the Well-being of Future Generations Act into procurement contracts and frameworks, and in particular, how they are taking into account the **long-term** impact of their decisions

- To what extent procurement is supporting delivery of the public bodies **well-being objectives**

Spotlight on Procurement

The £6 billion-pound opportunity

Comisiynydd Cenedlaethau'r Dyfodol Cymru
Future Generations Commissioner for Wales

Key findings from the Future Generations Report 2020

- There's **political commitment** but no clear **national procurement strategy**
- Procurement has improved over the last decade, but there's still **too much focus on process and not outcomes**
- **Community benefits** impact not widely shared
- Too much focus on **short-term cost** versus **delivering wider outcomes**
- Lack of **national co-ordination** and support to allow for **collaboration**
- Opportunities for **sharing information** and learning are limited
- Treated as a **transactional process** – transformational opportunities are not being maximized
- There are **frustrated champions** within our public bodies often working without wider organisational leadership or support

A Review into how the Well-being of Future Generation Act is informing procurement in Wales.

From the 44 public bodies invited to participate in the initial research phase, nine organisations representing a range of national, local authority and health board organisations were selected for the Review:

- Bridgend County Borough Council
- Cardiff and Vale University Health Board
- Denbighshire County Council
- Flintshire County Council
- National Library of Wales
- Velindre NHS Trust (as hosts of NHS Wales Shared Services)
- Wrexham County Council
- Welsh Government
- Ynys Môn / Anglesey Council

Issues directly relating to Welsh Government in their leadership capacity

- Welsh Government has failed to show clear joined up leadership on the role of procurement in delivering Wales' national well-being goals (and public bodies well-being objectives).
- There is poor communication and integration between different Welsh Government priorities, alongside lack of support available for public bodies to ensure these are implemented effectively on the ground.
- Opportunities for making spend work harder are being missed due to lack of support for the procurement profession and lack of accountability at a leadership level.
- There is no ongoing monitoring of procurement approaches or outcomes either for the purposes of spotting where things are going wrong, and opportunities are being missed, or for identifying and sharing best practice.

Issues relating to public bodies

- Opportunities to deliver on all four dimensions of well-being are not being maximised, often due to a lack of leadership and strategic approach that recognises the 'power of purchase'.
- The "procurement system" is too often leading to a focus on process and short-term cost rather than delivering wider outcomes over the long-term, and there is no consistent way of measuring the outcomes that can be achieved in line with the Act.
- There needs to be a shift to considering long term costs holistically, in line with the Act. There is no mechanism for promoting effective collaboration for public bodies, particularly cross-sector to improve sharing, learning, capacity and skills.

What can you do to contribute to this future vision?*

My key recommendation to Welsh Government in their leadership capacity is:

Welsh Government should establish a Procurement Centre of Excellence for improving coordination, collaboration and providing practical support to public bodies in the exercise of their procurement functions, specifically in relation to the Act.

- Development of this Centre of Excellence would require a comprehensive review and reform of the existing procurement landscape (structures, networks, partnerships and initiatives) and be resourced to build capacity and support implementation.

The Procurement Centre of Excellence should

- review and reform structures for national accountability and establish an appropriate mechanism to scrutinise progress on implementation. Welsh Government should report annually on how overall national public spend is contributing to the national well-being goals.
- develop a mechanism or tool to assist public bodies to monitor and report consistently on the Act (possibly building on the work being done on social value and the new TOMS framework) demonstrating how their procurement spend is meeting their well-being goals and objectives.

In addition, their annual report (on progress with the Act) should clearly set out how all of their own procurement spend, and grant spend, is contributing to meeting their well-being objectives, and in turn the seven national well-being goals.

*These are only the recommendations most relevant to the work of you and your team. There are more recommendations contained in the 'Spotlight on Procurement' Section of the Future Generations report, which you might wish to look at.

What can you do to contribute to this future vision?*

I also want Public Bodies to follow these recommendations :

- Senior leadership should review their procurement approach and activities to identify opportunities to maximise the social, economic, environmental and cultural impact of spending decisions, setting clear steps that show how procurement is supporting the delivery of their organisational well-being objectives.

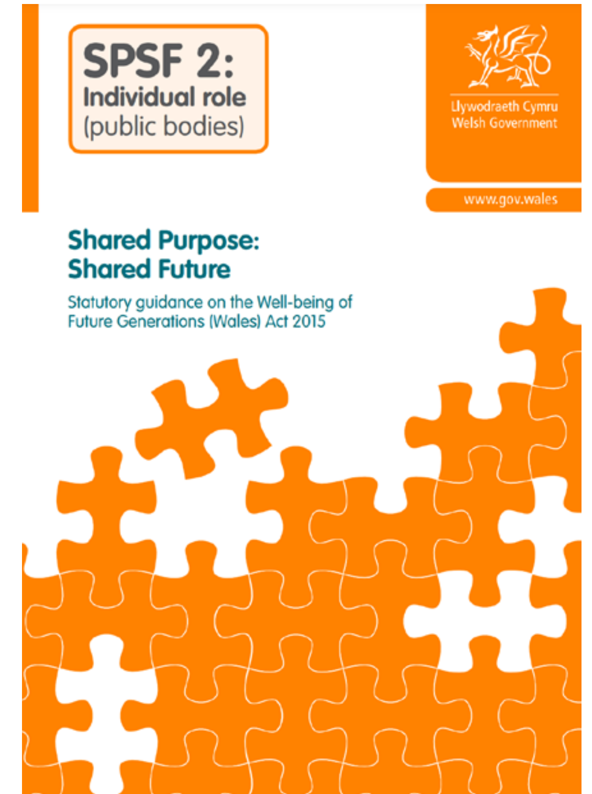
- Once a mechanism or tool is developed and adopted by Welsh Government, each public body should be using it to clearly monitor and report on its activities, both in individual procurement exercises and overall, how their procurement spend is meeting their well-being goals and objectives.
    - This must be reported within the annual reports on delivery of their well-being objectives.
    - In order to avoid confusion of language, and link clearly to the statutory requirements of the Act, the terminology should be revised to mirror the language of the Act.

- The Procurement Centre of Excellence established by Welsh Government will act as a central portal to support cross-sector collaboration and implementation. In collaboration with others Welsh Government should review existing groups and networks to better coordinate activity across local government, health, PSBs and regions, along with third sector and private sector.

- Public Services Boards should prioritise how they can collaborate and use, spend to maximise social value, contribute to their well-being objectives, and improve well-being on a local level.

*These are only the recommendations most relevant to the work of you and your team. There are more recommendations contained in the 'Spotlight on Procurement' Section of the Future Generations report, which you might wish look at.

Recommendations by the Commissioner, and the response by the Public Body



40. Public bodies have a duty to take all reasonable steps to follow the course of action set out in the recommendation by the Commissioner. Their response to the recommendation should include the steps it intends to take, or the steps it will take jointly with others if the review covers two or more bodies.

49. We would encourage the body to publish its response within 25 working days from the date of the Commissioner's recommendation. This may be a holding reply if the public body needs time to consider the recommendation, but a full response should be provided of what action, if any will be taken by the public body, within three months of the date it first receives the recommendation.

Future Generations Report 2020
Website link

The Future Generations Report 2020

Let's create the future together

Procuring well-being in Wales Report
Cymraeg / *English*

Bitesize version
Cymraeg / *English*

Procurement

What the Procurement Review Report means for Public Bodies and Welsh Government

Caffael

Beth mae Adroddiad yr Adolygiad Caffael yn ei olygu i Chyrff Cyhoeddus a Llywodraeth Cymru

Alice Horn
Analyst Officer
alice.horn@futuregenerations.wales

www.bangor.ac.uk/law

INSTITUTE FOR COMPETITION AND PROCUREMENT STUDIES

PRIFYSGOL BANGOR UNIVERSITY

UK Green Paper on Transforming Public Procurement: Reflections on the Enforcement Provisions

Dr Ama Eyo
Bangor Law School,
Bangor University,
North Wales,
United Kingdom
a.eyo@bangor.ac.uk

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Green Paper: mixed perceptions

Transforming public procurement

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Overview

- Preliminary issues
  - Green Paper on Public Procurement: Perceptions
- The Enforcement Provisions in the Green Paper
  - Premise for the proposed reform
  - Focus of the proposed reform
- Some reflections on the Enforcement provisions

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The Enforcement Provisions: Premise

- Bureaucratic process due to fear amongst buyers of a decision being challenged in courts!
  - Ambiguity in the procurement regulations;
- Current legal review processes are:
  - Excessive costs;
  - Time consuming;
  - Resource intensive!

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The Enforcement Provisions: Approach

- Para 11
  - **Reform the challenge process**
    - Speed up the review system
    - Make it more accessible.
  - Refocus the remedies
    - Introduce more pre-contractual redress measures so that fewer challenges proceed to court for post-contractual remedies!
    - Cap the damages level available to bidders
    - Reduce the attractiveness of speculative claims.

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Proposals for Enforcement: The Measures (2)

Court processes — Reform court processes

- Expedited process – speed + access (including cost)
  - Tailored fast track system
  - Use of written pleadings
  - New Civil Procedural Rules

Tribunal system — Investigate the possibility

- Low value claims
- Ongoing procurements
- Wider use should the proposed Court reforms not deliver the require benefits!

Redress for suppliers — Primacy of pre-contractual measures

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Proposals for Enforcement: The Measures (1)

New service unit & enforcement

- Review powers
- Intervention powers

Chapter 7

- Court process
- Tribunal
- Redress for suppliers
- Cap on Damages
- Automatic suspension test
- Changes to individual mandatory debrief letter

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Proposals for Enforcement: The Measures (3)

Damages — Introduce cap to level of damages

Automatic suspension — Remove for some contracts

- E.g., contracts let competitively in crisis or extreme urgency situations!

Individual debrief letter — Remove the requirement

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Reflections on the Proposals

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Reflections on the Proposals

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Thank you

Dr Ama Eyo
Lecturer and Public Procurement Specialist
Bangor Law School
Bangor University,
North Wales,
United Kingdom
a.eyo@bangor.ac.uk

Housing Allocations and Judicial Review

What is judicial review?

- A claim to review the lawfulness of an enactment; or decision, action or failure to act in relation to the exercise of the public function (including decisions on housing allocations).
- Type of court proceedings issued in the Administrative Court in Cardiff
- The court exercising its supervisory jurisdiction
- Essential to the rule of law and the separation of powers
- Public bodies and general public have an interest in ensuring that public bodies decisions, policies etc are lawful
- JR is a remedy of last resort

Housing Allocations

- What does a housing authority *allocate* accommodation?

  - When it selects a person to be a secure or introductory tenant of local authority accommodation;
  - Nominates a person to be a secure or introductory tenant of accommodation held by someone else;
  - Nominates a person to be an assured tenant of housing held by RSL or private registered provider of social housing

Housing Act 1996, s.159

Housing Allocations

- Local authorities have wide discretion to decide:
    - Who is eligible to be included on the housing register
    - How it allocates accommodation (subject to some statutory requirements)
    - Courts slow to interfere on ground of alleged irrationality (*Ahmed v Newham LBC* [2009] UKHL14)
    - Local lettings policies (Housing Act 1996, s.167(2E))
    - As such, there are many different allocations schemes

Eligibility

- Allocation of Housing and Homelessness (Eligibility) (Wales) Regulations 2014
- Immigration control and unacceptable behaviour (Housing Act 1996, s.160A)

Priorities

- *Every local authority in Wales shall have a scheme (their "allocations scheme") for determining priorities, and as to the procedure to be followed, in allocating housing accommodation* (Housing Act 1996, s.167(1))

- *A local authority in Wales shall not allocate housing accommodation except in accordance with their allocations scheme* (Housing Act 1996, s.167(8))

Reasonable preference

- The scheme shall be framed to secure that reasonable preference is given to:

  (a)people who are homeless (within the meaning of Part 2 of the Housing (Wales) Act 2014);

  (b)people who are owed any duty by a local housing authority under section 66, 73 or 75 of the Housing (Wales) Act 2014;

  (c)people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions;

  (d)people who need to move on medical or welfare grounds (including grounds relating to a disability); and

  (e)people who need to move to a particular locality in the district of the authority, where failure to meet that need would cause hardship (to themselves or to others).

  The scheme may also be framed so as to give additional preference to particular descriptions of people within this subsection (being descriptions of people with urgent housing needs).

Housing Act 1996, s.167(2)

Priorities

- The scheme may contain provision for determining priorities [to people given reasonable preference]; and the factors which the scheme may allow to be taken into account include:
  - Financial recourses available to meet housing costs
  - Behaviour
  - Local connection

Housing Act 1996, s.167(2A)

Local connection

- Normally resident by choice
- Employment
- Family associations
- Special circumstances
- Accommodated under s.95 IAA 1999 (asylum seekers)

Housing (Wales) Act 2014, s.81

Case law

- No Welsh cases?
- *Ahmed v Newham* [2009] UKHL14
  - Priority based on length of time on waiting list only was lawful
  - Courts should be slow to interfere on ground alleged irrationality
- *YA v LB Hammersmith and Fulham* [2016] EWHC 1850 (Admin)
  - Decision to refuse applicant entry on to housing register based on spent conviction was unlawful
- *Gullu v LB Hillingdon* [2019] EWCA Civ 692
  - 10 year residence requirement to join housing register indirectly discriminated
- *Favio Ortega Flores v Southwark LBC* [2020] EWCA Civ 1697
  - Authority must comply with allocations scheme it has established both in deciding which applicant should be selected for accommodation, and where on the waiting list they should be placed
- *Nur v Birmingham City Council* [2020] EWHC 3526 (Admin)
  - Lawful policy but misinterpreted and misapplied
- *Z v LB Hackney & Anor* (2020) UKSC 40
  - Statutory defence to direct discrimination in housing association's allocations policy

Final thoughts

- Why no judicial review of Welsh allocations schemes?

- What might give rise to challenge?

  - Negative review decisions regarding eligibility, reasonable preference or priority
  - Misinterpretation of the scheme
  - Changes to allocation schemes – proper consultation
  - Failure to follow statutory requirements
  - Local connection requirements
  - Determining priorities

- Everyone has an interest in ensuring public bodies' decisions are lawful

Thank you for listening

m.court@publiclawproject.org.uk

sinclairslaw

OVERVIEW OF ADULT SOCIAL CARE IN ENGLAND AND WALES

Helen Gill, 5th May 2021

OVERVIEW OF ADULT SOCIAL CARE IN ENGLAND AND WALES,

AND HOW TO CHALLENGE DECISIONS AND FAILURES BY JUDICIAL REVIEW

Introduction

1. The Care Act 2014 (CA): statutory duties of local authorities in England towards adults with social care needs.

2. The Social Services and Well-being (Wales) Act 2014 (SSWA): statutory duties of local authorities in Wales towards adults and children.

Duty to assess

England and Wales

3. If it appears to an LA an adult may have needs for care and support, an LA **must** assess their needs for care and support and what those needs are (s9(1) CA, s19(1) SSWA).

What must an assessment include?

England

4. LA must assess impact of adult's needs for care and support on well-being, outcomes, and whether (and to what extent) care and support could contribute to these outcomes (s9(4) CA).

5. LA must also consider if matters other than providing care and support could help achieve outcomes, and if they would benefit from help to reduce the need for care and support, or from support and advice from the LA (s9(6) CA).

Wales

6. LA must seek to identify outcomes, and whether (and to what extent) providing care and support, preventative services, or information, advice or assistance, could contribute to these outcomes or otherwise meet needs.

7. LA must also assess whether (and to what extent) other matters could contribute to achieving outcomes or meeting needs (s19(4) SSWA).

All needs must be assessed

8. R (Marcin Antoniak) v. Westminster City Council [2019] EWHC 3465 (Admin), Mr CMG Ockelton:

> *"30. … a needs assessment will not fulfil the requirements of s.9 if it does not include all the individual's needs,* ***whether currently being met or not****.*
>
> *31 …That was not, in my judgment, a lawful assessment of his eligible needs, because* ***the question of impact on his wellbeing should have been made without regard to the way in which needs were being met at the date of the assessment****."*

Who should be involved in the assessment?

England

9. The adult, carers, and any person the adult asks the LA to involve (s9(5) CA).

Wales

10. The adult and, **where feasible**, carers (s19(5) SSWA).

Other considerations

England

11. LA **must have regard to** (list is not exhaustive)

    (a) Assumption adult best-placed to judge their own well-being;

    (b) views, wishes, feelings and beliefs;

    (c) preventing or delaying need for care and support/reducing needs;

    (d) all circumstances (don't make assumptions);

    (e) participation and having information so they can participate;

    (f) balance between the individual's well-being and the well-being of carers who are also friends or relatives;

    (g) protection from abuse and neglect;

    (h) minimising restrictions on rights and freedoms (s1(3) CA).

12. Assessment must be appropriate and proportionate, and have regard to wishes and preferences, outcome sought from the assessment, and the severity and overall extent of needs (Regulation 3(2) Care and Support (Assessment) Regulations (2014/2827).

Wales

13. Assessment must be proportionate (s19(6) SSWA).

14. LA **must** assess and have regard to:

(a) circumstances,

(b) personal outcomes,

(c) barriers to achieving outcomes,

(d) risks to the person or to others if outcomes not achieved, and

(e) strengths and capabilities (Regulation 4, Care and Support (Assessment)(Wales) Regulations 2015/1305.

15. LA must also have regard to:

(a) views, wishes and feelings,

(b) dignity,

(c) characteristics, culture and beliefs (including language), and

(d) providing support for participation, particularly if communication is limited (s6(2) SSWA).

(c) control over day-to-day life including support;

(d) participation in work, education, training or recreation;

(e) social and economic well-being;

(f) domestic, family and personal relationships;

(g) suitability of living accommodation;

(i) contribution to society. (s1(2) CA).

Wales

The duty

20. LA must seek to promote well-being (s5 SSWA).

What is well-being?

21. Well-being is:

(a) physical and mental health and emotional well-being;

(b) protection from abuse and neglect;

16. LAs must also begin with the presumption the adult is the best person to judge well-being, and promoting independence where possible (s6(3) SSWA).

17. If an LA in England finalises an assessment which is neither proportionate nor appropriate: unlawful (Whyte J. in R(JF) v. London Borough of Merton [2017] EWHC 1519 (Admin), paragraph 47). If an LA in Wales finalises an assessment which is not proportionate: unlawful.

Well-being

England

The duty

18. LA has a general duty to promote the adult's well-being (s1(1) CA).

What is well-being?

19. Well-being is:

(a) personal dignity and respect;

(a) physical and mental health and emotional well-being;

(b) protection from abuse and neglect;

(c) education, training and recreation;

(d) domestic, family and personal relationships;

(e) contribution made to society;

(f) securing rights and entitlements;

(g) social and economic well-being;

(h) suitability of living accommodation (s2(2) SSWA);

(i) control over day to day life; and

(j) participation in work (s2(4) SSWA).

Comparison

22. England: "*general duty*" to promote an individual's well-being. Wales: LAs "*must seek to promote*" an individual's well-being.

23. England: well-being includes "*personal dignity (including treatment of the individual with respect*". Wales: well-being includes "*securing rights and entitlements*".

