Welsh Administrative Justice: Rights, Duties, and Implications for Legal Services

1. I want to first thank the Law Society for the opportunity to deliver this lecture. In particular to speak about administrative justice; which is Wales’ first devolved justice system, and a cornerstone to social justice and local justice.

Administrative Justice

2. At Bangor University we have been researching administrative justice since 2015, holding workshops to better understand the system in Wales.1 We are now working on a project to map the administrative justice system in Wales, funded by the Nuffield Foundation.2

3. Research suggests that many people in Wales, perhaps the majority, do not know which areas of decision-making power are devolved to the National Assembly for Wales and Welsh government, and which are not. In the area of ‘justice’ even the majority of lawyers, and assembly members would say that the subject of justice is not devolved to Wales. This is because almost all responsibility for criminal justice, prisons, policing and both the criminal and civil courts is reserved to the UK Government and Westminster Parliament. However, I want to argue that this view is mistaken as it is based on a narrow understanding of justice. Justice is about much more than just what courts do.

4. The title of today’s lecture – administrative justice – invokes images of bureaucracy, of filing cabinets and paper clips, or worse of the kind of summary justice dispensed by bureaucrats in non-democratic nations contrary to the rule of law principles familiar to us. Well, things are not quite as they seem. Despite often being called the Cinderella justice system, the administrative justice system as it applies to Wales determines more cases than either the criminal or civil justice system; potentially more cases than the two combined.

5. So what is administrative justice? In the terminology of the UK Administrative Justice Institute it concerns how we interact as individuals when the government, or those working on its behalf, act in ways that appear wrong, unfair or unjust.

6. Part of the difficulty in understanding administrative justice is its scale; encapsulated as ‘the justice of public decision-making’, it extends from complaints about local refuse collections, taxes, planning, school admissions and exclusions, to health and social care decisions, decisions about welfare benefits, and asylum and immigration matters often including alleged breaches of human rights.

7. The administrative justice system means the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including:

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2 https://www.nuffieldfoundation.org/paths-administrative-justice-wales
a. The procedure for making decisions;
b. The law governing decisions; and
c. The systems for resolving disputes and airing grievances in relation to decisions.

8. Administrative justice includes ensuring that decisions taken by public bodies are correct at first instance, to ensuring that where incorrect, unlawful or poor decision-making occurs there are avenues to have this redressed in as swift and appropriate manner as possible. And that where things have gone wrong, public bodies and others learn and improve.

9. Administrative justice is then especially important to Wales where, despite a notable recent reduction, the proportion of public sector workers is 20% (compared to a UK average of around 16%). The Public Services Ombudsman for Wales once noted that Wales has more public bodies per head of population than it has supermarkets.

10. According to the England and Wales Law Commission there are Four Pillars in an administrative justice system:
   a. The first is internal mechanisms for redress, such as complaint procedures.
   b. The second is external non-court avenues of redress, such as tribunals.
   c. The third is ombudsmen.
   d. The fourth is remedies available in law by way of a court action.

11. A problem for administrative justice is that it is hard for people (including lawyers) to see the connections between the abstract concept, the relevant laws and institutions, and the reality of people’s lives. As one Assembly Member has said, “administrative justice is not on the lips of my constituents”.

12. Therefore in my lecture I want to use some examples of administrative justice that are local to us in Conwy.

**Town and Country Planning and Judicial Review**

13. A very common area for administrative justice is town and country planning. In Conwy and across North Wales there have been a number of such issues resulting in judicial review in the Administrative Court. These are challenges to whether the decision-maker has correctly applied relevant law and fair procedures, it is not the role of the court to reconsider the outcome of the original decision-making process. The usual remedy is for the initial decision-maker to be ordered to re-take the decision in a procedurally fair and lawful way.

