

# Justice in Wales

Dr Sarah Nason, Prifysgol Bangor University (May 2020)

## **Contents:**

Summary.....	1
Chapter One: Introduction.....	7
Chapter Two: Criminal Justice.....	8
2.1 Criminal justice at the ‘jagged edges’ of devolution.....	8
2.2 Specific ‘jagged edge’ problems.....	11
2.3 Managing complexity and the need for leadership.....	13
2.4 The need for improved evidenced based evaluation of policy initiatives; the need for more disaggregated Wales-only data.....	14
2.5 Scrutiny and accountability.....	15
Chapter Three: Administrative Justice.....	19
3.1 Public administrative law.....	20
3.2 Administrative justice institutions.....	23
3.3 ‘Jagged edges’ and oversight.....	27
Chapter Four: Family Justice.....	28
4.1 Family justice: Introduction, key issues and oversight.....	29
4.2 Cafcass Cymru.....	30
4.3 Taking children into care.....	30
4.4 Family Drug and Alcohol Courts (FDACs).....	31
Chapter Five: Civil Justice.....	32
Chapter Six: Information, Advice and Assistance, Including Legal Aid.....	33
Chapter Seven: Funding for Justice in Wales.....	35
Chapter Eight: Key Themes and Conclusions.....	36
8.1 Leadership and oversight.....	37
8.2 Innovation and evaluation.....	38
8.3 Research and data.....	39
8.4 Prevention.....	39
8.5 Concluding reflections.....	39
Annex One – Mapping Justice in Wales	
Annex Two – Literature Review	
Annex Three – Appointments to Devolved Welsh Tribunals	

## Summary

1. The Senedd and Welsh Government are institutions responsible for delivering social justice in Wales in areas of activity including, for example, health and education. These social justice activities overlap with, and are integrated to, reserved functions over 'legal justice' (courts, tribunals, prisons, police etc) in various ways. In addition, the Senedd and Welsh Government also have some devolved competencies more directly in the area of legal justice (for example, devolved Welsh tribunals). This Report and its Annexes map key activities and issues relevant to making justice work in Wales.

### Key themes across Criminal, Administrative and Family justice

2. The Commission on Justice in Wales (and research into the '[jagged edges](#)' of justice in Wales) identified some concerns about locating leadership, including leadership within Welsh Government, on justice issues; who exactly is responsible and who can therefore be held accountable. This has likely improved with the establishment of a Cabinet Sub-Committee but there is still lack of awareness, and perhaps even some lack of transparency, around how many people in Welsh Government are working on justice issues and what their roles are.
3. Leadership concerns also related to whether existing Boards, Committees and Networks designed to report on the performance of justice systems in Wales and ensure co-ordination between stakeholders, are working effectively and efficiently. In criminal justice there are a complex and overlapping set of bodies, and their collective accountability is limited. According to the Justice Commission this is partially a result of Welsh Government establishing its own bodies due to lack of control over the agenda of bodies established by UK Government. There is no specific body responsible for oversight and reporting on the administrative justice system in Wales.
4. Progress has been made towards improving arrangements for consultation and co-operation between Welsh Government and the Ministry of Justice, in particular through a [Concordat](#) agreed in March 2018, however, further work is still needed to improve collaborative and strategic working. There is a case for greater Welsh Ministerial involvement within UK justice leadership bodies.
5. The division between policy development and implementation continues to be problematic, and justice institutions and services that are largely decentralised from a delivery perspective often find themselves reacting and responding to central Government policy initiatives, having to play 'catch up' as to how these might work specifically in Wales.
6. There is an actual (or perceived) inability to develop innovative solutions to a range of justice matters, including the resolution of disputes. Sometimes this is due to playing 'catch up' noted above, but perceptions of devolved competence, and some lack of general awareness and understanding of justice matters (including across the political branch and within civil society organisations in Wales) are also evident.

7. There continues to be a lack of research, and specifically civil society engagement, as concerns Wales as a 'site in which justice is done'. Combined with concerns around leadership, and problems accessing disaggregated 'Wales only' data about justice issues, this means that longer-term innovative solutions which could be more aligned to the needs of Wales (and which could also save money) have not always been explored or pursued. On the other hand, there are examples of grass-roots and local innovations across Wales that have had beneficial impacts and there have been key legislative changes in some areas.
8. There appear to be some concerns that the impacts of various policy initiatives and strategies, and even some specific legal reforms, have not been subject to longer-term evidence-based monitoring and evaluation. In part this seems to be due to lack of available data, not just from reserved institutions, but Welsh Government could also collect and publicise more data on the operation of justice mechanisms falling within its own competence.
9. The Welsh emphasis on prevention, across criminal, administrative and family justice, appears to be a significant asset, but there are two specific concerns. First, Welsh Government (and others) have expressed frustration that sometimes the Welsh preventative approach can be undermined by centralised justice policies, and that savings generated are being used to subsidise the operation of reserved institutions. Second, that prevention should not be seen as a substitute for, or negating the need for, access to redress mechanisms including legal redress mechanisms and developing, funding (and evaluating) a distinct Welsh approach to redress where appropriate.

## Criminal Justice

10. Welsh Government undertakes a wide range of complementary activities in relation to the criminal justice and policing environment. The system is complex and currently lacks sufficient scrutiny both at Westminster and in the Senedd. A set of institutions have developed in Wales amounting to a 'de facto system of administrative devolution'. The so-called 'jagged edges' of intersection between reserved issues in justice and policing, and devolved competence in education, health, housing etc cause complexity and are said to prevent Welsh Government from pursuing a 'whole system approach' including to tackling the causes of offending. Welsh Government and the Senedd cannot impose legal duties on reserved justice bodies, or require their participation in performance monitoring and oversight, and this is said to hamper the pursuit of Welsh policies.
11. Complex responsibilities, including in key areas such as community safety, make it difficult for public bodies to coordinate strategic approaches, this can undermine accountability and the ability to help people (the same could be said in other areas including family justice). It is not multi-agency working per se that is problematic but the proliferation of bodies and diffused and fragmented accountability where true collective accountability may be limited.

12. The Justice Commission considered there to be a lack of a rigorous approach to managing performance under various criminal justice strategies and frameworks developed by Welsh Government in partnership with criminal justice agencies.
13. Senedd oversight faces particular challenges including; that Committees often respond to new and emerging problems where there is more potential for shorter-term impact, and in non 'jagged edge' areas where the path to impact is clearer; UK Ministers and officials are sometimes reluctant to engage with Senedd work; there is a lack of Wales only data; civil society organisations have had limited involvement with justice in Wales; Welsh Government does not sufficiently 'promote' its activities in the justice arena and there remains a lack of clarity around ministerial and departmental responsibilities; 'focus' on justice issues is diluted by the many other responsibilities of Senedd Committees.

### Administrative Justice

14. In Wales much of the administrative justice system is already devolved and has been for some time. However, there is no express published Welsh Government policy for administrative justice (and tribunals), nor any strategies or framework documents as have been produced in relation to criminal justice issues. Independent oversight of administrative justice in Wales was discontinued in 2016.
15. There has, however, been significant [research](#) (instigated by the former Committee for Administrative Justice and Tribunals in Wales (CAJTW)) developing a programme of potential reforms (many of which were endorsed by the Justice Commission). Welsh Government has consistently engaged with this research and supported it where appropriate.
16. The Senedd has significant responsibility to ensure that administrative law develops in a clear, consistent and coherent manner, scrutiny powers to ensure that duties laid down are capable of performance by public bodies, and that continuing post-legislative review of the impacts of new duties on public bodies, compliance rates and outcomes is conducted. In his [Renton Lecture](#), Lord Thomas recently stated that administrative law duties should be drafted with sufficient precision to enable an appropriate court, tribunal or other institution to determine whether they have been discharged on the basis of objective evidence. He proposed that this may not be the case with respect to some Welsh administrative laws.
17. Concerns have been raised about 'layering' new duties on public bodies (primarily rights, well-being and equality-based duties) and whether there is a need for a review and possible rationalisation, especially in the context of consolidation and codification activity. In general, issues of rights, sustainability and equality have not been addressed as issues of justice, and the impact of legislation in these areas on the justice system in Wales appears to have been minimal.
18. Judicial review in the Administrative Court in Wales is a safety net when legislation does not include an express redress mechanism. Judicial review is also crucial to the rule of

law. Civil and criminal (non-immigration) judicial review claims per head of population from people in Wales are lower than from people in the English regions and the proportion of claims issued by unrepresented litigants in Wales has risen alongside a significant reduction in claims funded by legal aid.

19. Welsh Government is taking steps to support the public law legal profession in Wales and the Justice Commission recommended Civil Procedure Rules changes to make it compulsory for claims against Welsh public bodies challenging the lawfulness of their decisions to be issued and heard in Wales, alongside recommending that in future redress under Welsh law should be to the devolved Welsh tribunals. Welsh Government has focused on reforming devolved Welsh tribunals, though to date there has been only limited Senedd engagement.

### Family Justice

20. Family justice in Wales seems to be the area where there has been the least research, but where 'jagged edge' issues also exist, as law, court practice and procedures relating to children especially, straddle devolved and reserved matters. Devolved issues of education, health, social care, housing and so on form the day-to-day context for family life.
21. The Justice Commission considers the current leadership structure for family justice in Wales to be inadequate to address concerns about looked after children (the high rates of children being taken into care in Wales), and that reserved leadership and oversight bodies with Welsh participation are dominated by English issues.
22. There is a continued lack of awareness of the differences between Welsh and English law (especially relating to public law proceedings involving children) despite these differences being well publicised in (freely available) practitioner texts.
23. As with other areas, innovations (including in redress) are sometimes not pursued due to the actual (or perceived) limitations of the devolution settlement, and reforms that are progressed could be better monitored and evaluated. This would be assisted by more extensive research, as recommended by the Justice Commission.

### Civil Justice

24. The first Senedd Act intended to make changes to substantive civil law will be the Renting Homes (Wales) Act 2016 when this comes into force. There have been practical issues for HMCTS to develop necessary processes and forms for this Welsh specific law, and some general concerns that it highlights the lack of sufficient systems in place at delivery and operational level to manage anticipated further divergence between Welsh and English law.
25. It is worth reiterating that reserved policies such as digitalisation of courts and tribunals and physical court closures have unique impacts in Wales which should be carefully

monitored such that any existing inequality is not entrenched through different processes.

### Information, Advice and Assistance, Including Legal Aid

26. The central ‘jagged edge’ in the provision of advice, information and assistance (including advocacy services) is the reservation of legal aid and extent to which Welsh Government has funded the provision of advice services (including where funding would have been discontinued as a result of the Legal Aid Sentencing and Punishment of Offenders (LASPO) Act 2012). There has been a real-terms decrease in spending on legal aid in Wales of 38% since 2010-2011.
27. The Justice Commission concluded that current provision does not look at what is working well on a local level and there is still a lack of systematic and strategic approaches. Some of these concerns are beginning to be addressed in the work of the National Advice Network and the six Regional Advice Networks across Wales.

### Funding for Justice in Wales

28. The [Wales Governance Centre](#) has examined ‘Spending on the justice system in Wales’ and the ‘Fiscal implications of devolving justice’. Some headline conclusions are that in 2017-2018 approx. £1.2 billion was spent on the justice system for Wales, but 38% of this spending came from devolved and local government funding; and that the devolved elements have grown in real terms in recent years whereas reserved spending has fallen.
29. Unlike the picture in England, spending on prisons in Wales has increased in recent years alongside a large increase in the prison population located in Wales. For courts and reserved tribunals, net expenditure by HMCTS in Wales equated to just under 4% of HMCTS spending in 2017-2018 (compared with Wales’ proportion of the England and Wales population (5.3%) and of Great Britain (4.9%)).
30. There is a concern that the financial benefits of so-called ‘spend-to-save’ policies implemented by Welsh Government have been captured by UK Government. There has been no assessment of the full financial cost of delivering administrative justice, or of where savings could be made.

## Chapter One: Introduction

31. This Report examines key activities of Welsh Government and the Senedd, both directly within the field of legal justice and aligned to it, taking in turn: criminal justice; administrative justice; family justice; civil justice, and central issues relating to legal aid, information, advice and assistance and funding for justice in Wales. It then draws out some general themes and conclusions common to all, or at least to most, of the areas of justice examined. There are three Annexes to the Report. Annex One provides more detail on the 'mapping' exercise undertaken to establish key Welsh Government and Senedd activity relating to justice, this includes a methodology, and more detail on matters not selected for inclusion in the main Report. Annex Two provides a review of key literature on justice in Wales (research and other reports, books, journal articles, key evidence to the Commission on Justice in Wales (the 'Justice Commission') and so on). Together these Annexes provide a detailed evidence base for the conclusions of the main Report. Annex Three outlines processes for appointing judges and members to devolved Welsh tribunals, and where accountability for these appointments lies.
32. A first consideration for justice in Wales is to ask what is meant by justice? This is practically important to making justice work in Wales and does not appear to be a matter fully explored by the literature. In a broad sense delivering social justice is a primary role of the Senedd and Welsh Government. That these institutions do not have responsibility for courts, policing, prisons, probation, legal aid and so on does not prevent them from largely being concerned with social justice. Is the key aim of the current inquiry then to consider how social justice policies in Wales can be better aligned with the characteristic institutions of legal justice (courts, tribunals, judges, the police etc), or indeed how these institutions can be better aligned with Welsh social justice policies? The literature and mapping suggest that some clarification in terminology between social and legal justice may be useful.
33. The interface between social justice and legal justice is a broad topic, and a theme of this Report is that there are distinct concerns, challenges and opportunities, relating to criminal, administrative, family and civil justice in Wales. Whilst there are cross-cutting issues (some are identified and discussed in this Report), it may not always be helpful to refer to 'justice in Wales' indiscriminately.
34. The Justice Commission concluded that the people of Wales are being let down by current systems of justice (seemingly across criminal, administrative, family and civil justice), but for some different reasons in relation to each. It recommended full legislative and executive devolution of responsibility for justice, and a full transfer of financial resources. However, there has already been some devolution of legal justice powers to Wales, and far more devolution of social justice powers that impact on delivering legal justice.

35. The UK Government does not intend to respond to the Justice Commission’s Report, but has stated that it will continue discussions with Welsh Government, and honour commitments made during the passage of the Wales Act 2017 to undertake regular reviews of justice in Wales.
36. Welsh Government has established a Cabinet Sub-Committee on Justice, including the First Minister, Deputy Minister and Counsel General (with other Ministers being invited to attend where there is a specific policy interest). This Sub-Committee met on 20<sup>th</sup> January 2020, with minutes of that [meeting published on 8<sup>th</sup> April](#). Establishing the Sub-Committee can be seen as a response to the Justice Commission’s concerns about a lack of co-ordinated leadership in justice matters across Welsh Government. The Justice Commission specifically noted, under the heading ‘immediate action to be taken’, that ‘clear and accountable leadership on justice in the Welsh Government must be established under the current scheme of devolution’. Three papers were considered at the Sub-Committee meeting: terms of reference and proposed ways of working; Welsh Government’s initial analysis of the Justice Commission’s recommendations concluding that a proposed Justice Transformation Programme would be a multi-year project (two illustrative models for the Programme were provided, based on whether or not the UK Government would be open to some legislative devolution during the current Parliament). The third paper asked the Sub-Committee to agree its forward work programme and included a table of subjects for consideration along with suggested Ministerial leads.
37. The Justice Commission also recommended that: ‘Welsh Government should begin the process of reform by listing the recommendations it will seek to implement whilst the current scheme of devolution continues’.
38. Generally, it is through devolved social justice functions, in areas such as health, education, social welfare and housing, that Welsh Government and the Senedd make their biggest contributions to legal justice. Overarching matters unique to the Welsh social justice context include the [Well-being of Future Generations \(Wales\) Act 2015](#) (WFGWA) and activities to promote, strengthen and enhance equality and human rights. Well-being and prevention are central to Welsh Government and the Senedd’s approach to social justice, and there is a good understanding in Wales of the impact Adverse Childhood Experiences (ACEs) have on individuals, with recognition of how to account for and address these impacts through institutions of social and legal justice. Finally, at the institutional level, Public Service Boards (PSBs) under WFGWA are central to delivering this social justice agenda, alongside many other subject-area boards, committees, networks and task groups (likely too many in the view of the Justice Commission).

## Chapter Two: Criminal Justice

### 2.1 Criminal justice at the ‘jagged edges’ of devolution

39. The largest part of the Justice Commission’s report relates to criminal justice, including 16 recommendations. Prior to this the [Part II Report of the Silk Commission](#) (in 2014)

had recommended devolution of policing and youth justice; the Justice Commission recommends full devolution of criminal justice, prisons, policing and probation.

40. The Justice Commission drew on research by Dr Rob Jones and Professor Richard Wyn-Jones, which disclosed that the UK and Welsh Government's policy responsibilities impacting on criminal justice overlap within the same policy spaces, but not in a clear fashion, rather there is a 'jagged edge' of intersecting competences and responsibilities. The 'jagged edge' metaphor has since been useful in describing the intersection between devolved and reserved social justice and legal justice policies in other areas, including administrative and family justice.
41. Jones and Wyn-Jones' report (['Justice at the Jagged Edge in Wales'](#)) highlights how Welsh Government undertakes a wide range of complementary activities in relation to the criminal justice and policing environment, concluding that 'a relative dense thicket of Welsh institutions have developed in order to meet the particular challenges of operating in the Welsh context'. The authors argue that taken together these institutions represent a 'de facto system of administrative devolution'. There is a high level of complexity, with various committees and boards having been created concerned with criminal and social justice, and integrated/overlapping social policies in Wales. The Justice Commission attempted to map all these bodies, but its work is unlikely to be fully comprehensive and some aspects are now out of date. This is an acknowledged difficulty with any 'mapping' exercise.
42. The UK Government Home Office and Ministry of Justice retain primary policy responsibility for criminal justice in Wales. Each works with a wide range of differently constituted and accountable agencies and bodies to deliver policy commitments. Subject to parliamentary approval, UK Ministers have authority to introduce legislative changes to policing, crime and drugs policy in Wales. Home Office legislation and policy affecting Wales is subject to parliamentary scrutiny by the House of Commons Home Affairs Committee, but the so-called 'Jagged Edge' report discloses considerable criticism of the efficacy of this scrutiny. The policy, expenditure, and administration of the Ministry of Justice is scrutinised by the House of Commons Justice Committee. Again, the so-called 'Jagged Edge' Report raises concerns about the effectiveness of Westminster scrutiny from a Welsh perspective.
43. The mapping exercise (at Annex One to this Report) shows that Welsh Government and the Senedd are involved, across the 'jagged edge' in a broad range of matters relating to criminal justice, including; the prevention detection and investigation of crime; violence against women, domestic violence and sexual abuse; policing, community safety; victim support; modern slavery; misuse of and dealing in drugs or psychoactive substances; prisons; management of persons charged with or convicted of offences; and probation. Just some examples are:

- a. [Violence Against Women, Domestic Violence and Sexual Abuse](#)

Domestic violence legislation is largely common to England and Wales and remedies in respect of domestic violence, domestic abuse and female genital

mutilation are reserved. In 2010, Welsh Government launched a six-year strategy 'The Right to be Safe' to tackle violence against women in Wales, this was followed in November 2016 by a '[National Strategy on Violence against Women, Domestic Abuse and Sexual Violence \(2016-2021\)](#)'. The Foreword to this strategy notes that Welsh Government continues 'to work closely with the Home Office and criminal justice agencies in Wales to ensure all parties work together across devolved and non-devolved responsibilities, to achieve our goals'. The Senedd has enacted the [Violence Against Women, Domestic Abuse and Sexual Violence \(Wales\) Act 2015](#) (VAWDASV), aimed at improving the public sector response to abuse and violence in Wales.

#### b. Policing

Policing is a reserved matter but is a site of significant Welsh Government activity. This is substantially due to the funding context, where Welsh Government provides a component of the Police Settlement via the Revenue Support Grant and the distribution of National Non-Domestic Rates (a fully devolved tax). A high-profile example of activity is Welsh Government's support (£16.7 million in the 2019/20 Final Budget) for additional Police and Community Support Officers (PCSOs). However, there are other areas of Welsh Government and Senedd responsibility that interact with policing, including education, mental health and community safety. For example, in 2019 the Senedd Health, Social Care and Sport Committee conducted an inquiry '[Mental health in policing and police custody](#)' with a focus on partnership working between the police, health and social care services and others to consider how effectively services are working together in Wales to prevent people with mental health problems being taken into police custody, and to help ensure vulnerable people in mental health crisis get the care and support they need.

#### c. Modern Slavery

Whilst modern slavery is reserved, Welsh Government created the post of Anti-Slavery Co-ordinator in 2011 to work towards stopping slavery in Wales and to co-ordinate help and support for survivors. The Co-ordinator is funded by, and accountable to, Welsh Government. Police and Crime Commissioners also work with Welsh Government to support the Co-ordinator. Welsh Government seeks to address slavery through the supply chain and procurement policy, including with the creation of '[A Toolkit Guide Code of Practice – Ethical Employment in Supply Chains \(May 2017\)](#)'.

#### d. Prisons

Her Majesty's Prison and Probation Service (HMPPS) is an executive agency established in April 2017. The HMPPS Wales Directorate manages the day to day operation of public sector prisons in Wales. In delivery there are also arms-length bodies funded separately by the Ministry of Justice (including HM Inspectorate of Prisons, HM Inspectorate of Probation, Prisons and Probation Ombudsman,

Independent Monitoring Boards and a Parole Board). However, responsibility for the services that address the causes of criminality and support rehabilitation is devolved and this includes support for prisoners and preventing re-offending. Prisoner healthcare is devolved, and the Senedd Health, Social Care and Sport Committee is conducting an inquiry into '[Provision of health and social care in the adult prison estate](#)', this is focusing on Welsh prisoners' experiences of health and social care services. Welsh Government also delivers and funds the learning and skills provision in adult prisons in Wales through a joint Memorandum of understanding with HMPPS.

#### e. Management of Offenders

Many activities around offender management and reoffending are reserved. However, as the so-called 'Jagged Edge' Report notes 'these activities create demands on public services'. Welsh Government is seeking to pursue its own policies focusing on female offenders, and young offenders (as well as in youth justice more broadly).

44. The mapping exercise and literature review disclose particular issues for making criminal justice work in Wales. These include; the problems specifically caused by the 'jagged edges'; managing complexity and the need for leadership; the need for improved evidenced based evaluation of policy initiatives; the need for more disaggregated Wales-only data generally; and concerns about scrutiny and accountability.

#### 2.2 Specific 'jagged edge' problems

45. These are noted in more detail in the mapping exercise and literature review (Annexes One and Two), but include that constitutional arrangements can prevent Welsh Government from pursuing alternative approaches in areas it has policy responsibility for, and also prevents Welsh Government from taking a 'whole system' approach, including to tackling the root causes of offending.
46. As reserved bodies, police forces in Wales are not official members of PSBs, this means that they are not required to participate in meetings (although they are invited to attend, along with probation services), and Welsh Government and the Senedd cannot impose any duties on them including with respect to the functioning of PSBs.
47. Another example is the VAWDASV Act 2015, which places duties on Welsh public bodies regarding prevention, protection and support, however, it cannot place duties on the police, CPS or the courts as reserved institutions.
48. Community safety is an area of significant overlap with a range of criminal justice matters, including policing. Part of the background to community safety in Wales is the [Crime and Disorder Act 1998](#) which provided for Community Safety Partnerships, which are the responsibility of local authorities and the police. The Justice Commission notes in relation to these bodies that: 'Half of the required partners are now devolved' and

that: ‘This is reflected in amendments to the Act giving the Welsh Ministers powers to set certain requirements, either alone or jointly with the Secretary of State’. The Justice Commission further states, however, that despite these amendments the 1998 Act ‘is still not fit for purpose’ in devolved Wales. In a 2016 report, the Wales Audit Office found that ‘complex responsibilities make it difficult for public bodies to coordinate a strategic approach to community safety, which weakens collective leadership and accountability and undermines the potential to help people stay safe’ ([Wales Audit Office](#): [9]). The Justice Commission recommended that Community Safety Partnerships should be subsumed within its proposed reformed All Wales Criminal Justice Board.