Importance of assessing well-being

24. *R(JF) v. London Borough of Merton* [2017] EWHC 1519 (Admin), Whyte J (paragraph 47):

> *"…**If the Assessment failed to assess the impact of JF's needs for care and support upon the factors of wellbeing listed in section 1(2) of the Act, then it is an unlawful assessment.** Likewise, if it failed to assess the outcomes that JF's wishes to achieve in day-to-day life, and whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes, it is unlawful. If it fails to have regard to the matters specified in Regulation 3(2) as set out in paragraph 30 above, it is unlawful. If the author failed to have regard to the wishes and preferences of the individual (expressed here to a degree by the Guardians, his parents), then it is unlawful. If it is neither appropriate nor proportionate then it is unlawful."*

Duty to take all evidence into account

25. Allen J. in R (on the application of JG (by her Litigation Friend NG)) v London Borough of Southwark [2020] EWHC 1989 (Admin) (paragraph 76):

> *"…there were, in my judgment, **material pieces of evidence which he did not take into account in coming to the conclusions that he did and that the assessment is as a consequence unlawful.**"*

Eligibility

England

26. If LA satisfied after a needs assessment an adult has needs for care and support, it **must** determine if any of the needs meet the eligibility criteria (s13(1) CA).

27. Needs meet the eligibility criteria if:

(a) needs arise from or are related to a physical or mental impairment or illness;

(b) because of needs they cannot achieve 2 or more outcomes; and

(c)as a consequence there is, or is likely to be, a significant impact on well-being. (Regulation 2(1), Care and Support (Eligibility Criteria) Regulations 2015/313).

28. Outcomes:

(a) nutrition;

(b) hygiene;

(c) toilet needs;

(d) clothing;

(e) safe use of home;

(f) a habitable home;

(g) family or other personal relationships;

(h) work, training, education or volunteering;

(i) making use of facilities or services in the local community including public transport, and recreational facilities or services; and

(j) caring responsibilities for a child (Regulation 2(2)).

29. Adult can't achieve an outcome if they are:

(a) unable to achieve it without assistance;

(b) able to achieve it without assistance but doing so causes them significant pain, distress or anxiety;

(c) able to achieve it without assistance but doing so endangers or is likely to endanger the health or safety of them or others; or

(d) able to achieve it without assistance but takes significantly longer than would normally be expected (Regulation 2(3)).

Wales

30. LA must meet an adult's need for care and support if they meet the eligibility criteria or the LA thinks is necessary to meet the needs to protect the adult from abuse or neglect, or a risk of abuse or neglect (s35 SSWA).

31. Needs are eligible if they arise from the adult's physical or mental ill-health, age, disability, dependence on alcohol or drugs, or other similar circumstances, and if the need relates to one or more of:

(i) self-care/domestic routines;

(ii) communication;

(iii) protection from abuse or neglect;

(iv) work, education, learning or in leisure activities;

(v) family or other significant personal relationships;

(vi) social relationships and involvement in the community;

(vii) caring responsibilities for a child.

32. The need is eligible if the adult cannot meet it:

(i) alone;

(ii) with the care and support of others willing to provide that care and support; or

(iii) with the assistance of services in the community to which they have access.

33. Also, the adult has to be unlikely to achieve one or more of the outcomes unless the LA provides or arranges care or support or makes direct payments (Regulation 3 Care and Support (Eligibility)(Wales) Regulations 2015/1578).

Comparison

34. Wales: needs can arise not only from a physical or mental impairment or illness, but also from age, disability, alcohol, drugs or similar circumstances.

35. England: must be unable to achieve 2 or more outcomes. Wales: 1 outcome.

36. England: an adult must be unable to achieve outcomes alone, or, if they can achieve them alone, if they cannot achieve them without experiencing significant pain, distress or anxiety, or if by achieving them they are likely to put themselves or others in danger. Or, if it takes significantly longer than usual.

37. Wales: whether an adult cannot achieve the outcome either alone or with the support of others or services in the community.

The care and support plan – content

England

38. A care and support plan must include:

(i) needs identified by the assessment;

(ii) whether (and to what extent) needs are eligible;

(iii) needs LA will be meeting and how;

(iv) impact of needs on well-being, outcomes, and whether (and to what extent) providing care and support could help achieve outcomes;

(v) personal budget;

(vi) Advice and information to meet or reduce needs, or prevent or delay the development of needs; and

(vii) Which needs will be met by direct payments (and amount and frequency) (s25 CA).

Wales

42. The notes include links to codes of practice for general functions, assessing needs, meeting needs and measuring social services performance. LAs must comply with these codes or take into account guidance in them.

Challenging decisions and failures

43. Judicial review – challenges an LA's failure or refusal to assess an adult's social care needs, the assessment itself, an LA's refusal to issue a care and support plan or the plan itself – on the basis of a breach of statutory duty, or because the decision/failure is unlawful in broader public law terms (such as *Wednesbury* unreasonableness).

44. R (Marcin Antoniak) v. Westminster City Council (Ockelton J)(paragraph 9):

> *"It is not the role of the Court to apply detailed textual analysis to what the social worker has determined or the way in which that is expressed."*

Where?

45. Administrative Court in Cardiff.

When?

46. Promptly or within 3 months of the decision (including decisions within the assessment without waiting for the plan) (often there are ongoing failures). If the LA is willing to mediate or negotiate issue a protective claim and stay it.

The intensity of review

47. *Antoniak*, paragraph 13:

39. A care and support plan must include:

(i) eligible needs;

(ii) personal outcomes;

(iii) actions to be taken by the LA and others to help achieve outcomes (or otherwise meet eligible needs);

(iv) monitoring;

(v) review; and

(vi) which needs will be met by direct payments (and amount and frequency) (Regulation 3 Care and Support (Care Planning) (Wales) Regulations 2015/1335.

The care and support plan – involvement

England

40. The adult, carers, and any person the adult wants to be involved (s25(3) CA).

Wales

41. The adult and, **where feasible**, carers (s54(7) SSWA).

Codes of Practice: Wales

> *"Because the claimant is, almost inevitably, a vulnerable person, the level of review will be intense, but it remains nevertheless a review."*

Judicial review

The practice direction and guidance

48. The notes provide links to Practice Direction 54 and the Administrative Court Guide.

Litigation friend

49. Can give instructions on the person's behalf (usually a parent), as long as no conflict.

Legal aid

50. If the person is eligible financially for legal aid and merits good enough (moderate or good): legal aid certificate covers investigative work and the case itself.

Initial letter

51. LAA expects attempt to settle. Brief letter should ask the LA to take action and explain why, concluding that if this is not done in 7 days you will be taking the next steps to JR (legal aid application, pre-action letter).

Information

52. Seek specific disclosure in the initial letter.

53. Separately, make a subject access request, asking for everything (including internal emails).

Pre-action letter and counsel's advice

54. Next step: legal aid application for "Investigative Representation" (for pre-action letter and counsel's opinion).

55. Pre-action letter: (1) proposed claimant and litigation friend's details, (2) reference details and details of the firm's address for service, (3), summary of the matter being challenged (e.g. "The LA's failure to prepare a care and support plan"), (4) facts, (5) legal framework and pleadings, (6) ADR, (7) request for disclosure.

56. Then: counsel's advice if necessary. If positive: apply to the LAA to extend scope so you can issue the claim.

Permission for judicial review

57. If legal aid is granted, apply for permission to judicially review the LA. Counsel prepares grounds, which are sent to Court and the LA with the claim form (N461), bundle, index and list of essential reading, and statutory materials. When the Court seals the claim form, serve that.

58. Consider interim relief or urgency (including rolled-up hearing).

59. If no expedition, LA has 21 days to provide acknowledgment of service and summary grounds of resistance.

60. Reply.

61. Judge then decides if the case is arguable and if so grants permission on the papers.

62. If permission is refused: 7 days to apply to renew. Then: apply for legal aid for the renewal hearing (counsel's updated advice).

63. Renewal hearing (usually half an hour, often longer). Why is the case arguable?

64. LA entitled to attend the hearing, but generally not entitled to be paid.

65. If permission is refused there, if wrong in law: Court of Appeal (7 days).

66. If permission is granted, full judicial review hearing (usually 1 day).

67. Conceding the claim. Costs.

68. Final hearing: LA detailed grounds of resistance. Both sides: detailed skeleton arguments and hearing bundles.

69. Remedies: quashing, ordering the LA to carry out a new assessment or prepare a new plan.

Helen Gill
Sinclairslaw incorporating John Ford Solicitors and Match

May 2021

OVERVIEW OF ADULT SOCIAL CARE IN ENGLAND AND WALES,

AND HOW TO CHALLENGE DECISIONS AND FAILURES BY JUDICIAL REVIEW

Introduction

1. The Care Act 2014 (CA) sets out the statutory duties of local authorities in England towards adults with social care needs.

2. The Social Services and Well-being (Wales) Act 2014 (SSWA) sets out the statutory duties of local authorities in Wales towards adults and children.

The duty to assess

England and Wales

3. If it appears to an LA an adult may have needs for care and support, an LA **must** assess their needs for care and support and what those needs are (s9(1) CA, s19(1) SSWA).

What must an assessment include?

England

4. LA must assess the impact of the adult's needs for care and support on their well-being, the outcomes they want to achieve in day-to-day life, and whether and to what extent the LA providing care and support could contribute to achieving these outcomes (s9(4) CA).

5. An LA must also consider if matters other than providing care and support could help the person achieve their outcomes, and if they would benefit from help to reduce the needs they may have for care and support or from support and advice from the LA (s9(6) CA).

Wales

6. LA must seek to identify the outcomes the person wants to achieve in day to day life, and whether (and to what extent) providing care and support, preventative services, or information, advice or assistance, could contribute to the person achieving their outcomes or otherwise meet needs identified in their assessment. LA must also assess whether (and to what extent) other matters could contribute to achieving outcomes or meeting needs (s19(4) SSWA).

7. LAs in Wales must "*seek to identify*" outcomes. LAs in England must "*assess"* outcomes.

8. Duty on LAs in England to consider whether a person would benefit from "*anything which might be available in the community"*. LAs in Wales must consider whether (and to what extent) "*other matters*" could help a person achieve outcomes <u>or have their needs met</u>.

9. "*Other matters"* (Wales) are broader than "*anything which might be available in the community"* (England).

<u>A needs assessment must include an assessment of all an adult's needs, not just those needs which are not being met</u>

10. <u>R (Marcin Antoniak) v. Westminster City Council</u> [2019] EWHC 3465 (Admin), Mr CMG Ockelton:

> *"30. ... a needs assessment will not fulfil the requirements of s.9 if it does not include all the individual's needs,* ***whether currently being met or not****. It follows also that the determination of the eligibility criteria will not fulfil the requirements of s.13 unless the eligibility of needs currently being met is determined, as well as the eligibility of unmet needs.*
>
> *31 ...That was not, in my judgment, a lawful assessment of his eligible needs, because* ***the question of impact on his wellbeing should have been made without regard to the way in which needs were being met at the date of the assessment****."*

<u>Who should be involved in the assessment?</u>

<u>England</u>

11. The adult being assessed, any carer the adult has, and any person the adult asks the LA to involve (or if the adult does not have capacity any person who appears to the LA to be interested in their welfare) (s9(5) CA).

<u>Wales</u>

12. The adult being assessed and, **where feasible**, any carer the adult has (s19(5) SSWA).

Other considerations

England

13. LAs **must have regard to** (list is not exhaustive)

    (a) Assumption the adult is best-placed to judge their own well-being;

    (b) their views, wishes, feelings and beliefs;

    (c) preventing or delaying their need for care and support/reducing needs;

    (d) all the individual's circumstances (don't make assumptions);

    (e) participation and having information so they can participate;

    (f) balance between the individual's well-being and the well-being of carers who are also friends or relatives;

    (g) protection from abuse and neglect;

    (h) minimising restrictions on rights and freedoms (s1(3) CA).

14. The LA must carry out an assessment in an appropriate and proportionate manner, having regard to the person's wishes and preferences, the outcome they seek fromt eh assessment, and the severity and overall extent of their needs (Regulation 3(2) Care and Support (Assessment) Regulations (2014/2827).

Wales

15. The assessment must be done in a way which the LA considers is proportionate in the circumstances (s19(6) SSWA).

16. When carrying out an assessment an LA **must** assess and have regard to:

    (a) the person's circumstances,

    (b) personal outcomes,

    (c) barriers to achieving outcomes,

(d) risks to the person or to others if those outcomes are not achieved, and

(e) strengths and capabilities (Regulation 4, Care and Support (Assessment)(Wales) Regulations 2015/1305.

17. The LA must also:

    (a) so far as is reasonably practicable, ascertain and have regard to the individual's views, wishes and feelings,

    (b) have regard to the importance of promoting and respecting dignity,

    (c) have regard to the characteristics, culture and beliefs of the individual (including, for example, language), and

    (d) have regard to providing support to enable the person to participate (particularly if their communication is limited) (s6(2) SSWA).

18. Section 6(3) SSWA says that LAs must also begin with the presumption the adult is the best person to judge their own well-being, and of promoting their independence where possible.
.

19. LAs in England and Wales must carry out assessments in a proportionate manner, and in England they must also ensure assessments are carried out appropriately.

20. If a local authority in England finalises an assessment which is neither proportionate nor appropriate it is unlawful (Whyte J. in R(JF) v. London Borough of Merton [2017] EWHC 1519 (Admin), paragraph 47). If a local authority in Wales finalises an assessment which is not proportionate then this would also be unlawful.

Well-being

England

The duty

21. LA has a general duty to promote the adult's well-being (s1(1) CA).

What is well-being?

22. Well-being is:

(a) personal dignity and respect;

(a) physical and mental health and emotional well-being;

(b) protection from abuse and neglect;

(c) control over day-to-day life including support;

(d) participation in work, education, training or recreation;

(e) social and economic well-being;

(f) domestic, family and personal relationships;

(g) suitability of living accommodation;

(i) contribution to society. (s1(2) CA).

Wales

The duty

23. LA must seek to promote well-being (s5 SSWA).

What is well-being?

24. Well-being is:

(a) physical and mental health and emotional well-being;

(b) protection from abuse and neglect;

(c) education, training and recreation;

(d) domestic, family and personal relationships;

(e) contribution made to society;

(f) securing rights and entitlements;

(g) social and economic well-being;

(h) suitability of living accommodation (s2(2) SSWA);

(i) control over day to day life; and

(j) participation in work (s2(4) SSWA).

Comparison

25. The statutory duty in England is a "*general duty*" to promote an individual's well-being. In Wales local authorities "*must seek to promote*" an individual's well-being.

26. In England, well-being includes "*personal dignity (including treatment of the individual with respect*" which is not listed in the SSWA, and in Wales well-being includes "*securing rights and entitlements*", which is not listed in the CA.

27. In England and Wales, well-being includes control over day to day life, but in England this is further explained as "*including over care and support…provided to the individual and the way in which it is provided*."

Local authorities must assess well-being or there is a breach of statutory duty

28. *R (Davey) v. Oxfordshire CC & Ors* [2017] EWHC (Admin), Morris J:

> *"…if, in the course of a needs assessment, the local authority does not assess the matters specified in section 9(4) (including the impact on well-being matters set out in section 1(2)) then there is a breach of the statutory duty. There is, thus, a duty on the part of the local authority to assess these factors."*[1]

29. *R(JF) v. London Borough of Merton* [2017] EWHC 1519 (Admin), Whyte J:

> *"In my judgment the Needs Assessment must specify what JF's needs are and it must do so on a rational basis.* ***If the Assessment failed to assess the impact of JF's needs for care and support upon the factors of wellbeing listed in section 1(2) of the Act, then it is an unlawful assessment.*** *Likewise, if it failed to assess the outcomes that JF's wishes to achieve in day-to-day life, and whether, and if so to what extent, the provision of care and support could contribute to the*

[1] At paragraph 21 – this was affirmed by the Court of Appeal at paragraph 52 [2017] EWCA Civ 1308

achievement of those outcomes, it is unlawful. If it fails to have regard to the matters specified in Regulation 3(2) as set out in paragraph 30 above, it is unlawful. If the author failed to have regard to the wishes and preferences of the individual (expressed here to a degree by the Guardians, his parents), then it is unlawful. If it is neither appropriate nor proportionate then it is unlawful."[2]

Local authorities must take into account all evidence when carrying out assessments

30. Allen J. in R (on the application of JG (by her Litigation Friend NG)) v London Borough of Southwark [2020] EWHC 1989 (Admin) at paragraph 76:

> *"...I conclude that the claimant has made out ground 1 and identified elements of the assessment which are unlawful. This is not just a matter of disagreement. The legal test, as set out above, is a high one, and I have no doubt that Mr Choudry carried out a conscientious evaluation of the claimant's circumstances. But there were, in my judgment,* ***material pieces of evidence which he did not take into account in coming to the conclusions that he did and that the assessment is as a consequence unlawful****."*

Eligibility for care and support

England

31. If an LA is satisfied after carrying out a needs assessment an adult has needs for care and support, it **must** determine if any of the needs meet the eligibility criteria (s13(1) CA). Needs meet the eligibility criteria if they are in the regulations or are part of a combination of needs from them (s13(7) CA).

32. Needs meet the eligibility criteria if:

    (a) needs arise from or are related to a physical or mental impairment or illness;

    (b) because of their needs they cannot achieve 2 or more outcomes; and

    (c) as a consequence there is, or is likely to be, a significant impact on well-being. (Regulation 2(1), Care and Support (Eligibility Criteria) Regulations 2015/313).

33. The outcomes are:

    (a) nutrition;

    (b) hygiene;

[2] At paragraph 47

(c) toilet needs;

(d) appropriate clothing;

(e) safe use of home;

(f) a habitable home;

(g) family or other personal relationships;

(h) work, training, education or volunteering;

(i) making use of facilities or services in the local community including public transport, and recreational facilities or services; and

(j) caring responsibilities for a child (Regulation 2(2)).

34. An adult is unable to achieve an outcome if they are:

(a) unable to achieve it without assistance;

(b) able to achieve it without assistance but doing so causes them significant pain, distress or anxiety;

(c) able to achieve it without assistance but doing so endangers or is likely to endanger the health or safety of them or others; or

(d) able to achieve it without assistance but takes significantly longer than would normally be expected (Regulation 2(3)).

Wales

35. An LA must meet an adult's need for care and support if they meet the eligibility criteria or the LA thinks is necessary to meet the needs to protect the adult from abuse or neglect, or a risk of abuse or neglect (s35 SSWA).[3]

[3] Also if the person is in their area, and there are separate considerations regarding charging for services which are beyond the scope of these notes

36. Needs are eligible if they arise from the adult's physical or mental ill-health, age, disability, dependence on alcohol or drugs, or other similar circumstances, and if the need relates to one or more of:

    (i) self-care/domestic routines;

    (ii) communication;

    (iii) protection from abuse or neglect;

    (iv) work, education, learning or in leisure activities;

    (v) family or other significant personal relationships;

    (vi) social relationships and involvement in the community;

    (vii) caring responsibilities for a child.

37. The need is eligible if the adult cannot meet it:

    (i) alone;

    (ii) with the care and support of others willing to provide that care and support; or

    (iii) with the assistance of services in the community to which they have access.

38. To be an eligible need, the adult also has to be unlikely to achieve one or more of the outcomes unless the LA provides or arranges care or support or makes direct payments (Regulation 3 Care and Support (Eligibility)(Wales) Regulations 2015/1578).

Comparison

39. In Wales needs can arise not only from a physical or mental impairment or illness, but also from age, disability, alcohol, drugs or similar circumstances.

40. In England, an adult must be unable to achieve 2 or more outcomes, whereas in Wales an adult must be unable to achieve 1 or more outcomes.

