Administrative Justice and the Legacy of Executive Devolution: Establishing a Tribunals System for Wales

Nason, Sarah; Pritchard, Huw

Australian Journal of Administrative Law

Published: 24/04/2020

Peer reviewed version

Administrative Justice and the Legacy of Executive Devolution: Establishing a Tribunals System for Wales

Sarah Nason* and Huw Pritchard*

The Welsh model of tribunals is distinctive in light of Wales' political, constitutional and legal development. In particular its journey from a historically sophisticated legal code, to being England's first colony, becoming the often junior partner in a single England and Wales legal jurisdiction. Despite continuation of the combined legal jurisdiction, Wales has responsibilities for administrative justice, and an increasingly systematised approach to its set of devolved tribunals. This has been reinforced by recent legislation, including the statutory establishment of a President of Welsh Tribunals. The Tribunals within the President's remit are managed by devolved Welsh Government, an administrative set up seen by some as the nucleus containing the DNA not only for a fully devolved Welsh tribunals system, but potentially for a Welsh courts and tribunals service.[1]

During replication DNA unwinds so that its instructions can be read and copied, here we read the main strands of DNA within the Welsh tribunal system, examining how complete they might be and what gaps remain to be filled. These strands include; administrative justice principles, structure and administration, independence, procedures and practices, leadership, confidence and standards, political will, coherent policy and longer-term arrangements for oversight. Before examining each strand, we first draw attention to the constitutional context of Wales and how this has informed its unique administrative justice characteristics. Finally, we compare the Welsh model of administrative justice and tribunals to some other jurisdictions, focusing on possible strengths, weaknesses and future directions.

Constitutional Development

The codified native Welsh laws of the 10th Century maintained a clear distinction between Welsh and English laws that remained even after the Norman conquest in 1066. This was

* Bangor University, School of Law.
* Cardiff University, School of Law & Politics and Wales Governance Centre.
[1] Huw Pritchard, 'Building a Welsh Jurisdiction through Administrative Justice' in Sarah Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (UWP, 2017).

gradually challenged by the growing power of English Kings and in 1282, following the death of the 'last Prince of Wales', Edward I imposed aspects of English common law in Wales. In 1536 Henry VIII extended the English legal system over the whole of Wales. Although Wales retained a different structure of courts and circuits until the Judicature Act 1830, it was the English legal jurisdiction that operated in Wales,[2] a legacy underpinning the protracted devolution of legislative powers to Wales.[3]

The Government of Wales Act 1998 introduced a model of 'executive devolution' that established a National Assembly for Wales (the 'Assembly') as a body corporate with subordinate law-making powers. This was structured on a conferred powers model where specific executive powers were transferred from the UK Government to the Assembly.

The body corporate, or so-called 'double yolker' egg model, however, did not reflect a traditional Westminster conception of separation of powers between executive and legislative branches. After an informal separation, the Government of Wales Act 2006 (GoWA) officially divided the Assembly and the Welsh Assembly Government (later renamed the Welsh Government)[4]. GoWA gave the reformed Assembly powers to enact laws, known as Measures, in specific fields.[5] Measures had the same status as primary legislation but were limited by the conferred powers model. Full primary legislative powers were transferred in areas of devolved Welsh competence following a 2011 referendum, but the settlement remained one of conferred powers and Westminster continued to be Wales' other Parliament.

The legal problems of two legislatures within a single legal jurisdiction have since been dodged by 'constitutional sleight of hand'.[6] The GoWA principle of 'apply and extend' provides that Assembly laws apply only in Wales but extend over England and Wales. This allows courts in England to interpret Welsh law and for the unified legal system to operate largely unaltered.

The conferred powers model has however proved unsustainable, with the 2014 Commission on Devolution in Wales (the Silk Commission) recommending that Welsh devolution be brought into line with the reserved powers approach operating in Scotland and Northern Ireland. The Silk Commission concluded some aspects of justice could be devolved immediately, but that devolution of traditional justice institutions, such as courts and the

[2] Richard Rawlings, *Delineating Wales* (UWP, 2003) 22-23; David Gardner, *Administrative Law and the Administrative Court in Wales* (UWP, 2016) 4-11.
[3] Royal Commission on the Constitution 1969-1973 (Volume 1, Cmnd.5460, 1973) 343 [1151].
[4] *Wales Act 2014* (UK) s 4.
[5] *Government of Wales Act 2006* (UK), pt 3 sch 5.
[6] Chris Himsworth, 'Devolution and its Jurisdictional Asymmetries' (2007) 70(1) *MLR* 31, 43.

judiciary, would take at least a decade.[7] However, as concerns administrative justice it recommended that immediate progress could be made by reforming administration of the devolved Welsh tribunals.[8]

Following a Supreme Court case,[9] which interpreted conferred powers as wider than the UK Government had anticipated, a St David's Day White Paper set out plans for a reserved powers model.[10] However, the UK Government's politicised approach to reservations allowed the devolution of some subject matters to be vetoed without full justification. Consequently, 'justice' was not seen as a matter for devolution, except, that is, for statutory recognition of Welsh Tribunals. The subsequent Wales Act 2017 has been criticised for its complex framework of general reservations, specific reservations, and exceptions to reservations.[11] Commentators have described it as "carrying the seeds of its own destruction".[12] Nevertheless, administrative justice is an area where the UK Government has admitted that there are, and could legitimately continue to be, differences between justice in England and justice in Wales. For example, the history of tribunals in Wales operating under some degree of devolved structure goes back more than 50 years. The oldest Welsh Tribunal is the Agricultural Land Tribunal Wales created by the Agriculture Act 1947. Various other tribunals have since been established at different stages of devolution, meaning that their statutory basis and regulation is governed by multiple sources of UK, England and Wales, and Wales only primary and secondary legislation.

The Wales Act 2017 gives statutory recognition to seven specific tribunals; Agricultural Land, Mental Health, Rent Assessment Committees, the Special Educational Needs Tribunal for Wales, appeals about the registration of school inspectors, the Adjudication Panel for Wales and the Welsh Language Tribunal. Further tribunals can be designated as Welsh Tribunals by a UK Order in Council.

The 2017 Act also creates the role of President of Welsh Tribunals. The President is tasked to ensure that Welsh Tribunals are accessible, fair, efficient, that their members have

[7] Commission on Devolution in Wales (Silk Commission), *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (March 2014) chapter 10.
[8] Silk Commission n 7 124.
[9] *Attorney General's Reference, Agricultural Sector (Wales) Bill* [2014] UKSC 43.
[10] HM Government, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020 February 2015).
[11] Richard Rawlings, 'The Strange Reconstitution of Wales' [2018] PL 62, 68; Richard Wyn Jones, "Is it our fate to be governed on the basis of this nonsense?" *Wales Online* (Cardiff) 28 October 2016 <https://www.walesonline.co.uk/news/politics/richard-wyn-jones-wales-bill-12091891>.
[12] BBC News, 'Wales Act carries seeds of own destruction, says Rawlings' *BBC News Online* (5 March 2017) <http://www.bbc.co.uk/news/uk-wales-politics-39159133>.

sufficient expertise, and to have regard to "the need to develop innovative methods of resolving disputes".[13] The Act additionally provides for 'cross-deployment' of judges between the different Welsh Tribunals (with consent of the President).[14]

We discuss some practical implications of these reforms, but politically speaking the current Welsh Government takes the view that they do not go far enough in terms of an evolving Welsh justice system. The Government has argued that the reservation of large aspects of responsibility for the administration of justice, and the single legal jurisdiction of England and Wales, no longer serves the needs of the people of Wales, with the Counsel General for Wales stating:

> A process has begun to create a distinct legal infrastructure for Wales. This is a process that won't stop. The process of making laws for Wales won't stop, the divergence in laws between Wales and England won't stop. The creation of a Welsh legal jurisdiction and the devolution of the justice system is inevitable.[15]

Whether or not separation is indeed inevitable, the process of moving to a reserved powers model has exposed both the constitutional complexity caused by a growing body of divergent laws, but also the practical challenges of operating different systems of public administration within a single legal structure. Research has begun to expose 'jagged edges' in the devolution settlement; caused by the disconnect between devolved policy areas and a largely reserved justice system in the traditional sense of courts and legal services.[16] New statutory Welsh public law duties are more often than not enforced through the reserved England and Wales courts. Here Wales has limited sway over time set aside to create Wales-specific Civil Procedure Rules, a matter which has delayed the bringing into force of key legislation. Wales also has no real say over legal aid policies to support litigants.

That said, it would be wrong to conclude that apparent weaknesses in Welsh administrative justice stem entirely from external factors. Partially due to inexperience (the comparative youth of the Assembly and Welsh Government) and partially due to ideology, Welsh political institutions have tended to conflate administrative justice with public

[13] *Wales Act 2017* (UK), s 60(4)(d).
[14] *Wales Act 2017* (UK), s 62.
[15] Jeremy Miles AM, 'Law in Wales: Access & Accountability' (Legal Wales Conference, Aberystwyth, 11 October 2018) <http://www.legalwales.org/downloads/2018-10-30-speech-by-the-counsel-general-for-wales.pdf>.
[16] Robert Jones & Richard Wyn Jones, *Justice at the Jagged Edge in Wales* (WGC 2019).

administration. Our examples below show that this has led to challenges in complying with core constitutional principles of judicial independence and separation of powers.

Cognisant of growing concerns around 'jagged edges', the Welsh Government established a Commission on Justice in Wales under the chairmanship of Lord Thomas of Cwmgiedd. It had a wide remit to review the operation of the justice system in Wales, setting a long-term vision.[17] The Commission reported on 24 October 2019, with its headline recommendation being a call for the full legislative and executive devolution of responsibility for justice accompanied by a transfer of financial resources.[18] It also recommended that the law applicable in Wales should be formally identified as the law of Wales, distinct from the law of England. Perhaps unsurprisingly, the UK Ministry of Justice's immediate response was to stress its belief that a single legal jurisdiction remains the most effective way to deliver justice across England and Wales. Regardless of the MoJ's reaction, the Commission Report is full of 'ground-up' recommendations that address more immediate challenges of delivering justice in Wales, particularly administrative justice, for the people of Wales.

