



**Law Commission**  
Reforming the law  
**Comisiwn y Gyfraith**  
Diwygio'r gyfraith

# Devolved Tribunals in Wales Report



Law Com No 403

# Devolved Tribunals in Wales Report

Presented to Senedd Cymru

8 December 2021



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# Glossary

**Adjudication Panel for Wales (“APW”):** APW hears cases relating to alleged breaches of authorities’ codes of conduct by members of Welsh county, county borough, community councils, fire and national park authorities.

**Administrative Justice and Tribunals Council (“AJTC”):** The AJTC was established by section 44 of the Tribunals, Courts and Enforcement Act 2007, with four main aims: to keep the overall administrative justice system and most tribunals and statutory inquiries under review; advise ministers on the development of the administrative justice system; put forward proposals for changes, and make proposals for research. The AJTC was the successor to the Council on Tribunals.

**Agricultural Land Tribunal for Wales (“ALTW”):** ALTW hears both disputes between agricultural landlords and tenants and drainage disputes.

**‘AJTC Review of Tribunals Operating in Wales’ (“2010 Report”):** This report was published in 2010 by the Administrative Justice and Tribunals Council’s Welsh Committee. It provided a comprehensive overview of the effectiveness of devolved tribunals operating in Wales and made recommendations for reform.

**Appeal Tribunal for Wales:** In Chapter 4 of the Report we recommend the creation of a new appellate tribunal to hear cases from the First-tier Tribunal for Wales. We call this appellate tribunal the Appeal Tribunal for Wales.

**‘CAJTW Administrative Justice, A Cornerstone of Social Justice in Wales’ (“2016 Report”):** In 2016, the Committee for Administrative Justice and Tribunals, Wales published a report commissioned by the Welsh Government, titled “A Cornerstone of Social Justice in Wales”. It includes an overview of administrative justice in Wales, as well as providing an insight into the developments within the devolved tribunals in Wales since 2010.

**Committee for Administrative Justice and Tribunals Wales (“CAJTW”):** The CAJTW was established by the Welsh Ministers in 2013, as a successor committee to the AJTC. Its role was to act as a guardian of the public interest with regard to administrative justice in Wales, to provide expert advice and seek to ensure that the needs of the user of the administrative justice system in Wales continued to be paramount. CAJTW ceased operations in 2016, when a final report was published (“the 2016 report”).

**Constitutional Reform Act 2005 (“the 2005 Act”):** The 2005 Act sought to reform parts of the judiciary, and schedule 14 of the 2005 Act contains a list of judicial office holders. Some of the members and judicial leads of the devolved tribunals in Wales are listed in schedule 14.

**Cross-ticketing:** This is the practice of permitting a judge appointed to one judicial body to sit in another judicial body, usually with the agreement of a more senior judge. “Cross-ticketing” was originally used in the TCEA 2007 structure to mean giving a judge the ability to sit in different jurisdictions within a single chamber, but is now used more

broadly. Cross-assignment under the TCEA 2007 structure meant allowing the judge to sit in a different chamber. The Wales Act 2017 refers to cross-deployment, meaning (a) the ability of a member of one section 59 tribunal to sit in another, and (b) the ability of judges of the section 59 tribunals to sit in the FTT (and for the reverse; for judges of the FTT to sit in a section 59 tribunal).

**Devolved tribunal:** Schedule 7A para 9(2) of the Government of Wales Act 2006 defines a devolved tribunal as a tribunal, all of whose functions (a) are only exercisable in relation to Wales, and (b) do not relate to reserved matters. We use “devolved tribunal in Wales” where necessary to differentiate those tribunals from devolved tribunals elsewhere in the United Kingdom.

**Education Tribunal for Wales (“ETW”):** The ETW hears appeals against the decisions made by a local authority about the education of children and young people with additional learning needs. Until 31 August 2020, it was known as the Special Educational Needs Tribunal for Wales.

**First-tier Tribunal (“FTT”):** The first level of the unified tribunal structure created by the TCEA 2007.

**First-tier Tribunal for Wales (“FTTW”):** In Chapter 3 of the Report we recommend that the section 59 tribunals and the Valuation Tribunal for Wales should be subsumed into a new unified first-tier tribunal, called the First-tier Tribunal for Wales.

**Her Majesty’s Court and Tribunal Service (“HMCTS”):** HMCTS is responsible for the administration of criminal, civil and family courts and tribunals in England and Wales. It is an executive agency sponsored by the Ministry of Justice.

**Independent appeal panel:** A collective term used to refer to school admission appeals panels and school exclusion appeals panels.

**Judicial Appointments and Conduct Ombudsman (“JACO”):** JACO is responsible for investigating the handling of complaints about both judicial appointments processes and judicial discipline or conduct.

**Judicial Appointments Commission (“JAC”):** JAC is an independent statutory body that selects candidates for judicial office in courts and tribunals in England and Wales.

**Judicial College:** The Senior President of Tribunals is responsible for making arrangements for training members and judges of those tribunals that fall within the scope of TCEA 2007. This training is conducted by the Judicial College.

**Judicial Conduct Investigations Office (“JCIO”):** The JCIO is an independent office which supports the Lord Chancellor and Lord Chief Justice in considering complaints about the personal conduct of judicial office holders.

**Judicial lead:** The most senior judge of a tribunal usually referred to as President or, less commonly, Chairperson of a tribunal.

**‘Justice in Wales for the People of Wales’:** The Commission on Justice in Wales (“the Thomas Commission”), chaired by Lord Thomas of Cwmgïedd, undertook a

comprehensive review of the operation of the justice system in Wales. It published its report in October 2019.

**Leggatt Review/Report:** Sir Andrew Leggatt was commissioned to review the then system of tribunals in 2000. The review led to the report “Tribunals for Users; One System, One Service: Report of the Review of Tribunals” in March 2001. The Report eventually formed part of the basis of the reforms enacted by the Tribunals, Courts and Enforcement Act 2007. It did not make recommendations in relation to the devolved tribunals in Wales.

**Lord Chancellor:** The Lord Chancellor is a UK Cabinet Minister (and, until the Constitutional Reform Act 2005, was also a judge). The role is usually combined with that of Secretary of State for Justice.

**Lord Chief Justice:** The Lord Chief Justice of England and Wales is both the Head of the Judiciary of England and Wales and the President of the Courts of England and Wales.

**The Mental Health Review Tribunal for Wales (“MHRTW”):** MHRTW hears applications by and in respect of persons detained under the Mental Health Act 1983, as amended by the Mental Health Act 2007.

**Northern Ireland Courts and Tribunals Service (“NICTS”):** The NICTS administers all of Northern Ireland’s courts and the majority of its tribunals. NICTS is an executive agency of the Department of Justice.

**President of Scottish Tribunals (“PST”):** The PST is appointed by the Lord President. The PST is the senior member of the Scottish tribunals (the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland). The head of the Scottish tribunals is the Lord President, who may delegate some responsibilities for the Scottish tribunals to the PST.

**President of Welsh Tribunals (“PWT”):** The office of the PWT was established by the Wales Act 2017. The President is the most senior judge within the system of devolved tribunals in Wales, and is responsible for the training, guidance and welfare of tribunals presidents and members, as well as representing the views of the devolved tribunals to the Senedd.

**Public Services Ombudsman for Wales (“PSOW”):** The PSOW’s office was established by the Public Services Ombudsman (Wales) Act 2005. The PSOW investigates complaints about public services and independent care providers in Wales, as well as allegations that members of local government bodies have breached their authority’s code of conduct.

**Registered Nursery Education Inspectors Appeal Tribunal (“RNEIAT”) and Registered Schools Inspectors Appeal Tribunal (“RSIAT”):** These are tribunals constituted in accordance with schedule 3 to the Education Act 2005 to hear appeals in relation to the registration of inspectors in Wales pursuant to section 25 of the Act.

**Residential Property Tribunal Wales (“RPTW”):** RPTW is an “umbrella” tribunal, comprising three different tribunals (each based in different pieces of underlying legislation); rent assessment committees, leasehold valuation tribunals and residential property tribunals.

**School admission appeal panels:** These panels hear appeals against decisions of admission authorities (most frequently local authorities) about allocation of school places. Section 94(5) of the School Standards and Framework Act 1998 makes admission authorities responsible for the administration of the panels.

**School exclusion appeal panels:** Established by the Education Act 2002, school exclusion appeal panels hear appeals against decisions of governing body discipline committees regarding permanent exclusions of pupils. The panels are administered by local authorities.

**Scottish Courts and Tribunals Service (“SCTS”):** The SCTS provides administrative support to Scottish courts and tribunals. It is a body corporate and non-ministerial department, established in April 2015 under the Judiciary and Courts (Scotland) Act 2008.

**The section 59 tribunals:** The tribunals listed in section 59(1) of the Wales Act 2017 (and referred to as “Welsh tribunals” within that Act). They are subject to the supervision of the PWT and administered by the WTU.

**Senedd:** The Senedd is the democratically elected body which makes legislation for Wales (within certain subject areas). It is known both as the Welsh Parliament and the Senedd Cymru. In this report we refer to it by its commonly used Welsh name, the Senedd.

**Senior President of Tribunals (“SPT”):** The office of the Senior President of Tribunals was created by the Tribunals, Courts and Enforcement Act 2007. The President’s duties include ensuring the tribunals are accessible and fair, and that members of the tribunals have the necessary knowledge to allow them to dispose of cases. The SPT presides over both the FTT and the UT.

**Special Educational Needs Tribunal for Wales (“SENTW”):** SENTW hears appeals from children, their parents or young people, against the decisions made by a local authority about their education. SENTW was renamed the Education Tribunal for Wales on 1 September 2021.

**Tribunal members:** In the context of this consultation paper, a tribunal member means all those sitting on a tribunal panel (legal and lay) apart from the judicial lead.

**Tribunal Procedure Committee:** The Tribunal Procedure Committee makes rules governing the practice and procedure in the FTT and the UT.

**Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”):** The TCEA 2007 created a new unified structure for tribunals, made up of the FTT and the UT.

**Upper Tribunal (“UT”):** The second level of the unified tribunal structure created by the TCEA 2007. It hears appeals against decisions of the FTT, amongst other claims.

**Valuation Tribunal for Wales (“VTW”):** The VTW predominantly hears appeals relating to non-domestic rating and council tax valuations. The VTW is not included in the list of tribunals in section 59(1) of the Wales Act 2017.

**Wales Act 2017 (“the 2017 Act”):** The Wales Act 2017 made changes to the Welsh devolution settlement. Importantly for this project, section 59(1) lists the devolved tribunals in Wales that fall under the supervision of the PWT.

**Welsh Language Tribunal (“WLT”):** WLT hears appeals against the Welsh Language Commissioner’s decisions in relation to the Welsh Language Standards.

**Welsh Tribunals Unit (“WTU”):** The Welsh Tribunals Unit is a unit of the Welsh Government. It is responsible for the administration of those tribunals listed by section 59(1) of the Wales Act.





# Chapter 1: Introduction

- 1.1 The devolved tribunals in Wales evolved haphazardly. Most were created at various points in the 20th century, as thinking about tribunals and their relationship with Government was evolving. They were also created before devolution. As a result their processes and procedural rules vary significantly, and there are gaps and inconsistencies.
- 1.2 The tribunals have a limited relationship with each other. Since 2017 most have come under the supervision of the President of Welsh Tribunals, and are administered by the same unit of Welsh Government (the Welsh Tribunals Unit, or “WTU”). But fundamentally they are independent bodies, each with their own underlying legislation. At present, it is difficult to call them a “system”.
- 1.3 This report makes recommendations to remedy the gaps and inconsistencies. More importantly, our recommendations are designed to create a structure for the devolved tribunals which will help keep them up to date and ensure that they can respond flexibly to future needs of tribunal justice. We hope that in due course our recommendations will be enacted in a Tribunals (Wales) Bill.

## THE ORIGINS OF THIS PROJECT

- 1.4 The Law Commission’s 13th programme of law reform anticipated that the Law Commission would undertake work involving devolved Welsh law, but did not identify a particular area of law. Following discussions, the Commission and the Welsh Government agreed that Devolved Tribunals in Wales would be that project.
- 1.5 The First Minister, Mark Drakeford MS, made a written statement to the Senedd in August 2020 announcing that the project had commenced.<sup>1</sup> He made a further statement in December 2020 announcing that the Consultation Paper had been published.<sup>2</sup>

## OUR TERMS OF REFERENCE

- 1.6 We have been asked to consider matters relating to a new Tribunals Bill for Wales, designed to regulate the operation of a single system of tribunals in Wales. The Welsh Government has already consulted on plans to include the regulation of tribunals within a Public Administration Code for Wales. Our Memorandum of Understanding with the Welsh Government records that our review includes issues such as:

- (1) the scope of a tribunals system for Wales;

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<sup>1</sup> Welsh Government, Written Statement: Law Commission Project: Devolved Tribunals in Wales, (August 2020). See <https://gov.wales/written-statement-law-commission-project-devolved-tribunals-wales>. (All hyperlinks were last visited on 1 December 2021).

<sup>2</sup> Welsh Government, Written Statement: Law Commission Project: Devolved Tribunals in Wales, (August 2020). See <https://gov.wales/written-statement-law-commission-project-devolved-tribunals-wales>

- (2) the roles of the President of Welsh Tribunals and the Welsh Tribunals Unit;
  - (3) appointment and discipline of tribunal judges and other members;
  - (4) appointment of Presidents and Deputies;
  - (5) the power to make and standardise procedural rules;
  - (6) appeals processes;
  - (7) complaints processes; and
  - (8) protecting judicial independence.
- 1.7 The Memorandum of Understanding does not specify the tribunals that fall within the remit of the project. Identifying these has not been entirely straightforward. We consulted on our approach to this question, and set out the results of that consultation in Chapter 2.
- 1.8 Obvious candidates for inclusion were the “Welsh tribunals” listed in section 59(1) of the Wales Act 2017 (“the 2017 Act”). These are:
- (1) the Agricultural Land Tribunal for Wales (“ALTW”);
  - (2) the Mental Health Review Tribunal for Wales (“MHRTW”);
  - (3) the Residential Property Tribunal for Wales (“RPTW”);<sup>3</sup>
  - (4) the Special Educational Needs Tribunal for Wales (“SENTW”) (now renamed the Educational Tribunal for Wales, or “ETW”);<sup>4</sup>
  - (5) a tribunal constituted in accordance with Schedule 3 to the Education Act 2005 (registration of inspectors in Wales);<sup>5</sup>
  - (6) a tribunal drawn from the Adjudication Panel for Wales (“APW”); and
  - (7) the Welsh Language Tribunal (“WLT”).
- 1.9 In addition to these “section 59 tribunals”, we took the provisional view in the Consultation Paper that any tribunal which met the Government of Wales Act 2006 definition of a “devolved tribunal” should fall within the scope of the project. In Chapter 2 of both the Consultation Paper and this report we apply this test to bodies which

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<sup>3</sup> Defined by section 59(1) of the Wales Act 2017 as 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)”.

<sup>4</sup> Additional Learning Needs and Education Tribunal (Wales) Act 2018 (Commencement No 2) Order 2021 No 373, reg 8(h); the Special Educational Needs Tribunal for Wales was renamed on 1 September 2021.

<sup>5</sup> There are two tribunals constituted pursuant to these provisions. These are the Registered School Inspectors Appeal Tribunal and the Registered Nursery Inspectors Appeal Tribunal. Appeals to these tribunals are very rare; there have been none in recent years. Their functions may be performed by members of the ETW.

could be classified as tribunals. We have concluded that, in addition to the section 59 tribunals, the scope of the project includes the Valuation Tribunal for Wales (“VTW”), which determines appeals against council tax and non-domestic rating decisions, school exclusion and admission appeal panels set up in Wales pursuant to the School Standards and Framework Act 1998 and Education Act 2002 and appeal panels set up by Social Care Wales under the Regulation and Inspection of Social Care (Wales) Act 2016.

- 1.10 Our approach throughout this project has been to focus on the existing tribunals, and the overarching structures which govern them. It has not been possible to review the administrative justice landscape in Wales and form views on whether there is a need for additional tribunals or jurisdictions. Instead, we have focused on making recommendations which will improve the operation of the existing tribunals, while creating a resilient, flexible structure which is capable of evolving over time. Our recommendation in Chapter 3 for a new unified tribunal would make it easier to create additional chambers, without having to reinvent processes for matters such as appointments, discipline and procedural rules.

## **DEVELOPMENT OF THE DEVOLVED TRIBUNALS**

- 1.11 To understand the current pattern of devolved tribunals in Wales, it is helpful to understand how they developed. In this section we give a brief overview of the development of the existing devolved tribunals system, including previous recommendations for reform. The focus of the section is on the “section 59 tribunals”. We do, however, touch on the other tribunals that in our view fall within the scope of the project.

### **The devolved tribunal system**

- 1.12 Most of the section 59 tribunals were established during the 20th century, as part of a wider network of tribunals across England and Wales. Even prior to devolution, several of the tribunals operated on a regional basis, and had a dedicated Welsh component. For example, the successor to the Mental Health Act 1959, the Mental Health Act 1983, provided for a mental health review tribunal for Wales, as well as other regional tribunals (one for each regional health authority) in England. Other examples include the ETW and the VTW (which was previously part of a wider regional network of valuation tribunals).<sup>6</sup> The most recently created of the section 59 tribunals is the Welsh Language Tribunal, established in 2015.
- 1.13 As Dr Huw Pritchard notes, the responsibility for administering most of the devolved tribunals (with the exception of the APW and the WLT, which did not yet exist) was devolved when the Wales Act 1998 came into force:

Executive functions over 18 devolved fields, listed in Schedule 2 of the [Government of Wales] Act [1998], were transferred to the National Assembly for Wales. Powers over administrative tribunals within those fields were also devolved. For example, [the National Assembly of Wales] (Transfer of Functions) Order in 1999 devolved

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<sup>6</sup> Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) p 43.

functions under the Rent Act 1977 which included responsibility for Rent Assessment Committees.<sup>7</sup>

- 1.14 The devolution of tribunals along with executive powers in particular fields occurred primarily because the tribunals were still seen as an adjunct of the executive, rather than part of the judiciary. One of the consequences of devolution was that already-devolved tribunals did not fall within the scope of the review of tribunals conducted by Sir Andrew Leggatt. That review reported in 2001, and led to the reforms subsequently enacted in the Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”).<sup>8</sup> The reforms replaced individual tribunals with a unified tribunal, made up of a First-tier Tribunal and an appellate Upper Tribunal, each divided into chambers.
- 1.15 As part of these reforms, English equivalents of the tribunals were abolished, and their functions were transferred to the First-tier Tribunal. With the exception of the WLT, all of the section 59 tribunals previously had an English equivalent or equivalents. The English equivalents of the Registered School Inspectors Appeal Tribunal and the Registered Nursery Education Inspectors Appeal Tribunal were abolished by the Education Act 2005 before the enactment of the TCEA 2007. The equivalents of the other tribunals were abolished and replaced by the First-tier Tribunal.
- 1.16 Other devolved tribunals retain an English equivalent. The clearest example is the Valuation Tribunal for England, which has not been absorbed into the First-tier Tribunal. Similarly, school exclusion and admission appeal panels continue to exist in England (though school exclusion appeal panels are now referred to as independent review panels, and they operate slightly differently). Appeal Panels relating to the registration of social workers in England are set up by Social Work England.<sup>9</sup>
- 1.17 Subsequently to the Leggatt Report, executive functions were transferred from the National Assembly to the Welsh Assembly Government by the Government of Wales Act 2006 (“the 2006 Act”). In 2010, when the Administrative Justice and Tribunals Council, Welsh Committee (“the AJTC Welsh Committee”) published its review of tribunals operating in Wales (discussed in greater detail below), the devolved tribunals were administered by various Welsh Assembly Government departments.<sup>10</sup>
- 1.18 From 2010 onwards, some of these tribunals came to be administered by the Administrative Justice and Tribunals Unit (“the AJTU”) which was part of the Welsh Government (discussed in further detail at paragraphs 9.7 to 9.9 of our Consultation Paper). That unit was later renamed the WTU, which still administers the section 59 tribunals.

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<sup>7</sup> H Pritchard, “Building a Welsh Jurisdiction Through Administrative Justice” (2017) in *Administrative Justice in Wales and Comparative Perspectives*, p 225.

<sup>8</sup> Sir Andrew Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (March 2001). See <https://webarchive.nationalarchives.gov.uk/ukgwa/+/http://www.tribunals-review.org.uk/leggatthtml/leg-00.htm>.

<sup>9</sup> Social Work England was established under the Children and Social Work Act 2017, Schedule 3. The registration appeal panels constituted by Social Work England are provided by The Social Workers Regulations SI 2018 No 893, reg 19.

<sup>10</sup> Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) p 12.

1.19 The resulting situation is that the devolved tribunals have:

been established at different stages of devolution, meaning that their statutory basis and regulation is governed by multiple sources of United Kingdom, England and Wales, and Wales only primary and secondary legislation.<sup>11</sup>

### Previous reviews of the tribunal system in Wales

1.20 This section briefly summarises previous reviews of tribunals in Wales, and reviews of the wider justice system in Wales that included a discussion of the devolved tribunals. We draw on the recommendations made in those reviews in greater detail throughout the following chapters.

#### Review of tribunals operating in Wales (2010)

1.21 The Administrative Justice and Tribunals Council (“AJTC”) was a statutory body set up by the UK Government in 2008 and abolished in 2013. It had a broad responsibility for administrative justice. In its 2010 report the AJTC’s Welsh Committee reviewed the operation of tribunals in Wales. The review covered those bodies listed in the Administrative Justice and Tribunals Council (Listed Tribunals) (Wales) Order 2007,<sup>12</sup> together with the MHRTW, the ALTW and the Traffic Penalty Tribunal (when conducting hearings in Wales).

1.22 The AJTC Welsh Committee noted the ad hoc way in which the devolved tribunal system had developed and criticised the lack of independence between tribunals and Welsh Government departments responsible for administering them. It articulated a set of principles by which the devolved tribunals could be evaluated, which are set out in more detail below at paragraph 1.39.

1.23 The report made a number of recommendations, including for the establishment of a focal point for administrative justice (ideally within the Department for the First Minister and Cabinet) and the amalgamation of tribunals. The AJTC Welsh Committee also recommended that common principles be established in order to ensure greater coherence between the tribunals, including consistent rights of appeal and complaints procedures.

1.24 The 2010 review’s recommendation for a “focal point” for administrative justice led to the creation in March 2010 of the AJTU, referred to in paragraph 1.18 above.

#### Review of devolved tribunals operating in Wales (2014)

1.25 In 2014 the Welsh Government carried out a review of the progress made in implementing the recommendations made by the AJTC Welsh Committee in its 2010 report.

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<sup>11</sup> S Nason and H Pritchard, “Administrative Justice and the Legacy of Executive Devolution: Establishing a Tribunals System for Wales” (2020) 26 *Australian Journal of Administrative Law* 233.

<sup>12</sup> The Order listed the tribunals in Wales supervised by the AJTC. It is now repealed but included rent assessment committees, the Special Educational Needs Tribunal for Wales, tribunals drawn from the Adjudication Panel for Wales, the Registered School Inspectors Appeal Panel and Registered Inspectors of Nursery Education Appeal Panel, school admission and exclusion appeal panels, the Valuation Tribunal for Wales and a number of the other bodies discussed in Chapter 2.

- 1.26 The report noted that although the AJTU had been established as a “single focal point” for administrative justice and tribunals, there were a number of significant issues the AJTU was unable to address. These included issues relating to judicial resources, conduct and leadership within the Welsh Tribunals, appointments and training of tribunal members.
- 1.27 Echoing recommendations made by the AJTC Welsh Committee, the report recommended that a consistent and unified approach should be developed across the devolved Welsh tribunals in areas such as complaints processes, training, appeals and appointments. The report also recommended the creation of a Senior President of Welsh Tribunals, to oversee the devolved tribunals and the transfer of policy functions of the AJTU to the Justice Policy Team within the Welsh Government. The policy functions of the AJTU were transferred to the Justice Policy Team in late 2014, and the AJTU was renamed the Welsh Tribunals Unit.

### Administrative justice: a cornerstone of social justice in Wales (2016)

- 1.28 In 2016 the Committee for Administrative Justice and Tribunals Wales, the successor to the AJTC Welsh Committee, published a report on the administrative justice landscape in Wales. The Committee, like the 2014 Welsh Government review, recommended there should be a senior judicial lead for devolved tribunals and a standardised procedure for appointments.<sup>13</sup>
- 1.29 This issue was addressed by the Wales Act 2017, which created the role of President of Welsh Tribunals (“PWT”).<sup>14</sup> We discuss the role of the PWT in further detail in Chapter 5.
- 1.30 Another problem identified by the 2016 Report was the “only partial existence of formal agreements between the Welsh Government and the Judicial Office, Judicial Appointments Commission, the Judicial College and Judicial Conduct Investigations Office”.<sup>15</sup> Again, progress has been made towards this. There is now a formal agreement in place with the Judicial Appointments Commission for those appointments for which the Welsh Ministers are responsible.
- 1.31 As a result of the reviews outlined above, some steps have been taken towards bringing the devolved tribunals together. However, as noted by Dr Huw Pritchard, while this has brought “some degree of coherence”, “it remains difficult to conclude that the devolved tribunals actually constitute a ‘system’”.<sup>16</sup>
- 1.32 This project builds on this previous work. As noted at 1.6 above, our terms of reference include matters relating to a new Tribunals Bill for Wales, designed to regulate the operation of a single system of tribunals in Wales.

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<sup>13</sup> Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) para 31.

<sup>14</sup> Wales Act 2017, s 60.

<sup>15</sup> Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) para 24.

<sup>16</sup> H Pritchard, “Building a Welsh jurisdiction through administrative justice” in *Administrative Justice in Wales and Comparative Perspectives*, S Nason (ed) (2017) p 229. For further detail see paras 3.52 to 3.56 below.

## The Welsh Tribunals under the Wales Act 2017

- 1.33 The most significant changes to the devolved tribunals since 1998 were made by the Wales Act 2017. As well as making significant amendments to the devolution settlement, it established the office of the PWT with a supervisory role in relation to the “Welsh tribunals” listed in section 59 of the Act; we generally refer to these tribunals as “section 59 tribunals”, to avoid confusion with other tribunals operating in Wales. The PWT is responsible for the section 59 tribunals only, with a combination of “inward-facing” duties (including welfare of members, training, and ensuring tribunals are accessible) and “outward-facing” duties (to represent the section 59 tribunals to the Welsh Government and Senedd).
- 1.34 The 2017 Act also introduced “cross-deployment” across the section 59 tribunals (often referred to as “cross-ticketing”). This enables a member of one of the tribunals to sit as a member of another, at the request of the judicial lead of the second tribunal and with the approval of the PWT.<sup>17</sup> The 2017 Act also permits members of section 59 tribunals to sit in the First-tier Tribunal, and members and judges of the First-tier Tribunal to sit in the section 59 tribunals.<sup>18</sup>
- 1.35 The list of tribunals in section 59 of the 2017 Act contains the tribunals that were already administered by the Welsh Government. It does not include the VTW, school admission and exclusion appeal panels or Social Care Wales appeal panels, all of which we consider fall within the definition of a “devolved tribunal” and fall within the scope of this project.<sup>19</sup>

## Justice in Wales for the people of Wales (2019)

- 1.36 The Commission on Justice in Wales conducted a wide-ranging review of the justice system in Wales and made recommendations for its long-term future. The Commission made recommendations across a number of areas including access to justice, criminal justice, family justice, civil and administrative justice and the Welsh language.
- 1.37 In relation to tribunals, the Commission recommended that the PWT should be responsible for supervising all public bodies, ombudsmen or other tribunals established under Welsh law or by the Welsh Government. Moreover, the Commission recommended that the WTU should have structural independence from the Welsh Government and that devolved tribunals should be used for dispute resolution relating to future Welsh legislation.<sup>20</sup>
- 1.38 Partly in response to the Commission’s proposals the Fifth Senedd’s Legislation, Justice and Constitution Committee conducted an inquiry into the operation of justice functions and how the justice system could operate more effectively in Wales. It

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<sup>17</sup> Wales Act 2017, s 62. The legislation uses a variety of terminology to refer to the presiding members of the tribunals; we generally use the expression “judicial leads”.

<sup>18</sup> Wales Act 2017, s 63.

<sup>19</sup> See paras 2.17 to 2.30. and 2.31, and 2.34 to 2.36 below.

<sup>20</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) paras 6.50 and 6.59.2.



published a Legacy Report in March 2021.<sup>21</sup> The Welsh Government is also currently considering the implementation of parts of the Commission's proposals.

## PRINCIPLES INFORMING OUR ANALYSIS

1.39 When preparing our Consultation Paper, and later when analysing responses to it, we have found it helpful to refer to the "Principles for Welsh tribunals" prepared as part of the AJTC Welsh Committee's 2010 Report.<sup>22</sup> These were as follows.