41. In England, an adult must be unable to achieve outcomes alone, or, if they can achieve them alone, they have eligible needs if they cannot achieve them without experiencing significant pain, distress or anxiety, or if by achieving them they are likely to put themselves or others in danger. They also have eligible needs if they can achieve outcomes but it takes significantly longer than would normally be expected.

42. In Wales, the focus is on whether an adult cannot achieve the outcome either alone or with the support of others or services in the community.

The care and support plan – content

England

43. A care and support plan must include:

(i) the needs identified by the needs assessment;

(ii) whether (and to what extent) the needs are eligible;

(iii) the needs the LA will be meeting and how;

(iv) the impact of the adult's needs for care and support on their well-being, the outcomes they want to achieve, and whether (and to what extent) providing care and support could help them achieve those outcomes;

(v) the personal budget;

(vi) Advice and information to meet or reduce needs, or prevent or delay the development of needs; and

(vii) If some or all of the adult's needs are to be met through direct payments, details of the needs which are to be met by direct payments and the amount and frequency of the direct payments (s25 CA).

Wales

44. A care and support plan must include:

(i) eligible needs;

(ii) personal outcomes;

(iii) actions to be taken by the LA and others to help the person achieve outcomes (or otherwise meet eligible needs);

(iv) arrangements for monitoring;

(v) arrangements for review; and

(vi) where some or all the person's needs are to be met by direct payments, the eligible needs to be met by direct payments and the amount and frequency of the direct payments (Regulation 3 Care and Support (Care Planning) (Wales) Regulations 2015/1335.

The care and support plan – involvement

England

45. The LA must involve the adult, any carer the adult has, and any person the adult wants to be involved (or, where the adult lacks capacity, any person who appears to the LA to be interested in their welfare) (s25(3) CA).

Wales

46. The LA must involve the adult and, **where feasible**, any carer the adult has (s54(7) SSWA).

Codes of Practice: Wales

47. Part 2: General functions:

    https://gov.wales/sites/default/files/publications/2019-05/part-2-code-of-practice-general-functions.pdf

48. Part 3: assessing needs:

    https://gov.wales/sites/default/files/publications/2019-05/part-3-code-of-practice-assessing-the-needs-of-individuals.pdf

49. Part 4: meeting needs:

    https://gov.wales/sites/default/files/publications/2019-05/part-4-code-of-practice-meeting-needs.pdf

50. Measuring social services performance:

    https://gov.wales/sites/default/files/publications/2019-05/code-of-practice-in-relation-to-measuring-social-services-performance.pdf

Challenging decisions and failures

51. Judicial review – challenges an LA's failure or refusal to assess an adult's social care needs, the assessment itself, an LA's refusal to issue a care and support plan or the plan itself – on the basis of a breach of statutory duty, or because the decision/failure is unlawful in broader public law terms (such as *Wednesbury* unreasonableness).

52. R (Marcin Antoniak) v. Westminster City Council (Ockelton J)(paragraph 9):

    > *"It is not the role of the Court to apply detailed textual analysis to what the social worker has determined or the way in which that is expressed."*

Where?

53. Administrative Court in Cardiff.

When?

54. Promptly or within 3 months of the decision (including decisions within the assessment without waiting for the plan) (often there are ongoing failures). If the LA is willing to mediate or negotiate issue a protective claim and stay it.

The intensity of review

55. *Antoniak*, paragraph 13:

> *"Because the claimant is, almost inevitably, a vulnerable person, the level of review will be intense, but it remains nevertheless a review."*

56. R(KM) v Cambridgeshire County Council [2012] UKSC 23 Lord Wilson (paragraph 36):

> *"in community care cases the intensity of review will depend on the profundity of the impact of the determination… the court has to strike a difficult, judicious, balance."*

Judicial review

The practice direction and guidance

57. Practice Direction 54:

https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54

58. The Administrative Court Guide:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf

Litigation friend

59. If the person with social care needs is bringing the challenge, they can do this with the help of a litigation friend (usually a parent) who can give instructions on their behalf if they are not able to give instructions themself. There cannot be a conflict between the wishes of the person and their litigation friend.

Legal aid

60. If the person is eligible financially for legal aid, a legal aid certificate can be applied for in their name to bring the challenge (public law franchise).

Initial letter

61. The Legal Aid Agency (LAA) expects attempts to be made to resolve the dispute before legal aid is applied for. This can be addressed by a brief initial letter (usually around 2 – 3 pages long) setting out what you want the LA to do and why, giving them a 7 day deadline or less, and explaining that unless the LA does as you ask within 7 days the next steps will be taken towards issuing judicial review proceedings.

Information

62. Ask for relevant disclosure in this letter, and ask for this to be provided by the same deadline. This should not be a "fishing expedition" or the LA is more likely to treat the request as a subject access request under GDPR. Ask for very specific information, for example the minutes of the panel who made the decision, copies of communications concerning the particular decision or failure.

63. Separately, make a subject access request, asking for everything (all documents and communications held by the LA which refers to the person, including internal and external emails, letters, notes, minutes of meetings…). Having copies of internal emails can be particularly helpful. Provide the dates for which you want this information. It may be a few months before the social care assessment ought to have started leading to the date you make the request. The result will be a large volume of documents provided within a month (if the LA provides it by the deadline in GDPR). However, it could provide you with very helpful information.

Investigative representation: pre-action letter and counsel's advice

64. If the LA does not agree to do as you ask, or does not respond to the letter at all, a legal aid application can be made for "Investigative Representation", ensuring that in the application you ask for scope to include a pre-action protocol letter and then counsel's advice (the LAA will not pay for the pre-action letter unless the legal aid certificate specifically mentions it).

65. If/when legal aid is granted, the pre-action letter can then be prepared. It should include (1) the proposed claimant and litigation friend's details, (2) reference details and details of the firm's address for service, (3), a summary of the matter being challenged (e.g. "The LA's failure to prepare a care and support plan"), (4) the factual background of the case, (5) the legal framework – so quoting from the statutory provisions, caselaw if relevant, and then bring together in detailed pleadings why the LA is, you say, acting unlawfully, (6) confirmation the proposed claimant is willing to take part in Alternative Dispute Resolution, and (7) if the LA has not provided the specific information

requested in your initial letter, a repeat of that request and a reminder that if this information is not provided there may be costs consequences as this information is being requested in accordance with the pre-action protocol.

66. If the LA does not respond satisfactorily, or at all, the next step can either be an application for the scope of the legal aid certificate to be extended to include an application for judicial review permission on the papers, or, usually, an approach to counsel first asking for their advice on the prospects of success (followed by, if counsel advises positively, the application to extend scope). It is also possible to instruct counsel to advise before preparing a pre-action letter if this is better suited to the particular case.

Applying for permission for judicial review

67. If legal aid is granted then an application for judicial review can be made, with counsel preparing detailed judicial review grounds to be sent to Court (and served on the LA) with the claim form (N461), bundle of documents, index and list of essential reading, and statutory materials.

68. When making the application consider if you want to ask the Court to order the LA to provide interim relief (which is something you are asking the LA to provide whilst you are waiting for the Court to make its overall decision, for example if the claimant needs some hours of care and support urgently).

69. Or, consider if you want to ask the Court to speed up the usual timetable by having, say, a rolled-up hearing (a full judicial review hearing which will consider if a case should be given permission and if the judicial review as a whole should succeed).

70. If you do not ask for expedition, the LA has 21 days after you have served the *sealed* claim form on it to provide to you and the Court its acknowledgment of service and summary grounds of resistance, setting out in brief what its case is, if it is challenging the application for judicial review. Otherwise the AoS can say the LA is agreeing not to defend its position, but this is rare.

71. It makes sense to send to the LA, at the same time as the Court, a copy of the judicial review bundle which contains the unsealed claim form. However, always remember to serve the sealed claim form on the LA as soon as you receive it from the Court.

72. After the LA has provided its summary grounds, there is usually a long wait whilst the Court allocates the application to a judge, who will then read the papers and decide whether to grant the claimant permission or not. In so doing, the judge will decide whether the claim is *arguable* – does it justify a whole day in Court?

73. There is no right to reply to the LA's summary grounds, but in practice the claimant will usually prepare a reply dealing with what the LA is saying.

74. If permission is refused then, unless the application is adjudged totally without merit (this is extremely rare particularly if a case has sufficient merit to be granted legal aid), you have 7 days in which to apply to Court to renew the application.

75. As this deadline is so short, it may be wise to make the application for renewal first (the Court will send you the form), and then apply for legal aid to be extended to cover the renewal application (as the LAA may take too long to make a decision). The LAA may ask for counsel's advice, and it is wise to ask for this at the outset, usually it can be very brief, simply explaining why in the claimant's view the judge was wrong to refuse permission and that prospects remain good enough.

76. If the application is not renewed, then counsel and solicitors will not be paid for their work in issuing judicial review proceedings (though they are paid for investigative work, so for working on the pre-action letter and counsel's advice on prospects).

77. Once the renewal application is made (and send this to the LA), the Court will list a short renewal hearing where the claimant's barrister can explain why the case is arguable, and why therefore permission should be granted.

78. The LA is entitled to attend the hearing, but generally is not entitled to be paid for attending (if the claimant is not legally aided and loses the permission argument).

79. If permission is refused there, then if one can argue that the judge is wrong in law the next step is to apply to the Court of Appeal, which must be done within 7 days.

80. If permission is granted, then the Court will list the full judicial review hearing, which is usually listed for a day, sometimes longer.

81. A lot of LAs tend to concede claims if permission is granted. It may be worth writing to them inviting them to do this.

82. Do not forget to ask the LA to pay the claimant's costs if the LA concedes the claim.

83. If the case does go to a final hearing then the LA has to prepare detailed grounds of resistance, and both sides prepare detailed skeleton arguments. The claimant has to prepare a full hearing bundle. This will be the same as the JR permission bundle but will add the further orders and pleadings, any further significant correspondence and documents. Be careful about what you include, a bundle should only contain what is relevant.

84. The final hearing then takes place, and the judge will make a decision whether to allow the application for judicial review and, if so, what orders to make. The judge can quash the assessment and/or care and support plan and order the LA to carry out a new assessment or to prepare a new plan. If the LA has simply not assessed the claimant or prepared a care and support plan the judge can order the LA to do those things.

Helen Gill

Sinclairslaw incorporating John Ford Solicitors and Match

May 2021

PLP's Wales Conference 2021

Christian Davies, Solicitor and EUSS Hub Coordinator

Public Law Project

The EU Settlement Scheme

- Implementation of UK's obligations under Part 2 (Citizen's Rights) of the Withdrawal Agreement
- Appendix EU of the Immigration Rules
- Open to:
  - EEA and Swiss citizens resident in the UK **before 31 December 2020**
  - Family members
  - People with EU derivative rights to reside (e.g. Zambranos)

Settled status (SS)

- Indefinite leave to remain
- Available to EEA/Swiss citizens who have completed a 5 year continuous qualifying period in the UK, and their family members
- Must also meet the suitability requirements
- Similar rights to live, work, rent, access NHS and benefits as British citizens

Pre-settled status (PSS)

- 5 years' limited leave to remain
- Available to EEA/Swiss citizens who have been in the UK for less than 5 years, and their family members
- Must also meet the suitability requirements
- Right to live, work, rent and use the NHS
- Position in relation to welfare benefits is currently unclear. See *Fratila and Tanase v SSWP* [2020] EWCA Civ 174. UK Supreme Court and European Court of Justice hearing cases in May 2021.

EUSS status is “digital only”

- The majority of EUSS applications must be done online
- EEA nationals only receive a digital form of proof of status; no physical document
- Complex and unprecedented system – see PLP report

Deadlines

- Deadline for applications to the EUSS is 30 June 2021
- Late applications will be allowed where there are "reasonable grounds" - broad non-exhaustive guidance recently published (pp. 27-44)
- Individuals with PSS can upgrade to SS once they have completed a 5 year continuous qualifying period - must do so before PSS expires

Grace period

- EU free movement ended on 31 December 2020
- The Application Deadline and Temporary Protection Regulations effectively preserve the rights of those lawfully resident before 31 December 2020 until the later of:
  - 30 June 2021 (the application deadline); or
  - the date on which an application submitted before the application deadline is determined
- EEA citizens *should* be able to continue to rely on their passport to prove status until the application deadline
- No protection for individuals with “reasonable grounds” for making a late application

PLP's EUSS Hub

- The EUSS Hub provides second-tier advice to frontline organisations on complex EUSS applications
- We also take referrals for EUSS-related systemic public law challenges
- Please email c.davies@publiclawproject.org.uk for more information

Newfields>>

Immigration Paralegal - Alicia Percival

Topic of Discussion: EUSS

- Key issues and challenges faced in practice
- Examples of complex EUSS applications
- Future challenges post-June

Future challenges post-June

- Late Applications
  - Reasonable grounds, benefit of doubt, initial period after the deadline, evidence requirement
- Converting from Pre-Settled > Settled Status
  -Guidance covers late applications under this category
- Joining Family Members
  -EUSS Family Permit applications
- Criminal History
  -Trials that are concluded post-June, what happens next?
- Refusal of applications
  -Assistance, Administrative Review or re-application

Key issues and challenges faced in practice

- Lack of ID
  E.g. embassy closures, additional documentation, EUSS paper form application
  Case Study Example:-Homeless applicants (Cardiff County Council)
  -Elderly applicants (Mental Incapacity)
- Digital Exclusion
  Those aware/unaware they need to apply but don't have the resources or support to be able to do so
  Case Study Example:-Pobl Group, elderly applicant
- Digital Format
  E.g. outstanding applications, additional documentation, accessing online portal
  Case Study Example:-Resuming the review of an application once a court hearing has been concluded

*Language barriers

Introduction to the Independent Monitoring Authority

Rhys Davies,
General Counsel

Duties

We have 2 key duties:

- To **monitor** the application of citizens' rights.

This means that we actively seek information that will enable us to identify where things are going well and where things may not.

- To **promote** the effective implementation of citizens' rights.

This means helping citizens to understand their rights and supporting public bodies to understand where things are going wrong so that they can put them right.

Background

The Independent Monitoring Authority for the Citizens' Rights Agreements (IMA) is an independent body that makes sure that the rights of EU and EEA EFTA citizens (Iceland, Liechtenstein and Norway) living in the UK and Gibraltar are upheld.

The establishment of the IMA implements the UK's commitment in the Withdrawal Agreement and EEA EFTA Separation Agreement to establish a body to monitor the implementation and application of the citizens rights provided under those agreements.

The IMA became fully operational at 11pm on 31 December 2020.

Functions

We will fulfil our duties by carrying out the following functions

Collect and analyse intelligence from a range of sources to help us understand the experience of EU and EEA EFTA citizens in the UK.

Receive **complaints** from EU / EEA EFTA citizens' who believe that they have been, or may be, denied their rights.

Carry out **inquiries** where there are reasonable grounds to indicate general or systemic failings.

Check that public authorities have fulfilled their promise to improve the system for all.

Consider **legal action** where appropriate to help ensure the proper implementation or application of the citizens' rights agreements.

Share our knowledge of where things are going well and where things are going wrong to help everyone.

Publish reports to explain what we do and share our findings.

The IMA does not focus on the resolution of individual complaints, but instead its primary role is to focus on general and systemic issues that may impact a number of citizens.

Complainants are therefore encouraged via existing routes of complaint and appeal to raise their complaint directly with the public body concerned.

The IMA's remit

Scope

We operate across the UK and Gibraltar.

Qualifying persons

We review all complaints from qualifying persons who claims a right set out in the agreements mentioned. This includes:

- EU and EEA EFTA citizens and their families;
- frontier workers in the UK and their families (i.e. EU and EEA EFTA citizens who work in the UK, but live elsewhere);
- UK nationals who derive rights from the citizens' rights part of the Withdrawal Agreement and EEA EFTA Separation Agreement and their families; and
- anyone who has equivalent rights to those contained in the Withdrawal Agreement or EEA EFTA Separation Agreement as a result of their eligibility to claim settled status.

Governance

Independence

We are fully independent, with our own legal personality as a non-departmental public body (NDPB) of the Ministry of Justice (MoJ) which is our sponsor department.

The IMA Board, chaired by Sir Ashley Fox, was constituted in January 2021.

Funding

The IMA is funded by its sponsoring department, the Ministry of Justice.

Relationship

The IMA's relationship with its sponsoring UK Government department will be primarily governed by the terms of the EU (Withdrawal Agreement) Act 2020, but also supplemented by a Framework Agreement agreed between the IMA and the Ministry of Justice.

Relevant Rights

We look at all aspects of how UK public bodies manage the rights included in Part 2 of the Withdrawal Agreement and Part 2 of the EEA EFTA Separation Agreement.

The citizens' rights we monitor can be summarised as:

- **Residency** - this covers rights to reside, leave and re-enter.
- **Rights of Workers and Self-Employed Persons** - this covers the rights of workers, self-employed persons and frontier workers.
- **Mutual recognition of professional qualifications** - this covers the right for recognised professional qualifications to continue to be recognised.
- **Co-ordination of Social Security Systems** - these include benefits, access to education, housing and access to healthcare.

These rights are underpinned by the principles of equal treatment with nationals of the host state (in this case the UK) and prohibition of discrimination on the grounds of nationality.

Intelligence

The actions of the IMA will be informed by the information it receives. This information may derive from various sources, including:

- Complaints from individuals via the IMA Complaints Portal,
- Research carried out by the IMA,
- The IMA's legislation monitoring function, and
- Evidence of general and systemic issues received by other organisations

Further Information

- IMA Operational Guidance
- IMA Annual Plan 2021/22
- Framework Agreement (available soon)
- IMA Complaints Portal

Independent Monitoring Authority

For the Citizens' Rights Agreements

Contact us

To contact us you can:

Email us:
IMA@ima-citizensrights.org.uk

Further information can be found on our website:
https://ima-citizensrights.org.uk/

Find us on social media
Twitter - @IMA_CitRights
Facebook - facebook.com/imacitizensrights
LinkedIn – Independent Monitoring Authority

Write to us:
Independent Monitoring Authority
3rd Floor Civic Centre,
Oystermouth Road
Swansea
SA1 3SN

Travelling Ahead project
TGP Cymru

PLP Wales Conference – EUSS session

www.tgpcymru.org.uk

Barriers for the Roma community

- The application is in digital form
- The whole process is in English
- Evidencing residency is challenging, especially for women – risk of obtaining Pre-Settled Status
- Myths around not needing to apply for children
- Covid-19 impact:
  - Closures of Embassies = long waiting times and risk of not obtaining IDs
  - Lockdowns: we have a long waiting list of people for face-to-face support

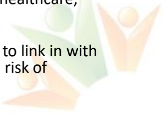
www.tgpcymru.org.uk

Work of Travelling Ahead / Teithio Ymlaen

- All Wales Advice and Advocacy Service
- Community and youth engagement, ensuring community voices are heard
- Training and supporting to develop better understanding of communities

- EU Settlement Scheme support and advice for Roma EU Citizens: OISC Level 1 EUSS
- Project is Wales-wide, free-of-charge and in home language:
  - Czech, English, French, Polish, Romanian, Russian, Slovak and Spanish
  - Practical steps, raising awareness of the scheme
  - One-to-one sessions: full application support

www.tgpcymru.org.uk



Risks for the Roma community

- Being without a status after 30th June 2021
- Having incorrect status due to accepting Pre-Settled Status
- The digital ID: difficulties in accessing it, challenges in using it
- Without status proof, barriers to accessing services: healthcare, housing, employment, education, social support
- Marginalisation could increase: people will be afraid to link in with systems as they cannot demonstrate proof of status, risk of exploitation

www.tgpcymru.org.uk

Review of UK Government Union Capability

November 2019

Lord Dunlop

Lord Dunlop served as Parliamentary Under Secretary of State at the Northern Ireland Office from July 2016 to June 2017. He also served as Parliamentary Under Secretary of State at the Scotland Office from May 2015 to June 2017.

