

Inquiry into the establishment of a separate Welsh jurisdiction  
Response from the Bangor Law School, Bangor University and an Annex to the Response

**INQUIRY INTO THE ESTABLISHMENT OF A SEPARATE WELSH JURISDICTION**

**Submission to the Constitutional and Legal Affairs Committee  
of the National Assembly for Wales**

**Bangor Law School  
Bangor University**

***Introduction***

1. This submission takes the view that a separate Welsh legal jurisdiction already exists. Wales is a defined territory<sup>1</sup> with a body of law that is growing increasingly apart from that pertaining to England and Wales or to England alone.<sup>2</sup> A distinct body of law applying to a defined territory implies the existence of a separate jurisdiction.

The submission therefore takes a different interpretation of the meaning of the word “jurisdiction” to that proposed by the Committee in its scoping paper. The Committee defines jurisdiction as “the territory or sphere of activity over which the legal authority of a court or other institution extends”. Therefore it relies significantly on the view that “jurisdiction” is largely related to the question of which court an action should be commenced in.

2. The Committee’s definition may confuse the concept of “jurisdiction”, which can be taken to refer to the presence of a distinct body of law applying to a defined territory, with that of “competence”, which refers to the authority of particular courts or other institutions to interpret and apply that law. At present there is a separate Welsh jurisdiction, however there are no courts or other legal institutions with exclusive competence over laws that apply only to Wales and over laws that apply both to England and Wales in respect of cases that relate predominantly to Wales.<sup>3</sup> The lack of such competency does not deny the existence of a

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<sup>1</sup> Wales is a statutorily defined territory and such has also been strengthened in practice by the establishment of the Welsh Circuit. Local Government Act 1972 (Part 2 and Schedule 4) as amended by the Local Government (Wales) Act 1994 and confirmed by the Interpretation Act 1978 (Schedule 1). Government of Wales Act 2006 (section 158) as amended by section 43 of the Marine and Coastal Access Act 2009.

<sup>2</sup> See for example, O. Rees, “Devolution and the development of family law in Wales” [2008] *Child and Family Law Quarterly* 45. In the field of health and social care there are substantive differences between provisions on either side of Offa’s Dyke. For instance, in England there is no statutorily defined procedure for assessing charges for domestic social care whereas in Wales there is. The differences that exist come about either by the use of separate and distinct legal processes such as the requisite Measure, or by minute differences found in separate and differing Directions from the Department of Health on the one hand and Welsh Government on the other. See L. Clements and P. Thompson, *Community Care and the Law*, (LAG, 2011) 12-13.

<sup>3</sup> Courts in either England or Wales have authority to administer Welsh law even if it applies to Wales alone. The “apply and extend” principle means that legislation applying to Wales alone has an effect which extends over England and Wales which allows English courts to hear cases related exclusively or predominantly to Wales. Regarding Acts of the Assembly this is defined by section 108 of the Government of Wales Act 2006.

separate Welsh jurisdiction. However, its absence will increasingly hinder the efficient, effective and fair administration of justice in Wales.<sup>4</sup>

3. This submission argues that what needs to be “introduced” is not a separate Welsh jurisdiction, for such already exists. We focus instead on the potential benefits, barriers, costs and practical implications for the legal profession and the public of “introducing” separate courts and other legal institutions with exclusive competence to administer Welsh law and claims under the law of England and Wales that pertain primarily to Wales. In particular, we draw upon research examining the early impacts of establishing a new legal institution in Cardiff, namely the Administrative Court in order to put forward evidence-based recommendations with respect to the development and support of such bodies.<sup>5</sup>
4. The submission also considers the need for other institutions (such as legal training providers and professional organisations), which although they do not administer the law, will be necessary to ensure full training and support to those that do. In doing so we refer comparatively to Northern Ireland, highlighting some of the considerations to be taken into account when establishing and maintaining appropriate legal institutions in small legal jurisdictions.

