Commission on Justice in Wales
Oral Evidence Session
15 March 2019

Present:	**Commission members**	**Secretariat team**
Dr Sarah Nason (SN) Professor Sir Adrian Webb (AW) Ray Burningham (RB)	Lord Thomas of Cwmgiedd, Chair Simon Davies Professor Elwen Evans QC Dr Nerys Llewelyn Jones Juliet Lyon Professor Rick Rawlings Sir Wyn Williams	David Slade Martin Wade

Question area: How would you describe current access to justice in Wales? What could be done to improve it?

Lord Thomas set the scene. Interested in the whole area of Administrative Justice and not just role of the Administrative Court.

AW – if you go back to the welsh committee of the AJTC and to CAJTW fundamentally what was of concern was that wales had inherited an ad hoc group of tribunals and methods of redress. At that time there was not a good understanding of administrative justice and a lack of coherence and understanding in welsh government. It was marginal and located in numerous different departments across Welsh Government. Related a quote from a politician that "administrative justice is not on the lips of my constituents" and there was no connection between the abstract concept of administrative justice and the reality that affects people's lives, social security tribunals, school admissions appeals, SEN etc…

It mattered greatly. There was real risk of severe reputational damage. Initially there was a clear issue of separation of powers. A significant number of cases where appeals are heard by people who are responsible to those who have made the decisions. School admissions for example.

There has been significant progress but that there is a long way still to go.

SN – the CAJTW legacy report and research done since has sought to identify the gaps that still exist. Education for example with school exclusions and housing – there are still gaps. But there are not many of these gaps. What is concerning is the ability of people to use the routes to redress that are available. Knows that the commission has received significant evidence around lack of knowledge of rights, and knowledge of who to go to for redress.

Areas where there is right to redress but doesn't give redress that people want. Eg school exclusions - feeling there is no justice. That feeling also exists about some aspects of housing, temporary accommodation for example.

What we've found is doubt over whether people can use the routes which are available. In terms of knowledge and access these are reasons they aren't using rights to redress. Also there is a perceived complexity. It is quite hard for people to navigate around. If we look at number of claims per head of population is lower in Wales than in England.

In almost all of the devolved tribunals for example per head of population there are less appeals to the devolved tribunals than you would expect in the relevant tribunal in England.

AW – Wales has to take administrative justice seriously and it ought to do it well. Does it have a strategy? Does it have a model it wants to pursue? If we were to do it well you would be able to find out easily which redress routes were available. Described the drop in cases that came with the introduction of fees. Described witnessing a litigant in person in the ET struggling to give evidence. The judge made huge efforts to help him through it but it was deeply unsatisfactory.

RB – At an institutional level we are talking about a small number of tribunals administered by WG. Small number administered by local government. Some hybrid decision making bodies which are paid for but not administered by WG. Then some that could be administered from here but aren't – traffic commissioner has some judicial and non-judicial functions wholly paid for by WG. There are then some things which could be administered by WG but currently aren't, Traffic Penalty Tribunal is currently administered from Manchester but could be done here. And ad hoc schemes like the Discretionary Assistance Fund. A whole mixture of things with different relationships with Welsh Government but all Welsh.

His background – secretary on council on tribunals. At that stage WG were not set up to consider tribunal matters in the round. They were set up along policy lines with each tribunal managed in line with the policy area of its subject matter. 2007 saw the first Council on Tribunals conference in Wales. 2008 – CAJTW set up. Progress was made quickly. Rationalisation of work around tribunals was done.

There were real issues with judicial leads facing difficulty in their relationship with Welsh Government. Advocated for the creation of a senior judicial role and delighted that PWT is now in place.

Existence of PWT now allows for progress to be made.

Scrutiny in the Assembly has been an issue but that is improving – cross party committee set up and SN given a National Assembly academic research fellowship.

Upcoming Law Commission project on devolved Welsh tribunals is an important step forward.

Things seem more complicated than they actually are. Described the admin justice system in wales as a jigsaw without a picture on the box.

Law Wales / Cyfraith Cymru website, if it worked well, would assist the justice system in developing as it would allow for a picture of it to be drawn - the justice system in Wales is like a jigsaw without a picture on the box. We heard the Counsel General in his speech to the Legal Wales conference of his determination to improve progress on the website and it will be good to see some progress made.

Tribunal president annual reports are valuable and looking forward to a consolidated annual report from the PWT.

LT – Why has it taken too long to improve things? Is it because of a lack of leadership?

AW – separation of powers is important of course but they always argued for a single, strong ministerial voice for administrative justice but that hasn't happened. It was the responsibility of the FM which is ideal from a separation of powers perspective but realistically the FM will never have time to do it. A junior minister, maybe within the FM's office, should have responsibility for advocating for administrative justice and have the time to do it. This hasn't happened and It is therefore still too easy for administrative justice matters to be considered as being administrative matters rather than judicial matters.