- (1) **Independence and impartiality.** The 2010 report stressed that "tribunals should be independent and impartial, and perceived as such". That meant that tribunal members also needed to be independent, and that "the procedures for their appointment should be fair, open and based on merit". Our terms of reference also explicitly direct us to consider the independence of the judiciary.
- (2) **Tribunals should be designed and organised with regard to the needs of the citizen.** The 2010 report went into some detail about how this could be accomplished. Of particular importance to this review were the principles that "users must be provided with information about tribunal processes and procedures", and that those procedures should be informal and enabling.
- (3) **Efficiency and effectiveness.** Again, the 2010 Report gives a number of ways in which this principle can be achieved. This includes having clear judicial leadership and structure of tribunals.
- (4) **Coherence.** This was the last principle set out by the 2010 report. It suggested that "tribunals should have a coherent structure" and that "there should be a common framework or principles to guide the establishment of new tribunals". It also recommended that there should be "appropriate and consistent avenues for appeal or review of tribunal decisions".

## CONSULTATION EVENTS

1.40 Our consultation ran from 16 December 2020 to 31 March 2021. During that period, we attended (remotely) a number of events and meetings in order to listen to responses to the questions raised in the Consultation Paper. Appendix 2 to this report lists the events and meetings we attended during this period.

1.41 Nicholas Paines QC, Commissioner for Public Law and the Law in Wales, gave evidence to the Fifth Senedd's Legislation, Justice and Constitution Committee on 22 February 2021. This evidence session formed part of the Committee's inquiry into "Making justice work in Wales".<sup>23</sup>

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<sup>21</sup> Legislation, Justice and Constitution Committee, *Fifth Senedd Legacy Report* (March 2021) pp 55 to 62 <https://senedd.wales/media/eccmngfv/cr-ld14319-e.pdf>

<sup>22</sup> Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) pp 24 and 25.

<sup>23</sup> The transcript and a video recording of that evidence session may be found on the Senedd's website: <https://business.senedd.wales/ieListDocuments.aspx?CId=434&MIId=11065&Ver=4>

## CONSULTATION RESPONSES

1.42 In total we received 42 responses to our consultation. These responses (with the exception of those marked “confidential”) are available on the Law Commission website. They are produced in the form and in the language in which they were submitted.

## OVERVIEW OF OUR REPORT AND RECOMMENDATIONS

1.43 The report is divided into nine further chapters, broadly corresponding to the terms of reference of the project.

- (1) Chapter 2 addresses some of the background concepts to this project. We consider what is meant by “tribunal”, and which bodies should form part of this review. We also consider how the devolution framework affects this project. We set out our conclusion (referred to above) on which bodies in Wales are devolved tribunals.
- (2) Chapter 3 considers the structure of the tribunal system at the first-tier level. Most significantly we recommend that the existing section 59 tribunals should be replaced by a unified First-tier Tribunal, divided into chambers. We also recommend that the Valuation Tribunal for Wales and the functions of school exclusion appeal panels should be brought within this structure, while school admission appeal panels and the appeal panels set up by Social Care Wales should not.
- (3) Chapter 4 considers onward appeals from the devolved tribunals. It explores whether the appeal routes should be the same from each tribunal, and where appeals should be heard. After evaluating the benefits of the High Court and the existing Upper Tribunal as appellate bodies for the devolved tribunals, it concludes that the best long-term option for the system of devolved tribunals would be the creation of an Appeal Tribunal for Wales. We also recommend the creation of a new right of appeal on a point of law from school admission appeal panels to the ETW, and in due course to an education chamber of the unified First-tier Tribunal.
- (4) Chapter 5 looks specifically at the role of President of the Welsh Tribunals (a topic which is developed further in later chapters on appointments and discipline). We recommend that the President should be entitled to sit as a judge in the First-tier Tribunal for Wales and the Appeal Tribunal for Wales. We also consider what role the President could have in relation to the supervision of school admission appeal panels.
- (5) Chapter 6 considers how the procedural rules of the devolved tribunals are made, and to what extent they should be standardised. We recommend the creation of a Tribunals Procedure Committee, to be responsible for the state of the procedural rules of both the First-tier Tribunal for Wales and the Appeal Tribunal for Wales.
- (6) Chapter 7 looks at the varied approach taken to appointments to the devolved tribunals (of both judicial leads and various different types of members), and

considers what principles should underpin a reform system. We recommend that members of the First-tier Tribunal for Wales should be made by the PWT, while appointments of Presidents of chambers of that tribunal should be made by the PWT and Welsh Ministers. We also consider how members should be selected, and the role of the Judicial Appointments Commission.

- (7) Chapter 8 addresses the question of judicial discipline. Who should be responsible for disciplining Presidents and other members of the First-tier Tribunal for Wales, and what kind of process should be adopted? We also make recommendations about complaints processes within the devolved tribunals, and how these could be improved.
- (8) Chapter 9 considers the question of tribunals administration, and how that should be organised to be structurally independent of Welsh Government. We recommend the replacement of the WTU and administrative support function of the VTW with a new non-ministerial department, a Tribunals Service for Wales.
- (9) Finally, Chapter 10 reflects on the principle of judicial independence and how it can be protected within the devolved tribunals. We recommend that Welsh Ministers and others responsible for the administration of justice in Wales be made subject to a statutory duty to respect the independence of the devolved tribunals and that Presidents and other members of tribunals should take the judicial oath.

## **SCHOOL ADMISSION APPEAL PANELS**

- 1.44 One of the outlier tribunals in this project has been the school admission appeal panels. While, for the reasons given in Chapter 2, we believe that they are correctly categorised as tribunals, they operate differently from many other devolved tribunals. Instead of forming one, national body (like the section 59 tribunals and the VTW), each admission authority is responsible for the running of its own panel. The panels are made up of lay members, advised by a clerk (who is provided by the admission authority).
- 1.45 In the Consultation Paper, we set out our provisional conclusion that these panels could be correctly categorised as tribunals. We did not however think that they should therefore be brought within a centralised system. Their high case load, concentrated at a particular point in the school year, and the importance of local knowledge on the part of panel members led us to propose that they should be left to be organised on a regional basis. The majority of respondents agreed; their responses are analysed in Chapter 3.
- 1.46 The Consultation Paper nonetheless went on to ask questions about some aspects of their operation that fell within our terms of reference. We had reservations about the degree of influence the admission authority has over the composition of the panels. We therefore asked questions about appointments to the panels (Chapter 7 of the Consultation Paper), and how panel members should be disciplined (Chapter 8 of the Consultation Paper). We explored whether they should be subject to the supervision of the President of Welsh Tribunals. Finally, we asked whether there should be a formal appeal route from the panels to the tribunals system.

- 1.47 We are persuaded that this last proposal was a sound one, and recommend in Chapter 4 that a new appeal route should be created. However, we only make one other recommendation about the operation of the panels: that the President of Welsh Tribunals should be consulted on any changes to the statutory guidance made available to the panels (Chapter 5). We have come to the conclusion, after analysing responses received in the consultation, that our terms of reference and the timeframe of the project do not enable us to make comprehensive and coherent recommendations about the method of operation of particular tribunals; we have taken the same approach in relation to the Valuation Tribunal for Wales, whose method of adjudication also differs from that of the section 59 tribunals.
- 1.48 As with the VTW, a thorough appraisal of the operation of school admission appeal panels would constitute a project in itself, raising difficult questions deserving of treatment in their own right (as was stressed to us in the consultation responses of Keith Bush QC and Huw Williams). The focus of this project has been to create a new system for tribunals in Wales and it has not been possible within its confines to give the admission appeal panels the attention that would be necessary before recommending their restructuring or other significant changes.
- 1.49 While we have concluded that the panels should not be assimilated into the tribunal system at present, there may be other ways in which some of the benefits of membership of a larger structure could be replicated. Some suggestions which have been put to us include a form of national consortium of panel members, which could help represent the panels to the outside world and coordinate the panels, ensuring they take a consistent approach. There may also be a case for a national pool of panel members, allowing some to be selected for local knowledge but others to be selected for their more general experience of education. We suggest that the Welsh Government keeps the position of the school admissions panels under review, including the possibility of amalgamating them into the new tribunal structure.

## **THE IMPACT ASSESSMENT**

- 1.50 We are publishing an impact assessment in relation to our recommendations, which will be available online alongside this Report. This includes an assessment of the expected impact of our recommendations on the Welsh language.

## **ACKNOWLEDGEMENTS**

- 1.51 We are grateful to all those who have shared their views with us during the consultation period following the publishing of our Consultation Paper in December 2020. A full list of respondents to the consultation can be found at Appendix 3.
- 1.52 The President of Welsh Tribunals, Sir Wyn Williams, the Welsh Government's Justice and Policy team, the staff of the Welsh Tribunals Unit and its head, Rhian Davies Rees, and the judicial leads of the devolved tribunals have all been generous in sharing their time and expertise. We are also grateful to the President and secretariat of the Education Tribunal for Wales, who allowed us to observe two hearings of the Special Educational Needs Tribunal for Wales (as it was then called) in November and December 2020.

- 1.53 We are also grateful for the assistance of members of the Law Commission's Wales Advisory Committee and of our devolved tribunals in Wales advisory group, which met on 1 October 2020 and on 8 June 2021. Those who attended the steering group meetings are listed at Appendix 1.

## **THE TEAM WORKING ON THE PROJECT**

- 1.54 The Commissioners would like to record their thanks to the following members of staff who worked on this Report: Henni Ouahes (team manager); Sarah Smith (lawyer in the public law and law in Wales team); and Awen Edwards and Tess McGovern (research assistants).

## Chapter 2: Devolved competence and devolved tribunals

- 2.1 In this Chapter of the Consultation Paper we considered some of the preliminary questions that confronted us when starting this project. What exactly is a tribunal? And how does any general definition apply to the devolved decision-making bodies that exist within Wales?
- 2.2 We asked whether readers agreed with the general definition we proposed, and with our application of it. We also analysed the devolutionary framework within which the project sits.
- 2.3 In this Chapter we discuss the responses we received to our consultation and set out our conclusion on the bodies that we regard as devolved tribunals for the purposes of the project.

### DEVOLVED TRIBUNALS

- 2.4 We provisionally adopted the definition of a devolved tribunal contained in paragraph 9(2) of Schedule 7A to the Government of Wales Act 2006: tribunals all of whose functions are exercisable only in relation to Wales and do not relate to reserved matters. This aspect of our proposals did not encounter any opposition. Applying the definition, however, requires a body to be identified as a tribunal.

#### The definition of a “tribunal”

- 2.5 Our Consultation Paper noted that any definition of a tribunal would have to be contextual: while it was relatively easy to distinguish a tribunal from a court, it was more difficult to distinguish tribunals from less formal means of adjudication. We provisionally concluded that the most useful test for the purposes of this project was whether a body adjudicated upon disputes between parties by making binding decisions.<sup>24</sup>
- 2.6 This definition attracted near unanimous support. Of the 28 consultees who responded to this question, all agreed apart from the Law Society of England and Wales who answered “other”. Dr Sarah Nason (senior lecturer in administrative law and jurisprudence at Bangor University) and Ann Sherlock (research fellow at Bangor University 2018-2020) called it a “sensible approach”. The Wales and Chester circuit thought it captured the “the fundamental defining characteristics of tribunals” and also “has the attraction of simplicity and clarity of outcome”.
- 2.7 The Law Society, however, considered that:

... a distinction should be drawn between decision-making bodies which adjudicate disputes by way of issuing binding determinations on legal grounds and those which adjudicate such disputes on factual grounds. School governing bodies, for example,

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<sup>24</sup> Consultation Paper, paras 2.52 to 2.55.

make decisions based on the facts of a case but do not interpret or apply the law in the same way as formal tribunals. Such characteristics highlight the need for reform of certain bodies which can be regarded as outliers in the overall landscape of the devolved tribunals as it stands before their incorporation into a single unified system.

- 2.8 Richard Payne, President of the Residential Property Tribunal for Wales (“RPTW”), also thought that our definition missed out some important criteria for tribunals. While agreeing in part, he added that:

... the make-up of the body of a tribunal, typically with a lawyer chair and then additional independent expertise and lay membership is as important as the simple power to make binding decisions. I am not sure if the question as posed, solely about function, should be asked in isolation and be determinative of what constitutes a tribunal.

### **Bodies falling within the scope of the project**

- 2.9 After identifying the criteria that we thought could be used to identify a devolved tribunal, Consultation Question 2 listed the decision-making bodies in Wales that we thought met this definition. Those were:

- (1) the tribunals listed in section 59 of the Wales Act 2017;
- (2) the Valuation Tribunal for Wales (“VTW”);
- (3) school admission appeal panels; and
- (4) school exclusion appeal panels.

- 2.10 Of the 31 consultees who responded to this question, 24 agreed, while five disagreed and two answered “other”. Unsurprisingly, no one disagreed that the tribunals listed in section 59 of the Wales Act 2017 should fall within the scope of our review.

- 2.11 Where there was disagreement, this centred on the status of the VTW and school admission and exclusion appeal panels. The Governing Council of the VTW agreed that the tribunal fell within the scope of the review. The Bar Council of England and Wales also agreed, saying that:

In addition to the Tribunals listed in section 59 of the Wales Act 2017, the Valuation Tribunal for Wales, school admission appeal panels and school exclusion appeal panels have the qualifying characteristics of being bodies which adjudicate disputes between parties by way of issuing binding determinations. They make decisions in relation to devolved matters. They qualify as devolved tribunals.

- 2.12 Others, however, thought that the local or regional nature of the VTW and school exclusion and admission appeal panels disqualified them from being categorised as “tribunals”. The Law Society thought that:

In the interest of procedural fairness and natural justice, we consider that the designation “tribunal” should solely apply to bodies which exercise functions on a national basis. School admission and exclusion appeal panels and the Valuation



Tribunal for Wales operate at a local/regional scale and should not, therefore, in our view be categorised as such.

2.13 The Mental Health Review Tribunal for Wales (“MHRTW”) also took this view, considering that “only bodies with a national coverage should be categorised as tribunals”. Pembrokeshire Council also stressed that the function of school admission panels is “delivered appropriately directly via Local Authorities who have the nexus between the school, parent/child and locality”.

2.14 Others focused not on the regional nature of exclusion and admission appeal panels but argued instead that the panels were less formal than tribunals. As Cardiff City Council put it:

... the school admission appeals panel and school exclusion appeal panel serve as a quasi legal forum. This ensures a structure is followed to comply with existing guidance and legislation but also panel members are able to ensure parents are at ease. The use of Tribunal as opposed to panel may be intimidating to parents and may deter appeals as the perception of a Tribunal is more formal and rigid.

2.15 Two respondents, Keith Bush QC (at the Welsh Governance Centre at Cardiff University) and Huw Williams (the Chief Legal Adviser to the Senedd, responding in his personal capacity) agreed that school admission and exclusion panels fell within the scope of the project but thought that they nonetheless required reform before they could be brought within any broader system of tribunals.

### **Additional bodies**

2.16 Richard Payne suggested two further bodies that might be considered as part of this review. His response is set out in full below.

One body that is not considered in the report and upon which I have sat in the past (but not recently) is a body to hear Pharmacy Appeals against the decisions of local health boards in Wales ... which were put together and funded by Welsh Ministers. They certainly had the feel of a tribunal with a lawyer chair, an expert pharmaceutical member and a lay member. Written decisions after an oral hearing would be made and a recommendation made to the Welsh Ministers. Thus, it would be the Welsh Ministers that would ultimately be the decision maker (but guided by the Panel) and the decisions of the Welsh Ministers would then be susceptible to judicial review. However, it seems to me that this body ought to be recognised as a tribunal and to make decisions that are binding and then subject to appeal as opposed to making references to the Welsh Ministers. I am uncertain of the current status of these bodies but if Pharmacy Appeals are still heard in this way then they should perhaps be looked at, as arguably, should Social Care Wales which as I understand is entirely funded by Welsh government and appears to meet the definition of tribunal and deals solely with matters in Wales.

2.17 We set out below more detail on the operation of these panels.



## Pharmacy appeals

- 2.18 In Wales, local health boards are required to prepare and maintain a “pharmaceutical list”: a list of providers that are entitled to supply NHS pharmaceutical services.<sup>25</sup> Those who wish to provide pharmaceutical services through the NHS, either by the provision of drugs or the provision of appliances, must apply to be on the list. They may appeal to the Welsh Ministers against a variety of decisions made by the local health board in relation to their inclusion on the list.<sup>26</sup> The Welsh Ministers may then arrange for an oral hearing, if they consider it to be necessary. If an oral hearing is held, the Welsh Ministers may appoint one or more persons to hear the appeal, and to then report back to them. The persons appointed may decide on the procedure to be followed at the hearing.<sup>27</sup> The Welsh Ministers are not bound by any recommendations arising from an oral hearing.<sup>28</sup>

## Social Care Wales panels

- 2.19 Social Care Wales, previously known as the Care Council for Wales, is a body corporate. Its statutory functions can be found in the Regulation and Inspection of Social Care (Wales) Act 2016. One of its duties is to keep a register of all social workers and social care workers in Wales.<sup>29</sup> If the registrar refuses to register an applicant or refuses to renew their registration, the applicant may appeal to the registration appeals panel, which is set up by Social Care Wales. An interim orders panel may decide whether to place an interim order on an application for registration if they decide there is a risk to the public, or it is in the public’s interest pending the outcome of an investigation. Finally, Social Care Wales also administers fitness to practise panels.<sup>30</sup>
- 2.20 Social Care Wales is responsible for making rules regarding the constitution of the panels, which are made up of three or five members. Members are either lay members (defined as a member of the general public who is not a social worker, or involved in social work) or social care members (a person who is a registered social worker or otherwise professionally involved in social care).<sup>31</sup> Appeals from the panels lie to the First-tier Tribunal (Care Standards), part of the Health, Education and Social Care Chamber.
- 2.21 Rules for the different types of hearings are made by Social Care Wales, although the Welsh Government may also publish guidance as to their content, including model

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<sup>25</sup> NHS (Wales) Act 2006, ss 83 and 84.

<sup>26</sup> The National Health Service (Pharmaceutical Services) (Wales) Regulations SI 2020 No 1073 (W 241). Reg 25 and sch 4.

<sup>27</sup> National Health Service (Pharmaceutical Services) (Wales) Regulations SI 2020 No 1073 (W 241), sch 4 para 2(2).

<sup>28</sup> National Health Service (Pharmaceutical Services) (Wales) Regulations SI 2020 No 1073 (W 241), sch 4 para 2(5).

<sup>29</sup> Regulation and Inspection of Social Care (Wales) Act 2016, s 80(2).

<sup>30</sup> Regulation and Inspection of Social Care (Wales) Act 2016, pt 8.

<sup>31</sup> Regulation and Inspection of Social Care (Wales) Act 2016, s 174(2), (4), (8) and (9), Social Care Wales (Constitution of Panels: Prescribed Persons) Regulations SI 2016 No 1099 (W 263) regs 3, 4 and 5 and schedules 1, 2 and 3, Social Care Wales (Constitution of Panels) Rules 2020 r 7.

rules.<sup>32</sup> It does not appear that the Welsh Government has published model rules; but if it did so, then Social Care Wales would be obliged to have regard to them.<sup>33</sup>

### **Bodies falling outside the scope of our project**

2.22 Consultation Question 3 listed a number of decision-making bodies or schemes that we provisionally concluded were not “devolved tribunals”. We provisionally considered that these fell outside the scope of the project for a variety of reasons: that they did not take binding decisions, but only made recommendations; that they did not follow an adjudicative process; or that their functions were not exercisable only in relation to Wales. The list of bodies we proposed to exclude was:

- (1) ombudsmen, including the Public Services Ombudsman for Wales;
- (2) the Planning Inspectorate;<sup>34</sup>
- (3) independent review of determinations panels in Wales;
- (4) the discretionary assistance fund for Wales;
- (5) the independent appeals process for farmers and forest owners;
- (6) continuing NHS healthcare review panels;
- (7) boards of medical referees under the firefighters’ pension and compensation schemes in Wales;
- (8) Forestry Committees for Wales;
- (9) the independent appeals process for farmers and landowners in Wales; and
- (10) the Traffic Penalty Tribunal.

2.23 Twenty three respondents replied to this consultation question, all but one of whom agreed that these bodies should fall outside the scope of our review. The respondent who disagreed did not give reasons for disagreeing. The Public Services Ombudsman for Wales (“PSOW”) agreed with the exclusion of the ombudsman from our review, providing the following comprehensive explanation:

My statutory powers are contained within the PSOW Act 2019. This newly enacted Senedd legislation is regarded as “best practice” both in the UK and internationally in terms of the appointment process for the ombudsman by the Senedd and the legislative powers in the Act.

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<sup>32</sup> The Social Care Wales (Proceedings before Panels) Regulations SI 2016 No 1100 (W 264) regs 13 and 26.

<sup>33</sup> The Social Care Wales (Proceedings before Panels) Regulations SI 2016 No 1100 (W 264) regs 13, 26 and 37.

<sup>34</sup> On 1 October 2021 the staff and functions of the Planning Inspectorate’s Wales Division transferred into Welsh Government’s separate, dedicated planning appeals service for Wales, known as Planning and Environment Decisions Wales.

Where I find evidence of maladministration which has caused injustice to an individual then I have the power to make recommendations to public bodies. Such recommendations are generally designed to:

- remedy that injustice to put the individual affected back into the position they would have been in had the failure not occurred, and
- to effect change in the public body's service delivery where any systemic failures have been found.

My recommendations are not binding and if a public body does not accept any of my recommendations, the Public Services Ombudsman Act 2019 ("PSOW Act 2019") provides a mechanism for a further reporting procedure to be instigated. This mechanism provides a system for democratic accountability if a public body does not comply with my recommendations.

My office provides citizens in Wales with an alternative to the Court and Tribunals system. I may not generally investigate complaints where a complainant has a remedy available to them in the courts or tribunal system. Also, the PSOW Act 2019 gives me wide discretion on how I consider complaints and what outcomes are appropriate when a person has suffered injustice as a consequence of maladministration or service failure by a public body.

My office does not adopt a legalistic approach in its handling of complaints. The processes and procedures I adopt are designed to be accessible to citizens in Wales, for example, the PSOW Act 2019 provides that I may take oral complaints from citizens who approach my office.

For these reasons and, as I do not make binding decisions on the public bodies which fall within my jurisdiction, I do not believe that my office's role and remit as set out in the PSOW Act 2019 performs the role of a devolved tribunal in Wales.

2.24 Huw Williams agreed with the proposed scope of our review, but noted that:

The notion of bringing the Planning Inspectorate within the Welsh Tribunals would bring with it the need to consider the desirability of the establishment of an Environmental Chamber ("A Welsh Environmental Court") which would be a fundamental change to the planning appeals system in Wales. I therefore agree that it falls outside the scope of the working definition for the purposes of this exercise – albeit that its time may come. That said the distinction is finely-balanced in practice as the vast majority of cases are delegated to planning inspectors for decision. Although in principle any case can be recalled by the Minister for them to determine only a small number of cases are actually recalled for Ministerial decision each year.

#### [Ad hoc redress schemes](#)

2.25 In Chapter 2 of the Consultation Paper we observed that the Committee on Administrative Justice and Tribunals had described various schemes set up by the Welsh Government as "ad hoc redress schemes" not having all the characteristics of a

tribunal.<sup>35</sup> One of these was the decision review process of the discretionary assistance fund. The Consultation Paper provisionally proposed excluding these from the scope of our review, on the basis that the process did not amount to adjudicating upon a dispute between parties.<sup>36</sup> While agreeing with this, Dr Sarah Nason and Huw Pritchard (lecturer in law at Cardiff University) contrasted the position in England and Scotland, and noted their concern that:

there is no clear route to adjudicated redress over matters of legal right in this context, and that there should be.

- 2.26 They cited concerns expressed previously by both the Committee on Administrative Justice and Tribunals in Wales and the Commission on Justice in Wales concerning the creation of ad hoc redress schemes.

## DISCUSSION

### The definition of a tribunal

- 2.27 We have carefully considered the various modifications of our proposed test suggested by respondents.<sup>37</sup> We do not consider that a workable distinction can be based on whether the body adjudicates on legal as opposed to factual grounds; the distinction between the two can be elusive.<sup>38</sup> Similarly, we do not think that it is essential to being a tribunal to have a particular composition, or element of legally qualified membership; a bench of lay magistrates is not required to include persons with legal qualifications, but it could not be suggested that it is not a court. We agree with Richard Payne that the composition of a tribunal is an important matter, but we consider that it lies outside the scope of this project to consider whether the composition of any of the tribunals should be reformed.
- 2.28 Similarly, we are not persuaded that procedural fairness or natural justice require a decision-making body to be organised on a national basis in order to be characterised as a tribunal. It is certainly true that very few tribunals are now organised on a local or regional basis; as tribunals across the UK have been rationalised, there has been a trend to consolidate them into national structures. But that has not always been the case. Both the mental health and valuation tribunals in England and Wales used to be organised regionally, and the Leggatt Report showed no hesitation in categorising them as tribunals. We also note that the Property Chamber of the First-tier Tribunal operates regionally.
- 2.29 Nor are we persuaded that a body that meets our criteria should not be characterised as a tribunal on the grounds that it is perceived as being less formal than a tribunal (with the consequence that school admission and exclusion appeal panels should fall out of the scope of our review). The tribunals that fall within our review operate with

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<sup>35</sup> Consultation Paper, para 2.51.

<sup>36</sup> Consultation Paper, paras 2.79 and 2.80.

<sup>37</sup> Paras 2.7, 2.8 and 2.10-2.15 above.

<sup>38</sup> For an illustration of this, see *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44. We think that an implicit part of the definition of a tribunal for our purposes is that it and its decision-making remit be established by law (as distinct, for example, from those of commercial arbitrators); we do not need to reach a final view on this, as no bodies that fail to meet those criteria were suggested to us for inclusion.

varying degrees of formality. While observing proceedings we have seen tribunals make great efforts to accommodate unrepresented applicants, ensuring that they understand the workings of the tribunal and assisting them to make their case as best as possible. The perception of “user-friendliness” is of course important from an access to justice point of view, and is relevant to designing the relationship between school admission and exclusion panels, and the tribunals structure as a whole. But we do not think it can dictate that the panels are not, in substance, tribunals.

- 2.30 Characterisation of bodies as tribunals does not necessarily mean that they should be treated in the same way. We consider the composition and design of a Welsh tribunal system in Chapter 3.

### **Our conclusion on which bodies in Wales are devolved tribunals**

- 2.31 We have accordingly concluded that the bodies listed at paragraph 2.9 above are devolved tribunals falling within the scope of our review. No consultee gave reasons for suggesting that any of the bodies we had provisionally excluded (listed at paragraph 2.22 above) should be included; we conclude that they should not be. We now turn to consider the additional bodies suggested to us by Richard Payne.

#### **Pharmaceutical panels**

- 2.32 As Richard Payne notes, these panels do not issue binding decisions; instead they make recommendations to the Welsh Ministers. In this respect they are like various other bodies that we have decided to exclude, such as the Forestry Committees for Wales and the independent appeals processes for farmers, forest owners and landowners in Wales. Our conclusion is that they fall outside the scope of this review for that reason.
- 2.33 Richard Payne suggested that binding force should be given to the decisions of pharmaceutical panels. This would also be a possibility for other bodies that currently only make recommendations, discussed in Chapter 2 of our Consultation Paper. It might be thought unsatisfactory, where a body follows a process of a judicial nature, for the executive to be able to disregard its decision. The question falls, however, outside our terms of reference and we leave it to the Welsh Government to consider in the course of developing the new tribunals structure.

#### **Social Care Wales**

- 2.34 In our view, Social Care Wales panels meet our test for categorisation as a tribunal, as they adjudicate disputes between parties (the registrar and the applicant) and make binding decisions. They also bear some similarities to school admission and exclusion appeal panels, or the VTW, in that they have non-legal panels who are advised on legal matters by others (in many cases, the clerk to the panel).
- 2.35 We have concluded however that it would not be appropriate for us to recommend bringing them into a Welsh tribunal structure. When they were created by Senedd legislation in 2016, a policy decision was taken to create a route of appeal from the panels to a tribunal (in that instance, the First-tier Tribunal created by the Tribunals,

Court and Enforcement Act 2007). The decision was informed by recommendations we had made regarding social care professionals in England.<sup>39</sup>

- 2.36 To recast the Social Care Wales panels as part of a First-tier Tribunal for Wales would disrupt that appeal structure and create an inconsistency with the appeal structure applying to the regulation of health and social care professionals in England and Wales. For social workers in England, fitness to practise hearings are not conducted by the First-tier Tribunal, but by Social Work England. Similarly, fitness to practise hearings for medical practitioners in both England and Wales are held by the Medical Practitioners Tribunal Service, rather than the First-tier Tribunal.<sup>40</sup> We think that decisions about the right venue for the work of Social Care Wales panels should only be made as part of a broader consideration of the regulation of health and social care professionals.