Principles of Administrative Justice

Principles are the foundation of any system of justice. The work of various bodies reporting on devolving legislative powers to Wales, and on jurisdictional arrangements, has been underpinned by a principled approach to good administration.[19] Emphasis has been placed on devolving competences for the benefit of public administration and social justice, not on the incremental increase in power for its own sake.

In 2007 Mark Drakeford (Wales' First Minister since late 2018) proposed a Welsh commitment to social justice anchored in principles including the value of good governance, an ethic of participation, and improving equality of outcome.[20] This connection to substantive equality has remained evident since former First Minister Rhodri Morgan's 2002 'clear red water' speech where he argued that Wales should take a different approach to the politics of Westminster, noting: "Our commitment to equality leads directly to a model of the relationship

[17] Commission on Justice in Wales <https://gov.wales/commission-justice-wales/what-we-do>.
[18] Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) ('Thomas Commission')
[19] The Richard Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (2004). <http://webarchive.nationalarchives.gov.uk/20100404200945/http:/www.richardcommission.gov.uk/content/finalreport/report-e.pdf>; Silk Commission, n 7, Thomas Commission, n 18.
[20] Mark Drakeford, 'Social Justice in a Devolved Wales' (2007) 15(2) *Journal of Public Finance and Public Choice* 171.

between the government and the individual which regards the individual as a citizen rather than as a consumer".[21] The political majority in Wales continues to back state provision of public services and 'progressive universalism' supporting those most in need.[22] In essence a Welsh approach to administrative justice is rooted in the view that good governance is "good for you".[23]

However, that the concept of administrative justice is still a relatively unfamiliar one in Wales, and as one Assembly Member put it, "is not on the lips of my constituents".[24] So, whilst there is significant evidence from which to construct a principled Welsh approach, those responsible for the system may take more convincing that this is indeed their construct, and that it matters.

The importance of underlying principles was recognised by the Committee for Administrative Justice and Tribunals in Wales (CAJTW), which considered one of its primary tasks to be creating a set of Administrative Justice Principles for Wales (the '*Principles'*). The *Principles* designate administrative justice as a fundamental right and a cornerstone to social justice.[25] They cover decision-making, systems and procedures, and values and behaviours. They are outward looking, being based in part on a synthesis of developing European and global standards.

When comparing the Welsh conception of administrative justice to a possible Australian account, a likely difference is that the Welsh approach is focused more on administrative justice as a collective social good, than as a means of providing individualised substantive justice. Matthew Groves has noted that during the 1999 Australian Institute of Administrative Law Annual Conference on the theme of administrative justice, no speaker offered a detailed or even working definition of the concept.[26] The Australian Administrative Review Council (ARC), unlike the Welsh CAJTW, did not develop specific administrative

[21] Rhodri Morgan, 'Clear Red Water' (speech to the National Centre for Public Policy, Swansea, December 2002) <https://www.sochealth.co.uk/the-socialist-health-association/sha-country-and-branch-organisation/sha-wales/clear-red-water/>.
[22] Matthew Wall and Sophie Williams, 'Seeking Evidence for a Welsh Progressive Consensus: Party Positioning in the 2016 National Assembly for Wales Election' (2017) *Parliamentary Affairs* 1.
[23] Drakeford, n 20.
[24] Sir Adrian Webb, Ray Burningham and Sarah Nason, 'Oral Evidence to the Commission on Justice in Wales' (23 March 2019).
[25] Committee on Administrative Justice and Tribunals Wales, *Administrative Justice: A Cornerstone of Social Justice in Wales; Reform priorities for the Fifth Assembly* (2016) <https://gov.wales/docs/cabinetstatements/2016/160729cornerstoneofsocialjustice.pdf>.
[26] Matthew Groves, 'Administrative Justice in Australian Administrative Law' (2011) 66 *Australian Institute of Administrative Law* 18.

justice principles, but it has espoused a collection of public law values including fairness, lawfulness, rationality openness (or transparency) and efficiency.[27]

It is likely that the basis of administrative justice in Australia remains as expressed by the Kerr Committee; that Federal institutions at least are intended to reconcile the requirements of efficiency in administration, and justice to the citizen. Australian literature highlights the role of individuals, emphasising they are recipients of justice and therefore central to administrative justice.[28] However, the individual's interests should be balanced against the distributive justice focus of public administration. The Australian concept stresses that individuals who access the administrative justice system are looking for a particular substantive outcome.

The Welsh conception mirrors this commitment to individuals as rights bearers in the administrative justice system. However, a difference may be the Welsh focus on protecting individuals through engagement and involvement, giving them a voice or co-operative role in developing and delivering public services, but less emphasis on securing individual substantive rights through tribunal (and court) procedures and remedies. What we cannot be certain of is whether this 'egalitarian'[29] Welsh approach to administrative justice is the product of principled design, or the default implications of limited power and responsibility over the full purview of justice functions (courts, judges, legal aid, the legal profession and so on).

Welsh Government's response to the CAJTW *Principles* was relatively lukewarm, noting that "the proposed principles closely reflect existing values and legislative provisions that inform working practices. The CAJTW formulation will provide a helpful source of guidance for the Welsh Government".[30] It is difficult to determine how much the *Principles* have been used as there are few references to them in published documents, whereas there have been occasions where explicitly testing proposed statutory redress measures against the *Principles* could have avoided problems further down the line.

Ongoing research has recommended that the President of Welsh Tribunals incorporates the *Principles* (or a suitably amended version of them) into the developing rules and procedures

[27] Administrative Review Council, *The Scope of Judicial Review* (Report No 47, 2006) 30.
[28] Robin Creyke, 'Administrative Justice in Australia' in Michael Adler (ed) *Administrative Justice in Context* (Hart Publishing 2010).
[29] An egalitarian system purports to engage users as partners in the process of procuring and delivering public services, and in the processes of decision-making and dispute resolution. See Simon Halliday and Colin Scott, 'A Cultural Analysis of Administrative Justice' in Michael Alder (ed), *Administrative Justice in Context* (Hart Publishing 2009).
[30] Welsh Government Response to CAJTW (2016) <https://gov.wales/docs/cabinetstatements/2016/160729justicetribunalsreportresponseen.pdf>.

of Welsh Tribunals.[31] The research also recommend that the Law Commission examines how best to incorporate the *Principles* into any proposed reforms to the Welsh Tribunals system as part of its forthcoming project. The background to this project is that whilst some of the gaps in Welsh Tribunal structural and procedural DNA have been filled by administrative arrangements and statutory reform, inconsistency and complexity remains in processes and legislative frameworks that developed prior to devolution, and which are now inconsistent with the Wales Act 2017. In this context, the Law Commission has a broad remit to consider the following:

- the roles of the President of Welsh Tribunals and the Welsh Tribunals Unit
- appointment and discipline of Tribunal judges and other members
- appointment of Presidents/Deputies
- power to make and standardise procedural rules
- appeals processes
- complaints process
- protecting judicial independence[32]

The project is anticipated to result in a draft Welsh Tribunals Bill designed to establish an appropriate degree of coherence and consistency in procedures.

Structure and Administration

Matters the Law Commission will have to grapple with include the strands of DNA concerning structure and administration. Unlike the reserved tribunals of England and Wales, and many Australian tribunals (at Commonwealth, and State and Territory level) the Welsh Tribunals have not been amalgamated into a single structure. In England and Wales reserved bodies, amalgamation has been through the creation of a single tribunal edifice incorporating a range of existing disparate bodies into a tier and chamber structure. These reforms were recommended by the 2001 Leggatt Report and enacted in the Tribunals Courts and Enforcement Act (TCEA) 2007.

[31] Sarah Nason, *Administrative Justice: Wales' First Devolved Justice System: Evaluation and Recommendations* (December 2018) <http://adminjustice.bangor.ac.uk/documents/AJWalesReportESRCDec18.pdf>.
[32] Law Commission, 'New Welsh law reform project on tribunals announced' (26 July 2018) <https://www.lawcom.gov.uk/new-welsh-law-reform-project-on-tribunals-announced/>.