49. The [Modern Slavery Act 2015](#) imposes duties on public services providers in Wales including the NHS and Transport for Wales. This Act interacts with Welsh police initiatives. The Wales Anti-Slavery Leadership Group (chaired by Welsh Government’s Head of Community Safety) provides strategic leadership, co-ordinating collaboration between devolved and non-devolved partners and the third sector. Other members of the Group include Police and Crime Commissioners, UK Home Office officials, the CPS, National Police Chief’s Council, National Crime Agency, probation service and third sector organisations. The Justice Commission has suggested that one reason why the Welsh Government may have set up groups such as the Anti-Slavery Leadership Group, and other national and regional groups to tackle domestic abuse, could be ‘because it did not control the agendas of other groups, such as Criminal Justice Boards, owned by Whitehall departments’.
50. The Justice Commission reports that Her Majesty’s Inspectorate of Prisons ‘has drawn attention to the problems of the “jagged edge” where health services are devolved and prison services under the UK Government’. The Senedd Health, Social Care and Sport Committee conducted a [consultation into Welsh prisoners’ experiences of health and social care services](#). [Evidence from Dr Rob Jones](#) of Cardiff University’s Wales Governance Centre notes that a 2015 HM Inspectorate of Prisons (HMIP) review into substance misuse in adult prisons in England and Wales highlighted that the different approach in Wales is leading to ‘poorer outcomes for some prisoners’ and ‘inconsistency in substance misuse treatment between prisons in England and Wales’. Dr Jones also refers to an updated HMIP Report (July 2018) which concludes that services in Wales continue to be ‘considerably less safe’ persistently leading to ‘poorer outcomes’ for prisoners. However, evidence of [HM Chief Inspector of Prisons](#) to that same Senedd consultation demonstrates that ‘jagged edge’ issues cut both ways. The Chief Inspector found governance arrangements and local partnership working to be generally good in adult male prisons in Wales, though oversight mechanisms require development. He considered that significant current barriers in relation to health and social care provision, especially mental health and substance misuse, relate to matters that are the responsibility of HMPPS, in particular buildings not fit for purpose, healthcare staff shortages and prison regimes (such as the distribution of medicines) that do not align with clinical need.
51. In 2019, the House of Commons [Welsh Affairs Committee examined governance of prisons and provision of services in prisons](#) in Wales, concluding that UK and Welsh

Governments should work more closely together in the areas that intersect in criminal justice, such as health, housing and education. This closer working is to include producing a new framework for cooperation and integration in the provision of prison services, with clear points of contact. It is difficult to determine how successful this closer working might so far have been, given that the Justice Commission reported significant concerns in its final Report (published five months after the Welsh Affairs Committee Report).

### 2.3 Managing complexity and the need for leadership

52. The UK Government has introduced a number of Welsh directorates with senior leadership roles to help reflect the Welsh dimension to its policing and criminal justice activities. Welsh Government has established many of its own committees, boards, associations, units, forums and advisory panels (most in association to varying extents with the police, Police and Crime Commissioners, local authorities, PSBs and third sector organisations).
53. The move to institutional decentralisation, and in particular the de facto establishment of administrative devolution of criminal justice in Wales, reflects the need to adapt to the Welsh context but is also premised on the value of joined-up working and multi-agency approaches. Such approaches can assist in identifying problems, leading to more effective solutions and are capable at least of avoiding duplication. It is not multi-agency working per se that is the problem, but rather that the proliferation of bodies.
54. The Justice Commission concluded that the current national and regional organisation of criminal justice in Wales 'is expensive and wasteful'. This makes the co-ordination of a strategic approach difficult to achieve and leads to a situation of diffused and fragmented accountability, with true collective accountability said to be missing.
55. The Justice Commission considers that PSBs should subsume Community Safety Partnerships and be the primary means of developing local coordination and delivery across all services. There is currently an All Wales Criminal Justice Board, that has 21 members, and a Policing Board for Wales (established in 2018) with similar membership. The Home Office and judiciary are not represented on these boards.
56. The Justice Commission notes that the All Wales Criminal Justice Board has no executive authority, relying on the members of the Board to exercise such authority in their individual leadership roles within their own organisations. The Board cannot hold anyone to account. It is not responsible for setting an overall strategy for Wales. In this sense it seems the Board also cannot be specifically held accountable as a whole, again accountability is through members in their senior leadership roles within their own organisations. The Justice Commission recommends: 'A new All Wales Criminal Justice Board should be created. It should set an overall criminal justice strategy for Wales and provide the means for accountability within Wales for the delivery of that overall strategic approach'.

This Board should include the following members:

One Police and Crime Commissioner  
One Chief Constable  
The Chief Crown Prosecutor for Wales  
The Director of Prison and Probation for Wales  
The Chairman of the Youth Justice Board Cymru  
The Director of HMCTS Wales  
A representative of Welsh Government at director level

The Board should also subsume the Policing Board for Wales and its overlapping roles, and senior representatives of the Home Office, Ministry of Justice and Victim Support should have a right to attend with other organisations being invited to attend as necessary. The new Wales Criminal Justice Board should operate openly and transparently, with a website clearly identifying its membership, the agendas for meetings and policy documents, and there should be periodic reporting to the Senedd.

#### 2.4 The need for improved evidenced based evaluation of policy initiatives; the need for more disaggregated Wales-only data

57. This matter raises concerns across all areas of justice in Wales. The literature examined for this Report in relation to criminal, administrative, civil and family justice all stresses the lack of data relating to justice that is available on a disaggregated Wales-only basis. It is commonplace for researchers to use Freedom of Information legislation to gain access to data about Wales that is routinely published either with respect to England-only, or on an England and Wales basis. In his work relating to imprisonment and sentencing, [Dr Rob Jones](#) concluded that many sources of Welsh only data could only be obtained using Freedom of Information legislation, and that the problems revealed raised pressing questions about political accountability for imprisonment. Dr Jones' work discloses that Wales has an extremely high imprisonment rate per head of population. Whilst stressing that the findings are alarming in and of themselves, Dr Jones notes that they are more so because the trends had not previously been detected. He concludes that: 'This undoubtedly calls into question the role being played by UK justice agencies in Wales as well as civil society organisations and academic researchers'. [Dr Daniel Newman](#) also notes the lack of Wales-only research into the impact of legal aid cuts on access to civil and criminal justice, and into access to justice issues more generally in Wales.
58. In the context of reoffending, a first '[Wales Reducing Reoffending Strategy](#)' was produced in 2014 in partnership between criminal justice agencies in Wales and Welsh Government. The Strategy explored Wales' approach to integrated offender management, and for each reoffending strategy it set objectives with performance indicators. The Justice Commission has been critical of the lack of a rigorous approach to managing performance under this Strategy and a successor [2018 Framework](#) (published jointly by Welsh Government and the Ministry of Justice). Of the 2014 Strategy the Justice Commission expressed its concern that 'no specific results in terms of data were produced' and the Commission could obtain no evidence of progress being made as a result of reducing and reoffending policies for Wales. The Justice

Commission noted that the 2018 Framework is aimed at promoting collaboration between devolved and non-devolved organisations, but again the Commission was concerned about the limited approach to monitoring performance, and lack of clear accountability. In light of this there also seems to be further concern about monitoring performance against new strategies and initiatives for female and youth offenders. Similar concerns have been expressed in relation to Family Justice initiatives (discussed in Chapter Four below).

## 2.5 Scrutiny and accountability

59. Concerns over leadership, the availability of data and extent of evaluation clearly impact on accountability, but the so-called ‘Jagged Edge’ Report also focuses on the complicated nature of intergovernmental relations and the limits of joined-up policy-making. Through a range of high-level interviews, alongside other primary and secondary research sources, the authors conclude that Wales is often overlooked by UK justice officials in London and that UK policy documents may acknowledge Welsh Government’s responsibilities, but often fail to reflect how the policy will work in practice. There is a particular concern that decentralisation in the administration of criminal justice institutions (like HMPPS and Integrated Offender Management (IOM) Cymru), is not sufficient to ensure that the Welsh context is fully taken into account. Whilst policy responsibility at Ministerial level is retained in Westminster and Whitehall, Wales can appear as an afterthought, leading to a situation where decentralised bodies are reacting and responding, having to adapt to policy decisions taken largely in the perceived interests of England. This playing catch-up stifles innovation and can lead to decentralised bodies adopting cut and paste solutions.
60. There is also evidence of insufficient consultation which undermines joint-working and intergovernmental collaboration, whereas the Welsh Government itself also does not have sufficient capacity to take full account of policing and criminal justice in Wales. Silo working between Welsh Government departments and changes to Ministerial portfolios are also said to have contributed to confusing arrangements for policing and criminal justice.
61. As noted above the All Wales Criminal Justice Board has no institutional accountability beyond that of its individual members. In general, the Justice Commission notes that ‘there are few legislative levers which enable devolved bodies to be held to account for reducing reoffending and improving rehabilitation outcomes’.
62. The so-called ‘Jagged Edge’ Report looked in some detail at Senedd oversight of criminal justice issues (and many of the concerns raised could be relevant to other areas of justice in Wales).
  - 62.1 A first concern is the type of problems that Senedd Committee’s respond to. The research disclosed that Committees may respond to new or emerging problems, but most often they respond to areas where Members feel there may be some potential for more immediate impact. The research also found that issues tend to be scrutinised when Members feel they can

no longer be ignored due to the obvious impact on constituents (rough sleeping, psychoactive substances and mental health being particular examples). Research interviewees suggested that this leads to Senedd scrutiny being 'reactive rather than proactive'. Due to the complexity of the devolution settlement, when scrutinising across devolved and non-devolved issues, Committees can also be unsure how their work will contribute to future policy. Committees can be uncertain about the scope of their recommendations and may end up recommending that Welsh Government 'have discussions' with say Police and Crime Commissioners or that they are 'encouraged to work alongside' UK Government departments. An example given was a potential inquiry into the construction of HMP Berwyn in North Wales which was not pursued due to concerns about the level of impact Senedd Members could have on prisons as a reserved matter.

62.2 Second, is that whilst plugging gaps in scrutiny of largely non-devolved issues may not be a conscious objective of Senedd Committees, research respondents suggested that this is part of the background to 'where we have ended up', particularly due to concerns about the level of scrutiny the Welsh context to an issue will attract in a House of Commons select committee.

62.3 Third, the 'Jagged Edge' Report identified practical problems for Senedd Committees scrutinising areas where there is overlap with UK Government responsibilities. Research participants noted that it can be difficult to get UK Ministers or officials to engage with Senedd work, including basic matters of communication about ongoing inquiries or upcoming evidence sessions. Correspondence has gone unanswered or with lengthy delays, and occasionally it has taken 'negotiation' before a UK Minister has agreed to provide oral evidence, and that in some cases last minute appearances have largely been due to a Committee's intimation that it could 'push more publicly' for the engagement sought; the process as a whole has been described as 'incredibly frustrating'. Legally the Senedd cannot 'impose' a call to evidence on a Crown Minister or an official working for the UK Government ([GoWA 2006, s.37\(3\)](#)). In any case officials perceive themselves to be more naturally answerable to the House of Commons Committees and the Senedd is low on their list of concerns. As Jones and Wyn Jones note: 'Although written answers to questions may be provided as an alternative, a refusal to appear in person will prevent committees from reaping the benefits associated with oral evidence sessions. These may include a "more informed" approach to scrutiny'.

62.4 Fourth, is the problem of lack of available Welsh-only data. Senedd officials too have had to rely on Freedom of Information Act requests to access data that would for the most part be clearly and publicly available in relation to England, or on an aggregated England and Wales basis. Respondents to the so-called 'Jagged Edge' Report considered this to be a 'main challenge' and

that getting access to data sometimes seemed to be linked to perceptions of whom it might be used by and how. In particular that policy-type data is easier to access, but specific statistics are harder to obtain, with the intimation that stats are more likely to be sought in connection with scrutinising current practices, rather than as a background to development of future policy initiatives.

62.5 Fifth, respondents to the so-called ‘Jagged Edge’ study suggested that academic research reports have sometimes been a partial or even significant catalyst for Senedd engagement with justice issues, however, there was a general view that civil society organisations in Wales have shown a lack of interest in justice issues. Reasons for this could include; the complexity of the devolution settlement, alongside the widespread view that since legal justice is largely not devolved, the Senedd and Welsh Government have no significant competences, and that civil society organisations are better off directing their attention to UK Ministers and MPs if they want to have an impact. Jones and Wyn Jones conclude: ‘In the absence of a strong and engaged civil society in Wales, [research] participants called upon the Welsh Government to be much clearer about its role in the policing and criminal justice police space’. It was also noted that without activity from interest groups, Committee Chairs and Members are unlikely to be handed ‘briefings’ about issues and emerging problems, this shades into a related matter of Members’ own understanding of justice issues.

62.6 Sixth, is the matter of Members’ capacity. In particular whether they have enough information, and understanding, to properly scrutinise a broad range of justice issues. Some respondents to the ‘Jagged Edge’ research recalled plenary debates where they considered understanding among Members to be variable, with some knowledge only ‘surface level’, this is linked to the comparative lack of ‘briefing’ by civil society organisations. However, it is also compounded by the fact that Members are stretched across a number of Committees. As the [Llywydd proposed in evidence to the Justice Commission](#) ‘the main constraint’ on the Senedd’s ability to provide in-depth scrutiny of justice issues is that there are not enough Members to carry out the work.

62.7 Seventh, is the matter of Welsh Government leadership and the complexity of justice across Government and Senedd competencies. Government openness is one the ‘key factors’ in determining the effectiveness of parliamentary scrutiny. Respondents to the so-called ‘Jagged Edge’ research suggested that Welsh Government has to better promote what it does in the justice arena. One interviewee suggested that ‘Welsh Government’s failure to clearly communicate what it is doing within the policing and criminal justice policy space acts as an impediment to effective scrutiny’, in short, ‘you can’t scrutinise what you don’t know is happening’. A view was expressed that Ministers are unlikely to draw attention to things

that are not specifically within their 'brief'. One interviewee noted that 'all the noise about policing in Wales comes from Westminster and the Home Office' and that because there is no Welsh Government Minister with policing specifically in their brief, other Ministers (such as those with briefs that concern health and education overlapping with policing) maybe less likely to communicate the scope of their activity. Welsh Government regularly altering Ministerial and departmental portfolios was also said to exacerbate uncertainty and lead to lack of Senedd scrutiny as it is not clear which Minister or department is responsible for a particular policy area. As one interviewee put it: 'if you don't have anyone who has a direct responsibility, or the system doesn't know where the person is, it means you don't really feel you're able to explain what is going on, and therefore the Assembly loses out because the Assembly doesn't know what's going on'. One specific example given was over the identity of the minister responsible for substance misuse in Wales, as one respondent said: 'I don't even know who the flipping minister is now'. This level of uncertainty has apparently also caused confusion when Members seek to raise questions in the Siambr. The division of responsibilities can cause difficulties, as for example, prisoner education is under education and prisoner health under health; where a question say about a particular incident in a Welsh prison is directed to may depend on the nature of the follow up questions the Member wishes to pursue. It was suggested in the so-called 'Jagged Edge' research that this level of complexity and uncertainty can sometimes mean individual Members feel they can obtain better information from alternative sources outside the specific realm of public scrutiny and accountability. Issues of complexity run wider than concerns about Government leadership. The nature of Senedd Committee portfolios means that policing and justice have straddled different Committees, with each responsible for scrutinising the portfolios of sometimes multiple Ministers. The 'focus' on justice issues per se is diluted by the range of other matters those Committees have to consider (often matters where Members can have a more immediate impact). Ultimately some areas ripe for oversight might even be deliberately avoided due to complexity, concerns about competence and impact, and that other more prominent devolved subjects will get more traction such that 'jagged edge' issues move further down the agenda until they gradually slip off.

63. Most suggestions to the so-called 'Jagged Edge' Report on how scrutiny could be improved centred on the need for clarity about the specific justice competences exercised within Welsh Government, which teams exercise what competencies, and who are the relevant accountable Ministers. There is no specific information available, for example, about the number of staff in Welsh Government dealing with justice matters. It was suggested that creating a more visible figurehead for justice policy in Wales would improve scrutiny as well as raising awareness. The responsibility lies with the First Minister, but this does not seem to be broadly known.

## Chapter Three: Administrative Justice

64. Administrative justice raises different considerations to criminal justice. First, that across the UK, administrative justice tends to be seen as a ‘Cinderella’ system, with comparatively limited understanding that the procedures for making administrative decisions, public administrative law, and dispute resolution mechanisms form a system of justice. Second, many aspects of administrative justice policy and legislative responsibility are already devolved to Wales. For example; developing coherent and consistent administrative law, especially that which imposes duties on public body decision-making; developing coherent and principled approaches to redress against public body decision making, and the operation of some redress mechanisms including the Public Services Ombudsman for Wales (PSOW) and the devolved Welsh tribunals. Effectively Welsh Government has responsibility for administrative justice policy as concerns all areas of devolved public administration (excepting the role of the courts, reserved tribunals and legal aid). It is notable that this has been the case, at least in part, since the inception of the Senedd, but a specific justice policy function was only established in Welsh Government in 2014. It is also notable that as yet Welsh Government has no published administrative justice policy, and the previous Administrative Justice and Tribunals Unit in Welsh Government has been renamed as the Welsh Tribunals Unit (WTU). This may suggest a narrowed account of administrative justice, perhaps neglecting a more co-ordinated and inclusive approach (that has been recommended by research (such as that being led by [Bangor University](#)) and more recently the Justice Commission). However, this name change may instead be calculated to emphasise the distinct character of the devolved Welsh tribunals as *judicial* bodies (when the legacy of tribunals having historically been part of *administrative* departments, and therefore lacking independence, is still evident).
65. The first body with a formal role to oversee the administrative justice system in Wales was the Welsh Committee of the AJTC. Its [Review of Tribunals Operating in Wales](#) published in 2010, supplemented by internal Welsh Government reviews, has formed the basis for Welsh Government’s programme of reforming devolved Welsh tribunals, including amendments enacted in the [Wales Act 2017](#).
66. The AJTC Welsh Committee was succeeded in 2013 by the Committee for Administrative Justice and Tribunals in Wales (CAJTW) (which was primarily funded by the UK Ministry of Justice). CAJTW’s key publication is its ‘Legacy Report’, [Administrative Justice: A Cornerstone of Social Justice in Wales; Reform priorities for the Fifth Assembly](#), published in 2016. CAJTW was then disbanded by Welsh Government. As with criminal justice, there are concerns around possible lack of co-ordination, leadership and oversight with respect to administrative justice.
67. CAJTW concluded that administrative justice is of far greater significance than is often realised. Its Legacy Report looked across the administrative justice landscape, producing 35 recommendations stressing that: ‘Administrative justice is not only about citizen redress but also about learning lessons from what goes wrong and incorporating them into a vision of good public administration’. The Legacy Report also emphasised that ‘good law and effective scrutiny’ are key components of administrative justice, and

that advice services are crucial to enabling people to navigate redress systems and understand their rights and entitlements. CAJTW's recommendations to Welsh Government addressed the operation of specific tribunals, and oversight and leadership of the tribunal system in Wales; concerns over the development of various 'ad hoc' redress mechanisms which are not governed by clear and transparent guiding principles, and which can lack consistency, and adequate (or in some cases any) oversight. CAJTW also made further recommendations to be communicated to the Senedd. In particular around training for Senedd Committee Chairs, and for Members and Senedd Commission staff, on the specific character and context of administrative justice, and the importance of political oversight in its development and operation.

68. Research into administrative justice in Wales (such as [Administrative Justice: Wales' First Devolved Justice System: Evaluation and Recommendations](#) (Bangor University/ESRC IAA) has made further recommendations relating to public administrative law and human rights (especially in the context of consolidation and codification), the roles of the PSOW and Welsh Commissioners, reviewing 'ad hoc' (or what the Justice Commission refers to as 'quasi judicial') redress mechanisms, recommendations relating to tribunal reform and oversight, and recommendations relating to specific devolved Welsh tribunals. In effect the majority of these recommendations were endorsed by the Justice Commission in its own terms, in six core recommendations on administrative justice, and in supplementary (and complementary) recommendations.
69. Recently completed further research, an [18 month Nuffield Foundation funded project](#) including academics from Bangor University, Cardiff University Wales Governance Centre and Cardiff Metropolitan University, makes another 36 recommendations in relation to administrative justice generally; 19 in the context of administrative justice in social housing and homelessness; and 12 relating to administrative justice in primary and secondary maintained education.

### 3.1 Public administrative law

70. The Justice Commission stated that substantive administrative law is the area where Welsh law has most diverged from that of England, and where there is the greatest potential for further divergence. Much work of Welsh Government and the Senedd falls into this category: legislation relating to public health, social care and well-being; legislation relating to education; social housing and homelessness; legislation relating to planning, the environment; and the Welsh language.
71. Some key Senedd functions are to ensure that administrative law develops in a clear, consistent and coherent manner; scrutiny to ensure that obligations laid down will be capable of performance by public bodies; and continuing post-legislative review of the impacts of new duties on public bodies, compliance rates and outcomes.
72. In 2014, the [Williams Commission on Public Services Governance and Delivery](#) recommended that Welsh Government and the Senedd review existing general administrative law to ensure that it simplifies and streamlines public-sector decision-

making rather than imposing undue constraints on it or creating complexity; and either repeal such provisions or clarify their meaning and interaction. Since the Williams Commission reported there does not appear to have been a review of existing legislation, and further legislation has been added ‘layering’ new duties on public bodies. It does, however, seem that some potential new Bills, for example an Older People’s Rights Bill, have been mooted, but not progressed by Welsh Government on the basis that this could add an extra layer of complexity without clarity as to what a new due regard duty would add, in practice, to existing duties. Further potential incorporation of international human rights norms would benefit from taking more specific account of the administrative justice context.

73. General Welsh administrative law, beyond specific subject areas of housing, education, planning and so on, primarily imposes rights, equality and sustainability based procedural duties either on the majority of public bodies in Wales, or on specific bodies usually in particular sectors. To an extent the reach of Welsh administrative law as a whole has been clarified by s.4 of the Wales Act 2017 which defines a ‘devolved Welsh authority’ (this could also be helpful in further defining and strengthening the role of the Administrative Court in Wales through Civil Procedure Rules (CPR) changes, discussed further below).
74. The rationalisation of at least some areas of Welsh public administrative law has to an extent being considered by a Working Group established under Welsh Government’s ‘Gender Equality Review’. In particular a Group, led by Dr Alison Parken of Cardiff University, assessed how to strengthen the integration of legislation and policy making in the fields of well-being, equality, domestic abuse and sexual violence, and social care, with the aim of improving implementation and outcomes ([Aligning and Improving Outcomes for Well-being and Equality](#) (2019)). Reforms suggested by the Group include; combined reporting by single public bodies on multiple duties, or public bodies working in partnership to report together in relation to particular duties; that time lines for reporting could be better ‘aligned’; that coverage should be reviewed to extend the applicability of particular legislative duties and improve consistency; that certain duties could be strengthened (either by amendment or by further guidance) seeking to ensure that they are more than tick box process exercises, and that there is greater accountability (including legal accountability) for outcomes.
75. The Justice Commission concluded that: ‘Wales has far sighted policies on future generations, sustainability, and international standards on human rights. These are, however, not integrated with the justice system. The distinctive legal framework being developed to underpin these policies, including the creation of independent public officers whose role is to promote and protect rights, is not aligned to the justice system’. Its use of the words not ‘integrated’ and not ‘aligned’ with the justice system may be deliberately somewhat ambiguous. They could be taken in a number of ways:
  - 75.1 That debate about rights, sustainability and equality in Welsh Government and the Senedd is not generally understood as an issue of ‘justice’, beyond the notion that human rights etc may foster collective social justice. The Equality and Human Rights Stakeholder Group convened by Welsh Government has not expressly

considered administrative justice, neither has the Senedd Cross-Party Group on Human Rights.

75.2 Existing Welsh legislation, regulations and guidance seeking to protect rights, equality and sustainability does not provide individuals (or groups) with a specific legal cause of action in a court or tribunal to protect rights or enforce duties. The impact of such legislation on the legal justice system in Wales seems to have been negligible.

75.3 As the Justice Commission notes 'independent public officers' have been created to promote rights and sustainability and to provide a degree of 'enforcement' and 'accountability'. The Justice Commission is in effect referring to the four Welsh Commissioners and may consider that the PSOW also has a role here. Each body has a slightly different relationship to legal justice institutions, courts and tribunals.

76. There has been some debate as to the enforceability of the Well-being of Future Generations (Wales) Act 2015 ('WFGWA'), Wales' flagship administrative law Act, following two unsuccessful attempts to 'enforce' duties under the Act through judicial review in the Administrative Court. This has been discussed both in Senedd Plenary, and in [scrutiny of the Future Generations Commissioner through the Equality, Local Government and Communities Committee](#). Welsh Government and the Commissioner appear to continue to disagree about the legal status of some duties under the Act. It is worth pointing out for completeness sake that a proposed [UK Well-being of Future Generations Bill](#) is not supported by the UK Government precisely because it is drafted to create specific causes of legal action to seek remedies for breach in the courts (provisions not included in the WFGWA). The Bill otherwise has cross party support.

77. Useful guidance here comes from Lord Thomas in his [November 2019 Renton Lecture to the Statute Law Society](#). Here he was critical of 'aspirational' legislation after his term as Chair of the Justice Commission. Lord Thomas argues that some Welsh administrative law, including WFGWA, raises false hopes and undermines the rule of law. His central interrelated conclusions are: first, that legislation which seeks to improve administrative decision-making must be drafted with sufficient precision to enable an appropriate court, tribunal or other enforcement body to determine whether relevant duties have been discharged on the basis of objective evidence; second, that the use of different enforcement mechanisms should be explored which could include a court or tribunal, but also potentially an ombud with an adjudicative role, or a commissioner with enforcement powers. It is fair to say that generally, however, the case for giving any of the Welsh Commissioners additional enforcement powers is highly variable based on their individual roles, and a one-size fits all approach would likely be inappropriate.