## DEVOLVED COMPETENCE

- 2.37 Chapter 2 of our Consultation Paper considered particular aspects of the project and whether they fell within the legislative competence of the Senedd.
- 2.38 Our broad provisional conclusion was that, because devolved tribunals are excluded from the reservation under paragraph 9 of Schedule 7A to the Government of Wales Act 2006, the majority of our terms of reference were within the legislative competence of the Senedd. One notable exception was the role of President of Welsh Tribunals, who is not a devolved Welsh authority for the purposes of the Government of Wales Act 2006. We do not repeat that analysis in detail here, but provide an update on one point.
- 2.39 The update relates to the drafting of paragraph 9 of Schedule 7B to the Government of Wales Act 2006. That schedule provides that the restriction preventing the Senedd from conferring or imposing functions on reserved authorities does not apply to the conferral or imposition on a court of a devolved function.<sup>41</sup> At the time of writing the Consultation Paper the Act omitted a definition of “devolved function”, though an Order in Council had been introduced to correct the omission. That Order came into force on 11 March 2021. Paragraph 9(4A) of Schedule 7B to the Government of Wales Act now defines a devolved function as:

a function involving deciding an application or an appeal in relation to a matter that is not a reserved matter, but this does not include the function of deciding an appeal from a court or from a tribunal to which paragraph 9 of Schedule 7A applies (tribunals other than devolved tribunals)

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<sup>39</sup> Regulation of Health Care Professionals, Regulation of Social Care Professionals in England (2014) Law Com No 345) (Scot Law com No 237) (NILC 28 (2014)). This was a joint report published by the three Law Commissions of the UK in 2014. While the recommendations on social care professionals did not extend to Wales, they influenced the policy implemented by the Regulation and Inspection of Social Care (Wales) Act 2016. See paras 3.166 and 3.187 of the explanatory memorandum to the legislation: [https://senedd.wales/laid%20documents/pri-Id10106-em%20-%20regulation%20and%20inspection%20of%20social%20care%20\(wales\)%20bill/pri-Id10106-em-e.pdf](https://senedd.wales/laid%20documents/pri-Id10106-em%20-%20regulation%20and%20inspection%20of%20social%20care%20(wales)%20bill/pri-Id10106-em-e.pdf)

<sup>40</sup> In both those cases, appeal is to the High Court, rather than to a tribunal.

<sup>41</sup> Government of Wales Act 2006, sch 7B, paras 8(1)(a) and 9(4)(a).

2.40 This makes it clear that the Senedd may create new appeal routes from the devolved tribunals to the First-tier Tribunal or to the courts.

## Chapter 3: A tribunals system for Wales

### A TRIBUNALS SYSTEM FOR WALES

3.1 Our Consultation Paper considered in detail the fragmented nature of the existing devolved tribunals in Wales. After reviewing the reforms encapsulated in the Tribunals Courts and Enforcement Act 2007 and the Tribunals (Scotland) Act 2014, we identified a number of advantages to unifying the devolved tribunals in a single statutory structure. These included the following.

- (1) Coherence. Amalgamating tribunals could remove unnecessary differences that have grown over time between the tribunals, both in administration and other practices and procedures. Amalgamating could allow tribunals to pick the best of the existing arrangements, while reducing complexity for tribunal users and members.
- (2) Public profile. A unified tribunal is likely to increase the profile of the devolved tribunals. A growing awareness of the role of tribunals could facilitate access to justice.
- (3) Ability to accommodate future developments within the devolved tribunals. An amalgamated system would be flexible by design, and capable of absorbing new chambers or appeals with relatively little disruption.

3.2 We therefore provisionally proposed that the existing section 59 tribunals should be consolidated into a First-tier Tribunal for Wales.

### A First-tier Tribunal for Wales

- 3.3 The majority of the 30 respondents to this question agreed with our provisional proposal. Only one disagreed, while three answered “other”.
- 3.4 Those who agreed with the provisional proposal included Public Law Wales, who “fully supported” the creation of a First-tier Tribunal for Wales, subdivided into separate specialist chambers. It agreed that these should broadly correspond with the current existing tribunals. Some common themes emerged from the responses.

### Coherence and the user experience

3.5 A number of respondents focused on the increased coherence of the system that would result if the existing tribunals were amalgamated. The Bar Council of England and Wales, for example, made the point that:

The creation of a First-tier Tribunal for Wales should produce the benefits of economies of scale, administrative coherence, systemic coherence, jurisprudential coherence, and an increase in public profile. It would also more easily accommodate a probable future increase in the devolved tribunals.



- 3.6 The Public Services Ombudsman for Wales focused on the impact of this coherence on tribunal users, arguing that:

A uniform system and approach would result in the tribunal system being less complicated for citizens to use and improve accessibility of the administrative justice system in Wales.

#### Public profile

- 3.7 Another advantage of amalgamation of the tribunals cited by respondents was the increased public profile of a First-tier Tribunal for Wales. Dr Sarah Nason, senior lecturer at Bangor University, and Dr Huw Pritchard, lecturer in law at Cardiff University, explained as follows:

A range of research continues to demonstrate a lack of awareness of public law rights in Wales, including amongst professionals as well as the broader general public. If a First-tier Tribunal for Wales has a more distinctive and visible presence, and enables more co-ordinated and wide-ranging opportunities to raise public awareness and to contribute to public legal education, this would be a key benefit for the system of administrative justice in Wales.

- 3.8 The point was also made by the Public Services Ombudsman for Wales, who said that “greater uniformity may also raise the public profile of the tribunals and the rights citizens have to use the tribunal system”.

#### Preservation of specialism

- 3.9 As we set out in the Consultation Paper, one of the risks of an amalgamated system is that there is a loss of specialism. This can involve both a loss of specialism of tribunal members, and the loss of practices and ways of working that have been developed to accommodate certain types of work. Some respondents thought that this loss of specialism presented too great a risk.
- 3.10 Ceredigion Council, for example, noted the importance of members of the Special Educational Needs Tribunal for Wales (now renamed the Education Tribunal for Wales) continuing to have experience of and expertise in additional learning needs (previously known as special educational needs).
- 3.11 Keith Bush QC (at the Welsh Governance Centre at Cardiff University) disagreed with the provisional proposal and put forward a different model to address this problem:

I believe that the advantages of the reforms recommended by the Consultation Paper in the areas of organisation, procedure, appointments, training and discipline could be achieved by adopting a federal arrangement that would preserve the identities of individual tribunals. I feel that there are important practical advantages in adopting such an arrangement, rather than removing the particular tribunals and replacing them with a single unified tribunal, as a federal system would:

- respect the traditions and practices of the different tribunals, which have evolved from their different experiences of exercising functions which can vary considerably according to the subject;

- allow important differences to be retained in the membership and procedures of different tribunals (for example the contribution of “specialist” members such as surveyors and doctors);
- help to recruit members interested in an individual tribunal area – it would be easier to attract lay members to serve as members of the Welsh Language Tribunal than to be members of the First-tier Tribunal for Wales, even if they were to be “assigned” to the “Welsh language chamber” of that tribunal.<sup>42</sup>

3.12 Noel Edwards, retired technical adviser for the Valuation Office Agency, (marking his answer as “other”) also preferred a federal model, arguing that this would leave the tribunals:

independent and thus retaining their specialisms – they would ostensibly be “First Tier” tribunals but retain their independence of electing presidents, administration, membership and conduct/discipline etc.

3.13 Others however thought that a chamber system could accommodate the differences which need to be preserved. The current President of Welsh Tribunals (the “PWT”), Sir Wyn Williams, explained why he supported our provisional proposal as follows:

I agree with the reasoning of the Law Commission on this issue. I have heard it argued (most persuasively by Keith Bush QC) that the creation of a FTT for Wales will dilute the individual strengths of the existing tribunals and, in the case of the Welsh Language Tribunal in particular, lead to a loss of cultural identity. I respect this argument but do not agree with it. The creation of Chambers within a FTT structure will go a long way towards preserving what is good about the existing tribunals. The Chamber Presidents will have a very similar role to the current judicial leads of the existing tribunals and will, I am sure, be astute to maintain a separate identity for each Chamber so far as that is consistent with good practice within the system as a whole. The very nature of the Welsh Language Tribunal and the work assigned to it is such that its cultural identity and individuality will necessarily be preserved whether it is a stand alone tribunal or a Chamber within a FTT structure.

3.14 The Bar Council also thought that:

The division of the First-tier Tribunal for Wales into chambers would recognise the very different jurisdictions encompassed by the whole and should permit for the development of judicial expertise and distinct procedural rules, within each.

### Practical problems

3.15 Some respondents stressed the disruption that would be caused by amalgamation of the existing tribunals. Swansea Council, marking its answer as “other”, argued “there is a risk of creating further delays in grouping tribunal into Chambers and a risk of narrower specialisms within them”.

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<sup>42</sup> This response has been translated from the Welsh original.

- 3.16 The response of the Adjudication Panel for Wales (“APW”), marked as “other”, demonstrated a split of opinion amongst its members:

Some feel that the proposal would allow similar functions to be grouped together; preserve existing expertise; allow new chambers or areas to be included in the future; ensure collegiate working between the chambers and judicial leads; and would be easy for members of the public to understand and access. Other members feel that this proposal would involve a significant amount of effort and work to create the First-tier Tribunal for Wales to only then separate the chambers and suggest that it would be more proportionate to merge tribunals with similar functions such as the Agricultural Land Tribunal for Wales and the Valuation Tribunal for Wales, leaving more distinct tribunals alone. Some of the staff of the WTU already work for more than one tribunal at a time so it is not clear if the chamber structure would prevent this from continuing. Cross-ticketing already exists for members so the chamber structure is unlikely to make any real practical difference in this regard.

- 3.17 Dr Sarah Nason and Dr Huw Pritchard were generally in favour of our proposal, but also urged a cautious approach, particularly given the absence of any empirical evidence that the Leggatt reforms had achieved their intended objectives. They argued that:

The approach taken to consolidation and the division into chambers must appropriately balance sufficient degrees of specialisation and generalisation, including through some flexibility in rules and procedures, and must balance the interests of a range of stakeholders, with the ‘user’ at the heart of this balancing exercise.

- 3.18 They recommended that any proposals developed provide for an ongoing process of evaluation, including the development of a range of outcome based (qualitative and quantitative) indicators.

### **Division of First-tier Tribunal for Wales into chambers**

- 3.19 In Consultation Question 5 we provisionally proposed that the Welsh Ministers should be able to provide for a First-tier Tribunal for Wales to be subdivided into chambers, and work allocated to those chambers. We suggested that chambers should be created by secondary legislation, with the agreement of the PWT.

- 3.20 This provisional proposal attracted significant support, with 24 of the 27 responses expressing agreement. Three respondents answered “other”, and none expressed outright disagreement.

- 3.21 Several respondents suggested variations on the arrangement that we proposed. Dr Sarah Nason and Dr Huw Pritchard agreed that the division of functions to particular chambers could be achieved under the leadership of the PWT, but added this process should take place alongside engagement with the tribunal leads.

- 3.22 Public Law Wales suggested a division of responsibility between the conferring of new functions upon the tribunal, and the allocation of functions to particular chambers:

The transfer of functions to the Welsh First-tier Tribunal (“WFTT”), and the conferring of future new functions on it would need to be accomplished by legislation

(subordinate legislation made by the Welsh Ministers) but the allocation of functions to individual chambers within the WFTT, including a General Regulatory Chamber if felt necessary, should be within the powers of the PWT to accomplish by rules, order(s) or practice direction(s) (following, of course, proper consultation).

- 3.23 Two respondents suggested more prominence be given to the role of the PWT. Professor Thomas Watkin suggested that provision for the allocation of work to the subdivided chambers of the First-tier Tribunal for Wales could also be made by Welsh Ministers upon the recommendation of the PWT. Huw Williams, Chief Legal Adviser to the Senedd, responding in his personal capacity, also thought the President should have a greater role, reasoning as follows:

I think that the best allocation of work between chambers and the creation of new chambers should be matters on which the President of Welsh Tribunals should take the lead. The President in the reformed role will be at the head of the Welsh Tribunals system and best placed to decide the most efficient distribution of work to achieve the overall objectives for the Welsh Tribunals.

I therefore suggest that the distribution of chambers should be by statutory instrument made by a Welsh tribunals service (as a non-ministerial department), with the consent of the Welsh Ministers following a proposal by the President after consultation with a Welsh Tribunals Rules Committee and other stakeholders.

## Discussion

- 3.24 In light of the strong support from the majority of respondents, we recommend below that the section 59 tribunals should be consolidated into a single unified tribunal, subdivided into chambers.

### A federal system

- 3.25 In our view there are some advantages to the federal system proposed by Keith Bush QC. It would provide particularly strong protection for individual tribunals, helping to ensure that practices and processes that are currently in place and that work well would not be at risk of being changed in order to conform with other ways of doing things in other tribunals.
- 3.26 The key disadvantage, however, would be that it would be more difficult to rearrange tribunals within the structure. Primary legislation would be necessary to add in new jurisdictions (whether by creating a tribunal or adding the jurisdiction to an existing tribunal). It would be less easy to amalgamate existing tribunals as their work developed. In short, it is inherently a less flexible model. That flexibility is in our view one of the most attractive qualities of the unified model. It would enable the tribunal system to grow and adapt to the work with which it has been tasked. We think that the additional benefit of protection for individual tribunals is not worth the loss of flexibility in the unified model, with its benefits for the tribunals system as a whole.
- 3.27 For similar reasons we are not attracted by the suggestion put forward by the APW (set out at paragraph 3.16 above) that similar existing tribunals, for example, the Agricultural Land Tribunal for Wales (“ALTW”) and the Residential Property Tribunal for Wales (“RPTW”), should simply be merged and other tribunals left unchanged.

- 3.28 What we see as particularly important is the flexibility to enlarge and adapt the system that is inherent in a power to create chambers by secondary legislation. In this report we use the nomenclature of a tribunal and chambers because we consider that that best describes the reality of what we are recommending. As a matter of legislative drafting, a similar result could be achieved by creating an entity described (in the plural) as the “Welsh First-tier Tribunals” along with regulation-making powers to create, and assign work to, a “Tribunal” within the structure. We leave the question of nomenclature to the Welsh Government, which might wish to consult further with tribunal members and users.

#### The regulation-making power

- 3.29 Under the Tribunals, Courts and Enforcement Act 2007, the power to organise the First-tier Tribunal into chambers is exercised by the Lord Chancellor with the concurrence of the Senior President of Tribunals. We recommend that in Wales the power should similarly be exercised by the Welsh Ministers with the concurrence of the PWT. We fear that the split of powers suggested by Public Law Wales would be artificial, and anticipate that the Welsh Ministers will take due account of the views of the PWT.

#### Monitoring progress

- 3.30 We agree that it will be important for progress in creating the new structure to be monitored, in order to ensure that it is achieving the benefits set out above. If one of our further recommendations is accepted, the system will be administered by a new Tribunals Service for Wales.<sup>43</sup> Such a body would be well placed to review progress of early amalgamations (for example, of the ALTW and RPTW, discussed below at paragraphs 3.141 to 3.150), and learn any lessons.

#### **Recommendation 1.**

- 3.31 We recommend that the tribunals listed in section 59 of the Wales Act 2017 should be replaced by a single First-tier Tribunal for Wales, which may then be subdivided into chambers.

#### **Recommendation 2.**

- 3.32 We recommend that chambers of the First-tier Tribunal for Wales should be led by chamber Presidents, supported by Deputy Presidents where necessary.

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<sup>43</sup> See recommendation 51 at paragraph 9.53.

### **Recommendation 3.**

- 3.33 We recommend that the Welsh Ministers should be empowered to subdivide the First-tier Tribunal for Wales into chambers, and to allocate work to those chambers, by way of secondary legislation made with the concurrence of the President of Welsh Tribunals.

## **THE VALUATION TRIBUNAL FOR WALES**

- 3.34 Our Consultation Paper provisionally proposed at Consultation Question 6 that the Valuation Tribunal for Wales (“VTW”) should be brought within the First-tier Tribunal for Wales. We suggested that there would be a number of advantages to this amalgamation, including:
- (1) combining administration with the other section 59 tribunals, leading to potential efficiency savings;
  - (2) increasing the profile of the tribunal; and
  - (3) additional judicial leadership, in the form of the PWT.
- 3.35 We received 19 responses to this question. A narrow majority (10) were in favour of the proposal, while four disagreed, and five expressed other views.

### **Supporting views**

- 3.36 Those who supported the proposal included Sir Wyn Williams, the current PWT, who said:

I do not underestimate the practical difficulties in integrating the Valuation Tribunal into the First-tier Tribunal structure for Wales given that it already has a structure in place which is quite different from the devolved tribunals. However, I am convinced of the need to bring the Valuation Tribunal into the family of devolved tribunals given the nature of the work it undertakes and for the other reasons advanced by the Law Commission.

- 3.37 The responses of Dr Sarah Nason and Dr Huw Pritchard, and the Wales and Chester Circuit, both stressed the importance of bringing all tribunals with a First-tier Tribunal for Wales. As the Wales and Chester Circuit put it:

We favour the inclusion of all the devolved tribunals within the First-tier Tribunal for Wales. That has the attraction of simplicity, consistency and transparency. The inclusion of all the devolved tribunals within the First-tier Tribunal for Wales should also produce greater economies of scale, coherence and public profile.

### **Potential barriers to unification**

- 3.38 Other respondents expressed support in principle, but were concerned that specific ways of working should be preserved. Roger Handy, a Chairman of the VTW, could see advantages in joint administration, but did not think amalgamation should come at

the expense of the role of tribunal clerks as case managers and source of specialist knowledge and advice, or changes to the current makeup of VTW panels (including lay members and those with specialist knowledge). He also explained that the VTW sometimes heard multiple appeals relating to similar properties, so that “all the available evidence can be considered together and an informed decision made”. He noted that:

It is not in the public or individual taxpayer’s interest for each appeal to be dealt with in “splendid isolation” with, potentially, changes being made to numerous assessments after each hearing.

- 3.39 He argued that if this way of working could not be accommodated in a revised First-tier Tribunal, then it would be better for the VTW to remain self-standing.

- 3.40 Huw Williams also had concerns. He thought that if one were designing the system from first principles, council tax and rating appeals might be heard within a taxation chamber of a First-tier Tribunal. However, the extent to which the structure of the VTW was based on the magistrates court:

suggest that the incorporation of the VTW into a Welsh Tribunals system should be the subject of separate study after the overall design of the Welsh Tribunals system is settled.

- 3.41 Others focused on the financial implications of including the VTW within the broader system, and in particular the consequences of introducing pay for lay members who currently volunteer their time for free. For example, the Law Society of England and Wales, while not opposed to the proposal in principle, warned that:

Were the Tribunal to be brought within the ambit of the Welsh Tribunals Unit, then its members could, quite rightly, expect to be paid in line with members of other devolved tribunals. This risks stretching the already inadequate budget of the Unit even further and highlights the corresponding need to “professionalise” the Tribunal which currently operates on the basis of volunteers.

- 3.42 The Mental Health Review Tribunal for Wales (“MHRTW”) made a similar point, arguing that:

We already have major concerns about the resources available to meet the very significant increase in the workload of our tribunal arising out of the reformed Mental Health Act to be brought forward shortly.

- 3.43 The most detailed response was provided by the Governing Council of the VTW itself, which is reproduced below.

Although there is an academic attraction and purist logic to unifying all tribunals in Wales, there are many practical considerations and factors that add complication to the implementation of this option and the scale of change could potentially impact on service delivery at the time of any transition.

It is highly probable that there would be much more significant cost in merging the Valuation Tribunal for Wales into a First-tier tribunal than merging the section 59

tribunals into a new umbrella organisation. These practical considerations need to be included in evaluating whether the Valuation Tribunal for Wales should be included, at least at the outset. To attempt to merge tribunals which are considerably unlike in terms of their set-up, organisation and administrative support without considering in some detail how those issues, which will inevitably follow on, will be resolved, would amount to a leap of faith. Further scrutiny is required to make sure that the change would work well and also to identify the extent of the costs. Not to do so at this stage would amount to “sweeping these issues under the carpet” in the hope that they can be resolved later.

The Paper itself acknowledges that the Valuation Tribunal for Wales operates differently from other tribunals in Wales and possesses a unique member appointment process and system of governance. The Valuation Tribunal for Wales has its own independent administration, which provides bespoke clerical and IT support, and which is also employed on different terms and conditions to the administrative support proposed later in this Paper for the new unified tribunals. Its membership is lay and is provided with legal support by clerks with specialist knowledge. The membership is also unpaid; this key reality will stand out in stark relief in any merged structure when compared to members sitting in the other proposed chambers of a single First-tier Tribunal who are paid fees to hear their cases. The introduction of the payment of fees for Valuation Tribunal for Wales members (which would seem appropriate and right in terms of equality and parity in the merged context) would represent a significant on-cost if a single structure were brought about. The process of receiving the bulk of its appeals is also very different to other tribunals and it receives a very large volume of appeals. It is the case that these considerations and factors have resulted in the Valuation Tribunal for Wales’s English counterpart, the Valuation Tribunal for England, being left outside the First-tier Tribunal in England when similar proposals were considered there. It is clear that in the light of that fact, and the fact that Valuation Tribunal for England still stands outside of the First-tier structure many years later, that these are material considerations that need to be addressed now in the context of the Paper’s proposals for Wales. They should not be passed over lightly.

Having said that, however, there are ways in which the Valuation Tribunal for Wales could benefit from being more closely associated with the other tribunals in Wales but assimilation into a unified structure is realistically only a longer-term aim; the starting position is markedly different to that of the section 59 tribunals. It would be wrong to ignore this fact and subsequently hope that things will resolve themselves. Building public policy on aspiration and hope without attending to practical realities is likely to result in difficulties in the future and unforeseen costs. Vision for the future is a good thing, but a pragmatic and realistic approach must be taken on the road to achieving this.

- 3.44 The differences between the VTW and other tribunals, captured above by the VTW’s response, led some to argue that reform should take place gradually. Huw Williams (in response to Consultation Question 1), argued that review or reform was necessary before tribunals could be accommodated in the unified scheme, and that the VTW (and school admission and exclusion appeal panels), being “outliers”, should not overly influence the overall design of a Welsh tribunals system.



## Discussion

- 3.45 We have considered carefully the views of respondents, and particularly those of the VTW. We do not underestimate the practical obstacles to bringing the VTW in closer alignment with the section 59 tribunals. Some of these we express a view upon here. Others are not ones on which we can comment in a useful way. In whatever form the VTW is brought into the unified structure, further work will undoubtedly be necessary on the part of the Welsh Government, the VTW and the PWT. Any changes should also be timed carefully to minimise the impact on the VTW's work. We note, by comparison, that changes to the valuation committees in Scotland have been planned to coincide with quieter periods of work for the committees.
- 3.46 Nonetheless, we are persuaded by the majority of the responses we have received that the VTW's home should be within a unified tribunal system. The nature of its work is not so far removed from that of other devolved tribunals to justify it continuing to operate independently from them. Its current separate existence risks it becoming increasingly isolated and less able to compete for work, adapt, and ultimately serve its users.
- 3.47 With its large number of cases, the VTW would contribute a sizeable component of the First-tier Tribunal for Wales. It is however comparable in size to the MHRTW, which received 1,790 applications or referrals for a hearing in 2020/2021, and scheduled 1,878 hearings.<sup>44</sup> While the VTW received 7,625 applications in 2018/2019, these in practice only occupied 181 tribunal meetings (this volume of cases is more representative than the number in 2019/2020, which was reduced due to an agreement with the Valuation Office Agency).<sup>45</sup> We understand that this is partly because of the arrangements made with the Valuation Office Agency, which have the result that many applications are generated automatically and settle before a hearing (4,940 applications settled in 2018/2019). In our view this volume of work justifies keeping the work of the valuation tribunal, at least initially, in a separate chamber.<sup>46</sup> We do not however believe it of itself justifies the separate existence of the VTW.
- 3.48 The most striking point of difference between the VTW and the section 59 tribunals is, in our view, the model of adjudication used by the VTW. As explained in our Consultation Paper and in the response of the Governing Council of the VTW, VTW panels are currently made up of lay members advised by a specialist clerk. This model is similar to that of the lay magistracy, but is not to our knowledge found elsewhere in tribunals.<sup>47</sup>

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<sup>44</sup> Mental Health Review Tribunal for Wales, *Annual Report 2020-21* (June 2021) pp 9 and 11. See <https://mentalhealthreviewtribunal.gov.wales/sites/mentalhealthreview/files/2021-07/mhrtw-annual-report-20-21.pdf>

<sup>45</sup> Valuation Tribunal for Wales, *Annual report 2018-19* (2019) p 17. See [https://www.valuationtribunal.wales/fileadmin/resources/docs/publications/en/Annual\\_Report\\_2018-19.pdf](https://www.valuationtribunal.wales/fileadmin/resources/docs/publications/en/Annual_Report_2018-19.pdf)

<sup>46</sup> We note the suggestion from Huw Williams that, if starting from first principles, some of the work of the VTW might be accommodated in a taxation chamber of the First-tier Tribunal for Wales. The Law Society also suggested that the Valuation Tribunal for Wales could be amalgamated with the Residential Property Tribunal for Wales and Agricultural Land Tribunal for Wales into a property chamber.

<sup>47</sup> We note that the work formerly done by General Commissioners of Income Tax is now performed by judges of the First-tier Tribunal (Tax Chamber).

- 3.49 We took the provisional view in our Consultation Paper that changing the mode of adjudication of the VTW fell outside the scope of this project. We remain of that view; assessing the advantages and disadvantages of that model of adjudication is a substantial task in itself, and not one that we could have accommodated within the timeframe of the project. In our view it would be possible to create a new valuation chamber within a unified tribunal using the model of adjudication followed by the VTW at present.
- 3.50 Some changes to its current arrangements would be inevitable. As a Welsh Government sponsored body, the VTW is currently responsible for its own governance and administration. It is governed by its Governing Council, made up of its President, national tribunal representatives and Welsh Government appointees. If brought into the broader tribunals system, the governance of the tribunal would fall instead to the Board of the Tribunals Service for Wales (discussed in more detail in Chapter 9). The administration of the tribunal would also be conducted by that service. Because some of the administration would remain the responsibility of the clerks to the tribunal, it is likely that they would have to remain in a separate team within the Tribunals Service for Wales. We do not think this is unmanageable; we note that, at present, the Welsh Tribunals Unit (“WTU”) is divided into teams which focus on particular tribunals.
- 3.51 Elsewhere in this report we make other recommendations for change to the VTW’s arrangements in consequence of its becoming part of the First-tier Tribunal.<sup>48</sup> We also see force in the point made by a number of respondents that it would be anomalous to include the VTW within the system while leaving its members unpaid.
- 3.52 It is a matter for the Welsh Government whether it takes the creation of the First-tier Tribunal as an opportunity to reform the way in which non-domestic rates and council tax appeals are adjudicated, either before or after the work is incorporated into the unified system. We can see that there may be advantages in moving to a model where the panel itself has the necessary specialist legal as well as technical knowledge, rather than relying on clerks. Those specialist members could perhaps sit alongside lay members. Nonetheless, the primary consideration must be choosing a model of adjudication that works well for tribunal users and facilitates the efficient disposal of cases.

#### Age limit for Valuation Tribunal for Wales members

- 3.53 One of the consequences of bringing the VTW into the First-tier Tribunal for Wales is that its members might become subject to a mandatory retirement age. Currently the mandatory retirement age is 70 for the MHRTW, ALTW and RPTW.<sup>49</sup> Were a similar limit to be imposed on members of the VTW that could have serious consequences; the 2019/20 annual report for the VTW states that 50.6% of its membership fall within the age bracket 70 – 79, with 9.4% of its membership aged 80 or over. The Lord Chancellor however announced in March 2021 that he plans to raise the mandatory

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<sup>48</sup> See the discussion of appeals at paras 4.90 and 4.91, and recommendations 34 and 35 from Chapter 7, and 46 and 48 from Chapter 8.

<sup>49</sup> Mental Health Act 1983 sch 2, para 2A; Agriculture Act 1947, sch 9, para 15; Rent Act 1977, sch 10, para 2A.

retirement age to 75.<sup>50</sup> If that trend were followed in the devolved tribunals, that could cushion the impact on the VTW.

#### **Recommendation 4.**

- 3.54 We recommend that the jurisdictions of the Valuation Tribunal for Wales should be transferred to a new valuation chamber of the First-tier Tribunal for Wales.

### **SCHOOL ADMISSION AND EXCLUSION APPEAL PANELS**

- 3.55 Chapter 3 of our Consultation Paper also considered the relationship of school admission and exclusion appeal panels (sometimes known as independent appeal panels) with the rest of the devolved tribunals system. At present the majority of these panels are convened and administered by local authorities (though some admission appeal panels are run by the school in question).