### *The Administrative Court in Wales*

5. The Administrative Court acts as a constitutional court adjudicating upon the powers of public bodies, establishing standards of legal propriety, applying public law principles consistently and equally, and acting as guardian of our fundamental rights. A Judicial Working Group recommended that an Administrative Court should be established in Cardiff both to improve access to justice and for constitutional reasons.<sup>6</sup>
6. At present the “competence” of the Cardiff Administrative Court (by which we mean the reach of its authority both in terms of the subject matter and territorial origin of claims that can be issued in that Court) is governed by Civil Procedure Rules, Practice Direction 54 Administrative Court (Venue). The Practice Direction does not state that claims wholly or mainly pertaining to Wales must be issued in Cardiff and heard in Wales. There is, however, a general presumption that where claims are issued in Cardiff they will be heard in Wales.

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<sup>4</sup> In this paper, we do not make out the case for a formal legal definition of the competency of the courts in Wales. The arguments in favour of this development have been persuasively articulated elsewhere and, in our view, make such a development an incontestable requirement, see T. G. Watkin, Law Society Wales Annual Lecture, National Eisteddfod 2011.

<sup>5</sup> This research was funded by the Nuffield Foundation and British Academy and supported by the Administrative Court. For further information see, S. Nason, ‘Regionalisation of the administrative court and the tribunalisation of judicial review’ [2009] Public Law 440 and S. Nason and M. Sunkin ‘The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Legal Services in Public Law’ *forthcoming* Public Law.

<sup>6</sup> First, that the Welsh Assembly Government derives its powers from a variety of sources. Second, that public law pertaining to Wales already differs from that pertaining to England and Wales, and to England alone and that such divergences will continue to increase. Third, that judicial review and other public law claims examining decisions made in Wales by Welsh public bodies ought obviously to be issued and heard in Wales, this third point should be seen particularly in the context of bilingual court proceedings. Prior to the opening of an Administrative Court in April 2009, some public law claims could be issued in Cardiff, but this facility came to be known as little more than a “post box” and many claims issued in Cardiff continued to be heard in London.

Nevertheless, in all cases (whether proceedings are initially issued in Cardiff or one of the English courts) a number of factors will be taken into account in determining the final location of administration and hearing.<sup>7</sup> The upshot is that claims under Welsh law and claims under the law of England and Wales either wholly or mainly pertaining to Wales can still be issued and heard in England.

### *Impacts of the Cardiff Administrative Court (given its current competence)<sup>8</sup>*

#### *Benefits*

7. The case for maintaining a centralised system of public decision-making, including systems for accessing the courts has now been outweighed by the benefits of devolution (in Wales) and localism (in the English regions). A specific claim is that local courts ought to better understand local issues and may serve as a symbol of community, justice and equality within the territory.<sup>9</sup> Comparative research examining the legitimacy of national high courts, for instance, has concluded that with increased awareness comes increased confidence, “...to know something about courts is to be favourably oriented toward them”.<sup>10</sup>
8. The current research noted a “cluster” effect in which specialist legal service providers will “cluster” around courts with the relevant “competence” to determine particular claims. This can lead to greater awareness and increased use of the courts among the local population.
9. Prior to the opening of the Administrative Court in Cardiff, Wales generated an estimated 2% of all judicial review<sup>11</sup> claims issued across the Administrative Court as a whole, despite being home to 5.6% of the population of England and Wales.<sup>12</sup> There is early evidence that the number of judicial review applications pertaining to Wales has increased following the opening of the Cardiff Court, to an estimated 2.5%-3% of all Administrative Court claims. The number of claims issued against Welsh public bodies (as opposed to those bodies with responsibility for both England and Wales) has increased (by at least 30%).<sup>13</sup> Increased litigation is not prima facie a “benefit”, however given that the number of claims per head of population is so small across Wales compared to the English regions questions must be asked,

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<sup>7</sup> There is a “general expectation...that proceedings will be administered and determined in the region with which the claimant has the closest connection”. However, other factors are taken into account such as the location of the claimant’s legal representatives, the location of the defendant and their legal representatives, media interest, urgency, the backlog of cases in any of the four regional Administrative Court Centres or in London and so on.

<sup>8</sup> Further data is available at Annex A.

<sup>9</sup> M. Elliott and S. Bailey, “Taking Local Government Seriously: Democracy, Autonomy and the Constitution” (2009) Cambridge Law Journal 436.

<sup>10</sup> J.Gibson, G.Caldeira and V.Baird, “On the legitimacy of national high courts” (1998) 92(2) *American Political Science Review* 343, 344-345.