He was Prime Minister David Cameron's devolution advisor in Number 10 from February 2012 to May 2015. He is currently a member of the House of Lords Constitution Committee.

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Foreword

In the 20 years or so since the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly met for the first time, significant powers have been transferred from the UK Parliament and Government to devolved institutions.

During this period much less attention has been paid to the implications of this power transfer for the way our Union runs. The focus has not been on the machinery and arrangements which enable the UK Government to discharge sensitively its own unique duties to people across all parts of the country, and to work constructively with devolved governments where responsibilities overlap. This machinery and these arrangements are part of the essential glue that binds together our United Kingdom.

The UK's withdrawal from the European Union – with the accompanying repatriation of powers from Brussels – makes a review of these arrangements urgent. They are, in any case, ripe for review as the devolution settlements have evolved since 1998, with increasing areas of shared competence.[1]

Working together is no longer an optional extra, if ever it was. It is fundamental to the business of government in these islands. More importantly, it's what people across the UK want and expect from their elected governments.

Our Union – the United Kingdom – is the most successful multinational state in the world. Its success is built, in part, on an ability to adapt to change. Devolution has been a significant constitutional change. It has empowered local decision-making while also preserving the UK's ability to act collectively when size and heft matters.

Diversity is a feature of devolution and the management of difference one of its natural consequences. Solidarity is an attribute of the Union and the promotion of common interests one of its essential roles. Being able to successfully marry the two offers the whole country the best of both worlds.

A core principle underpinning our devolution settlements is the respect of the UK Government and the devolved governments for each other's areas of competence. For the last 20 years this has largely worked remarkably well.

More recently, the working relationships devolution requires have been tested by withdrawal from the European Union. In such a highly contested political space, it is often not possible to resolve fundamental differences. It should nevertheless be possible to establish professional working relationships based on a higher level of trust than currently exists.

How the UK Government is structured and operates can make a significant contribution to developing relationships and building trust. It can also improve democratic accountability by encouraging a better understanding of the respective roles of the UK and devolved governments, and in particular the UK Government's role in serving people across the country.

This report assesses the UK Government's current Union capability and makes a set

1 By which the Review means a dependence on respective competences.

of practical recommendations, which can be taken forward in a timely manner to strengthen the working of the Union. They are intended to:

- embed the Union at the heart of UK Government policy development and decision-making
- achieve the optimum balance between the representational value of the offices of the Secretaries of State for Scotland, Wales and Northern Ireland, and the convening power of the Cabinet Office
- provide a more predictable and robust process for managing intergovernmental relations

Lord Dunlop

Summary

The recommendations in this report aim to ensure that the UK Government is working in the most effective way possible to realise fully all the benefits of being a United Kingdom. It makes the case for a transformation to guarantee that the Union is a mainstream consideration embedded in policy development, decision-making and delivery, and sets out a package of measures to support this change.

This report proposes:

- a new Great Office of State in the Cabinet
- a new structure supporting the separate offices of the Secretaries of State for Scotland, Wales and Northern Ireland with a single Permanent Secretary
- a new fund for UK-wide projects, including joint projects with devolved governments
- a new UK Intergovernmental Council (replacing the Joint Ministerial Committee), supported by an independent secretariat

These proposals, taken together, form a coherent plan to make sure that both the Union and devolution sensitivity are a fundamental part of the structure of the UK, delivering better governance for the UK as a whole. Trust, respect and co-operation between governments would be more than aspirations – they would be built into our system of government. Some of this will require increases in resources, and some requires existing resources to be redirected more effectively.

These changes will require leadership from the highest level of the UK Government. It is recommended that **a new senior Cabinet position** is formally recognised within the machinery of government with specific responsibility for the constitutional integrity of the United Kingdom. The new role, with the suggested title 'Secretary of State for Intergovernmental and Constitutional Affairs', should have a status akin to the Chancellor of the Exchequer, Foreign Secretary or Home Secretary. The new Secretary of State will speak in Cabinet for the constitution and will take a holistic view across the UK, arbitrating between other ministers. Just as the Lord Chancellor is responsible for defending judicial independence (as recognised in the Cabinet Manual), the new Secretary of State will have a duty to uphold the integrity of the constitution, including intergovernmental relations.

The Secretary of State for Intergovernmental and Constitutional Affairs should be supported by **a new Cabinet sub-committee** tasked with preparing cross-government strategic priorities to enhance the Union and ensure their effective delivery.

These suggested changes will give Union issues greater visibility at ministerial level. To amplify these effects, departments too must sharpen their focus on the vitality of the Union. It is therefore recommended that HM Treasury set aside **a fund for UK-wide projects**, which aims to incentivise and support departments to initiate projects that strengthen the Union. Allocation of the funding would be the responsibility of the new Cabinet sub-committee under the leadership of the new Secretary of State and fully involving the Secretaries of State for Scotland, Wales and Northern Ireland and Treasury ministers.

In addition, **a second portion of the fund, open to bids from UK Government departments and devolved governments working in co-operation** will be made available. This part of the fund will

encourage collaborative working and policy innovation in different parts of the UK. Departments will have an incentive to find support from devolved governments, and devolved governments will have an incentive to work in co-operation with UK Government departments.

In tandem with the new government structure and funding initiatives, the Civil Service must also meet the challenges of delivering policies for the whole of the UK. To that end, there should be system-wide reforms to the structure of departments to equip them with the necessary Union and devolution capability. **Any civil servant with ambitions to reach the higher levels of the service should acquire such capability**. In particular, devolution teams should not be peripheral within departments – they should be located at the heart of strategy and policy development. As a matter of urgency, departments should address the need for an increased policy presence in Scotland, Wales and Northern Ireland. There should also be more opportunities for loans and secondments between the UK, Scottish and Welsh Governments, and also greater interchange with the Northern Ireland Civil Service.

It is also important to address the question of the relationship between the UK Government and the devolved governments in Scotland, Wales and Northern Ireland. There is a broad consensus, with which the Review agrees, that the UK's intergovernmental relations machinery is not fit for purpose. The problem should be addressed by **the creation of a UK Intergovernmental Council (UKIC)**. It would replace the Joint Ministerial Committee and reset relationships for the future. It would be a forum for co-operation and joint working on both opportunities and challenges. As well as looking to make decisions by consensus on areas of devolved or shared responsibility, it should provide a platform for informed consultation by the UK Government on reserved matters.[2] Greater transparency, and scrutiny by Parliament, would incentivise the new body to reach consensual decisions.

UK Government ministers should be able to reach agreement at the Cabinet sub-committee. As a consequence, UK Government representation at the UKIC meetings could be smaller, and more effectively tailored to the agenda, which should improve intergovernmental discussion and make consensus easier to achieve.

To give all parties to the UKIC confidence that it is run fairly and impartially, it **should be supported by a standing independent secretariat**. Sub-committees should be constituted with specific aims and objectives.

Taken as a whole, these proposals are intended to build trust and respect between the institutions of government in the UK. The UK Government is the government of the whole UK and, if the relationship between the UK Government and devolved governments is to be fully mature, its role in all parts of the UK must be visible and transparent. If the UK Government's activities in Scotland, Wales and Northern Ireland are not recognised publicly, democratic accountability will be lost. It is recommended, therefore, that spending by the UK Government in Scotland, Wales and Northern Ireland **should be clearly marked with UK Government branding**.

To ensure a focused and effective communications strategy, UK Government departments should keep up-to-date and accurate data about activities and spending in Scotland, Wales and Northern Ireland. This would allow the UK Government to test the effect of their policies across the four nations and equip UK Government ministers visiting any part of the UK with the information they

2 In this report, the term 'reserved' is used, for ease of expression, to matters which are not within the competence of the devolved legislatures.

need to explain the impact of their own departments on that part of the country. The new Secretary of State for Intergovernmental and Constitutional Affairs should oversee a communications strategy for Scotland, Wales and Northern Ireland.

The report also notes the important roles and responsibilities of the many public bodies in the UK. Although these bodies often have responsibilities in all parts of the UK, it is not clear the extent to which a sensitivity to Union issues is baked into the appointments process and organisational culture. It is suggested that an audit of public bodies is undertaken. It is also recommended that the new Secretary of State for Intergovernmental and Constitutional Affairs should ensure that public bodies with a UK-wide remit are representative of the UK as a whole in the future.

There are some words which readers will see repeated in this report: trust, transparency, strategic, co-operation. These words encapsulate its overall theme. Government in the United Kingdom needs a cohesive and co-operative approach, which these recommendations aim to achieve. Solidarity and diversity are central to the character of the Union. The public expect UK and devolved institutions to work together in the interests of all. This report is intended to bring about a step-change to how government thinks and acts to meet public expectations.

Strengthening the Secretaries of State for Scotland, Wales and Northern Ireland.

Taken together, the Review's recommendations **greatly enhance the status** and voice of the Secretaries of State in Government, through:

a more **focused role**, working alongside the new senior Secretary of State for Intergovernmental and Constitutional Affairs

a requirement – in the **Cabinet Manual** – to be **consulted on policy** before it is submitted for collective agreement via the new Secretary of State's officials

a new Cabinet sub-committee to agree **UK Government positions** ahead of engaging with the devolved administrations

direct influence over a **specific budget** aimed at improving the UK Government's delivery in Scotland, Wales and Northern Ireland, as well as cross-border

a new shared policy function which retains distinct nation-specific coverage, **improving the range** of areas covered and **enhancing the quality** of the advice and support they receive

Introduction

As the United Kingdom prepares to leave the European Union, it does so with a very different constitutional architecture to the UK that joined the European Economic Community in 1973. In 1998, significant powers were devolved from the UK Parliament to legislatures in Scotland, Wales and Northern Ireland. In the years since, further powers have been transferred. The Government of Wales Act 2006 created the Welsh Government and, following a further referendum in 2011, greater fiscal and legislative functions were devolved by way of the Wales Acts of 2014 and 2017. In 2014, voters in Scotland chose decisively to remain part of the United Kingdom and following the referendum, the recommendations – including the power to raise taxes – of the Smith Commission were enacted by the Scotland Act 2016.

England has been subject to decentralisation: as well as in the capital, which is governed by the mayor-led Greater London Assembly, many other cities across the country now have directly-elected mayors. The many forms which devolution takes across the UK result in constitutional asymmetry and indeed there has been a long debate over the 'West Lothian question'.[3] That is, whether MPs from Scotland, Wales or Northern Ireland should be able to vote on matters that affect only England. Following the McKay Commission (2013), English Votes for English Laws was implemented by the UK Parliament in 2015 to seek to address this.

The UK Government remains responsible for huge swathes of UK-wide policy, for example defence, foreign affairs, pensions and the macroeconomy.

As the devolution settlements have evolved, the UK Government and, as a corollary, the Civil Service, have evolved to meet this changing constitutional landscape. It is timely for the UK Government to consider how, through its institutional arrangements, it ensures that the Union continues to prosper in the years ahead. This is more than understanding and being sensitive to devolution – the UK Government must consider its decisions through the specific lens of their impact on every part of the Union.

Review of UK Government Union capability

Following an announcement in July 2019 this Review has considered, within the context of the existing devolution settlements, how the UK Government can work to most effectively realise the benefits of being a United Kingdom and how institutional structures can be configured to strengthen the working of the Union. The objective is to articulate a coherent plan to deliver better governance for the UK as a whole, guided by the core principles of trust, respect and co-operation.

The recommendations are intended to improve the effectiveness of UK Government Union capability regardless of any future changes in the political makeup of the UK Government or devolved administrations. While the Review has been undertaken in the context of continuing challenges around the lack of an Executive in Northern Ireland its recommendations aim to be applicable both in the current situation and following the return of an Executive.

3 The question of the perceived imbalance in voting rights between MPs representing constituencies in Scotland, Wales or Northern Ireland and those representing English constituencies has been known as the 'West Lothian Question' since 1977 when it was raised by the MP for West Lothian at that time during a debate on devolution.

The findings of the Review were shaped by discussions with a range of stakeholders across the UK. These stakeholders included politicians, officials and academics. The wealth of literature, including academic papers and parliamentary inquiries, was of great help in informing these conversations. The Review was also aided by a number of UK Government departments including those which provided clarification on factual background.

The Review is indebted to all those involved in discussions, who provided input, or who engaged with the Review via its webpage.

Report structure

This report seeks to address a number of areas. **Chapter 1** discusses how the machinery of government has adapted to devolution. In particular, this section looks at whether the structure of the UK Government and its departments enables proper consideration of the Union in the process of policy development and delivery.

Chapter 2 explores the capability of the Civil Service in respect of the Union. This constitutes an assessment of departmental capability to deliver policies for the whole of the UK and an examination of the support civil servants receive to learn and develop the necessary skills to be effective in a UK-wide context.

In **Chapter 3**, the report turns to the role of spending and whether there should be financial incentives across government to encourage more collaborative working and the development of Union-enhancing policies.

Chapter 4 examines intergovernmental relations and how, particularly given the UK's exit from the European Union, these might be reformed with a new set of structures to replace the Joint Ministerial Committee.

The role of appointments in ensuring public services are delivered for the whole of the UK is the subject of **Chapter 5**. Finally **Chapter 6** considers the strategic role of communications in strengthening how the Union works.

The Review is not intended to be a complete implementation plan, but rather a package of reforms across a wide range of areas. Taken together, the reforms respond to the significant constitutional changes of the last 20 years and aim to transform the conduct of government business to put the Union at the heart of decision-making.

Chapter 1

Machinery of government

Over the last ten years, successive Prime Ministers have been increasingly explicit about the priority they attach to the overall health, strength and value of the Union. Their commitment cannot be doubted. The challenge has been to determine how this translates to practical policy development, decision-making and delivery to ensure that Union considerations are integral to the way in which Whitehall thinks and acts.

Sensible improvements have been made to the way in which the UK Government works and its awareness of devolution issues has improved. These represent helpful steps in the right direction. However, it is widely accepted that there is still some way to travel to reach a consistent and systematic consideration of how the UK Government delivers for the whole of the UK, with robust actionable plans. Moreover, it has never been more important for officials and ministers to possess a heightened sense of awareness of the implications of UK Government policy and action for Scotland, Wales and Northern Ireland at this critical juncture. Understanding the devolution settlements is necessary, but is not sufficient to enable officials and ministers to deliver a holistic Union strategy. The UK Government should be sophisticated enough to design policy for the UK as a whole or differential policy for its constituent parts. A transformation is required to make the Union a mainstream policy consideration. There is no silver bullet to achieve this – a package of mutually reinforcing measures is necessary to provide the right balance of incentives to bring about change.

Ministerial responsibility

The UK Government has, since 1998, organised itself in a variety of ways to manage its responsibilities in Scotland, Wales and Northern Ireland and relationships with devolved institutions.

Ministerial responsibilities for these interests have ranged from having Secretaries of State for Scotland, Wales and Northern Ireland jointly appointed to another department, through to the Deputy Prime Minister, First Secretary of State or Chancellor of the Duchy of Lancaster having specific responsibility for the UK Government's relationship with devolved administrations. More recently, the Prime Minister has added the title 'Minister for the Union' to his portfolio and set up a new unit in Number 10 to consider Union issues more carefully. Both these steps demonstrate the importance he attaches to the Union.

However, although a current priority, Union issues are not embedded in the machinery of government. Recent practice has been for the Minister for the Cabinet Office to have departmental responsibility for the Union. The weight and influence of the role has depended on who holds it. For example, the Review heard of the recent positive influence of David Lidington, building on the work of his predecessor Damian Green. Their seniority and proximity to the Prime Minister made them particularly effective in the role.

More robust and systematic arrangements are required to secure the effective and consistent management of Union issues in the future. The importance of the role must

transcend the holder of the post at any one time. The position and office holder need to be of sufficient stature and influence within government to both facilitate relations with the devolved administrations and to drive effective joint working across government. The right outcome can best be secured by adopting best practice, not relying on serendipity.

The Prime Minister needs to be supported as Minister for the Union by the establishment of an operational arm, in ministerial terms, with day-to-day oversight of matters related to Scotland, Wales and Northern Ireland and the constitution. A ministerial role with that brief, and with responsibility for advising and involving the Prime Minister at the right moments, should be established. The parallel is the Prime Minister's title of First Lord of the Treasury, which does not obviate the need for a Chancellor of the Exchequer.

The Cabinet's responsibility for the development of Union strategy, led by the minister with that portfolio, has often been supported by a Cabinet committee. Under the Coalition Government this took the shape of the Devolution Committee, chaired by the Deputy Prime Minister Nick Clegg and then by the First Secretary of State William Hague. There was also a Scotland Committee chaired by the Chancellor of the Exchequer, George Osborne. The Review has received evidence that the Devolution Committee did not work as effectively as it might have done because it had insufficient clarity of purpose. By way of contrast, the Scotland Committee, with a clearer objective, is regarded as having been more successful.

As well as the importance of a ministerial portfolio for the Union, the Secretaries of State for Scotland, Wales and Northern Ireland and their separate offices are integral to the vitality of the Union. Indeed, they play a crucial role in managing the UK Government's relationship with each devolved administration. That said, their departments are some of the smallest in Whitehall and they must try to cover the whole of the UK Government's policy agenda alongside developments in Scotland, Wales or Northern Ireland. The Review heard of the specialist local knowledge and experience the offices provide. However the small policy teams in each are stretched having to balance producing briefings and responding to parliamentary questions with driving and influencing the broader policy agenda. This means they may at times struggle to exert the right level of influence within the UK Government. This must be addressed.

An enhanced process has been introduced to support the write-round process within the UK Government to record the devolution or UK-wide implications of policy proposals being submitted for collective agreement. This seeks to ensure that all officials are conscious of the implications of their policy and helps avoid the three Secretaries of State offices or Cabinet Office having to 'catch' issues in the write-round process.

Machinery

Several UK Government departments have responsibility for policy areas with implications for the constitutional landscape. For example, the Ministry of Housing, Communities and Local Government leads the UK Government's English devolution agenda. With its joint BEIS unit, it has brokered City and Growth Deals across England, the latest in a range of initiatives designed to support localism.

Overall responsibility for Union policy sits with the Cabinet Office, supported by the newly established Number 10 Union Unit. The UK Governance Group (UKGG) was established in June 2015 to lead the UK Government's work on the constitution and devolution. It brings together, under one Civil Service command, the Cabinet Office's Constitution Group, the Office of the Secretary of State for Scotland, the Office of the Advocate General

for Scotland and the Office of the Secretary of State for Wales. The Northern Ireland Office (NIO) remains under a separate management structure although more recently, the UKGG has created a bespoke team to complement the NIO's work and some cross-cutting policy issues are now considered in collaboration.

The UKGG was set up to reflect the changes to the structure of the centre of the UK Government that occurred during the Coalition Government (2010 to 2015). An office was created for the Deputy Prime Minister within the Cabinet Office, headed up by a Senior Civil Servant. The Deputy Prime Minister's portfolio, which included constitutional reform, necessitated bringing civil servants with the relevant expertise into the centre of government. They came largely from the Ministry of Justice, which held the constitutional brief before then. When the Coalition Government ended, a decision was taken to maintain this pool of expertise under the newly established UKGG.

