

**YSGOL Y GYFRAITH
SCHOOL OF LAW**



Response to the Senedd Public Accounts Committee Inquiry into Barriers to the Successful Implementation of the Well-Being of Future Generations (Wales) Act 2015 on behalf of Bangor Law School, Public Law Research Group

Response to Questions 1-4: Awareness and understanding the Act and its implications; resources available to public bodies to implement the Act and how effectively they have been deployed; support provided to public bodies by the Future Generations Commissioner; and the leadership role of the Welsh Government

1. This part of our response is based on research into administrative justice in Wales, conducted between September 2018 and May 2020, funded by the Nuffield Foundation. Administrative justice is the justice of relationships between citizens and the state. Specifically, it concerns ‘how government and public bodies treat people, the correctness of their decisions, the fairness of their procedures and the opportunities people have to question and challenge decisions made about them’ ([UK Administrative Justice Institute](#)). In our research we engaged with over 200 individuals and organisations in the Welsh administrative justice system including local authorities, lawyers, judges, third sector organisations, academics, sector representative bodies in housing and education, and public sector staff and volunteers in the fields of housing and education. The full methods of our research can be found in our three reports: *Public Administration and a Just Wales*, *Public Administration and Justice in Wales (Social Housing and Homelessness)* and *Public Administration and Justice in Wales (Education)*, all available at: <https://www.nuffieldfoundation.org/project/paths-to-administrative-justice-in-wales>
2. Our research incorporated extensive analysis of how the recommendations of the Commission on Justice in Wales (Justice Commission) relating to administrative justice, could be progressed. The Justice Commission acknowledged that: ‘Administrative justice is the part of the justice system most likely to impact upon the lives of people in Wales’ ([Commission on Justice in Wales](#)). It also stated that substantive Welsh administrative law is the area with the most potential for short-term divergence from English law. In theory at least, the Well-being of Future Generations (Wales) Act 2015 (WFGA) can be seen as the bedrock of Welsh administrative law. Some of our research participants felt that there had been a clear policy choice and direction by Welsh Government to focus on well-being as the cornerstone to good administration in Wales, perhaps even with some consequent marginalisation of other foundations (which could include for example, human rights, equality, and specifically *Principles of Administrative Justice for Wales* developed by the [Committee on Administrative Justice and Tribunals in Wales](#)).
3. A major theme of our research has been the complexity of administrative law and its application by public bodies in Wales. We address the complexity of the legislation below as a particular barrier to implementation. In general, much recent Welsh legislation relating to public administration can be seen as constituting what Professor Emyr Lewis

has called ‘high-level soft law regulation’. Our research respondents suggested that, as yet, there is little clarity about how this is intended to apply to the decision-making of so-called ‘street level’ bureaucrats, those taking regular, often daily decisions that impact people’s lives in the administrative justice system. Is this new layer of regulation intended to apply to them at all, would implementation potentially be improved if WFGA decision-making principles more clearly applied to all layers of public administration?

4. An issue raised across our research has been noting the challenges faced by street-level administrative decision-makers in applying sometimes complex legal principles. For example, we heard that local authority staff ‘are not legal experts, they just administer law’ and received examples of a perennial problem for administrative law; namely how to understand distinctions between law and policy, and between rule-governed and discretionary decision-making, and particularly how increases in the volume of soft-law (such as guidance and various new frameworks), that are tools to support decision-making, can lead to confusion about the appropriate space for discretionary judgement. The conclusions of our research tend to support the key findings of Audit Wales in its recent ‘[Think Piece](#)’ on implementing Welsh law: that local authorities can lack sufficient capacity to devote to implementing legislation; that guidance, including Welsh Government guidance, could be clearer and available in a more timely fashion; that lack of alignment and/or integration between particular pieces of legislation and guidance (in this case including WFGA and related guidance) makes it difficult for public bodies to deliver new responsibilities effectively.
5. Our respondents particularly found the different conceptions of well-being in WFGA and the Social Services and Well-being (Wales) Act 2014 (SSWB) respectively, could lead to confusion, and that more could be done to highlight the differences. There were some perceptions that local authority staff too often perceive of well-being as an individualist and personal concept, related to self-care, and what some described as being related to social class, which seems to an extent quite the opposite of the meaning given to the concept in WFGA itself. That said, the training provided by the office of the Future Generations Commissioner was considered to be very good by those of our respondents who had benefitted from it; and there is comity between all the Welsh Commissioners, and between the Commissioners and the Public Services Ombudsman for Wales, which we suggest also benefits implementation of WFGA, although the resources of each organisation impacts on the degree of joint-working that can be progressed. Specifically, the resources of the office of the Future Generations Commissioner seem to us insufficient given the breadth of Commissioner’s role, and the extent of well-being goals within her remit to monitor and assess.
6. Resources remain an issue impacting on implementation within public bodies, including specifically, local authorities. Responses to our research from local authorities and those working closely with them, demonstrated a general feeling that scarce resources frame the context in which everything else has to be made to work. Where disputes over the application of administrative law provisions directly concern the use of resources, it is easier to see how the effects of austerity can escalate problems. However, we noted that some disputes, and some implementation weaknesses, are at base about adherence, or lack of, to procedures that are not directly associated with the scarcity of resources.
7. Although the publicity and media (including social media) activities of the Future Generations Commissioner were seen by our participants to be extensive and well targeted, there is still some lack of awareness, or lack of more detailed depth of