78. The main means of legal enforcement of Welsh public administrative law is through judicial review in the Administrative Court. Judicial review is in effect used as a common law backstop in the absence of statutory enforcement mechanisms, with many examples where it may provide the only legal means for individuals to seek redress (for

example, under WFGWA, to enforce certain duties under the [Social Services and Well-being \(Wales\) Act 2014](#), and under the [Rights of Children and Young Persons \(Wales\) Measure 2011](#)). Judicial review provides a relatively weak form of accountability as far as individual redress is concerned, in practice it is a safety net in the case of absence, or insufficiency, of other redress measures. Deference to process and sensitivity to the respective expertise and constitutional position of judges and administrators is built into the procedure, it is not well designed as a means to protect individual legal rights, even if this is how it is most often used in practice in both Wales and England. Organisations, including the Equality and Human Rights Commission note that the lack of awareness of judicial review in Wales means it can be difficult to identify and therefore to fund cases where Welsh law would benefit from transparent, independent judicial interpretation, and which would pass the necessary judicial review threshold of 'arguability' on their individual facts (presentation and discussion during Public Law Wales event, Disability and Justice in Wales, January 2020).

79. All this said, judicial review is an essential safeguard to the rule of law, and the Senedd and Welsh Government should be aware that manifesto commitments of the current UK Government include a review of administrative law and specifically judicial review, which should be watched closely for its potential impacts in Wales.

### 3.2 Administrative justice institutions

#### *The Administrative Court in Wales*

80. An Administrative Court was established in Cardiff in 2009 as part of proposals made by a Judicial Working Group for Justice Outside London to decentralise judicial review in England and Wales, allowing cases to be issued and determined locally aiming to reduce costs and inconvenience for 'regional' litigants and their lawyers. Whilst there is a constitutional and linguistic rationale for decentralisation specifically to Wales, this was only part of the case for reform. This chimes with experiences in criminal justice where 'regionalisation' has been a broader England and Wales policy initiative, but where the devolution context gives rise to distinct issues, and opportunities, in Wales.
81. The vast majority of claims against Welsh public body defendants are now issued in Cardiff and heard in Wales, but it remains common for cases to be started elsewhere (usually in London) and subsequently transferred to Cardiff under the relevant Practice Direction. Empirically, Wales continues to generate fewer ordinary civil (non-immigration) judicial review claims per-head of population than English regions, and the proportion of claims issued by unrepresented litigants is increasing (in Cardiff and across the Administrative Court as a whole). Legal aid reforms are likely to have had a disproportionate impact on access to judicial review outside London, including in Wales, at least in part because these reforms have led to the closure of law firms offering relevant public administrative law advice. The proportion of judicial review claims across England and Wales funded by legal aid has reduced from 36.7% in 2001 to 4.4% in 2015.

82. A distinct issue in the ‘regionalisation’ of public law, and other Administrative Court claims, to Wales has been the limited development of public administrative law legal services. For example, barristers based at chambers in Wales are instructed in only a small proportion of the total number of claims handled by the Administrative Court in Cardiff. Barristers in Wales do handle a larger proportion of pre-litigation work, but it seems there is less confidence in instructing them to appear before the Court. In 2019, Welsh Government commissioned a [‘rapid review’](#) of its procurement of legal services and has proposed measures to increase instruction of Wales-based advocates.
83. The Justice Commission recommended that it should be compulsory under the CPR for claims against Welsh public bodies (devolved Welsh authorities as defined in the Wales Act 2017) challenging the lawfulness of their decisions to be issued and heard in Wales. Currently the CPR and judicial pronouncements create a strong presumption that this should be the case, but not a firm rule. Procedural amendments to judicial review can be made through CPR Practice Directions, and such rule changes have also been used to create Wales only statutory appeals in the Administrative Court in Cardiff, that must be issued and determined in Wales. There are clearly sound constitutional and access to justice reasons for this proposal, but some concerns remain around a requirement that claims against Welsh public bodies ‘must’ be issued in Wales, if access to legal aid funded public law advice remains a problem (and perhaps more of a problem in Wales than it is in England).

#### *The Welsh Commissioners*

84. The Welsh Language Commissioner, Children’s Commissioner for Wales, Older People’s Commissioner for Wales and the Future Generations Commissioner for Wales are part of the Welsh administrative justice system. As they have been established at different stages of devolution, the powers and functions of each are contained in different forms of legislation and there has been some discussion of reform towards a common Welsh model (examined to an extent by a Senedd, Public Accounts Committee Report in 2015). However, there are significant differences in their roles, and legislation already requires the Commissioners (and the PSOW) to engage, and even collaborate, where appropriate, and this is supported by a Memorandum of Understanding. Some key issues raised in the context of justice are perhaps more specifically that the Children’s Commissioner for Wales’ current powers are coterminous with the devolution settlement and not with all matters (whether devolved or reserved (including reserved justice matters) that affect the welfare of children and young persons who normally reside in Wales). Accountability of Commissioners to Welsh Government (as opposed to the Senedd) also remains contentious.

#### *The PSOW*

85. The PSOW’s corporate plan for 2019/20 is entitled [‘Delivering Justice’](#), noting that the PSOW’s mission is: ‘To uphold justice and improve public services’. The PSOW has reported on examples of law incorrectly identified or misunderstood amounting to maladministration (this includes incorrect English law applied by Welsh public bodies). The PSOW can recommend that public bodies apply correct law and improve training

and provision of information but cannot make judgments about the determination of legal rights or entitlements. The Justice Commission endorsed various Law Commission recommendations to enhance inter-action between the Administrative Court and ombuds (initially conceived for England and Wales, and UK ombuds). The rationale is to make the best use of the expertise of each institution, and to ensure that individuals can access an appropriate remedy whilst also making sure that systemic problems (of both administration and legal interpretation) are addressed for the future. The Senedd Finance Committee had previously rejected some of these recommendations due to concerns about altering the relationship between an ombud and a court on a Wales-only basis. As discussed in the 'Mapping' Annex One to this Report, there may be concerns around legislative competence in relation to some of the Law Commission (and Justice Commission) recommendations, but not all of them. This is perhaps another example of the devolution context potentially stifling innovation in relation to access to justice. However, as concerns the core devolved competencies of the PSOW, the Senedd has passed innovative legislation, the [Public Services Ombudsman \(Wales\) Act 2019](#), which gives the PSOW new powers, including to conduct own initiative investigations, receive complaints more flexibly, and enables the establishment of a Complaints Standards Authority.

### *Tribunals*

86. Devolved tribunals have been at the centre of legal justice reform in Wales, in part due to being the only judicial bodies administered by Welsh Government, but also because this is an area of justice where there is a degree of consensus between Welsh and UK Governments, resulting in provisions about Welsh tribunals being included in the Wales Act 2017.

87. The Wales Act 2017 gives statutory recognition to seven 'Welsh tribunals':

Agricultural Land Tribunal for Wales

Mental Health Review Tribunal for Wales

A rent assessment committee constituted in accordance with Schedule 10 to the Rent Act 1977 (including a leasehold valuation tribunal and a residential property tribunal) jurisdictions of the Residential Property Tribunal for Wales

Special Educational Needs Tribunal for Wales (to be renamed the Education Tribunal for Wales)

Appeals about the registration of school inspectors

Adjudication Panel for Wales

Welsh Language Tribunal

88. 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 sufficient expertise, and to have regard to 'the need to develop innovative methods of resolving disputes'. The 2017 Act additionally provides for 'cross-deployment' of judges between the different Welsh tribunals (with consent of the President) and cross-deployment of Welsh tribunal judges into the England and Wales

First-tier tribunals. Early indications are that this has been successful in terms of level of judicial interest and quality of candidates, it can also reduce recruitment costs.

89. Welsh Government is responsible for funding the statutory tribunals (defined in the Wales Act 2017) administered by the Welsh Tribunals Unit (WTU), this is a management structure within the Welsh Government that provides administrative support.
90. Protecting judicial independence is part of the remit of the Law Commission's current review of Welsh tribunals. This is also important to the President of Welsh Tribunals (PWT) and was highlighted by the Justice Commission. The lack of independent status of the WTU from Welsh Government is an issue which the PWT is eager to tackle 'as soon as reasonably practicable'.
91. 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 [Tribunals, Courts and Enforcement Act \(TCEA\) 2007](#), whereas the 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. This leaves old rules and regulations designed for England and Wales tribunals operating in a different, Wales only, constitutional and public administration context.
92. Another matter for clarification and reform is the disjointed appeal routes from Welsh Tribunals. 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.
93. In terms of tribunal appointments, Welsh Government has adopted several administrative measures aimed to achieve standards that are comparable with non-devolved tribunals. Specific responsibilities for appointments are noted in Annex Three to this Report. 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.
94. CAJTW noted in 2016 that although the Welsh judiciary were in effect 'tied in' to England and Wales institutions (Judicial Office, JAC, Judicial College JCIO) the relationship between them has not been clear. In particular, the small size of Welsh tribunals and complexity of their constitutional position hampered progression of more formal arrangements.

95. 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. 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.
96. The Justice Commission concluded that there has been a tendency in the legislation passed by the Senedd for it to specify that dispute resolution should take place in the County Court or in the non-devolved courts and tribunals. The Justice Commission regarded this as anomalous when specialist Welsh tribunals exist that have the competence and capability to determine disputes. The Justice Commission recommended that Welsh tribunals should be used for dispute resolution relating to future Welsh legislation.

### 3.3 'Jagged edges' and oversight

97. In administrative justice there are fewer obvious 'jagged edges' with reserved competences. In specific areas reserved social security policies (particularly the roll-out of universal credit, and the spare room subsidy, the so-called 'bedroom tax') have likely had an impact on resort to the administrative justice system in Wales. Legal aid reforms and closure of county courts will also have had an impact on access to administrative as well as civil justice. There are often overlaps between criminal and administrative justice, where weaknesses and failures in either system can result in interaction with the other. For example, children whose additional learning needs are not met due to incorrect or poor administrative decision-making may be out of school and potentially become involved in criminal activity. Innovations (that have proven difficult to establish in Wales) including Family Drug and Alcohol Courts could also lead to savings for the administrative justice system.
98. Proposed reforms to administrative justice in England may necessitate further consideration of the position in Wales. For example, the Justice Commission notes that neither Welsh Government nor the Senedd has reviewed dispute resolution for housing matters, despite housing law being devolved to Wales. The UK Government has recently consulted on a '[Single Housing Court](#)' (one variation of which could require 'reverse devolution' of disputes already handled by the Residential Property Tribunal for Wales). The UK Government has involved Welsh Government in the process of considering reforms, but [researchers](#) have instead suggested that Welsh Government should conduct its own review of the best methods for resolving housing disputes under Welsh law.
99. In terms of leadership, unlike in criminal and family justice, there is no specific administrative justice board or network for Wales. The publication of CAJTW's Legacy report in March 2016 led to an oral statement (during the Senedd recess) where the First Minister noted that the Report, and Welsh Government's response to it, had been published. However, there was no follow up in the Senedd and no further discussion of

the Report. There have been no mentions of the Welsh Tribunals Unit in the Senedd record of proceedings (at the time of preparing this Report).

100. The [President of Welsh Tribunals Annual Report](#) must be presented to the Senedd Presiding Officer. The President's First Annual Report had not been referred to in the Senedd, either in Plenary or in any Committee (at the time of writing). Other Presidents of devolved Welsh tribunals have noted that they have not been called to discuss their Annual Reports with relevant Senedd Committees. Discussion of the work of Welsh tribunals seems to be on an 'ad hoc' subject matter basis, even where judicial leads are required to submit their Annual Reports' to the Senedd.

## Chapter Four: Family Justice

### 4.1 Family justice: Introduction, key issues and oversight

101. Family justice deals with a wide range of matters including concerns about children, the breakdown of relationships and the financial consequences of relationship breakdown. There is a distinction between public law matters (usually involving the intervention of a local authority to protect children) and private law matters (dealing with relationships and relationship breakdown, including where parents, guardians or other carers cannot agree on arrangements for their children). Private family law and justice is reserved, and dispute resolution is largely the responsibility of mediators and the Family Court headed by the President of the Family Division. Whilst reductions in legal aid following the [Legal Aid, Sentencing and Punishment of Offenders Act \(LASPO\) 2012](#) have had a significant impact on private family law disputes in Wales, this Report focuses on public family law, and particularly (taking the lead from the Justice Commission) cases involving children.

102. Family justice seems to be the area of justice in Wales where there has been the least specifically focused research. The Justice Commission notes that family justice is complex in Wales because the law, and court practice and procedure relating to children, straddles the 'jagged edge' of devolved and non-devolved matters.

103. Welsh Government evidence to the Justice Commission stressed that the effect of the current devolution scheme has been to divide responsibilities and interconnections within the family justice system, which can cause complexity and conflict. As [Ruth Henke QC noted in her evidence to the Commission](#): 'Whilst health, education and social care fall outside the definition of family law, they are relevant to it because they are the very areas of law that provide the day-to-day context of family life. They determine the provision of support and services that every family in Wales is entitled to and they inform that which they can expect'.

104. Following a joint Ministry of Justice, UK Department for Education and Welsh Government review in 2011 ([Norgrove Review](#)), a Family Justice Board was established to set direction and oversee improvements across the family justice system in England and Wales. It is chaired by Ministers from the UK Ministry of Justice and Department for Education and attended by the President of the Family Division as an observer.

Representation from Wales includes the Chief Executive of Cafcass Cymru, the Welsh Government's Director of Social Services and a representative from the Association of Directors of Social Services Cymru. There is no Ministerial representation from Wales and the Justice Commission considers the Board to be 'dominated and influenced by issues that arise in England'.

105. A Family Justice Network for Wales, established in 2012, is intended to provide leadership in Wales and to provide a link to the Family Justice Board. It is co-ordinated by the Welsh Government and brings together key organisations in the family justice system in Wales. It provides advice and monitors the performance of the family justice system in Wales. The Network meets three times a year. It is chaired by the Director of Social Services in the Welsh Government. The judiciary attend meetings (in an observational capacity).

106. The 'mapping' document at Annex One to this Report shows some of the key devolved and non-devolved aspects of family law. This includes, for example:

106.1 Child arrangements and adoption are reserved matters however, there are exceptions for services and facilities relating to adoption and adoption agencies.

106.2 Parenthood and parental responsibility are reserved matters, however, parental discipline is excepted and therefore devolved, this includes the right to administer reasonable chastisement to a child, which the Senedd has addressed in the [Children \(Abolition of Defence of Reasonable Punishment\) \(Wales\) Act 2020](#) (straddling both family and criminal justice).

106.3 The main provision for Special Guardianship remains in England and Wales legislation, but the provision of services and support under Special Guardianship orders is devolved and covered in Welsh secondary legislation, statutory guidance and codes.

106.4 Domestic violence legislation is largely common to England and Wales and remedies in respect of domestic violence, domestic abuse and female genital mutilation are reserved. However, the Violence Against [Woman, Domestic Abuse and Sexual Violence \(Wales\) Act 2015](#) aims to improve the public sector response to abuse and violence in Wales.

106.5 Although the Mental Health Review Tribunal for Wales and Special Educational Needs Tribunal for Wales (soon to be Education Tribunal) do not make determinations of family law, they are devolved tribunals whose roles significantly interact with family law and dispute resolution.

107. In many areas of family law, the primary statute remains an England and Wales Act, whereas the distinct Welsh law is contained in secondary legislation, statutory guidance and codes. The Lexis Nexis Book, 'Family Court Practice' (otherwise known as the Red

Book) includes a Welsh Law Supplement explaining the differences between Welsh and English family law, differences are also published in Butterworths Family Law Service. Nevertheless, evidence to the Justice Commission suggested that there is still a notable failure among both legal advisers and lay people to appreciate that Welsh law is distinct, and that this is not due to limited availability of legal materials, but rather lack of awareness that there is specifically Welsh law to be researched and applied.

#### 4.2 Cafcass Cymru

108. Responsibility for the Children and Family Court Advisory and Support Service (Cafcass) was transferred to Welsh Government in 2004. Cafcass Cymru provides expert child-focused advice and support, to safeguard children and make sure their voices are heard in family courts across Wales so that decisions are made in their best interests. Cafcass Cymru must take a rights-based approach as the Rights of Children and Young Persons (Wales) Measure 2011 applies to the exercise of its functions. When responsibility for Cafcass in England was transferred to the Department for Education for UK Government reasons, the decision was taken to devolve responsibility for Cafcass in Wales, since it was considered to sit within 'education' as a devolved department. Whilst Cafcass in England was then run by a non-departmental public body, Cafcass Cymru was, and still is, administered by Welsh Government as such it is not organisationally independent from Government. In 2014 responsibility for Cafcass England was transferred back to the Ministry of Justice, Cafcass England is run as a non-departmental public body sponsored by the Ministry of Justice.

#### 4.3 Taking children into care

109. The [Social Services and Well-being \(Wales\) Act 2014](#) (SSWA) contains specific provisions covering the powers and duties of local authorities with respect to looked after children and accommodated children. As Ruth Henke QC concludes: 'The Family Court is thus most likely to note the divergence of the law in relation to children in England and Wales when considering care planning for a child in public law proceedings', she also considered that most reported cases have so far concerned the requirements that must be met by a Welsh local authority before holding a child in secure accommodation.

110. The Justice Commission considered the use and conduct of care proceedings to be the most important issue for it to examine in relation to children and family justice. It was clearly concerned about data showing a rise in the number of looked after children in Wales, being significantly higher than rates in England (taken as a whole) and Northern Ireland. The Justice Commission considered some attempts to explain the high rates of looked after children in Wales and the variance across local authorities. This included that local authorities might be more paternalistic in Wales and the influence of a rights-based approach under the Children's Rights Measure. The Commission examined research from the [Wales Centre for Public Policy Studies](#) which suggested that the four main contributory factors are: deprivation, variations in the policy and practice of the ways in which local authorities and the judiciary deal

with cases, parental factors (relating to domestic violence, substance misuse and mental health, and population). Whilst the Justice Commission reflected that there are some good analyses, there remains inadequate knowledge about the reasons behind increases in both care orders and children coming into care.

111. There is a legal requirement for local authorities to establish Integrated Support Service Teams providing support for families affected by substance misuse or mental health issues or domestic violence who are on the brink of having their children taken into care. The Justice Commission notes that there is some evidence of short-term gains resulting from the work of these Teams but that there has been no further research to see if these gains can be sustained for the longer-term. Continuing on the theme of lack of research, data and analysis the Justice Commission also notes that there is no published evidence or analysis of the operation of the Welsh Government Code of Practice which sets out local authority duties to looked after children under the SSWA 2014.
112. The Justice Commission welcomed a Welsh Government Deputy Ministerial statement (2 July 2019) that taking preventative action in respect of looked after children was a priority, but considered that there should be a longer-term plan based on evidence, requiring action to make data held by local authorities and Welsh Government available for anonymised use.
113. The Justice Commission considered the current leadership structure for family justice in Wales to be inadequate to address concerns about looked after children and recommended that a small all Wales delivery body be established as a sub-group of the Family Justice Network for Wales, headed by a senior person to ensure leadership. This, it said, should be seen as a step towards ensuring the Family Justice Network for Wales begins to develop into a body that provides leadership and ensures accountability alongside Local Family Justice Boards.
114. Overall, the Justice Commission recommends that there 'should be vigorous support for a programme of research to underpin reform of Welsh family justice and associated preventative services'.

#### 4.4 Family Drug and Alcohol Courts (FDACs)

115. A theme of this Report is that those involved in justice in Wales, and particularly Welsh Government, have seemingly faced barriers to developing or adopting innovative solutions. One example is the lack of FDACs in Wales. FDACs take a problem-solving approach to public law Family Court proceedings where parents have serious problems of drug and alcohol misuse or addiction and are at risk of having their children taken into care. FDACs are a partnership between the Family Courts and teams of substance misuse specialists and social workers. In England, 18 local authority areas are served by FDACs, but there are none in Wales (at the time of writing), though this has been discussed by the Family Justice Network for Wales. The reasons for non-establishment seem indicative of the concerns raised by the 'jagged edges' of family justice.

116. The first reason advanced by Welsh Government was that there is already a policy approach to avoid court intervention through the support services offered by the Integrated Family Support Services in Wales. The Justice Commission considered this argument difficult to follow since: 'It takes no account of the overwhelming evidence that the number of applications to the Court and the number of care orders made is increasing'. FDACs are intended to try and see if better solutions can be reached once a matter has already reached court.
117. Second the Government argued that there were not enough cases in Wales to make establishing a FDAC viable. The Justice Commission concluded that this argument is not based on examination of data and does not take into account that FDACs can operate on a part-time basis.
118. Third, the Government told the Justice Commission that it was keen to explore the establishment of FDACs in Wales, but only if funding was forthcoming from the UK Government. The Justice Commission noted that in England funding had been found other than through the court budget (for example through local authorities and health boards). The Commission noted that savings to a range of public services that could ultimately follow from establishing FDACs 'make it difficult to see' why Welsh Government has not taken steps to fund their establishment.

## Chapter Five: Civil Justice

119. Civil justice describes the law other than that relating to family relationships, crime and administrative decision-making. Key areas in practice are the law of civil wrongs (torts) and contract law, these are matters where there has been little devolved activity, and where much of the law remains as England and Wales common law.
120. The first Senedd Act intended to make changes to substantive civil law will be the [Renting \(Homes\) Wales Act 2016](#) when this comes into force. Its implementation has taken some time, in part due to the large volume of secondary legislation required to be passed. Legislating to provide greater security for tenants also means that aspects of Renting Homes will be amended before the whole Act comes into force. The need for HMCTS to develop necessary processes and forms, including in relation to online possession claims has also protracted the time taken for commencing the Act. According to the Justice Commission there have been similar issues in terms of the commencement of the [Childcare Funding \(Wales\) Act 2019](#) (also not yet in force at the time of writing), and in this case seemingly relating to the role of the reserved First-tier tribunal in reviewing determinations and handling appeals.
121. It is not possible within the scope of this Report to examine in detail each reserved civil justice issue impacting distinctly on Wales, but some key matters are:
  - 121.1 The impact of moves to increase digitalisation in HMCTS, from further opportunities for issuing cases electronically, using electronic documents and communication, online case management up to and including online

hearings and continuous online management of cases. These reforms are likely to have a distinctive impact in Wales, based on differences in matters such as digital literacy, broad band access, geography and demography (as compared to England). The reform process should be carefully monitored and evaluated for its impacts on Wales. Care must be taken that digitalisation does not lead to entrenching existing inequality through different processes.

121.2 The impact that physical court closures have had across Wales, and the sufficiency of alternatives.

121.3 Legal aid cuts (discussed further in Chapters Six and Seven below).

122. Other issues identified by the Justice Commission chime with some themes of this Report. One is the difficulty of innovation in dispute resolution. For example, the Justice Commission found that a lack of proper linkage between court processes and the availability of local mediation services in Wales leading to little awareness and take up of these services. The Commission also expressed concern about the lack of Welsh Government funding for mediation and lack of a public explanation as to why recommendations to establish a mediation centre of excellence for Wales have not been taken up. The Commission concluded that there is a lack of information and understanding about the role that ADR (including mediation but also other methods such as conciliation and arbitration) can play in Wales.

123. On the theme of communication, perhaps also touching on leadership, it is notable that the Regional Employment Judge for Wales informed the Justice Commission that legislation impacting upon the work of the Employment Tribunal had been passed without communication between Welsh Government and the Tribunal; it appears this occurred due to lack of a proper system for communication. The Employment Tribunal is a reserved body but determining disputes impacted by Welsh law on agricultural wages, trade unions, and enhanced rights for those who work in domiciliary care.

## Chapter Six: Information, Advice and Assistance, Including Legal Aid

124. Information, advice and assistance is necessary to enable people to access justice. Legal aid policy is the responsibility of the UK Government, Ministry of Justice. Legal aid is administered by the Legal Aid Agency (an executive agency sponsored by the Ministry of Justice). The severe decline in legal aid expenditure following the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 is now well documented. As is the disproportionately negative effect in Wales where spending on legal aid in both civil and criminal justice has suffered a higher real terms reduction than in England.

125. The central 'jagged edge' in relation to the provision of advice, information and assistance is the extent to which Welsh Government has effectively funded advice services despite the matter being formally reserved (excepting debt advice funding devolved in 2019). Welsh Government has funded the continued provision of advice

services by Citizens Advice/Cyngor ar Bopeth and Shelter Cymru (Wales' two biggest advice providers) that would have been discontinued due to LASPO. Evidence of the First Minister to the Justice Commission was that cuts to legal aid had placed additional demand on public services in Wales. The Welsh Government responded by providing additional resources, including (from January 2020) £8.1 million to Citizens Advice/Cyngor ar Bopeth to provide a new Single Advice Service across all regions in Wales, as well as a remote advice service, for 12 months.