14. One example from Conwy is the case of *Thompson (and the members of Passionate About Llanddulas)* v *Conwy County Borough Council and Cartrefi Conwy*. This relates to the Fair View Inn in Llanddulas, which featured as “Mrs Robert’s Pub” both in the diaries of Evelyn Waugh and in his first novel *Decline and Fall*. The pub itself had closed down but was still regarded as a community facility. It is not my aim here to talk in detail about the legal issues in the case. In short, the defendant Council had granted the developers planning permission to develop the pub and its grounds for

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social housing. The judge rejected the claimant’s argument that this was in breach of planning policy, in particular the requirement to protect community facilities. What is interesting about this case is that both Conwy County Council and Cartrefi Conwy were represented by lawyers based in England including barristers from chambers in Manchester, and the case was heard in Liverpool. The claimant had ‘Crowd funded’ the claim through the webpage ‘Just Giving’ and had been represented by a lawyer (from Wales) who acted ‘pro bono’ at the outset and later under a form of conditional fee arrangement.

15. There may have been important reasons for this turn of events in the particular case, but it highlights a number of trends that we have found in our research at Bangor Law School:

   a. Judicial review is increasingly difficult to access for people in Wales (and England too) and a significant reason for this is cuts in legal aid funding. Cuts to legal aid have had a more significant negative effect in Wales than they have had in England. Legal aid policy has historically been designed with the needs of Southern England in mind.

   b. An Administrative Court for Wales was opened in Cardiff just over ten years ago this year. Cases are managed from Cardiff but can be heard at any appropriate venue in Wales. It was hoped that this would lead to more Welsh public administrative law claims being determined in Wales, and to growing an administrative law legal profession in Wales. Although the majority of claims against Welsh public bodies are now issued and heard in Wales there has actually been no increase in the administrative law litigation activities of solicitors based in Wales.

   c. Claimants (usually individual people) in judicial review claims are unrepresented in more than one third of all cases issued in Wales. Defendant public bodies are more likely to be represented by lawyers (solicitors and barristers) based in England than by lawyers based in Wales. Since the Administrative Court opened in Cardiff in April 2009, only around 15% of the barristers who have appeared in the Court have been from chambers based in Wales.

   d. This is despite much of the relevant law and policy being specifically Welsh law and policy that is increasingly different to English law and policy.

16. I am often asked what can be done to ensure that more public administrative law work is handled by lawyers based in Wales. I think the profession may be better placed to answer this question. However, raising awareness is one point, and this is what I am doing today; teaching the next generation of lawyers is another (which we address at Bangor Law School); greater responsibility for Wales over legal funding is likely another point.

**Devolved Welsh Tribunals**

17. I have said that administrative justice is about much more than what courts do, but fallen into the trap of using the Administrative Court and judicial review as my first example. Yet what is more important is that decisions are made right first time within
public bodies, and that there are opportunities for early and informal resolution of disputes where appropriate. This reduces time and costs, and the emotional burdens on those involved in the matter. Our current research into administrative justice in Wales (funded by the Nuffield Foundation) is finding examples of good practice in early resolution of potential disputes across North Wales, including in the housing sector.

18. Our current research focuses on two areas of service provision; social housing and homelessness, and education. Education, and in particular special educational needs (or soon to be additional learning needs), is an area where the Welsh Government seeks to bring in a new approach to administrative justice that is based on avoiding disagreements and earlier dispute resolution (ensuring matters are considered and resolved at the most local level), and providing clear and consistent rights of appeal.

19. These are aims underpinning the Additional Learning Needs and Education Tribunal (Wales) Act 2018. There remain important matters to address about how these aims are implemented. This includes the role of local authorities in providing alternative dispute resolution arrangements, and ensuring that parents, children and young people are provided with clear and independent advice.

20. Should early dispute resolution fail, there is an option for a parent, child or young person to appeal to the Special Educational Needs Tribunal for Wales, soon to be renamed as the Education Tribunal for Wales. One of the reasons I raise this example today is that for the last two annual reporting periods available (covering 2015 to 2017) Conwy residents have produced more appeals to this tribunal per 10,000 members of school age population than any other local authority in Wales.

21. As with the above example of planning, it is not my intention to discuss the legal merits of any of these appeals, but it is hard to escape the background concerns about funding for local schools.