The creation of UKGG has greatly enhanced the way in which the centre and three Secretary of State offices work together and given the UK Government a greater presence in Scotland, Wales and Northern Ireland. It has provided a more powerful collective voice within the upper echelons of the government for issues related to Scotland, Wales and Northern Ireland and the Union. The Review received evidence of the significant value of the role performed by Philip Rycroft, the inaugural Permanent Secretary of UKGG. He was able to represent the interests of Scotland and Wales with his senior colleagues in the UK Government and vice versa. The Review also heard that much of this flowed from his career experience working in senior positions in both the UK Government and Scottish Government. His knowledge and experience undoubtedly enhanced the influence of UKGG within Whitehall. His seniority as Second Permanent Secretary in the Cabinet Office and later Permanent Secretary of the Department for Exiting the European Union was also a critical factor. A like-for-like replacement has not been appointed following his retirement from the Civil Service. The objective for the future is to ensure that his example is the norm and not an exception.

As part of UKGG, the HR, IT and finance functions of the offices of the Secretaries of State for Scotland and Wales are not streamlined. Their HR services, for example, are still provided by the Ministry of Justice as the successor to the Department for Constitutional Affairs.

Recommendations

The Review makes four main recommendations to address these issues.

First, **a senior Cabinet position with specific responsibility for the constitutional integrity and operation of the United Kingdom needs to be more formally recognised within the machinery of government**. The Review finds that the standing of the previous incarnations of this role should be enhanced. It should have a status equivalent to one of the Great Offices of State (the Chancellor, Foreign Secretary, or Home Secretary).

Providing greater clarity and visibility to the role will leave no doubt as to who in Cabinet has responsibility to speak for the constitution. In this context, functional descriptions matter. It is suggested that 'Secretary of State for Intergovernmental and Constitutional Affairs' would be an appropriate title. The Prime Minister will also want to consider how the seniority of this post is recognised and guaranteed. For example, the title of First Secretary of State or one of the historic titles could also be attached to the role, although the Review felt that Chancellor of the Duchy of Lancaster is a curiously inappropriate title for a

minister with prime responsibility for managing the UK Government's interaction with the devolved administrations. The status of the role could also be recognised in the Cabinet order of precedence.

An updated Cabinet Manual should attach certain duties to the role to uphold the integrity of the constitution, including the operation of intergovernmental relations. These duties would be akin to the Lord Chancellor's responsibilities, which transcend politics, regarding the rule of law and independence of the judiciary. The Review believes that this would also be a helpful innovation in the context of strengthening the machinery of intergovernmental relations.

The purpose of this role would be to take a holistic view across the UK, arbitrating when necessary between other ministers to make sure policy decisions are taken cognisant of the broader Union implications. The post-holder will also act as the principal interlocutor for the devolved administrations, supported by the Secretaries of State for Scotland, Wales and Northern Ireland.

The role should remain within the Cabinet Office, rather than establishing a new government department. This takes advantage of that department's convening power and overall responsibility for the implementation of government policy. The portfolio should include oversight of the wider constitutional implications of English devolution. However, the Review does not make the case for extending responsibility to English local government policy delivery, which should remain with the Ministry of Housing, Communities and Local Government.

The Prime Minister will clearly wish to consider whether this post-holder also acts as chair or deputy chair of any cabinet committees. In doing so, the Review thinks the importance of the core functions of the role and the need to devote sufficient time to them should be recognised.

The holder of this senior Cabinet role, will work with the Secretaries of State for Scotland, Wales, and Northern Ireland and their separate departments to discharge their important representative role in Cabinet and on behalf of the UK Government in Scotland, Wales and Northern Ireland.

In the wake of devolution the need for these roles has been questioned.[4] The Review concludes that there is great value in continuing to have ministers of Cabinet rank, providing a distinct voice and collective conscience for the interests of Scotland, Wales and Northern Ireland within the UK Government. This role cannot be performed by the devolved governments, who are not part of the UK Government and whose responsibilities are in their own areas of devolved competence. The influence of the Secretaries of State for Scotland, Wales and Northern Ireland within the UK Government will be reinforced by the new Secretary of State for Intergovernmental and Constitutional Affairs. The recommendations set out in this report are aimed at strengthening their capacity and influence to the positive benefit of the UK as a whole.

To build on the enhanced process for write-rounds, a new addition should be made to the Cabinet Manual. This should assign a specific role to the new Secretary of State for Intergovernmental and Constitutional Affairs' officials to approve, earlier in the process of collective agreement, the release of policy for write-rounds, which has a Union impact.

4 https://publications.parliament.uk/pa/cm201719/cmselect/cmscotaf/1586/1586.pdf

This is a role akin to that set out for HM Treasury (HMT) in the Cabinet Manual and is designed to have the effect of incentivising consideration earlier in the policy development process, not at the point the policy is submitted for clearance. Officials should seek to ensure the views of the Secretaries of State for Scotland, Wales and Northern Ireland are taken account of before collective agreement is sought as part of this process

The Cabinet is responsible for the development of Union strategy. To support this role and complement the enhanced Secretary of State, **a new Cabinet sub-committee should oversee the delivery and implementation of a set of strategic priorities and departments' plans to support the UK Government's Union agenda**.

This new sub-committee would avoid the pitfalls of predecessor committees by having a clear and focused remit: to agree a small list of cross-government strategic priorities that further enhance the Union and ensure their effective delivery. This committee should be supported by the Cabinet Secretariat.

It is envisaged this sub-committee will comprise standing membership of the new Secretary of State for Intergovernmental and Constitutional Affairs, the Chancellor (or, at their delegation, the Chief Secretary to the Treasury) and the Secretaries of State for Scotland, Wales and Northern Ireland. Other Cabinet ministers will be invited to attend depending on the agenda, not least to ensure effective accountability for the development and delivery of their Union plans.

Consideration should be given to using the Fusion Doctrine to support the sub-committee.[5] This is where a Director General is given specific responsibility for cross-government delivery against a particular theme or project it has agreed. This ensures that different policy options can be tested against a range of different departmental interests. The National Security Council has adopted this approach to make sure security policy balances the sometimes conflicting objectives in this sphere.

As a sub-committee of Cabinet it will be a forum for collective agreement. However, it should not replace other committee structures and processes used for discussing and collectively agreeing cross-government policy. The aim is for this sub-committee to supplement these processes and ensure in parallel that Union issues are effectively considered at all times. This forum could also be used to consider a limited range of spending decisions in concert with HMT, as discussed later in this report.

While a new Cabinet sub-committee will drive a more strategic approach to the Union, the Cabinet Manual should also be updated to make clear that all Cabinet sub-committees have a responsibility in their deliberations to consider the Union priority.

The Cabinet Manual makes clear that, by exception, devolved administrations can be invited to some Cabinet sub-committees with the agreement of the relevant chair. It notes that emergency responses may be one such example of this. The Review considers there is an opportunity to build on this provision. Even when the chair determines it is not appropriate to invite the devolved administration to the Cabinet sub-committee, if matters related to devolved competence are being discussed efforts should be made to share relevant extracts of documents in advance. An addition should be made to the Cabinet Manual to make this clear.

5 UK Parliament, 'Revisiting the UK's national security strategy: The National Security Capability Review and the Modernising Defence Programme', available at: https://publications.parliament.uk/pa/jt201719/jtselect/jtnatsec/2072/207206.htm

As well as the changes to the structure of Cabinet and its committees, Whitehall would benefit from a similar development of its structures. The Review concludes that now is the time to fully realise the benefits of UKGG and makes two specific recommendations to achieve this.

The first is **the establishment of a single Permanent Secretary Head of UKGG to lead the three offices of the Secretaries of State for Scotland, Wales and Northern Ireland as well as the relevant Cabinet Office teams, supporting the new senior minister and three Secretaries of State**. This will give Union strategy a coherent voice within government, for example at the weekly meeting of Permanent Secretaries chaired by the Cabinet Secretary, to which the Scottish and Welsh Government Permanent Secretaries and the Head of the Northern Ireland Civil Service are also invited.

The NIO has an important role in a number of sensitive issues in Northern Ireland, not least security and political strategy. This recommendation aims to ensure the importance of these issues is maintained and their status enhanced within the centre of government, ensuring there is a wider depth of understanding about Northern Ireland issues outside of the NIO. Although there may be advantages to the NIO having its own Permanent Secretary, which, it is argued, enhances the status of Northern Ireland issues, the Review is not persuaded these benefits outweigh the gains that would be made by bringing the NIO into the fabric of UKGG. This will better enable a more joined-up approach to devolution issues, while protecting the unique features of the individual devolution settlements. As a consequence, the risk of NIO exclusion from important conversations and decisions is minimised, and their voice is amplified by the power and capacity of the Cabinet Office.

To improve efficiency, career progression opportunities and ensure appropriate accountability, the back office functions (IT, HR, finance) of the offices of the Secretaries of States for Scotland and Wales, and the NIO should be merged into a single operating unit. In practice, this means:

- A single shared IT platform across all four units (likely adopting the Cabinet Office's system already in place in the NIO and planned for the Office of the Secretary of State for Scotland). This will allow for a more progressive and digital means of cross site collaborative working
- Moving to a single HR system with shared terms and conditions, and, where relevant, loan arrangements when staff are from other UK Government departments or devolved administrations. The result would be greater ease of movement between constituent units, more obvious career progression paths and a single 'brand' for recruitment purposes, under the Cabinet Office. It is likely within this structure a more standard HR Business Partner function could be created
- Creating a shared service model for back office and finance functions, while retaining specialist support bespoke to the different block grant transfer function for each nation

While there will be some upfront costs associated with this, it is expected that in a new shared operating structure that efficiencies could be realised in the longer term, which the Review strongly recommends are reinvested in policy functions. The Review further notes the importance of market-facing pay. It may therefore be necessary to have a degree of flexibility in current arrangements to ensure those based in geographical areas with other high public sector employment are able to compete for the highest quality candidates.

The second recommendation under this theme is that a **shared policy function for all three offices should be created in the Cabinet Office as soon as possible**. The Review proposes the creation of a shared policy function to improve the support available to the Secretaries of State for Scotland, Wales and Northern Ireland, structured around themes like ‘infrastructure’, ‘environment’ and ‘economy’. The aim would be to enhance the provision of high-quality policy advice and improve the collective influence of the Scotland, Wales and Northern Ireland policy interests across government. This function should be created from new resources in the centre and a pooling of most policy resources from the offices of the Secretaries of State for Scotland, Wales and Northern Ireland. It is expected this move will allow greater time to invest in building cross-government and external relationships, with outward facing engagement being a core part of everyone’s role within these policy teams. This recommendation aims to achieve the best of both detailed policy expertise and local knowledge by enhancing capacity and by enabling policy teams to specialise. It is hoped this would also have a positive impact on retention by providing greater and clearer career opportunities.

This change would represent a further development of UKGG, which has already been very successful in creating this sort of function for constitutional issues. It may be helpful to pick one or two themes to pilot a proof of concept. For the NIO in particular, this proposal will enable policy focus to be better separated between managing the most immediate and high priority issues and those focusing on longer-term strategy and policy development.

Recognising that Scotland, Wales and Northern Ireland have, at times, differing policy interests, these teams should have a named lead with principal responsibility for each nation. The Review recognises there will be times when the Secretaries of State have different priorities and will want to argue for distinct policy positions. The retention of Scotland, Wales and Northern Ireland ‘leads’ in each area will allow for this with the added benefit of avoiding duplication of policy advice on the basic factual and analytical aspects.

In London, these teams should be co-located. While the Office of the Secretary of State for Scotland will still reside in Dover House, and the Office of the Secretary of State for Wales in Gwydyr House, the shared themed policy teams will be located, in London at least, in just one of these buildings. Outside of London, the creation of UK Government Hubs will allow for this type of working arrangement and provide candidates applying to roles in this shared policy function more flexibility on location.

In practice, this means, and entirely in keeping with moves to refer to the relevant Secretary of State for Scotland, Wales and Northern Ireland as the ‘Offices’, the main teams that will continue to be exclusively organised on a nation specific basis will be: Private Office, Communications, Constitution teams (where there is a direct nation specific policy responsibility) and a small specialised project based unit to act as an intelligent customer of advice from the shared policy function. The remainder of services would then be ‘bought in’ from the shared function. In addition, it is likely the NIO will need to retain its specialist political strategy, legacy and security teams given their important expertise. The function complements recommendations considered under the capability chapter for all departments to greatly improve the effectiveness of their work in relation to Scotland, Wales and Northern Ireland.

Chapter 2

Civil Service capability

Successive Prime Ministers have made the Union a priority. It is vital the Civil Service has the requisite knowledge and most importantly, the skills, to support this priority. While the UK Government must respect the devolved administrations' responsibilities in devolved areas, it must ensure the Union is embedded at the heart of its policy development and decision-making. It is important to recognise that although devolution capability is vital, it is not the same as ensuring the Union priority is ingrained in policy development and decision-making. Departments need to move much more firmly and quickly to develop the confidence of their staff in discharging their UK-wide responsibilities.

This chapter of the report considers two aspects of capability:

- departmental capability to deliver policies for the whole of the UK, cognisant of where this has implications for devolved areas
- the capabilities of individual civil servants and the support (including incentives) they receive to continuously learn and develop the necessary skills to be effective in the context of the devolution settlements

Departmental

Each UK Government department has its own 'Devolution Team'. For some departments these teams can be sizeable, for example in the Department for Business, Energy and Industrial Strategy (BEIS) and HMT. For others the team can be as little as one full-time equivalent. These teams are responsible for straddling both devolution capability and ensuring, where appropriate, that UK-wide delivery is embedded in policy development. Teams can also support interactions with the devolved administrations and engagement with stakeholders in Scotland, Wales and Northern Ireland. It is important to recognise that even when policy is wholly devolved, it is possible policy changes have a spillover effect on another nation or administration. The Review heard of the example of the Teaching Excellence and Student Outcomes Framework (TEF). The TEF was introduced by the Department for Education and is primarily an English policy. That said, the TEF has consequences for the higher education sector across the UK: although each nation has its own quality assurance mechanisms, those institutions that do not subscribe to the TEF will need to demonstrate their quality to prospective international students in some other way. Indeed, while participation in the TEF is mandatory only in England,[6] concerns that the TEF could be perceived as an indicator of teaching quality for the whole of the UK have led universities from all parts of the UK to participate.

6 For providers with more than 500 undergraduates.

UK Government departments have various Devolution Team models. Some have specific policy responsibilities; others operate much more as a guidance service. All aim to improve the department's overall capability to engage with devolved governments across the UK and act as catalysts for change. Where Devolution Teams 'own' specific policy in departments, the Review heard this can have the effect of insulating the rest of the department from the need to develop the skills necessary to operate UK-wide. In extreme cases this has created a perception that teams absolve the wider department of responsibility for understanding the context in Scotland, Wales and Northern Ireland. To address this, some departments have created a network of 'champions' to help improve capability in different teams. However there seems to be considerable inconsistency in the effectiveness of this approach.

Every department has a Senior Civil Servant responsible for devolution who represents the department at meetings of the Devolution Leaders Network. Alongside other matters this is the Cabinet Office's principal means for discussing other government departments' Union priorities. The effectiveness of this network – in spite of attempts to test different structures and agendas – has been questioned as evidenced by the frequency with which attendance is delegated. As a result, the network has struggled to significantly support efforts to improve outcomes.

More recently, 'Union plans' have been created as a means of understanding what departments are doing to deliver UK-wide. This is a useful start. However the plans are often a brigading of existing policy. Most lack hard-edged metrics to monitor improvements and it's not always clear how they relate to the Cabinet's wider Union ambitions and strategy. There is a significant opportunity to embed a more creative consideration of the whole of the UK right at the heart of policy development.

In addition to Devolution Teams some departments have stakeholder engagement leads based outside of London. For example, BEIS and HMT do this in Scotland and their initiative has been warmly welcomed there. These roles are designed to engage with local stakeholders, representing their department and bringing back insights to inform the policy process. The Review heard that there is significant appetite for more of these sorts of roles to increase localised engagement.

One consequence of not having such a capability is that when a 'view' is required from one of the constituent parts of the UK, the first port of call is often the devolved administration, rather than interested stakeholders or UKGG or the NIO. Some departments such as the Department for Environment, Food and Rural Affairs have developed direct relationships with stakeholders across the UK, in other cases the practice has been to delegate responsibility for building relationships in Scotland, Wales and Northern Ireland to Devolution Teams or UKGG and NIO. Each UK government department needs to consider whether it has in place adequate mechanisms to engage with the full range of stakeholders across the UK. This will not always be appropriate on a nation specific basis, and departments should also consider where engagement is better considered on an economic regions basis as well.

The Review, for example, recognises a particularly strong case for the Department for International Trade (DIT) to have significant presence in Scotland, Wales and Northern Ireland, both to improve its offering to stakeholders and help facilitate joint working with the devolved administration. It is vital the whole of the UK benefits from DIT's work and global reach. There is clearly benefit from establishing close working relations not just with the devolved administrations but also with people and businesses in Scotland, Wales and Northern Ireland.

Foreign affairs are the responsibility of the UK Government, which ensures people and businesses across the UK benefit from the Foreign and Commonwealth Office (FCO)'s role to represent the whole of the UK and its global network of nearly 270 diplomatic offices. In recent years the devolved administrations have, to varying degrees, looked to expand their footprint overseas. Devolution capability is necessary not just to support joint working with the devolved administrations on matters of shared interest but also to maximise the FCO's contribution to the UK Government's Union priority. Since 2016, the FCO has developed a more systematic approach to devolution capability including under its overseas leadership programme.

Individuals

Improving Civil Service capability is not only important for the UK Government but also for the three devolved administrations. Capability needs to exist at all levels in the Civil Service. Although significant progress has been made over recent years, the initial focus has primarily been on knowledge rather than skills-based training.

Since 2015, the 'Devolution and You' programme has looked to improve civil servants' knowledge of devolution as well as their ability to work across administrations. The programme is run in partnership with both the Scottish and Welsh Governments, working closely with the Northern Ireland Civil Service (NICS) as well.

The programme:

- designs and delivers learning and development events
- co-ordinates, delivers and advises on interchange schemes – allowing staff to experience working in another administration
- evaluates devolution learning, including through an annual survey of staff devolution capability, and advises others on best practice

The Review heard strong support for the programme, which has successfully evolved since 2015 and plays an important role in improving capability. A number of areas for further development have been identified. The programme is characterised as self-selecting, both in terms of those accessing learning opportunities and those undertaking its annual Civil Service devolution capability survey. It can also be characterised in general as providing those taking part with devolution knowledge which, although important, is not the same as having the necessary skills to work in the devolution context. Recently progress has been made to include skills aspects and there is a strong case to build on this further.

The value of Senior Civil Servants having experience of working in both the UK Government and one of the devolved administrations has been referenced elsewhere in this report. However, there appears to be few structural incentives for this sort of experience to be more widely replicated. It is entirely possible, and even the current norm, to reach the highest levels in the Civil Service without ever having operated within a devolved context.