Assembly scrutiny is important too. There should be a scrutiny committee solely dedicated to administrative justice.

Question area: What more could be done to retain Welsh cases in Wales? And; is there adequate use of the Administrative Court in Wales for judicial review and other proceedings?

SN - Data on court use speaks for itself. Even ten years after the Cardiff admin court was established people still issue claims elsewhere. Usually due to location of counsel and convenience.

There are constitutional reasons that a case against a Welsh public body by a Welsh complainant should be heard in Wales. There the benefit to the legal services sector in terms of confidence in the system and financial benefits to the sector too. Benefits to the wider economy too.

In North Wales it is tricky. There is no bar in North Wales so going to Chester is essential. Cases then end up being heard in Manchester for obvious reasons of convenience.

WW – So far as the judicial world is concerned there are procedures for cases being started elsewhere and being transferred back to Wales and those systems work. So there are therefore welsh cases heard in wales but with no welsh lawyers involved.

SN – Where cases do start outside Wales it is predominantly due to accessibility of legal services and in the main accessibility of counsel. In roughly half of cases with a welsh claimant there is a Welsh solicitor involved but when it comes to counsel that number is only 15%. And Welsh Public bodies are also likely to instruct London based counsel including the Welsh Government. There is good work being done but it doesn't seem to be filtering in to instruction patterns but it is still the case that public bodies in Wales will often instruct London based council. There is a real sense that people do what they've always done. They instruct the barristers and the chambers that they have instructed previously. But there are chambers in Wales who want that work and would be able to do it.

RR – Asked if there is a sense of how many cases from Wales are commenced outside of Wales and how successful the presiding judge is at getting them routed back to wales. As an outsider it seems an inefficient system.

SN – it isn't very many but there aren't that many cases to start with so as a proportion it is greater.

Question area: How important is specific Welsh legislation such as the Well-being of Future Generations (Wales) Act in differentiating Welsh administrative law from English administrative law? Are there any (or any other) respects in which Welsh administrative law may be diverging from English administrative law?

SN – It is important. Would make a wider point about WFG Act and other specific welsh equality duties. Thinks that there has been specific investment through these developments as a method of promoting right first time decision making. This is a good thing – right first time decision making is good decision making. This investment is greater than anywhere else and deserves due credit.

The 5 ways of working may have raised the bar in terms of decision making. There remains therefore question is that whether they create a statutory duty to the extent that somebody could seek judicial review. The legislation creates a comply or explain regime – role for AGW and FG commissioner.

Cymmer Afan school closure Judicial Review application. Initially refused permission on papers and then refused again at a renewal hearing. Question on whether the seven well-being goals and five ways of working are transferred into an individual right and are challengeable in court.

In this case, still not clear, it appears that the court found that these are enforceable but that in this case the ways of working had been met.

Swansea barrage case. An interesting situation as there were contradictory arguments made under the Wellbeing and Future Generations Act by opposing sides.

Lord Thomas – request to SN. Asked for the name of the case to be left with secretariat for the transcript to be chased up. (done)

When looking at the law it is important to recognise the law is not just what judges do but wider. Asked Sarah for a half page setting out her view as to whether the actions the WG has taken has created a different / distinct system of administrative law in Wales. (done)

Question area: Is there capacity in Wales to satisfactorily resolve complaints and disputes in relation to all administrative justice issues?

Question area: Do you think greater use should be made of alternative dispute resolution and / or ombudsmen to improve access to justice and the resolution of disputes and complaints in Wales? How should these jurisdictions be linked to the Administrative Court?

AW – certainly sought to encourage alternative dispute resolution. WW – bearing in mind that an issue exists in terms of regulation already, so there is a danger that without central control those risks / problems are heightened.

AW – when looking at independent review of determination panels it was clear that the quasi legal approach was being abandoned because the prospective parents were being case worked and the panel ended up being a regurgitation of the case work. There is a risk that people will depart from judicial / quasi-judicial processes.

SN – depends on what is meant by ADR. Current research is looking at education and housing. Very few cases are making it to JR because so much is resolved internally or informally before even getting to a formal complaints procedure. This early resolution of issues seems to be strongly encouraged.

New Additional Learning Needs Act will require LAs to put in place ADR methods. It isn't set what or how they should be though. Risk of 22 different methods.

AW – refers to SEN tribunal. Most cases that reach it are there because of a failure to manage requests and the conflict can escalate by the time it gets to the tribunal.

WW – agreed that by the time it gets to the tribunal it's probably too late. What can be done to improve the process before it gets to tribunal? What trigger could be implemented to ensure mediation is attempted. Is there a case for the Authority to say "this is our initial decision, and it can now be mediated" rather than have internal complaint processes?