22. According to the Wales Centre for Public Policy: “Welsh local government is reaching a tipping point in terms of financial challenges. Most efficiency savings have now been made, and anticipated reductions in the range and quality of services in future will directly impact on citizen’s quality of life in Wales”. Administrative justice allows people an opportunity to challenge the consequences of public sector funding cuts through means other than the ballot box.

23. Returning to the Special Educational Needs Tribunal for Wales. This is one of a set of devolved Welsh Tribunals administered by the Welsh Government. Other devolved tribunals include the Agricultural Land Tribunal for Wales and the Residential Property Tribunal for Wales. These are all part of the Welsh administrative justice system. However, the tribunals have developed ‘ad hoc’ over time, at different stages of devolution, and they have different rules and procedures.

24. There have been significant developments in the process of reforming tribunals in Wales. These include reforms to the processes for appointing tribunal judges to ensure greater independence and consistency, and that appointees possess appropriate knowledge and expertise. Devolved Welsh tribunal websites are clearer

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4 Professor James Downe and Emma Taylor-Collins, At the tipping point? Welsh local government and austerity (June 2019).
and more accessible, and a broader range of information has been made available online in a timely fashion.

25. The Wales 2017 Act creates a President of Welsh Tribunals to provide leadership, ensuring tribunals are accessible, fair, efficient, that their members have sufficient expertise, and having regard to "the need to develop innovative methods of resolving disputes". 5

26. Tribunals are often seen to be more flexible and informal than courts, with less need for legal representation. There are significant advantages to the local justice offered by Welsh tribunals. However, our research shows that local authority defendants are often represented by lawyers, whereas individual people bringing appeals are not. Perhaps this situation could be made fairer by a different approach to legal services, legal aid, tribunal procedures and alternative dispute resolution in Wales.

27. The 2017 Act makes provision for ‘cross-deployment’ of judges between various devolved Welsh tribunals. This is where judges can hear cases in two different jurisdictions (e.g., Special Educational Needs Tribunal for Wales and the Residential Property Tribunal for Wales) without having to hold two separate judicial appointments. Judges have also been authorised for cross-deployment between English tribunals and Welsh tribunals. In some cases this has been due to an increasing workload from Wales but where there are not enough Welsh judges to cope with the increase. Again one reason for this is likely to be the comparative underdevelopment of public administrative law as an area of practice for lawyers in Wales, who might eventually go on to become tribunal judges.

28. Reforming the devolved Welsh tribunals has been widely acknowledged as a perceived test bed for developing broader Welsh competence in the administration of justice. It is argued that many of the issues raised with respect to tribunals would be similarly applicable to other areas of justice; judicial appointments, training and careers, discipline, rules, procedures, remedies and enforcement, so-called ‘back office’ administration and managing resources (both human and financial). How well such can be managed on a ‘Wales only’ basis will provide some important lessons.

29. So far the Welsh Government has appeared quite reluctant to make greater use of the devolved Welsh tribunals. For example, the Housing (Wales) Act 2014 changes the substantive law, but retains the previous England and Wales approach to appeals against public body decision-making. That is local authority internal review followed by a possible appeal to the county courts. The Act only makes limited use of the Residential Property Tribunal for Wales. Similarly, most ‘occupation contract’ disputes under the Renting Homes (Wales) Act 2016 will be determined by the county courts. Another example is that appeals relating to the new Welsh Land Transaction Tax go to the England and Wales First-tier Tribunal (Tax).

30. The organisation, Public Law Wales, among others, has subsequently recommended, that when legislating to create new public law duties applicable to devolved Welsh authorities, Welsh Government and the Assembly should apply a presumption that any new legal redress measures created should be by recourse to devolved Welsh tribunals.

5 Section.60(d).
31. Bangor research has recommended that consideration be given to developing a comprehensive system of devolved tribunals reflecting the full scope of devolution in Wales. These matters will be considered by the Law Commission for England and Wales in its forthcoming project on devolved Welsh tribunals starting later this year.

The ‘Integrity’ Branch

32. Administrative justice in Wales also extends beyond public services providers, tribunals and courts. A central branch of administrative justice in Wales is what can be called the integrity branch. These are modern un-elected bodies for holding the administration to account. This includes the Public Services Ombudsman for Wales and various Commissioners.