When Leggatt reported, powers over a range of tribunals had already been transferred to the Assembly. Although England and Wales (and UK) tribunals have been increasingly judicialised, at the time of devolution tribunal jurisdictions nevertheless attached to the administrative policy fields that transferred from the UK Government Wales Office to the Assembly (and subsequently to Welsh Government). [33] Despite Leggatt's remit not extending directly to devolved tribunals, he highlighted the need for cross-border operation.[34]

> The process is complex because devolution has been achieved in different ways in each country as regards jurisdiction, powers, policy responsibilities, legislation and operational matters. There are tensions between general (devolved) administrative justice matters and the reservation of UK tribunals.[35]

That devolved tribunals in Scotland, Wales and Northern Ireland remained outside the TCEA 2007 structure has sometimes compounded the ad hoc development that Leggatt hoped to resolve.[36] He proposed closer inter-governmental relations as a means to ensure that devolved issues were considered during tribunal reform.[37] However, the UK's inter-governmental mechanisms have come under consistent strain, and justice is no exception.[38]

An innovation of the TCEA 2007 was the introduction of a statutory definition of an administrative justice system. This would have been of limited value in itself, without the creation of an Administrative Justice and Tribunals Council (AJTC) to oversee that system. This included a Welsh Committee with a statutory duty to oversee administrative justice as it applies to Wales, extending to tribunals administered by the Welsh Government. This provided an opportunity to define devolved tribunals operating in Wales in a converging, but loose and non-comprehensive structure based on the statutory remit of the Welsh Committee.[39] In 2010

[33] HM Government, *A Voice for Wales: A White Paper* (Cm3718, July 1997); Roderick Evans J, 'Devolution and the Administration of Justice' (Lord Callaghan Memorial Lecture 2010, Swansea University, 19 February 2010).
[34] Sir Andrew Leggatt, *Tribunals for Users: One System, One Service* (March 2001) [11.4].
[35] Leggatt, n 34, [11.3].
[36] Leggatt, n 34, [1.3].
[37] Leggatt, n 34, [11.5].
[38] *Jagged Edge*, n 16, 43; Nicola McEwen, Michael Kenny, Jack Sheldon and Coree Brown Swan, *Reforming Intergovernmental Relations in the United Kingdom* (November 2018); Brian Thompson, 'Opportunities and Constraints: Reflections on Reforming Administrative Jsutice Within and Across the United Kingdom' in Sarah Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (UWP, 2017).
[39] *Tribunals, Courts and Enforcement Act 2007* (UK) sch 7, pt 4, para 27 defined them as tribunals whose functions are only exercisable in Wales and where Welsh Ministers have powers to either appoint or make regulations; See also *Administrative Justice and Tribunals Council (Listed Tribunals) (Wales) Order 2007*, SI 2007/2876 (W.250).

the Welsh Committee undertook a *Review of Tribunals Operating in Wales*,[40] identifying relevant bodies, some administered by Welsh Government departments, others by local authorities, some long standing, others ad hoc. This Review highlighted matters to be rectified, including independence and impartiality, accessibility for users, efficiency and effectiveness, and coherence.[41]

The Report emphasised contextual differences between England and Wales, and also between Wales, Scotland and Northern Ireland. Differences relating to devolution settlements, the absence of a separate Welsh legal jurisdiction (Scotland and Northern Ireland both being separate from the England and Wales jurisdiction), and the comparative size and scale of tribunal decision-making.[42]

Welsh Government has subsequently followed an incremental approach, especially in relation to reforming tribunal administration, beginning with the establishment of an Administrative Justice and Tribunals Unit (now known as the Welsh Tribunals Unit (WTU)). The WTU provides a unified management structure, and some independence from policy departments.[43] This form of 'shared services' model also operates for some smaller federal tribunals in Canada[44] and allows access to pooled resources, technology, and expertise, including linguistic expertise valuable for a bilingual system.[45]

Amalgamation is not off the table and has been proposed for tribunals in the smaller jurisdiction of Northern Ireland (a population just over half that of Wales). However, this process has been paused due to the current suspension of devolution to Northern Ireland (at the time of writing). On the other hand, reform in Scotland is on-going with a six chamber First-tier Tribunal and a single chamber Upper Tribunal having been established.[46] Following the Scotland Act 2016, there are also further provisions to transfer responsibility for management and operation of some reserved tribunals to Scotland. The President of Scottish Tribunals has expressed frustration with the lack of development in transferring employment, tax and social security jurisdictions, whilst recognising that much of this delay is caused by inevitable

[40] Administrative Justice and Tribunals Council: Welsh Committee, *Review of Tribunals Operating in Wales* (2010)
[41] *Tribunals Operating in Wales*, n 40, 24-25.
[42] *Tribunals Operating in Wales*, n 40, [69].
[43] *Administrative Justice* n 25, [25].
[44] *Administrative Tribunals Support Service of Canada Act*, SC 2014, c 20.
[45] Philip Bryden, 'A Canadian Perspective on Tribunal Independence' paper presented to a Council of Australasian Tribunals (COAT) seminar, Adelaide (16 April 2015) cited in Robin Creyke, 'Amalgamation of Tribunals in Australia: Whether 'tis Better ... ?' in Sarah Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (UWP 2017) 325.
[46] Judicial Office for Scotland, *The Scottish Tribunals: Annual Report prepared by the President of the Scottish Tribunals, 1 December 2016 - 31 March 2018* (September 2018) Annex A.

financial constraints as well as ensuring that transferred judges retain the same terms and conditions of service, particularly as regards security of tenure.[47]

Australian commentators note that tribunal reforms, and in particular the amalgamation of tribunals, have often been undertaken for political and pragmatic reasons, with little if any independent empirical evidence or inquiry to support them. Matthew Groves argues that whilst the AAT was originally set up as an interface between citizens and government as a means of increasing access to justice, this has been supplanted by aspirations of efficiency and informality directly linked to costs savings. Similar concerns have been expressed in the UK, perhaps less so in relation to the amalgamation of England and Wales and UK tribunals (though there has been no evidence-based review of the success of the Leggatt reforms), but increasingly in relation to the introduction of compulsory internal administrative review prior to a tribunal appeal, and the digitalisation programme.[48]

Robin Creyke has proposed an approach to tribunal reforms, and particularly to tribunal amalgamation, that takes into account organizational theory.[49] She argues that Wales should take a less hasty approach than has occurred in other jurisdictions and should consider four key factors; political commitment, organizational structure, process and procedure and organizational culture. Each of these factors requires discussion and some are equivalent to the broader strands of DNA which we consider are contained in the nucleus of the Welsh Tribunals system.

Independence

An important aspect of organizational structure, and particular processes (especially those relating to tribunal judges) is independence. In the Welsh structure, WTU staff are Welsh Government employees.[50] Though not providing complete independence, this is consistent with AJTC Welsh Committee recommendations about a suitable structure for Wales for the time being.[51] This structure is also, to some degree, consistent with developments in other parts of the UK and the common law world. For example, Scottish devolved tribunals were initially administered by an executive unit of the Scottish Government before being incorporated into

[47] *The Scottish Tribunals Annual Report*, n 46, 19.
[48] Robert Thomas, 'Current Developments in UK Tribunals: Challenges for Administrative Justice' in Sarah Nason (ed*), Administrative Justice in Wales and Comparative Perspectives* (UWP 2017).
[49] Robin Creyke, n 35.
[50] Research Interview with Head of WTU (June 2019).
[51] *Tribunals Operating in Wales*, n 40, [68], [70].

the Scottish Courts and Tribunals Service.[52] This approach provides what Sossin has referred to as 'quasi-independence'; such quasi-independent bodies are often tied to legislation designed to meet quite specific policy objectives, and they have limited control over their budgets and staff appointments.[53] Sossin suggests that with strong political leadership it is possible to uphold this quasi-independent structure.[54]

At least some Welsh Tribunal leaders are satisfied with the current 'quasi-independent' administrative arrangements. The Chairperson of the Agricultural Land Tribunal for Wales has noted that it 'is already a well-understood separation of roles, reflecting the separation of powers between the judiciary and the executive'.[55] A research interviewee from the WTU explained that the WTU is perceived differently to other Welsh Government departments and workstreams, and that there is growing element of respect and understanding particularly for judicial independence and expertise, though this has taken some time to establish. It was also suggested that having a judicial lead (the President of Welsh Tribunals) creates space between the individual tribunal presidents and Ministers.[56] Nevertheless, outward perceptions of the relationship between WTU and Welsh Government are also important.

The President of Welsh Tribunals has proposed that the WTU structure should be reformed as an executive agency.[57] One reason for this is the importance of ensuring not only that judicial independence *is* maintained, but that it is "seen to be maintained" as "the cornerstone of the democratic system".[58] There is still some room for flexibility in the precise model that would enhance independence and clarify the relationship between Welsh Government and the WTU. For example, the Welsh Revenue Authority, the first non-ministerial government department established by the Welsh Government, could provide a template for developing the WTU.[59] The Commission on Justice in Wales has now recommended that: "The Welsh Tribunals Unit should have structural independence".[60] If the

[52] Scottish Government, *Consultation on the Scottish Government's Proposals for a New Tribunal System for Scotland* (2012) [3.21]-[3.28]; Administrative Justice and Tribunal Council: Scottish Committee, *Tribunal Reform in Scotland: A Vision for the Future* (2010) [4.35].
[53] Lorne Sossin, 'The puzzle of administrative independence and parliamentary democracy in the common law world: A Canadian perspective' in Susan Rose-Ackerman & Peter Lindseth (eds) *Comparative Administrative Law* (Edward Elgar 2010) 212.
[54] Lorne Sossin, n 53, 220-221.
[55] Commission on Justice in Wales, *Oral Evidence Session* (22 March 2019) <https://gov.wales/sites/default/files/publications/2019-05/Oral%20evidence%20to%20the%20Justice%20Commission%20on%20Tribunals%20in%20Wales_0.pdf>.
[56] Research Interview with Head of WTU (June 2019).
[57] President of Welsh Tribunals, *First Annual Report (*31 March 2019) 9-10.
[58] President of Welsh Tribunals, n 57, 10.
[59] Welsh Revenue Authority, *Annual Report and Accounts 2017-19* (WG38294, 2019).
[60] Thomas Commission, n 18, Recommendation 27.

WTU is reformed as an executive agency this may well then be short-lived, with the Justice Commission (and the President of Welsh Tribunals who was also a Commissioner) now openly favouring an independent tribunals service chaired by the President (based on the Scottish model). This would be desirable not only for the immediate benefits, but also in anticipation of a longer-term transfer of additional justice functions to Wales.

The current Welsh 'quasi-independence' model is quite different to the constitutional position of many Australian tribunals, which are, in effect, part of the executive branch and defined specifically as 'not courts'. When considering the case for England and Wales, and UK-wide reforms the Leggatt Committee recognised tribunals as judicial bodies, (and superior courts of record in the case of the Upper Tribunal), insisting that they should have the same independent status as courts.[61] Although Leggatt welcomed some comparisons with Australian tribunals as having an "admirable and distinctive role" within the executive branch, he concluded that the 1957 Franks Committee had set UK tribunals on a judicial path.[62] The more recent Tribunals (Scotland) Act 2014 follows this judicial trajectory. Nevertheless, there has been discussion of the potential value of a 'merits review' approach particularly in high-volume UK tribunal jurisdictions (especially immigration and social security);[63] the case for UK tribunals considering cases on their substantive merits is not entirely closed.