#### **School exclusion appeal panels**

- 3.56 Our Consultation Paper provisionally proposed that the jurisdiction of the school exclusion appeal panels should be amalgamated into that of the Special Educational Needs Tribunal for Wales (renamed the Education Tribunal for Wales on 1 September 2021; we have kept references to “SENTW” in this Chapter where that was the term used by respondents).<sup>51</sup> Ultimately we envisaged the tribunal forming the basis for an education chamber within a First-tier Tribunal for Wales.
- 3.57 Our provisional proposal was influenced by the relatively low numbers of these appeals in Wales. While comprehensive statistics are not published, recent estimates suggest there may be approximately 40 a year, spread across local authorities.<sup>52</sup> This suggests that each local authority only hears a handful of these cases a year. During the consultation period we spoke to a number of local authorities. While some larger authorities, such as Cardiff and Newport, had had multiple appeals in recent years, others had had none. This suggests that in some areas panels operate with a limited degree of experience.
- 3.58 Our Consultation Paper also suggested that the need for knowledge of local educational provision was less for exclusion panels than for admission panels. There is a statutory requirement that admission appeal panels include members “acquainted with educational conditions in the area of the authority”, or who are parents of children at a school.<sup>53</sup> There is no equivalent requirement for exclusion panels. This makes sense given the different issues that the panels consider; admission panels are often

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<sup>50</sup> Ministry of Justice, *Judicial mandatory retirement age: response to consultation* (March 2021) p 4. See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/967234/judicial-mandatory-retirement-age-consultation-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/967234/judicial-mandatory-retirement-age-consultation-response.pdf). See also the Public Service Pensions and Judicial Officer Bill, cl 103 and sch 1.

<sup>51</sup> Additional Learning Needs and Education Tribunal (Wales) Act 2018, s 91(1).

<sup>52</sup> Devolved Tribunals in Wales (2020) Law Commission Consultation Paper No 251, appendix 1, para 1.55.

<sup>53</sup> Education (Admission Appeals Arrangements) (Wales) Regulations SI 2005 No 1398 (W 112) sch 1 para 1.

required to assess the prejudice that admitting a child might cause to a school, which inevitably requires knowledge of local conditions. Exclusion appeals focus on the individual circumstances of the appellant rather than the local education system as a whole.

- 3.59 The majority of respondents (23 of 32) supported the provisional proposal. Seven disagreed and two gave other responses.

#### Coherence of the entire system

- 3.60 Some respondents were in favour of the proposal on the basis that it made the whole system of tribunals more coherent. For example, both the Bar Council and the Wales and Chester Circuit told us that:

We favour the inclusion of all the devolved tribunals dealing with educational issues within an education chamber of the First-tier Tribunal for Wales. The advantages associated with the creation of a First-tier Tribunal for Wales appear to be equally applicable to the inclusion of all the non-section 59 educational devolved tribunals within it.

- 3.61 Sir Wyn Williams also supported the proposal, for the reasons set out in our Consultation Paper.

#### Expertise

- 3.62 Many respondents focused on the expertise needed for school exclusion appeal panels to run successfully. Respondents differed on whether it was more important to have local expertise, or panel members who had experience of additional learning needs.

- 3.63 Two respondents in particular argued that school exclusion cases often concerned similar issues to appeals heard by the Education Tribunal for Wales (“ETW”): Huw Williams thought that the “underlying reasons for exclusions share many characteristics with the issues that arise in special educational needs cases”, while the National Deaf Children’s Society Cymru argued that:

In our experience, exclusions have occurred as a result of an inability to meet a learner’s additional learning needs. We would welcome moves to ensure relevant expertise is provided in such cases. We are keen to ensure that such a move would not affect capacity for SENTW, but suspect that cases of this nature are low in number.

- 3.64 The Catholic Education Service also agreed that “exclusion appeals are less reliant on local expertise”. However, a school panel member from Cardiff disagreed, arguing that the ETW:

should be composed of highly trained education specialists who would be over trained for ordinary appeals. ... Also the panel members have knowledge of the schools involved and the areas so are able to give expert opinions. ... Knowledge of the different schools and areas are imperative in all decisions.

- 3.65 The response of Cardiff City Council also maintained that local knowledge “can be crucial in decision making”.

#### Consistency and volume of appeals

- 3.66 A number of responses agreed with the view expressed in the Consultation Paper; that a low level of appeals led to concerns about consistency. For example, the Public Services Ombudsman for Wales said that:

I believe that bringing such appeals under the remit of the Special Educational Needs Tribunal for Wales would improve transparency and uniformity of the process. A decision to exclude a child from school could have significant consequences for the individual. Public confidence in the appeal panel process is vital.

- 3.67 The Catholic Education Service agreed, saying:

The aim of this proposal is to ensure that school exclusion appeals are heard and decided more consistently. We are fully in support of this aim and we are of the view that the development of an Education Tribunal which would build a body of expertise in this area will ensure that such appeals are able to be heard more fairly and consistently than may currently be the case.

- 3.68 Dr Sarah Nason and Ann Sherlock, a research fellow at Bangor University 2018-2020, thought that the relatively low number of exclusion appeals would make it easier to transfer the jurisdiction to the ETW, saying that this would make it a “more manageable addition” than admission appeals.

#### Independence from the local authority

- 3.69 Respondents gave conflicting views on the extent to which exclusion panels are sufficiently independent from local authorities. One tribunal member explained that:

Whilst I appreciate that the current local authorities panels have the relevant expertise, and knowledge of the local area, I feel that parents and the pupil (where appropriate), feel that they have a more independent and impartial judgement via a panel external to the local authority. As a result, the parents and pupil are likely to be more willing to accept the judgement reached. I feel that SENTW members have the appropriate knowledge and skills to address this work.

- 3.70 Conversely, a school appeal panel member from Cardiff explained that:

Every panel I have sat on the chair has made it very clear that it is unpaid volunteers who have no connection to the LA or governing body and are truly independent.

- 3.71 Dr Sarah Nason and Ann Sherlock drew on their own research to present a mixed picture of the independence of the panels:

During our research we received feedback from some local authority lawyers who considered that the system worked well: in their view, any parental concerns about the independence of the panels could be managed by a good introduction from the panel’s chair and the proper performance of the clerk’s role, ensuring no discussion

with the school before the panel. We heard from some local authorities that exclusion appeal panels were managed and arranged by the regional consortium, and also that there was co-operation between authorities so that people with experience and expertise worked across authorities on the panels. Some local authority lawyers felt that some degree of oversight of the exclusion panels would be appropriate but not to the extent of transferring the process to SENTW, a move that they feared would lead to a more formal process and the loss of direct local experience. On the other hand, we heard concerns that the ‘local expertise’ valued by local authorities could be perceived by some parents as a lack of independence from the schools. It is not clear why so few pupils / parents pursue appeals against permanent exclusions and it is therefore difficult to gauge whether a move to the Tribunal would affect their likelihood of pursuing a case.

- 3.72 In a separate response, Dr Sarah Nason and Dr Huw Pritchard highlighted Recommendation 11 of a report published in 2020 forming part of a larger body of work, aiming to inform administrative justice policy making in Wales. This included a recommendation that the Welsh Government should consider whether:

the Clerk to the independent panel should be legally trained, or, if not, where the Clerk to the independent panel is not legally trained, that the local authority be required to ensure that an independent source of legal advice is provided.<sup>54</sup>

### Resourcing

- 3.73 Some respondents were concerned about the tight timescales involved in hearing these cases, and questioned whether the ETW would be able to meet these. For example, Swansea Council noted:

The short timescales involved in dealing with exclusion appeals requires panels to meet no later than the fifteenth school day after the day on which appeal was lodged. We feel that SENTW would not be able to meet these deadlines and will cause unnecessary delays.

- 3.74 The question was also raised by Cardiff City Council, noting it had received 11 appeals within the last 18 months.

### Formality

- 3.75 One respondent, Pembrokeshire County Council, was concerned that hearing appeals nationally could be more off-putting for parents and young people. It argued that the panels were “accessible”, saying that:

Having exclusion appeals dealt with by SENTW may well discourage appellants from exercising their right to appeal as this could be perceived to be a more formal route of appeal, and there may also be a cost/resource implication if the process were to be changed.

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<sup>54</sup> S Nason, A Sherlock, H Pritchard and H Taylor, *Public Administration and a Just Wales – Education* (March 2020) p 71, recommendation 11(iii). See <https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Admin-Justice-Wales-Education-Full.pdf>

- 3.76 The Equality and Human Rights Commission were also concerned about access, and in particular that children and young people should continue to be able to bring their own appeals:

The current Welsh Government guidance for exclusions provides that children and young people must be able to bring their own appeals and if necessary an advocate should be provided to support them. This requirement should be preserved if any changes are made as it is fundamental for children's rights. In our *Is Wales fairer?* 2018 report, we note that the exclusion rates for children with additional learning needs and those who are socio-economically disadvantaged tend to be far higher than average. In line with the public sector equality duty and socio-economic duty, any changes to exclusions appeals should take this into account.

### Creating a right of appeal to the Education Chamber

- 3.77 Two respondents suggested that, if exclusion appeals continued to be administered at local authority level, a right of appeal to the Education Chamber could be introduced. Dr Sarah Nason and Ann Sherlock pointed to their 2020 report, which recommended that:

...if the current system of exclusion appeals to independent panels remains in place, it is considered whether, by way of exception, permanently excluded learners with SEN / ALN should be given the right to appeal to the Education Tribunal.

- 3.78 A similar suggestion was made by the Governing Council of the VTW.

### Other points

- 3.79 Dr Sarah Nason and Ann Sherlock made the point that reform of the school exclusion appeal panels should not preclude policy reform of the broader system of school exclusions, and in particular of fixed term exclusions. They explained that:

This is not a reason to resist moving the exclusion appeal panel remit to SENTW but we highlight the issue in the hope that the reform of one issue will not lead to a sense of complacency regarding how the rest of the exclusions process is working.

- 3.80 Keith Bush QC believed that the panels should remain under the control of local authorities, but proposed that the functions of the PWT and Tribunal Procedure Rules Committee should apply to them. We consider these questions further in Chapters 5 and 6.

- 3.81 The Catholic Education Service stressed the importance of engagement with parents through the provision of good quality guidance to parents and to schools.

We support the rights of parents, as primary educators of their children, to support their children and request an independent review of exclusions where they feel that their child has been treated illegally or unfairly, but it is important that schools are not put to the time and expense of participating in such reviews where there is no realistic prospect of success. We would fully support any proposals that would enable parents and schools to engage more effectively in making informed decisions



as to whether or not such appeals should be brought and if they are, how they should be responded to. The success of otherwise of this proposal and whether or not it leads to more informed decision making will very much depend on the guidance issued to both parents and schools as to the appropriate grounds both for the exclusion itself and then the challenging of that decision and we would be very happy to work with the Welsh Government in the drafting and reviewing of that guidance. It is important that any new regime acknowledges the important role that headteachers play in the management of discipline in their schools and preserves their ability to permanently exclude where it is appropriate, justifiable and a last resort having looked at all other alternative solutions...

## Discussion

- 3.82 Our starting point when formulating our provisional proposal was that, ideally, tribunals should be structurally independent from the body whose decisions are under challenge. This means that their administration should not be undertaken by that body. This principle underpinned the Leggatt Report.
- 3.83 While local authorities do not take the decision to exclude a student (which is first made by the headteacher, and then subject to review by a disciplinary committee formed of school governors), they are nonetheless expected to take part in the process. The Exclusions Guidance advises that local authorities should send a representative to all meetings of the discipline committee if they are considering permanent or longer fixed-term exclusions, where they can “make a statement to the discipline committee, for example, about how other schools in the area have dealt with similar incidents and to advise on alternative arrangements for the learner to continue his or her education if the exclusion is confirmed.”<sup>55</sup>
- 3.84 The responses of local authorities to this question were noticeably split, with a small majority supporting the transfer of school exclusion appeal panels away from local authorities. We note that of the responses we received, it was the smallest authorities (in terms of population) who tended to support the provisional proposal. Those authorities are likely to encounter cases only rarely, and therefore to find it harder to comply with the tight deadlines while ensuring panel members are appropriately trained and have the right experience. In our view this creates a real risk of inconsistent approaches being taken to these hearings across Wales, which can only partly be mitigated by the application of the School Exclusions Guidance.
- 3.85 We are not persuaded that local experience on the part of the panel is a sufficient reason for these appeals to continue to be determined at local authority level. We think it significant that there is no statutory requirement for exclusion appeal panel members to have local experience (unlike with school admission appeals). Parties to proceedings before the tribunal will continue to have experience of local educational conditions, and, to the extent that this is relevant, will be able to draw on it when making submissions to the panel.
- 3.86 Conversely, several respondents argued that experience of additional learning needs was an advantage. This seems to have been recognised in England, where parents

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<sup>55</sup> Welsh Government, Exclusions guidance, para 3.3.1. See <https://gov.wales/sites/default/files/publications/2018-03/exclusion-from-schools-and-pupil-referral-units.pdf>



are entitled in some circumstances to require a local authority or academy trust to appoint a special educational needs expert to advise an independent review panel.

- 3.87 We recognise that the assumption of the jurisdiction of school exclusion appeal panels can only succeed if it is properly resourced. The need to ensure certainty for children and young people means that the deadlines attached to these appeals are, quite rightly, short. There will need to be a sufficient number of tribunal members and sufficient administrative resource to ensure that those deadlines can be met. This should not be beyond the capability of the tribunal service. For example, applications made under section 2 of the Mental Health Act 1983 must be listed in the MHRTW within seven days of receipt of the application; this target was met for almost all applications listed in 2019-2020.<sup>56</sup>
- 3.88 We also observe that in making this recommendation we follow the example of other reports on tribunals and administrative justice. The Leggatt Report itself recommended that school exclusion panels should be brought within the unified tribunal system.<sup>57</sup> The 2016 Report of the Committee on Administrative Justice and Tribunals, Wales (discussed further at Chapter 1 above) pressed the Welsh Government to explore the merits of extending the jurisdiction of the SENTW to create a national tribunal for school admissions and exclusion appeals, while most recently the Commission on Justice in Wales expressed concern that the appeals panels “operate without any kind of judicial scrutiny”.<sup>58</sup>
- 3.89 We believe that the Education Chamber of a First-tier Tribunal for Wales will provide a more appropriate structure in which school exclusion appeals may be heard. We therefore recommend that their jurisdiction should be transferred to an Education Chamber of a First-tier Tribunal for Wales.

#### **Recommendation 5.**

- 3.90 We recommend that school exclusion appeals should be transferred to the Education Chamber of a First-tier Tribunal for Wales.

#### **School admission appeal panels**

- 3.91 In our Consultation Paper we considered the argument for including school admission appeal panels within the unified tribunals system. The panels hear appeals from parents and young people who have been refused a place at their chosen school and, at present, are organised by local authorities. Given that in most cases these local

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<sup>56</sup> Mental Health Review Tribunal for Wales, *Annual Report 2019 – 2020*, (July 2020), p 12, See <https://mentalhealthreviewtribunal.gov.wales/sites/mentalhealthreview/files/2020-08/mhrtw-annual-report-2019-20.pdf>

<sup>57</sup> Sir Andrew Leggatt, *Tribunals for Users: One System, One Service: Report of the Review of Tribunals* (March 2001) recommendation 7 and para 3.15.

<sup>58</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019), para 6.47 See [https://gov.wales/sites/default/files/publications/2019-10/Justice%20Commission%20ENG%20DIGITAL\\_2.pdf](https://gov.wales/sites/default/files/publications/2019-10/Justice%20Commission%20ENG%20DIGITAL_2.pdf)

authorities also make the decisions about allocation of school places, the system lacks the structural independence which is a key design feature of the other tribunals.

- 3.92 Despite this, the Consultation Paper provisionally proposed that school admission appeal panels should remain outside the tribunal system. There were two reasons for the proposal. The first was that the volume and seasonal nature of the work risked overwhelming a central system, and was more easily absorbed into the day-to-day work of local authorities. The second was that the panels relied on members with experience of the local education system, which would be difficult to replicate on a national scale.
- 3.93 The proposal divided the 31 respondents; 18 agreed, 10 disagreed, and three answered “other”.

### Supporting views

- 3.94 Five of the six local authorities who submitted responses to our Consultation Paper were in favour of this proposal. Several of them agreed that the volume and timing of appeals, and need for panels with local experience, pointed towards retaining the current system.
- 3.95 Swansea Council, for example, argued that:
- We have a high volume of admission appeals coming through and we have built up good knowledgeable panels to deal with local area issues that often arise. This experience and knowledge would be lost if the panels were amalgamated with the SENTW and there is a risk of unnecessary delays which would ultimately negatively impact on that child’s education.
- 3.96 Cardiff City Council also agreed that the current arrangements should remain in place. In addition to the value of local knowledge, it also pointed to the low cost of the current system, and to the practical advantages of the appeals being administered by local authorities:

Panel members are volunteers so there are limited costs. Access to where the appeals are held (pre COVID) is a neutral and central building. Liaising and communication between Admissions team, parents and Clerk is essential to the smooth running and scheduling of appeals which is fluid and there are significant peaks in the volume of appeals during main round periods (in the region of 300 appeals are received between March and July). Would a centralised body be able to resource and respond to such demands?

- 3.97 The Catholic Education Service also expressed support for the current system, saying that the “current processes work well for parents and schools” and that they provide:
- consistency in decision making, a timely outcome, and as far as is possible, certainty, without putting unnecessary burdens on parents, schools, governing bodies, clerks or panel members.

- 3.98 It also argued that the need for panels with local knowledge was particularly acute for Catholic schools:

Admission arrangements can vary from school to school and in fact, from Catholic school to Catholic school and it is important that locally sourced panel members are used as they are best placed to determine whether or not particular admission arrangements have been correctly applied. This can be particularly important in Catholic schools where it is important that panel members understand admission arrangements in the context of Catholic schools as well as the local education context.

- 3.99 Others were supportive of maintaining the current arrangements for the time being, with a view to bringing school admission appeal panels within the broader system in the longer term. The Law Society for example favoured an incremental approach. Huw Williams said that:

The lack of information about the operation of school admissions appeals and the need for greater understanding of the way they reach their decisions suggests a more detailed study should be undertaken before they are brought into a Welsh Tribunals system. A reform of the admissions appeals system may be needed before this can happen.

- 3.100 Public Law Wales (which answered “other”) also argued that reform should “proceed with caution”, given the “present lack of comprehensive statistics on the activities of local authority panels”.

### Opposing views

- 3.101 Those who disagreed with the proposal tended to be of the view that the current system provided insufficient structural independence. Denbighshire County Council for example argued that:

Whilst the Local Authority’s view is that they operate well at a local level, it is felt that there is no separation of powers or decision making process from the point of view of a parent. The Local Authority is of the view that the admission appeal panels should form part of the Tribunal as there is no reason not to take these in along with the exclusion appeals.

- 3.102 In contrast to those who argued that the current system provided low-cost and proportionate justice, Denbighshire Council argued that:

it is becoming increasingly difficult for the Local Authority to find volunteers who are willing to sit as panel members given that they do this for free. In the current times, and perhaps going forward, the panel members are expected to use their own technology (laptops, ipads, phones etc) to conduct the hearings remotely without any recompense.

- 3.103 We received two responses from panel members who told us of their fear that deciding against the local authority could jeopardise their place on the panel. They both saw a difficulty in panels operating independently when legal advice was provided by staff from the local authority’s legal department.

- 3.104 Others argued that bringing school admission appeal panels within the unified system would bring advantages including consistency and judicial oversight. The response of the Wales and Chester Circuit (with which the Bar Council agreed) favoured bringing admission appeals within an education chamber on the grounds that:

The simplicity, clarity and transparency associated with the inclusion of all devolved tribunals that deal with educational issues within the First-tier Tribunal for Wales (and an educational chamber of it) would be attractive.

- 3.105 The response suggested that the answer to the logistical problem of administering the panels was to “retain the current system of administrative support for that part of what would be the educational chamber”. In relation to the composition of the panels, they observed that:

Appropriately trained lay-people play a part in many aspects of the administration of justice – the role of magistrates in the criminal courts and the Family Court is perhaps the most obvious example.

#### Qualified agreement

- 3.106 Several respondents expressed qualified agreement with the provisional proposal, suggesting that other reforms might be required. The Public Services Ombudsman for Wales explained his position as follows:

The volume and seasonal nature of these appeal decisions requires quick and timely decisions at a local level. I agree therefore that these appeals would not sit well within the SENTW system as a first tier of appeal decision making.

However, there is a need for uniformity of approach and transparency in appeal processes for all school admissions to maintain confidence in the process in relation to all local authority and independently run admission decisions.

- 3.107 Keith Bush QC also thought the panels should remain under the auspices of local authorities, but thought that the functions of the PWT, the Tribunal Procedure Rules Committee and a revived Administrative Justice Council should apply to them.

#### Additional appeals for an education chamber

- 3.108 Denbighshire County Council, which supported amalgamating admission panels within an education tribunal, suggested that a further type of education appeal could be heard by the tribunal:

The local authority also manages the process for school transport appeals, relating to decisions based on the Learner Travel (Wales) Measure 2008. Within the context of this process, the local authority suggests that such appeals could also be drawn under a central tribunal procedure. With Welsh Government presently considering options to update this area of legislation, there is potentially scope to coordinate these two areas of work to ensure a combined approach to school transport appeals in the future, which is reflected in the new updated legislation.

## Discussion

3.109 We have concluded that, at least for the time being, admission appeal panels should remain the responsibility of admission authorities, rather than being brought within the first tier of a unified tribunal system.

3.110 There is a risk that this approach may lead to a lack of consistency across Wales. To remedy this, and to introduce a level of judicial oversight that the system currently lacks, in Chapter 4 we recommend that a right of onward appeal should be introduced from the panels to what will be the Education Chamber of the First-tier Tribunal for Wales. This would not fully solve the problem of structural independence. The local authority would remain responsible for both admission decisions and for selecting the panel. But it would at least provide for independent scrutiny of admission panels' decisions.

### **Recommendation 6.**

3.111 We recommend that school admission appeal panels in Wales should continue to be administered by admission authorities.

## **SOCIAL CARE WALES PANELS**

3.112 We have already explained, in paragraphs 2.34 to 2.36 of Chapter 2, our reasons for recommending that appeal panels set up by Social Care Wales should not be brought into the unified tribunal structure.

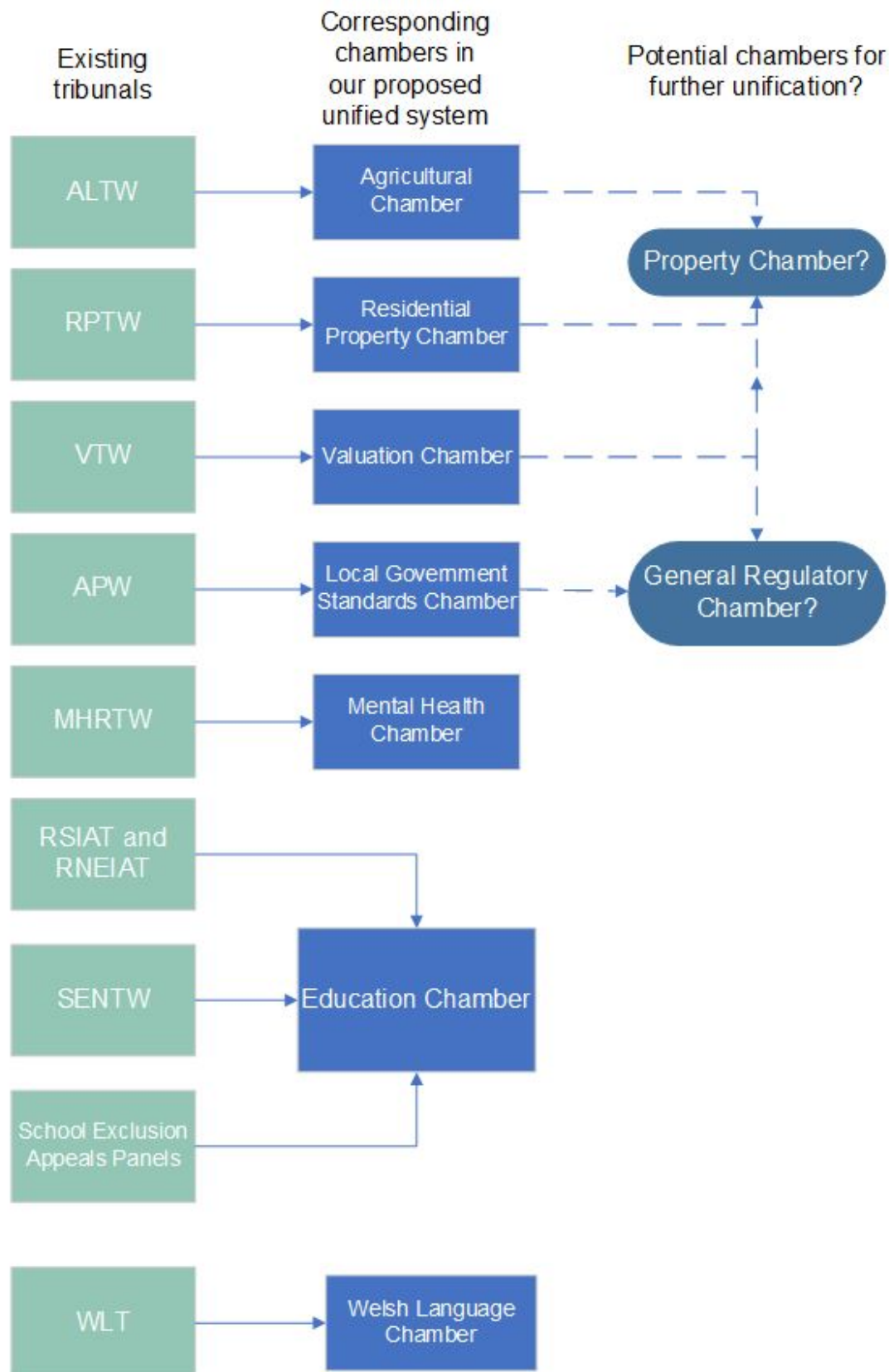
### **Recommendation 7.**

3.113 We recommend that social care appeal panels should continue to be administered by Social Care Wales.

## **REORGANISATION OF JURISDICTION WITHIN A FIRST-TIER TRIBUNAL**

3.114 Having provisionally proposed the creation of a unified First-tier Tribunal for Wales, our Consultation Paper then moved on to consider what chambers might be created within that tribunal, and how work might be allocated between them. We made two provisional proposals. One related to appeals by registered inspectors of school and nursery education and the other to formally amalgamating the constituent tribunals of the RPTW. We also asked three open questions relating to the creation of a General Regulatory Chamber ("GRC") and to the possible amalgamation of the ALTW and the RPTW or of any other tribunals. The possibilities were illustrated by a diagram, which is reproduced overleaf.

Diagram 1



3.115 We discuss consultees' responses on these topics before presenting our recommendations.

### **Registered inspectors of school and nursery education**

3.116 Consultation Question 9 provisionally proposed that the jurisdictions of the Registered School Inspectors Appeal Tribunal ("RSIAT") and Registered Nursery Education Inspectors Appeal Tribunal ("RNEIAT") should be amalgamated with that of the Special Educational Needs Tribunal for Wales (now renamed the Education Tribunal for Wales). These tribunals have not been constituted in recent years, but the members of the Education Tribunal are capable of hearing any cases.<sup>59</sup> It therefore seemed sensible for the jurisdiction to be included within an education chamber. Of the 18 responses to this question, only one disagreed.

3.117 The Law Society supported the provisional proposal, calling it "entirely logical". Both the Bar Council and Wales and Chester Circuit agreed, arguing that "all devolved tribunals dealing with educational issues should be included within an education chamber".

3.118 The consultee who expressed disagreement, Nadia Alabere (an independent appeals panel member), did so on the basis that the two tribunals have "different agendas". We are not persuaded that there is any better place to locate the inspectors' appeals, and think it would be excessive to create a separate chamber to hear them. While it is true that the jurisdictions of RSIAT and RNEIAT are different from those of the Education Tribunal, they all relate to education.

3.119 Given the strong support from respondents for this amalgamation, we recommend below that the jurisdictions of the RSIAT and RNEIAT should be amalgamated with the Educational Tribunal for Wales to create an Education Chamber of the First-tier Tribunal for Wales. Unless and until it is decided that the jurisdiction over inspectors' appeals is no longer required, we believe an Education Chamber is the appropriate place for it.

### **The Residential Property Tribunal for Wales**

3.120 Our Consultation Paper explained that the RPTW is made up of residential property tribunals, leasehold valuation tribunals, and rent assessment committees.<sup>60</sup> While it operates for most purposes as one body, this split does mean that each constituent part has different procedural rules. Consultation Question 10 provisionally proposed that the constituent parts of the RPTW be formally combined into a single residential property chamber.

3.121 Of the 18 respondents to this question, 17 agreed and one answered "other". Several respondents commented that this would amount to little change, given that the RPTW already operates as an umbrella institution. For example, Richard Payne, the President of the RPTW, said that "in practice the three jurisdictions are in fact one chamber", and that all members of the RPTW sit in all three jurisdictions.

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<sup>59</sup> President of Welsh Tribunals, *First Annual Report* (March 2019) p 5.

<sup>60</sup> Devolved Tribunals in Wales (2020) Law Commission Consultation Paper No 251, para 3.40.



## A General Regulatory Chamber?

3.122 Consultation Question 11 sought views on:

- (1) whether the First-tier Tribunal for Wales should include a GRC, and if so;
- (2) which existing tribunals should form part of that Chamber.

3.123 The Consultation Paper noted that a significant proportion of new appeal routes created in Wales in recent years have been directed to the GRC of the First-tier Tribunal, suggesting there might be future demand. We also suggested that such a chamber could serve as a home for smaller tribunals, such as the APW.