understanding of WFGA among professionals in the administrative justice sector, and among the members of the public who we engaged with.

8. Similar views to those expressed above were also echoed by another pilot (ongoing research) at Bangor University on ‘Achieving WFGA goals through Public Procurement activities’, by Welsh public bodies. In the initial research with representatives of Welsh local councils, including the participants from the Welsh Local Government Association and Swansea council, it was noted that there is increasing awareness by council staff of the need to ensure that their procurement process, reflect local priorities that align with the WFGA goals, and evidence that some councils are beginning to consider and reflect some of these goals in the design of tenders and award criteria in public contracts. However, many challenges have affected the deployment and implementation of wellbeing goals in councils’ procurement activities. These challenges include competing priorities and conflicting government agendas, including Covid-19 procurement measures. Another challenge relates to the lack of sufficient resources and knowledge among staff on how best to draw up appropriate requirements in tenders, and measures of scoring, measuring and monitoring such requirements in public contracts.

Questions 5 and 6: Any other barriers to successful implementation of the Act (e.g., Brexit, Covid-19, etc); and how to ensure that the Act is implemented successfully in the future

9. Our research has looked, to an extent, at whether greater alignment with the justice system has the potential to improve implementation of WFGA (and other general Welsh administrative law). A key point is the conclusion of the Commission on Justice in Wales 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.

10. The Commission does not define the two key terms of not ‘integrated’ with and not ‘aligned’ to the justice system, but it does go on to say that Wales lacks sufficient machinery for implementation of its law through courts and tribunals (suggesting that the small devolved tribunal judiciary only adds to fragmentation and complexity). The Commission further concludes:

The Future Generations Act has raised questions whether (1) the principles are purely aspirational and therefore without a mechanism for enforcement, or whether (2) the principles give rise to duties enforceable by administrative measures through the Future Generations Commissioner or Auditor General for Wales, or whether (3) the principles give rise to duties which are justiciable and directly enforceable by the courts.

11. So far at least, in permission stage judicial review decisions that do not create binding legal precedents, the Administrative Court in Wales has found that particular duties under WFGA are not legally enforceable through judicial review at the suit of individual claimants. In *R(B) v Neath Port Talbot*, the claimant was a parent of a child

affected by a proposed school closure, who argued that the local council had not complied with its sustainable development duties under WFGA in its decision to close the school. Lambert J did 'not find it arguable that the 2015 act does more than prescribe a high-level target duty which is deliberately vague, general and aspirational and which applies to a class rather than individuals...As such, judicial review is not the appropriate means of enforcing such duties'. After his tenure as Chair of the Commission on Justice in Wales, [Lord Thomas](#) was critical of aspirational legislation, including WFGA, as raising false hopes and undermining the rule of law. His central interrelated conclusions were: 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.