Procedure and Practice

Leggatt's equation of courts and tribunals is said to have led to the 'judicialisation' of tribunals; increased formalism in rules, practices and procedures, and an increase in adversarialism in at least some jurisdictions. This form of judicialisation or juridification is not so evident in the Welsh Tribunals. Their flexibility and adaptability has been recognised, including where lack of amalgamation within a courts and tribunals structure has led to making better use of less formal venues more sensitive to user perspectives. Cuts to the HMCTS England and Wales estate will have less impact on Welsh Tribunals which have only made limited use of court buildings. It is fair to say that the Welsh Tribunals have to an extent developed ad hoc practices suited to the needs of particular jurisdictions, however this adaptability does not entirely ameliorate concerns caused by inconsistencies across rule and regulation making processes.

[61] Leggatt, n 34, [2.5]; Lorne Sossin, n 53, 218.
[62] Leggatt, n 34, [2.5].
[63] Robert Thomas and Joe Tomlinson, 'A Design Problem for Judicial Review: What We Know and What We Need to Know about Immigration Judicial Reviews', *U.K. Const. L. Blog* (16th Mar 2017) <https://ukconstitutionallaw.org/>.

Despite Welsh Government having most administrative responsibility for Welsh Tribunals, procedural rules stem from a range of legal sources. For example, rules and regulations of the Agricultural Lands Tribunal for Wales are formally laid down by the Lord Chancellor, despite funding and administration of the tribunal being the responsibility of the WTU. There are also legacy issues, where certain English subject-matter jurisdictions (for example Residential Property Tribunals) have been transferred to the First-tier Tribunal under the TCEA 2007, whereas the sister Welsh jurisdiction (the Residential Property Tribunal for Wales) remains governed largely by sections of England and Wales legislation (the Housing Act 2004) that no longer apply to England.[64] This leaves old rules and regulations designed for England and Wales tribunals operating in a different, Wales only, constitutional and public administration context.

Wales' first attempt at devising a wholly devolved administrative justice regime was the Welsh Language (Wales) Measure 2011, creating a system of Welsh Language Standards, a Welsh Language Commissioner and a Welsh Language Tribunal.[65] Although this is the primary means for protecting a national language, the main emphasis of the legislation is on administrative procedures, detailing the role and functions of the language regulator (the Commissioner) and the regulator's regulator (the Welsh Language Tribunal (WLT)). Some argue that this has come at the expense of outlining the content of legally enforceable substantive language rights.[66] Individuals cannot directly challenge the content of Welsh Language Standards developed by the Welsh Language Commissioner. If a complainant considers there has been a flaw in the Commissioner's investigation into compliance with its own Standards, they can appeal to the WLT.

The WLT is a unique case study as it was the Welsh Government and Assembly's first attempt at establishing a body with judicial functions. The WLT appointment regulations require Welsh Ministers to 'have regard' to upholding the principles of rule of law and independence of the Tribunal.[67] Arrangements were also made for a member of the Law Commission to sit on the panel appointing the tribunal President and members.[68] The 2011 Measure copies Part 2 of TCEA 2007 in determining whether a person satisfies judicial-appointments eligibility conditions. In terms of drawing up the tribunal regulations themselves,

[64] *Transfer of Tribunal Functions Order 2013,* SI 2013/1036, sch 2, pt 1 para 1.
[65] Catrin F Huws, 'Administrative Justice and the Welsh Language (Wales) Measure 2011' in Sarah Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (Cardiff, UWP, 2017).
[66] Huws, n 65.
[67] *Welsh Language Tribunal (Appointment) Regulations 2013*, SI 2013/3139.
[68] Welsh Government, *Appointment of the President and other members of the Welsh Language Tribunal: Statement of Appointment Policy and Procedure* (Version 1(10.12.13)) [4.3.1].

the WLT President was primarily responsible for the process with support from CAJTW, thus ensuring expertise and impartiality from government.

In relation to procedures and practices, the President of Welsh Tribunals is also required to have regard to innovative methods of dispute resolution. Such methods are anticipated to include mediation processes and other ADR techniques, inquisitorial methods, and digitalisation. A previous Report of the Justice in Wales Stakeholder Group, recommended that Welsh Government should consider the benefits of adopting inquisitorial approaches in any of the devolved tribunals it administers.[69] However, the Report did not examine any research and commentary around different types of approaches, and that adversarial/inquisitorial and active/passive methods are a continuum of different styles rather than absolutes. It did however note that changing judicial and administrative styles could involve costs and new training requirements and should only be adopted in order to improve outcomes for individuals.

In the context of any move to systematise or rationalise Welsh Tribunal procedures and processes, whether combined with amalgamation of jurisdictions or not, there must be an appropriate degree of balancing specialisation and generalisation within tribunal rules and balancing the interests of a range of stakeholders. There is a particular concern to ensure that the needs of smaller jurisdictions are not swamped by those with larger caseloads, for example the caseload of the Mental Health Review Tribunal for Wales is over 2,000 per-annum whereas that of the WLT is circa five to ten per-annum.

Another matter for clarification and reform will be the disjointed appeal routes from Welsh Tribunals.[70] For example, some appeals go to the Administrative Court and others to various Chambers of the England and Wales Upper Tribunal. The only real consistency is that there are no devolved judicial bodies in Wales with the authority to set binding legal precedents.

Another issue of procedure is the extent to which Welsh Tribunals should be digitalised. Electronic working is already evident within Welsh Tribunals, and it is notably easier for some tribunals to adapt their processes quickly depending on the nature of their caseloads. Reforms at England and Wales, and UK levels are progressing rapidly under the HMCTS digitalisation project.[71] Through the *Tribunals Judicial Ways of Working* programme, tribunals will see

[69] Justice Stakeholder Group, *Law and Justice in Wales: Some Issues for the Next Assembly* (March 2016) <https://gov.wales/sites/default/files/inline-documents/2018-11/written-statement-justice-stakeholder-groups-report-law-and-justice-in-wales.pdf>.
[70] Research Interview President of Welsh Tribunals.
[71] Senior President of Tribunals, *Tribunals Judicial Ways of Working* (2019) <https://www.judiciary.uk/wp-content/uploads/2019/01/tribunals-jwow-response-1.pdf>; Joe Tomlinson, *Justice in the Digital State: Assessing the next revolution in administrative justice* (2019).

radical changes to how they operate,[72] including for example, full video hearings and continuous online resolution.

Digitalisation could have particular benefits for Wales, which has significant rural populations. However, advantages in terms of geography will need to be balanced against challenges of demography, digital exclusion and broadband access.[73] Digitalisation reforms are on-going for a substantial number of cases from Wales that are determined in reserved tribunals (the biggest by far being the Social Security and Child Support Chamber of the First-tier Tribunal) and for appeals from Welsh Tribunals to the England and Wales Upper Tribunal. There are concerns around two-speed or multiple-speed processes diverging between England and Wales, where Welsh tribunals risk being left behind in part due to not being able to take advantage of economies of scale in technological developments. The WTU is likely to bide its time until sufficient information is available to evaluate the success of the HMCTS digitalisation programme with respect to jurisdictions where Wales has comparable devolved competence, such as in mental health and special educational needs. This is a wise move as the speed of the reforms and limited opportunities for independent research evaluation have alarmed commentators.[74] That the reforms are taking place during a time of austerity cannot be ignored; if a particular degree of digitalisation prioritises efficiency over fairness and equal access to justice, this would not fit with the Welsh political approach to good administration.

The Commission on Justice in Wales has now recommended that a strategy should be drawn up to ensure proper access to justice based on the needs of people of Wales. This should include a "workable court IT network" with video and digital facilities, assistance for users, improved information on accessing dispute resolution remotely, a "digital network" and a court centre in Cardiff "fit for a capital city". [75]

Confidence and Standards

The perceived fairness of tribunal procedures and practices is a factor going to public confidence, with 2015 research highlighting a lack of confidence in the capacity of the justice

[72] *Tribunals Judicial Ways of Working*, n 71.
[73] *Wales' First Devolved Justice System*, n 31, [103]-[105].
[74] Public Law Project, *The Digitalisation of Tribunals: What we know and what we need to know* (PLP 2018) <https://publiclawproject.org.uk/wp-content/uploads/2018/04/The-Digitalisation-of-Tribunals-for-website.pdf>.
[75] Thomas Commission, n 18, Recommendation 39.

system as devolved to Wales to deliver quality outcomes and experiences comparable to combined England and Wales institutions.[76]

CAJTW has stressed that individual users and legal professionals must be able to have confidence in the system and that it should deliver "at least as good a quality of justice as in England". One way of achieving this is through ensuring quality within the judicial branch, with consistent judicial appraisal and discipline across the Welsh Tribunals, capable of passing 'parity test' with England.[77] Efforts to achieve this have highlighted the 'jagged edges' of devolution, especially regarding parity of judicial conditions, and parity of judicial opportunity. The judicial appointments process remains inconsistent across the Welsh Tribunals. For example, the Lord Chancellor appoints the president and legal chairs of the Special Educational Needs Tribunal for Wales (SENTW), whereas the appointment of lay members has been transferred to the Welsh Government (though Secretary of State consent is required).[78]

The Welsh Government has adopted several administrative measures aimed to "achieve standards that are comparable with non-devolved tribunals".[79] There is a Framework Agreement between the Judicial Appointments Commission (JAC) and Welsh Government for recruitment and appointment processes. In practice the process for appointing tribunal judges is the same regardless of whether the Lord Chancellor or Welsh Ministers are the appointing body, however this is not reflected in statutory frameworks which are still disjointed.[80]

In addition to the JAC, the Judicial Office has also provided support including providing access to judicial office guidance and training materials. The Welsh tribunal judiciary use the same ejudiciary communication network as England and Wales judges. This shows that WTU can 'tap into' non-devolved arrangements in order to provide a consistent level of service to the judiciary. Similar arrangements have previously been in place with the Judicial College (in respect of training) and the Judicial Conduct Investigations Office (JCIO) regarding complaints.