33. The Public Services Ombudsman for Wales has the widest remit of the integrity bodies. People can complain to the Ombudsman about maladministration and poor service provision against a broad range of public bodies in Wales. It can be difficult to understand the difference between receiving a poor service and being treated unfairly on the one hand, and being treated unlawfully on the other, often these issues overlap. However, in general the Ombudsman cannot investigate an issue where the complainant has the right to seek a legal remedy in a court or tribunal.

34. A local example of the Ombudsman’s work was a complaint about Conwy Council’s decision to withdraw funding for a charity that provided local services to deaf people. The Ombudsman considered that the Council had not properly consulted local deaf people using the services of the charity. The Ombudsman also upheld a complaint of maladministration because the Council had not properly completed an Equality Impact Assessment.

35. The recently enacted Public Services Ombudsman (Wales) Act 2019 sets out new powers for the Ombudsman to accept oral complaints, investigate private medical treatment in a public/private health pathway, and to undertake a role in relation to complaints handling standards and procedures. The 2019 Act also gives the Ombudsman important own initiative powers of investigation.

36. However, the Act does not address some of the Ombudsman’s other concerns, in particular, the role of the Office as an Administrative justice ‘bridging organisation’ with the courts and tribunals. In evidence to the Commission on Justice in Wales, the Ombudsman wanted further attention to be given to the following:

   a. Statutory bars [on the ombudsman investigating when a court or tribunal-based action is available] be replaced with the discretion for the ombudsman to investigate if appropriate
   b. The Administrative Court should have an express power to ‘stay’ an action before it, to allow a public services ombudsman to investigate or dispose of a complaint; and
   c. The Ombudsman to have the power to refer a ‘point of law’ to the courts.

37. In our research we have found that people would like to see more flexibility between the Ombudsman and courts and tribunals in Wales, to make the best use of the
different expertise of each type of body. And to ensure that people do not lose their opportunity for redress by going to the wrong body to start their complaint.

38. In the context of the relationship between tribunals and ombudsmen, the senior President of England and Wales tribunals, Sir Ernest Ryder, has recently called for more ‘interoperability’. He has also suggested that ‘inter-action’ between geographical legal jurisdictions is included in the sections of the Wales Act 2017 relating to devolved tribunals in Wales.\(^6\)

39. A future approach to administrative justice could involve flexible interaction (interoperability) between a range of institutions, within and across jurisdictional boundaries, whether these be territorial boundaries, or the boundaries of procedures and perceived expertise.

40. In addition to the Ombudsman, the integrity branch in Wales includes four Commissioners. The Welsh Language Commissioner, the Children’s Commissioner for Wales, the Older People’s Commissioner for Wales and the Future Generations Commissioner.

41. Wales spends comparatively more on its set of Commissioners than other UK nations, and they can be seen as part of an important Welsh commitment to promoting and protecting human rights. The Commissioners aim to ensure that Welsh language rights, the rights of children, older people, and future generations are properly respected in the administrative decision-making of public bodies in Wales.

42. Each Commissioner has different powers to enable them to perform their roles. For example, the Welsh Language Commissioner can investigate complaints made by individuals that public bodies have not complied with Welsh Language Standards. The Children’s Commissioner and Older People’s Commissioner can investigate complaints relating to the rights and interests of children and older people respectively. But only when a complaint is likely to have wider systematic implications for people other than the individual who has complained. The Future Generations Commissioner does not have the power to investigate complaints from individuals about possible breaches of sustainability and Well-Being duties.

43. If someone has complained to a Commissioner and is not satisfied with how the complaints process has been conducted, they may be able to seek an appeal or a judicial review of the Commissioner’s decision. But how they should do this can differ depending on which Commissioner’s decision or process they want to challenge. For example, to challenge a decision of the Welsh Language Commissioner a person or public body should seek an appeal or review at the Welsh Language Tribunal. This is the first tribunal to be fully established by National Assembly legislation.

44. All the Commissioners have important roles to monitor and report on how well public bodies are complying with rights-based duties. For example, the Children’s Commissioner has a role in monitoring compliance with the United Nations Convention on the Rights of the Child. The Future Generations Commissioner

monitors compliance with the principle of sustainable development and Well-Being Goals.