3.124 We received 15 responses to this question. Ten of those expressed support, while four disagreed and one answered “other”.

### Supporting arguments

3.125 Respondents who agreed with this suggestion tended to do so for the reasons outlined in the Consultation Paper; primarily, that it would provide a place in which to locate new jurisdictions, therefore making recourse to the tribunal more attractive to policy makers. Dr Sarah Nason and Dr Huw Pritchard said:

We agree that it would be sensible to include provision for a General Regulatory Chamber that would in the first instance include the Adjudication Panel for Wales. We note the Commission on Justice in Wales recommendation that ‘...Welsh tribunals should be used for dispute resolution relating to future Welsh legislation’ (Justice Commission para 6.59 and recommendation 27). The creation of a General Regulatory Chamber could help achieve this objective where new appeal routes are created under Welsh law that might instead have been allocated to the General Regulatory Chamber of the First-tier Tribunal for England and Wales or through some of form of resolution including “ad hoc” resolution.

3.126 A recurring theme in responses was the need to make sure the tribunals structure could accommodate new appeal routes. The Governing Council of the VTW said, for example:

We consider that it would be sensible to include a general regulatory chamber within the First-tier Tribunal for Wales; it would provide an initial appeal avenue for new jurisdictions whilst an assessment of appeal volumes and the required judicial expertise was undertaken.

3.127 The Wales and Chester Circuit and the Bar Council thought the suggestion “desirable”, and added “it is likely that new routes of appeal which do not obviously fall within the expertise of one of the other chambers, would lie to this chamber”.



### Create the chamber when necessary

- 3.128 Several respondents foresaw a need for such a chamber in the future, but thought it premature to create it now. The APW thought that in principle the idea of having a tribunal for new appeals created by the Senedd was logical, but argued that:

... if new areas arise closely connected to the work of another tribunal or chamber eg property matters, it would make more sense to assign that work to the appropriate chamber. This could leave the Welsh General Regulatory Chamber ("GRC") with little or no work, and bearing in mind the number of cases dealt with by the Welsh tribunals overall, might lead to the Welsh GRC being seen as unattractive by potential members due to lack of work, lack of coherent connection between the work, and confusion with the current England and Wales GRC. If chambers can be created through secondary legislation, then if it becomes necessary to create such a chamber, it can be done later for a specific purpose.

- 3.129 Sir Wyn Williams also thought that there was no current need for the chamber, but that it could be brought into being at a later stage if necessary.

If it is being created to cater for certain appeals I would prefer there to be an Appeal Tribunal for Wales with jurisdiction to deal with all appeals arising from devolved tribunals. If its primary purpose is so that the very small tribunals (in terms of number of cases) can be sited in one Chamber I do not believe that to be necessary and if its creation is predicated upon the need for an "all purpose Chamber" to deal with future and as yet unidentified areas of work I consider that the likelihood is that there will be sufficient Chambers available to allocate such work appropriately for the foreseeable future.

### Incorporation of the APW and VTW into a General Regulatory Chamber

- 3.130 As indicated above, Consultation Question 11 asked which chambers might form part of a GRC for Wales. We suggested that the chamber could perhaps accommodate the APW, and potentially the elements of the VTW's work that involve assessing liability to tax (rather than valuation). Five respondents considered specifically whether the APW could form part of a General Regulatory Chamber. The Governing Council of the VTW made the general point that:

Any existing tribunals with extremely low appeal rates, which do not readily lend themselves to the jurisdictions within the proposed chamber structure, could also form part of a general regulatory chamber.

- 3.131 The Wales and Chester Circuit and Bar Council were also generally supportive, noting that:

the APW does not obviously have any other chamber of which it could be part. Its jurisdiction under Part III of the Local Government Act 2000 (as it still applies in Wales) is completely different to the work of any of the other devolved tribunals.

- 3.132 Richard Payne also thought the APW an “obvious” candidate for inclusion in a GRC. The APW, however, expressed misgivings in its response. It explained that:

APW members have expressed real concern about being asked to deal with work utterly unrelated to its current work, and have suggested it would make remaining a member of the APW less attractive. Members have a specialism and real interest in standards. The APW is also unclear why diagram 1 within the report suggests that the VTW could be merged with it into the Wales-GRC; our work is entirely unrelated to each other.

The APW has been proposed to be within the Welsh GRC. The APW notes that its work is cyclical and the numbers quoted by the Law Commission represent the least busy parts of our hearing cycle – the current work before the APW for this financial year is higher than the Commission has noted. Also, it is unclear why the Welsh Language Tribunal (“WLT”) is proposed to remain as a separate entity, given its workload and number of hearings, while the APW is proposed for merger within a Welsh GRC.

Our submission above expresses the concerns of the members if required to deal with issues unrelated to its work. Also, the APW has to deal with politicians, the press and the public and is concerned simply becoming a sub-chamber within another chamber will reduce its standing and status both within the Tribunal system and externally – its members have to enforce the Code of Conduct in often contentious circumstances in the public gaze. The Counsel General has stated publicly that the APW members are judicial office holders worthy of respect.

The APW has noted that the Law Commission proposes a name change to “Local Government Standards Chamber”. The APW is concerned that this proposed name overlooks its role in upholding the standards of regional bodies, such as Fire & Rescue Authorities and National Park Authorities, and would make the nature of its work more opaque to the public. “Local Governance Chamber” may be more reflective of the APW’s current work.

- 3.133 Roger Handy was the only respondent who specifically addressed the question of possible incorporation of elements of the VTW’s jurisdiction. He was unpersuaded by our suggestion, explaining:

I can see the advantage of having a General Regulatory Chamber, especially as this would help make the structure more “future proof”. However I see little benefit in splitting current VTW jurisdiction between two different chambers as I can see little synergy between the function of the APW and billing authorities / council authorities’ non-domestic ratings/council tax charging decisions.

## Other suggestions

3.134 Some respondents made suggestions for other types of appeal that could be heard by a GRC, or similar chamber. The APW for example put forward the possibility of creating a regulatory standards chamber, particularly if justice and policing are ultimately devolved. Its response noted:

There is much similarity in both the law and approach between the existing regulatory tribunals which cover England and Wales, and many members of the APW sit in such tribunals. Such a proposal would need to be agreed with the Westminster government and professional regulatory bodies, but could lead to police misconduct hearings, local government standards hearings, hearings about the conduct of professionals such as social workers, health care professionals, etc, being dealt with in one place. The amount of work such a chamber would deal with would be substantial and more than enough to justify individual chamber status. If it was felt that the current standard arrangements in the Senedd Cymru should be externalised, this arrangement could be an option.

3.135 A similar suggestion was made by Richard Payne, who thought that Social Care Wales panels and pharmaceutical appeals panels could fit within a new GRC. We discuss the position of Social Care Wales panels in more detail in Chapter 2.

3.136 Dr Sarah Nason and Dr Huw Pritchard also put forward the possibility of including a new right of appeal from decisions relating to the Discretionary Assistance Fund for Wales (discussed at paragraphs 2.79 and 2.80 of our Consultation Paper). They thought there might be other “ad hoc legality reviews” that could potentially be brought within the chamber.

3.137 Huw Williams took a different approach, suggesting instead that the work of the APW could be taken on by an Appeals Tribunal for Wales (alongside the work of the WLT). His views on those topics are considered in more detail in Chapter 4 below.

## Discussion

3.138 This provisional proposal attracted a number of different ideas. Many of them are however contingent on additional work being directed to tribunals in Wales. This additional work is at varying stages of policy development, and is therefore difficult to predict. It could encompass additional tribunal jurisdictions in fields as diverse as housing, rural payments, taxation and the environment. New jurisdictions in any of these areas could change the balance of work across chambers, and possibly change the nature of the chambers themselves. Therefore, the approach we have decided to take is to make recommendations that suit the work of the tribunals that already exist. Undoubtedly, we should recommend a system that is capable of evolving with the needs of its users, but it would be foolish to try and predict at this stage exactly what the future needs of its users might be.

3.139 For this reason, we have decided not to recommend the creation of a GRC. At present, the only tribunal whose work would be absorbed by that Chamber would be the APW. Without knowing what other jurisdictions could be absorbed into a GRC in future, it is difficult to know whether these would be sufficiently similar to the APW to justify being placed in the same chamber.

3.140 We remain of the view that a GRC is likely to prove a useful part of a broader devolved tribunals structure in the future. On balance, however, we agree with those respondents who thought it should be created as and when there was a clear and present need for it. We therefore recommend below that the Welsh Government should keep the need for a General Regulatory Chamber under review.

### Property chamber

3.141 A second possible amalgamation on which we sought views was that of the RPTW and ALTW, to form a property chamber. The majority of respondents to Consultation Question 12 (11 respondents) agreed with this proposal (including the President of the ALTW, Christopher McNall) while two disagreed and two marked their answer “other”.

3.142 The Law Society and the Bar Council supported the suggestion, with the Law Society calling the proposal “logical”, and the Bar Council explaining that:

We consider that a single chamber dealing with all property work would be desirable. That approach seems to us to offer the greatest potential for economies of scale, coherence and increase in public profile. We think it likely that the legal expertise required across the work of the present property tribunals is likely to be common. Specialist lay expertise may not be but we do not think that a reason for not amalgamating the tribunals within a single property chamber.

3.143 Bob Chapman, a former member of both the Committee for Administrative Justice and Tribunals Wales and the Welsh Committee of the Administrative Justice and Tribunals Council, also supported amalgamation, on the basis that the simpler the overall structure, the better. Huw Williams agreed too, though qualified his answer by saying that:

attention will need to be paid to the recruitment of members suitably qualified in agricultural law and surveying to maintain the chamber’s specialist character in agricultural disputes.

3.144 Two respondents gave thought to a broader question for administrative justice in Wales: where should housing and homelessness appeals sit? Dr Sarah Nason and Dr Huw Pritchard agreed that the tribunals should be consolidated into a Property Chamber (provided that neither lost its specific identity, user focus and strengths within those processes), but also considered that:

there is a case for a potential future broader Property Chamber that could include jurisdiction over some devolved Welsh law housing and homelessness appeals (currently determined by the County Courts in Wales). However, this further extension is a matter of significant debate, to which we have contributed in our report.<sup>61</sup>

3.145 Richard Payne also considered the place of housing appeals as part of a broader consideration of future development of work of the RPTW and ALTW. In his view the

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<sup>61</sup> S Nason, A Sherlock, H Taylor and H Pritchard, *Public Administration and Justice in Wales: Social Housing and Homelessness* (Nuffield Foundation) (2020) and S Nason and H Taylor, “Housing and Justice in Wales” (2020) 23(5) *Journal of Housing Law* 97-103.

better arrangement might be to consolidate the work of the RPTW with housing appeals, while leaving the ALTW to focus on agricultural work:

Although if both [the RPTW and ALTW] were in the same chamber they would retain their individual character and expertise, I think on balance that I prefer that consideration be given instead to an Agricultural and Rural Affairs Chamber or some such denomination. The Commission on Justice in Wales broadly stressed the aspiration and target to try and keep legal work/disputes originating in Wales within Wales and the chamber structure would enable this to happen and for new routes of appeal or dispute resolution to be created within such a structure. It seems at the very least, possible that there are likely to be future developments in Wales (related to rural land management and climate change obligations etc) that will sit more easily in an agricultural chamber. Further, as stated at paragraph 3.136 in the [Consultation Paper], in Scotland there is a Housing and Property Chamber - this seems to make more sense and any new future causes of action could be dealt with there, particularly if the longstanding aims for a Housing tribunal and the transfer of powers relating to housing matters, come to the Welsh tribunals.

3.146 He also commented on the differences between the work of the tribunals, noting:

On a more practical basis, I suggest that the matters that the ALT deal with have largely little or nothing in common with the RPT/LVT's work which is concerned with residential property. The drainage matters dealt with by the ALT require completely different expertise and knowledge to that of the surveyor expert members in the RPT who are expert in residential property. There is not at present (save for lawyers) and I do not anticipate there being in the future, any great cross-over in expertise between the expert members of the two tribunals. In conclusion therefore I think that there should be a Property Chamber and an Agricultural Chamber.

## Discussion

3.147 Whether or not to amalgamate the ALTW and RPTW into a single Property Chamber has proved a difficult question. While it has the support of the majority of respondents, the judicial leads of the tribunals in question have differed on whether amalgamation would be right for their tribunals.

3.148 We can see that in future there might be an argument for combining residential property work with housing claims, particularly if the work of the ALTW is bolstered by new agriculture and environmental routes of appeal. However, at the moment it is not clear when or if these new areas of work might be added to the tribunal system. We therefore adopt here the same approach we outlined above at paragraph 3.138 to 3.140. Given the existing jurisdictions of the tribunals, we remain of the view that an amalgamation of the RPTW and ALTW would be sensible.

3.149 It is true that there is specialist expertise in each tribunal which may not be applicable to the other. Members of the drainage panel of the ALTW are a good example; that is considered such specialist work that members are recruited separately, even within the ALTW, and we would expect that to continue. But there are legal members who have experience of the work of both tribunals. And while some of the work may differ, both the RPTW and the ALTW hear disputes between landlords and tenants.

3.150 This grouping of work will also have the advantage that it may be familiar to legal practitioners, who are accustomed to the structure of the First-tier Tribunal.

### **Other suggestions**

3.151 Consultation Question 13 sought views on whether any of the other existing devolved tribunals should be amalgamated into a single chamber. We only received two suggestions for alternative amalgamations.

3.152 The Law Society raised the question of:

whether the Valuation Tribunal for Wales should be amalgamated with the Residential Property Tribunal for Wales and Agricultural Land Tribunal for Wales into a property chamber. A feasibility study could determine how such an embracing chamber would work in practice, including its likely staffing profile and anticipated caseload. We note that the Residential Property Tribunal for Wales and Agricultural Land Tribunal for Wales already share some staffing resource.

3.153 Huw Williams took the view that the First-tier Tribunal should initially consist of three chambers: a Property Chamber (excluding the VTW) an Education Chamber (excluding school admission appeals) and a Mental Health Chamber. As referred to above, he also thought that if designing a system from first principles a taxation chamber could encompass council tax and rating valuations (which are presently dealt with by the VTW), along with Welsh landfill and land transaction tax appeals.

3.154 These are avenues that the Welsh Government may wish to explore in future. In our view, the fundamental point is that the VTW should be brought within the system of devolved tribunals, for the reasons articulated above at paragraphs 3.45 to 3.53. That will facilitate any future changes in grouping of jurisdictions.

### **Recommendation 8.**

3.155 We recommend that the Welsh Ministers exercise their power to create chambers of the First-tier Tribunal for Wales so as to form an Education Chamber to exercise the jurisdictions of the Registered School Inspectors Appeal Tribunal, the Registered Nursery Education Inspectors Appeal Tribunal and the Education Tribunal for Wales.

### **Recommendation 9.**

3.156 We recommend that the Welsh Ministers exercise their power to create chambers of the First-tier Tribunal for Wales so as to form a Property Chamber of the First-tier Tribunal for Wales to exercise the jurisdictions of the Agricultural Land Tribunal for Wales and Residential Property Tribunal for Wales.

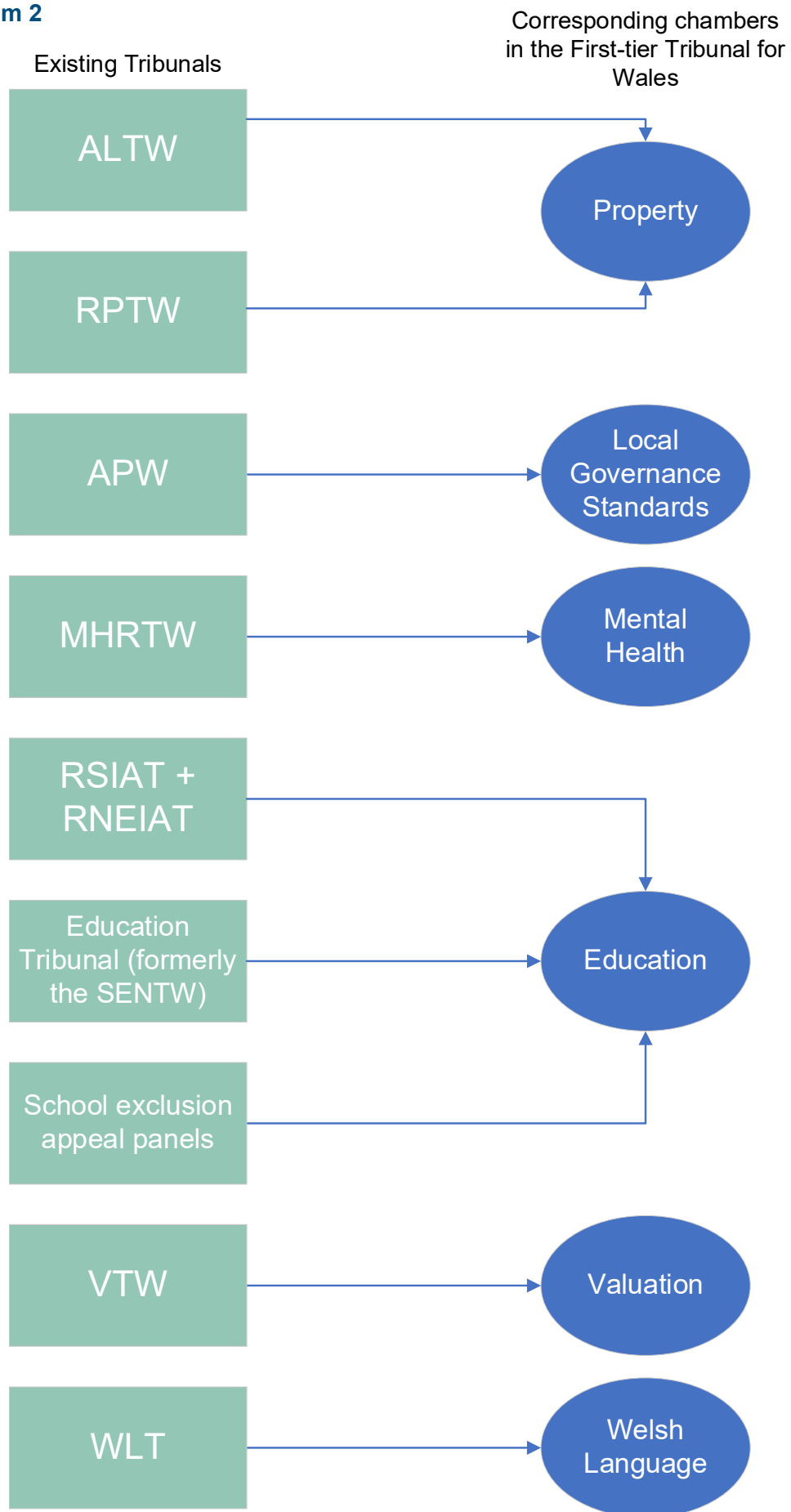
**Recommendation 10.**

3.157 We recommend that the Welsh Government should keep the organisation of chambers of First-tier Tribunal for Wales, including the possible creation of a General Regulatory Chamber, under review as new tribunal jurisdictions are created.

**Our proposed structure**

3.158 The diagram overleaf shows our recommended structure for the First-tier Tribunal for Wales.

**Diagram 2**







## Chapter 4: Appeals

- 4.1 In Chapter 3 we recommended the creation of a First-tier Tribunal for Wales. In this Chapter we tackle the question of appeals from that tribunal, as well as the question of appeals from school admission appeal panels.
- 4.2 As set out in our Consultation Paper, the provision made for appeals from the devolved tribunals at present is not uniform. Most are directed to the Upper Tribunal created by the Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”), with the result that cases at the appellate stage are heard alongside appeals from corresponding tribunals in England. By contrast, appeals from the Adjudication Panel for Wales (“APW”) and the Welsh Language Tribunal (“WLT”) are heard by the High Court. Appeals from the Valuation Tribunal for Wales (“VTW”) are to the High Court or the Upper Tribunal, depending on whether they relate to council tax or to non-domestic ratings. For school admission and exclusion appeal panels, there is no route of appeal as such.
- 4.3 Our Consultation Paper contained one provisional proposal relating to permission for appeals from rent assessment committees (one of the constituent bodies of the Residential Property Tribunal for Wales (“RPTW”))<sup>62</sup> and six open questions seeking views. We asked first whether the varying onward appeal routes should be made uniform, creating a single route of appeal from decisions of the First-tier Tribunal for Wales. Secondly, we asked what the appeal body might be; the High Court, Upper Tribunal, or a new Appeal Tribunal for Wales. We also asked whether, instead of a uniform appeal route, there should be a “default” appeal route.<sup>63</sup>
- 4.4 We treated school admission appeal panels separately, asking whether a new route of appeal should be created from those panels to the Special Educational Needs Tribunal for Wales (now the Education Tribunal for Wales; we have retained references to “SENTW” in this Chapter when quoting respondents). We asked whether onward appeals from such decisions should be limited to important points of principle or practice.<sup>64</sup> Finally, we asked whether there should be a single route of appeal from the VTW and, if so, what it should be.<sup>65</sup>
- 4.5 We start this Chapter with a summary of the position at present, before summarising the results of the consultation, and then discussing our conclusions. We deal first with appeals from the tribunals listed in section 59 of the Wales Act 2017 and the VTW, and secondly with appeals from school admission appeal panels.

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<sup>62</sup> That appeals from rent assessment committees should be subject to permission to appeal, as are appeals from the other constituent bodies of the RPT: Consultation Question 20.

<sup>63</sup> Consultation Questions 14 to 16.

<sup>64</sup> Consultation Questions 17 and 18.

<sup>65</sup> Consultation Question 19.

## THE POSITION AT PRESENT

4.6 Below we reproduce tables from the Consultation Paper setting out where appeals currently lie, and the number of appeals heard each year (updated to reflect data from the year 2020 – 2021).

<b>Tribunal<sup>66</sup></b>	<b>Appellate body</b>	<b>Nature of appeal</b>
ALTW	Upper Tribunal (Lands Chamber)	Point of law
APW	Appeals against the decision of an interim case tribunal or case tribunal: High Court. No right of appeal against the decision of an appeals tribunal (judicial review available).	Appeals may be brought against any suspension, or length of suspension (not restricted to a point of law).
MHRTW	Upper Tribunal (Administrative Appeals Chamber).	Point of law.
RPTW	Upper Tribunal (Lands Chamber).	Appeal from a rent assessment committee restricted to appeal on a point of law. Appeal from a residential property tribunal or leasehold valuation tribunal not so restricted. <sup>67</sup>
RSIAT and RNEIAT	None (judicial review is available; the tribunal may also review its own decision).	-
School admission appeal panels	None (judicial review available; applicants may also complain to the Welsh Ministers or Public Services Ombudsman for Wales).	-
ETW (formerly known as SENTW)	Upper Tribunal (Administrative Appeals Chamber).	Point of law.
VTW	Council tax appeals: High Court. Non-domestic rating appeals: Upper Tribunal (Lands Chamber).	Point of law.  Fact and law.
WLT	High Court.	Point of law.

<sup>66</sup> The abbreviations used in the above table and the table overleaf are as follows: Agricultural Land Tribunal for Wales (“ALTW”), Adjudication Panel for Wales (“APW”), Mental Health Review Tribunal for Wales (“MHRTW”), Residential Property Tribunal for Wales (“RPTW”), Registered School Inspectors Appeal Tribunal and Registered Nursery Education Inspectors Appeal Tribunal (“RSIAT” and “RNEIAT”), Education Tribunal for Wales (“ETW”), Special Educational Needs Tribunal for Wales (“SENTW”) and Welsh Language Tribunal (“WLT”).

<sup>67</sup> The Upper Tribunal (Lands Chamber) Practice Directions 2010 para 4.2 requires applicants for permission to appeal to specify whether their reasons for making the application fall within one of four categories:

- 4.7 The number of applications for permission to appeal made to the section 59 tribunals, and the outcome of those applications, are set out in the table below.<sup>68</sup>

<b>Tribunal</b>	<b>2020/2021</b>	<b>2019/20</b>	<b>2018/19</b>
ALTW <sup>69</sup>	-	2 (both refused)	1 (refused)
APW	-	-	-
MHRTW	6 (3 granted)	6 (1 granted)	4 (2 granted)
RPTW	3 (refused)	13 (all refused)	9 (all refused)
RSIAT and RNEIAT	-	-	-
SENTW	11 (2 granted, 9 refused)	8 (all refused).	2 (both refused)
VTW	n/a	n/a	n/a
WLT	-	-	-

- 4.8 The VTW is excluded from the table, as it is not a section 59 tribunal. It too has a low number of appeals. In 2018/2019 there was just one; an appeal to the High Court. The year 2019/2020 saw two statutory appeals and one application for permission for judicial review, which was refused. One rating decision was appealed to the Upper Tribunal.<sup>70</sup>
- 4.9 The table above indicates that only eight grants of permission to appeal to the Upper Tribunal have been made by section 59 tribunals in the last three years, and exclusively by the MHRTW and the ETW. We have been unable to establish reliably how many applications for permission have been made to the UT or how many appeals heard. The recent report of the President of the Administrative Appeals Chamber of the UT, which hears appeals from the MHRTW and ETW, states that:

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(a) that the leasehold valuation tribunal or residential property tribunal wrongly interpreted or applied the relevant law; (b) that it wrongly applied, misinterpreted or disregarded a relevant principle of valuation or other professional practice; (c) that it took account of irrelevant considerations, failed to take account of a relevant consideration or evidence, or there was a substantial procedural defect; or (d) the point or points at issue is or are of potentially wide implication.

<sup>68</sup> Data supplied by the Welsh Tribunals Unit.

<sup>69</sup> In a recent decision, the Upper Tribunal has held that there is no requirement, when appealing from the ALTW, to seek permission either from the ALTW itself or from the Upper Tribunal. This is interesting given that there clearly have been permission to appeal applications made in the past in relation to that tribunal. The UT does state that “the question has never previously arisen”. See *Adams v Jones* [2021] UKUT 9 (LC), [2021] All ER (D) 65 (Jan) at [5].

<sup>70</sup> Valuation Tribunal for Wales, *Annual report 2018-2019*, paras 2.6 and 2.6.

appeals to UTAAC from devolved tribunals within its jurisdiction are rare. The vast majority of hearings in Wales involve challenges to decisions of the [First-tier Tribunal] rather than to decisions of Welsh tribunals.<sup>71</sup>

- 4.10 We are not aware of any appeals from section 59 tribunals to the High Court in this period. Even taking into account the appeal work generated by the VTW, it appears that the total volume of appeal work generated by devolved tribunals is very low.

## APPEALS FROM THE TRIBUNALS

### A uniform route of appeal

- 4.11 At Consultation Question 14, we asked respondents whether routes of appeal from the devolved tribunals should be uniform. Of the 22 respondents who answered this question, 14 agreed, three disagreed, and five offered other answers.

- 4.12 In strong support of a uniform route of appeal was Sir Wyn Williams, President of the Welsh Tribunals, who thought that:

... there is no reasonable justification for appeals from some (a minority) tribunals going to the High Court whereas appeals from the remaining tribunals (the majority) go the Upper Tribunal of England and Wales. The current routes of appeal are, in my view, the result of historical developments undertaken on a piecemeal basis and without reference to the overarching objective of having in place a coherent tribunal structure of which routes of appeal are an integral part.

- 4.13 Christopher McNall, the Chairperson of the ALTW, also agreed with the provisional proposal. Several respondents argued that having a uniform route of appeal would make the system easier to understand for users and practitioners and ultimately increase access to justice; these included the Bar Council of England and Wales; Bob Chapman, a former member of both the Committee for Administrative Justice and Tribunals Wales, and the Welsh Committee of the Administrative Justice and Tribunals Council; and Huw Williams, Chief Legal Adviser to the Senedd, responding in his personal capacity. As Dr Angela Ash, a member of the RPTW, put it:

From a public perspective, having very different appeal routes has always baffled me. Streamlining and consolidating systems, structures and processes stands a chance of making justice more accessible and understandable to the people who use it.

- 4.14 Not all, however, were convinced that having one uniform route of appeal would necessarily make things easier for users. The Governing Council of the VTW made the point that even if appeals from devolved tribunals were made uniform, other non-devolved tribunals would continue to operate in Wales. As a result, different appeal routes (and the potential for confusion) would continue to exist:

As a result of the reservation of the single legal jurisdiction for England and Wales, excepting devolved tribunals, it will be the case that users of non-devolved tribunals

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<sup>71</sup> Senior President of Tribunals, *Annual report 2020 – 2021*, annex A. See <https://www.judiciary.uk/wp-content/uploads/2021/09/Senior-Presidents-Annual-Report-2021-Final-web.pdf>

in Wales will inescapably have to use the joint England and Wales system for further appeals. This means that, even if a uniform route of appeal were developed for the devolved tribunals, there would still necessarily be different routes of appeal for Welsh tribunal users across the full panoply of jurisdictional areas. In this context there does not appear to be a compelling argument for having one channel and one channel only for further appeal for users of the devolved tribunals simply because the appeal arises from a decision of a devolved tribunal. The resolution of the matter at the next level should take place in the forum that is best placed to deal with the issue – ie that place which has the required expertise and also the volume of appeals to justify the expense of setting up that forum in the first place.