CAJTW noted in 2016 that "although [the] Welsh judiciary [were] in effect 'tied in' to England and Wales institutions (the Judicial Office, Judicial Appointments Commission, Judicial College and Judicial Conduct Investigations Office)" the relationship between them

[76] Sarah Nason, *Understanding Administrative Justice in Wales* (November 2015) 17 <http://adminjustice.bangor.ac.uk/documents/full-report.pdf>.
[77] *Administrative Justice*, n 25, [25], recommendation 11.
[78] This will remain the case when the provisions for the Education Tribunal for Wales come into force under the *Additional Learning Needs and Education Tribunals for Wales (Wales) Act 2018* (Wales), s 91.
[79] *Welsh Government Response to the CAJTW*, n 30.
[80] *Welsh Government Response to the CAJTW*, n 30.

has not been clear.[81] In particular, the small size of Welsh Tribunals and complexity of their constitutional position hampered progression of more formal arrangements.[82] There were also notable gaps. For example, JCIO do not extend over all devolved tribunals and the Wales Training Committee of the Judicial College has no responsibility for devolved Welsh Tribunals (only Welsh interests in the TCEA 2007 edifice).[83]

CAJTW recommended a comprehensive set of formal agreements with judicial offices like JAC, Judicial College, and JCIO, [84] but it also emphasised that Welsh training should not be solely delivered by England and Wales bodies. Currently, training is arranged by the individual Welsh Tribunal presidents, with oversight from the President of Welsh Tribunals, and can be adapted to deal with emerging legislation. Joint 'judge craft' training days have also been discussed across the Welsh Tribunals. It has been suggested that the minimum amount of training is being met by these arrangements.[85]

The WTU, in conjunction with the President of Welsh Tribunals and tribunal leads, is beginning to develop internal expertise and establishing equivalent roles to those within HMCTS, the JCIO and Judicial Office. A natural consequence of administering tribunals is the need to increase expertise in areas not previously the concern of Welsh Government such as judicial salaries, pensions, and complaints.[86] This provides some insights into what will eventually be required to administer a potentially much larger set of judicial bodies in the case of further devolution.

The Welsh Tribunal judiciary have in the past been concerned about parity of opportunity with the 'English' judiciary. Research in 2015 noted that there was little incentive for junior practitioners to undertake a judicial career in Wales due to lack of opportunities to sit. It was suggested that good candidates were being lost to England where there were more opportunities to gain experience. Participants worried about the risk of a 'second-rate' judiciary in Wales and 'cross-ticketing' of judges was identified as a way to tackle some concerns.[87] The Wales Act 2017 now provides for Welsh Tribunal judges to be cross-deployed across the Welsh Tribunals, or to the First-tier Tribunal. Early indications are that this has been successful in terms of level of judicial interest and quality of candidates, it can also reduce recruitment

[81] *Administrative Justice*, n 25, [26].
[82] *Administrative Justice*, n 25, [26].
[83] *Administrative Justice*, n 25, [28]; Commission on Justice in Wales, *Oral Evidence Session* (22 March 2019) <https://gov.wales/sites/default/files/publications/2019-05/Oral%20evidence%20to%20the%20Justice%20Commission%20on%20Tribunals%20in%20Wales_0.pdf>.
[84] *Administrative Justice*, n 25, Recommendation 10.
[85] Research Interview with Head of WTU (June 2019).
[86] Research Interview with Head of WTU (June 2019).
[87] *Understanding Administrative Justice*, n 76, [7.6]-[7.9].

costs.[88] Cross-deployment into the First-tier Tribunal has also occurred in the case of the Property Chamber. A member of the tribunal judiciary in Wales has recently been appointed as a circuit judge; and there is a perceived sense of greater opportunities for career progression than back in 2015.

Political Will and Jagged Edges

Although the Welsh Government has made little ostensible use of the Administrative Justice Principles for Wales developed by CAJTW, the Counsel General has reinforced the importance of principle-based administrative decision-making in the context of modern devolved government. Such proposed principles were said to include; honesty, fairness, candidness, legality, rationality, proportionality and sustainability. With decisions subject to testing by review processes that are objectively fair and proportionate. Following up this account in an Assembly Plenary discussion he proposed that:

> we can expect that administrative decisions lead us to a more equal Wales...so that decisions taken by tribunals and by commissioners and by ombudsmen within the administrative justice system lead us to that outcome…[89]

The current Welsh Government's commitment to further devolution of responsibility for the administration of justice is encapsulated, again in the words of the Counsel General, that devolution of justice and the creation of a Welsh legal jurisdiction is inevitable.

Welsh Government commitment to improving judicial independence through administrative and governance arrangements has more recently been matched by public statements. Such as the Counsel General's Cabinet Statement on the Welsh Tribunal judiciary's independence, coinciding with pressure on the UK Lord Chancellor for not defending the judiciary following press criticism of the main 'Brexit' judicial review case.[90]

However, when it comes to specific reforms that could increase the workload of Welsh Tribunals, political attitudes appear more reticent. We give three specific examples here, also highlighting other strands of DNA in tribunal development (such as appropriate procedures

[88] President of Welsh Tribunals, n 57, 7; Research Interviews with Head of WTU (June 2019).
[89] Counsel General Questions (National Assembly for Wales, Plenary, 26 September 2018) <http://record.assembly.wales/Plenary/5352#A45564>.
[90] *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 and Counsel General, 'Written Statement: independence of the Welsh tribunals' (March 2017).

and coherent structures). These examples are education, residential property and returning again to the Welsh language. The first two examples also highlight the 'jagged edges' of devolution where policy responsibility and tribunal administration is devolved, whilst traditional justice functions such as courts and legal aid are not.

Education

The Additional Learning Needs and Education Tribunal (Wales) Act 2018 creates a new framework for supporting children of compulsory school age (or below) and young people in school or further education with Additional Learning Needs (ALN). It introduces a single statutory Individual Development Plan (IDP) that applies to all learners up to age 25, aimed at ensuring equity in terms of support and rights for those in post-16 education. Further core aims of the Act are more participation and collaboration in the development and implementation of IDPs; avoiding disagreements and early dispute resolution; and providing clear and consistent rights of appeal.

The Act renames SENTW as the Education Tribunal. It is predicted to lead to an increase in Education Tribunal claims, as the right to appeal is extended from under 16s (through their parents/carers or in their own right where relevant) to young people up to the age of 25 pursuing further education. Other changes in the legislation will have a consequent impact on the types of cases issued and determined in the Education Tribunal, but not necessarily their frequency.

Whilst some increase in caseload is accepted in consequence of substantive Welsh law reforms, there are also matters currently determined in non-devolved courts that could feasibly have been transferred to the Education Tribunal, but which will not be. These are disability discrimination cases under the UK Equality Act 2010 currently within the jurisdiction of the county courts. These cases are within the specialist expertise of Education Tribunal members and transferring them to the Tribunal could lead to a more integrated and less confusing system for users. It may be that the reason for not transferring this class of cases to the tribunal is more to do with concerns about Wales taking a different approach to England (where such cases are determined in county courts) than it is to do with further increases in the Welsh Tribunal caseload.

In the education context the AJTC Welsh Committee, and later CAJTW, recommended that thought be given to transferring school admissions and school exclusions appeals into an Education Tribunal for Wales. These appeals are currently determined by panels convened by

Local Authorities (of which there are 22, potentially resulting in 22 different processes with concerns over consistency, fairness and transparency).[91] However, following feasibility studies, the Welsh Government current view is that the Education Tribunal is not an 'appropriate vehicle' for these types of appeals.[92] The Commission on Justice in Wales has, however, stated:

> We are concerned that school admissions and exclusions appeals panels operate without any kind of judicial scrutiny save in those very rare cases in which an exclusion leads to an application for judicial review. The role of judges in determining disputes relating to the education of pupils has steadily increased over time as functions of public bodies have increased. We consider that a thorough appraisal of the operation of local authority appeal panels and oversight by the President of Welsh Tribunals of their decision making processes is required.[93]

It is ultimately hard to escape the conclusion that rebranding SENTW as the Education Tribunal for Wales has been done in anticipation of longer-term expansion in the Tribunal's subject-matter jurisdiction.

Residential Property

The Renting Homes (Wales) Act 2016 will replace existing leases and licences in Wales with two types of 'occupation contract',[94] designed to make renting a home simpler and easier. At present the majority of housing disputes are determined in the non-devolved county courts, with a smaller number of matters handled by the Residential Property Tribunal for Wales (RPTW). The legislative process provided an opportunity to reform how the majority of housing disputes are determined in Wales. In evidence during the Bill's passage respondents expressed enthusiasm for increased use of ADR processes (especially mediation) and greater use of the RPTW to resolve housing disputes. In the view of specialist NGO Shelter Cymru:

[91] *Review of Tribunals Operating in Wales*, n 40, [76]; *Administrative Justice: A Cornerstone of Social Justice in Wales*, n 26, [53].
[92] Welsh Government Response to CAJTW, n 29, 4.
[93] Thomas Commission, n 18, para [6.47].
[94] A secure contract modelled on the current secure tenancy used by local authorities, and a standard contract modelled on current assured shorthold tenancies used by the private sector.