<sup>11</sup> The most prominent species of public law claim constituting approximately 80% of the Administrative Court’s overall caseload.

<sup>12</sup> Office for National Statistics data.

<sup>13</sup> This bucks a trend in the English regions where the number of claims against local authorities is reducing.

and any assumption that this is because public services are better administered in Wales should be treated with caution.

*Barriers, costs and practical implications for the legal profession and the public*

10. Critics were concerned that Wales would not generate enough cases to justify the resources needed to maintain its own Court. It was suggested that communications technology, i.e. video-links would be sufficient to enable claimants and advisers located in Wales to participate in proceedings administered and determined in London. With respect this proposal would fail to achieve most of the “benefits” noted above and it was duly dismissed.
11. Another barrier that remains is the limited specialist public law legal service provision in Wales. There is still an evident lack of experienced practitioners in this field, and the activities of those lawyers with specialist expertise have been hindered by the past London-centricity of public law litigation. General public awareness of judicial review and other public law claims is also extremely limited.
12. There is evidence that the presence of an Administrative Court in Cardiff has improved professional and public awareness of public law redress. In ordinary civil judicial review (i.e. all claims except asylum and immigration) the number of claims per 1,000 residents in Wales has increased from 0.021 to 0.028 between the first and second years of operation of the Cardiff Court. In London and the South of England the number of claims per 1,000 residents has stayed static but is much higher at 0.057 claims per 1,000 residents.
13. A key practical concern is that almost 50% of judicial review claims issued in Cardiff do not pertain either wholly or substantially to Wales. At least 42% of such claims relate to the South West of England, with a smaller proportion concerning the Midlands. Occasionally Welsh solicitors are instructed to represent claimants and defendants from the South West of England (which is of economic benefit to the Welsh legal services industry), but generally speaking public law legal services in Wales are under-developed and those services which exist are under-utilised as a consequence of historic London-centricity. .
14. A high proportion of Welsh claimants and solicitors choose to issue their claims in London.<sup>14</sup> There may be a number of reasons for this, i.e. the gravitas attached to litigating at the Royal Courts of Justice in London and concern for the quality and consistency of justice dispensed by judges outside London. Lack of awareness may be another factor. Approximately half of all claims involving a Welsh public authority or the Welsh Assembly Government are issued in London and the factor seemingly most influential in the choice of issue location is the instruction by Welsh defendants of London-based specialist barristers.
15. Even some unrepresented Welsh claimants, litigants in person, are choosing to issue in London (approximately 40%). However, overall there has been an increase in the number of claims issued by unrepresented Welsh claimants. This phenomenon has been experienced in

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<sup>14</sup> Approximately 40 per cent in the first year post the Cardiff Court’s opening, down to 34 per cent in the second year.

the English regions gaining new Administrative Court Centres,<sup>15</sup> but not in London and the South of England. The growth in Welsh and regional litigants in person may raise particular concerns about the availability of legal aid funding. Regionalisation of the Administrative Court was meant to broaden access to public law redress in part by encouraging regional solicitors to specialise in this area, whereas reforms of public funding have worked to reduce the numbers of solicitors able to undertake publicly funded cases.<sup>16</sup>

***An Administrative Court with exclusive competence over Welsh public law and cases under the public law of England and Wales pertaining primarily to Wales***

*Benefits*

16. At present the Cardiff Court does not have exclusive competence over claims under Welsh law or over claims under English and Welsh law wholly or substantially pertaining to Wales. Such claims are regularly issued and heard in London where there is no protected right to use the Welsh language in court proceedings.<sup>17</sup> Giving the Cardiff Administrative Court exclusive competence would better protect this right. It would also ensure that cases are listed before appropriately experienced judges with the capacity to extend equal weight to both the English and Welsh versions of legislative texts. Giving the Cardiff Court exclusive competence might also lead to an increase in the number of claims issued and heard in Cardiff. This would be beneficial in terms of justifying court and judicial resources. It might also catalyse more widespread and better quality public law legal service provision in Wales.