Accordingly, appeals from devolved tribunals would appear to be better served by the expertise and specialisation of judges hearing significant numbers of similar appeals within the broader system of reserved tribunals in England and Wales. There will be no disadvantage to the tribunal user, provided the appropriate appeal route is clearly sign-posted in the notification of decision from the devolved tribunal.

4.15 The Governing Council of the VTW thought that:

Appeal routes from devolved tribunals should be rationalised as much as possible but it will be impossible to achieve a uniform appeal route unless an Appeal Tribunal for Wales is newly established.

However, it did not see an Appeal Tribunal as a realistic option, as:

Due to the low numbers of appeals from tribunals in Wales, it is likely that expertise would need to be drawn from reserved courts/tribunals and would effectively render the newly created appeal tribunal a cosmetic exercise.

4.16 Others maintained that different needs of particular tribunals justified different appeal routes. The APW explained that:

The needs, workload, type of work and users served by the existing tribunals greatly vary. For example, the APW deals with public law and human rights issues in public hearings that can affect the implementation of decisions taken by the electorate in local government elections while SENTW sits in private considering the additional learning needs of individual children following a case raised by the family/carer against the affected local authority. SENTW is likely to be more informal in proceedings than the APW and may require appeals to be determined swiftly to ensure a child receives the support to which they are entitled; the decision of the APW may deprive thousands of voters of their chosen representative and deny those voters a representative for a period of time. Given the variation between the devolved tribunals, it is not obvious that the routes of appeal should be uniform. The APW cannot speak to the needs of other tribunal users, but it is of the view that the appropriate course of appeal is to the High Court for this jurisdiction due to the complexity of the matters considered and the need for it to be perceived to be reviewed at a higher level by a suitably qualified judge of sufficient standing to win respect and deal with the human rights issues.

- 4.17 If a uniform route was necessary, the APW suggested that this might be to an Appeal Tribunal for Wales populated by a mixture of High Court and Upper Tribunal judiciary:

If an uniform route must be adopted, could a hybrid scheme be devised for an Appeal Tribunal for Wales split into two sections – one from the Upper Tribunal (cross-ticketed) for those tribunals currently served in such a way and the other from the High Court for those where appeal lies in that direction? The needs of the tribunals and their users are too diverse to be put into one uniform group.

- 4.18 Similarly, the Law Society of England and Wales thought that appeals from the Mental Health Tribunal for Wales should continue to lie to the Upper Tribunal (though was in favour of a uniform appeal route from other devolved tribunals). That tribunal also currently hears appeals from the First-tier Tribunal (Health, Education and Social Care). The Law Society argued that the appeal routes for mental health cases should continue to be the same “because of its intricate jurisdiction (eg deprivation of liberty and enforced treatment) and the undesirability of any cross-border divergence in human rights protections”.

- 4.19 The Mental Health Review Tribunal for Wales (“MHRTW”) shared this view for similar reasons:

It is crucial for us to have the same appeal route as the First-tier Tribunal (Mental Health). Many of the decisions made on appeal from us revolve around human rights issues which equally affect patients in England. Also, many English patients are detained in Wales, so a system which potentially risks key decisions on appeal being decided differently in Wales to England would create chaos. The route from the First-tier Tribunal (Mental Health) is to the Upper Tribunal so it is essential that that remains our route also. We have no view as to whether uniformity amongst devolved tribunals is desirable, but if it is so decided then the smaller tribunals will need to follow us.

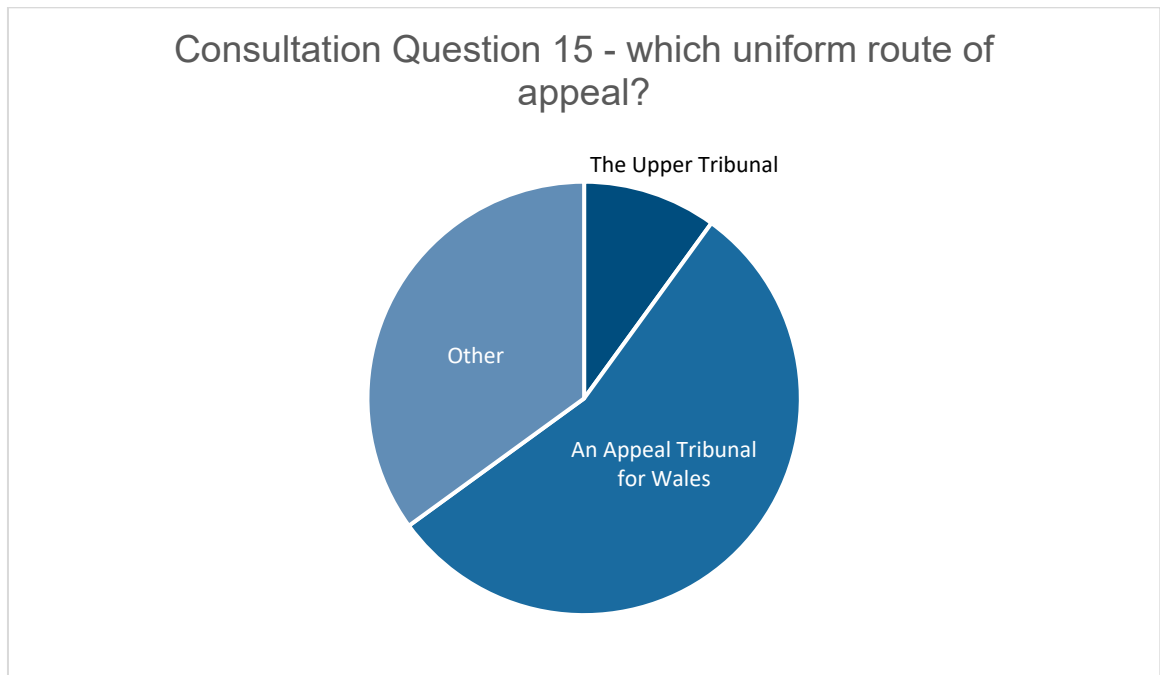
- 4.20 Richard Payne, President of the RPTW, also favoured retaining access to the expertise of the Upper Tribunal. He advocated a “hybrid model” (discussed further below). According to the hybrid model, appeals based on underlying legislation passed by the Senedd and only applicable in Wales would be directed to an Appeal Tribunal for Wales. Appeals based on underlying legislation passed in Westminster, however, would follow the same route as in the reserved system. He used the example of the residential property tribunals and leasehold valuation tribunals benefitting from the current body of expertise in the Upper Tribunal (Lands Chamber), and added:

I do not believe that the Appeal Tribunal for Wales would be able to replicate the experience and learning of the Upper Tribunal, nor do I think at this stage, that it would be desirable to have two senior appellate bodies determining the same issues.

### **Destination of onward appeals**

- 4.21 One of the consultation questions that has generated the most discussion throughout the consultation period is whether, if a uniform appeal route is adopted, that should be

to the Upper Tribunal, the Administrative Court in Wales, or a newly established Appeal Tribunal for Wales.



Of the 20 people that responded to this question, 11 were in favour of an Appeal Tribunal for Wales, two were in favour of the Upper Tribunal and no respondent gave the Administrative Court in Wales as their first choice for a sole appeal route. Some of those that answered “other” – seven respondents – expressed support for more than one option.

#### Appeal Tribunal for Wales

- 4.22 Sir Wyn Williams expressed support for an Appeal Tribunal for Wales during the consultation period. In his written response, he concluded that:

This opportunity should be taken to fashion an appeal structure within Wales for the future. As the work of the devolved tribunals increases and additional bodies become devolved tribunals the case for there being a discrete appellate structure within Wales becomes, in my view, compelling.... In my view we should take this opportunity to create an appeal structure within Wales which, when in place, can subsist for the foreseeable future.

- 4.23 The Bar Council, the Law Society, the Wales and Chester Circuit and Public Law Wales also concurred with the idea of taking the opportunity to put in place an appeal structure within Wales for the future. Both the Bar Council and the Wales and Chester Circuit agreed with the reasoning in favour of an Appeal Tribunal for Wales, set out at paragraph 4.50 of our Consultation Paper.<sup>72</sup>

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<sup>72</sup> Devolved Tribunals in Wales (2020) Law Commission Consultation Paper No 251, para 4.50.



- 4.24 Dr Sarah Nason and Dr Huw Pritchard's response (marked "other"), set out particular considerations which had arisen from their research:

The perceived benefits of establishing a new Appeal Tribunal for Wales would be in the notion of a distinctly Welsh identity, with administration through the Welsh Tribunals Unit (whatever form this takes in future) and judicial leadership from the President of Welsh Tribunals. This approach also has the potential to respond to various concerns about the comparative resources allocated to Welsh law matters within judicial training in combined England and Wales structures. However, it is not clear whether a more distinctive Welsh identity and administration would have demonstrable benefits as far as access to justice is concerned. Potentially, the move in effect from "regionalised" institution (the Administrative Court in Wales) to devolved institution (the Appeal Tribunal for Wales) could add value in terms of raising awareness and improving accessibility. It would also improve the prospects for accountability for the administration of justice in Wales to the Senedd Cymru/Welsh Parliament. It might also be said that a cadre of Appeal Tribunal for Wales judges, although potentially also regularly sitting as judges of the Administrative Court and reserved Upper Tribunal, might feel more emboldened to interpret/develop the growing body of devolved Welsh law in more distinctive, but potentially also more consistently principled ways as serves the needs of people in Wales. All this said, the research suggests that a factor over and above uniformity and institutional identity, is access to legal aid funded advice and representation as standard.

- 4.25 Public Law Wales supported the creation of an Appeal Tribunal. In its response, it addressed the potential objection that such a tribunal could lead to diverging caselaw in England and Wales:

Consistency of approach to questions of law common to devolved and non-devolved tribunals will inevitably be ensured by the ordinary rules of precedent and from the inclusion within the Welsh Upper Tribunal judiciary of judges who also sit in the (England and Wales) Upper Tribunal and the High Court.

- 4.26 Huw Williams, who advocated the creation of a Welsh Appeal Tribunal, noted that its scope need not be restricted to appeals from the First-tier Tribunal. In relation to the APW and the WLT, he argued that:

The Adjudication Panel for Wales hears appeals from local authority standards and ethics committees. The committees' proceedings are structured with an independent element and an independent chair. Standards of conduct cases are conducted formally, often with a presenting officer from the Public Service Ombudsman. I think there is a strong argument that this constitutes an adequate first tier hearing, albeit outside the proposed Welsh Tribunals system. An analysis of the decisions of the Adjudication Panel shows, in my view, that it exercises an appellate function rather than a first instance function and for that reason I would place the functions of the Adjudication Panel within the Appeal Tribunal and not as a First Tier Tribunal. In those exceptional cases where the Public Services Ombudsman makes a direct referral under section 69(4)(c) of the Local Government Act 2000 then the position is analogous to other instances where the England and Wales Upper Tribunal acts as the first instance hearing.

Likewise, the Welsh Language Tribunal hears appeals from the decisions of the Welsh Language Commissioner. The procedures in the Welsh Language Measure are highly prescriptive and formal and while sitting outside the First Tier of the system nevertheless contain many features designed to ensure fair consideration of objections before decisions are made by the Commissioner initially. Similarly, to the Adjudication Panel therefore, I think that the functions of the Welsh Language Tribunal should sit within the Appeal Tribunal – perhaps badged as a Welsh Language Chamber.

4.27 He thought it important that any body in Wales with appellate jurisdiction should be:

recognised as a superior court of record, so that its decisions may be cited in areas where the law in Wales and in England make similar provision. I think this is a particularly important point in relation to mental health cases and would be conducive to maintaining coherence between Wales and England when similar provisions apply, and patients frequently move between hospital settings in Wales and England.

4.28 Dr Calum Delaney, a member of the Education Tribunal for Wales, however sounded a warning note, saying that:

the progress of devolution may not be as great as anticipated, and may reverse in some aspects, and the effect of the low numbers of appeals on the development of case law and judicial expertise may be exacerbated by restricting these further to a Tribunal for Wales.

4.29 Professor Thomas Watkin also supported the introduction of an Appeal Tribunal for Wales (with his second choice being the Administrative Court in Wales, and his third the Upper Tribunal). He noted that he would be “happy to see the default appeal route being created gradually if that is the best way of securing a special Appeal Tribunal for Wales”.<sup>73</sup>

4.30 Finally, Richard Payne favoured the creation of an Appeal Tribunal for Wales, in the event that his suggestion of a hybrid model was not adopted.

### The Upper Tribunal

4.31 The second most popular option for a uniform appeal route was the existing Upper Tribunal (which already hears onward appeals from the majority of devolved tribunals). This was the view of the Mental Health Review Tribunal, for the reasons given in answer to the previous question; in summary, “the crucial concordance on key issues would be lost” if appeals were directed elsewhere. Alun Green, a member of an independent appeals panel, agreed, seeing no reason for additional bodies to be introduced into the system or to increase the workload of the Administrative Court.

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<sup>73</sup> This response has been translated from the Welsh original.

- 4.32 Again, whilst not necessarily supporting the proposal, Dr Sarah Nason and Huw Pritchard summarised their views of the advantages and disadvantages of the Upper Tribunal:

It has been suggested to us in research, including by members of the judiciary, that the England and Wales Upper Tribunal can already effectively operate as the Upper Tribunal for Wales when determining appeals on points of devolved Welsh law, and that in such cases, judges with appropriate expertise and experience of Welsh law and context can be allocated to determine appeals. Directing appeals to an existing body has the benefits of utilising established infrastructure (as noted in our research and in the Consultation Paper).

Various issues arise about the nature of judicial expertise, in particular whether what might be more important is expertise in specialist areas of law, such as in residential property law, education law or mental health law, across the English and Welsh variants, or, on the other hand, expertise in general principles of the Welsh devolved approach to law-making, and to Welsh policy contexts. The latter might indicate favouring a new Appeal Tribunal for Wales to focus on developing and applying this body of Welsh law, but the former might favour appeals to the England and Wales Upper Tribunal, or at least provide less support for a new institution. In the case of types of specialism, there is, or could be, provision for ensuring that judges that are considered to have the relevant expertise, are allocated to determine appeals. We question, then, whether the means to operate as the Upper Tribunal for Wales could be formalised in some way in relevant procedural rules and operating practices of the Upper Tribunal for England and Wales.

#### The Administrative Court in Wales

- 4.33 No respondents supported the suggestion that all appeals from the devolved tribunals should in future lie to the Administrative Court in Wales. Dr Sarah Nason and Huw Pritchard did however consider the option, explaining:

Issues of accessibility relate to the comparative cost of Administrative Court (High Court) claims as compared to Upper Tribunal claims. A key factor impacting on accessibility of appeal routes will be the costs, and this is likely to be a more significant factor in discouraging meritorious appeals than any lack of uniformity in appeal routes that are consequentially hard to navigate.

Another factor often mentioned in research is the availability of legal aid. A specific concern is that legal aid might not be available for appeals to the Upper Tribunal (be that the England and Wales Upper Tribunal or an Appeal Tribunal for Wales), whereas for many Administrative Court appeals and judicial review, legal aid is still technically available, albeit that it is often difficult to access.

... Our research also suggests a concern that tribunal justice continues to lack some of the gravitas associated with the Administrative Court in Wales, potentially impacting on public body attitudes to particular processes, and on compliance with judgments.

## A default route of appeal

- 4.34 At Consultation Question 16, we sought views as to whether, if no uniform route is adopted, there should nonetheless be a default route for appeals (for example, for newly created tribunals). We asked what the default route should be, which tribunals should have their onward appeals heard by that default route and whether the default appeal route could be populated gradually.
- 4.35 Fourteen consultees responded to this question in total, with six in favour of a default appeal route, and eight offering other answers, some of which were in qualified agreement.
- 4.36 The Wales and Chester Circuit, the Bar Council, Law Society, Professor Thomas Watkin, and Roger Handy, a Chairman of the VTW, all thought that if no uniform route of appeal were adopted, there should be a default route of appeal and that this should be to the newly established Appeal Tribunal for Wales.
- 4.37 Richard Payne believed that “if the newly created tribunals are only dealing with Senedd created Welsh legislation applicable only to Wales then the default route should be to the Appeal Tribunal for Wales”.

## Precedent

- 4.38 One issue raised by several respondents in relation to appeals was the question of precedent. Before evaluating the various options, we set out here a brief summary of how precedent works in the tribunals system at present. We also consider the relationship between the decisions of different tribunals in different parts of the United Kingdom.

## The existing First-tier and Upper Tribunals

- 4.39 Both the Upper Tribunal and the First-tier Tribunal are bound by decisions of the Court of Appeal and the Supreme Court.
- 4.40 According to Edward Jacobs, the First-tier Tribunal “is not bound by its own decisions, which are persuasive only”.<sup>74</sup> An exception is the First-tier Immigration and Asylum Chamber, where judges are only expected to follow the law set out in reported cases.<sup>75</sup>
- 4.41 The First-tier Tribunal is, however, bound by decisions of the Upper Tribunal. This is because the Upper Tribunal was created as a “superior court of record” under section 3(5) of the TCEA 2007. Its decisions on points of law are therefore binding not just in

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<sup>74</sup> E Jacobs, *Tribunal Practice and Procedure* (5<sup>th</sup> ed 2019) para 13.68. See also *Hampshire County Council v JP* [2009] UKUT 239 (AAC) at [15]. In *West Midland Baptist (Trust) Association (Inc) v Birmingham Corporation* [1968] 2 QB 188, the Court of Appeal considered the Lands Tribunals’ approach of following previous decisions. Salmon LJ, commenting on this practice, noted that “No doubt previous decisions of the tribunal on points of law should be treated by the tribunal with great respect and considered as persuasive authority, even when made by a layman. But they should never be treated as binding.”

<sup>75</sup> Mr Justice Peter Lane, Upper Tribunal Immigration and Asylum Chamber, Guidance Note 2011 No 2, Reporting of decisions of the Upper Tribunal Immigration and Asylum Chamber (July 2011, as amended in January 2018), para 11.

individual cases where an onward appeal has been made, but as a matter of precedent on lower tribunals.<sup>76</sup>

- 4.42 The Upper Tribunal is in some cases expected to follow its own decisions. It has been held, for example, that a single judge of the Administrative Appeals Chamber will usually follow the decision of a three-judge panel of the same chamber.<sup>77</sup> As for the First-tier Tribunal, an exception is made for the Immigration and Asylum Chamber of the Upper Tribunal, where the Chamber is not expected to follow unreported decisions.<sup>78</sup>
- 4.43 Because of the volume of cases, the Immigration and Asylum Chambers of the First-tier and Upper Tribunals have slightly more complex rules in relation to precedent. For example, both tribunals use a system of “starred” reported decisions. These are treated by both the First-tier and Upper Tribunal as authoritative in respect of the matter to which the “starring” relates, unless inconsistent with other binding authority.

#### Relationship with tribunals in other parts of the UK

- 4.44 Courts and tribunals in England and Wales are not strictly bound by decisions of courts whose jurisdictions run in Scotland. Those decisions however do have persuasive effect. Sometimes this is explained in terms of “comity”, or mutual respect. Laws LJ in the Court of Appeal decision in *Marshall's Clay Products Ltd* explained that:

it would be a constitutional solecism of some magnitude to suggest that by force of the common law of precedent any court of England and Wales is in the strict sense bound by decisions of any court whose jurisdiction runs in Scotland only or – most assuredly – vice versa. Comity and practicality are another thing altogether. They exert a wholly legitimate pressure.<sup>79</sup>

- 4.45 Later, in the Upper Tribunal, Judge Rowland in the Administrative Appeals Chamber thought he was obliged to follow both a decision of a three-judge panel of the Upper Tribunal and a decision of the Court of Session, although:

strictly, this is a matter of comity rather than because the decisions are technically binding. Where there is a conflict between the decisions, I should follow the decision of the Court of Session because it is a court that is superior to the Upper Tribunal (whose jurisdiction in social security matters extends across Great Britain) and, although its decisions are not strictly binding in England and Wales (*Marshall's Clay Products Ltd v Caulfield*) it is necessary to avoid legislation that applies throughout

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<sup>76</sup> *R (on the application of Cart) v UT (Immigration and Asylum Chamber)* [2011] UKSC 28, [2012] 1 AC 663 at [43]; *Sinclair Gardens Investments (Kensington) Limited v Christine Lesley Ray* [2015] EWCA Civ 1247 at [23].

<sup>77</sup> R(I) 12/75 reported decision of a Tribunal of Commissioners (12/8/1975) See [https://www.rightsnet.org.uk/pdfs/ri/12\\_75.pdf](https://www.rightsnet.org.uk/pdfs/ri/12_75.pdf) [19] and [20]; *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC), [2009] Public and Third Sector Reports, 1112.

<sup>78</sup> Mr Justice Peter Lane, Upper Tribunal Immigration and Asylum Chamber, Guidance Note 2011 No 2, Reporting of decisions of the Upper Tribunal Immigration and Asylum Chamber (July 2011, as amended in January 2018, para 11).

<sup>79</sup> [2004] EWCA Civ 422 at [32].

Great Britain being applied in inconsistent ways depending on whether a case arises north or south of the Scottish border.<sup>80</sup>

- 4.46 Since the establishment of the Scottish Upper Tribunal, Lady Smith, the President of Scottish Tribunals, noted in her annual report that where a case considered the application of the Equality Act 2010 to children with special education needs, the Health and Education Chamber would consider the decision in that case persuasive, but not binding.<sup>81</sup>

## Discussion

- 4.47 The proper location for appeals from devolved tribunals in Wales has been one of the most difficult topics in this consultation, and has split respondents. Several of the existing leaders of the section 59 tribunals have responded to the consultation explaining that their current appeal route works well for their tribunal, and should be preserved. This desire to preserve current appeal routes must however be balanced against a need to make sure that the system is coherent and works well as a whole; that it is capable of evolving and accommodating new appeal routes.
- 4.48 In our view, the introduction of a unified First-tier Tribunal for Wales creates a strong impetus for a single appeal route to an Appeal Tribunal for Wales; eleven of the 14 respondents who favoured a uniform appeal route also supported the creation of an Appeal Tribunal.<sup>82</sup> This project undoubtedly presents an opportunity to create a system that is simple, intuitive and coherent, whereas building in different appeal routes from the outset risks compromising that objective.
- 4.49 On the other hand, creating a single appeal location will inevitably mean changing the route of appeal for some tribunals. We have noted the strong support amongst judicial leads for retaining their current routes of appeal. It also inevitably raises the question of which appeal route is suitable.
- 4.50 In our view, there are only two realistic options for a uniform appeal route; these are the existing Upper Tribunal, or a new Appeal Tribunal for Wales. The suggestion of a single route of appeal to the High Court received no support; a move away from a specialist appeal tribunal to the general jurisdiction of the High Court (or even the Administrative Court) would run counter to the trend of recent decades and would sit oddly with the existence of specialist tribunals at First-tier level. Moreover, very little of the appeal work generated by the tribunals at present is handled by the High Court.

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<sup>80</sup> *Secretary of State for Work and Pensions v RR* CH/211/2015 [2018] UKUT 180 (AAC), [2019] PTSR 19, at [16].

<sup>81</sup> President of Scottish Tribunals, *Second Annual Report* (2019) See [https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/scottish-tribunals-publications/scottish-tribunals-annual-report-2018-19.pdf?sfvrsn=3e64715a\\_6](https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/scottish-tribunals-publications/scottish-tribunals-annual-report-2018-19.pdf?sfvrsn=3e64715a_6) p 37.

<sup>82</sup> Only two favoured a uniform route of appeal to the Upper Tribunal; one (Huw Williams) did not express a firm view of the identity of the appellate body.

## A hybrid model?

- 4.51 We have considered carefully Richard Payne's suggestion of non-uniform appeal system. As he put it:

In simple terms, if the law is passed by the Senedd and only applicable in Wales then appeals against decisions could and arguably should be dealt with by an Appeal Tribunal for Wales (ATW). For example, in the RPT we deal with cases under the Housing (Wales) Act 2014 that introduced the licensing of private landlords and introduced some powers such as rent stopping orders, that I don't believe exist in England. An ATW would be appropriate to hear such appeals. By contrast, most law applied by the residential property tribunals/land valuation tribunals is common to England and Wales and the Upper Tribunal Lands Chamber has great expertise and depth of knowledge, on for example, enfranchisement matters. I do not believe that the ATW would be able to replicate the experience and learning of the UT, nor do I think at this stage, that it would be desirable to have two senior appellate bodies determining the same issues. There is clear scope for legal confusion and for different decisions to emerge relating to England and Wales. If my hybrid suggestion is adopted, then this would not be a risk. This would mean that all appeals from the Welsh Language Tribunal would go to the ATW as would selected appeals from the other tribunals depending on the original legislation.

- 4.52 The attraction of this system is that it has the potential to combine the best from both the Upper Tribunal and Appeal Tribunal for Wales options. Decisions which are based on shared legislation could continue to be made in one place by those with relevant specialist expertise, reducing the risk of divergence in case law. At the same time, it would make it possible to build up a body of local expertise in areas of law applying only in Wales. We do not, however, think it is viable as a criterion to govern the direction of appeals, first because it would create a complicated pattern of appeal routes and secondly because the distinction between tribunals applying shared law and those applying Welsh law is likely to become increasingly difficult to draw.
- 4.53 The effect of a hybrid system would vary across tribunals. It is quite common for tribunals to have jurisdictions based on primary legislation applying to both England and Wales, but which must be applied in combination with legislation which applies only in Wales. This complicates the application of the hybrid model; in our view, the appeal route would in any event have to be specified in legislation, rather than being determined case by case, which would be a recipe for satellite litigation.
- 4.54 Some tribunals would have their appeals heard solely by an Appeal Tribunal for Wales: for example, cases from a Welsh language chamber, an education chamber,<sup>83</sup> and possibly the APW.<sup>84</sup> Appeals from a property chamber would be mixed; most

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<sup>83</sup> In the future, most appeals to the Education Chamber of a new tribunal will be based in the Additional Learning Needs and Education Tribunal Act 2018. The phased implementation of that Act began in September 2021. The Welsh Government, *Written statement: Additional Learning Needs and Education Tribunal Act 2018 Implementation*, 14 July 2021. See <https://gov.wales/written-statement-additional-learning-needs-and-educational-tribunal-act-2018-implementation>

<sup>84</sup> The Adjudication Panel for Wales finds its statutory basis in the Local Government Act 2000. When originally passed the Act provided for a similar system in England, but those provisions have now been repealed.



agricultural claims would go to the Upper Tribunal, while the appeals from existing Residential Property Tribunal jurisdictions would be split (for the reasons articulated by Richard Payne above). Appeals from the Valuation Chamber would stay where they are presently. The future direction of mental health appeals is uncertain; under the current scheme they would go to the Upper Tribunal, but if the Mental Health Act 1983 is replaced by an Act of the Senedd, they might be redirected to an Appeal Tribunal for Wales.

- 4.55 There would remain a risk that an appeal could arise involving two jurisdictions, which would normally be heard by two different appeal venues. Looking at previous appeal decisions suggests that this situation would only arise rarely, if at all. But it would be theoretically possible, and again provision would have to be made either in legislation or in the rules or practice directions to ensure clarity for users of the tribunals.
- 4.56 The overall effect of a hybrid scheme would therefore be complex. It would also be likely to change over time and require regular review; as the Senedd introduced new or replacement legislation in particular fields, the destination of appeals would change.
- 4.57 Nevertheless, the idea which seems to us to underlie the proposal – that it is potentially unsatisfactory to duplicate within Wales appellate jurisdiction over shared law, particularly to handle very small numbers of cases – strikes us as having considerable force. In our view, this idea is something to be taken into account in decisions about whether to move particular appellate jurisdictions to an Appeal Tribunal for Wales.

#### The Upper Tribunal as the sole appeal route

- 4.58 Using the Upper Tribunal for appeals would ensure continued access to specialist judges with experience of some of the complex jurisdictions handled by the devolved tribunals. It would also involve minimal disruption: nearly all the appeal work generated by the tribunals is already handled by the Upper Tribunal.
- 4.59 There are, however, drawbacks in using an appellate body which serves both England and Wales. The Welsh Government has no control over the operation of the tribunal; nor can the President of Welsh Tribunals or our proposed Tribunal Procedure Committee determine what the procedural rules for the tribunal should be. Instead, to the extent that there are particular needs for tribunal users in Wales, they would continue to be balanced against the needs of tribunal users elsewhere.
- 4.60 An additional complication of adopting the Upper Tribunal as the sole appellate jurisdiction is that this would involve transferring to it the appellate jurisdictions currently held by the High Court, presumably generating a need for training to equip its judiciary to handle additional streams of work – albeit that the volume of appeals from devolved tribunals to the High Court is currently very low.

#### The Administrative Court in Wales

- 4.61 Given the lack of support for this option expressed by respondents, we have concluded that it would not be satisfactory to transfer jurisdiction over all appeals from a First-tier Tribunal for Wales to the Administrative Court in Wales.<sup>85</sup> We should,

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<sup>85</sup> Para 4.33 above.



however, also consider the arguments presented to us against transferring its existing appellate jurisdiction away from that court. Three of the devolved tribunals direct their appeals at present to the High Court. These are the VTW (in respect of council tax appeals), the WLT and the APW.