> The county court is not always the most effective route for resolving disputes. As well as the escalating court costs themselves, we also find that a lack of expertise in housing law among District Judges can sometimes result in delays and poor decision-making that ultimately prejudice both parties. Many other countries have specialist housing tribunals…We suggest that the most cost-effective solution for Wales may be to expand the role of the Residential Property Tribunal, which is currently quite under-used. Creating a specialist tribunal for Wales would considerably increase landlords' and tenants' confidence that they can resolve disputes quickly and fairly when they need to…[95]

However, in response to further information requested by the Assembly Equality, Communities and Local Government Committee, the Residential Landlords Association (RLA) argued that the majority of cases should remain in the county courts as HMCTS already has "the necessary infrastructure" in place. The RLA proposed that as the RPTW is not assimilated into a courts and tribunals service it lacks sufficient resources (e.g., designated hearing venues). It also noted that RPTW members are fee paid part-time judges, not permanent salaried appointees and that "with the current climate affecting public expenditure, it is unrealistic to think that this [expanding the jurisdiction of the RPTW to include possession claims] is a priority to which resources could be devoted".[96] Expanding the jurisdiction of the RPTW to include possession claims would, for example, increase its caseload from approx. 150 per-annum to over 4,000 cases per-annum.

Other issues raised included the processes and procedures of each institution. Some respondents suggested that their experience of county court claims had been of highly adversarial procedures (especially in anti-social behaviour cases) and they were concerned about whether a tribunal is the appropriate venue for more 'heated' disputes.[97]

The crux is that possession and anti-social behaviour claims are said to be more adversarial than say rent assessment or disrepair cases, as such it is argued they should take place in a court and the parties should be legally represented. Such claims should not be determined in tribunals where more inquisitorial procedures are used, where parties 'need' not

[95] Shelter Cymru, *Response to the Communities, Local Government and Equality Committee inquiry into the general principles of the Renting Homes Bill (2015)* <https://sheltercymru.org.uk/wp-content/uploads/2015/03/Renting-Homes-general-principles-evidence-web.pdf>.
[96] Residential Landlord Association, *Letter to Communities, Equality and Local Government Committee* (27 May 2015) <http://www.senedd.assembly.wales/documents/s40793/RH%2029b%20-%20Residential%20Landlords%20Association.pdf>.
[97] Chair of Housing Law Committee, Law Society, Oral evidence, 30 April [174].

be legally represented, and specifically where legal aid funding for representation is not available. A representative from HLPA put this starkly: "The downside of the residential property tribunal is, one, there will never be legal aid for it. Just conceptually, there isn't legal aid for tribunals. It's just the divide that we strike as a matter of legal policy in this country". Presumably he was referring here to 'England and Wales' as Wales has not yet had any opportunity to develop a legal aid policy, this being a reserved matter. The Commission on Justice in Wales has now recommended that:

> The funding for legal aid and for the third sector providing advice and assistance should be brought together in Wales to form a single fund under the strategic direction of an independent body.[98]

England and Wales wide reforms have greatly reduced the availability of legal aid funding for representation in housing claims in the county courts; in practice many types of claim, e.g., social housing possession cases, are rarely at the extreme end of an adversarial-inquisitorial continuum (cf mortgage company possession claims); and more often than not defendants in tribunal proceedings *will* be legally represented whereas claimants will not be.[99] Arguments about adversarial and inquisitorial procedures, and represented and unrepresented parties, may no longer stack up. These are just some reasons why the UK Government is currently considering the case for a specialist housing court combing the housing dispute resolution jurisdictions of the county courts (in England and Wales) and the First-tier Tribunal Property Chamber (in England), but not (it would appear) the jurisdiction of the RPTW. Devolution of responsibility for the administration of particular tribunals is not necessarily permanent, though politically very hard to reverse. It would not be impossible for the RPTW to be absorbed into an England and Wales housing court, and such 'reverse devolution' was actually proposed by the Law Commission in a 2007 consultation on proportionate dispute resolution in housing.[100] It is extremely unlikely this would take place now given the political context and increasing divergence between English and Welsh housing law.

Institutional hierarchies are just part of the 'jagged edge' that will continue to cause issues for Wales, as many appeals on a point of law from Welsh Tribunals are to England and

[98] Thomas Commission, n 18, Recommendation 1.
[99] Housing Law Practitioners Association (HLPA), Oral evidence, 20 May [136].
[100] Law Commission, *Housing: Proportionate Dispute Resolution – The Role of Tribunals* (Consultation Paper 180, 2007).

Wales Upper Tribunal Chambers or to the non-devolved Administrative Court. As it stands appeals from the RPTW go to the England and Wales Upper Tribunal (Lands Chamber), which already has a back-log of cases and would struggle to deal with additional appeals from Wales should the RPTW jurisdiction be expanded. Further to this, decisions made by the Upper Tribunal are not binding on the county court as there is no legal hierarchy between them, so in cases where there is significant inter-play between aspects of county court jurisdiction and aspects of actual (or proposed future) jurisdiction of the RPTW, any appeal decisions taken by the Upper Tribunal would not be binding on the county courts causing what HLPA describes as 'legal chaos'.[101]

The Law Society for England and Wales has been particularly critical of proposals to establish a single housing court, noting that central issues delaying resolution of disputes are insufficient resourcing of the county courts, and the (necessary) procedural requirements that must be complied with before a person can be evicted from their home.[102] The establishment of a more specialist court will invite further reductions in the availability of legal aid funding for advice and representation, leading to even higher numbers of unrepresented litigants.

In relation to unrepresented claimants, the RPTW President has stressed that tribunal members have considerable experience and "are very good at teasing out what the issues are…making sure that both sides of the argument are heard and the issues are aired". Despite criticism from the Upper Tribunal about tribunals taking issues that parties have not raised, he felt that "it is our obligation as an expert tribunal to get to the crux of the matter".[103] This reflection may disclose future concerns. The President of Welsh Tribunals is required to have regard to innovative methods of dispute resolution, but exercising this function may cause some 'jagged edge' tension if it involves developing active inquisitorial methods in Welsh Tribunals with appeal routes to the England and Wales Upper Tribunal, especially if the latter is sceptical about these approaches.

Ultimately with respect to Renting Homes, the Assembly Committee recommended a modest transfer of some existing types of county court claims to the RPTW, and that some new claims (arising specifically in the context of renting Homes (Wales) obligations) also be determined by the tribunal. These included; disputes in relation to rent increases, fitness for human habitation issues, succession rights, and failure to supply a contract. The President of

[101] HLPA n 100, [137]-[138].
[102] Law Society, *Considering the case for a Housing Court - Law Society response* (January 2019): <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/considering-the-case-for-a-housing-court/>.
[103] Andrew Morris, President RPTW, Oral Evidence, 30 April [309]-[311].

the RPTW indicated that the tribunal would be an appropriately specialised forum to determine these cases, but that it would require additional resources.[104] However, the Welsh Minister responded to the Committee stating: "Whilst such an amendment may initially have some attraction, the Residential Property Tribunal for Wales does not have the necessary capacity to deal with such disputes. Building in such capacity would be costly and would need to be fully considered and consulted upon".[105]

Overall when enacting new legislation imposing duties on public bodies in Wales, the Assembly has generally tended not to interfere with administrative justice redress processes, deciding instead to roll over existing mechanisms from England and Wales legislation. Sometimes this is done without any real consideration of why these redress processes were initially chosen and whether such original justifications remain, there has also tended to be little consideration of data showing how many people are actually using these processes and their outcomes. For example, although the Housing (Wales) Act 2014 makes some additional use of the RPTW, the overwhelming majority of claims under the Act adopt the internal review followed by county court appeal route followed in previous England and Wales legislation. Shelter Cymru has expressed concerns about the lack of county court appeals under the Act (approximately 2-4 per-annum) and the subsequently limited independent judicial interpretation of new substantive Welsh law. It is an open question whether a tribunal appeal route might have proven more accessible.[106] The Commission on Justice in Wales has argued:

> In relation to housing disputes, for example, a single court or tribunal is needed to more efficiently deal with such matters. Even though the UK Government has not yet reached a decision on a single housing court, the reasons for providing all decisions to be made by a single judicial body are compelling. A single judicial body would be able to develop expertise and an overview of all the different issues that will arise on housing. The creation of the single court would also facilitate access to justice to those with housing disputes. Our analysis is that the current structure for resolving disputes

[104] Andrew Morris, n 104, [309]-[311].
[105] Welsh Government, Welsh Minister's response to the Committee's Stage 1 Report (27 August 2015) Response to Recommendation 36 <http://www.senedd.assembly.wales/documents/s44686/Ministers%20Response%20to%20the%20Committees%20Stage%201%20report.pdf>.
[106] Another example is with the introduction of a new Welsh Land Transaction Tax to replace Stamp Duty tax in Wales, where redress is to the England and Wales First-tier (Tax) Tribunal rather than through an existing or new Welsh tribunal.

> demonstrates that there is a need to unify courts and tribunals, both for civil justice and administrative justice.[107]

The Commission has therefore recommended that: 'Courts and tribunals which determine disputes in both civil and administrative law should be under one unified system in Wales'.[108] This could ultimately lead to Wales developing its own version of Civil and Administrative Tribunals (CATs) common in Australia.

Welsh Language

Returning to the Welsh Language Tribunal, the context is quite different. The Welsh language protection regime was the Welsh Government and Assembly's first attempt at establishing a full administrative justice process including an appellate tribunal. However, this only lasted six years before a 2017 White Paper proposed further reforms suggesting that; the existing regime is too bureaucratic, does not ensure value for money, and does not strike a proportionate balance between promoting the Welsh language and regulating compliance with Welsh Language Standards.[109] New proposals emphasised internal processes, with individuals being required to complain first to the public body before taking their complaint to a new Welsh Language Commission (to replace the existing Commissioner). However, as a package the reforms were described as regressive by language campaigners and Plaid Cymru.[110] They had the potential to diminish individual rights to use Welsh; first, by the provision that the Welsh Language Commission should only investigate complaints in 'serious' cases and second by watering down the content of the Standards. A third issue was the proposal to introduce a permission requirement into some appeals to the WLT.