*Barriers, costs and practical implications for the legal profession and the public*

17. Approximately half the Cardiff Court's current caseload stems from outside Wales. To an extent this work, originating in England, is subsidising access to justice in Wales by ensuring a large enough caseload for the Cardiff Court to remain a going concern. If the Cardiff were to lose its competence with respect to cases under the law of England or the law of England and Wales pertaining mainly to England, Cardiff would lose this work. Similarly public law practitioners in Wales would be less inclined to advise English clients losing out on business.

18. At present approximately five claims per-annum originate in North Wales and most of these are issued in Manchester due to geographical convenience, though hearings take place in North Wales. Were Cardiff to have exclusive competence over Welsh claims this might reduce access to justice for claimants and legal advisers based in North Wales.

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<sup>15</sup> North East, North West and Midlands.

<sup>16</sup> The implication is that specialist firms of advice providers dealing with a higher volume of cases will be able to attract public funding for judicial review claims, whereas the vast majority of solicitors who issue only a small number of claims per-annum will not.

<sup>17</sup> Under section 22 of the Welsh Language Act 1993, there is a right to use the Welsh language in any court proceedings in Wales, but this does not extend to cases heard in England.

### ***Northern Ireland: the experience of a small jurisdiction***

19. A study of the experience of Northern Ireland is instructive in understanding the legal and practical issues involved in successfully operating a small jurisdiction within the UK.

To this end, Bangor Law School, in partnership with the School of Law at Queen's University Belfast, is currently working on a research project entitled '*Small legal jurisdictions in the UK: the legal and practical considerations*'.

The aim of this project is three-fold:

*(i) To consider the legal issues that may arise for small jurisdictions in the UK*

Including cross-jurisdictional issues, binding/persuasive effect of judgements from outside the jurisdiction.

*(ii) To examine the institutional framework required to support such jurisdictions*

Including the role of highly specialised courts that are of fundamental importance to the Welsh public and private spheres (such as the Administrative Court and Mercantile Court), but which generate small caseloads making the effective allocation of resources a challenging consideration. Other concerns are appropriate levels of public funding for institutions and for the cases they administer, and raising awareness of new institutions to ensure access to justice.

*(iii) To identify the implications for the legal profession*

Including the teaching of law at third level; availability of learning materials; professional training issues (including the mutual recognition of qualifying law degrees within the UK); professional qualification and regulation issues (including the mutual recognition of professional qualifications within the UK); continued professional development for legal practitioners; access to statutes and case law; and judicial structures, including training and appointments.

20. As noted, the research project aims to provide a detailed understanding of the institutional framework required to support a separate jurisdiction. This demands consideration not only of courts and tribunals but also the requirement for other institutions (such as legal training providers and professional organisations), which although they do not administer the law, will be necessary to ensure full training and support to those that do. Preliminary research in Northern Ireland suggests that, at a minimum, organisations with the following functions should be established.

(i) A body to ensure that professional training bodies are informed of the evolving needs of the Welsh legal professions.

- (ii) A body to support a general understanding of the law and legal system throughout Wales (through the publication of Welsh law bulletins, the publication of books on various aspects of Welsh law; the organisation of conferences and courses for legal practitioners, civil servants and other interested parties).

### ***Summary and recommendations***

21. If existing courts or new institutions are given exclusive competence over Welsh legal matters, measures must be taken to promote practitioner and general public awareness in order to ensure access to justice and caseloads sufficient to justify the allocation of resources to these institutions and the to the particular fields of law involved.
22. The Administrative Court research concluded that market forces and the availability of public funding have substantial effects on access to justice and these should be taken into consideration when introducing any new institutions or altering the competence of existing institutions.
23. The opportunity to alter the competence of existing institutions and to create new institutions to service the separate Welsh jurisdiction provides an opportunity to create new structures and competencies that both increase efficiency and improve access to justice.<sup>18</sup>
24. Northern Ireland provides an appropriate point of reference in understanding the substance and process required in supporting a successful small jurisdiction. A detailed examination of the Northern Ireland experience would be highly beneficial in contributing to the continued evolution of a separate Welsh jurisdiction.

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<sup>18</sup> In public law, for example, it is questionable whether the majority of public law claims (particularly those concerning human rights) must necessarily be issued at High Court level. It can be argued that such claims ought to be capable of issue at any civil court in Wales. Wales does not need to maintain the High Court-centricity of the current arrangements.