126. The Justice Commission found it 'exceptionally difficult' to establish how much public funding goes into the third sector in Wales for the provision of advice and advocacy. Its estimate was that funding from the Welsh Government, the UK Government, local authorities, health boards, utilities, grant giving charities, trusts and foundations probably exceeds £20 million per year (but this funding comes from a wide range of sources, which also impacts on sustainability of services from the perspective of advice providers). In January 2019, the Wales Audit Office found that local authorities mostly 'do not have an effective strategic approach to working with the third sector and inconsistencies in funding arrangements make it difficult to demonstrate value for money'. The Justice Commission concluded that 'current provision does not look at what is working well on a local level, is not focused on the beneficiaries and lacks a systematic and strategic approach'.
127. A National Advice Network Wales (NAN) was established by Welsh Government in March 2015 and consists of key stakeholders including funders, advice providers, representative organisations, and other partners. It is tasked with providing expert advice, guidance, and support to Welsh Ministers on how to strategically develop the provision of social welfare information and advice services throughout Wales. Six Regional Advice Networks (RANs) have also been established across Wales, with independent chairs and steering groups and membership of local and regional stakeholders. Across 2020, the RANs are tasked to: map advice need and provision and identify gaps; build referral networks between all advice services; combine experiences to identify the root causes of common problems; share best practices and support each other to deliver quality assured advice.
128. For the longer-term the Justice Commission recommended the development of a strategy bringing together funding streams for legal aid and third sector advice provision, and that this strategy should be driven by an independent body that would ensure that there is no gap in provision and that the funding is sustainable. It did not consider the Ministry of Justices' post-LASPO '[Legal Support Action Plan](#)' sufficient to effectively redress the scale of the problem in Wales.
129. In [evidence to the Justice Commission Dr Daniel Newman \(Cardiff University\)](#) stressed that it is still the case that little empirical work has been done on access to justice in Wales, with most subsumed into generic England and Wales research that may lack sufficient Welsh participation to be properly representative; existing research may often have been reported with the assumption that Wales is the same as England. Having conducted research in Wales, including in rural areas, Dr Newman notes that legal aid cuts may well have resulted in more harmful impacts in Wales in light of higher

rates of income poverty. He also finds that it is the people less able to pay for legal services in Wales who are most likely to need them, concluding that 'to expect payment to achieve fair treatment is a de facto tax on the poor'. He considers that Welsh Government should fund more research into access to justice in Wales to develop a better understanding of the needs of people in different parts of the country. Importantly, he notes that people must feel part of any further research and that: 'Justice in Wales should be something people across Wales understand and can engage with. That is how to ensure it works for them'.

## Chapter Seven: Funding for Justice in Wales

130. Although justice is ostensibly reserved, Welsh Government has responsibility for funding some areas of the justice system in Wales (for example, part funding of the police system) and devolved budgets include spending which interacts with justice functions. The Wales Governance Centre has conducted research into 'Spending on the justice system in Wales' and the 'Fiscal implications of devolving justice'. For this project, lead author Guto Ifan found that almost £1.2 billion was spent on the justice system for Wales in 2017-18. This equates to £370 per person and accounts for approx. 3.6% of total identifiable spending for Wales. A key conclusion is that some £442 million (38% of the total spending) comes from devolved or local government funding, and this devolved and local element of spending has grown in real terms since 2009-2010; contrasted to reserved UK Government spending which has fallen by one-third in real terms over the same period.
131. Ifan's research notes that funding for most agencies responsible for the delivery of justice functions in Wales comes primarily from the Ministry of Justice and Home Office budgets, which are unprotected in the context of austerity such that both departments have experienced significant cuts.
132. Wales' four police forces receive funding from the Home Office police grant; the Welsh Government through a revenue support grants and redistributed non-domestic rates; and through a council tax precept. Whilst the share of police funding stemming from the council tax precept has increased from 17% in 1999-2000 to 42% in 2018-2019, Home Office grant funding has fallen to 30% over the same period. Since 2010-2011, precept levels have risen faster in Welsh police force areas (averaging 4% per-annum) as compared to England (at 2.4% per-annum). According to Ifan's research, this faster increase in precepts means that Welsh police funding was £34 million greater in 2017-2018 than it would have been if precepts had risen in line with England. Welsh Government also provides specific grants for Welsh police forces, notably funding for additional Police and Community Support Officers and the All Wales Schools Programme. The range of different funding streams can create complexity and uncertainty.
133. Total reported spending on prisons and probation services for Wales was £205 million in 2017-2018. As Ifan's report explains, unlike the picture in England, spending on prisons in Wales has increased in recent years alongside a large increase in the prison

population located in Wales. Estimated overall expenditure on prisoners from Wales (based on address prior to custody) in 2017-2018 was around £189 million, however, nearly 40% of this was spent on Welsh prisoners outside Wales.

134. For courts and reserved tribunals, net expenditure by HMCTS Wales in 2017-2018 was £67.6 million. Ifan's research found that, excluding depreciation and other non-cash expenditure, estimated net expenditure by HMCTS for Wales equated to just under 4% of HMCTS spending in 2017-2018 (to be compared with Wales' proportion of the England and Wales population (5.3%) and Great Britain (4.9%)).
135. Legal aid expenditure for Wales was £76.9 million in 2017-2018, constituting a real terms decrease of over 38% since 2010-2011. The estimated total spending on justice in Wales reached by Ifan's research does not include spending by Welsh Government, local government, third sector and various other bodies on advice and advocacy services, given the difficulties of establishing an accurate figure for this. Ifan develops an estimate of £9.51 million for 2016-2017 but considers this to be significantly under-representative.
136. Spending from the Welsh Government Budget 2017-2018 on tribunals for which it is responsible was just over £3 million, with the largest share (approx. £2.5 million) going to the Mental Health Review Tribunal for Wales. Local government in Wales also spent approx. £5.4 million on Coroners' and other courts services in 2017-2018. As discussed in Chapter Three, a broad definition of administrative justice would also include spending on the PSOW, Welsh Commissioners and various other 'ad hoc' redress mechanisms not included in Ifan's research.
137. A notable concern (raised in the so-called 'Jagged Edge' Report and Ifan's research) is that under the present system some financial benefits of so-called spend-to-save policies implemented by Welsh Government to reduce costs in the justice system have been captured by the UK Government. Ifan's research on the financial implications of devolving justice notes various ways in which devolution of criminal justice could allow Welsh Government to pursue policies leading to greater efficiencies and a reduction in overall spending (for example by reducing the prison population). It is worth noting that improvements in administrative justice (much of which is already devolved) can also lead to savings. For example, at UK level a 2005 National Audit Office Report on [Citizen Redress in Administration](#) concluded that: 'Cutting down the initial numbers of complaints or appeals, resolving more complaints and appeals more speedily and pro-actively, and improving the cost efficiency of current redress arrangements, could all make appreciable savings in public money, savings which could then cumulate with every passing year'.

## Chapter Eight: Key Themes and Conclusions

138. The mapping exercise and literature review disclose some key themes that may cut across criminal, administrative, family (and to a lesser extent) civil justice in Wales.

## 8.1 Leadership and oversight

139. There seem to be a range of concerns about leadership, including leadership within Welsh Government on justice issues, who exactly is responsible and who can therefore be held accountable. With the inception of the Cabinet Sub-Committee this is likely to have improved, but there is still a lack of awareness and perhaps even some lack of transparency, around how many people in Welsh Government are working on justice issues, what their roles are, and how they interact.
140. Concerns also seem to extend to whether existing Boards, Committees and Networks designed variously to report on the performance of justice systems in Wales (especially criminal and family justice) and to ensure co-ordination between stakeholders, are working effectively and efficiently. The collective accountability of these bodies has also been questioned. In administrative justice there is no longer a specific body tasked with monitoring and reporting on the system in Wales.
141. Questions of leadership can perhaps also extend to the higher levels of inter-governmental relationships. Progress has been made on improving the arrangements for consultation and co-operation between Welsh Government and Ministry of Justice, in particular through a 'Concordat between the Welsh Government and UK Ministry of Justice' agreed on 21 March 2018. The advent of Justice Impact Assessments on proposed legislation, which s.110A of Government of Wales Act 2006 has, since April 2018, made mandatory, has helped to solidify engagement relationships both within and outside Welsh Government, as well as providing a formal mechanism whereby the Ministry of Justice can express a view on redress design proposals that impact on the courts. There is now a 'Justice in Wales Strategy Group' which brings together operational and policy officials from Welsh Government the Ministry of Justice and various justice bodies. It provides a forum for discussion and collaboration on policy issues, and researchers may no longer have to resort to Freedom of Information requests (as Dr Rob Jones did in 2017) to gain information about the activities of strategy groups and committees such as the [Independent Expert Advisory Committee](#) for ongoing review of the operation of justice in Wales. In its 2019 Report, this Committee considered there was still further work needed to improve collaborative and strategic working between the Ministry of Justice and Welsh Government. However, higher level engagement has also been proposed. For example, in 2017 the Justice in Wales Working Group recommended that the Secretary of State for Justice could consider whether there would be benefit in giving a Ministry of Justice Minister specific responsibility for considering how Ministry of Justice services are delivered in Wales. At least from publicly available information about Ministerial portfolios this recommendation does not seem to have been taken up. The Justice Commission note that there is no Welsh Ministerial representation on the Family Justice Board for England and Wales. In 2016, Dr Huw Pritchard recommended at least that a Welsh Government representative and a judicial representative from Wales should have seats on the HMCTS Board (again from publicly available information it does not look like this has occurred).

142. The literature and mapping suggest that the division between policy development and implementation is problematic, and that as a result institutions and services that are largely decentralised from a delivery perspective are reacting and responding to central Government policy initiatives, having to ‘play catch up’ as to how these might work specifically in Wales. This sometimes results in ill-fitting carbon-copies of English approaches due to the lack of time, space and leadership needed for innovation.

## 8.2 Innovation and evaluation

143. Another cross-cutting theme seems to be an actual or perceived inability to develop innovative solutions to a broad range of justice issues in Wales, including in relation to the resolution of disputes. In some instances, it clearly is the limitations of the devolution settlement that prevent Wales from developing unique solutions, and the Justice Commission clearly concluded that only full legislative and financial devolution can properly redress this concern.

144. However, there seem to be other reasons discouraging innovation. For example, in relation to interaction between the PSOW and the Administrative Court, the concern may be more due to perceptions of devolved competence rather than any detailed analysis, and concerns about being seen to ‘rock the boat’ in relation to the role of the courts generally. In relation to FDACs, the Justice Commission rejected Welsh Government’s view that establishing such courts was hampered by the devolution settlement. As discussed in Section 3.3 above (about Senedd oversight), lack of innovation is perhaps unlikely to be something picked up by the Senedd due to the limitations on its own capacity to scrutinise justice issues.

145. Aside from perceptions of competence there are other factors impacting the ability to innovate. These include general awareness and understanding of justice matters, across the political branch, and civil society (with researchers having noted that civil society organisations, including the third sector in Wales, have so far had only limited engagement). Resources are also an important concern. A key reason why alternative methods of resolving administrative law disputes (including by making greater use of devolved Welsh tribunals) have not been explored is likely that any new initiatives would require substantial funding (especially on inception), whereas diverting redress to judicial review in the Administrative Court, or a non-devolved court or tribunal, is seen to involve negligible cost (as noted in Justice Impact Assessments). There are likely to be similar examples in criminal justice. There may be longer-term innovative solutions that could be more aligned to the needs of Wales, and that could also save money, but in the absence of evidence-based research, and with concerns over leadership, it is understandable why such approaches have not always been explored and pursued. All this said, research into criminal and administrative justice has found many positive examples of more grass-roots and local innovations across Wales that have had beneficial impacts, and there have been key legislative changes such as expanding the jurisdiction of the PSOW.

146. There also appears to be some concern that the impacts of various policy initiatives, strategies, and even some specific legal changes including to statutory codes, are not subject to longer-term evidenced-based monitoring and evaluation.

### 8.3 Research and data

147. There is so far still only limited research as to how particular aspects of justice operate in and affect Wales. The extensive evidence submitted to the Justice Commission provides an extremely valuable source of information for future research, and it has been recommended that Welsh Government should fund additional research in relation to family justice, and issues affecting access to justice in Wales. There is value in this research being based significantly on the views of 'users' of the justice system in Wales, and people working day-to-day within it.

148. Whilst research into the constitutional architecture of Wales has been, and continues to be, of great importance, making justice work in Wales could also (and perhaps more so) be focused on understanding some of the more practical, including grass-roots, initiatives that affect how justice is delivered in Wales. Stronger research networks could contribute to this.

149. Access to dis-aggregated Wales-only data about a range of matters relating to justice remains a problem, both for policy makers, Senedd Members and officials, and independent researchers. In 2017 the Justice in Wales Working Group recommended that the Ministry of Justice should undertake a review of how its data collection and publishing practices reflect the distinctiveness of Wales, where possible disaggregating data to give a clear picture of how justice in Wales functions. It would be interesting to know the results of this review and exactly what information is now available. There could also be better collection of data by Welsh Government itself on the operation of justice mechanisms falling within its own competence; as the Justice Commission noted, lack of data recording (including by Welsh Government) has hampered the evaluation of particular initiatives.

### 8.4 Prevention

150. Welsh Government (and others) have expressed frustration that the Welsh preventative approach can be undermined by centralised justice policies, and that savings generated by this approach are being used to subsidise the operation of reserved institutions (including dispute resolution mechanisms). Literature and mapping suggest that the Welsh emphasis on prevention, across criminal, administrative, and family justice, is a significant asset and must continue to be promoted. However, there is some concern (demonstrated by examples from family and administrative justice), that preventative measures should not be seen as a substitute for, or negating the need for, access to independent judicial determination of legal rights. This is true also in civil justice, with Dr Daniel Newman noting that 'without access to civil justice there can be no social justice'. Welsh Government clearly recognises this given its evident concerns over the impact of legal aid cuts and court closures in Wales.

## 8.5 Concluding reflections

151. In its Report the Justice Commission makes much reference to the need for cultural change and leadership as regards justice in Wales. There does seem to have been important progress here, both in the establishment of a Cabinet Sub-Committee, and in the changed remit and current work of the Senedd Legislation, Justice and Constitution Committee. Whilst the literature review and mapping disclose continued concerns about awareness of, and access to Welsh law, again this is clearly something that Welsh Government and the Senedd are tackling; though there are some ongoing concerns about communication of divergence, the availability of appropriate training for professionals, and impacts at an operational level. What seems to be most important for the future is encapsulated in [Dr Daniel Newman's](#) reflection that Wales must be taken seriously as a site in which justice is done, and that people must feel able to play a continuing part in research and engagement about what works for them.

## Annex One: Mapping Justice in Wales

### CONTENTS:

1. Introduction, Scope and Methods.....	2
2. Criminal Justice.....	3
2.1 The Prevention, Detection and Investigation of Crime.....	4
2.2 Violence Against Women, Domestic Violence and Sexual Abuse.....	4
2.3 Policing.....	5
2.4 Community Safety.....	6
2.5 Police and Crime Commissioners.....	6
2.6 Victim Support.....	6
2.7 Anti-Social Behaviour.....	7
2.8 Modern Slavery.....	7
2.9 Prostitution.....	8
2.10 Dangerous Items (Firearms Act 1968 to 1997, Poisons Act 1972, Knives).....	8
2.11 Misuse of and Dealing in Drugs or Psychoactive Substances.....	8
2.12 The Subject Matter of the Mental Capacity Act 2005.....	9
2.13 Prisons and Other Institutions for the Detention of Persons Charged with or Convicted of Offences.....	10
2.14 Management of Persons Charged with or Convicted of Offences.....	11
2.15 Female Offending.....	12
2.16 Probation.....	12
3. Youth Justice.....	13
4. Administrative Justice.....	13
4.1 Administrative Justice Policy.....	14
4.2 Public Administrative Law.....	15
4.3 Clarification, Consolidation and Codification, and Awareness and Accessibility of Welsh Law.....	15
4.4 General Welsh Administrative Law.....	16
4.5 Administrative Justice Institutions: The Administrative Court in Wales and Judicial Review.....	17
4.6 The Welsh Commissioners.....	18
4.7 The Public Services Ombudsman for Wales (PSOW).....	21
4.8 Tribunals.....	22
4.9 'Ad hoc' Redress Mechanisms.....	23
4.10 UK Administrative Justice Council.....	23
5. Family Justice.....	24
5.1 Leadership organisations in Family Justice.....	24
5.2 Reserved Matters Generally.....	25
5.3 Adoption.....	25
5.4 Parenthood and Parental Discipline.....	25
5.5 Special Guardianship.....	25
5.6 Domestic Violence.....	25
5.7 Mental Health.....	26

5.8 Health.....	26
5.9 Education.....	26
5.10 Social Welfare and Well-being.....	26
5.11 Taking Children into Care.....	27
5.12 Family Law Proceedings.....	27
5.13 Cafcass Cymru and Family Proceedings Officers.....	27
6. Civil Justice.....	28
6.1 Employment Law Issues.....	28
6.2 Agricultural Land Tribunal for Wales and Residential Property Tribunal for Wales.....	28
6.3 Dispute Resolution in Civil (and Administrative) Justice.....	28
7. Legal Aid (Information, Advice and Assistance).....	29
7.1 The National Advice Network and Single Advice Fund.....	29

## 1. Introduction, Scope and Methods

Under each of the various devolution settlements, the Senedd and Welsh Government have exercised powers and functions integral to the proper functioning of justice in Wales. However, the list of reservations in the Wales Act 2017 is extensive, and includes:

court surveillance by persons exercising public functions; the prevention, detection and investigation of crime; maintenance of public order; policing and police and crime commissioners; dangerous dogs; anti-social behaviour; modern slavery and prostitution; rehabilitation of offenders; criminal records; poisons and knives; private security; late night refreshment; the sale and supply of alcohol; charities; courts, judges, civil and criminal proceedings; legal profession, legal services and claims management; legal aid; coroners; arbitration; mental capacity; public records; compensation of those affected by crime and miscarriage of justice; prisons and offender management; family relationships and children; gender recognition and; the registration of births, deaths and places of worship.

It is through devolved functions in areas such as health, education, social welfare and housing that Welsh Government and the Senedd make their biggest contributions to justice. Before seeking to ‘map’ against the ‘jagged edges’ of devolution, between the reserved powers noted above, and the activities of Welsh Government and the Senedd, it is worth noting overarching matters unique to the Welsh justice context. These are discussed in the main Report, and include: preventative and well-being approaches enshrined in the Well-being of Future Generations (Wales) Act 2015; seeking to strengthen and advance equality and human rights in Wales; and a well-developed understanding of the impact of Adverse Childhood Experiences (ACEs) and how these impacts can be mitigated in the interests of social justice especially for people coming into contact with the criminal, administrative and family justice systems in Wales.

'Mapping' organisations, functions and accountability is a complex exercise and this account is not comprehensive, its aim is to provide a baseline to be supplemented by further evidence and discussion. There are multiple different ways to 'map' justice functions. The Justice Commission based its Report on broad areas (Criminal, Family, Civil and Administrative Justice); Nason et al have drilled down further into the specific administrative justice systems of social housing and homelessness, and primary and secondary education in Wales. In the 'Jagged Edge' report Jones and Wyn Jones base their analysis on Welsh Government activity in matters falling within, or complementary too, policing and justice reservations in the Wales Act 2017. In this Report a mixed approach is taken, organising material under general themes (Criminal, Administrative etc) and within this using, for the most part in criminal justice, Jones and Wyn Jones' 'Jagged Edge' approach of mapping Welsh Government and Senedd activity against the devolution architecture of the Wales Act 2017, with some additional overarching categories of activity. In administrative justice the 'jagged edge' still exists but the Senedd and Welsh Government have far more competencies in this area. The family justice material is based largely on the Justice Commission's analysis and evidence submitted to it.

This mapping also draws on Pritchard's 'spectrum approach' to decentralisation of powers (discussed further in Annex Two), noting what level of decentralisation has occurred for some key subjects/competencies. These levels include; awareness of a distinct approach in Wales, collaboration (between devolved and central government), regionalisation and/or administrative devolution, and executive and legislative devolution.

## 2. Criminal Justice

Criminal Justice is taken to include; police forces, the Crown Prosecution Service (CPS), courts, prisons and probation services, none of which are ostensibly devolved to Wales. These headline attributes of criminal justice interact with services that are the responsibility of other parts of UK Central Government, but crucially also both devolved and local government in Wales. This leads to a high level of complexity, with various committees and boards having been created concerned with criminal and social justice, and integrated/overlapping social policies in Wales. The Justice Commission attempted to 'map' the main Criminal Justice bodies in Figure 14 of its Report, this Figure is useful but may already be out of date and it is not comprehensive.

The UK Government Home Office and Ministry of Justice retain primary policy responsibility for Criminal Justice in Wales. The Home Office is responsible for policing, crime and drugs policy; the Ministry of Justice for prison and probation services, courts and tribunals, and legal aid. Each works with a wide range of differently constituted and accountable agencies and bodies to deliver policy commitments. Subject to parliamentary approval, UK Ministers have authority to introduce legislative changes to policing, crime and drugs policy in Wales. According to the 'Jagged Edge' Report, Home Office Ministers and officials also have exclusive responsibility for policy initiatives in these areas.

Subject to parliamentary approval, UK Ministers are also responsible for legislation relating to youth justice, and prisons and probation services in Wales, alongside courts, tribunals and legal aid. The policy, expenditure, and administration of the Ministry of Justice is scrutinised by the House of Commons Justice Committee.

## 2.1 The Prevention, Detection and Investigation of Crime

Welsh Government is involved in crime prevention through various policies including community safety, youth justice, and violence against women, domestic violence and sexual abuse. According to Jones and Wyn Jones, the main focus of Welsh Government activity in relation to criminal justice is in the prevention of youth crime, discussed in the context of Youth Justice below. Jones and Wyn Jones consider that Welsh Government's involvement in adult crime prevention is less clear ('Jagged Edge: p.27). However, this may in part demonstrate the difficulties of mapping around the 'jagged edges' of justice. As the Justice Commission has stated 'the primary focus of the Welsh Government's social policy and legislation...has been the determination to tackle factors that blight communities and prevent people from reaching their potential and in this way to contribute to a reduction in offending' (Justice Commission: para[4.202]). However, the Commission further concludes that 'there are few legislative levers which enable devolved bodies to be held to account for reducing reoffending and improving rehabilitation outcomes' (Justice Commission: para[4.14]). The preventative agenda cuts across many areas of devolved policy responsibility, and as such is difficult to map as a separate category.

## 2.2 Violence Against Women, Domestic Violence and Sexual Abuse

This is a significant area of activity for both Welsh Government and the Senedd which is integral to the prevention, detection and investigation of crime. In 2010, Welsh Government launched a six-year strategy 'The Right to be Safe' to tackle violence against women in Wales, this was followed in November 2016 by a 'National Strategy on Violence against Women, Domestic Abuse and Sexual Violence (2016-2021)'. The Foreword to this strategy (by the then Cabinet Secretary for Communities and Children) notes that Welsh Government continues 'to work closely with the Home Office and criminal justice agencies in Wales to ensure all parties work together across devolved and non-devolved responsibilities, to achieve our goals'. There is no longer a Cabinet Secretary for Communities and Children, violence against women, domestic violence and sexual abuse is now the responsibility of the Deputy Minister and Chief Whip.

The Senedd has enacted the Violence Against Women, Domestic Abuse and Sexual Violence (Wales) (VAWDASV) Act 2015 which aims to: 'improve arrangements for the prevention of gender-based violence, domestic abuse and sexual violence; to improve arrangements for the protection of victims of such abuse and violence; to improve support for people affected by such abuse and violence; and to require the appointment of a National Adviser on gender-based violence, domestic abuse and sexual violence'. In March 2016 Welsh Government launched a 'National Training Framework' to help deliver the 2015 Act consistently across Wales (the Minister accountable at this time had the portfolio of Minister for Public Services, another Ministerial position that no longer exists). Both the 'Training Framework' and the 2016-2021 'Strategy' recognise that the criminal justice system plays a central role in tackling violence against women, but that 'there is much that can be done in other areas, such as health, education, housing and social services, to help and prevent people from getting into the criminal justice system in the first place' (2016-2021 Strategy: p.15). The Senedd scrutinises progress against the goals of the VAWDASV Act, and there are national and local groups involved in implementation.

The VAWDASV Act places duties on Welsh public bodies regarding prevention, protection and support, however, it cannot place duties on the police, CPS or the courts as reserved institutions. These latter institutions should then work administratively alongside devolved public services, with a distinctive Welsh focus, and demonstrate awareness of devolved policy aims and initiatives.

### 2.3 Policing

Some key areas of activity in relation to policing are discussed in the main Report (at sections 2.1-2.3). Other matters include, the creation of a post of 'All Wales Deputy Chief Constable' designed to establish closer and more effective relationships between Welsh Government, the police and Police and Crime Commissioners, and to ensure that implementation of policing policy accords as closely as possible with cross-cutting areas of devolved responsibility.

In education, Welsh Government and the four Welsh Police Forces have worked in partnership to develop an 'All Wales School Liaison Core Programme' (AWSLCP) in recognition of the role that schools can play in tackling anti-social behaviour, substance misuse and personal safety. This consists of a series of Crime Prevention inputs, specific lessons and Supportive School Policing initiatives. The strapline of the programme is: 'Police safeguarding the children of Wales through crime prevention education'. Again, it is difficult to precisely 'map' this activity as it relates both to education, children's well-being, crime prevention and policing. Though discussed further in relation to funding, it is worth noting here the Justice Commission's concern that whilst Welsh Government funding for school liaison and for PCSOs 'is the envy of English police forces, the future of such funding is uncertain since it is discretionary' (Justice Commission: paras[4.89] and [4.141]).

Other aligned policy areas include mental health, specifically the 'Mental Health Crisis Care Concordat' brings together Welsh Government, Police, NHS Wales, the Welsh Ambulance Services, local authorities, third sector organisations, the home Office and a range of other bodies including the Youth Justice Board for Wales and Healthcare Inspectorate Wales. The Concordat was co-produced with Welsh Government and aims to improve the care and support for people experiencing or at risk of mental health crisis and who are likely to be detained under section 135 or section 136 of the Mental Health Act 1983.

In July 2018 a Senedd Cross-party Group on Policing was established to consider questions of how policing operates within the devolved and non-devolved aspects of public services in Wales, what are the current issues facing the force in Wales and how best to engage with the Senedd on policing challenges, policy and practical issues of common interest. The Group has discussed homelessness, rough sleeping, substance misuse and mental health.