45. Under relevant Welsh law public bodies have various duties including to have due regard to children’s rights and to take all reasonable steps to meet well-being objectives designed to achieve sustainable development. However, there has (so far as I’m aware) not yet been any case before the Administrative Court where a claimant has successfully argued that the children’s rights due regard duty has been breached.

46. In the context of the well-being and sustainability duties under the Future Generations Act, the Administrative Court has recently decided that individuals cannot take legal action to enforce these duties. This is because the duties are considered too broad, general and aspirational to be the subject of legal action. However, this leaves open the question of whether monitoring by a Commissioner is sufficient. The legislation seems to create legal duties, framed in law by use of traditional language such as ‘must’ and ‘should’. However, these have been found to be too broad, general and aspirational to be legally enforced. It is possible that if Wales continues to create rights-based duties that are not legally enforceable, the strength of its commitment to the rule of law could even be questioned.

47. The Well-Being of Future Generations (Wales) Act 2015 introduces five ways of working into Welsh public administrative law. These are:

a. balancing short and long term needs
b. the need to take an integrated approach
c. importance of involving other persons
d. acting in collaboration
e. preventing problems occurring or getting worse

48. Again public bodies are encouraged to work according to these methods. But a person is unlikely to be able to bring a court claim on the basis that a local authority has failed to work in these ways.

A Welsh Policy for a Welsh System

49. More consideration needs to be given to whether Wales has got the balance correct between promoting good administration and giving individuals a legal means to enforce their rights. In particular when there are serious and increasing conversations about incorporating other rights – such as a right to housing – into Welsh law.

50. I hope so far to have shown you that Wales has a very active administrative justice system, consisting of administrative law (legislation), policy, the actions of public bodies, tribunals, the Ombudsman and Commissioners. And that (apart from the Administrative Court and some key tribunals) most of this system is devolved.

51. However, I expect you will also have realised how hard it is to really describe this collection of law and institutions as a system, because the connections between its

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7 R (B) v. Neath and Port Talbot County Borough Council, 30 January 2019 (unreported).
various parts are complex, often inconsistent, and hard to navigate for professionals let alone for the ordinary person.

52. In order for rights and principles to have practical value there should be various pathways for people to hold decision-makers to account and to allow people to enforce their rights. These pathways need not all be to a court (or even a tribunal), but they should be clear, consistent, proportionate and accessible.

53. In our research we have recommended that Welsh Government develops a policy for Administrative Justice and Tribunals in Wales which draws explicit connections between administrative justice, and issues of human rights, equality, public services and local government reform in Wales and includes principles of administrative justice redress design.

54. This should also incorporate the Counsel General’s own view of an: “expectation, which individuals should have, that each person is able to seek redress in the way that is most convenient for them”. 8

55. When he was a Welsh Government policy advisor, the current First Minister stated that the first principle of social justice in Wales is that good administration is good for you.9 In our research we argue that as such administrative justice (as the justice of good administration) is the primary method for ensuring social justice in Wales. And particularly for ensuring justice for local people.

56. The Welsh administrative justice system should continue to focus on promoting good administration firstly as a civic good, with dispute resolution mechanisms that are more deliberative than adversarial. It should also continue to advance remedies that are restorative not just compensatory (for example the work that is being done by the Wales Restorative Approaches Partnership).

Implications for Legal Services

57. Because this is the Law Society lecture, I have been thinking about administrative justice and the legal profession in Wales. Public administrative law is not a large area of Welsh legal practice, and it is also likely not a lucrative one. From what I have said so far you will also probably realise that a lot of administrative justice is carried out by people who are not traditional lawyers in private practice, or not lawyers at all.

58. There are challenges, but also opportunities created by administrative justice in Wales.

   a. The first is an opportunity. Still some 50% of work representing Welsh defendant public bodies in administrative law court claims is carried out by lawyers based in England. There is still an untapped market for Welsh lawyers. And one where law schools such as Bangor would be well able to provide additional training for solicitors and barristers wanting to develop more expertise in the subject.