## ANNEX A

### 1. *The General Administrative Court caseload*

**Figure 1: Location of issue – Civil judicial review claims**

Administrative Court Centre	1 May 2009 to 30 April 2010		1 May 2010 to 30 April 2011	
	No	%	No	%
Birmingham	137	6.5	178	8
Cardiff	61	3	80	4
Leeds	221	10.5	238	11
Manchester	215	10	212	10
Sub-total outside London	634	30	708	33

Figure 1 shows that 4% of all civil judicial review claims are now issued in Cardiff, however it should be noted that approximately half of these claims originate from outside Wales, with 42% pertaining to the South West of England. On the other hand approximately 35% of claims originating in Wales were listed outside Cardiff in the second year post regionalisation (1 May 2010 to 30 April 2011), most of these claims were issued in London with 3-5 North Wales claims issued in Manchester.

**Figure 2: Civil judicial review claims per 1000 residents**

Region	Claims per 1000 residents - 1 May 2009 to 30 April 2010	Claims per 1000 residents – 1 May 2010 to 30 April 2011
Midlands (Birmingham claims)	0.015	0.019
Wales (Cardiff claims)	0.021	0.028
North East (Leeds claims)	0.029	0.032
North West (Manchester claims)	0.032	0.031
London and South of England (London claims)	0.058	0.056

Figure 2 shows that whilst claim rate per 1000 residents in Wales is half the claim rate in London and the South of England, claim rates in Wales have increased more than in any other region in the second year after the new Administrative Court Centres were opened. The figure for Wales is similar to the North East and North West, with the Midlands having the lowest rate of claim per 1000 residents.

**Figure 3: The main subject areas of judicial review claims by Centre 1 May 2009 to 30 April 2011 (excluding asylum and immigration)**

Subject	Location of issue											
	B'ham		Cardiff		Leeds		Manchester		London		Total	
	No	%	No	%	No	%	No	%	No	%	No	%
Community care	51	16	3	2	15	3	12	3	104	4	182	4



Homelessness	18	6	15	11	7	1.5	36	8	89	3	165	4
Housing	13	4	2	1	6	1	10	2	236	8	267	6
Prisons	47	15	7	5	262	57	192	45	489	17	997	24
Town and country planning	25	8	28	20	17	4	22	5	235	8	327	8

Figure 3 shows the main topics of civil judicial review (excluding asylum and immigration). What this shows is that the most prominent public law claims issued in Cardiff relate to homelessness and town and country planning. However, these figures must be treated with caution as they also include cases stemming from the South West of England that have been issued in Cardiff. On further analysis it appears, however, that homeless in particular, but also town and country planning do have a higher incidence among claims specifically relating to Wales when compared to London and some other English regions.

**Figure 4: Asylum and immigration judicial review claims**

Administrative Court Centre	1 May 2009 to 30 April 2010		1 May 2010 to 30 April 2011	
	No	%	No	%
Birmingham	334	4	517	6
Cardiff	59	0.8	69	0.9
Leeds	154	2	244	3
Manchester	186	2	284	3.5
Sub-total outside London	733	8.8	1114	13.4
London	6,894	91.2	6,983	86.6

Figure 4 refers specifically to the location of issue of asylum and immigration claims and the proportion issued in Cardiff is clearly very small. In part this is due to the low proportion of foreign born residents living in Wales, nevertheless rates of claim are still lower than is to be expected given immigrant and asylum seeker populations. Unlike with ordinary civil judicial review the vast majority of these claims do originate in Wales, not in the South West of England.

**Figure 5: Asylum and immigration claims per 1000 residents**

Region	Claims per 1000 residents - 1 May 2009 to 30 April 2010	Claims per 1000 residents – 1 May 2010 to 30 April 2011
Midlands (Birmingham claims)	0.035	0.055
Wales (Cardiff claims)	0.020	0.024
North East (Leeds claims)	0.020	0.032
North West (Manchester claims)	0.027	0.042
London and South of England (London claims)	0.268	0.272

Figure 5 shows that Wales has the lowest rates of claim per 1000 residents with respect to asylum and immigration judicial review, this is partly a function of the small asylum seeker and immigrant population, however, the current research also found a lack of specialist legal service

providers in this field. 95% of asylum and immigration claims issued in Cardiff involved just one firm of solicitors.