In 2019 the Senedd Health, Social Care and Sport Committee conducted an inquiry, 'Mental health in policing and police custody' with a focus on partnership working between the police, health and social care services and others to consider how effectively services are working together in Wales to prevent people with mental health problems being taken into police custody, and to help ensure vulnerable people in mental health crisis get the care and support

they need. This also focused specifically on people arrested under section 136 of the Mental Health Act 1983.

A Policing Board for Wales was established in November 2018, this brings together the Chief Constables and Police and Crime Commissioners of each of the police forces in Wales, Welsh Government Ministers and officials. Its membership is very similar to that of the All Wales Criminal Justice Board (established in 2011) discussed further below.

## 2.4 Community Safety

Community safety is an area of significant overlap with a range of criminal justice matters, including policing. This is discussed at para 19 of the main Report.

Despite criticism, some examples of partnership working between police forces and devolved public service providers were praised in a 2016 Wales Audit Office Report. Welsh Government then conducted a 'Working Together for Safer Community Review' (reporting in 2017). National Police Chiefs Council, and the Welsh Police and Crime Commissioners are part of the 'Working Together for Safer Communities Oversight Group' established to oversee implementation of recommendations. Following the Review: 'Welsh Government proposes to establish a long-term programme of work – in partnership with our devolved and non-devolved partners and stakeholders – to take forward and implement a new and ambitious vision for working together for safer communities in Wales'. One element of this work programme was to establish a community safety 'partnership' policy, with leadership functions to deliver this to be established within the Welsh Government, working in close partnership with the Home Office, Ministry of Justice and other relevant 'devolved' leads for UK Government. A Safer Communities Programme Board was subsequently established in 2018. Welsh Government reported on the progress of its activities to the Senedd Public Accounts Committee in June 2019.

## 2.5 Police and Crime Commissioners

The Police Reform and Social Responsibility Act 2011 introduced Police and Crime Commissioners to replace Police Authorities broadly representative of local communities. There is an elected Police and Crime Commissioner for each of the four Welsh police forces. They have a particular role in bringing together community safety and criminal justice organisations, to make sure that local priorities are joined up (Justice Commission: [4.79.5), this means that they regularly interact with devolved public services. Police and Crime Commissioners can raise money through devolved Council Tax (some £127.8 million in 2018/19 ('Jagged Edge': p.29).

## 2.6 Victim Support

The Justice Commission notes specifically that Police and Crime Commissioners provide the main funding for Victim Support, which is an independent charity that works inside and outside court to support victims of crime and traumatic incidents in both Wales and England. Further funding is also provided by the Ministry of Justice and Welsh Government. Welsh Government funds Victim Support to run a helpline and reporting service on hate crime.

The aims of the Violence Against Women, Domestic Abuse and Sexual Violence Act 2015 includes increasing levels of reporting abuse; ensuring the availability of effective, evidence-based early interventions for victims and survivors; and increasing victim confidence and access to justice (Justice Commission: para[4.39]).

The Welsh Government also has a framework to prevent and tackle hate crime against diverse communities (Welsh Government, 'Tackling Hate Crimes and Incidents: Framework for Action': 2017).

## 2.7 Anti-Social Behaviour

Anti-social behaviour is reserved but attempts to address it have formed part of devolved Welsh housing policy. This is not uniquely a Welsh development. Westminster legislation had expanded the tools available to social landlords to deal with anti-social behaviour and recognised the need for social landlords to work in partnership with other key agencies. The Anti-social Behaviour, Crime and Policing Act 2014 provides for local authorities (and housing associations in some circumstances) to seek injunctions for housing related anti-social behaviour, it also provides that anti-social behaviour is an absolute ground for seeking possession. The Secure Tenancies (Absolute Ground for Possession for Anti-Social Behaviour) (Review Procedure) (Wales) Regulations 2015 specifies the process to be followed for an internal administrative review by a local authority or housing action trust of its decision to seek possession under the absolute ground for anti-social behaviour. This is just one of many examples of internal administrative review procedures that are a specific redress measure within the Welsh system of administrative justice. The absolute ground of possession for anti-social behaviour will be repealed when the Renting Homes (Wales) Act 2016 comes into force, it seems that Renting Homes may also provide a narrower definition of anti-social behaviour than under currently applicable law. Renting Homes also introduces a controversial provision whereby a landlord can exclude a contract-holder from a dwelling for up to 48 hours for certain types of anti-social behaviour. There is no specific right to seek an urgent review or appeal of a decision to exclude, and respondents to research have suggested that this could be in breach of Article 6 ECHR (right to a fair trial in determination of civil rights). These matters are currently the responsibility of the Welsh Government Minister for Housing and Local Government.

Social housing providers also work with Police and Crime Commissioners. For example, in 2018 a pilot project in South Wales brought together social housing providers with the Police and Crime Commissioner's office to look at a relational approach to tackling anti-social behaviour.

## 2.8 Modern Slavery

This is discussed in the main Report (at para 20). In addition to the Welsh Government activity discussed in that para, the Modern Slavery Act 2015 imposes duties on public services providers in Wales including the NHS and Transport for Wales. The 2015 Act interacts with Welsh police initiatives and the Wales Anti-Slavery Leadership Group (chaired by Welsh Government's Head of Community Safety) then provides strategic leadership co-ordinating collaboration between devolved and non-devolved partners and the third sector. Other members of the Group include Police and Crime Commissioners, UK Home Office officials, the

CPS, National Police Chief's Council, National Crime Agency, probation service and third sector organisations.

The Welsh structure for tackling modern-slavery is one of multi-layered partnership, and the Leadership Group has further sub-groups in training, threat, case-work review and sex-worker support. There is an Operational Delivery Group which co-ordinate six regional anti-slavery groups tasked with implementing strategic objectives, sharing information, intelligence and best practice. Modern slavery is the responsibility of the First Minister supported by the Deputy Minister.

## 2.9 Prostitution

Legislating and regulating sex work is reserved. In its National Strategy on Violence Against Women, Domestic Abuse and Sexual Violence, Welsh Government outlines its commitment to seeking to protect women and improve access to support for those involved in prostitution in Wales. Welsh Government has also funded third sector organisations providing support to sex workers and victims of abuse, and funded research into the relationships between sex work and substance misuse in Wales. Again, these are strategies to support sex workers rather than the specific exercise of 'justice' powers in their formal sense, and the UK Government also regularly commissions research that extends to both England and Wales, sometimes working in partnership with 'awareness' of the Welsh dimension. For example, research jointly commissioned by the Home Office and the Office of the Police and Crime Commissioner for South Wales ('The nature and prevalence of prostitution and sex work in England and Wales today': October 2019).

## 2.10 Dangerous Items (Firearms Act 1968 to 1997, Poisons Act 1972, Knives)

Law regulating this area is reserved, but education policy is devolved. After new powers to search for weapons were introduced in the Violent Crime Reduction Act 2006, Welsh Government produced guidance for schools on how to search children from weapons (current version: 'Safe and effective intervention – use of reasonable force and searching for weapons: March 2013).

## 2.11 Misuse of and Dealing in Drugs or Psychoactive Substances

Misuse of and dealing in drugs as well as their classification is reserved, but Welsh Government and the Senedd exercise powers in relation to addressing the effects of substance misuse. Welsh Government's first strategy, 'Tackling Substance Misuse in Wales' (2000) was based largely on the UK Government's 'Tackling Drugs to Build a Better Britain Strategy' (Home Office 1998), but more recent strategies have included additional elements focused more on harm reduction. A 10-year strategy 'Working Together to Reduce Harm' was published in 2018, and Welsh Government priorities are periodically set out in substance misuse delivery plans. In June 2018, Welsh Government published 'A Healthier Wales: our Plan for Health and Social Care' setting out a whole system approach to health and social care, outlining a 'wellness' system, which aims to support and anticipate health needs, to prevent illness and reduce the impact of poor health and inequality. The 'Substance Misuse Delivery Plan 2019-2022' aligns to 'A Healthier Wales' and includes actions in priority areas of; responding to mental health

problems, improving partnership working with homelessness services, and improving access to services generally and providing support for families and carers. The Plan states that it 'will provide a focus for ensuring that substance misuse is embedded across other policy areas in the Welsh Government, particularly as we focus more on prevention. For example, close joint work will continue with Education, Children and Families, Employability, Housing, Social Services, Tackling Poverty and Crime and Justice to strengthen links with these areas' ('Delivery Plan 2019-2022: p.10). Substance misuse engagement in Wales is the responsibility of the Welsh Minister for Health and Social Services.

In 2014/15 the Senedd Health and Social Care Committee undertook an inquiry into new psychoactive substances. Its terms of reference included: 'The possible legislative approaches to tackling the issue of new psychoactive substances at both Welsh Government and UK Government level' and 'How effectively a partnership approach to tackling the issue of new psychoactive substances in Wales is being coordinated, both within Wales and between the Welsh and UK Governments'. The so-called 'Jagged Edge' Report raises some concerns about the difficulties experienced by inquiry officials in seeking UK Government engagement with the inquiry. The then UK Minister for Crime Prevention did write to the Committee's Chair supporting the recommendations and noting the role of the Home Office and other Whitehall departments in assisting Welsh Government to deliver on the recommendations. The UK Minister noted that the Committee recommended a legislative ban on new psychoactive substances and that the Home Office was then developing proposals, now enacted through the Psychoactive Substances Act 2016.

## 2.12 The Subject Matter of the Mental Capacity Act 2005

The Welsh Government is responsible for implementing the 2005 Act where it interacts with health and social care. The 2005 Act provides a statutory framework for people who lack capacity to make decisions for themselves or have capacity and want to make preparations for a time when they may lack capacity in the future. It sets out who can take decisions, in which situations, and how they should go about this. It was amended by the Mental Health Act 2007 to incorporate deprivation of liberty safeguards. As the Welsh Government 'Together for Mental Health Delivery Plan 2019-2022' states:

The current landscape of mental health and mental capacity legislation that operates in Wales reflects some of the societal and policy changes that have occurred in recent years. The three main legal frameworks of the Mental Health (Wales) Measure 2010, the Mental Health Act 1983 and the Mental Capacity Act 2005, including the Deprivation of Liberty safeguards each have points of (sometimes complex) interface with each other and engage people's human rights. The three Acts also reflect a continuum from devolved and reserved policy areas but share a common feature in that people come into contact with the legislation largely through the delivery of health and social care. In Wales, mental health and mental capacity legislation also operates closely with the Social Services and (Well-Being) Act 2014, Regulation and Inspection of Social Care (Wales) Act 2016, Additional Learning Needs and Education Tribunal (Wales) Act 2018 and equality legislation.

Mental health is discussed further below both in the context of prisoners, and the Mental Health Review Tribunal for Wales.

### 2.13 Prisons and Other Institutions for the Detention of Persons Charged with or Convicted of Offences

As discussed in the main Report at para 14, the Wales Directorate of Her Majesty's Prison and Probation Service (HMPPS) manages the day to day operation of the six public sector prisons in Wales. The Justice Commission notes that: 'All of Wales' prison and probation services are led and managed by a Wales-based and Wales-focused directorate with clear lines of accountability to one senior manager. These arrangements have achieved greater alignment in Wales between prison services and probation services than anywhere else in the UK' (Justice Commission: para[4.228]).

Despite this regional approach to delivering a reserved prisons service, it is worth noting the Justice Commission's recognition that 'responsibility for the services that address the *causes of criminality and support rehabilitation* is devolved' (Justice Commission: [4.208]) and this includes support for prisoners and preventing re-offending. An exception to the reservation of 'Prisons and offender management' in the Wales Act 2017 is: 'The provision of health care, social care, education, training or libraries'. The responsibilities for education, training and library services first transferred to the Senedd through a Transfer of Functions Order in 2009. Health and social care functions were transferred in 2003.

The so-called 'Jagged Edge' report states in particular that: 'The area of prisoner healthcare represents the Welsh Government's most significant set of responsibilities for prisoners in Wales ('Jagged Edge: p.34). In February 2006, responsibility for healthcare at public sector prisons in Wales was transferred from Welsh Government to Local Health Boards. There is a Partnership Agreement for Prison Health in Wales, outlining agreed priorities between Welsh Government, Local Health Boards and Public Health Wales. The Partnership Agreement is underpinned by a Prison Health Delivery Plan, in practice this can only be delivered in partnership with HMPPS.

Part 11 of the Social Services and Well-being (Wales) Act 2014 places duties on Local Authorities with a prison within their boundary such that if it appears to a Local Authority that an adult in prison in its area may have needs for care and support, there is a duty to undertake an assessment of those needs and where appropriate to take steps to meet them.

The Mental Health (Wales) Measure 2010 sets requirements for the provision of mental health services to prisoners in Wales. A Welsh Government 'Suicide and Self-Harm Prevention Strategy for Wales 2015-2020' identified prisoners as a high-risk group and prisons as priority places where suicide prevention services should be specifically directed.

The Senedd Health, Social Care and Sport Committee has conducted an inquiry into 'Provision of health and social care in the adult prison estate', and this is discussed in the main Report at para 14.

In July 2019 Welsh Government and HMPPS published a 'Learning and Skills Strategy for Prisons in Wales' to improve well-being of prisoners during their sentences and once released and give them the skills they need to unlock their potential, gain and maintain sustainable employment. Welsh Government delivers and funds the learning and skills provision in adult prisons in Wales through a joint Memorandum of understanding with HMPPS.

Welsh Government and the Senedd are responsible for prisoners housing needs. Notably the Homeless Persons (Priority Need) (Wales) Order 2001 broadened the category of those considered to be in 'priority need' for the purposes of homelessness support to include former prisoners homeless after release. The Housing (Wales) Act 2014 has since been much criticised for stripping away the automatic 'priority need' categorisation for prisoners. It does not appear to sit well with broader Welsh Government policy around protecting vulnerable people. In 2015 Welsh Government launched a 'National Pathway for Homelessness Services for Children, Young People and Adults in the Secure Estate' (this has been evaluated by Madoc-Jones et al 2018). Welsh Government Financial Inclusion Strategy has also emphasised that ex-prisoners are an important group as part of wider efforts to provide financial support for vulnerable people.

#### 2.14 Management of Persons Charged with or Convicted of Offences

Many activities around offender management and reoffending are reserved. However, as the so-called 'Jagged Edge' Report notes 'these activities create demands on public services'. Whole overall prisons policy is devolved, Welsh Government is seeking to pursue its own policies focusing on young people and women (both considered in more detail below).

Various reoffending strategies and frameworks have been produced in partnership between criminal justice agencies in Wales and Welsh Government. As discussed in the main Report (at para 29) the Justice Commission was somewhat critical about how performance is being monitored and accountability ensured under these strategies.

Integrated Offender Management Cymru is an umbrella body supporting partners in taking a coordinated approach to the management of offenders. The broader IOM England and Wales had been traditional focused on serious and repeat offenders, IOM Cymru is now being extended in Wales to other priority groups jointly identified by partner agencies. It notes that the complex needs of these individuals are most likely to be met by agencies working together and making the best use of local resources. IOM Cymru is accountable to the All Wales Criminal Justice Board and is led by HMPPS in Wales and the National Police Chiefs' Council, with representation from a wide range of criminal and social justice partners, including the Welsh Government. IOM Cymru has responsibility for supporting and facilitating the coordinated development and delivery of IOM across Wales, including oversight of the IOM Cymru programme of work. This includes a 'Reducing Reoffending Pathways Group' a 'Programme Management Board' and 'Regional Groups' established in line with Welsh police force areas. A key responsibility of the Regional Groups is to develop and agree Regional Delivery Plans, ensuring alignment with the 'Framework to Support Positive Change for those at Risk of Reoffending in Wales 2018-2023' and key priorities identified by the local Community Safety Partnerships.

## 2.15 Female Offending

Following a pilot scheme between 2014 and 2017 in six local authority areas that diverted 1,400 women from the criminal justice system, a project known as 'Women's Pathfinder' will continue to work with the police, Police and Crime Commissioners, HMPPS and Welsh Government to roll out a Whole System Approach Service Delivery Model across further police force areas.

In 2019 Welsh Government and the Ministry of Justice published a blueprint for 'Female Offending'.

The Council Tax (Administration and Enforcement) (Amendment) (Wales) Regulations 2019 have removed the sanction of imprisonment for non-payment of Council Tax, a sanction that disproportionately impacted upon women. This is a rare entry into sentencing policy, aligned to Welsh Government's devolved responsibility for Council Tax.

## 2.16 Probation

Probation in Wales has to be understood against UK Government reforms. In 2014 the delivery of probation services was divided into two; a National Probation Service (NPS) and Community Rehabilitation Companies (CRC). The NPS was to be responsible for higher risk offenders with the CRCs contracted to work with offenders presenting low or medium risk. The contract between UK Government and the CRCs included an element of payment by results.

In Wales there is a single NPS (part of HMPPS) and a single CRC, known as the 'Wales division of the Kent, Surrey and Sussex Community Rehabilitation Company'. In 2015 the CRCs were given responsibility for providing resettlement services for prisoners 12 weeks before their release to prepare them for re-joining the community (this is known as 'Through the Gate' support). The set of 'Transforming Rehabilitation' reforms (creating the NPS and CRCs) have been heavily criticised, with the Justice Commission stating: 'In summary, it is sufficient to state that the reforms failed'.

Steps take to rectify the situation are that when the current Wales CRC contract concludes (end 2020) the NPS in Wales will assume responsibility for management of all offenders, and relevant staff will transfer to the NPS. The Senedd debated this 'probation service reform' on 23 October 2018 and agreed Motion NDM6831 as amended:

Notes proposals for Probation Services Reform in Wales. Notes that the HM Prisons and Probation Service in Wales will build upon the unique arrangements that it already has in Wales through its established prisons and probation directorate, to better reflect the devolved responsibilities of the Welsh Government and build on existing local partnerships. Agrees with the National Association of Probation Officers that the privatisation of probation services has been a failure. Calls for the devolution of criminal justice to Wales in order to create a publicly run probation service which serves the interests of our communities.

England is now also due to follow suit and transfer functions back into the public sector when current contracts run their course. The Ministry of Justice also published a draft operating blueprint for 'The Proposed Model for Probation' in June 2019. It aims to reintegrate offender management into the community under the responsibility of one organisation. It emphasises the central importance of the offender management function to the effectiveness of the criminal justice system in rehabilitating offenders. However, the Justice Commission, and Senedd members in Plenary, have expressed concern about the new arrangements including the regional coordination function and competitive tendering/outsourcing of rehabilitative interventions (see e.g, Justice Commission: para[4.239.3]).

Comparing reoffending statistics and various inspection reports, the Justice Commission identified a number of shortcomings in the NPS Wales, and recommended reforms including that outcomes should be more strictly measured on a regular basis and be made public.

### 3. Youth Justice

The Youth Justice system overlaps with devolved responsibilities across education, training and local government. However, section 37 to 42 of the Crime and Disorder Act 1998 concerning 'Youth Justice' are specifically reserved. The Youth Justice system concerns young people between 10 and 17 who commit offences or who are at risk of offending. Youth Justice is currently overseen by the Youth Justice Board an executive non-departmental public body sponsored by the Ministry of Justice. The Youth Justice Board has a Board Member for Wales, and there is also a Youth Justice Board Cymru which facilitates co-operation between devolved and UK services. There are two further bodies: A Wales Youth Justice Advisory Panel which reports to the All Wales Criminal Justice Board, and an Interim Youth Work Board for Wales that will operate until approx. the end of 2020 to support the development of a new youth work strategy and provide advice to Welsh Ministers.

The Crime and Disorder Act 1998 provided for the establishment of Youth Offending Teams by all local authorities in Wales and England.

The Justice Commission notes that the rationale for youth offending services is to 'provide "joined up solutions" to "joined up problems"' and that there 'is a long established level of joint policy development on youth justice in Wales' (Justice Commission: [4.183]). An 'All Wales Youth Offending Strategy' was developed by the Youth Justice Board and Welsh Government in 2004, with further work including 'Children and Young People First' a 2014 joint strategy to improve outcomes for people in Wales at risk of being involved in, or in, the youth justice system. A further shared blueprint for Youth Justice was published in May 2019.

### 4. Administrative Justice

A starting point for administrative justice is the 'definition' provided by the Tribunals Courts and Enforcement Act (TCEA) 2007. An administrative justice system is:

The overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including – (a) the procedures for making such

decisions, (b) the law under which such decisions are made, and (c) the systems for resolving disputes and airing grievances in relation to such decisions.

This definition was repealed when the AJTC was disbanded, but remains apt. Other explanations of the breadth of administrative justice can be found in the work of the UK Administrative Justice Institute and the UK Administrative Justice Council, as well as in academic and ombuds research.

A detailed mapping of administrative justice as it relates to Wales (both devolved and reserved) would require an account of law and redress procedures for most areas of devolved competence in Wales, plus an account of the inter-action between them, and a detailed account of UK Government policy and Westminster competence across all the non-devolved areas of public administration. Noting this complexity and breadth, researchers have begun to 'map' the 'Welsh' system on a sectoral basis, beginning with housing and homelessness, and primary and secondary maintained education. The summary reports of those mapping exercises have been submitted to the Senedd LJC Committee in evidence. The current 'map' focuses on examples of key more general activities in administrative justice.

#### 4.1 Administrative Justice Policy

The UK Government has developed and sought to implement policies and work programmes in the field of administrative justice and tribunals. The last general programme being a Strategic Work Programme for 2013-16. In this work the Ministry of Justice was guided by an Administrative Justice Forum (since dis-banded) which included (from the Welsh perspective) representatives from Welsh Government, from the Committee for Administrative Justice and Tribunals in Wales (CAJTW) (also now dis-banded) and academics.

Key initiatives in administrative justice include the HMCTS reform programme, aiming to bring new technology to the way justice is administered. Particular activities in administrative justice include pilots to increase the digitalisation of various tribunals dealing with public administrative law including specifically the First-tier tribunals in Social Security and Child Support, and the Immigration and Asylum. Digitalisation of these tribunals may well have specific impacts on claimants based in Wales, and tribunal judges with experience of hearing cases in Wales, and of Welsh claimants, have been involved in the process of developing and piloting these reforms.

In practice appeals from devolved Welsh tribunals are to either England and Wales Tribunals or courts, so even where key elements of redress are devolved to Wales, the reservation of courts and higher tribunals can have an impact. As demonstrated in Annex Three, some appointments to devolved Welsh tribunals are made by the Lord Chancellor.

As examined in Nason's Senedd Fellowship Research Reports, there has been considerable concern among administrative justice stakeholders that the UK Government is no longer-taking a joined-up user centred approach to administrative justice (looking at law, redress and learning to improve the system), and that redress has increasingly included bureaucratic processes such as internal administrative review (especially mandatory reconsiderations in

immigration and social security) where access to an independent tribunal has subsequently been withdrawn or limited.

An aspect of administrative justice that affects people in Wales, alongside courts and reserved tribunals, is the role of the Parliamentary and Health Services Ombudsman (for people in Wales who wish to complain about the administration of UK Government bodies).

UK Government administrative justice policy and legislation is scrutinised across various different Westminster Committees, including especially the Justice Committee and the Public Administration and Constitutional Affairs Committee.

Effectively Welsh Government has ‘responsibility’ for administrative justice policy as concerns all areas of devolved public administration (excepting the role of the courts, reserved tribunals and legal aid).

## 4.2 Public Administrative law

The Justice Commission stated that substantive administrative law is the area where Welsh law has most diverged from that of England, and where there is the greatest potential for further divergence, and in practice the extent of ‘jagged edges’ in relation to administrative law and administrative justice are variable across subject areas of public administration.

The key area of non-devolved public administrative law is the general principles of administrative law that have developed largely through judicial review (which is a reserved matter). Judicial review principles have developed as part of the common law of England and Wales, and the judicial review procedure is contained in England and Wales legislation (the Senior Courts Act 1981) and in the Civil Procedure Rules. As discussed below in relation to the Administrative Court, the CPR and case law, together establish a presumption that judicial review claims involving Welsh public body defendants should be issued and heard in Wales (but this presumption can be displaced). Whilst the England and Wales legal system per se is a single jurisdiction and final appeal is to the UK Supreme Court, it may be suggested that general common law principles of administrative law could develop in a unique or adapted format in light of Welsh legislation affecting public administration (especially the WFGWA), however there is so far no evidence of this in reported judgments.

The Human Rights Act 1998 also introduces a specific ground of public law claim (under section 6) for breach of public body duties to comply with ECHR rights incorporated by the 1998 Act. The Senedd and Welsh Government must comply with the ECHR, but observing and implementing international obligations including under the ECHR is not a reserved matter.

## 4.3 Clarification, Consolidation and Codification, and Awareness and Accessibility of Welsh Law

The Senedd’s work in relation to the awareness and accessibility of Welsh law is of central importance to administrative law. The Senedd has passed the Legislation (Wales) Act 2019 and continues to scrutinise Welsh Government’s proposals for the clarification, consolidation and codification of Welsh law, and proposals to improve awareness and accessibility of Welsh law.

A key area of Welsh administrative law that is proposed to be codified is planning law. This example also shows inter-action between Welsh Government and the Law Commission. The *Form and Accessibility of the Law Applicable in Wales* was the Law Commission's first key Wales specific project, and planning law has been its second.