While the 'Devolution and You' programme has offered civil servants across administrations the opportunity to take part in an interchange week, there is less proactive encouragement to move between administrations for longer periods of time. As well as developing devolution learning, it is clear that all four administrations could gain from a greater interchange of staff. This would improve the UK Government's devolution understanding and capability. It would also provide opportunities for staff working in devolved administrations to gain further understanding of how Whitehall works

and aid capability in new policy areas as they exercise additional powers. Data does not currently exist on movements between the different administrations. While NICS is a separate Civil Service, with its own Civil Service Commission, staff interchange with other administrations is still possible. However this does not seem to be frequent and is rare outside the NIO.

Recommendations

Each UK Government department should have a Senior Civil Servant board member with lead responsibility for the department's devolution capability and Union strategy. All UK Government departments should ensure that Union and devolution issues are represented at the highest level within their organisations and sit at the heart of policy making and delivery. This should include having a member of the Civil Service leadership team with specific responsibility on departmental management boards for devolution capability and the Union priority. Permanent Secretaries should also show significant leadership in this area and this should be reflected in their objectives. Outcome-based metrics should be developed to manage performance and the nominated board member should work with the Permanent Secretary to improve performance.

Additionally, **all UK Government departments should have a nominated non-executive board members with specific responsibility to lead on advising and challenging the department on its Union strategy and devolution capability**. This board member should hold the Permanent Secretary to account for these priorities. Departments should consider the relevant skills and experience such a non-executive board member needs to perform this role. This should not remove the need for all board members to be engaged with the UK Government's Union priorities. The Cabinet Office should provide devolution and constitutional training for all sitting non-executive board members and establish a scheme to ensure all new non-executives undertake training ahead of joining a board.

The Cabinet Office should ensure there are outcome-based metrics to continually assess departmental capability. Within departments, the responsible board member should report to the wider board, the department's ministers, and the new Secretary of State for Intergovernmental and Constitutional Affairs on the department's performance and strategy for continual improvement. The non-executive board member may like to consider undertaking an annual audit to present to the board to ensure sufficient attention is given to this agenda.

Each UK Government department should ensure devolution teams are suitably located within the organisation to have greater visibility and significant influence on wider departmental strategy and policy development. Devolution Teams should therefore be suitably positioned at the centre of departmental strategy functions – close to ministers – so they have the ability and tools to have department-wide impact. It is vital Devolution Teams have the capacity to fulfil a dual role of implementing improvements in departmental capability and ensuring its plans are in line with the Government's Union priorities. Although Devolution Teams should support and enable other policy teams, the Union priority should be embedded at the centre of all policy development. Part of the success of Devolution Teams can be measured by the extent to which departments' reliance on them continues to be necessary.

The UK Government should urgently address the case for an increased policy presence in Scotland, Wales and Northern Ireland. Permanent Secretaries of departments with substantial reserved responsibilities should be required to produce specific plans outlining how their department will move policy posts into Hubs. In support of this recommendation, a cross-government programme lead should be appointed with strategic responsibility for ensuring Hubs are well populated with high quality policy roles. Having policy officials based in Scotland, Wales and Northern Ireland will also support co-operation with the devolved administrations and further improve individual devolution capability. UK Government Hubs in Scotland, Wales and Northern Ireland present the greatest opportunity to implement this change quickly. The UK Government should look to further use technology to ensure officials and teams based in Scotland, Wales and Northern Ireland are able to seamlessly engage with their Whitehall colleagues and ministers. This is entirely in keeping with the UK Government's wider estates strategy to reduce its expensive Whitehall footprint.

BEIS and DIT should urgently create more posts in Scotland, Wales and Northern Ireland. This will ensure local people and businesses have improved access to the services offered by BEIS and DIT. These posts should also be based in the Hubs.

The Civil Service should build on the work of the 'Devolution and You' programme by ensuring the full range of Civil Service leadership programmes include a significant devolution dimension. This should apply to leadership programmes such as the Fast Stream, Future Leadership Scheme and Senior Leadership Scheme. The Cabinet Office should work with other departments to ensure internal departmental leadership programmes also have significant focus on devolution and the Union. Internal communications are an additional and important means of promoting a better understanding of the devolution settlements more widely within the Civil Service.

Senior Civil Service job and person specifications should be amended to include a requirement to demonstrate significant experience working in or with one of the devolved administrations or a Union-related issue. In future, Civil Service leaders should not only have substantial knowledge of devolution, but also the skills to use this knowledge. Adding this to the requirements for entering the Senior Civil Service will encourage civil servants to develop these skills at an earlier stage in their careers. While working towards a more devolution-confident Civil Service of the future, it is important existing civil servants in senior roles feel fully devolution literate. Cabinet Office may like to consider a tailored learning course for existing Senior Civil Servants who wish to improve their skills.

The FCO should further build on the devolution and Union aspects of its Head and Deputy Head of Mission overseas leadership programme. It should also identify which other overseas roles would benefit from an expanded programme.

In order for the UK, Scottish and Welsh Governments to best realise the benefits of being one Civil Service, the UK Government should look to work with the Scottish and Welsh Governments to take steps to encourage more staff interchange between administrations. Expanding opportunities for staff, for example via loan and secondments, across administrations would have the additional benefits of expanding career path opportunities and providing experience within organisations of varying sizes, structures and functions. Beyond this, individuals and institutions could benefit from an expanded

set of working relationships and networks that such interchange will provide.

Although staff in the UK, Scottish and Welsh Governments benefit from extensive job opportunities as part of the same Civil Service, the Northern Ireland Executive functions with a separate Civil Service. While this might currently act as a barrier to more regular exchanges, the benefits of previous interchanges were brought to the attention of the Review. There appears to be a mutual appetite to encourage and enable greater interchange among NICS and UK, Scottish and Welsh Governments. **While respecting that NICS is a separate service, the UK Government should look to work jointly with NICS to increase interchanges. Cross government roles in the Civil Service should be open to NICS staff, whilst NICS roles should be more routinely open to civil servants working in the other administrations**. To support this, NICS roles should be advertised on the Civil Service Jobs platform, which should be also open to NICS staff.

The UK Government and NICS should work together to explore where both could benefit more from an increase in sharing best practice and, where suitable, resources. The Review heard a promising case for NICS to benefit from the Civil Service Commission making its expertise available in a Northern Ireland context. Extending its role in this way would allow NICS to benefit from the commission’s wider work, while ensuring it was accountable to Northern Ireland Executive ministers for its work in Northern Ireland. Additionally, where appropriate, Civil Service learning and development, as well as leadership programmes, should be open to civil servants from NICS.

Chapter 3

Spending

The Union is essentially based on solidarity. Its citizens share an expectation of standard of living, quality of infrastructure and recognition of fundamental rights and freedoms. One of the core functions of government is to collect taxes from its citizens and to redistribute those common resources in the way it considers most appropriate. UK Government funding should support communities in all parts of the UK. At the same time, UK funding in Scotland, Wales and Northern Ireland should not undermine the democratic accountability of different levels of government, or destabilise the devolution settlements. Changes which affect the Barnett Formula are out of scope for this review. However, significant evidence and commentary was received on other ways the UK Government funds public services in Scotland, Wales and Northern Ireland, which this chapter considers.

UK departmental spending

The first type of funding in Scotland, Wales and Northern Ireland is on projects and policies in reserved areas, where UK Government departments spend money across the UK on priorities set and approved by UK Government ministers. Examples include spending on security or defence, broadband, or the work of the Research Councils. At the start of each spending period, HMT will allocate each department a budget to deliver its priorities. It will then monitor the department's spending against these priorities and against the principles set out in Managing Public Money.[7] For a department to spend money, it has to obtain both the approval of Parliament for its budget, through the Finance Bill or supplementary estimates, and the ambit, or legal authority to spend, in any given area. Following devolution, UK Government departments have generally not spent in areas of devolved policy, though some limited powers remain to do so.[8]

Block grant

It is for the devolved administrations to set the budget for devolved services from the block grant they receive from the UK Government (and their own tax revenues and borrowing) according to local needs and priorities. This second type of funding is calculated using the relatively mechanical Barnett Formula (devised in 1978). The calculation of how much money is allocated to the block grant is based on looking at changes from the previous year's equivalent England spending and applying the Barnett Formula, which applies a population share to these changes. So, if health spending in England goes up, the Scottish and Welsh Governments, and the Northern Ireland Executive receive a budget increase, in proportion with the size of their population.

While the devolved administrations were initially funded almost exclusively by the UK Government block grant, the devolution of further tax and borrowing powers means they now have more accountability for the size of their budget, as well as how this is allocated between devolved public services.

7 HM Treasury, 'Managing Public Money', available at: https://www.gov.uk/government/publications/managing-public-money

8 As set out in the Local Government Act 2003, Industrial Development Act 1982 and Infrastructure (Financial Assistance) Act 2012

Additional spending

The third type of UK Government funding is provided to the devolved administrations to spend in specific areas or specific projects either in reserved or devolved areas. For example, if there is extreme weather in one part of the country but not nationally, it might be more appropriate to provide funding to support those areas affected rather than UK-wide. Similarly, this can work in other areas where there is agreement between the devolved administration and UK Government to work in collaboration. One of the most notable of these is the City and Growth deals programme, where funding is provided by the UK Government to the devolved administrations. The purpose is to transform major cities and areas over a ten to twenty year period according to priorities determined locally between local authorities, business and universities.

As a matter of technical practice, this UK Government funding is provided alongside the block grant and ring fenced for pre-agreed projects. The same is true for Northern Ireland funding directed towards addressing specific issues, like that agreed alongside the Stormont House Agreement. Other examples of this type of expenditure are investments of UK-wide significance which, in technical accounting terms, fall into devolved areas of competence, like UK Government additional investment in V&A Dundee, or the Lloyd George Museum, Llanystumdwy.

Actual spend on public services per head in the UK is: £11,190 in Northern Ireland, £10,881 in Scotland, £10,397 in Wales, and £9,080 in England. The UK average spend per head is £9,350.[9]

Challenges

Over recent years questions have been raised as to whether the UK Government's spending levers are sufficient in Scotland, Wales and Northern Ireland and whether changes might be required to ensure better delivery of services and other initiatives for the whole of the UK. In particular, there are concerns about the inability to celebrate UK-wide cultural initiatives effectively, or to ensure UK-wide strategic priorities. As the UK leaves the European Union, there is also a debate around the delivery mechanism for the domestic replacement to EU programmes.

It may be argued that UK Government funding in relation to devolved matters, albeit with agreement, makes it unclear where different governments' responsibilities lie. In systems of devolved government, it is important the electorate understands which government to hold to account for levels of funding and how funds are spent. However, it is also important not to overstate this risk. The UK Government has no incentive to blur levels of accountability. It is in the interests of the UK Government to ensure that funding is properly targeted and does not impinge on the policy initiatives for which devolved governments will be held to account. It is, however, not clear to what extent, once additional UK Government funding in devolved areas is agreed (for example in City Deals), the UK Government has the necessary presence on the ground to support delivery. As discussed in the chapter on communications, there is a tendency to fund and forget as well as devolve and forget.

The Review has also considered whether additional UK Government funding in Scotland, Wales and Northern Ireland risks diverting resources from parts of England, which might also have a valid claim for additional funds. However, it should be

9 National Audit Office, 'Investigation into devolved funding' available at: https://www.nao.org.uk/wp-content/uploads/2019/02/Investigation-into-devolved-funding.pdf

noted that the sums of money used for funding projects in devolved areas – while significant for those areas – are relatively small in comparison with the budgets of larger departments. Also, the underlying rationale for the kind of funding proposed here is that it will improve life in the whole of the UK. Often consideration of spending is done in 'nation' terms rather than driven by the need to consider cross-border shared economic areas. Moreover, funds to enhance collaboration within the UK are modest compared to the potential costs to all parts of the UK that would be incurred by all parts of the UK should the current sense of solidarity within the country ever break down.

It is also sometimes suggested that the UK Government should be prepared to give funding directly to local authorities in Scotland, Wales and Northern Ireland as a way of ensuring that funds are used for their intended purpose. While there may be a case for, exceptionally, ringfencing some funding to direct at a specified purpose, the Review has concluded that it is not necessary or productive to bypass the devolved governments in funding arrangements and would be difficult to do without legislation. As noted elsewhere, there is a need for transparency in funding arrangements, and if such arrangements are open to public scrutiny, direct funding should not be required to achieve the intended outcome.

Recommendations

In considering the question of spending, the Review has rigorously taken note of its terms of reference and has not considered changes to the Barnett Formula. Instead, the Review has sought to balance the concerns expressed with creating the right incentives across government to make sure the whole UK is at the centre of policy considerations. In particular, creating a greater role for the Secretaries of State for Scotland, Wales and Northern Ireland to positively influence UK Government spending priorities, given their own modest departmental budgets. The Review seeks to build on the success of joint investment by creating greater opportunities to work with the devolved governments and encourage co-operation. However, it is also recognised that funding by the UK Government in devolved areas must not replace core funding and must be applied with the support of the devolved governments.

It is recommended that HMT should set aside a fund for UK-wide projects. In reserved areas this fund should be aimed at UK strategic projects. Departments developing such initiatives should be able to bid for resources from this fund in addition to the money they receive for UK-wide policy implementation from the Spending Review. The aim of this fund would be to address the challenge that when prioritised, projects in Scotland, Wales and Northern Ireland will often compete poorly with those in England. It should also allow for greater cross-border consideration in shared economic areas. It would also provide Whitehall departments with a positive incremental incentive to make the Union a central part of their policy development and delivery. This fund should be directed towards increasing reserved activity in Scotland, Wales and Northern Ireland without impacting standard 'value for money' assessments, which departments will use when considering the allocation of funding for projects. It is anticipated that this fund will be used to co-fund projects alongside funding from existing allocations.

As discussed earlier in this report, there should be a new sub-committee dedicated to considering Union policy. The Review concludes this sub-committee would be the most appropriate forum to consider the allocation of this funding, under the leadership of the new Secretary of State but working in tandem with the Chancellor, or delegated to

the Chief Secretary to the Treasury. Projects demonstrating a positive local impact in Scotland, Wales or Northern Ireland would be most appropriate for this type of fund. In further support of this, changes could also be considered to guidance on appraising and evaluating business cases to put the Union more central to these considerations.

In devolved areas, there should be a second portion of the same fund, which is open to bids from UK Government departments and devolved governments working in co-operation. That is, the funds would be applied to projects where there was agreement between a UK Government department and individually the Scottish Government, Welsh Government or Northern Ireland Executive.

The second co-operation fund would incentivise cross-border working between the different administrations and could enable different types of co-ordinated policy innovation in different parts of the UK, including England. Examples include innovative fishing or farming techniques, to efforts to tackle drug abuse, increase productivity or reduce carbon emissions. This sort of approach to common endeavours is discussed again in the section on intergovernmental relations.

It is important to recognise that where something has been devolved there are still opportunities for working together and building a common policy across the UK. In these circumstances the four governments, or combinations of them, can come together as partners in a common endeavour. UK Common Frameworks, in the process of being established for when the UK leaves the European Union, prove this point. The funding incentive would work in two ways: first, devolved governments would be presented with the opportunity to work with the rest of the UK or, where it did not wish to work jointly, to refuse funding. Second, a UK Government department with the support of the devolved governments would be in a strong position to make a case for funding to HMT. By supporting co-operation, this recommendation complements the approach proposed for reformed intergovernmental relations – to change the mindset from simply dispute management to a more positive agenda of finding reasons to work together.

The Review does not make specific recommendations on the size of the fund, but expects that to deliver significant UK-wide strategic priorities it is likely to need to be in the hundreds of millions, akin to the scale of funding allocated to City Deals over a comparable period. As a result, it does not call into question anything related to the Barnett Formula.

UK Government departments, when providing funding in Scotland, Wales and Northern Ireland, outside of the block grant, should monitor the application and effect of that funding at local level to ensure value for money.

Although, as noted above, funding schemes such as City Deals can be considered a success, it is nevertheless essential that the UK Government's interest in the project does not end when funds are delivered. The impact of the funding at local level must be monitored and assessed to ensure that not only are the funds delivered to the right destination, but that they have the intended effect.

Where funds are spent in relation to reserved matters, a UK Government department clearly has an interest in ensuring that the taxpayer receives value for money. However, even where the UK Government does not have a formal accounting officer role, it should still protect the interests of the public purse by close monitoring of the schemes, which are being funded and putting in place the necessary staff resources to do so.

Chapter 4

Intergovernmental relations

Since the transfer of significant powers to devolved institutions in Scotland, Wales and Northern Ireland, the three devolution settlements defined in statute have set out the roles and responsibilities of UK and devolved institutions. Throughout this the UK Parliament remains the Parliament of the whole of the UK with MPs representing constituencies across England, Scotland, Wales and Northern Ireland. Alongside the statutory framework, non-statutory arrangements have supported intergovernmental relations (IGR) between the UK Government and three devolved administrations.

Since their establishment these IGR arrangements have remained broadly unchanged despite significant shifts in constitutional and political circumstances.

First, changes made over the last ten years have substantially increased the powers and responsibilities of the devolved institutions. They have also meant the settlements are more complex with many areas of shared competence and overlap.

Second, the UK's exit from the European Union has heightened the imperative for collaborative working, because UK common frameworks will need to replace EU rules and the UK Government's reserved policy responsibilities – for example negotiating trade or other international agreements – will interact with areas of devolved competence.

Third, the governments in London, Cardiff and Edinburgh were, at the outset of devolution, predominantly drawn from the same political party. Intergovernmental relations were therefore handled on a more informal basis through well established party channels. The machinery for handling intergovernmental relations was never stress-tested from the beginning for a situation where there are governments of different political hues in the four capitals.

In the context of these significant changes there is broad consensus, with which the Review agrees, that the IGR machinery is no longer fit for purpose and is in urgent need for reform.

It is important to be realistic about what this reform can achieve. No IGR machinery, however perfect, is capable of resolving fundamentally different political objectives of the respective administrations, particularly where these involve very different visions for the UK's constitutional future, and nor should it. It is, however, realistic to expect that serviceable and resilient working relationships, based on mutual respect and far greater levels of trust, can be established between the governments across the UK. Indeed it is clear that beyond well-publicised political differences, the administrations can and do work constructively together.

Looking to the future it will be essential to put in place a more transparent, predictable and robust system for intergovernmental relations to support the day-to-day contacts between administrations. The machinery supporting IGR should act as a stimulus for more mutually beneficial working relationships rather than as a platform for public dispute or grievance. Whether this machinery is set out in statute

or political agreement is an area of debate, which the Review seeks to address through its recommendations.

An improvement in IGR should also have the positive effect of encouraging more dialogue and relationship building between the UK Parliament and the devolved legislatures. This could build on the recent welcome innovation of the Inter-parliamentary Forum on Brexit.

Joint Ministerial Committee

Since 1999, the primary IGR machinery has been the Joint Ministerial Committee (JMC), which works to the following Terms of Reference:[10]

- *to consider reserved matters which impinge on devolved responsibilities, and devolved matters which impinge on reserved responsibilities;*
- *where the UK Government and the devolved administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in the different parts of the United Kingdom;*
- *to keep the arrangements for liaison between the UK Government and the devolved administrations under review; and*
- *to consider disputes between the administrations.*

The Prime Minister chairs JMC Plenary meetings attended by the heads of the devolved administrations and Secretaries of State for Scotland, Wales and Northern Ireland. Other UK Government and devolved administration ministers are invited to attend when appropriate. Although the JMC Plenary is intended to meet at least once a year, it has at times gone much longer without meeting. Unlike summits of the British-Irish Council the JMC is generally restricted to the formal meeting and lacks, beyond some bilateral meetings, a wider set of surrounding engagements.