The proposals had a policy objective of avoiding disputes and resolving issues as early and informally as possible but appeared to gloss over some more specifically legal technicalities. In particular, the nuances involved in determining what might be a 'serious breach' of Standards before the Commission. Another nuance is the distinction between appeals and reviews in the WLT, as this impacts on whether introducing a permission

[107] Thomas Commission, n 18, [5.56].
[108] Thomas Commission, n 18, Recommendation 22.
[109] Welsh Government, *White Paper Consultation Document: Striking the right balance: proposals for Welsh Language Bill* (WG32353 October 2017) [4].
[110] Martin Shipton, 'Reaction to plans to scrap the Welsh Language Commissioner' *Wales Online* (10 August 2017) <https://www.walesonline.co.uk/news/politics/this-would-big-step-backwards-13457824>.

requirement would be principled and consistent. There was also no evidence that the WLT was inundated by an unmanageable caseload at the time, however in response to consultation the WLT President agreed that a permission filter could be imposed on some types of case (akin to judicial review) given an anticipated rise in the tribunals caseload and the impact that this would also have on the Commissioner.[111] However, he further concluded that there is no evidence of the need to add a permission filter into cases where an individual complainant has a right to appeal to the WLT, as this could give rise to "unintended and unexpected complications".

The proposals are not in fact being taken forward, with the Minister for International Relations and the Welsh Language instead looking to reconsider the balance between the Welsh Language Commissioner's language promotion and regulation functions. Within this broader picture the role of the WLT is quite limited, and Welsh Government has specifically rejected a proposal for enacting a right to use Welsh in primary legislation, to be enforced by a direct appeal route to the WLT.[112]

A Welsh Model of Administrative Justice: Implications for Tribunal Reform?

In comparing different nations' approaches to administrative justice, Michael Asimow has proposed 'models of administrative adjudication'. He argues that there are three phases to administrative justice; the initial decision, administrative reconsideration and judicial review (in effect any reviews or appeals on a point of law). For Asimow, the initial decision does not actually refer to the front-line decision, it refers to the first opportunity a person has to query that decision. A key relevant insight is that:

> Each country tends to rely primarily on one of the three phases (that is, initial decision, reconsideration, or judicial review) to achieve a fair and accurate result. Efficiency concerns require countries to make this choice. Countries cannot afford to invest resources equally in two, much less all three, of the phases. The phase that each country

[111] Welsh Language Tribunal, *Response to Welsh Government's Consultation: "Striking the right balance: Proposals for a Welsh Language Bill"* (October 2017).
[112] Welsh Government's Consultation: Striking the right balance: Proposals for a Welsh Language Bill, [13]-[14] rejecting 'Option 5: right for individuals to use Welsh set out in primary legislation'.

> chooses as the recipient of most resources is likely to be the phase that private parties regard as providing their best chance to win the case.[113]

Asimow concludes that the UK and Australia follow the same model of administrative adjudication because the phase of adjudication receiving the largest state resource is tribunal reconsideration. Asimow's models are admittedly over-simplifications, as growing differences between Wales, England and UK tribunals demonstrate. For example, in high-volume areas of administrative decision making still largely reserved to the UK (social security and immigration) there has been a policy of de-tribunalisation, with Government emphasising compulsory administrative review (reconsideration) by the initial decision-making agency and seeking to limit access to tribunals.[114]

Where Wales is increasingly differing to England (and to reserved UK-wide matters) is through its investment in initial decision-making and the avoidance of disputes. This tracks to a Welsh fascination with what some consider to be an Australian invention, the 'integrity' branch.[115] However, this has been coupled perhaps with a distinctively non-Australian approach to social and economic rights. Whilst the common law of England and Wales remains the central repository of administrative law standards, Welsh political institutions have expressed their commitment to human rights by legislating to develop new procedural duties requiring public bodies to show they have taken social, economic and inter-generational rights into account in their decision-making. This has combined to form a nascent rights-based administrative procedure law.[116]

Relevant legislation begins with policy goals evidencing a strong declaration of political intent to promote and protect rights. However, good intentions have sometimes been weakened in legislative drafting, with the end result being a hybrid, or compromise between Government and civil society, that some have referred to as 'bestial' in its complexity.[117] These legislative developments have occurred against an understandable backdrop of Government wishing to carve out its own constitutional identity and to promote its record on rights and social justice issues, whilst simultaneously insulating itself from potentially repetitive and

[113] Michael Asimow, 'Five Models of Administrative Adjudication' (Stanford Public Law Working Paper No 2632711, 2014).
[114] Robert Thomas, n 48.
[115] Bruce Topperwien, 'Separation of Powers and the Status of Administrative Review' (1999) 20 AIAL Forum 1, 11-13.
[116] David Gardner, 'An Administrative Law Code for Wales: Benefits to Reap and Obstacles to Overcome' (2018) *Statute Law Review* <https://academic.oup.com/slr/advance-article/doi/10.1093/slr/hmy003/4880596>.
[117] Emyr Lewis, 'Public Law Decision-Making in Wales' (*Public Law Project Wales Conference*, Cardiff, 25 April 2019).

costly individual legal challenges. As such the new duties are rarely coupled with specific correlative rights for individuals to enforce them through legal action in a tribunal or court. More often the duties are to be 'enforced' either by ad hoc arrangements, or through a regime of 'soft law' power consisting of institutions that have various functions to review public body activities, make recommendations, and promote 'right first time' decision-making. The rejection of specific legally enforceable rights in Wales sometimes appears to have occurred more for pragmatic reasons than any concerns over the limits of legislative competence. For example, the Secretary of State for Wales can still intervene to prevent Bills going for Royal Assent if he has reasonable grounds to believe that legal divergence would have an adverse effect on the operation of the law as it applies in England.[118] In other cases it is explicitly a matter of resources; such being the main argument against legal rights to use Welsh to be protected by a specific tribunal appeal route.

The most ambitious example of Welsh rights and social justice based administrative procedure legislation is the Well-being of Future Generations (Wales) Act 2015 (WFGA). This places public bodies under a duty to practice sustainable development by complying with Well-being Goals.[119] Public bodies *must* carry out sustainable development and *must* "take all reasonable steps" to meet their set Well-being Objectives as a means to achieving Well-being Goals. The word *must* implies a legal duty enforceable through judicial review. However, the broad, general and aspirational nature of the legislative objectives appears at odds with this form of enforcement. The Administrative Court has concluded that WFGA prescribes a high-level target duty that is deliberately vague, general and aspirational and which applies to a class rather than to individuals, as such judicial review will not lie. Judicial review is also not available to enforce the 'Five Ways of Working' laid out in WFGA. The legislation states that public bodies must act in these Ways when carrying out sustainable development; they are; thinking long-term, integrating various objectives, involving people, collaboration, and prevention (deploying resources to prevent problems occurring or getting worse). Together these 'Ways of Working' could express some overarching requirements of administrative procedure, but their vagueness hampers expressly legal enforcement.

Some would consider it significant that the judge who has so far rejected judicial review claims seeking to rely on WFGA is a so-called 'judge on wheels'[120] having never practiced law

[118] *Government of Wales Act 2006* (UK), s 101(1)(c).
[119] A more prosperous Wales, a resilient Wales, a healthier Wale, a more equal Wales, a Wales of cohesive communities, a Wales of vibrant culture and thriving Welsh language, and a globally responsible Wales.
[120] Rawlings uses this phrase to describe London-based judges travelling out to hear cases in the Regional Administrative Court Centres in Cardiff, Birmingham, Leeds and Manchester, or where judges move between the

in Wales. However, a further reason for excluding judicial review is that WFGA provides for other public bodies and mechanisms to police compliance with sustainability and well-being duties, namely integrity branch institutions, a Future Generations Commissioner and the Auditor General for Wales.

The Welsh integrity landscape also includes an Older People's Commissioner, the Welsh Language Commissioner and a Public Services Ombudsman for Wales (PSOW). The PSOW is the most long-established and wide-ranging Welsh integrity institution, appointed by and accountable to the Assembly. The Public Services Ombudsman (Wales) Act 2019 gave the PSOW 'own initiative' powers of investigation, powers to accept oral complaints, powers over some private medical treatment; and a more extensive role in relation to complaints handling standards and procedures. This makes the PSOW one of the most influential and progressive of the UK Ombudsmen. Though perhaps it is a further sign of the jagged-edges of devolution that an argument in favour of reforming 'statutory bars' regulating the relationship between the PSOW and courts and tribunals, aiming to make redress more flexible,[121] was rejected by an Assembly Committee on the basis that altering the relationship between Ombuds and the courts should only be approached on a UK-wide basis.[122] The PSOW called for this issue to be revisited by the Commission on Justice in Wales.[123] The Commission has recommended that:

> The Administrative Court should have the power to stay court proceedings whilst the Public Services Ombudsman for Wales investigates a complaint. The Ombudsman should have the power to refer a point of law to the Court.[124]

The Senior President of UK, and England and Wales Tribunals also endorses a more fluid approach to institutional relationships between Ombuds and the tribunal judiciary.

Ultimately Welsh administrative procedure legislation attempts to harnesses the quasi-political power of integrity branch institutions to incentivise systematic change, subsequently

---

Administrative Court and the Upper Tribunal. Richard Rawlings, 'Modelling Judicial Review' (2008) CLP 95, 108.

[121] Law Commission, *Public Services Ombudsmen* (Law Com No.329) [3.23]-[3.49].