12. In terms of court-based redress, our research reports examine some general weaknesses of judicial review as a mechanism for holding public bodies to account in Wales. Some weaknesses include: lack of awareness of public administrative law generally (this is far from being an issue that affects the WFGA alone); reduction in legal aid funded advice provision (a disproportionate reduction in Wales as compared to England); and the still comparatively limited availability of specialist public administrative law advice provision outside the major urban areas of south Wales. Our participants in workshops, focus groups and surveys, noted that legal complexity is a significant reason why people find it hard to challenge administrative decisions which may be unlawful and/or unfair, including decisions which might breach the sustainability principle. Participants also noted that a general reluctance of people in Wales to challenge also makes it hard for professionals to identify and progress claims that could help raise awareness of particular aspects of Welsh administrative law, and/or which could improve implementation by clarifying law and practice for the longer-term. Our analysis of caseload data from tribunals and courts suggested that, where information is available, claims per head of population from people in Wales are lower in most subject matters of public administrative law, than claims per head of population from people in England. Little use has been made of the courts and tribunals as a means to hold public bodies to account under other newer Welsh administrative law (such as the SSWB, the Rights of Children and Young Persons (Wales) Measure 2011, or the Welsh Specific Equality Duties). The general difficulties of accessing judicial review, coupled with how new at least some of this legislation is (comparatively) may be a reason why the courts are little used as a means to further implementation. For example, although the parallels are not exact, research in the [Cynon valley in the mid-2000s](#) found limited awareness of the pervasive nature of the Human Rights Act 1998 (HRA) among solicitors in the valley, and a reluctance to use it as a cause of action. Solicitors noted their concerns that lower courts would not be particularly receptive to HRA 1998 arguments, and that defence solicitors also expressed a preference for more familiar legislative provisions. This is unlikely to still be the case today. There is still a difference of course between the HRA 1998 which provides directly enforceable legal rights of redress to individuals, and Welsh administrative law, which does not. We note that such direct enforcement has been provided for in a draft UK Future Generations Bill, but that Government support for the Bill was not forthcoming specifically due to the strong enforcement regime it would create. Outside of court-based enforcement, of course, the possibility cannot be discounted that one reason for the very low rates of judicial review in Wales could be

that other softer more ‘administrative’ or ‘bureaucratic’ methods of enforcement are themselves holding the ring of ensuring that administration is fair and lawful to a significant degree. Whether more direct legal enforcement for individuals, or potential means to encourage collective (or public interest) litigation, might be a means to improve implementation is a matter that requires further research, and which remains open to debate.

13. What we did find in our research, is that the comparative reluctance of people in Wales to challenge public bodies through the courts, is not a reluctance that seems to extend to making use of other non-legal redress mechanisms in the administrative justice system including raising concerns with one of the Welsh Commissioners (including the Future Generations Commissioner) or the Public Services Ombudsman for Wales.
14. All this said, participants in our research generally took the view that WFGA lacks clarity specifically with regard to administrative justice implications, with various duties being layered through the Act itself and within subsequent guidance. The claimant’s barrister in R(B) described the legislation as ‘particularly badly drafted’ the defence team also noted that the provisions explaining how the five Ways of Working should be used when ‘doing something in accordance with the sustainable development principle’ (section 2 and section 5) lead to a scheme that is ‘hard to follow’ and there is evident disagreement and lack of clarity around legal enforceability. Lambert J in R(B) also criticised the drafting of Welsh Government Guidance. As the Future Generations Commissioner has noted, there are also anomalies in the promotion and scrutiny roles as between her office and that of the Auditor General for Wales.
15. Matters that we consider could be explored to assist with ensuring that WFGA is implemented more successfully in the future include:
 - a. Greater clarity around leadership roles, especially within Public Services Boards (PSBs), given that there is no collective accountability of the PSBs themselves
 - b. Continued work on integration and alignment of various administrative law frameworks and duties, including through consolidation and codification of Welsh administrative law
 - c. Increased resources for the office of the Future Generations Commissioner
 - d. Raise awareness and/or clarify the respective conceptions of well-being in SSWB and WFGA
 - e. Potential to further improve guidance including Welsh Government guidance
 - f. Resolve the anomaly in the promotion and scrutiny roles as between Wales Audit and the Future Generations Commissioner
 - g. That the Future Generations Commissioner continue to use ‘administrative’ enforcement powers, and for further consideration of how those powers might be added to or strengthened