A Memorandum of Understanding (MoU) and supplementary agreements sets out that *"the JMC is a consultative body rather than an executive body, and so will reach agreements rather than decisions"*[11] Through this the JMC does not bind any of the administrations. Although the MoU has not been updated since 2013, a Cabinet Office led review into IGR is currently ongoing. To date, the following draft principles have been agreed (but not yet formally agreed by the JMC Plenary) to build on and sit alongside the existing MoU and inform its future development:[12]

- *maintaining positive and constructive relations, based on mutual respect for the responsibilities of governments across the UK and their shared role in the governance of the UK*
- *building and maintaining trust, based on effective communication*
- *sharing information and respecting confidentiality*
- *promoting understanding of, and accountability for, their intergovernmental activity*
- *resolving disputes according to a clear and agreed process*

In addition to the JMC Plenary, the JMC also meets in a number of sub-committees. Prior to the EU referendum these comprised a

10 'Memorandum of Understanding and Supplementary Agreements', available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf

11 Ibid

12 'Agreement on Joint Working', available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814304/2019-07-03_Agreement_on_Joint_Working.pdf

JMC Europe (JMC(E)) and a JMC Domestic (JMC(D)). JMC(E) was to take place in advance of European Council meetings and JMC(D) was designed to discuss a range of issues across the devolved and reserved policy space. However, JMC(D) has not met since 2013. Since the EU referendum, a new JMC EU Negotiations (JMC(EN)) has met 20 times in order to facilitate engagement and collaboration between the UK Government and devolved administrations on the UK's exit from the European Union. JMC(EN) has, with the exception of one meeting, been chaired by the UK Government although it has sometimes taken place outside of London, as has its sub-committee the Ministerial Forum (EU Negotiations).

The JMC Plenary and JMC sub-committees are supported by a joint secretariat. The Cabinet Office has lead responsibility for this and despite the secretariat supporting all four administrations, it is not regarded outside the UK Government as a truly joint secretariat to the extent the MoU would suggest.

After meetings of the JMC(P) or JMC(EN), a joint communique is produced setting out the areas discussed. However, communiques are short, largely agreed in advance and provide little insight into the matters discussed. The void this creates is filled by media statements by attendees focused more on political messaging than providing transparency. This has resulted in these JMCs being characterised largely as a forum for airing grievances and managing disputes rather than for fostering effective collaboration. This issue has been exacerbated by limited reporting to Parliament following JMCs.

Following the EU referendum the administrations have worked closely to address the need for UK-wide Common Frameworks once the UK has left the European Union. The UK Government has committed to providing jointly agreed quarterly reports to Parliament on progress towards Common Frameworks. This commitment has been warmly welcomed and shows the benefits increased transparency can have in shaping constructive and collaborative behaviours.

Outside of the JMC machinery, and in addition to the everyday interactions between administrations, there are multiple forums for technical discussions which highlight the benefits of the four administrations' ability to work constructively. Following the Smith Commission, the UK Government and Scottish Government have worked together via the Joint Ministerial Working Group on Welfare to implement the devolution of substantial welfare powers. The Inter-Ministerial Group for Environment, Food and Rural Affairs was established following the EU referendum to provide central co-ordination and promotion of greater collaboration in areas of shared interest between administrations. Furthermore, there are specific committees established to help manage matters of finance between HMT and the devolved administrations.

There is now a widely-held view that the JMC structure sitting above the technical level forums needs to be fundamentally reset. What has become a forum largely for airing grievances and managing disputes needs to evolve into a forum for fostering more effective collaboration. This is not easy to achieve in the current context of the UK's as yet unresolved and highly-charged withdrawal from the EU.

The JMC machinery must look and feel like a joint endeavour. In the absence of a regular programme of meetings across the full range of issues, there is a clear sense that JMC meetings take place at the request of the UK Government. Some have argued that the best way of achieving regularity is to put IGR on a statutory footing, and to use that as a means to build trust. The Review concludes this would fundamentally miss the point of what the IGR machinery is there to achieve – the management of political matters.

While the Review therefore agrees there should be a far greater role for Parliament in scrutinising discussions which take place in an IGR setting, to put their basis in statute risks dragging the courts into what fundamentally should be a political and parliamentary realm. In order to build respect and trust around IGR it is therefore important political differences are handled in a political, not legal, space. Indeed, statute could also prevent the necessary flexibility required in the system to respond to changing circumstances. Moreover, increasing the scope to involve the courts to resolve disagreements could militate against reaching timely agreement on contentious issues. Greater transparency and more robust scrutiny by the UK Parliament and the devolved legislatures is a more appropriate means of encouraging the right types of collaborative behaviours. The Review therefore concludes that this can be far better achieved by agreeing a clear statement of intent between all parties.

The Review heard that JMC(E) is often regarded more positively than other committees, largely because it has a clarity of purpose alongside a regular drumbeat of meetings to coincide with EU Council meetings. This resulted in a shared need to establish, beforehand, the UK's negotiating position. Not doing so risked undermining all parties' positions resulting in an undesirable outcome for one or more constituent parts of the UK. This created a platform for compromise, which has not been a universal feature for the wider JMC machinery.

The pace of policy development around the UK's exit from the EU has strained the trust required for effective intergovernmental relations. As policy issues have developed, little time has been afforded to discuss details and share documents between administrations. While the UK Government has at times rightfully completed internal collective agreement before sharing with the devolved administrations, this has led to frustration from the devolved administrations around the JMC(EN) process. This has been compounded by the use of the term 'oversight' in the JMC(EN) Terms of Reference, which created a false impression from the outset about what would be possible and therefore achieved.

The differing nature of JMC(E) and JMC(EN) highlight that, although at times the UK Government is seeking to come to a joint decision for a UK-wide approach on a devolved matter, at other times it is informing on a reserved policy matter. However, the approach the UK Government takes to constructing these different types of discussions does not differ. This has led to further frustration on the part of those attending from the devolved administrations and criticism of JMC as simply a talking shop. The UK Government needs to be much clearer when it is consulting on reserved matters and when it is seeking to come to a joint decision on matters engaging a devolved competence.

The Review heard varying views on how IGR machinery should approach joint decision-making on areas of devolved or shared competence. There are different ways to address this, from co-decision by consensus through to a voting system. However, formalised voting systems dilutes the need to build trust through consensus and by design imposes decisions on administrations in their own areas of competence without their consent.

The Inter-Ministerial Group for Environment, Food and Rural Affairs provides an example of co-decision by consent. The location and dates of the meetings are agreed on an annual basis with the intention of a rotating host and chair. This helps build a sense of joint endeavour while agendas are provided by a supporting officials' board and jointly agreed. This style of group not only shows it is possible to create positive opportunities for

IGR to address areas of shared interest but has the potential to build on the approach to co-operation funding set out earlier in this Review.

The asymmetric nature of the UK's structure and that of the three devolution settlements inevitably leads to an imbalance between representations from across the UK. The Review heard of two particular issues raised by the asymmetric nature of the current devolution settlements.

The first was regarding the representation of England within intergovernmental structures and in particular the 'dual hatted' nature of the role of UK Government ministers. While the settlements differ, largely, on reserved matters the UK Government is speaking for the whole of the UK. At other points – where the issue concerned is a devolved competence – they are speaking primarily for England. On the one hand this can be seen as an over-representation of England, given the UK Government ministers are representing both England and the UK. On the other hand, some see this as deficient from an English perspective, given that UK Government ministers represent the whole of the UK on reserved matters and not just England. As discussed under capability, much of this needs to be addressed through a far better understanding in UK Government departments of spillover effects of policy.

This issue is further complicated on matters of shared competence and again highlights the need for IGR structures to be clearer when the UK Government is consulting on reserved matters and when it is seeking to come to a joint decision on devolved matters. This will become increasingly important as the UK looks to negotiate new trade agreements around the world. The UK Government is responsible for conducting trading negotiations with foreign states. However, given this will often interact with areas of devolved competence, the UK Government will be best served by regular engagement with the devolved administrations in the build up to, process of, and conclusion of negotiating new trade agreements.

Secondly, there were also differing views of the roles of the Secretaries of State for Scotland, Wales and Northern Ireland within the JMC and IGR more generally. Although, to improve the numerical division between administrations, there is a case for reducing the number of UK Government ministers attending JMCs, a balance needs to be struck to ensure that IGR structures allow UK ministers to suitably carry out their full range of responsibilities.

Recommendations

Intergovernmental relations should be recalibrated and the JMC replaced by a UK Intergovernmental Council (UKIC) with a number of sub-committees. Mutual respect and trust are central to effective intergovernmental relations and a new structure is needed to reset relationships for the future. This structure should look to provide regular and high level ministerial engagement above, and in addition to, the wider interactions taking place between administrations. As a significant departure from the current JMC, the title 'UK Intergovernmental Council' represents much more than just a change in name, and far better reflects the ambitions of this new IGR machinery. To provide regularity and suitable flexibility, the four administrations should agree a new MoU with a very public political declaration to underpin the UKIC and politically bind the administrations into a new way of working. The new arrangements should be much more open to scrutiny to further support those involved to conduct business in the spirit of collaboration.

The Prime Minister should host a summit at least twice a year based around a meeting of the UKIC with the heads of each administration. Summits should not be restricted to the meeting of UKIC and should provide opportunities to build trusted relationships by including wider engagements. Given the priority Prime Ministers have attached to this issue, the Review considers this level of commitment entirely appropriate within the constraints of their diary. Summits could include a press conference afterwards so all attendees can hear each others' comments on the discussion and more collegiate behaviours can be encouraged.

The UKIC should be supported by an independent secretariat. A standing independent secretariat should work closely with all four administrations on the schedule and agendas of meetings. This secretariat would be largely administrative and manage the logistical coordination between all parties. Although the secretariat should strive to ensure agreement on agendas, all administrations should be able to propose items. This will ensure all parties to the council feel confident their representations are being fairly heard. The recruitment of the secretariat should be a joint exercise and roles should be open to staff from all four administrations. Consideration should be given to a location outside of London for this secretariat.

UK Government ministers should provide a statement to Parliament following each meeting. The devolved administrations could also consider providing statements to their respective legislatures. To further enhance scrutiny, the secretariat should lead on the production of two annual UKIC reports. These should follow the UKIC heads of government summits but also report on the activity of sub-committees. This should be in addition to informative communiques following each meeting and seek to build on the sort of reporting agreed on UK Common Frameworks already in place.

There should be a number of sub-committees within the structure. Given the need to adapt to changing opportunities as well as challenges, a one size fits all approach will not work. Instead, committees should be constituted and meet dependent on individual aims and objectives. Each committee should be clear from the outset whether it is consultative on a reserved area, or whether it is a decision-making forum where all three devolved institutions have competence.[13] Some may benefit from the support of the independent secretariat. In reserved areas it is more likely to be appropriate for the secretariat to be provided from within the UK Government, however the principles of transparency remain as relevant.

The new UKIC should look to take on a decision making role via co-decision by consensus. The result of an inability to proceed with a decision by consensus will differ depending on the topic under discussion, which is discussed further below. However, whenever it is not possible there should be complete transparency on why consensus was not possible and why whatever conclusion has been reached. The effect of this is to open up the process to scrutiny and create incentives to find consensus.

The UK Government should use the new Cabinet sub-committee (recommended earlier) to agree UK Government positions in advance of meetings of the UKIC and its sub-committees. While there is a role for the Secretaries of State for Scotland, Wales and Northern Ireland in supporting the Prime Minister at UKIC heads of administrations summits, the Cabinet sub-committee should be used as their principal means for

13 Where matters only affect one or two administrations, these should be considered outside of this JMC structure.

influencing the UK Government's position in advance of UKIC sub-committees. This should reduce the number of UK Government ministers at UKIC sub-committees, creating better atmospherics in the room, and at the same time enhancing the pivotal role the three Secretaries of State have in determining and influencing the UK Government's position. As a forum for collective agreement, this will also allow the UK Government to share more information at an earlier stage in the process.

While the Review does not make specific recommendations about how the English voice is understood, it notes that consideration could be given to establishing an English Regions Forum, to feed views in from other sub-national governments in England to relevant UK Government ministers ahead of UKIC meetings.

The exact nature of sub-committees should be determined by the Prime Minister and heads of the devolved administrations, however the Review considers that frameworks and the internal market, as well as trade and future EU negotiations are early areas appropriate for sub-committees. In addition, considerations could also be given to how UK wide issues of common interest, like efforts to address climate change could feature in this architecture.

A UKIC sub-committee focused on the internal market could provide a forum for high level strategic discussions not just regarding individual frameworks but on a whole range of issues relating to the functioning of the UK's internal market. Given discussions are likely to be primarily based on devolved areas, there is a case for this sub-committee to have a rotating chair between administrations and would be an example of a forum seeking to make co-decisions by consensus. Non-consensus could mean there is an agreement to no change or to proceed with change but not on a UK-wide basis, conscious of the impacts to the UK internal market of this action.

A sub-committee focused on the UK's future economic partnership with the EU and future international trade arrangements should be chaired by the new Secretary of State and bring together relevant Brexit and trade ministers from the UK Government and the devolved administration. The UK Government should be prepared to share its position at a developmental stage in confidence with the devolved administrations, in the full knowledge of all concerned that any breach of confidence will have adverse consequences. This would follow from extensive technical engagement expected to take place outside of the UKIC architecture.

DIT and other UK Government departments should build on wider examples of technical engagement and explore establishing inter-ministerial groups. The Inter-Ministerial Group for Environment, Food and Rural Affairs provides one example of this, however departments should not be restricted by a one size fits all approach. While UKIC sub-committees may meet a number of times a year inter-ministerial groups would provide a platform for more regular engagement and more detailed technical discussions. Although separate from the UKIC structure, these forums could, where suitable, feed into UKIC discussion on a regular or ad hoc basis. For example, while UKIC should focus on high level issues and strategic matters, inter-ministerial groups should consider and discuss details and technical matters. With regard to international trade, this multi-layer approach will provide devolved administrations a substantive platform to be significantly involved in the formulation of the UK Government's approach to trade negotiations, while respecting that trade negotiations are ultimately a reserved matter. For UK Government departments responsible for policy primarily in the devolved space, inter-ministerial groups would provide a new forum of sharing information and best practice while ensuring more substantive engagement around spillover of policy development and delivery.

Handling disputes

The package of IGR reforms proposed by the Review is specifically aimed at increasing trust and reducing tensions leading to disputes. By including opportunities for far more scrutiny, there are many more opportunities to resolve areas of political disagreement earlier in the process. However, as noted at the outset, there are limitations to what IGR can achieve and it is therefore necessary to be clear on what is required should an area of political disagreement become a formal dispute.

The current MoU underpinning the JMC sets out a procedure for dispute avoidance and resolution. This process includes an attempt to settle differences at working level before reference to the secretariat and allows for, where necessary, a UK Government-chaired JMC meeting to attempt to resolve disputes. The process also provides an opportunity for independent analysis to be commissioned with the support of the secretariat. There have been only a handful of formal disputes raised through the JMC process.

While the lack of formal disputes over the past 20 years should be welcomed, it could also be an indicator of a lack of confidence in the existing resolution process. The Review heard criticism of the current JMC dispute resolution process, particularly in relation to the perceived role of the UK Government as the arbitrator of any possible dispute due to its role as the chair of JMC meetings (including where it is one of the parties involved in the dispute). Furthermore, the process is based on consensus, which means that any administration involved in a dispute has to agree that it is a dispute before it enters into the formal dispute process. This means that administrations party to a dispute could block the dispute from being escalated if they do not perceive it to be a legitimate dispute. For example, in 2017, the Welsh and Scottish Governments looked to raise a dispute relating to the funding agreed for Northern Ireland following the general election. However, the UK Government did not agree that this case should be considered by the dispute resolution process, making clear the funding was provided in line with HMT's Statement of Funding Principles. Although the UK Government set out its reasoning, the fact it could block the process while also being one of the parties involved was considered by many to be a clear conflict of interest.

This highlights the strong case for the creation of a more robust and trusted dispute handling process. The Review heard a number of suggestions to enhance the handling of disputes including binding independent arbitration. Although this could provide a more definitive outcome from disputes, it not only risks confusing political disputes with possible legal disagreements and also fails to support wider ambitions for creating more respect and trust between administrations. Some have suggested a solution would be for one of the four administrations not directly involved in a dispute to act as a mediator. However, this risks unnecessarily drawing administrators into disputes unconnected to them and may not always be possible, for example if a dispute involved all four administrations. Therefore, **the new UKIC should have a clear dispute handling process**.

Within these reforms there should be a clear set of robust steps, including extensive informal discussions at official and ministerial level, aimed at resolving a dispute. In addition, consideration should be given to including an independent element where there is a benefit to all parties, to address concerns about one party being both judge and jury. The independent secretariat should be responsible for administratively managing the dispute process.

The independent element could include in some circumstances the use of a mediator. The mediator could facilitate further discussion between the parties if they considered

this helpful, as well as consider evidence, including independent technical evidence, before making an impartial proposal on a way forward. The Review has noted the agreement already reached between the UK Government and devolved governments for an independent report and recommendations to inform the reviews of the fiscal frameworks for Scotland and Wales.[14] A role for independent mediation could fulfil a similar function in the context of disputes. In keeping with the Review's other IGR recommendations, the dispute handling process should be transparent both through reporting to Parliament and the UKIC annual reporting. The history of devolution demonstrates that the vast majority of possible disputes can, despite significant political differences, be avoided at an early stage. It is important that a new dispute resolution system does not hinder earlier action to avoid formal disputes.

14 'The agreement between the Scottish government and the United Kingdom government on the Scottish government's fiscal framework', available at: https://www.gov.uk/government/publications/the-agreement-between-the-scottish-government-and-the-united-kingdom-government-on-the-scottish-governments-fiscal-framework; 'The agreement between the Welsh Government and the United Kingdom Government on the Welsh Government's fiscal framework', available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578836/Wales_Fiscal_Framework_Agreement_Dec_2016_2.pdf

Chapter 5

Appointments to UK bodies

To realise the benefits of embedding the whole of the UK at the heart of government, consideration needs to extend beyond the Whitehall machine.

Each year, the UK Government makes appointments to the boards of over 550 public bodies.[15] In total, these organisations spend over £200 billion per annum and deliver crucial services across all aspects of public life, from running museums to regulating the nuclear deterrent. Public bodies also make a vital contribution to communities through organisations such as Network Rail, the BBC and UK Sport. As such, the majority have an important role in helping to ensure public services are run by, and delivered for, the whole of the UK.

While of course employees of public bodies have responsibilities to ensure their service or function is effective across whichever jurisdiction they cover, board members have an incredibly important role in helping shape the tone and values of the organisation as a whole. For public bodies that have a UK-wide responsibility, Union capability is an essential part of this. The Review has already commented on the importance of this for UK Government departments. To ensure the level of sensitivity is considered at all levels of government, it is therefore important to consider the same issues with public bodies.

Existing public bodies

No two public bodies are the same and, as a corollary, the appointments process for each must be tailored. Indeed, some public appointments are regulated by the Commissioner for Public Appointments, of which some have an independent panel member, and some are subject to pre-appointment scrutiny in Parliament.[16] Many public bodies have been long established, well before devolution was a construct of the UK's constitution. Since devolution, the legislation underpinning some public bodies has required that the devolved administrations are consulted during the appointment process. While valuable in ensuring nation specific representation for some bodies, it is important not to conflate consulting devolved administrations on candidates with ensuring they have the skills to support their organisations deliver its business in a way which enhances the whole UK.