- 4.62 Both the APW and the VTW have expressed a preference for their appeal routes to remain the same.<sup>86</sup> The APW argued that:

the appropriate course of appeal is to the High Court for this jurisdiction due to the complexity of the matters considered and the need for it to be perceived to be reviewed at a higher level by a suitably qualified judge of sufficient standing to win respect and deal with the human rights issues.

- 4.63 The cases that the APW hears are undoubtedly complex, and do raise human rights issues. We are not, however, persuaded that those factors make them unsuitable for consideration by an appellate tribunal. The Upper Tribunal regularly deals with extremely complex and controversial issues, including those that involve the determination of human rights claims (for example, in the case of mental health).
- 4.64 It is of course important to ensure that a suitably qualified judge hears cases. We believe, however, that an Appeal Tribunal for Wales would be staffed by experienced judges with the necessary skills and knowledge to hear the difficult issues encountered by the APW. If an Appeal Tribunal for Wales is set up, we would expect the President of Welsh Tribunals to sit on appeals (and indeed make a Recommendation to this effect in Chapter 5: see Recommendation 18). The primary route for appointment to that office requires applicants to have been appointed either to the High Court or Court of Appeal, meaning that one of the judges in the Appeal Tribunal would be a judge of considerable seniority.

### [An Appeal Tribunal for Wales](#)

- 4.65 In contrast to the Upper Tribunal, an Appeal Tribunal for Wales would serve only the devolved tribunals. It would therefore be subject to the President of Welsh Tribunals and the Tribunal Procedure Committee, and would be administered by the successor to the Welsh Tribunals Unit, rather than HMCTS. In some respects, it would therefore be more flexible and able to respond to the needs of its Welsh constituents than the Upper Tribunal. However, it would only operate successfully if it were able to rely on suitably qualified judges, which in practice is likely to mean cross-ticketing judges from the existing Upper Tribunal. The availability of those judges may restrict its ability to, for example, reduce waiting times for appeals to be heard.
- 4.66 We would expect its membership to include the President of Welsh Tribunals, who will usually be either a serving or retired judge of the High Court or Court of Appeal. By sitting on cases the President would continue to develop understanding of the workings of the tribunals for which the President is responsible and have a role in determining difficult or novel points of law, opening up the possibility of development of new lines of precedent in the law in Wales. As more legislation is passed which

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<sup>86</sup> We discuss onward appeal from the VTW in the next section of this Chapter.

applies only in Wales, an Appeal Tribunal could take the lead in interpreting that legislation.

- 4.67 A difficulty that cannot be ignored is that there are very few appeals from the devolved tribunals at present; they go almost entirely to the Upper Tribunal and to a large extent involve law that is common to England and Wales. Creating a new appellate tribunal would require a significant investment of time and resource to deal with a very small number of cases. The creation of a tribunal which hears only a handful of appeals and relies on cross-ticketed Upper Tribunal judges could amount to simply duplicating the existing system.

#### Divergence in case law

- 4.68 A number of respondents were concerned that creating a new Appeal Tribunal for Wales would lead to a divergence in case law between tribunals in England and Wales, in areas where the tribunals were applying the same legislation. We identified two types of concern. The first was that the situation would become overly complex; users of the tribunals would have to be aware that there was the potential for divergence.
- 4.69 The second concern was that it was undesirable in and of itself to have divergence in two regimes based in the same legislation. The Law Society for example argued against moving away from the Upper Tribunal in respect of the MHRTW:
- because of its intricate jurisdiction (eg deprivation of liberty and enforced treatment) *and the undesirability of any cross-border divergence in human rights protections* (emphasis added).
- 4.70 We are not persuaded that the risk of divergence in case law is a sufficient reason to prevent the creation of an Appeal Tribunal for Wales. As set out above, the usual principles of precedent will mean that the tribunal is likely to treat the decisions of the existing Upper Tribunal as persuasive, if not strictly binding. It would be open to the President of Welsh Tribunals to issue guidance which could provide for a closer relationship between case law in particular tribunals, if that is thought to be necessary.
- 4.71 It is true that the need to check case law of the Appeal Tribunal for Wales will add an additional layer of complexity to the law. However, we are not persuaded that being aware of this case law is an unreasonable demand to make of users of devolved tribunals. By their very nature, the law that is applied in these tribunals is devolved. In some places it will be the same as in England; in others it will not. Given that tribunal users will already have to verify the legal position, it is a small additional step to also check jurisprudence from an Appeal Tribunal for Wales.
- 4.72 A separate point arises in relation to the MHRTW. Both the Law Society and the tribunal itself have argued that because patients cross the border between England and Wales, it is necessary to use the same appellate location. We note that already tribunal users are required to apply to either the First-tier Tribunal (Mental Health) or the MHRTW, and that the Mental Health Act 1983 sets out which is the correct choice in a number of situations.<sup>87</sup> We are not persuaded that creating an additional appeal

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<sup>87</sup> Mental Health Act 1983, s 77.

location will add greatly to the existing bifurcation of the system, particularly when the first instance tribunal will be able to signpost appellants to the correct location.

## Conclusion

- 4.73 We recommend that legislation creating a First-tier Tribunal for Wales should also provide for an Appeal Tribunal for Wales, accompanied by a power of the Welsh Ministers to create chambers of the appeal tribunal and allocate work to the tribunal by statutory instrument. We do not consider ourselves to be in a position to make firm recommendations as to the transfer of appeal work to the Tribunal. This is because we are not able to predict how the volume of appeal work suitable for an appeal tribunal will develop.
- 4.74 We can envisage a number of possible sources of additional work for the tribunal system. For example, we are aware of approximately twenty tribunal appeal routes that currently lie to the UK First-tier Tribunal from decisions made under devolved law. If some or all of these were redirected to a First-tier Tribunal for Wales they could generate onward appeals. Other possible areas of expansion of Welsh law, and corresponding tribunal appeal rights, include housing, environmental law and local taxation. There has also been a recommendation (accepted by the Welsh Government) that challenges from decisions of the environmental protection assessor (expected to be put in place in 2022) might be heard within the Upper Tribunal;<sup>88</sup> these, and similar challenges, could be heard by an Appeal Tribunal for Wales.
- 4.75 Most of these potential sources of new work are, however, at an early stage of development. In our view, a degree of confidence that the tribunal system will grow will be necessary before the setting up of an Appeal Tribunal for Wales is justified. We envisage that that would involve firmer plans for expansion of the tribunal system, with the addition of new jurisdictions.
- 4.76 We are therefore recommending that the Welsh Government legislate for the creation of an Appeal Tribunal for Wales alongside the other recommendations made in this paper, but with a view to bringing those provisions into force and establishing the tribunal when the Welsh Government has a clearer view of how the tribunals system is likely to develop. The legislation should include powers to transfer jurisdictions to the Appeal Tribunal (and possibly to create chambers of the tribunal, although we suspect it would not be necessary to use these powers for some time). The Welsh Government would then be able to bring the Appeal Tribunal for Wales into existence and populate it when the time is ripe.
- 4.77 We expect that jurisdictions would gradually be transferred to the Appeal Tribunal. One principle which should guide that transfer is the extent to which the jurisdiction involves applying Welsh law. This could allow tribunals which deal largely in shared jurisdictions to continue to benefit from having their appeals heard by the Upper Tribunal as the Appeal Tribunal for Wales becomes established.

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<sup>88</sup> Environmental Governance Stakeholder Group, *Environmental Governance in Wales Post Exit from the European Union* (March 2020) para 3.3.9; and *Welsh Ministers, Written Statement: Environmental Governance Stakeholder Task Group Report* (November 2020). See <https://gov.wales/response-report-environmental-governance-stakeholder-task-group>

- 4.78 We have considered Huw Williams's suggestion that some existing section 59 tribunals should be moved into the Appeal Tribunal. We do not recommend this. It would not be without precedent for the Appeal Tribunal to have some original jurisdiction; it exists, in particular, in the Lands Chamber of the Upper Tribunal. However, we see the function of an Appeal Tribunal as deciding appeals from the First-tier Tribunal rather than directly from executive decision-makers. The parallel existence of original jurisdiction would create a complication and would remove the possibility for appeals from such decisions to be dealt with within the tribunal system.
- 4.79 In the interim period, we believe there are steps that might be taken to improve the Upper Tribunal as a venue for appeals from devolved tribunals. These could include ensuring that all hearings are heard in Wales, and possibly appointing the President of Welsh Tribunals to be a judge of the Upper Tribunal. That would allow the President to sit on appeals of particular significance to the devolved tribunals, and potentially have an input on developing lines of Welsh case law.<sup>89</sup>

#### **Recommendation 11.**

- 4.80 We recommend that legislation should create an Appeal Tribunal for Wales.

#### **Recommendation 12.**

- 4.81 We recommend that the Welsh Ministers should have power by statutory instrument to establish chambers of the Appeal Tribunal and to transfer appellate jurisdiction to it.

#### **Recommendation 13.**

- 4.82 We recommend that the Appeal Tribunal for Wales should, in the absence of positive reason for different provision, be the appeal venue for appeals from the First-tier Tribunal for Wales.

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<sup>89</sup> The current President is a retired High Court judge. As such, we understand he would be eligible for appointment in retirement as a deputy Upper Tribunal judge under the Constitutional Reform Act 2005 s 94B.

## THE VALUATION TRIBUNAL FOR WALES

- 4.83 As discussed at paragraph 4.66 of the Consultation Paper,<sup>90</sup> onward appeals from the VTW lie either to the High Court on a point of law (in the case of council tax appeals), or to the Upper Tribunal (Lands Chamber) for non-domestic rating appeals.<sup>91</sup>
- 4.84 In line with our other suggestions to streamline the system, in Consultation Question 19, we sought respondents' views as to whether there should be one route of appeal from the VTW for both rating and council tax appeals and, if so, what that appeal route should be.
- 4.85 Fourteen respondents answered this question, 11 of which were in favour of adopting one appeal route from the VTW. Of the 11 in favour, seven believed that the route should be to a newly established Appeal Tribunal for Wales, with one in favour of the Upper Tribunal, and the other three not specifying a route.
- 4.86 Many of those in favour of unifying the appeal routes took the view that this would be simpler. The Wales and Chester Circuit said, for example, that:
- Given that there is a drive to unify the appeals process, so as to bring to it accessibility, consistency and understanding, it would seem at odds to here have a separate process. We therefore agree that there should be one route, and it should be to the Appeal Tribunal for Wales (Lands Chamber). There is now this opportunity to streamline the approach, which should be taken. Simplification of the appeals system is required.
- 4.87 Roger Handy commented as follows:
- The only justification I can see for having separate routes for Rating (non-domestic ratings, "NDR") & Council Tax (CT) decision appeals is that NDR appeals can be on myriad grounds but CT appeals are restricted to points of law. I consider that an Upper Tribunal could deal effectively with both.
- 4.88 The Governing Council of the VTW, however, argued that the current routes of appeal should continue to exist, but that "appeals against the valuation of property for council tax should be directed to the Upper-tier Tribunal (Lands Chamber)". That would amount to an extension of the current rights of appeal, which in the case of council tax, are currently limited to appeals on a point of law. Roger Handy could also see "few reasons why [council tax] appeals are restricted to a point of law".
- 4.89 Noel Edwards, a retired technical adviser to the Valuation Office Agency, noted that the division of onward appeals between the High Court and Upper Tribunal (Lands Chamber) still exists in the Valuation Tribunal for England.

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<sup>90</sup> Devolved Tribunals in Wales (2020) Law Commission Consultation Paper No 251, para 4.66.

<sup>91</sup> Valuation Tribunal for Wales Regulations SI 2010 No 713 (W 69), reg 44(1) and Non-Domestic Rating (Alteration of Lists and Appeals) (Wales) Regulations SI 2005 No 758 (W 63), reg 37.

## Discussion

- 4.90 In Chapter 3, we recommend that the VTW should be incorporated within a unified First-tier Tribunal for Wales. In consequence, we consider that the route of appeal from the Valuation Chamber of the new tribunal should be considered along with appeals from the other chambers. The attraction of a single route of appeal is obvious. We note in this connection that, while appeals from the Valuation Tribunal for England remain split between the High Court and Upper Tribunal, the Law Commission has in the past made a recommendation that the Valuation Tribunal for England should be brought into the tribunals system, with all appeals (including in relation to council tax) lying to what was then the Lands Tribunal.<sup>92</sup>
- 4.91 We see advantages in redirecting appeals from a valuation chamber to a new Appeal Tribunal for Wales, fortified by the fact that the majority of respondents thought that there should be one appeal route. The High Court has no particular expertise in council tax appeals, and there seems to us to be merit in creating a route of appeal in relation to the valuation of property for the purposes of council tax, which the Upper Tribunal does not presently have. We do not make a formal recommendation to this effect as we consider it best for the Welsh Government to decide on the routing of appeals to an Appeal Tribunal for Wales.

## RENT ASSESSMENT COMMITTEES – PERMISSION TO APPEAL

- 4.92 The Consultation Paper noted a discrepancy in relation to appeals between the different constituent tribunals of the Residential Property Tribunal for Wales. Whereas appeals from residential property tribunals and leasehold valuation tribunals require permission to appeal, appeals from rent assessment committees do not. We therefore provisionally proposed that appeals from rent assessment committees should require permission to appeal.
- 4.93 Of the 16 who responded to this question at Consultation Question 20, 15 agreed with our provisional proposal. The Law Society described it as a “logical and sensible proposal”, while Dr Angela Ash said that she had struggled to understand why there was a difference at present.
- 4.94 We recommend in Chapter 3 that the Residential Property Tribunal should be amalgamated with the Agricultural Land Tribunal to form a Property Chamber (see Recommendation 9). We envisage in consequence, that the Property Chamber will be subject to the same rules as other chambers in relation to appeals, including the requirement for permission.

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<sup>92</sup> Land, Valuation and Housing Tribunals: The Future (2002) Law Com No 218, para 2.6. [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc281\\_Land\\_Valuation\\_and\\_Housing\\_Tribunals\\_The\\_Future.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc281_Land_Valuation_and_Housing_Tribunals_The_Future.pdf)

#### **Recommendation 14.**

- 4.95 We recommend that appeals from rent assessment committees should require permission.

### **SCHOOL ADMISSION APPEAL PANELS**

#### **Appellate jurisdiction for the Education Tribunal for Wales**

- 4.96 In Chapter 3 we explain the rationale for amalgamating the jurisdiction of the school exclusion appeal panels with that of the Education Tribunal for Wales, but for school admission appeal panels continuing to be organised on a local basis.<sup>93</sup> At present there is no route of appeal as such from those panels. Instead applicants may complain to the Public Services Ombudsman for Wales<sup>94</sup> or to the Welsh Ministers,<sup>95</sup> or bring a judicial review.
- 4.97 In the Consultation Paper, we asked whether instead there should be a new route of further appeal from these panels to the SENTW (subsequently renamed the Education Tribunal for Wales). Consultation Question 17 asked whether appeals from school admission appeal panels should lie to the SENTW and if so, on what grounds. Of the 26 respondents who answered this question, a narrow majority (15) agreed that appeals from school admission appeal panels should lie to the SENTW, five disagreed, and six offered other answers.

#### **Views in favour of creating an appellate jurisdiction**

- 4.98 Many of the respondents who agreed with our provisional view found the current arrangements unsatisfactory; they were described by the Wales and Chester Circuit and the Bar Council as “unwieldy, unclear and consuming too much time at a stage when given the nature of the decision being questioned, time is of the essence.”
- 4.99 The Public Services Ombudsman for Wales (“PSOW”) explained his view that this was an appropriate appeal route as it would “provide a consistent approach and oversight to the decision-making process”. Richard Payne also favoured this route, in the interest of consistency.
- 4.100 The Governing Council of the VTW also noted that this would be a “more accessible route of appeal ... a far more appropriate mechanism than judicial review”.

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<sup>93</sup> See paras 3.55 to 3.11 above.

<sup>94</sup> The Ombudsman can only intervene if the handling of the appeal involved maladministration.

<sup>95</sup> The Welsh Government’s *School Admission Appeals Code*, (issued December 2013) See <https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>, para 6.14 which explains that the Welsh Ministers cannot review or overturn decisions of individual independent appeal panels but can consider whether to exercise their powers of intervention in particular circumstances.



- 4.101 The Bar Council, Wales and Chester Circuit and the President of Welsh Tribunals agreed that an appeal route was needed, but thought that an Appeal Tribunal for Wales would be a more appropriate venue.
- 4.102 Dr Sarah Nason and Anne Sherlock, a former research fellow at Bangor University, were more supportive of the proposed appeal route as an interim measure, than as a permanent solution:

While there is a logical inconsistency in the different treatment being proposed for admission appeal panels and exclusion appeal panels, if the jurisdiction of admission appeal panels is not transferred to SENTW, we can see that making provision for appeals from admission appeal panels to SENTW would introduce an element of judicial oversight where none exists at present. On the other hand, the problems noted in para 3.125 of the Consultation Paper document regarding the concentration of appeals in April – May would apply too: any appeals from the panels to SENTW would also be concentrated into the late Spring -early summer period. If this were to be managed by limiting the right of appeal, the greater the limits on the right to appeal from a panel to SENTW, the more diminished the judicial oversight that would be provided by SENTW.

Para. 3.129 of the Consultation Paper suggests that proposal is being advanced as an interim stage on the way to transferring the jurisdiction of the appeal panels to the tribunal, allowing the tribunal to gain experience with these cases without the burden of taking on the full volume of the panels' work. We consider that this is a pragmatic approach and would tend to be more supportive of the proposal as an interim measure rather than as a final outcome.

#### [Views against creating an appellate jurisdiction for the Education Tribunal for Wales](#)

- 4.103 Of the four respondents that disagreed with our provisional proposal to create an appellate jurisdiction for the SENTW, three were local authorities and one was a school appeals panel member.
- 4.104 Pembrokeshire and Cardiff councils both expressed the view that existing routes of redress were sufficient, and that an additional route of appeal was therefore unnecessary. Swansea Council objected that:

the proposed reforms will lead to a risk of education disengagement by having a process that takes even longer, with a longer appeal route, and is damaging to children's education.

- 4.105 Public Law Wales gave a cautious response, suggesting instead that an appeal could lie to an Appeal Tribunal for Wales:

As far as appeals are concerned, the exclusion, at least initially, of local authority appeals panels from full integration into the Welsh tribunals system by transferring of their functions to an Education Chamber of a Welsh First Tier Tribunal (see below) would not preclude providing for a right of appeal, on a question of law, from these panels to the proposed Welsh Upper Tribunal (again, see below). Even in this regard the Association stresses, however, the need for careful consideration of the practical implications of such a step, in order to avoid unintended consequences.



Challenges to unlawful decisions of panels, by means of judicial review, do currently take place and can provide a speedy and effective remedy and it would be ironic if a change intended to increase access to justice were to have the opposite effect because, for example, of differential entitlements to legal aid as between cases pursued in the High Court and in a new Welsh equivalent to the existing Upper Tribunal.

4.106 Conversely, Denbighshire Council told us:

Our view is that to keep admission appeals at a local level and give a right of appeal to SENTW could then give rise to a second right of appeal from SENTW to the Upper Tribunal or equivalent – this clearly should not be an option.

4.107 Some respondents who answered “other” agreed in principle with a right of appeal, but warned that this could create a surge in work and strain on resources at particular times of the year, due to the seasonal nature of the appeals.

#### Grounds of appeal

4.108 Fewer respondents explicitly addressed the question of grounds of appeal in their answer. The Catholic Education Service explained in detail the benefits of limiting the grounds of appeal:

It is our view that the grounds for appeal should be limited as it is important that, in the interests of children’s education, the matter of school places is finalised at the earliest opportunity. Only allowing further appeals where the grounds for appeal are clear and parents can make an informed decision about whether an appeal is likely to be successful, is important to ensuring the continuity of children’s education. Our preference would be for the only appeal route to be based on a procedural irregularity or maladministration in the way in which the appeal was organised or conducted, rather than any unfairness in the decision made. Further consideration would also need to be given as to the potential outcomes of any appeal for example, whether or not a fresh appeal will be required to be held.

In our experience, appeals in relation to the decision of admission appeals panels are rare and we would caution against any route of appeal being opened that would encourage a greater number of cases as such cases lead to uncertainty for children and parents and disruption and expense for schools.

4.109 While agreeing that decisions on appeals would need to be made quickly, the PSOW argued that the grounds for appeal should be broader than those suggested by the Catholic Education Service:

Any such appeal right should in my view be sufficiently broad to allow SENTW to consider the individual circumstances of the child and the impact a refusal of a school place may have on the individual child, whilst balancing the rights of others in the school. As there is a need for timely decisions, it is essential that, if any such appeal process is introduced, that decisions are taken in a timely manner so as not to adversely impact upon the child’s position.

4.110 Sir Wyn Williams was in favour of “a merits based right of appeal with the permission of the panel or the appellate body”.

- 4.111 Other answers revealed a split between those who thought that appeals should only be allowed on a point of law, and those who thought that an appeal on factual grounds should also be permitted. The Governing Council of the VTW, and Wales and Chester Circuit, the Bar Council and Richard Payne all favoured allowing appeals on grounds of both fact and law.
- 4.112 Keith Bush QC, at the Welsh Governance Centre at Cardiff University, thought there should be an appeal on a point of law only (noting that this “would, of course, include serious procedural flaws which would undermine the factual findings of the parties”).<sup>96</sup> Pembrokeshire Council generally opposed the introduction of the right of appeal, but thought that if introduced, it should be limited to an appeal on a point of law. As noted above, Public Law Wales envisaged an appeal an Upper Tribunal, limited to points of law.

### **Grounds of onward appeal from the Education Tribunal**

- 4.113 If an appeal route were introduced from school admission appeal panels to the ETW, then any further appeal from the ETW to the Upper Tribunal (or, in our proposed scheme, from the Education Chamber of the First-tier Tribunal), would be a second appeal. Usually these can only be made on limited grounds. We therefore sought views on whether these onward appeals should be limited to cases which raise some important point of principle or practice, or where there is another compelling reason to hear the appeal (ie the “second appeals test”).
- 4.114 Of the 20 respondents, 15 agreed with limiting onward appeals to those cases that met the “second appeals” test. Cardiff City Council thought that the grounds should be so limited to prevent an “opening of floodgates” of appeals from disappointed parents and pupils.
- 4.115 Others argued that a slightly broader test should apply. The Wales and Chester Circuit was in favour of limiting onward appeals, and suggested that the determinative factors for appeal should include “significant facts, points of principle, points of practice, points of law and/or some other compelling reason”.
- 4.116 The Bar Council favoured the creation of an Appeal Tribunal for Wales, and thought that appeals to that tribunal should be treated consistently, and allowed on a point of law:

If ... the appeal route is first to SENTW and then to the Appeal Tribunal for Wales, we consider that the SENTW should have the ability to review its own decision... and that all appeals (not just from this chamber) to the Appeal Tribunal for Wales should have a consistent approach in terms of the standard and Grounds of Appeal. Appeals from school admission appeal panel decisions (assuming that a review by that panel has been unsuccessful) should proceed to the SENTW, such appeal should effectively be a re-decision.

The SENTW should, akin to a First Tier Tribunal in England, have the ability to review its own decision. An appeal from SENTW to the Appeal Tribunal for Wales should be limited to a point of law. Moreover, rigour needs to be applied to the

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<sup>96</sup> This response has been translated from the Welsh original.

appeals process. The standard proposed, “limited to cases which raise some important point of principle or practice, or where there is another compelling reason to hear the appeal”, should be applied to appeals from the Appeal Tribunal (akin to appeals from the Upper Tribunal), not to appeals from the SENTW.

- 4.117 Richard Payne also thought that onward appeals should be allowed on any point of law, rather than being limited to cases meeting the second appeals test.

## Discussion

- 4.118 Finding the right answer in relation to appeals from admission appeal panels has been difficult. This is partly because the avenues of redress are currently very limited, making it difficult to assess what the need is for an additional route. We remain, however, of the view that it is anomalous that parties to admission appeals have no formal appeal rights, and must instead resort to judicial review or to a complaint to the Welsh Ministers or the PSOW. This presents a stark contrast with other types of claim in the education sphere that are heard by the ETW with the possibility of onward appeal, and with the principles behind admission appeals panels as a whole. They embody a commitment to local, effective and timely justice.<sup>97</sup> That principle is not, however, carried through to an appellate stage.
- 4.119 One solution would be to incorporate the admission panels within an education chamber in a unified tribunal. We have rejected this possibility because we see important advantages to the current system. It enables admission authorities to draw on volunteers with knowledge of and commitment to their local education system, and has the ability to accommodate the annual increase in cases in April/May.
- 4.120 We therefore recommend retaining the local character of the admission appeal panels, coupled with a right of appeal to what is currently the ETW (and would in the future be an education chamber of a First-tier Tribunal for Wales).

## Grounds of appeal to the Education Tribunal for Wales

- 4.121 One of the key questions for any new appeal route is what the grounds of that appeal should be. The possibilities range from a full rehearing, in which the evidence and arguments are presented afresh, to an appeal limited to point of law. Intermediate positions are occupied by a rehearing without fresh evidence and by “review”, as provided for by the Civil Procedure Rules applying to appeals to the High Court, the County Court and the Civil Division of the Court of Appeal.<sup>98</sup> In a review, the rules explain that an appeal court will allow an appeal where the decision or the lower court is “wrong; or unjust because of a serious procedural or other irregularity in the

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<sup>97</sup> The Admission Appeals Code, para 1.9, emphasises that “appeal panels are carrying out a judicial function and must apply the principles of natural justice”.

<sup>98</sup> Civil Procedure Rules, r 52.1(1) and r 52.21(1). The latter states that “every appeal will be limited to a review of the decision of the lower court”. This rule has two exceptions, where “a practice direction makes different provision for a particular category of appeal” or “the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.”

proceedings in the lower court”.<sup>99</sup> Usually the appellate court will not receive evidence that was not before the lower court.<sup>100</sup>

- 4.122 In practice however there may be little difference between a review and a rehearing which does not involve fresh evidence. In *Meadow v General Medical Council*, for example, Auld LJ described the distinction as “thin and variable according to the circumstances and needs of each case”.<sup>101</sup>
- 4.123 In the tribunals context, the Franks Report described a “general appeal” as “an appeal on fact, law or merits”.<sup>102</sup> Later, the Tribunals Courts and Enforcement Act 2007 provided that appeals from the First-tier Tribunal to the Upper Tribunal should be “on any point of law arising from a decision made by the First-tier Tribunal”.<sup>103</sup> Edward Jacobs explains that the point of law may be “a defect in the decision, in the reasoning on which the decision is based, or in the procedure that led to the decision.”<sup>104</sup>
- 4.124 In practice, the difference between a point of law and a point of fact can be elusive, and has been the subject of consideration in the appellate courts.<sup>105</sup> However, it is a distinction that continues to be widely used in legislation. Restricting school admission appeal tribunals to points of law is therefore a possibility for a new appeal route from the school admission appeal tribunals.
- 4.125 We have concluded that appeals from an admission appeals panel should be limited to points of law. This is for a number of reasons. First, the appeals panels will have conducted a thorough assessment of the facts. In a “prejudice” case the Admissions Appeal Code requires panels to undertake a structured process of decision-making, first involving findings on factual issues: whether the admissions authority’s admission arrangements comply with mandatory requirements of the School Admissions Code and the underlying legislation; if so, whether they were correctly and impartially applied; and, if so, whether admitting the pupil would prejudice the provision of efficient education or the efficient use of resources. If the panel’s conclusion on any of these matters is adverse to the admissions authority, it must allow the appeal. Otherwise it must proceed to a discretionary “balancing” stage, weighing the degree of prejudice to the admissions authority that would result from admitting the pupil against the weight of the pupil’s case for being admitted. The matters to be considered include

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<sup>99</sup> Civil Procedure Rules, r 52.21(3).

<sup>100</sup> Civil Procedure Rules, r 52.21(2)(b).

<sup>101</sup> [2007] QB 462 at [128], 2007 [EWCA] Civ 1390, at [128].

<sup>102</sup> Report of the Committee on Administrative Tribunals and Enquiries (the Franks Report) (July 1957) Cmnd 218, para 105.

<sup>103</sup> Tribunals Courts and Enforcement Act 2007, s 11(1).

<sup>104</sup> E Jacobs, *Tribunal Practice and Procedure* (5<sup>th</sup> ed 2019) para 4.57.

<sup>105</sup> See, for example, the discussion by Lord Carnwath in *Commissioners for Her Majesty’s Revenue and Customs v Pendragon plc and others* [2015] UKSC 37, [2015] 1 WLR 2838, at [51] and Lord Hoffmann in *Lawson v Serco* [2006] UKHL 3, [2006] 1 All ER 823 at [34].

the impact on the school in question of admitting an additional pupil or pupils and the impact of its doing so on other schools in the area.<sup>106</sup>

4.126 Secondly, the panels are staffed by expert members chosen for their local knowledge. We do not believe that the Education Tribunal, which has education expertise but not the same degree of local knowledge as panel members, is in as good a position as them to make the necessary findings on the purely factual elements of the case and an informed exercise of discretion.