[122] National Assembly for Wales Finance Committee, *Consideration of Powers: Public Services Ombudsman for Wales* (May 2015) 68.

[123] Public Services Ombudsman for Wales, *Response of the Public Services Ombudsman for Wales to the Commission on Justice in Wales' call for evidence* (June 2018) <https://gov.wales/sites/default/files/publications/2018-06/Submission%20to%20the%20Justice%20Commission%20from%20the%20Public%20Service%20Ombudsman.pdf>.

[124] Thomas Commission, n 18, Recommendation 26.

perhaps reducing the need for individual legal challenges. On the contrary it could be said that Federal Australian Administrative Procedure law, such as the Administrative Decisions (Judicial Review) Act 1977, is primarily about outlining specific circumstances where an individual can seek legal redress. This more legalised model is not without its problems, particularly in terms of potentially increasing the incidence of litigation focused on fine-grained interpretations of statutory terminology that may have little impact on improving decision-making outcomes and administrative practices.

In terms of how well the Welsh model of prioritising rights-based 'right first time' decision-making is working in comparison to other models, there is evidence that public satisfaction with Government, and with public services provision, tends to be higher than the UK average.[125] We also know that legal claims per-head of population are lower when comparing Wales to other UK devolved nations, and to regions within England. For example, the number of judicial review applications is lower per-head of population in Wales than it is across various English regions.[126] The number of tribunal appeals per-head of population is also lower in Wales, in almost all the Welsh Tribunals for which comparative data is available. However, low rates of judicial review and tribunal appeals could be as much due to lack of awareness, and limited accessibility of affordable legal advice as to the quality of Welsh administrative decision-making. Evidence to the Commission on Justice in Wales shows that cuts to legal aid funding (a non-devolved matter) have had a disproportionately negative impact in Wales and that the number of specialist public administrative lawyers based in Wales has been decreasing.[127] It is revealing that the only Welsh Tribunal which has a higher rate of applications per-head of population than its English counterpart is the Mental Health Review Tribunal. This is the one tribunal where legal aid funding for advice and representation remains available in principle for all applicants.

Policy and Oversight: Drawing the DNA Strands Together

[125] Lauren Carter-Davies and Steve Martin, *Improving Public Services: Existing Evidence and Evidence Needs* (Public Policy Institute for Wales 2016); However, the 2018 National Survey for Wales shows satisfaction with health services and secondary education has been falling, see Welsh Government, *National Survey for Wales: Headline results, April 2017 – March 2018* (20 June 2018) <https://gov.wales/docs/statistics/2018/180620-national-survey-wales-2017-18-headline-results-en.pdf>.

[126] Public Law Project and Sarah Nason, *Evidence to the Commission on Justice in Wale* (25 October 2018) <https://gov.wales/sites/default/files/publications/2018-11/submission-to-the-justice-commission-from-public-law-project-sarah-nason.pdf>.

[127] Sue Harper, *PLP Research Briefing: The Effects of LASPO on Civil legal Aid in Wales* (June 2018) <https://publiclawproject.org.uk/wp-content/uploads/2018/07/LASPOA_briefing_Wales.pdf>.

Whilst we can construct a Welsh model of administrative justice, this is based on our interpretation of the evidence, as there is no administrative justice and tribunals policy for Wales. Previous research has recommended developing an administrative justice policy specifically drawing explicit connections between administrative justice, and issues of human rights, equality, good administration, nascent rights-based Welsh administrative procedure law, and social justice more broadly.[128] This policy could also contain a presumption, as recommended by the Commission on Justice, that when legislating to create new public law duties applicable to devolved Welsh authorities, any new legal redress measures created should be by recourse to Welsh Tribunals.[129] This would also stem the creation of ad hoc redress schemes, where a consistent and principled approach is lacking and there are no overarching standards for operation.[130] Such schemes do not always give citizens a fair and independent system of redress[131] and that they have tended to be considered as administrative processes rather than mechanisms for serving justice.[132]

Whilst the underpinning conceptions of administrative justice in Australia and Wales have their differences, it is telling that both the Australian Administrative Review Council and the CAJTW have been disbanded and that neither Australia or Wales currently has a specific body charged with oversight of its administrative justice system as a whole.[133] We recommend greater political engagement with, and ownership of, administrative justice in Wales and the establishment of an oversight function either within an existing Assembly Committee (for starters the Constitutional and Legislative Affairs Committee) or in a new Committee established for the next Assembly (from 2021) (such as a Justice Committee). Oversight must be by way of a statutory political committee, to ensure the bi-partisan political support essential to progressing administrative justice reforms, especially those involving adequate funding for the establishment and continued operation of new, or reformed, tribunal structures.

The Commission on Justice has now recommended that the Assembly should take a more proactive role in appropriate scrutiny of the operation of the justice system,[134] and that further legislative devolution should be accompanied by the creation of a Justice Department

[128] *Wales' First Devolved Justice System*, n 31, 3.
[129] Thomas Commission, n 18, Recommendation 27.
[130] The Discretionary Assistance Fund providing some means tested benefits. A private company administers the Fund on behalf of Welsh Government, initial redress is to the company itself, with a possible further appeal to a charity, and the PSOW has jurisdiction over maladministration and service complaints.
[131] *Administrative Justice*, n 25, [72].
[132] *Administrative Justice*, n 25, [72].
[133] There is an Administrative Justice Council, but this has no practical statutory oversight function and aims to cover the whole of the UK <https://ajc-justice.co.uk>.
[134] Thomas Commission, n 18, Recommendation 62.

within Welsh Government[135] and a Justice Committee within the Assembly.[136] In the more immediate term the Commission recommends that:

> All public bodies, ombudsmen and other tribunals which have been established under Welsh law or by the Welsh Government, which make judicial or quasi-judicial decisions, and are not currently subject to the supervision of the President of Welsh Tribunals, should be brought under the supervision of the President.[137]

More detailed thought will likely need to be given about the precise nature of this supervisory role, particularly for bodies which are already accountable to the Assembly or Welsh Government, and those which are independent such as the PSOW.

Returning to whether the Welsh Tribunals are the nucleus containing the DNA of a fully devolved justice system, this conclusion seems quite a stretch. Wales is already a long way from having a single comprehensive system of tribunals reflecting the full extent of devolution. A more comprehensive system could be arranged around broad areas including; planning and environment, land and tax, education, public administration (including local government), housing, health and social welfare and Welsh language rights.

Having some (administrative) justice functions has likely led to more Welsh Government insight and awareness into the operation of a justice system, including matters of constitutional principle as well as more pragmatic resource implications. The requirements to make provision for more impartial relationships between policy departments and tribunals, and the WTU and the Welsh Government itself, is significant for an administration where justice is mostly not a devolved responsibility. Welsh Government and the Assembly have often had to undertake these reforms within the constitutional confines of various unsatisfactory devolution settlements that continue to struggle with positioning the administration of justice. It is then less surprising that workable mechanisms have had to be fashioned through administrative arrangements, and by deploying administrative justice in its broadest sense to include a range of integrity branch institutions.

A new buzz word in UK administrative justice, recently coined by Sir Ernest Ryder Senior President of Tribunals, is ‘interoperability’. This has a range of dimensions, one of which is cross-deployment of tribunal judges across at least three of the four UK nations. Cross-

[135] Thomas Commission, n 18, Recommendation 68.
[136] Thomas Commission, n 18, Recommendation 70.
[137] Thomas Commission, n 18, Recommendation 25.

deployment between tribunals both within and across territorial and subject-matter boundaries is built into the Wales Act 2017. For example, with Welsh Tribunal judges deployed to English Property Tribunals. The Tribunals (Scotland) Act 2014 contains similar foundations that could see the territorial cross-deployment of Scottish Tribunal judges. Another dimension of 'interoperability' is in co-operation and shared services between devolved and reserved tribunals, with the opening of a new joint tribunal centre in Glasgow being seen as a positive example.[138]

In these dimensions interoperability advances Leggatt's earlier reflections on the need for improved cross-border co-operation.[139] This encapsulates an evolving relationship between administrative justice systems where there is a more fluid relationship across UK jurisdictions. This development should be followed closely, particularly in terms of how efficiency and effectiveness for users can be improved through shared services, and consistency of judicial and administrative standards. Interoperability will have to respect the asymmetrical constitutional context and allow room for the autonomy of each government. For example, there are already some concerns the cross-deployment is being used to deploy 'English' judges into Welsh Tribunal cases, seemingly contrary to the initial impetus for the practice as designed to increase opportunities for Welsh judges to sit, making a career in the Welsh Tribunal judiciary a more feasible and attractive prospect.

A further dimension of interoperability is the relationship between bodies in the administrative justice system, with the Senior President of Tribunals specifically encouraging joint working between Ombuds and tribunals including developing joint training and liaison. Such engagement should be sought as a means to share skills, learning, and good practice across administrative justice systems,[140] and could be more swiftly and effectively progressed in Wales given its comparatively smaller size.

Whether or not the Welsh Tribunals contain the DNA for a broader justice system, the context of their development helps demonstrate that traditional court, and court equivalent structures, and largely paper-based and adversarial models, are not optimum means for delivering administrative justice in the 21st Century. A more successful approach is likely to involve flexible interactions (interoperability) between a range of institutions, both within and

[138] Judicial Office for Scotland, *The Scottish Tribunals: Annual Report prepared by the President of the Scottish Tribunals, 1 December 2016 - 31 March 2018* (September 2018) 5.
[139] Leggatt, n 34, [11.3]-[11.4].
[140] Sir Ernest Ryder, 'Driving Improvements: Collaboration and Peer Learning' (Ombudsman Association Conference, Belfast, 21 May 2019) 4.

across jurisdictional boundaries, whether these be territorial boundaries, or boundaries of traditionally perceived procedures and expertise.