Where public bodies have a responsibility for the whole of the UK, appointing individuals with an understanding of nation-specific issues and how to effectively operate UK-wide should be fundamental. While some departments may actively consider this in their appointment process, the Review has found that this is not sufficiently understood nor strategically assured by the centre.

15 'Diversity Action Plan', available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812694/20190627-CO_Diversity_Action_Plan_FINAL-6.pdf

16 A list of 'significant appointments', agreed by ministers and the Commissioner for Public Appointments, is published. These competitions must have a Senior Independent Panel Member (SIPM) on their Advisory Assessment Panels. A SIPM is an individual who is independent of the department and body concerned, and should not be politically active.

This problem is compounded by a lack of transparency: it is difficult to ascertain which public bodies require Union skills on their board. Indeed, the consideration of these issues in the public appointments process is not clear in all cases, which breeds a lack of confidence that the system works for the whole of the UK.

Establishing new public bodies

Although Union sensitivity may arise when bodies are being created, the Review has found that the ad hoc nature of such interventions is inadequate. The establishment of UK Research and Innovation (UKRI) illustrates this well.

The Higher Education and Research Act 2017, which underpins UKRI, did not initially contain any provisions to ensure that members of the board had relevant nation-specific experience. Under political pressure, the UK Government amended the legislation to require ministers, in appointing the UKRI board, "to have regard to the desirability of the members including at least one person with relevant experience in relation to at least one of Scotland, Wales and Northern Ireland".[17] In the UKRI case, the problem was resolved too late, and only after it had become politically charged. For other public bodies it may not be resolved at all. There is no mechanism for addressing Union sensitivity at an earlier stage. Although there is evidence of improvement, much like the issues discussed earlier in the report, the challenge is to make the process more resilient and ensure its efficacy is not reliant on chance.

It is crucial that these issues are addressed, particularly at this juncture, as the UK prepares to leave the European Union and considers domestic replacements for EU bodies. The functions of the 38 European agencies of which the UK is a member, may need to be replicated by new UK-wide bodies. While the collective agreement process, already discussed, will help ensure this at the end of the process, it's important this is embedded as a strategic factor as departments start to consider the creation of new bodies as it should be with all policy. The Review makes two specific recommendations to that end.

This report recommends that an audit of public bodies is undertaken. This should establish the extent to which an understanding of nation-specific issues is considered an important metric by which to assess candidates for public bodies with cross-border competence. The outcome of this investigation should be published in a public report which contains a list of public bodies that are strategically important to the Union. It should also determine which of these bodies require the consultation of the devolved administrations and other stakeholders in the appointments process, and which require their agreement. This should be updated at least annually, and in the process of creating new public bodies, there should be an awareness that their function might necessitate Union capability. This should be reflected in the underpinning legislation.

It is worth noting that the Review is not suggesting that every relevant public body should have members on its board who are approved by ministers from the devolved administrations. Nor is it recommending that their consultation is necessarily required. In many cases, the UKRI approach will be sufficient.

The Secretary of State for Intergovernmental and Constitutional Affairs should oversee this aspect of the appointments process to ensure that public bodies with a UK-wide remit are representative of the UK as a whole. The new Secretary of State should work with UK

17 HC Deb 21 November 2016, Amendment 35 (now Sch 9 2(6) in the Bill agreed in the Commons, 21 November 2016).

Government department to ensure there are sufficient appointees with the relevant nation-specific expertise. To achieve this, relevant data concerning existing appointees should be captured, and a database of individuals who have the relevant depth of knowledge to be appointed in future should be generated. Additionally, checks should be put in place to ensure that the list of public bodies specified by the audit are equipped with the requisite expertise. The new Secretary of State should have oversight of this, working closely with the Secretaries of State for Scotland, Wales and Northern Ireland.

Chapter 6

Communications

The UK Government is the government of the whole United Kingdom. The challenge is whether this is how it appears to its citizens in all parts of the country. Arguably, in some parts of the UK, the UK Government has appeared to retreat from the public sphere since the advent of devolved government in the late 1990s.

The UK Government is in fact active in Scotland, Wales and Northern Ireland. It directly employs more than 57,000 civil servants in Scotland, Wales and Northern Ireland and is responsible for considerable investment in relation to reserved matters. It is also involved in joint funding projects with the devolved administrations, such as the City Deals funding initiatives. However, the extent to which the UK Government's role in these projects is visible and is widely understood by the general public has been questioned.

After 1998, it was important that the devolved administrations established themselves in each nation. Indeed, before devolution the UK Government would not have considered it necessary to the same extent as is now the case to publicise the extent of the continued presence of civil servants who work directly for the UK Government. UK Government departments providing services in reserved areas did not always market themselves overtly as arms of the UK Government.

There was also, in Whitehall, a sense of 'devolve and forget', which resulted in rowing back in areas where the UK retained an interest.

However, it is essential for both sound governance and the health of our democracy that citizens are able to easily understand which responsibilities fall to which levels of government serving them. This is particularly true in those parts of the UK which have two governments.

Although branding is a sensitive area, and overly nationalistic branding would be insensitive in some contexts, it is nevertheless important that the UK Government is visible in what it does and what it funds. It should not be embarrassed about promoting itself, and it should, as a matter of principle, be transparent about its activities.

As noted in the Civil Service Capability section of this report, there will be UK Government Hubs in Scotland, Wales and Northern Ireland. These new buildings constitute an opportunity for the UK Government to position itself back at the heart of public life in the capital cities. There will be increased public awareness of the UK Government's work in those cities and the UK Government must be sure its work there will stand up to scrutiny. The quality of the jobs, or the events being held there will be noticed locally.

Some UK Government departments compile, and have ready access to, data about what the department is doing in different parts of the UK. Where this data is available, it allows departments to test the effect of their policies in each part of the UK. When Government ministers visit any part of the UK they can be given data about what their department is doing there, what its effect is on the local

economy, how many people it employs and how much it spends.

However, this practice is not universal among departments which have responsibilities in Scotland, Wales or Northern Ireland. The data may not be readily available or compiled in such a way as to be useful on ministerial visits, either by the department's ministers or by ministers from other departments who might need it as background information for their own visits.

Even if a visiting minister has access to their department's data, they do not have ready access to data about other UK Government departments. The absence of specific data for Scotland, Wales and Northern Ireland also prevents the UK Government from receiving proper credit for the work of its departments.

The UK Government has aims and aspirations which apply to the whole country. For example, there is an aspiration to rebalance the economy beyond Greater London and spread the prosperity of south-eastern England. If data specific to other parts of the UK is not available, how can it test the effect of its policies in those areas?

Information and analysis of how being part of the United Kingdom impacts on each part of the UK is not readily available. Between February 2013 and August 2014, before the Scottish independence referendum, the UK Government published a series of papers with detailed research analysis on the benefits to Scotland of being part of the UK. The papers covered, in some detail, topics such as currency and monetary policy, financial services, security, energy, welfare and pensions.[18]

The analysis papers were carefully prepared. During a highly contested referendum campaign, they were subject to a high degree of critical scrutiny from journalists and academics.

Since the referendum in September 2014, the papers have not been revised, updated or adapted for use beyond the particular circumstances of the 2014 referendum. Moreover, there is no equivalent analysis for Wales or Northern Ireland.

In spite of the 'write-round' collective agreement process, and a general norm to the effect that UKGG and NIO should be informed about policy announcements impacting on their areas of responsibility, it is often the case that UK Government departments make announcements without their effect throughout the UK being properly understood. The result is public statements which misfire in Scotland, Wales or Northern Ireland, or which fail to maximise their potential effect in all parts of the UK. In short, the policy and communications systems in Whitehall lack a holistic approach and can sometimes be poorly co-ordinated, particularly in relation to announcements.

UK Government communications are subject to central co-ordination via Number 10. There is an overarching communications strategy, and, in that context, Union issues are discussed in a group which meets regularly. The offices of the Secretaries of State for Scotland, Wales and Northern Ireland are each represented in this group, and the directors of communication for each office keep in touch with each other regularly.

There is, of course, a common strategy and those responsible for communications meet regularly to consider how best to make the case for the Union. What is required is a strengthening of those efforts and a strong oversight at senior Cabinet level to ensure momentum and keep the strategy at the centre of UK Government thinking.

18 The conclusions of the series of papers were published in "United Kingdom, united future: conclusions of the Scotland analysis programme" (June 2014, Cm.8869). All of the papers can be found at: www.gov.uk/government/collections/scotland-analysis

A communications strategy aimed at promoting the cohesion of and solidarity within the UK must address public perceptions in all parts of the UK, not only in the parts with devolved legislatures. The various publics in the UK are not sealed off from each other, and share a common culture served by a common media industry (albeit with regional and national differences). When communications are prepared for one part of the UK, consideration must be given to their effect and how they sound in the other parts.

UK Government departments frequently organise visits for their ministers to Scotland, Wales and Northern Ireland as well as all parts of England. As well as listening to the views of communities and stakeholders on these visits, ministers also make regular policy announcements, many of which resonate in different ways in the various parts of the UK. In theory, UKGG or NIO should always be aware of, and supportive of, these visits and announcements. However, it is not clear if visits are co-ordinated and supported in such a way as to gain the maximum benefit from them. Similarly, there are occasions where the offices of the Secretaries of State for Scotland, Wales and Northern Ireland are not aware of forthcoming policy announcements from other departments and their potential effect in each part of the UK.

Further, ministerial visits do not always fulfil their potential effect. They may be undertaken only for one narrow policy purpose without any sense of an overarching strategy. At worst they may be undertaken out of a sense of duty but lacking in strategic purpose. As with public announcements, the issue is one of co-ordination and a common vision.

While some departments have stakeholder managers based in Scotland, Wales or Northern Ireland, this is not a universal practice. There are UK Government departments with policy interests in those nations but no stakeholder strategy involving officials present there at all times. It is hard to see how they formulate policy without that feedback and without the means to properly assess the effect of their policies.

BEIS, for example, has a stakeholder manager for Scotland, who is the first line of contact for stakeholders and a line of communication for businesses and business organisations. It seems a large area for one person to cover, and, considering it seems to be an effective initiative, it also seems surprising that there are not stakeholder managers for all large departments in Scotland, Wales and Northern Ireland.

Recommendations

The UK Government's activities in Scotland, Wales and Northern Ireland should be clearly marked with UK Government branding. The role of the UK Government should be properly acknowledged. This principle is essential for transparency and democratic accountability. It is particularly important that signage, promotional material and media communications in any project include specific recognition of UK Government funding.

The UK Government should acknowledge and respect the activities of devolved governments in their own areas of responsibility, including acknowledgement of successes. In return, the Government should expect that its work in Scotland, Wales and Northern Ireland is correctly attributed. All four governments should respect each other's communications with the public and, for example, respect embargoes placed on news announcements. It is not suggested in this report that governments should compete in terms of branding and publicity. There is no need for either government, in a nation with devolved government, to question the legitimacy of the way the other explains its activities to the public.

The creation of UK Government Hubs in Scotland, Wales and Northern Ireland, particularly those in the capital cities, are a major opportunity to improve the visibility of the UK Government and its officials. These buildings should also be venues for active events programmes, which would include trade events, HMT briefings and visits by foreign leaders and officials.

All UK Government departments with policy responsibilities in Scotland, Wales or Northern Ireland should keep up-to-date and accurate data about their activities and spending in those countries. As noted above, UK Government departments are not able to test properly the effect of their policies unless they have access to data specific to all parts of the UK.

In addition, when UK Government ministers carry out their duties in Scotland, Wales or Northern Ireland, they should have information on the impacts of their own department in that nation. It would also be useful if ministers and their advisers also had access to data about other UK departments' activity and impact. Ideally, any visiting minister would have all the necessary data covering all the issues which are likely to arise during the visit in relation to the whole range of UK Government policies.

Ready access to such data would aid the cause of transparency about the work of the UK Government. It would also allow ministers and civil servants to ensure that work is properly credited.

UK Government departments should compile such data as a matter of course without a statutory requirement that they do so. Although the relevant legislation (the Statistics and Registration Service Act 2007) makes provision for the offices of the Secretaries of State for Scotland, Wales and Northern Ireland to produce official statistics, the Review understands that this has not been done.[19]

The kind of data to be compiled will vary from department to department. As part of their departmental plan, each department with policy responsibilities in Scotland, Wales or Northern Ireland should list the data they need to compile specific to those nations and, if that data does not exist, resources should be made available to compile it.

The UK Government should revise, update and adapt for contemporary circumstances the Scotland analysis programme documents it published in 2014 prior to the Scottish independence referendum. There should be similar programmes for Wales and Northern Ireland. All three analysis programmes should be updated regularly and developed into something that is more akin to a 'State of the Union' Report.

The analysis produced by the UK Government in advance of the Scottish independence referendum was a major and effective exercise in creating an authoritative body of work describing how the UK works today. Analysis of this kind should be available even where there is not an event such as a referendum in prospect.

An updated and expanded analysis programme would provide a ready source of empirical information and analysis to inform public debate and would assist both ministers and officials.

The same efforts should be applied to making a similar analysis available to the citizens in Wales and Northern Ireland. There would be some overlap between the publications (for example, the benefits of UK membership of international organisations, or the UK's network of diplomatic offices, applies equally in Scotland, Wales and Northern Ireland) but there would also be analysis specific to each nation (for example the fiscal analysis).

19 Evidence received from the Office for Statistics Regulation

To achieve their full benefits, the publications must be current and up-to-date. It is suggested that an annual update would be sufficient.

UK Government departments should consult the Secretaries of State for Scotland, Wales, Northern Ireland, and Intergovernmental and Constitutional Affairs before making major announcements in respect of policies which apply in Scotland, Wales or Northern Ireland.

Ideally the Secretaries of State for Scotland, Wales, Northern Ireland, and Intergovernmental and Constitutional Affairs should be aware of policy developments in reserved areas in all UK Government departments from an early stage. However, it is essential that policies in reserved areas are seen to be fit for purpose in all parts of the United Kingdom. To guard against policy announcements landing badly in Scotland, Wales and Northern Ireland, they should be tested in advance with those offices who can best assess their effect in all parts of the United Kingdom and ensure that the voices of Scotland, Wales and Northern Ireland are heard in policy development.

It is also important that opportunities are not missed to ensure that UK Government policy announcements have maximum impact in all parts of the UK. Departments should be aware that in some cases a policy which is relatively minor in UK terms could have a major impact in Scotland, Wales or Northern Ireland.

All UK Government communications in Scotland, Wales and Northern Ireland should be subject to a strategy overseen by the Secretary of State for Intergovernmental and Constitutional Affairs with the assistance of the Secretaries of State for Scotland, Wales and Northern Ireland. The strategy should be prepared by a communications group within Cabinet Office, which meets regularly. At least twice a year those meetings should be chaired by the Secretary of State for Intergovernmental and Constitutional Affairs.

It is essential that the UK Government develops a strategy for proactive communications aimed at achieving a clearer understanding of the work of the UK Government and the benefits of being part of the UK. Any such strategy must be backed by the authority of a senior member of the Cabinet, the Secretary of State for Intergovernmental and Constitutional Affairs, and supported by the expertise of the Secretaries of States for Scotland, Wales and Northern Ireland.

Note that this recommendation includes communications which are ostensibly aimed at an English audience but will ‘bleed’ into all parts of the United Kingdom.

This Review also notes that a communications strategy cannot be delivered properly without adequate resources. Despite the size of its overall communications spend, there may be a case for increased communications funding in Scotland, Wales or Northern Ireland. It is up to the relevant Secretary of State and their office to make the case for increased funding specific to the circumstances in Scotland, Wales and Northern Ireland.

Any strategy prepared by the communications group should be delivered across all platforms, including digital.

This report has already discussed the importance of policy officials in the new shared unit having a clear role in external engagement. To ensure the most tangible results from this role, it should be an expectation that engagement is noted in a shared record for use in support of the communications strategy and accessible by other departments. Ideally, other UK Government departments would also feed into this database.

The Secretary of State for Intergovernmental and Constitutional Affairs should have oversight of all ministerial visits to Scotland, Wales and Northern Ireland, and all ministerial visits should be subject to an overall UK communications strategy.

All visits to Scotland, Wales and Northern Ireland by UK Government ministers should be directly related to the overall UK Government communications strategy. The visits may be undertaken for specific policy reasons but should be subject to the overarching purpose of ensuring that the UK is governed for the benefit of all its citizens wherever they live, and is seen to be so.

The Secretary of State for Intergovernmental and Constitutional Affairs should have the capacity and resources to ensure that the maximum benefit is obtained from ministerial visits. Cabinet Office will also have the expertise to work with the devolved administrations when liaison and co-operation is necessary.

Ministerial visits should not be simply reactive to events. Public visits by UK Government ministers to Scotland, Wales and Northern Ireland should be planned with reference to, and be subject to, a proactive communications strategy.

Every UK Government department which is active in Scotland, Wales and Northern Ireland should have a network of stakeholder managers in those nations.

There are already stakeholder managers working effectively in different parts of the UK (see, for example, BEIS and HMT in Scotland). However, there is scope for expanding existing activities and some departments have very little stakeholder engagement in Scotland, Wales and Northern Ireland. There should be further consideration of when it is helpful for these roles to be specific to a nation or to an economic region.

Stakeholder managers can ensure that the voice of Scotland, Wales and Northern Ireland is heard properly in policy making. They can also be a point of contact for stakeholders and a visible presence for the UK Government in all parts of the UK. In the absence of such managers, stakeholders are likely to turn to the devolved governments to raise issues, unhelpfully blurring the lines of responsibility and accountability.

Review of UK Government Union Capability:

Terms of reference

Context

The successful devolution of powers to legislatures and Ministers in Scotland, Wales and Northern Ireland has taken place gradually over the last twenty years via a succession of Acts of Parliament, including most recently the Scotland Act 2016 and the Wales Act 2017. Over that time the UK Government has adapted to meet this changing constitutional landscape while maintaining its primary responsibility of being a Government serving the whole United Kingdom. However, as the United Kingdom leaves the European Union, it is timely for the UK Government to consider how through its institutional arrangements it meets the challenge of strengthening and sustaining the Union in the future.

Objective

Within this context, the UK Government has asked Lord Dunlop to undertake a short, focused independent review to ensure that, within the context of the existing devolution settlements, we are working in the most effective way possible to realise fully all the benefits of being a United Kingdom. The review is forward-looking, and will not consider past decisions. The review will not consider the powers or responsibilities of the devolved administrations and legislatures. The review will consider and make recommendations on the following question:

To consider whether UK Government structures are configured in such a way as to strengthen the working of the Union, and to recommend changes where appropriate.

In examining the above terms of reference, the reviewer should take into account the following:

- The need to respect and support the current devolution settlements, including the Scotland, Wales and Northern Ireland Acts, as well as the Belfast agreement and its successors.
- The importance of Scotland, Wales and Northern Ireland retaining their own Secretaries of State who are members of Cabinet and Territorial Offices that represent the interests of the devolved nations in Westminster; and
- That the question of the Barnett Formula and the Scottish and Welsh Governments' fiscal frameworks are out of scope for this review.

Process

The review will be independent of government and supported by a small team of civil servants. It will report to the Prime Minister.

The review will be expected to take evidence but there will be no formal written consultation.

Timing

The review will begin in July and conclude in the Autumn through a report to the Prime Minister.