The Law Commission also recommends that a new Planning Code is created for Wales, which is comprehensive but simpler. The Commission has analysed responses to its Consultation Paper, and produced a Final Report, submitted to the Welsh Government and laid in the UK Parliament and Senedd in December 2018. Welsh Government provided an interim response in May 2019. Senedd scrutiny of this process will be important.

Nason et al's new research into social housing and homelessness, and primary and secondary maintained education, concludes that both areas of law would benefit from clarification and consolidation and potentially codification in the longer-term. In both areas the law remains spread across Welsh, and England and Wales sources, mistakes are regularly made by those tasked to apply the law, redress mechanisms are sometimes not clear, and there often seems to be no coherent justification as to why certain forms of redress are made available in relation to some duties, but not to others. Another area also in need of consolidation, but not considered in detail by Nason et al, is social/community care.

Commentators have recommended the eventual production of an Administrative Law or Administrative Procedure Code for Wales (in keeping with the majority of legal jurisdictions which have some form of administrative procedure legislation – England and Wales is somewhat of an outlier here). This would include principles of public administrative decision-making that should generally apply to all devolved Welsh authorities, in the absence of any subject-area specific variations.

The Senedd is more broadly scrutinising proposals to improve accessibility of the law applicable in Wales (which is primarily administrative law), through a revamp of the Law Wales website and work between Welsh Government, UK Government and the National Archives. Scrutiny of this process is crucial, especially in relation to digital presentation of law.

#### 4.4 General Welsh Administrative Law

The Justice Commission noted that:

Wales has far sighted policies on future generations, sustainability, and international standards on human rights. These are, however, not integrated with the justice system. The distinctive legal framework being developed to underpin these policies, including the creation of independent public officers whose role is to promote and protect rights, is not aligned to the justice system (Justice Commission: [12.21]).

These policies have resulted in legislation (primary and secondary), guidance, statutory and non-statutory codes of practice etc that impact on strategic, operational and in some cases the daily decision-making of public bodies in Wales. As discussed in para 43 of the main Report, by 2014 the proliferation of duties on public bodies (in legislation and guidance) had already led the Williams Commission on Public Services Governance and Delivery to recommend Welsh

Government and the Senedd conduct a review. A review has not yet been conducted, but research by Nason et al makes further recommendations around what it could include, especially in light of potential consolidation and codification of various areas of Welsh administrative law.

#### 4.5 Administrative Justice Institutions: The Administrative Court in Wales and Judicial Review

Judicial review appears crucially important to Welsh administrative procedure law relating to rights, equality and sustainability. In every instance where there is no specific legal cause of action on the face of the legislation, it is then assumed that legal redress will be available through judicial review in the Administrative Court.

Judicial review is not only used as the default remedy for general administrative law, but also in subject specific areas of administrative law. For example, in various areas of Welsh social housing and homelessness legislation there is no specific right to redress either through an internal administrative review, or a county court or tribunal appeal, and so judicial review is the only available option. This is also true in relation to some policies, strategies and decisions under Welsh education law (the other area that has so far been mapped in detail by researchers).

The Social Services and Well-being (Wales) Act 2014 imposes new duties on some devolved Welsh authorities including local authorities and Health Boards, requiring them to work to promote the well-being of those who need care and support, and carers who need support, including adults as well as children. There is no specific legal route to enforcement of these duties contained in the legislation itself, the only route to legal redress is the back stop of judicial review. The Independent Expert Advisory Committee for the ongoing review of justice in Wales states that there had been an expectation that the Act's implementation 'would have a major impact on the courts' and the Committee seemed surprised that the impact has been minimal, putting this down in part to enhanced training provided to judges and legal advisers (Independent Committee: para.[53]). However, there has been significant evidence available for some time about the lack of accessibility of judicial review in Wales, which makes this minimal impact on the courts in administrative law not surprising. It may be that the Independent Expert Advisory Committee had in mind other duties under the Act relating to local authority decision-making when it comes to looked after children, and specifically matters that are the preserve of the Family Courts, but it did not state which area of law it was referring to or which courts.

An Administrative Court was established in Cardiff in 2009 (though there had already been some administrative facility for issuing and hearing cases in Wales). The Court Centre was established as part of proposals made by a Judicial Working Group for Justice Outside London to decentralise judicial review in England and Wales, allowing cases to be issued and determined locally aiming to reduce costs and inconvenience for 'regional' litigants and their lawyers. Whilst there is a constitutional and linguistic rationale for decentralisation specifically to Wales (a form of regionalisation in Pritchard's continuum) that was not the expressed basis for the reform. There was strong resistance from some members of the judiciary and court

officials who thought the rationale of increasing access to justice could be as well achieved by greater use of technology (electronic listing and video-linked hearings etc).

The empirical incidence of judicial review in Wales, who issues claims and who defends them is discussed further in the main Report. In terms of legal substance, the judicial review caseload pertaining to Wales is diverse, often involving a complex mixture of devolved and non-devolved law and policy relevant to the particular claim. The Public Law Project and Nason's analysis of 82 substantive judicial review judgments delivered by the Administrative Court in Cardiff over an eight-year period showed that only 26 judgments involved an examination of primary or secondary legislation or guidance made by the Senedd or Welsh Ministers.

Only a small proportion of claims reach a final substantive hearing, and many of those withdrawn at various stages result in a negotiated solution favourable to the claimant. There may also be many potential judicial review claims resolved through pre-action correspondence or informal negotiation prior to issue. There are examples of potential claims in Wales curtailed when public bodies had either conceded the legal point, or more often had committed to re-taking a decision in the individual's favour without conceding any legal errors in the initial decision. Learning from these potential challenges might be being passed on through public body networks, but not in a systematic fashion, and not in a way that would be communicated to a range of others (including individuals) who might be affected.

The Justice Commission proposed that it should be compulsory under the Civil Procedure Rules for claims against Welsh public bodies challenging the lawfulness of their decisions to be issued and heard in Wales, and this is discussed in the main Report at paras 51-54.

There is a specific Administrative Court Liaison Judge for Wales, the post has been held for the longest period by Hickinbottom LJ who provided leadership and contributed to debates on the distinctiveness of administrative justice in Wales. His predecessors have not held the post for more than a couple of years (it can be seen as a staging post to a Court of Appeal appointment) and have on balance tended to engage less with the specific Welsh context in terms of off the bench lectures and seminars.

## 4.6 The Welsh Commissioners

### The Welsh Language Commissioner

The Welsh Language Commissioner was created by the Welsh Language (Wales) Measure 2011 and has a broad range of functions and powers relating to the promotion and facilitation of use of the Welsh language. Whilst the Commissioner is primarily a regulator, there are circumstances where individuals can complain to the Commissioner about a public body's alleged lack of compliance with particular language requirements, and individuals can complain that their right to use Welsh has been interfered with. Individuals cannot directly challenge the content of Welsh Language Standards developed by the Welsh Language Commissioner. However, 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 Welsh Language Tribunal.

The Welsh language Commissioner has a specific statutory power to ‘institute or intervene in legal proceedings in England and Wales if it appears to the Commissioner that the proceedings are relevant to a matter in respect of which the Commissioner has a function’ (Welsh Language (Wales) Measure 2011, s.8(1)). This power is qualified, however, by the restriction that it ‘does not create a cause of action’. Although the effect of this restriction has not been tested in the courts, it may well prove an obstacle to the Commissioner seeking declaratory statements as to the law by the courts in advance of the exercise by the Commissioner of the function to which the question of law relates. The Commissioner may provide an individual with assistance if the person is, or may become, a party to actual or possible legal proceedings in England and Wales that are relevant to a matter in respect of which the Commissioner has a function.

It has been argued that the Commissioner is insufficiently independent from Government, being a Welsh Government appointee, whilst also legally bound to monitor Government compliance with Welsh Language Standards. A 2017 Welsh Government White Paper proposed reforms aimed at ‘reducing bureaucracy’ and ensuring ‘value for money’, hoping to strike a more proportionate balance between promoting the Welsh language and regulating compliance with Standards. This would have abolished the Welsh Language Commissioner and replaced it with a Welsh Language Commission. Welsh Government would have been responsible for making and imposing Standards and the Welsh Language Commission would enforce compliance with the Standards and promote language use. The reforms were described as a step backwards by language campaigners. They potentially diminished individual rights; first, by the provision that the Welsh Language Commission should only investigate complaints in serious cases; second, by watering down the content of the Standards; third, introducing a permission requirement into some appeals to the Welsh Language Tribunal.

An alternative could have been for the PSOW (who already handles Welsh language complaints in relation to the Senedd Commission) to be given power to handle all Welsh language complaints, with the new Welsh Language Commission taking on regulatory and promotive roles.

In its earlier consultation, Welsh Government rejected a proposal for enacting a right to use Welsh in primary legislation, potentially to be enforced by a direct appeal to the Welsh Language Tribunal. This was seen as too costly given the limited extent of Welsh language skills in the workforce; it was said that a large list of exceptions, where the right would apply in an attenuated form or not at all, would be ‘inevitable’. The reform proposals have not been progressed, with the Minister for International Relations and the Welsh Language concluding that various consultation responses demonstrated no appetite for reforms to the whole system.

The Senedd Culture, Welsh Language and Communications Committee periodically scrutinises the work of the Welsh Language Commissioner.

### [The Children’s Commissioner for Wales](#)

The Office of the Children’s Commissioner for Wales was established by the Care Standards Act 2000, the Commissioner’s remit is laid down in the Children’s Commissioner for Wales Act 2001 (which amended the Care Standards Act), further detail is provided by the Children’s

Commissioner for Wales Regulations 2001. The role is principally concerned to safeguard and promote the rights and welfare of children, and in doing so must have regard to the United Nations Convention on the Rights of the Child (UNCRC). The Children's Commissioner has jurisdiction over specific public bodies in Wales including local authorities and Health Boards.

The Commissioner can: review the effect on children of exercise of functions or proposed exercise of functions including Welsh Government; review and monitor arrangements for complaints, whistle blowing and advocacy of some public bodies, provide assistance to a child in some circumstances and make representations to Welsh Government about matters related to the role where the Commissioner does not have powers. The Commissioner can examine the case of a particular child/children where their complaint relates to issues concerning the provision of services or the effect on the child/children of the exercise of functions of a public body. The Commissioner can only examine individual complaints where the representation made by the child or a person on their behalf raises a question of general principle which has broader application or relevance to the rights or welfare of relevant children. The Commissioner may not review or examine a matter that is currently under judgment or which has been decided by a court of law or tribunal. Specifically, the Commissioner cannot act in relation to: non-devolved matters (which includes importantly immigration and asylum, child poverty, 'justice and policing', and children in the military); the Commissioner cannot act where the Children and Court Advocacy Service (Cafcass) is able to act; and cannot act where Welsh Ministers have functions in respect of family proceedings.

The Senedd Children, Young People and Education Committee periodically scrutinises the work of the Children's Commissioner for Wales.

### [The Older People's Commissioner for Wales](#)

Functions of the Older People's Commissioner for Wales are defined by the Commissioner for Older People (Wales) Act 2006 and accompanying Regulations. The Commissioner may review the way in which the interests of older people are safeguarded and promoted when public bodies discharge their functions, propose to discharge their functions or fail to discharge their functions. The Commissioner can also review whether, and to what extent, the arrangements of certain bodies' advocacy, whistle-blowing and complaints arrangements are effective in safeguarding and promoting the interests of relevant older people in Wales.

The Older People's Commissioner can also assist a person who is, or has been, an older person in Wales in making a complaint about or representation to public bodies. Assistance includes financial assistance or arranging for a person to advise, represent or assist an older person. The Commissioner may assist a person in certain legal proceedings but may not review or examine a matter that is currently under judgement or has been decided by a court of law or tribunal. The Commissioner may only assist in legal proceedings where the issues in the case are of wider interest to older people and not merely specific to a particular older person. The Commissioner may examine the case of an older person in relation to a matter which affects the interests of a wider group of older people and not just the individual concerned. Following an examination, the Commissioner must produce a report and may make recommendations.

The Senedd Health, Social Care and Sport Committee periodically scrutinises the work of the Older People's Commissioner for Wales.

#### The Future Generations Commissioner for Wales

The Future Generations Commissioner for Wales' role is to promote the sustainable development principle, to act as a guardian for the interests of future generations, and to assist public bodies in thinking about the long term and in working towards achieving the Well-being Goals. The Commissioner has various functions to encourage and promote good practice, including the duty to monitor and assess the extent to which public bodies are meeting their own well-being objectives and the power to carry out reviews and make recommendations. Public bodies that have been subject to review must take all reasonable steps to follow the course of action set out in a recommendation made by the Commissioner unless satisfied that there is good reason not to follow the recommendation in particular categories of case or at all, or if the public body decides on an alternative course of action in respect of the subject matter of the recommendation. The Welsh Ministers may issue guidance to other public bodies about how to respond to a recommendation made by the Commissioner, and other public bodies are then required to take such guidance 'into account'.

The Senedd Equality, Local Government and Communities Committee periodically scrutinises the work of the Future Generations Commissioner.

The WFGWA also requires the Auditor General for Wales to 'carry out examinations of public bodies for the purposes of assessing the extent to which a body has acted in accordance with the sustainable development principle when a) setting well-being objectives, and b) taking steps to meet those objectives'. An examination must be carried out in relation to each public body between 2015 and 2020. The Commissioner, on the other hand does not have a duty to carry out assessments and has suggested that there are anomalies in the division of functions between her office and those of the Auditor General for Wales. Administrative justice broadly understood also includes public audit functions carried out by the Auditor General for Wales.

#### 4.7 The Public Services Ombudsman for Wales (PSOW)

The PSOW provides a 'one stop shop' for complaints against public bodies in Wales. Its corporate plan for 2019/20 is entitled 'Delivering Justice', noting that the PSOW's mission is: 'To uphold justice and improve public services'.

The Justice Commission considered the relationship between the PSOW and the Administrative Court, which was previously examined by the Law Commission. The Law Commission made three recommendations: removal of the statutory bar (where an ombud cannot investigate if an individual could have sought, or could be reasonably expected to have sought, a remedy in a court, tribunal or other review mechanism); giving the Administrative Court power to stay proceedings for an ombuds investigation and; giving the ombud a power to refer a point of law to the courts. The Justice Commission endorsed the latter two recommendations. Removal of the 'statutory' bar has been considered by the Senedd Finance Committee who were concerned about altering the relationship between an ombud and a court on a Wales only basis. This 'may' raise questions of legislative competence; removing the

bar would involve amendment to devolved legislation (now the PSOW Act 2019) and would have an 'impact' on the reserved matters of courts, and judicial review of administrative action. However, concerns about the costs of a 'twin track' approach (where the PSOW effectively has some degree of concurrent jurisdiction with the legal branch) might be less well founded. Concurrent jurisdiction is likely to be used sparingly, bringing to bare expertise necessary to clarify the law, as well as improving standards of public administration, this could avoid costly future disputes and lead to administrative savings. There would be no legislative competence issues raised in removing the statutory bar only so far as it concerns the jurisdiction of the devolved Welsh tribunals, discussed further below.

The Justice Commission endorsed proposals for the Administrative Court to be able to 'stay' proceedings for an ombuds investigation. Again, the devolved tribunals in Wales could be given this specific power (including through a new Welsh Tribunals Bill – a likely product of a current Law Commission project). In practice, the Administrative Court in Wales can likely use its existing stay powers to allow for a PSOW investigation if a judge is so inclined. But the Law Commission concludes that a specific new formal power would require changes to the Senior Courts Act 1981 and the CPR, and as such this may raise issues of Senedd legislative competence. Likewise, giving the PSOW a specific power to refer a point of law to the Administrative Court in Wales, would primarily require an amendment to the PSOW's powers, but would have an impact on the jurisdiction of the Court, which the Law Commission considers necessitates changes to judicial review procedural rules. In terms of empirical impact, other examples of formal legal reference procedures laid down in legislation (e.g., concerning Charities and Pensions disputes), are rarely used.

#### 4.8 Tribunals

The TCEA 2007 provided a statutory definition of an administrative justice system. This would have been of limited value in itself, without the creation of the 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. Devolved tribunals have been at the centre of justice reform, in part due to being the only judicial bodies administered by Welsh Government, but also because this is an area of justice where there is a degree of consensus between Welsh and UK Governments, resulting in provisions about Welsh Tribunals included in the Wales Act 2017. Welsh tribunals are discussed in paras 57-67 of the main Report.

#### Senedd Oversight

This is discussed in the main Report at Section 3.3 and in Nason's two Senedd Academic Research Fellowship Reports.

#### Law Commission Project on Welsh Tribunals

A Law Commission project running for the year of 2020 has a 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

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

#### 4.9 'Ad hoc' Redress Mechanisms

CAJTW's concern had also been around the development of various 'ad hoc' redress mechanisms to resolve disputes. These are mechanisms established through Government developed legislation in the Senedd, or through administrative policies, and are mechanisms which have some characteristics of a tribunal but which do not, and are not intended, to meet the same standards as a tribunal in terms of their independence from Government, their structure, their openness to public scrutiny and their procedures. These have included:

- Independent Review of Determination Panels (IRM Cymru)
- Discretionary Assistance Fund for Wales
- Continuing Healthcare Review Panels

Some schemes are delivered by Welsh Government, others have been outsourced, including to private companies. CAJTW's concern was that there are risks associated with setting up schemes that are not based on clear principles and which do not confirm to minimum standards. Welsh Government responded that existing mechanisms though having developed ad hoc and in silos, are adequate on their own terms and that the cost versus benefits of a more coherent approach would need further investigation.

#### 4.10 UK Administrative Justice Council

A new Administrative Justice Council (AJC) was established in 2017. Its terms of reference state that it is to keep the operation of the whole UK administrative justice system under review, considering how to make it more accessible, fair and efficient, giving relevant advice to the Lord Chancellor, other ministers and the judiciary, sharing learning and good practice across the UK, providing a forum for the exchange of information between Government, the judiciary, ombuds, academics and organisations working with users of the administrative justice system, to identify areas that would benefit from research and make proposals for reform. This is an extremely wide range of objectives for a body receiving initial funding of £15,000-£20,000 per annum from the MoJ and £25,000 over two years from 'charitable sources' (the Legal Education Foundation) (the Legal Education Foundation contribution will increase from 2020). Given its limited resources, and dependence on the 'good will' of its members across the main Council and individual panels, it is likely inevitable that the AJC's work will consist of subject-specific contributions to particular issues, focusing on those areas where members consider that central Government (and others) are most open to implementing, or at least responding

to, relevant research and recommendations. Although the AJC main Council and Academic Panels include Welsh members (from ombuds, tribunals, justice policy and academia), the AJC cannot perform an extensive oversight function of Welsh administrative justice, rather it seeks to consider specifically Welsh perspectives, interests and concerns, in relation to broader themes (such as the relationship between tribunals and ombuds, and digitalisation of tribunals),

## 5. Family Justice

Family justice deals with a wide range of matters including concerns about children, the breakdown of relationships and the financial consequences of relationship breakdown. In family law generally there is a distinction between public law matters (usually involving the intervention of a local authority to protect children) and private law matters (dealing with relationships and relationship breakdown, including where parents, guardians or other carers cannot agree on arrangements for their children). Private family law and justice is reserved, and dispute resolution and legal development is the responsibility of the Family Court, headed by the President of the Family Division.

Welsh Government evidence to the Justice Commission stressed that the effect of the current devolution scheme has been to divide responsibilities and interconnections within the family justice system, which can cause complexity and conflict. This has been exacerbated by the increasing divergence between approaches to family justice in England and Wales and policy in devolved fields which impact on family justice (notably including the WFGWA and Children's Rights Measure).

### 5.1 Leadership organisations in Family Justice

The need for strong leadership and accountability in family justice has been long evident and was stressed in a 2011 *Family Justice Review* by Sir David Norgrove, jointly commissioned by the UK Ministry of Justice and Department for Education, and Welsh Government. In response to the Norgrove Review as Family Justice Board was established to set direction and oversee improvements across the family justice system in England and Wales. It is chaired by Ministers from the UK Ministry of Justice and Department for Education and attended by the President of the Family Division as an observer. Representation from Wales includes the Chief Executive of Cafcass Cymru, the Welsh Government's Director of Social Services and a representative from the Association of Directors of Social Services Cymru. There is no Ministerial representation from Wales and the Justice Commission considers the Board to be 'dominated and influenced by issues that arise in England' (Justice Commission: para[7.12]. The Board is supported by sub-groups including the Family Justice Council (chaired by the President of the Family Division, and on which there are members from Wales), the Family Justice Young People's Board and a Performance Improvement sub-group.

Wales is divided into three Local Family Justice Areas, each of which has a Local Family Justice Board and Designated Family Judge. The areas are (1) North Wales; (2) Swansea and South West Wales; and (3) Cardiff and South East Wales. A member of Welsh Government attends the Local Family Justice Boards as does the Designated Family Judge (as observer), other attendees include representatives from local authorities and other devolved bodies.

As discussed in the main Report (para 76) a Family Justice Network for Wales provides leadership in Wales and a link to the Family Justice Board. It is chaired by the Director of Social Services in the Welsh Government. The judiciary attend meetings (in the capacity of observers) and play an important role.

## 5.2 Reserved Matters Generally

Reserved matters in family justice include: human genetics, human fertilisation and surrogacy arrangements; the subject matter of the Mental Capacity Act including deprivation of liberty; family relationships including marriage, civil partnership, cohabitation and divorce; most aspects of the law relating to children; proceedings under Part 4 or 5 of the Children Act 1989 or otherwise relating to the care and supervision of children. In light of these many reservations, Ruth Henke QC concludes that: 'The effect of devolution on family law in Wales has thus been incremental. It is also often tangential or hidden' (Henke, Submission in Relation to Family Law in Wales: para[14]).

## 5.3 Adoption

Child arrangements and adoption are reserved matters however, there are exceptions for services and facilities relating to adoption, adoption agencies and their functions (other than the functions of the Central Authority under the Hague Convention (on protection of children and intercountry adoption)). The regulation of adoption services is devolved, as is the provision and support for adoptive placement. Here the primary statute remains England and Wales legislation (the Adoption and Children Act 2002), whereas secondary legislation, statutory guidance and codes made by the Senedd and Welsh Ministers contain the differences in provision and approach.

## 5.4 Parenthood and Parental Discipline

Parenthood and parental responsibility are reserved matters, however, parental discipline is excepted and therefore devolved, this includes the right to administer reasonable chastisement to a child and smacking. In this regard the Senedd has passed the Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020. Which was scrutinised by the Senedd Children, Young People and Education Committee, as well as being considered by the then Constitutional and Legislative Affairs Committee.

## 5.5 Special Guardianship

The main provision for Special Guardianship remains in England and Wales legislation, but the provision of services and support under Special Guardianship orders is devolved and covered in Welsh secondary legislation, statutory guidance and codes.

## 5.6 Domestic Violence

Domestic violence legislation is largely common to England and Wales and civil remedies in respect of domestic violence, domestic abuse and female genital mutilation are reserved.

However, as noted above in relation to criminal justice, the Violence Against Woman, Domestic Abuse and Sexual Violence (Wales) Act 2015 aims to improve the public sector response to abuse and violence in Wales. Again, this will have an impact on the family justice system.

## 5.7 Mental Health

As noted above in relation to criminal justice, Wales has some distinctive law and guidance relating to mental health. The Mental Health (Wales) Measure 2010 runs alongside the Mental Health Acts of 1983 and 2007. These latter Acts are largely about compulsory powers, especially admission to and discharge from hospital, the 2010 Measure covers the support that should be given to people generally with mental health problems in Wales. It is intended to ensure that mental health services are more focused on individual people's needs. Mental health concerns may well be present where family law disputes have arisen, including when parents or other guardians or carers have mental health needs.

The Court of Protection sits in England and Wales, and the Mental Capacity Act 2005 applies, alongside a single statutory Code with some minor differences introduced by secondary legislation. The Mental Health Act 1983 applies in both Wales and England, however, separate statutory Codes have been issued. Cases of patients detained in a hospital or living in the community subject to a conditional discharge, community treatment or guardianship order are reviewed by the devolved Mental health Review Tribunal for Wales.

## 5.8 Health

In healthcare broadly, the geographical area of Welsh Local Health Boards is the same as that of Regional Safeguarding Boards for Adults and Children established under the Social Services and Well-being (Wales) Act 2014, and Welsh legislation more generally provides for partnership working and cooperation as concerns health and social care services.

## 5.9 Education

Education is an area of devolved competence which interacts with reserved family law. For example, in relation to the education of looked after children. The role of the Special Educational Needs Tribunal for Wales (soon to be the Education Tribunal for Wales) is notable as dealing with appeals against certain decisions about a child or young person and their education, and for its role in dealing with claims about unfair treatment in school that relate to a disability.

## 5.10 Social Welfare and Well-being

A range of aspects of social welfare broadly understood are devolved including protection and well-being of children and young persons, care of children and young persons, and care standards. However, there are exceptions in a range of areas including child support, child benefit and tax credits, and social security.

The Social Services and Well-being (Wales) Act 2014 repeals Part 3 of the Children Act 1989 in relation to Wales, creating a new statutory scheme governing the provision of social care in Wales and the manner in which social services functions are delivered by local authorities.

### 5.11 Taking Children into Care

The Social Services and Well-being (Wales) Act 2014 contains specific provisions covering the powers and duties of local authorities with respect to looked after children and accommodated children. These issues are discussed in the main Report at Section 4.3.