## 2. *Ordinary civil judicial review claims, location and type of claimant*

The remainder of this Annex focuses on ordinary civil judicial review claims which make up the main caseload in Wales, further data with regard to asylum and immigration claims is available if required.

**Figure 6: Ordinary civil judicial review claims by claimant location where claimant address available<sup>1</sup>**

Claimant location	1 May 2007 – 30 April 2008		1 May 2008 – 30 April 2009		1 May 2009 – 30 April 2010		1 May 2010 – 30 April 2011	
	No.	%	No.	%	No.	%	No.	%
North West	35	6	70	8	65	9	69	8
North East	48	8	62	7	100	14	83	10
Midlands	51	8	82	10	123	17	124	14
Wales	25	4	28	3	31	4	42	5
Sub Total Four locations with new Admin Court Centres	<b>26%</b>		<b>28%</b>		<b>44%</b>		<b>37%</b>	
South West	55	8	82	10	62	8	67	8
South East	112	18	167	20	117	15	137	15
London	296	48	361	42	244	33	351	40

Figure 6 clearly shows that in cases where the claimant's address is available (which constitute 36% of all ordinary civil judicial review claims over the period of research) the number and proportion of claims issued by litigants outside London and the South of England has increased substantially in the two years after the new Administrative Court Centres were opened.

**Figure 7: Litigants in person ordinary civil judicial review applications**

Location	1 May 2007 – 30 April 2008	1 May 2008 – 30 April 2009	1 May 2009 – 30 April 2010	1 May 2010 – 30 April 2011
North West	20	24	37	31
North East	28	28	47	52
Midlands	30	30	47	49

<sup>1</sup> The claimant's address is generally only recorded where the claimant personally issues the application, claimant's address was available in 36% of cases during the period of this research, in 58% of cases the claimant remained as an unrepresented litigant, in 42% of claims they went on to instruct legal advisers.

Wales	19	14	18	23
South East	67	64	68	91
South West	39	39	36	47
London	197	199	160	181
<b>Total</b>	<b>400</b>	<b>398</b>	<b>413</b>	<b>474</b>

Figure 7 looks specifically at those claimants who remain unrepresented throughout the progression of their claims. There has been a notable rise in the number of litigants in person from every location except London. This may be a reflection of the availability of legal aid funding outside the Greater London area. It may also be a sign of increased awareness among potential claimants.

### 3. *Legal advisers*

**Figure 8: Ordinary civil judicial review claims by solicitor's location**

Location	1 May 2007 – 30 April 2008		1 May 2008 – 30 April 2009		1 May 2009 – 30 April 2010		1 May 2010 – 30 April 2011	
	No.	%	No.	%	No.	%	No.	%
North West	208	14	149	11	167	11	128	9
North East	166	11	182	13	208	14	192	14
Midlands	198	14	132	9	189	13	152	11
Wales	30	2	28	2	37	2	31	2
Sub Total Four new regional Admin Court Centres	<b>41%</b>		<b>35%</b>		<b>40%</b>		<b>36%</b>	
South West	137	9	104	7	87	6	78	5
South East	122	9	118	9	127	9	106	8
London	601	41	696	49	678	45	717	51

Figure 8 examines the origin of claims by considering solicitor's addresses. What we find is that the number and proportion of claims involving solicitors based outside London and the South of England has either stayed the same, decreased or certainly has not increased as dramatically as claims from unrepresented litigants outside London and the South of England. Essentially it appears that whilst judicial review claims from outside London and the South of England are increasing, most of the increase is made up of litigants in person and not represented claimants. Even among represented claimants, a considerable number are still choosing to instruct solicitors from outside their own region, for example approximately 30% of Welsh claimants instruct solicitors based outside of Wales (predominantly solicitors based in London).

This Annex does not discuss the position of barristers in detail though further statistics are available if required. Essentially the research found that barristers outside London are taking on an increasing proportion of Administrative Court work. However, it still appears that London-based barristers are instructed to act for claimants in 40% of judicial review claims originating in Wales and London-based barristers are instructed to act for public body defendants in 50% of claims originating in Wales.