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b. The second is that Welsh public administrative law is increasingly diverging from English public law in terms of its content. There will be an increasing need for lawyers who are experts specifically in Welsh law. The form of Welsh law will also be changing over time with a programme of codification. Organising law in terms of subject matter rather than date of enactment.

c. The codification of Welsh law is primarily the codification of Welsh administrative law, including codification that has already begun in planning law, and in future areas such as education, housing and health. Legal expertise will be needed both in drafting the Codes and in interpreting and applying them over time.

d. In general, new administrative law such as the Future Generations Act places additional duties on public bodies. These bodies may then need further legal advice and expertise in how to ensure that they comply with relevant duties.

e. Whilst integrity branch institutions do not provide legal remedies themselves, they have to work within the law. They have to have a clear understanding of the relationship between administrative law and broader principles of good administration and human rights. These bodies also have a central role in monitoring compliance with international law. As such they have significant need of legal expertise.

f. The increased professionalism and potential expansion of the set of devolved Welsh Tribunals could provide new opportunities for legal practitioners as well as increased potential to progress to a career as a member of the Welsh tribunal judiciary.

g. Administrative justice in Wales is also increasingly turning to alternative methods of dispute resolution. Lawyers who can diversify as arbitrators or mediators will be valued.

h. The legal implications of Brexit are significantly implications for UK and Welsh administrative law, where legal expertise will be in demand, especially in areas such as agriculture and environmental protection. Brexit itself raises major challenges for administrative justice including the rights of EU citizens in the UK.

i. Though a prospect further in the future. The potential devolution of other areas of administrative law to Wales, in particular social security, would require administrative law expertise. Including expertise in how to create a new administrative justice system to enable people to enforce their rights. This would have to be significantly better than the current process of administrative reconsideration by the Department for Work and Pensions.

59. Whilst our research suggests there could be reforms to increase the coherence, efficiency and effectiveness of administrative justice in Wales, an improved system can never be in itself a replacement for advice services. These will always be essential. There are many different pathways to administrative justice; some legal, some not, and some a combination of the two. This can be seen as a positive
development, but it means that early access to high quality information, advice and assistance is crucial. Not least to help people navigate the pathways that are open to them, and to ‘triage’ people’s concerns into the appropriate forum for redress.

60. People’s problems do not come neatly packaged. An issue with special educational needs could well include a health condition, that would be exacerbated by social housing problems. School exclusion can well lead to criminality and engagement between the administrative justice and criminal justice systems. Families could find themselves navigating two, three or more different paths to justice at the same time. Here good advice is essential.

61. This system of pathways to administrative justice is also likely to be heavily influenced by new technologies. In the England and Wales Social Security and Child Support Tribunal, online dispute resolution is currently being piloted. A range of other court and tribunal jurisdictions are in various stages of moving towards greater use of technology. This includes the devolved Welsh tribunals. Wales may choose not to adopt the same approach to continuous online dispute resolution as is being proposed for England (and England and Wales tribunals), but still new technologies will be important.

62. Such new technologies should best be used as tools to assist divergent pathways to administrative justice in different ways. They should absolutely not be seen as universal replacements for advice services, or for in person tribunal and court hearings where required.

63. The modern administrative lawyer is increasingly a problem solver, equipped to understand and advise on a range of matters relating to the administration of public services, and broader government decision-making, using new technologies in that role.

Introducing ‘Artemus’…

64. As part of our current research we have started to develop an online tool. We envisage this will be primarily used by advice providers, and those working in the administrative justice system. However, we also believe that it could help to provide the general public with information about the administrative justice system in Wales, its main institutions, and their different powers and functions.

65. So I would like to introduce you to ‘Artemus’. ‘Artemus’ is an online map of administrative Justice in Wales. You can ask ‘Artemus’ to show you the map of the whole system, and learn more about the bodies in the system, what they do and how they are connected. Or you can follow a particular path, by searching for key terms, for example about education or social housing.

66. We hope to formally launch ‘Artemus’ in early 2020 as the first electronic visualisation of an administrative justice system.

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