### 5.12 Family Law Proceedings

The Family Procedure Rules 2010 applied by the Family Court apply to both England and Wales, though as noted Welsh law imposes different substantive and procedural duties on the decision making and actions of public bodies especially with respect to children.

The Lexis Nexis Book, Family Court Practice (otherwise known as the Red Book) includes a Welsh Law Supplement explaining the differences between Welsh and English family law, differences are also published in Butterworths Family law service. It is notable that a failure to appreciate legal differences in practice here seems to be less due to lack of availability of legal materials and more to do with a general lack of knowledge that aspects of family law are devolved, and people (both lay and legal professionals) then not realising there is specifically Welsh law to be researched and applied (Justice Commission: [7.8]). Family law proceedings are largely reserved apart from the following:

- Welfare advice to courts, representation and provision of information advice and other support to children ordinarily resident in Wales and their families
- Welfare advice to courts in respect of family proceedings in which the welfare of children ordinarily resident in Wales may be in question and representation in respect of such proceedings
- The provision of support (including information and advice) to children ordinarily resident in Wales and their families in respect of such proceedings; and
- Welsh family proceedings officers.

### 5.13 Cafcass Cymru and Family Proceedings Officers

Responsibility for the Children and Family Court Advisory and Support Service (Cafcass) was transferred to Welsh Government in 2004. Cafcass is discussed further in Section 4.2 of the main Report.

Family Proceedings Officers of Cafcass Cymru include Family Court Reporters and Guardians. In contentious private law proceedings involving children a Family Court Reporter is appointed to report to the court on the child's welfare and in some cases to represent the child's welfare interests before the court. In public law proceedings the relevant child/children will have a Guardian.

## 6. Civil Justice

In effect civil law describes the law other than relating to family relationships, crime and administrative decision-making. Key areas in practice are the law of civil wrongs (torts) and contract law, these are matters where there has been little devolved activity.

The first Act intended to make changes to substantive civil law will be the Renting (Homes) Wales Act 2016 when this comes into force.

In civil justice, the Justice Commission focused its attention largely on the options for dispute resolution.

The structure of civil courts is not discussed in this mapping exercise, suffice it to say that for most civil law disputes affecting people in Wales, the forum for a legal appeal will be to the county courts, and where relevant particular Divisions of the High Court, with onward appeal to the Court of Appeal and so on. It is relevant that the Civil Division of the Court of Appeal did not sit in Wales during the court year of 2017/18 or 2018/19 and that HMCTS was not able to explain to the Justice Commission the reasons for this or provide information on the number of applications or appeals originating from courts in Wales during the last year that could have been heard in Wales had the Civil Division sat there.

Another significant issue has been the programme of courts reform, which has led to the closure of courts across Wales, this matter is well addressed in the Report of the Justice Commission, with stark presentation of data. This is also an issue being monitored by the Law Society in its work in Wales.

### 6.1 Employment Law Issues

Although employment law is not devolved there is distinctive Welsh legislation in relation to agricultural wages, trade unions, and enhanced rights for those who work in domiciliary care, as well as broader Welsh Specific Equality Duties (WSEDs). Most Welsh law disputes touching on employment law issues are determined by the non-devolved Employment Tribunal (no separate tribunal for Wales has been created, because the number of cases is likely to be small). It is notable that the Regional Employment Judge for Wales informed the Justice Commission that legislation impacting upon the work of the Employment Tribunal had been passed without communication between Welsh Government and the Tribunal, it appears this occurred due to lack of a proper system for communication.

### 6.2 Agricultural Land Tribunal for Wales and Residential Property Tribunal for Wales

Whilst as devolved Welsh tribunals, these have been considered above as part of administrative justice, their case load is made up primarily of civil law disputes.

### 6.3 Dispute Resolution in Civil (and Administrative) Justice

The Justice Commission recommended that leadership and coordination could be improved by establishing a body, to be chaired by a senior judge, to promote and coordinate dispute

resolution before civil courts, tribunals, ADR and ombudsmen as well as dispute resolution in respect of administrative law in Wales. Ultimately the Commission recommended that courts and tribunals which determine disputes in both civil and administrative law should be under one unified system in Wales.

## 7. Legal Aid (Information, Advice and Assistance)

Legal aid policy is the responsibility of the UK Government, Ministry of Justice. Legal aid is administered by the Legal Aid Agency (an executive agency sponsored by the Ministry of Justice). In criminal legal aid, the Agency procures services from barristers and solicitors through the Public Defender Service. The criteria for accessing criminal legal aid are set out in the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012, and include a means test and an interests of justice test concerning the merits and seriousness of the case. Since Crown Court trials are automatically deemed to satisfy the test, in practice most defendants in the Magistrates' Courts in Wales will not receive legal aid for non-imprisonable offences. Following LASPO there has been a severe decline in legal aid expenditure across England and Wales, including in criminal legal aid in Wales. The Justice Commission has noted that the decline (relative to England) is too severe to be explained by the argument that provision is demand led and that there are more large-scale cases in England.

In civil legal aid the Legal Aid Agency funds Civil Legal Advice, a service providing advice on a range of issues including family matters, housing and debt, to people who qualify (again under a means test especially). It is now well documented that LASPO led to a disproportionate reduction of legal aid expenditure in Wales as compared to England. The real terms reduction in England between 2011/12 to 2018/19 was 28%, in Wales it has been 37%.

The reduction has been across all areas of legal aid, but most notable in civil and family justice. Alongside concerns about the high proportion of looked after children in Wales, in 2018/19 some 97% of the total expenditure on family legal aid in Wales was made up of court representation and advocacy. From 2011/12 to and including 2017/18 Wales' per capita spending on public law care proceedings was 32% higher than that of England.

The central 'jagged edge' in relation to the provision of advice, information and assistance is the extent to which Welsh Government has effectively funded advice services despite the matter being formally reserved. Funding for advice services is discussed in para 97 of the main Report.

### 7.1 The National Advice Network and Single Advice Fund

The National Advice Network Wales (NAN) was established by the Welsh Government in March 2015 and consists of key stakeholders including funders, advice providers, umbrella organisations, and other partners. It is tasked with providing expert advice, guidance, and support to Welsh Ministers on how to strategically develop the provision of social welfare information and advice service throughout Wales. Six Regional Advice Networks (RANs) have also been established across Wales.

Under the Information and Advice Network Plan (published in 2016) the Welsh Government has merged three separate grant funding programmes for advice services, collectively worth approx. £6 million, into a Single Advice Fund intended to introduce better coordination of its own advice service funding. From January 2019, a share of the UK Financial Levy (an annual payment collected by the Financial Conduct Authority, on behalf of HM Treasury, from financial institutions carrying out their business in the UK) for debt advice funding has been devolved to Welsh Government. This funding of over £2 million is being integrated with the commissioning of debt advice services alongside other areas of social welfare advice services that the Welsh Government funds through the Single Advice Fund. This has been discussed in plenary in the Senedd.

Citizens Advice/Cyngor ar Bopeth won a competitive process to provide the Single Advice Fund and was awarded funding of £8.1 million in January 2020 to provide services across all regions in Wales, as well as a remote advice service, for 12 months.

The Justice Commission expressed concern that despite the establishment and ongoing work of the NAN and its associated RANs, there is still no fully coordinated approach to funding advice services in Wales. In fairness, it noted that there is no statutory duty on any agency in Wales to fund services provided within the third sector, with the exception of debt advice (noted above).

For the longer-term the Justice Commission recommended the development of a strategy bringing together funding streams for legal aid and third sector advice provision, and that this strategy should be driven by an independent body that would ensure that there is no gap in provision and that the funding is sustainable. It should be designed to meet the needs of the people of Wales and deliver fairly and equitably across Wales. There should also be an approach to quality that combines high standards with proportionate expectations on smaller providers, and the body should assist in raising charitable funds in addition to administering public funds to provide core long-term funding and monitoring progress. The Commission also considered raising public awareness to be fundamental including prioritising outreach to connect particularly with disabled people, people with mental health issues, people with learning difficulties, people in crisis, people whose first language is not English or Welsh and people who are digitally excluded. It also recommended expansion of Support Through Court to all courts and tribunals in Wales.

## Justice in Wales - Annex Two: Literature Review

### Report of the Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019)

This was the most extensive study into justice in Wales in 200 years. It received written evidence from just over 200 people/organisations and took oral evidence from 150 people. Its remit was broad, and it made 78 specific recommendations. In addition to the specific headline recommendations repeated in the executive summary report, there are a further 156 subsidiary but complementary recommendations. The Report provides an extensive programme of work, much of which requires at least some engagement with UK Government. The Commission were guided not by questions about jurisdictional arrangements (continuance, or not, of the single England and Wales legal jurisdiction), but by the principle that justice is at the heart of any system of democratic governance. Nevertheless, the Commission stated that its unanimous finding, that people in Wales are being let down by the current system (Commission, Executive Summary: para[1]), can only be remedied by full legislative and executive devolution of responsibility for justice, and a full transfer of financial resources (recs, 58, 59 & 60). It also recommended that the law applicable in Wales should be formally identified as the law of Wales, distinct from the law of England (Commission, rec 73), but that the present system where legal practitioners can practise in England and Wales, and where the professions are jointly regulated should continue (rec 74).

The Report is underpinned by a range of principles; equality, fairness, the rule of law, sustainability, respect for international human rights, proportionality and access to justice. It contains 12 Chapters, including historical context and guiding principles; Information, advice and assistance; Criminal justice; Family justice; Civil justice; Administrative justice and coroners; Delivering justice; The legal sector and economy of Wales; Knowledge, skills and innovation; Welsh language; and Governance, the law of Wales and the judiciary.

The UK Ministry of Justice's response, by tweet within 15mins of the Report's publication, was to reiterate its belief that a single legal jurisdiction remains the most effective way to deliver justice across England and Wales. In a Westminster Hall debate, moved by Liz Saville-Roberts MP Plaid Cymru, Parliamentary Under-Secretary of State for Justice Chris Philp MP stated that there will be no formal UK Government response to the Report. Mr Philp MP argued that the costs of devolving justice would be disproportionate given the comparative volume of devolved and reserved legislation.

The Commission's Report is drawn on heavily in this current exercise of mapping justice functions in Wales, alongside accountability, scrutiny and funding. In terms of the role of the Welsh Government and Senedd, the Justice Commission specifically noted, under the heading 'immediate action to be taken', that 'clear and accountable leadership on justice in the Welsh Government must be established under the current scheme of devolution' (Commission: rec 61). It recommended that with legislative devolution 'there must be a new Justice Department in the Welsh Government led by a Cabinet Minister' (Commission: rec 68). A Cabinet Sub-Committee on Justice has been formed, including the First Minister, Counsel General for Wales, and Deputy Minister.

The Justice Commission further recommended that: 'The Assembly should take a more proactive role in appropriate scrutiny of the operation of the justice system' (Commission: rec 62) with a recommendation to establish a Justice Committee in the longer-term with legislative devolution (Commission: rec 70). The Commission also recommended that: 'The Assembly should make arrangements to monitor and review the process of reform' (Commission: rec 78), as the Legislation, Justice and Constitution Committee is now doing through the current inquiry.

The Commission also recommended that 'Welsh Government should begin the process of reform by listing the recommendations it will seek to implement whilst the current scheme of devolution continues' (Commission: rec 78).

### R Jones and R Wyn Jones, *Justice at the Jagged Edge in Wales* (Cardiff University, Wales Governance Centre: March 2019)

In addition to the Justice Commission's Report, this is the most significant work looking at organisation, functioning, accountability and scrutiny across policing and the criminal justice system in post-devolution Wales. Its central finding is that the UK and Welsh Government's policy responsibilities overlap within the same policy spaces, but not in a clear fashion, rather there is a 'jagged edge' of intersecting competences and responsibilities. Specifically, the authors note 'even in the absence of a Welsh legal jurisdiction and devolved criminal justice system, the justice system in Wales is no longer identical to the English system. This is because of the ways in which so many areas of social policy that have a direct bearing on the criminal justice system have been devolved' ('Jagged Edge': p.5).

The Report highlights how Welsh Government undertakes a wide range of complementary activities in relation to the criminal justice and policing environment. The authors argue that taken together these institutions represent a 'de facto system of administrative devolution' ('Jagged Edge': Chapter 2).

Further chapters of the 'Jagged Edge' Report focus on the complicated nature of intergovernmental relations and the limits of joined-up policy-making. Through a range of high-level interviews, alongside other primary and secondary research sources, the authors conclude that Wales is often overlooked by UK justice officials in London and that UK policy documents may acknowledge Welsh Government's responsibilities, but often fail to reflect how the policy will work in practice. There is evidence of insufficient consultation which undermines joint-working and intergovernmental collaboration, whereas the Welsh Government itself also does not have sufficient capacity to take full account of policing and criminal justice in Wales. Silo working between Welsh Government departments and changes to Ministerial portfolios are also said to have contributed to confusing arrangements for policing and criminal justice.

The authors conclude that the constitutional arrangements can prevent Welsh Government from pursuing alternative approaches in areas it has policy responsibility for, and also prevents Welsh Government from taking a 'whole system' approach, including to tackling the root

causes of offending. The authors conclude that Welsh Government is often seen as a minor partner, with limited power to influence UK Government policy, in some cases leading Welsh Government to implement policies which it opposes.

The Report also examines the complex funding arrangements for policing and criminal justice. The authors conclude: that Welsh Government funding is being used to support the UK Government in delivering policing and criminal justice services in Wales; that funding from policing and criminal justice agencies is being used to 'subsidise' devolved public services and that (at least at the time of writing the Report) savings generated by the Welsh Government policy 'spend to save' were being captured by the UK Treasury.

The Report finds that the Senedd plays a significant role in scrutinising policing and criminal justice, but is limited in its ability to do so, and is further hampered by the lack of clarity in relation to Welsh Government Ministerial and departmental portfolios and the lack of publicly available Welsh-only data on policing and criminal justice. The authors conclude that: 'The complex nature of the devolution dispensation means that issues relating to policing and criminal justice are being missed by committees in Cardiff and Westminster' ('Jagged Edge': p.10 and specifically Chapter 6).

### Ministry of Justice, Justice in Wales Working Group and [Independent Expert Advisory Committee for ongoing review of the operation of justice in Wales: First Report \(July 2019\)](#)

This Working Group is not specifically referred to in the Justice Commission Report. It was established in 2016 and involves a group of Ministry of Justice and Welsh Government (primarily Justice Policy Team) officials considering and making recommendations around managing divergence and ensuring the distinctive needs of Wales are taken into account across the reserved justice system. There appear to have been some concerns around the transparency of the Group's operation, with Dr Rob Jones (Cardiff University, Wales Governance Centre) resorting to making FOI requests in 2017 to find out information about how often the Group met and topics covered. Liz Saville-Roberts MP also asked a Parliamentary written question on 17 October 2017 asking the Secretary of State for Justice 'if he will publish the list of organisations and individuals consulted by the Justice in Wales Working Group relating to its report on devolution'. The information was subsequently published and included (exhaustively), the Law Society, Bar Council, Welsh Universities, two law firms in Wales, the Law Commission, CPS, National Offender Management Service, HMCTS Wales, Youth Justice Board Cymru and the Judicial College. I have been unable to find a copy of this Report online, it may be that it is still not publicly available though I understand that representatives of the Welsh law schools have seen it. The information from Working Group's Report reproduced below comes from the more recent Report of the Independent Expert Advisory Committee.

The Working Group made ten Recommendations relating mostly to working between Ministry of Justice and Welsh Government. Notable are the following recommendations (numbered as they appear in the Report):

1. The Secretary of State could consider whether there would be benefit in giving an

Ministry of Justice Minister specific responsibility for considering how Ministry of Justice services are delivered in Wales.

2. The Ministry of Justice Board should consider having (at least) an annual discussion of how the department as a whole is meeting the distinctive needs of Wales.
6. The Ministry of Justice should establish clear mechanisms for ensuring that (a) the distinctive needs of Wales are fully considered in the development and implementation of policy, and the Welsh Government is involved where appropriate; and (b) information from the Welsh Government and the Assembly (for example about upcoming legislative changes) is effectively communicated to all relevant parts of the justice system.
8. The Ministry of Justice should undertake a review of how its data collection and publishing practices reflect the distinctiveness of Wales, where possible disaggregating data to give a clear picture of how justice in Wales functions.
9. The Ministry of Justice should consider the way in which information is presented on its website, in order that information about Wales is easily accessible.

Progress has been made on improving arrangements for consultation and co-operation between Welsh Government and Ministry of Justice, in particular through a 'Concordat between the Welsh Government and UK Ministry of Justice' agreed on 21 March 2018. However, the Justice Commission concludes that the Concordat 'does not really address the problems or provide a sustainable or long-term, solution to the effect of separating justice from other devolved fields. In practice, the actions of the Assembly and the Welsh Government which are directly relevant to justice go wider than this' (Justice Commission: paras[2.32-2.33]).

The Concordat provides for 'Exchange of Information, Statistics and Research' between the Ministry of Justice and Welsh Government, but there is still limited data publicly available on a dis-aggregated Wales-only basis and researchers consistently find that data is not available, not only because it has not been disaggregated and published, but also because it is not collected. Information about Wales could still be made much more easily available via the Ministry of Justice website.

There is now a 'Justice in Wales Strategy Group' which brings together operational and policy officials from Welsh Government the Ministry of Justice and various justice bodies. It provides a forum for discussion and collaboration on policy issues.

The Independent Expert Advisory Committee for ongoing review of the operation of justice in Wales is distinct from the Justice in Wales Working Group, it is tasked with ongoing review of the operation of justice in Wales. It reports to the Lord Chancellor and Secretary of State for Justice, with copies to the First Minister, Secretary of State for Wales and Lord Chief Justice. Its membership includes a Director from the UK Government's Cabinet Office, representatives from the judiciary in Wales/Judicial College, Welsh Government officials (Director/Deputy Director level), Wales Office official, Bar Council, Law Society in Wales, and Directors/Deputy Directors from HMCTS, HMPPS and the Ministry of Justice. The Justice Commission states that it has considered this Committee's first (2019) Report but the Commission does not refer to the Committee's specific recommendations directly.

The 2019 Committee Report focuses on the challenges caused by divergence of laws and accessibility of Welsh law. Despite the Concordat and other initiatives, the Committee ‘highlighted the need for more collaborative and strategic working between the MoJ and Welsh Government to ensure that the impact of both reserved and devolved functions is considered properly at an early stage’ (Advisory Committee: para[16]). The Committee acknowledged work being done on the accessibility of Welsh law and recommended that MoJ should collaborate further with Welsh Government on this agenda; including working with the National Archives to enable better dedicated search facilities on legislation.gov; that MoJ and Welsh Government could consider joint approaches to commercial providers to improve provision of more thematic content on Welsh law; and that MoJ and Welsh Government could work jointly with practitioner organisers to produce guides to law applicable in Wales.

On divergence of laws the Committee stressed that it is important for Ministers to know that there are cost and resource implications in arrangements and proposals to better manage increasing divergence in laws, and that whilst systems and processes have been put into place these could come under greater strain if divergence increases. The Committee also noted that: ‘There are no dedicated systems in place at delivery and operational level to manage anticipated further divergence in future. In particular, there is a need to ensure better preparation within operational arms’ (Advisory Committee: para[44]).

The Committee gives the example of the Renting Homes (Wales) Act 2016 and that implementation has been delayed partly due to the need to develop HMCTS computer systems (specifically the online possession claims portal) to accommodate the divergence from English law. The Committee notes that development of systems is costly and time-consuming and will need to be considered each time legislation requires changes in the way HMCTS systems operate. The Committee thought it important to ensure more robust and effective management of divergence and recommended that Ministry of Justice and Welsh Government should consider practical arrangements to ensure that delivery arms and devolved bodies are notified of divergence in advance so they can identify, agree and manage impacts effectively (Advisory Committee: paras[65-67]).

## [Evidence Submitted by Welsh Government to the Commission on Justice in Wales](#)

Whilst this Report cannot review all 200 pieces of written evidence to the Justice Commission, it is informed by some key submissions including those of the Welsh Government. Welsh Government’s main evidence is split into two parts; the first focusing on constitutional issues and the second on policing and justice as public services. There is further supplementary evidence on other matters including Family Justice.

The first section of Welsh Government’s main evidence reiterates the Government’s support for a separate Welsh legal jurisdiction and the devolution of policing and justice powers. Emphasis in the current Report is on the second part which stresses the importance of joined-up policy making for the delivery of public services and that Government has found this ‘almost impossible’ to achieve given what it considers to be the ‘incoherent allocation of responsibility

and accountability' that is 'drawn right through the services we might seek to join together' (Welsh Government Evidence: p.9).

Welsh Government notes that the Welsh mode of public service delivery is underpinned by the ways of working required by the WFGWA, and is designed to ensure a more joined up and sustainable approach based on collaboration and service integration that encourages prevention. The Guiding Principles of Welsh Government's strategy are set out in 'Prosperity for All', namely; prevention, partnership, collaboration and to secure better outcomes. The Government's view is that these Principles cannot be fully achieved in light of the devolution settlement where Government and Senedd powers are considered to be non-comprehensive, incoherent and often illogical.

In particular the Government highlights its community safety review where it found aspects of multi-agency partnership working to be seriously undermined by the current division of responsibilities, accountabilities and leadership. These include; the inability of partnerships and agencies to base their planning and activities on shared data, research and evidence; barriers posed by competing priorities and shrinking of public sector resources; failure to incentive 'invest to save' approaches to public services delivery as a result of budgeting structures and silos (investment in devolved approaches to prevention and early intervention yields savings for non-devolved criminal justice budgets); and reduced opportunities for 'place' or 'person' centred approaches to public service budgeting.

The Government notes that Welsh initiatives can be frustrated due to lack of power, budget control or complexity and can be disrupted by and organisational change designed in Whitehall that is not tailored to the Welsh context (probation is a specific example). The Government also notes that there remains a lack of accountability in prisoner health and education that militates against good governance.

The Government gives examples of action it is taking through legislation and delivery programmes on issues affecting the justice system, these are noted in the 'Mapping' Annex One of this Report.

### *Law and Justice in Wales: Some Issues for the Next Assembly, A report to the Minister for Public Services by the Justice Stakeholder Group (March 2016)*

The Report considers the need for greater accessibility of the growing body of Welsh Law, it examines the challenges connected with providing legal training at various levels and that this forms part of a broader set of issues connected with the possible emergence of a distinct and expanding Welsh law, and the potential formation of a distinct Welsh legal jurisdiction.

In light of this context the Report considers wider reforms to the justice system (such as legal aid cuts, digitalisation and court reform) and the Welsh language, considering how a Welsh approach to justice could be developed. The Group made ten recommendations to which Welsh Government responded. Welsh Government acknowledged the Group's recommendations around the accessibility of Welsh law and the need for improvements to the

Law Wales website and broader publication of Welsh legal materials. It noted that at the time it was responding to the Law Commission's Report on the [Form and Accessibility of the Law Applicable in Wales](#) (see now the Legislation (Wales) Act 2019) and continuing to improve the Law Wales site. It rejected the recommendation that it should seek funding from UK Government to support publication of Welsh law texts and materials, noting that the UK Government is not responsible for the publication, promotion and accessibility of such materials.

The Group recommended more Welsh Government engagement between laws schools and training bodies to support the development of Welsh legal education at all levels, Welsh Government responded that it already regularly engages with University law schools and professional bodies. In relation to the Group's recommendations around the need to be proactive in developing a jurisdictional solution to accommodate the distinct needs of Wales, Welsh Government noted that it had consistently argued for the establishment of a non-statutory committee on justice in Wales.

The Group also recommended that Welsh Government consider the potential for adopting more inquisitorial (as opposed to adversarial approaches) in the tribunals it administers. Welsh Government responded that such approaches are already used in devolved and non-devolved tribunals. Despite Welsh Government's response, it should be noted that there is a spectrum of inquisitorial to adversarial (or as also more recently understood, active and passive judicial approaches) rather than a binary divide between inquisitorial/adversarial approaches and the Group's broader discussion of the issue could have warranted more detailed consideration.

The Group also recommended that Welsh Government should ensure a more consistent and structured approach is taken to engagement with key stakeholders involved in the administration of justice, including legal practitioners, the judiciary and the Law Commission. As more recent reports suggest, whilst such engagement clearly does occur, it is questionable whether it is yet along structured and consistent lines. Similarly, the Group recommended establishment of a 'Justice Stakeholder Group', following on from its preceding recommendation on stakeholder engagement, it assumed that this group would include legal practitioners, the judiciary and the Law Commission as well as those involved in the administration of justice. The Welsh Government responded positively that there is a case for such being established as an independent self-organising forum. But as yet it appears no body precisely along these lines has been established; such a role could be fulfilled by the Justice Commission's proposed 'Law Council for Wales'.

## H Pritchard, [Justice in Wales: Principles, Progress and Next Steps](#) (Cardiff University, Wales Governance Centre: September 2016)

The Report sets out key principles which Pritchard argues should be actively promoted by the 'Justice in Wales' Working Group (discussed above). Drawing on principles expressed by the Silk Commission, the full list includes; clarity, efficiency, collaboration, subsidiarity and accountability. Pritchard also notes the importance for access to justice of taking into account the distinct demographic, economic, social and linguistic characteristics of Wales. The Report aims to expose how *ad hoc* and piecemeal developments have contributed to the formation

of gaps and overlaps in justice functions, and that alongside the general complexity of the devolution settlement, this leads to a democratic deficit as regards oversight of justice in Wales.