NL-J. Referred to the nature of some cases in public law that it is seen as being a yes/no answer and that mediation is therefore not possible.

SN – Will be interesting to see how the ALN act pans out. There is a compulsory requirement for mediation to be attempted in England but that was not wanted by our tribunal when the bill was being put through. Was not sure of the reasons the Welsh tribunal did not want it but could find out.

LT – asked SN for details of that.

RB – Referred to mandatory reconsideration that is in place in some jurisdictions before going to tribunal. There are risks and potential perverse incentives. Examples – from English tribunal member going out to witness appeal. Panel chair expressing a view on the case before the hearing. Chair not explaining to parents. Chair's phone going off during process. Clerk consistently taking issue with the panel during proceedings etc… Sometimes a dispute resolution process just needs to be improved rather than putting an alternative in place.

SN – ombudsmen. Research is showing that more flexibility in relationship between the admin court and ombudsmen would be a good idea. Supports the recommendations of the Law Commission. Express power for the court to stay an action to allow ombudsmen to investigate. Power for ombudsman to reference something to the court on a point of law.

Question area: It is said that amongst the most significant forms of dispute for the ordinary person are (1) employment (2) landlord and tenant / housing (3) social welfare entitlement and (4) family issues. Should the tribunals system / administrative justice cover any more of these such as all forms of landlord and tenant / housing disputes?

RR – Is there potential for moving disputes out of the courts and into the devolved tribunals.

SN – on employment and social welfare, they are a part of the admin justice system already but are of course reserved to the UK.

Considering in current research the need for a housing tribunal. Noted that there was a consultation on a specialist housing court.

When Renting Homes Act was being scrutinised there was discussion over whether some of the redress contained within it should be to RPT and not to the county court. The consideration over adversarial rather than inquisitorial procedure was noted as being an issue in that scrutiny and whether possession cases required the adversarial approach of the county court. Other concerns included what would you then do about legal aid that was available at court and would not be available in a tribunal.

You would need to resource the tribunals to take on such work but it could be done and might be desirable.

AW – this is the sort of thing that you would need to cover when drawing up a policy for administrative justice in Wales. In developing the policy you would need to look at the inconsistent ways things go to different methods of resolution, you would have to look at whether there are gaps. There has to be an ambition for administrative justice in wales to be distinct, to be coherent and to be comprehensive. And there isn't that ambition. This is something that is missing and has not been done and it should have been done.

Lord Thomas asked SN to point us to the assembly debates referred to.

Question area: Should assistance be available for disputes before tribunals? If so, can this be met in whole or part by the third sector?

RB – notes that Bob Chapman has given evidence and that he would not be able to add anything to that. Noted that Sir Andrew Leggatt stated in his review of tribunals that tribunals should be something that people can navigate by themselves.

SN – likes that idea but suggests that evidence shows that people do need assistance and related the example of the SEN tribunal where the parents who could pay for the best advice are better served at the tribunal.

Example from Cymorth Cymru conference. Highlighted importance of person centred approach. Delivery of services in the way that the person wanted and that was the support they felt they needed rather than providing a blanket support package to all. Saves money and a better experience.

AW – Paucity of advice is a profound barrier to access to justice. This is because people coming before tribunals are some of the most vulnerable in society. They are some of the least well informed in society. So information is vital. Information about appeal rights and then the confidence to then exercise those appeal rights.

When there is a change in system (law or administration) in social security, when people appeal they are successful ¾ the time and when they are in receipt of advice the success rate is greater.

The third sector is crumbling. Totally denuded of long term public funding for core business that they used to be able to rely upon to keep themselves in existence and they now access only specific streams of money / contracts for doing specific things. The third sector cannot do what it once was able to, let alone be expected to do more.

Question area: To what extent do you see the devolved tribunals under the leadership of the President of Welsh Tribunals forming the basis of a justice system for Wales? Do you think tribunals outside the President's remit should be brought within it and if so why?

LT – can you use the President of Welsh Tribunals to form a proper basis from which to get the issue of justice understood by WG and NAfW.

AW – Yes. But it would mean looking beyond the tribunals. You would need to look more broadly at all the ombudsmen and at some of the more ad hoc arrangements. And the President can't do it on their own. Back to the point, needing a very strong voice in cabinet and also the scrutiny ability within the Assembly.

SN – concern that this suggests that we would look at this with a view to create a new version of the E&W system and that isn't necessarily the way forward.

WW – The heart of this is fairness. One side will have a lawyer. Usually the public body. The other side may not. The question is how you redress that balance.

AW – related experience to the imbalance of arms on the occasion of the hearing.

Discussion about potential structures – pathways not chambers.

RB – Reflected on his aspirations for the PWT role at the start. Fix gaps. Proper arrangements with judicial office. Value of annual report. Role of convener. An influential voice beyond the statutory remit.