Crucially, Pritchard notes: 'To proceed simply in binary terms – whether or not the justice function is devolved – is not helpful...decentralisation can and does come in a variety of different forms' (Pritchard: p.11). He proposes that there is a spectrum of arrangements:

At one end, it may not mean any formal model of decentralisation but rather an 'awareness of devolution in Wales and Welsh law'. This may increase to include intergovernmental mechanisms such as simple consultation, concordats and memoranda of understanding. More formal decentralisation occurs with establishing Welsh Committees, appointments of Welsh representatives on central boards or appointing Welsh commissioners for particular organisations either voluntarily or through statutory requirement. A more advanced form of administrative decentralisation occurs with regionalisation, when an organisation establishes a directorate in Wales with a physical presence and a dedicated Welsh remit. At the far end, bodies such as Welsh tribunals or Welsh Commissioners may be the product of executive and/or legislative devolution. (Pritchard: p.11)

Pritchard acknowledges that different forms of decentralisation may be evident within the same body, giving the example of devolved Welsh tribunals where legislative responsibility lies mostly with the Senedd but where some executive functions are retained by the UK Lord Chancellor and Secretary of State for Justice.

Pritchard made 16 recommendations. As with others he recommended some form of standing committee to keep arrangements under review. He recommended a more formal concordat between Welsh Government and the Ministry of Justice (which, as noted above, has now been concluded) and other means of more collaborative working. Some recommendations which have not been progressed are the recommendation for a fully operational High Court Office in Wales and changes to the composition of the body of Supreme Court Justices to reflect the position of Wales (these have been taken up by the Justice Commission). Whilst there may have been some improvement in relation to his recommendations around data availability and online visibility of 'Welsh' departments or branches of England and Wales institutions, there is still more work that could be done. Pritchard recommended that a Welsh Government representative and a judicial representative from Wales should have seats on the HMCTS Board, this has not yet occurred (to my knowledge).

## Administrative Justice and Tribunals Council (AJTC) Welsh Committee, and Committee for Administrative Justice and Tribunals in Wales (CAJTW)

The first body with a formal role to oversee the administrative justice system in Wales was the Welsh Committee of the AJTC set up in 2008. The Committee was abolished along with the AJTC by the Westminster Government in 2013 but in its short life it had a significant impact in highlighting the particular administrative justice challenges faced in Wales, and in promoting

reform. A key publication of the AJTC Welsh Committee was its *Review of Tribunals Operating in Wales* published in 2010. This has formed the basis for Welsh Government's programme of reforming the devolved Welsh tribunals, including legislative development in the Wales Act 2017, and an ongoing project by the Law Commission for England and Wales.

The AJTC Welsh Committee was succeeded in 2013 by CAJTW, set up by Welsh Ministers to ensure that expert advice remained in place in Wales, and that the needs of users of the system in Wales continued to be paramount. CAJTW's key publication is its so-called 'Legacy Report', [\*Administrative Justice: A Cornerstone of Social Justice in Wales; Reform priorities for the Fifth Assembly\*](#), published in 2016. This Report drew heavily on research commissioned by CAJTW from Bangor University in support of two objectives: to create a community of interest in tribunal reform and administrative justice issues in Wales which can be supported over the long term; and to provide advice, guidance and commentary that will continue to promote the development of the administrative justice system in Wales. Bangor University's Report, [\*Understanding Administrative Justice in Wales\*](#), published in 2015, mapped out which elements of administrative justice have been devolved to Wales, what are the emergent underlying principles of a Welsh approach, and what are the key opportunities and challenges.

CAJTW concluded that administrative justice is of far greater significance than is often realised and that it is best understood as a cornerstone to social justice. Whereas the AJTC Welsh Committee had focused primarily on tribunal reforms, CAJTW's Legacy Report looked across the administrative justice landscape, producing 35 recommendations stressing that: 'Administrative justice is not only about citizen redress but also about learning lessons from what goes wrong and incorporating them into a vision of good public administration'.

The Legacy Report also emphasised that 'good law and effective scrutiny' are key components of administrative justice, and that advice services are crucial to enabling people to navigate redress systems and understand their rights and entitlements. CAJTW made a range of recommendations to Welsh Government and further recommendations to be communicated to the Senedd. These are discussed in paras 37-38 of the main Report.

G Ifan, [\*Public spending on the justice system for Wales\*](#) (Wales Governance Centre, Cardiff University: May 2019) and [\*Fiscal implications of devolving justice\*](#) (Wales Governance Centre, Cardiff University: August 2019)

The first report examines the scale and composition of public spending on the justice system for Wales. This is discussed in Chapter 7 of the main Report. The second assesses the possible fiscal and budgetary implications of devolving justice functions to Welsh Government. The second also analyses the size of the transfer of funding that would be required from UK Government to Welsh Government; the possible scale of additional administration and set-up costs; issues that would be subject to negotiation between governments; and the budgetary risks and incentives Welsh Government might face post devolution.

**In this summary literature review, the focus is on reports that cut across justice in Wales broadly conceived and which specifically address organisation, accountability, scrutiny and**

funding. Subject-area specific research and other evidence is utilised in the mapping exercise, but two work streams are worth specific mention. These are the work of the Wales Governance Centre (and specifically Dr Rob Jones) in criminal justice, and the work of researchers in administrative justice (primarily led by Bangor University, but collaborating across the Welsh law schools).

## Administrative Justice

Reports from this work include the 2015 project (noted above) that informed CAJTW's Legacy Report. A further update, largely the product of a workshop held at the Senedd hosted by the Counsel General for Wales, was published in 2018. This update Report, [\*Administrative Justice: Wales' First Devolved Justice System: Evaluation and Recommendations\*](#) (Bangor University/ESRC IAA), made 13 recommendations. These concerned public administrative law and human rights (especially in the context of consolidation and codification), the roles of the Public Services Ombudsman for Wales and Welsh Commissioners, reviewing 'ad hoc' (or what the Justice Commission refers to as 'quasi judicial') redress mechanisms, recommendations relating to tribunal reform and oversight, and recommendations relating to specific devolved Welsh tribunals. In effect the majority of these recommendations have been endorsed by the Justice Commission in its own terms.

[\*Administrative Justice in Wales and Comparative Perspectives\*](#) (University of Wales Press 2017) is an edited collection of chapters examining administrative justice in Wales in comparison with other jurisdictions, including other UK nations, Australia, Belgium and the Netherlands.

Further research is due to be published by the end of May. In particular the findings and recommendations of an 18-month Nuffield Foundation funded project including academics from Bangor University, Cardiff University Wales Governance Centre and Cardiff Metropolitan University. There are three reports from this work. The first, entitled [\*Public Administration and a Just Wales\*](#), focuses on four key issues: Public administration and administrative law; Administrative justice institutions; Opportunities for legislative reform (consolidation and codification) and Redress system design and oversight. It makes 36 recommendations, which can be summarised as follows:

- recommendations designed to further raise awareness and understanding of administrative justice in Wales, and its connections to policy agendas in well-being, human rights and equality.
- recommendations for improved training on administrative justice for elected representatives (at all levels) and for administrative staff in public bodies taking decisions that affect people's rights and entitlements.
- recommendations that a principled approach to administrative justice must be taken, and that these principles should be used to guide evaluation of particular institutions within the system (tribunals, ombuds, internal review etc) as well as how the overall system is functioning.
- recommendations around the nature of Welsh administrative laws' which place duties on public bodies and seek to promote rights, in particular to increase clarity about how these duties are intended to be enforced and these rights secured.

- recommendations around the clarity, consolidation and codification of Welsh public administrative law.
- recommendations to ensure better use of the administrative justice system to hold public bodies to account in a rights and well-being based context.
- recommendations to promote increased opportunities for the transparent judicial interpretation of Welsh administrative law, and for enhanced practical inter-action between redress institutions (including the Public Services Ombudsman for Wales, Administrative Court in Wales and Welsh tribunals).
- recommendations on the structure and functioning of devolved Welsh tribunals.
- recommendations for administrative justice oversight and enhanced Senedd scrutiny.

The second report is entitled, [\*Public Administration and Justice in Wales: Social Housing and Homelessness\*](#). The report provides a detailed mapping of administrative justice (law, dispute avoidance, and dispute resolution) in social housing and homelessness as devolved to Wales. The report makes 19 recommendations. A key conclusion is that Welsh Government should review housing law and dispute resolution specifically as it applies to Wales. Other studies have been conducted ostensibly on an England and Wales basis, but due to timing, scope or objectives, none has been able to fully consider the current situation of housing law and dispute resolution devolved to Wales, or the inter-action between devolved and non-devolved law and redress. This means that some proposals either do not apply to Wales, or their application is problematic. The authors conclude that; improving access to advice, clarifying and consolidating current law, and increasing the availability and strengthening the effectiveness of existing individual routes to redress may well have more impact on just and fair outcomes in the social housing sector, than a policy-framing right to housing – though they recommend that all these elements should be simultaneously pursued. Aspirations towards rights, equality and good administration in Wales must be more explicitly recognised as matters of justice, and administrative justice redress mechanisms should be seen as a means to bridge the gap between policy and implementation, ensuring that both policy makers and decision takers are held to account. There is a need for more independent and transparent judicial interpretation and clarification of Welsh housing law. Housing law regularly requires determination of people’s legal rights alongside relationship management. But this need for more formal justice should not be met at the expense of less formal structures of collective justice; indeed when these structures have developed from the grass roots level they should be encouraged and supported with better mechanisms to identify community issues and to enable people to address concerns together and support lesson learning in a more informal context.

The third report of the series is entitled, [\*Public Administration and Justice in Wales: Education\*](#). This provides a detailed analysis of education law in Wales specifically from the context of administrative justice. Its focus is on primary and secondary maintained education, and it makes 12 recommendations. The authors conclude that there is a wide range and complexity of routes to redress in relation to education disputes. They find it unsurprising that at least some parents, learners, teachers, governors, and even some in local authorities may struggle to grapple with them. While there is good quality information available, it requires a basic knowledge of where to start and what to look for. What many people lack most is an overview of the redress system as a whole where they can locate the possible routes that they might follow, and the implications of choosing one over another. It is also important that clear and

accurate information and advice is available, as early as possible in relation to an issue that has arisen or may arise, and from a source that is independent from the parties to the dispute. Those making decisions at all levels must have appropriate knowledge and understanding of the law and of general complaints handling best practice and must be supported in their decision making. A key finding of the report is that it is essential that education disputes issues are appreciated within a justice perspective as well as a substantive education perspective. The same is equally true in relation to social housing and homelessness. In the context of both areas of law (social housing and homelessness, and education) the researchers recommend consolidation and codification, but note that education law as it applies to Wales is an area 'crying out' for codification due to the current fragmentation and complexity.

Finally, Dr Nason's two [Senedd Fellowship reports](#) address what she considers should be the Senedd's role in administrative justice.

## Criminal Justice: Imprisonment, Sentencing and Prisoners

The largest part of the Justice Commission's report relates to criminal justice, including 16 recommendations. Prior to this the Part II Report of the Silk Commission (in 2014) had recommended devolution of policing and youth justice.

Research work from Dr Rob Jones' for the Wales Governance Centre begins with a 2018 Report, [Imprisonment in Wales: A Factfile](#), which gathered a range of data revealing the performance of prisons in Wales, the status of all prisoners from Wales and where they are being held. The report revealed specific and unique imprisonment problems affecting people from and in Wales, including high levels of self-harm and assaults, above average distances for Welsh adult men, women and children in custody. Dr Jones concluded that many sources of Welsh only data could only be obtained using Freedom of Information legislation, and that the problems revealed by the report raised pressing questions about political accountability for imprisonment. An Annex to the 2018 report breaks down the imprisonment data by local authority and provides more detailed insight into the geographical spread of Welsh people across England and Wales, as well as English prisoners held in Wales. The report further examines the use of the prison estate in Wales and explores the issues facing individuals involved or affected by the criminal justice system in Wales.

The Wales Governance Centre has also submitted evidence to the House of Commons Welsh Affairs Committee on issues including drugs, alcohol and homelessness in the context of criminal justice; to Senedd inquiries into voting rights for prisoners, and provision of health and social care in the adult prison estate.

Dr Jones' 2019 report, [Sentencing and Immediate Custody in Wales: A Factfile](#) demonstrated that a higher proportion of Wales' overall population was serving time in prison than England for every year since 2013. Other key findings included that whilst use of custodial sentences was decreasing in England between 2010 to 2017, in Wales there had been a marginal increase, and that racial disproportionality was higher amongst the Welsh prison population than the English prison population (2017). Dr Jones' concluded that more research is needed to further explain Wales' high imprisonment rate, recognising that socio-economic context is likely to have had an impact, noting previous research linking poverty, marginalisation and

imprisonment. Dr Jones' concluded that the report's findings add weight to the call to acknowledge potential sentencing differences between Wales and England. Finally, he considered the research findings not only alarming in and of themselves, but more so because the trends had not previously been detected. As Dr Jones concluded: 'This undoubtedly calls into question the role being played by UK justice agencies in Wales as well as civil society organisations and academic researchers' (Jones: 2019, p.123). Further research, also published in 2019, examines [International Evidence on Driving Down Imprisonment Rates](#) using case studies of legal jurisdictions that have introduced measures to reduce high levels of imprisonment.

## Family Justice

This is an area where there appears to be less specific literature, and this would seem to tally with the Justice Commission's recommendation that there 'should be vigorous support for a programme of research to underpin reform of Welsh family justice and associated preventative services' (Justice Commission: para[7.11]). The Commission focused primarily on the public law aspects of family justice and most of its discussion and analysis relates to children. It notes various initiatives in Wales which it considered had not been properly monitored and evaluated including through independent research, data collection and analysis. Examples include, Integrated Family Support Teams (under the Social Services and Well-being (Wales) Act 2014, and the Code of Practice setting out local authority duties under the 2014 Act including around returning children to their birth parents), Edge of Care Services, and the *Reflect* programme (for parents whose children had been placed in the care system).

In its discussion of the disturbingly high numbers of children in care (looked after children) in Wales, the Justice Commission drew on research published in 2019 by the Wales Centre for Public Policy, [Analysis of the Factors Contributing to the High Rates of Care in Wales](#). The Centre's research programme into 'Better Services for Children and Young People Looked After' including further reports in 2020 on [International approaches to managing placement provision for children and young people looked after](#) and [What do children and young people and their families looked after think about care?](#)

In terms of understanding family law and particularly the 'jagged edges' of the devolution settlement, the Commission drew heavily on the submission of Ruth Henke QC, [Submission in Relation to Family law in Wales](#). Both the Commission and Ms Henke note the complexities of family law where despite the reservation of legislative powers and functions relating to family law and the Family Court, devolved powers in health, education and social care have been used in such a way that some family law, and in particular the law relating to children in Wales, is significantly different to the law applicable in England. Ms Henke makes four key submissions. First, that the way devolution has evolved means that much of the Welsh law (different to that of England) is contained in secondary legislation or Codes, where the divergence lies in a related topic (such as education, health or social care) which nevertheless impacts on the family, meaning that the need to consider the potential divergence between the laws in England and Wales is often over-looked. Henke notes, and the Justice Commission finds 'disappointing' (para.[7.8]) the lack of awareness of Welsh law given that in this particular area the Welsh legislation and guidance is published as a supplement to key texts and is available

free of charge online. The conclusion appears to be that people inside and outside Wales (both lay and lawyers) are not aware of the differences and so simply don't seek them out.

Henke's second submission concerns the limited publication of Family Court judgments, and its impacts upon awareness of Welsh law. Third, she stresses the additional costs that can be involved for advocates examining cases turning on Welsh law, in particular where it is suggested that as a matter of practice advocates should draw the differences between Welsh and English law to the attention of the court. Finally, and relatedly she notes the impact that reductions in access to legal aid have had in the context of family law in Wales.

The Justice Commission cites Welsh Government evidence concluding that the effect of the current devolution scheme has been to divide responsibilities and interconnections within the family justice system, which can cause complexity and conflict. This has been exacerbated by the increasing divergence between approaches to family justice in England and Wales and policy in devolved fields which impact on family justice (Justice Commission: para[7.17]).

## Information, Advice and Assistance: Specifically, Legal Aid

This literature review cannot provide a comprehensive assessment of the range of evidence submitted to the Justice Commission on the matter specifically of the impact of legal aid funding cuts in Wales. The Justice Commission's assessment is itself an important contribution to the literature, and here I can only highlight some key submissions and related work.

First that of Dr Daniel Newman from Cardiff University, including especially his work on ['Attitudes to Justice in a Rural Community' \(2016\) 36\(6\) Legal Studies 591](#) and on ['Justice in a Time of Austerity' \(2018\)](#). In his evidence to the Justice Commission Dr Newman stressed that it is still the case that little empirical work has been done on access to justice in Wales, with most subsumed into generic England and Wales research that may lack sufficient Welsh participation to be properly representative; existing research may often have been reported with the assumption that Wales is the same as England. Having conducted research in Wales, including in rural areas, Dr Newman notes that legal aid cuts may well have resulted in more harmful impacts in Wales in light of higher rates of income poverty (700,000 people living in poverty, approx. 1 in 4 of the population according to the Justice Commission). He also finds that it is the people less able to pay for legal services in Wales who are most likely to need them, concluding that 'to expect payment to achieve fair treatment is a de facto tax on the poor' (Newman: p.9). He considers that at the very least Welsh Government should fund more research into access to justice in Wales to develop a better understanding of the needs of people in different parts of the country, and that Wales should be taken seriously 'as a site in which justice is done'.

Evidence to the Justice Commission on the specific impacts of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012, was also submitted by [Sue Harper on behalf of the Public Law Project](#). Key conclusions being that Wales has seen a larger proportionate fall in civil legal aid expenditure than England, there has been a reduction in legal aid providers for matters remaining in scope in Wales leading to geographical areas with sparse provision (so-called 'advice deserts'); and that a larger proportion of firms in Wales have reported changes to legal aid as being a significant problem as compared to firms in England.

The overall body of evidence on the damaging impacts of LASPO across England and Wales is extensive, and ultimately the UK Government conducted a [Post-Implementation Review](#) leading to a [Legal Support Action Plan](#). This promises a comprehensive review of the legal aid eligibility regime, with earlier action focused particularly around access to legal aid in family and children related disputes. A mandatory telephone gateway for civil legal services in education, discrimination and debt is also being phased out. There is an ongoing review of criminal legal aid schemes (due to report in summer 2020).

The Justice Commission's conclusion was that 'the review and plan does not properly assess or effectively address the scale of the problem' and that in Wales 'a more far reaching and radical plan is needed' (Justice Commission: para[3.26]). For the longer-term the Justice Commission recommended the development of a strategy bringing together funding streams for legal aid and third sector advice provision, and that this strategy should be driven by an independent body that would ensure that there is no gap in provision and that the funding is sustainable. It should be designed to meet the needs of the people of Wales and deliver fairly and equitably across Wales. There should also be an approach to quality that combines high standards with proportionate expectations on smaller providers, and the body should assist in raising charitable funds in addition to administering public funds to provide core long-term funding and monitoring progress. The Commission also considered raising public awareness to be fundamental including prioritising outreach to connect particularly with disabled people, people with mental health issues, people with learning difficulties, people in crisis, people whose first language is not English or Welsh and people who are digitally excluded. It also recommended expansion of Support Through Court to all courts and tribunals in Wales.

### Annex Three: Appointments to devolved Welsh tribunals

WTU Administered Tribunals			
Tribunal	Established by	Appointments Process	Appeal
<b>Special Educational Needs Tribunal for Wales</b>	Education Act 1996 Will be governed by the Additional Learning Needs and Education Tribunal (Wales) Act 2018 when in force.	<p style="text-align: center;">Legal Chair and two members.</p> <p>The President and Chair are appointed by the Lord Chancellor Under s.333(3) Education Act 1996.</p> <p>Lay panel members are appointed by Welsh Ministers under s.333(4) Education Act 1996 with the agreement of the Secretary of State.</p> <p>When in force s.91 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 will not change this process. The President will continue to be appointed by the Lord Chancellor with agreement of the Lord Chief Justice. Legal Chairs are to be appointed by the Lord Chancellor with agreement of the Tribunal President and lay members are to be appointed by the Welsh Ministers with the agreement of the Secretary of State and Tribunal President.</p>	Upper Tribunal
<b>Registered Inspectors of Schools Appeal Tribunal and Registered Nursery Education Inspectors Appeal Tribunal</b>	Appeals under s.27 Education Act 2005 against decisions of Her Majesty's Inspectorate for Education and Training in Wales (ESTYN) relating to registration. Power of Welsh Ministers now	<p>The Chair is to be appointed by the Lord Chief Justice after consultation with the Lord Chancellor. Two other members to be appointed by Welsh Ministers.</p> <p>During the most recent year of reporting (2017/18) according to the President of Welsh Tribunals, no tribunal has been constituted, specifically, to hear appeals under section 27 of the Education Act 2005. Certainly, it has no judicial lead appointed by any formal process. However, tribunal members from SENTW are eligible to deal with any cases which arise.</p>	Can review own decisions but seems to be no direct appeal route, as such judicial review in the Administrative Court might be pursued.

	contained in Schd. 3 Education Act 2005.		
<b>Mental Health Review Tribunal for Wales</b>	Mental Health Act 1983	Schd.2 Mental Health Act 1983. Lord Chancellor may appoint; legal members, medical members and other persons having experience or knowledge of social services or other experience as the Lord Chancellor thinks appropriate. One legal member must be appointed as Chair of the Tribunal. One legal member must be appointed as President of the Tribunal.	Upper Tribunal
<b>Adjudication Panel for Wales</b>	Local Government Act 2000	Legal chair and two members appointed by Welsh Ministers (President and Deputy President) s.75 Local Government Act 2000.	High Court
<b>Agricultural Land Tribunal Wales</b>	Agriculture Act 1947	The Chair and Deputy Chair are appointed by the Lord Chancellor. The Chair must be a barrister or solicitor of at least seven years' experience. Panel members are also appointed by the Lord Chancellor.	Upper Tribunal
<b>Residential Property Tribunal for Wales</b>	Various - some functions under Housing Act 2004, others under Commonhold and Leasehold Reform Act 2002, other under Mobile Homes (Wales) Act 2013 and Housing (Wales) Act 2014	Tribunal lawyer chairpersons are appointed by the Lord Chancellor. The president and vice president are nominated by Welsh Ministers from those members appointed by the Lord Chancellor. Professional and lay members are appointed by Welsh Ministers.	Upper Tribunal
<b>Welsh Language Tribunal</b>	Welsh Language (Wales) Measure 2011	President and members appointed by Welsh Ministers (President must be a barrister or solicitor of at least ten years' experience).	Appeal or judicial review in the Administrative Court

			depending on decision challenged
<b>Not Administered by WTU</b>			
<b>Valuation Tribunal for Wales</b>	Valuation Tribunal for Wales Regulations 2010	Members are appointed by the relevant local authority jointly in association with the President of the Tribunal. Regulations provide for the President to be appointed by an election procedure, and for appointment by election of chairpersons and members.	Valuation for ratings appeals to the Upper Tribunal, council tax liabilities appeals to the High Court on a point of law, council tax valuation cannot be challenged.
<b>Traffic Penalty Tribunal</b>	Civil Enforcement of Road Traffic Contraventions (General Provisions) (Wales) Regulations 2013	Section 81(1) Traffic Management Act 2004 provides for Lord Chancellor to make regulations about appointment. The 2013 Regulations provide that Welsh Ministers appoint such number of adjudicators as they decide, appointment and removal requires the consent of the Lord Chancellor.	There is a process for internal review of a decision but no appeals process, judicial review in the Administrative Court may then lie.
<b>Social Admissions Appeal Panels</b>	Education (Admission Appeals Arrangements) (Wales) Regulations 2005	Members are appointed by Local Education Authority (LEA): 1 lay member, 1 person experienced in education, 1 parent (panel of 3-5 members) the LEA to appoint a chair.	No provision for appeal, so likely further redress limited to judicial review in the Administrative Court
<b>School Exclusions Appeal Panels</b>	Education (Pupil Exclusions and Appeals) (Maintained Schools)(Wales) Regulations 2003	Members are appointed by LEA, 3-5 members: 1 lay member, 1 person experienced in education, 1 governor or ex-governor of a maintained school. Panel must be chaired by a lay member.	No provision for appeal, so likely further redress limited to judicial review in the Administrative Court
<b>Independent Review of Determinations Panels (IRM Cymru)</b>	Independent Review of Determinations (Adoption and Fostering) (Wales) Regulations 2010	By Welsh Ministers	No provision for appeal, so likely further redress limited to judicial review in the Administrative Court

<b>Board of Medical Referees</b>	Firefighters Pensions Scheme (Wales) Order 2007 (appeals against decisions of a medical nature under Fire and Rescue Services legislation.	Members appointed by or in accordance with arrangements of Welsh Ministers	No provision for appeal, so likely further redress limited to judicial review in the Administrative Court
<b>Forestry Committees for Wales</b>	To advise Ministers on reviews of refusals of tree felling licenses or conditions of licenses and appeals against restocking notices. Welsh Ministers are the decision-makers.	Chair and two members appointed by Welsh Ministers.	No provision for appeal, so likely further redress limited to judicial review in the Administrative Court