4.127 Thirdly, the Admission Appeals Code requires panels to give fully reasoned decisions; it stipulates that:

The decision letter must be expressed clearly, without the use of jargon so that can be readily understood by a lay person. It must enable the parties to:

- see what matters have been taken into consideration
- understand what view the panel has taken on questions of fact or law which the panel had to resolve, and
- know broadly why the panel has reached its decision and, in particular, should enable an unsuccessful appellant to understand why their appeal has not succeeded.

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Where an appellant has raised specific, relevant factors which have been considered by the panel, these must be recorded in summary form in the letter. Where it has been necessary to obtain legal advice, this must be summarised in the letter, especially if this advice was received after the panel retired to make its decision.<sup>107</sup>

4.128 As we have pointed out above, appeal on a point of law is not limited to correcting misinterpretations of the law, but extends to procedural errors and inadequately stated or defective reasoning. A right of appeal on points of law would enable the ETW or education chamber to set aside decisions whose reasoning was defective or inadequately stated.

4.129 A further reason is pragmatic, and to do with the number of likely appeals and the timeframe in which they must be heard. It is difficult to estimate exactly how many appeals to admission panels there are each year, but there are likely to be many hundreds. In Cardiff alone, panels heard 457 appeals in 2019/20, of which just 39

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<sup>106</sup> Welsh Government, *School Admissions Appeal Code* (2013) See <https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>, para 5.14.

<sup>107</sup> Welsh Government, *School admissions appeal code* (2013). See <https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>, paras 6.2 and 6.4, omitting footnotes.

were successful.<sup>108</sup> Given the low rate of success, there could be a considerable demand for a further appellate route if general appeals on the merits were permitted; there is a danger that the Education Chamber would be swamped by the number of appeals. This is particularly so given the time frame in which an appeal would need to be determined in order for a successful pupil to take up a school place at the start of the next academic year.

- 4.130 A right of appeal on a point of law would provide a more convenient route than exists at present for challenging legal or procedural error by the panels, and would be consistent with the grounds of appeal usually available for an appeal from the First-tier Tribunal to the Upper Tribunal. We believe there is also a greater chance that it would accomplish this without risking swamping the Education Tribunal with a huge number of cases at one point in the year, ensuring that children and young people still have final decisions made about their education in a timely manner.

### Appeal to an Appeal Tribunal for Wales?

- 4.131 In the light of comments from respondents, we have considered whether a better option would be to direct appeals from school admissions panels to the Upper Tribunal, or to an Appeal Tribunal for Wales. The argument for this is that admission appeal panels essentially act as a first-instance tribunal. We have considered whether it would be more logical for appeals to go to an appellate tribunal, rather than another first-instance tribunal. There is some force in this suggestion, particularly if and when an Appeal Tribunal for Wales is created.
- 4.132 However, as we have already indicated, we see the function of an Appeal Tribunal as being to determine appeals from the First-tier Tribunal for Wales. We are also concerned that the likely volume of appeals would dominate an Appeal Tribunal for Wales. Even if these were only in the order of 30 a year (approximately the number of complaints received by the PSOW), they would considerably exceed the current number of appeals from all the other devolved tribunals. The appeals are also seasonal, and have to be decided within a short timeframe, so that offers of school places made in the spring can be taken up in the autumn.
- 4.133 It seems to us more sensible to place the work within an existing and already populated tribunal. The ETW, or an education chamber of a First-tier Tribunal for Wales, would have the advantage of an existing panel made up of education specialists.

### Grounds of onward appeal

- 4.134 We agree with the majority of respondents who favoured limiting onward appeal to those that meet the “second appeals test” currently applied to appeals from the Upper Tribunal. Appellants would already have had a decision of the ETW or education chamber on whether the panel’s decision was erroneous in law. We do not consider that a second appeal on the same grounds would be justified in all cases. In our view, there is a need for further filtering of appeals at a second appeal stage, and the existing second appeals test is appropriate. That would mean that onward appeals

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<sup>108</sup> Cardiff Council, *Appealing a decision about a school place*. See <https://www.cardiff.gov.uk/ENG/resident/Schools-and-learning/Schools/Applying-for-a-school-place/Appealing-a-decision-about-a-school-place/Pages/default.aspx>

from the ETW or education chamber would be limited to cases which raise an important point of principle or practice, or where there is some other compelling reason to hear the appeal.

**Recommendation 15.**

4.135 We recommend that appeals from school admission appeals panels should be available on a point of law to the Education Chamber of the First-tier Tribunal for Wales.

**Recommendation 16.**

4.136 We recommend that onward appeals from decisions of the Education Chamber on appeals from school admission appeals panels should be limited to cases which raise some important point of principle or practice, or where there is some other compelling reason to hear the appeal.

## Chapter 5: The President of Welsh Tribunals

- 5.1 The President of Welsh Tribunals (“PWT”) is the most senior judicial figure within the system of devolved tribunals in Wales. The office was created by section 60 of the Wales Act 2017 (the “2017 Act”) and bears similarities to those of the Senior President of Tribunals and the President of Scottish Tribunals. Sir Wyn Williams, the first holder of the office, has been instrumental in building a relationship between the tribunals.
- 5.2 The PWT’s role is two-fold, and includes what we have characterised as “inward-looking” and “outward-looking” aspects. The inward-looking duties include ensuring judicial leads and members are trained, and pastoral duties. Outward looking duties include representing the interests of the tribunals to the Senedd.<sup>109</sup>
- 5.3 In Chapter 3 of this Report, we recommend that a unified system of tribunals should be established. This would involve the creation of a new First-tier Tribunal for Wales. We also recommend in Chapter 4 that, in due course, appeals from that tribunal should be heard by a new Appeal Tribunal for Wales.
- 5.4 The PWT will be key to ensuring that the transition to this new system takes place smoothly and with minimal disruption to tribunal users. In Chapters 6, 7 and 8 we recommend roles for the President in relation to the tribunals’ procedural rules, appointments and discipline. The role of the PWT is also considered further in Chapter 9, where we discuss how the unified tribunals system should be administered in the future. In this Chapter, we consider two additional ways in which the PWT’s role could be enhanced.
- 5.5 The first is the conferral on the PWT of a judicial role in relation to the new tribunals system. The second is the PWT’s relationship with school admission appeal panels. We sought views in the Consultation Paper on whether the President should have a supervisory role over the panels. Consistent with the approach we have taken in relation to school admission appeal panels (set out in Chapter 1), we do not make a recommendation in this Chapter that the PWT should supervise the panels. We do however make a more limited recommendation: the PWT should be consulted when the statutory School Admissions Appeal Code is revised.
- 5.6 Finally, we consider the role of the PWT in relation to the Valuation Tribunal for Wales, in the event that that tribunal is not brought within the First-tier Tribunal for Wales.

### A JUDICIAL ROLE FOR THE PRESIDENT OF WELSH TRIBUNALS

- 5.7 The current duties of the PWT are contained in section 60(4) of the 2017 Act. While section 60 outlines duties including to have regard to the need for fairness, accessibility and swift justice, it does not expressly confer on the PWT a judicial role in any of the tribunals listed in section 59 of the 2017 Act (the “section 59 tribunals”). This can be contrasted with the Senior President of Tribunals (who is, by virtue of

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<sup>109</sup> Wales Act 2017, s 60(5).



appointment, a member of both the First-tier Tribunal and Upper Tribunal)<sup>110</sup> and the President of Scottish Tribunals, who is a member of the Upper Tribunal for Scotland.<sup>111</sup>

5.8 Sir Wyn Williams summarised the situation as follows in his second annual report:

Although, it is generally accepted that the President is entitled to sit as a judge in the Welsh Tribunals, there is no clear statutory basis which supports this conclusion.... there is at least the possibility that the absence of a formal and specific judicial role for the President will be off-putting for future potential candidates for the office. Accordingly, I would recommend that careful consideration is given to formulating a specific judicial role for the President.<sup>112</sup>

5.9 In addition to making the role more attractive to prospective applicants, we took the provisional view in the Consultation Paper that allowing the PWT to sit in the tribunals would help develop the President's understanding of the day-to-day work of the tribunals. This would in turn enhance the PWT's ability to perform the other statutory duties that attach to the role. We therefore provisionally proposed at Consultation Question 62 that the PWT should be a judge of the tribunal or tribunals over which the President presides.

5.10 Seventeen respondents answered this question, of whom 13 agreed with our provisional proposal, one disagreed and three marked their answers as "other".

5.11 Sir Wyn Williams reiterated his view, previously expressed elsewhere,<sup>113</sup> that there is:

undoubtedly a need for PWT to have a specified judicial role. In the absence of a discrete appeal tribunal for Wales consideration should be given to PWT being authorised to sit in the UT on Welsh cases.

5.12 The Governing Council of the Valuation Tribunal for Wales ("VTW") agreed with the provisional proposal, as this would ensure that the PWT "continues to have a day-to-day understanding of the tribunal for which they have responsibility". Professor Thomas Watkin also agreed, describing the role as a "focus of unity" for the devolved tribunals.<sup>114</sup>

5.13 Huw Williams, the Chief Legal Adviser to the Senedd, responding in his personal capacity, echoed Sir Wyn Williams' words, noting that establishing a judicial role for the PWT would help "attract another judicial figure of substance to fill the role in the steps of the first PWT". The only respondent who disagreed outright did not give reasons for their answer.

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<sup>110</sup> Tribunals Courts and Enforcement Act 2007, ss4(1)(c) and 5(1)(a).

<sup>111</sup> Tribunals (Scotland) Act 2014, s 17(5).

<sup>112</sup> President of Welsh Tribunals, *Annual Report 2019-2020* (April 2020) para 3.10.

<sup>113</sup> See, for example, President of Welsh Tribunals, *Annual Report 2019-2020* (April 2020) para 3.10 and oral evidence session of Sir Wyn Williams and Rhian Davies Rees to the Legislation, Justice and Constitution Committee on 13 July 2020, <https://record.assembly.wales/Committee/6414> at para 12.

<sup>114</sup> This response has been translated from the Welsh original.

- 5.14 The Mental Health Review Tribunal for Wales, whose answer was marked “other”, expressed concern about the possibility of allowing the PWT to sit alongside a judicial lead on a panel, quoted here in full:

There is no provision in our rules for two judges to sit on the same panel and therefore nothing governing the possibility of a disagreement between the two. Bearing in mind that we deal with the liberty of the subject, a majority decision prevails and with four members on the panel this may not be achieved. Points of principle are invariably decided in our case by the Upper Tribunal and we do not deal with matters affecting more than one jurisdiction, so those eventualities would not arise in this tribunal. We have no objection to the PWT sitting as a judge with a medical member and a lay member in the usual way, but we suggest that this should only happen at the invitation of the judicial lead.

- 5.15 Noel Edwards, a retired technical adviser of the Valuation Office Agency, and Roger Handy, a chair of the VTW, both marking their answers as “other”, considered the application of this provisional proposal to the VTW. Noel Edwards thought that a judicial role for the PWT might be possible for other existing tribunals, but not the VTW, while Roger Handy asked whether this would mean that the PWT could sit as chairman.

## Discussion

- 5.16 We agree that there are practical benefits in allocating a judicial role to the President. This would ensure that he or she has exposure to the work of the tribunals, increasing their understanding of how those tribunals work, and whether any changes are necessary. Permitting the PWT to sit could also make the role attractive for judicial applicants in future.
- 5.17 We believe that the President should be able to sit in the First-tier Tribunal for Wales, where necessary. We think it more likely, however, that the President would sit from time to time in the Appeal Tribunal for Wales, for example in cases raising issues relating to the work of the first-tier chambers as a whole or involving the interpretation and application of devolved legislation.

## Provision for the President of Welsh Tribunals to sit as a tribunal judge

- 5.18 In our Consultation Paper, we presented non-exhaustive examples of circumstances under which the PWT could sit in the First-tier Tribunal for Wales; such as to sit in the judicial lead’s place, or alongside the judicial lead, to deal with a point of principle or practice affecting more than one jurisdiction.

- 5.19 We agree that if the PWT were ever to sit as part of a four-person panel then there would need to be provisions setting out how a decision could be reached in the event of a tie in votes. In our view this could be addressed by the procedural rules of the tribunal. For example, the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 provides:

If the decision of the tribunal is not unanimous, the decision of the majority is the decision of the tribunal; and the presiding member has a casting vote if the votes are equally divided.<sup>115</sup>

- 5.20 We would not expect a provision along these lines to be used frequently. But if it was felt in a particular case that there was a need for the PWT to sit as part of a four-person panel, we recognise there would need to be rules setting out how a decision of that panel should be arrived at.

- 5.21 The circumstances in which the PWT would be able to sit could also be elaborated on in either procedural rules or directions. We envisage that the PWT would not normally sit in a chamber of our proposed First-tier Tribunal for Wales without the agreement of that chamber's President. This is in line with the current President's view: in his first annual report, he said the PWT should sit as legal chair of a tribunal:

only if the judicial lead of that tribunal and the PWT agree that the circumstances prevailing in a given case make it inappropriate for the judicial lead to sit.<sup>116</sup>

## Conclusion

- 5.22 We agree with the views expressed by a majority of respondents in relation to this question – and Sir Wyn Williams in particular – that there is an “undoubted need for the PWT to have a specified judicial role”.
- 5.23 Empowering the PWT to sit as a judge of the tribunals would assist the President in keeping in touch with the work of the tribunals, and making informed decisions about the running of the tribunals. It should also enhance the President's credibility amongst tribunal members.
- 5.24 Finally, it would have the additional benefits of clarifying the current legal position, and increasing the attraction of the role for potential candidates in the future. We therefore recommend that the PWT should be a judge of the First-tier Tribunal for Wales and Appeal Tribunal for Wales.
- 5.25 We also make a related recommendation: the PWT should be the presiding judge of both the First-tier Tribunal for Wales and the Appeal Tribunal for Wales.

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<sup>115</sup> First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order SI 2008 No 2835, art 8.

<sup>116</sup> President of Welsh Tribunals, *First Annual Report* (March 2019) p 3.

### **Recommendation 17.**

- 5.26 We recommend that the President of Welsh Tribunals should be a judge of the First-tier Tribunal for Wales and the Appeal Tribunal for Wales. Provision for the President of Welsh Tribunals to sit should be made in procedural rules or directions.

### **Recommendation 18.**

- 5.27 We recommend that the President of Welsh Tribunals should be the presiding judge of the First-tier Tribunal for Wales and the Appeal Tribunal for Wales.

## **SUPERVISION OF THE SCHOOL ADMISSION AND (IF RETAINED) SCHOOL EXCLUSION APPEAL PANELS**

- 5.28 Before its abolition in 2013, school admission and exclusion appeal panels were subject to the statutory supervision of the Administrative Justice and Tribunals Council (“AJTC”). Since 2013, however, there has not been a single independent body responsible for keeping the entire system of school admission and exclusion appeal panels under review.
- 5.29 In Chapter 3 of this Report, we recommend that the work of school exclusion appeal panels be brought within the Education Tribunal for Wales; this work will therefore be subject to the supervision of the PWT as part of the activities of that tribunal. We recommend, however, leaving school admission appeal panels as they are, with the exception of the introduction of a new right of appeal. The remainder of the discussion in this section of the Report will therefore focus on the school admission appeal panels.
- 5.30 At Chapter 8 of the Consultation Paper, we considered the advantages and disadvantages of the PWT supervising the school admission appeal panels. This was not an entirely new idea. The Thomas Commission has, in the past, recommended that:

All public bodies, ombudsmen and other tribunals which have been established under Welsh law or by the Welsh Government, which make judicial or quasi-judicial decisions, and are not currently subject to the supervision of the President of Welsh Tribunals should be brought under the supervision of the President.<sup>117</sup>

- 5.31 We recognised that although the supervision of the PWT could provide increased independence, outward representation and training, there were potential administrative difficulties. This was because of the number of admission authorities in Wales. Each local authority is its own admission authority, and some types of schools are also responsible for their own admissions. This regional and disaggregated

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<sup>117</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019), recommendation 25, p 21.

system differs considerably from the section 59 tribunals. Each of the section 59 tribunals has a judicial lead, making the reporting lines to the PWT quite clear.

- 5.32 Given the potential difficulties involved in extending the PWT's supervision to school admission appeal panels, we did not make a provisional proposal. Instead, at Consultation Question 63 we sought respondents' views on whether school admission appeal panels should be subject to the supervision of the PWT. Twenty-two respondents answered this question, of whom 13 were broadly in agreement, five were in qualified agreement (some expressing the view that the PWT's supervision would be appropriate should the panels be brought within the broader system), whilst four expressed other views.

## Responses

- 5.33 At various points in his response, Sir Wyn Williams expressed the view that unless the school admission appeal panels were brought within the unified system, they should remain the responsibility of local authorities. He reiterated this view in relation to extending the PWT's supervisory functions to cover the panels.

## Supporting views

- 5.34 The Governing Council of the VTW, the Wales and Chester Circuit, the Bar Council Legal Services Committee and Richard Payne (President of the Residential Property Tribunal for Wales) all welcomed a supervisory role for the PWT in relation to the school appeal panels.
- 5.35 Dr Sarah Nason (senior lecturer at Bangor University) and Dr Huw Pritchard (lecturer at Cardiff University) believed that there is "potential for a supervisory role for the President of Welsh Tribunals over school admission and exclusion appeal panels" and that this could "encourage more coherence and coordination between panels and improve the perception of panels as independent". They acknowledged, however, that there are differences between the role of the PWT and the previous role of the AJTC:

While we agree that this may provide some of the same benefits as having a supervisory Administrative Justice oversight body, it is important to emphasise that the roles are different and there is a case for establishing a specific statutory oversight body. Care should be taken in ensuring that the President of Welsh Tribunals is not burdened with functions that would detract from the core functions of the President and would be more suitable for a statutory oversight body with specific resources for monitoring and supervising the administrative justice system.

- 5.36 Patrick Moriarty, a school appeal panel member, was concerned that legal advice for the panel typically came from the local authority. In his view "if the panel was truly independent the legal advice would come from an independent source". He thought external supervision could ensure this.
- 5.37 Public Law Wales envisaged a broader role for the PWT, suggesting that:

It may be that, at least in the short term, something falling short of full integration of local authority appeals panels into the Welsh tribunals system would be a safer first step. Their (school appeal panels) administration might, for example, be left in local authority hands whilst the PWT and the proposed Welsh Tribunal Rules Committee

could acquire statutory roles in relation to procedures, complaints and discipline (and even, in the case of the PWT to appointments).

### An advisory role?

- 5.38 Keith Bush QC, at the Wales Governance Centre of Cardiff University, believed that the PWT should have an “advisory role in relation to the panels” rather than a supervisory role.

### Local authorities

- 5.39 The local authority responses we received were divided on this question. Anglesey and Gwynedd Councils both “agreed strongly” that the PWT should have a supervisory role, “in order to ensure consistency”.<sup>118</sup> Denbighshire Council also agreed with the suggestion. Both Pembrokeshire and Cardiff Councils, on the other hand, sought further clarification on “what is meant by supervision”. Pembrokeshire went on to explain that they had questions in relation to what is the:

remit and purpose of supervision. In terms of training of panel members, this is often carried out jointly with other nearby local authorities which furthers a consistent approach.

### Discussion

- 5.40 We can see a number of potential benefits to extending the PWT’s supervisory powers to cover school admission appeal panels. We outline these below. We are, however, concerned about the practicality of doing so. A simple translation of the PWT’s existing responsibilities to admission appeal panels will not work; they work too differently from other tribunals. This is partly because their administration is the responsibility of different admission authorities, of which there are many across Wales.

### Judicial independence

- 5.41 At present, the panels are not structurally independent of admission authorities. While the Code stresses that they should act independently, the fact remains that the administration of the panels is the responsibility of one of the parties to the hearing. This means that, at present, panel members are appointed by admission authorities. It is also possible that the clerk to the panel will be a local authority employee, though the School Admission Appeals Code advises against this.<sup>119</sup>
- 5.42 As a result, there will continue to be a risk that panels are perceived as insufficiently independent of local authorities. Introducing an appeal from the panels to the Education Chamber of the First-tier Tribunal (as we recommend in Chapter 4) will go some way to improving this situation. However, having a senior judge supervising the school admissions appeal system could strengthen the perception that the panels make decisions independently.

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<sup>118</sup> This response has been translated from the Welsh original.

<sup>119</sup> Welsh Government, *School Admissions Appeal Code* (2013), para 3.3. See <https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>

## Guidance and directions on practice and procedure

- 5.43 One of the ways in which the PWT ensures that proceedings in the section 59 tribunals are accessible, fair, and handled quickly and efficiently is through giving directions on practice and procedure.<sup>120</sup> In a similar way, the PWT's legal expertise and experience of tribunals could also be valuable when considering changes to the system. For example, it could be a requirement that the content of the School Admissions Appeal Code should be the subject of consultation with the PWT.

## Representation

- 5.44 One of the statutory duties of the PWT is to represent the views of members of the Welsh tribunals to the Welsh Ministers and to other members of the Senedd. This is a role that is missing from the current system of school admission appeal panels; there is no one person who is responsible for representing the interests of members. There could be value in a role of representing the interests of panels to the Senedd, and possibly to the Welsh Government.
- 5.45 It is also possible that the PWT's annual report could be a useful vehicle for collecting and disseminating information about the activities of the admission panels. At present basic data about the operation of the panels (how many appeals they hear, how many succeed, and the number of panel members) is not consistently published online. Coverage of the panels' activities in the PWT's annual report would be a way of ensuring an improvement in the transparency of these panels.

## Training

- 5.46 Another of the statutory responsibilities of the PWT is to ensure that tribunal members receive adequate training.<sup>121</sup> Training is particularly important for admission appeal panels, which are made up of lay members. However, the approach to training varies across admission authorities. While Pembrokeshire note that their training is "often carried out jointly with other nearby local authorities which furthers a consistent approach", this is not the case for all admission authorities.
- 5.47 The Code does make some provision for training, explaining that admission authorities must arrange and fund training for appeal panel members, panel clerks and presenting officers. It also states that admission authorities "should consider what scope there is for co-ordinating training", and "invite members of all appeal panels within their area to participate in shared training". But as far as we are aware there is no central monitoring of whether this approach is adopted in practice.

## Conclusion

- 5.48 Despite the potential advantages, we have been driven to the conclusion (which seems to us to underlie Sir Wyn Williams's own opposition to the suggestion) that a duty of the PWT to supervise the panels would not be practicable. The President has no powers of direction over the admission authorities that run the panels. In addition, it is not easy to see how the powers necessary for the President properly to discharge

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<sup>120</sup> Wales Act 2017, s 61.

<sup>121</sup> Wales Act 2017, s 60(5)(a).

the duty could be created compatibly with the panels being administered by approximately 182<sup>122</sup> admission authorities spread across 22 local authorities.

- 5.49 Moreover, as we explained in Chapter 1, we are not in a position in this project to make many sufficiently informed recommendations about the operation of school admission appeal panels, not having been able to explore in detail their methods of operation and whether these could be improved. The possibility of adapting them to supervision by the President encounters the same problems. In Chapter 1 we made some suggestions for giving panel members some of the benefits of membership of a larger structure. These could involve a role for the PWT, but we leave that to the Welsh Government to assess.
- 5.50 The other issue that we highlight above (the lack of comprehensive and accurate information about the operation of the panels) could be addressed without the involvement of the PWT. The Welsh Government could itself make arrangements for publication of information about the panels' activities.
- 5.51 One recommendation that we feel confident in making is that the PWT be consulted on future iterations of the School Admissions Appeal Code. The Code already contains a substantial amount of material on the legal duties of panels as bodies performing judicial functions, and the President is well placed to contribute to this; consultation of the PWT would also provide a mechanism for ensuring that lessons learned from hearing appeals from the panels will be fed back into the Code. Under section 85(2) of the School Standards and Framework Act 1998, the Welsh Ministers are already required to consult with such persons as they think fit, and consider any representations made to them.

#### **Recommendation 19.**

- 5.52 We recommend that the Welsh Government should consult with the President of Welsh Tribunals on the School Admissions Appeal Code pursuant to section 85(2) of the School Standards and Framework Act 1998.

## **SUPERVISION OF THE VALUATION TRIBUNAL FOR WALES**

- 5.53 In Chapter 3 of this Report, we recommend that the VTW be brought within the unified system of tribunals. This would entail the consequence that it would be brought within the remit of the PWT.
- 5.54 Even if that recommendation is not pursued, we still see merit in the VTW being subject to the supervision of the PWT. This would help integrate the VTW with the broader devolved tribunals system and ensures its interests and those of its members

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<sup>122</sup> This figure has been deduced from the number of community schools, voluntary controlled schools, voluntary aided schools and foundation schools provided by the Welsh Government, *Address List of Schools – Guidance*. See <https://gov.wales/address-list-schools>. The definition of these school governance structures can be found at paragraph 51 of Appendix 4.



are represented to Welsh Government and to the Senedd. We therefore provisionally proposed at Consultation Question 64 that the PWT should supervise the VTW.

### Consultation responses

- 5.55 Nineteen respondents answered this question, of whom 15 agreed with our provisional proposal.
- 5.56 Dr Sarah Nason and Dr Huw Pritchard explained that there are:
- benefits to supervision of the President of Welsh Tribunals over the VTW. At the least, this would enable more co-ordination across Welsh Tribunals which is in line with the reforms proposed in the Consultation Paper as a whole.
- 5.57 Notably, Sir Wyn Williams and the Governing Council of the VTW believed that the PWT should supervise the VTW. The Governing Council of the VTW thought it “reasonable that the PWT should have some supervisory powers with regard to the VTW” even if the VTW remained outside of the tribunal structure.
- 5.58 The only respondent to give reasons for his disagreement was Noel Edwards, a retired technical adviser of the Valuation Office Agency. He highlighted the difference between the ministerial supervision of the Valuation Tribunal Service in England, and our proposed judicial supervision of the VTW. In his view this made the supervision of the VTW by the PWT inappropriate.
- 5.59 Two respondents marked their answers “other”. The first was the Adjudication Panel for Wales, which made the point that if the VTW were to join the devolved tribunals system, it would make sense for the administration of the tribunals to be joint. The second was Huw Williams who, consistently with his other responses, believed that the VTW should be reviewed and reformed as part of a separate exercise, once the structure of the other devolved tribunals had been settled.

### Discussion

- 5.60 We recommend at Chapter 3 of this Report that the VTW be brought within the unified system of tribunals, which would mean it would be subject to the supervision of the PWT. We recognise, however, that there are practical and financial barriers to including the VTW within the unified system, discussed further at paragraphs 3.38 to 3.44 of this Report.
- 5.61 Should the obstacles prove too great, we still think that there would be value in the PWT supervising the VTW in its current form. This could enhance judicial independence. It could also help to increase cohesion with the broader devolved tribunals system and representation of the tribunal’s interests to the Senedd. Supervising the VTW does not pose the same administrative difficulties for the PWT as supervising school admission appeal panels. However, if the VTW were to continue in its present form, the PWT’s relationship with the Governing Council would have to be considered.
- 5.62 We are minded to make a conditional recommendation. If the VTW remains outside the unified system of tribunals (whether as an interim measure or indefinitely) we consider that the PWT should supervise the VTW.

**Recommendation 20.**

- 5.63 If the Valuation Tribunal for Wales remains outside the unified system of tribunals, it should nonetheless be subject to the supervision of the President of Welsh Tribunals.



# Chapter 6: Procedural rules

## INTRODUCTION

- 6.1 In Chapter 2 we discuss the piecemeal development of the devolved tribunals in Wales. That piecemeal development is particularly evident in the procedural rules of the tribunals. Some date back to pre-devolution legislation from the 1970s and were not written with Wales or modern tribunal practice in mind. This leaves the tribunal user navigating rules that are inconsistent, complex and out of date. As well as causing difficulties for the tribunal user, outdated procedural rules can make it harder for judges to manage cases properly.
- 6.2 At present, each tribunal has its own set of procedural rules (and in the case of some tribunals, more than one set). One of the questions we considered in the Consultation Paper was whether the rules should be more standardised: whether they should adopt the same approach to common procedural issues. As well as considering the content of the rules, we also considered questions of presentation. Should the rules for all tribunals be amalgamated into one set of procedural rules?
- 6.3 A related issue explored in our Consultation Paper was how procedural rules should be made. Our overarching provisional proposal was to establish a Tribunal Procedure Committee for Wales, to keep the rules of the devolved tribunals in Wales under review. This follows the model established by the Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”).
- 6.4 Finally, in this Chapter we explore some features of procedural rules and respondents’ views on these. Given our recommendation to create a Tribunal Procedure Committee we only make limited recommendations on specific aspects of the procedural rules.

## THE CURRENT LAW

### Terminology

- 6.5 As we described in the Consultation Paper, inconsistent terminology is used across various pieces of legislation to refer to the power to make “rules”,<sup>123</sup> “regulations”,<sup>124</sup> “provision for procedure”<sup>125</sup> and “procedure regulations”.<sup>126</sup> In this Chapter we use the term procedural rules to refer to the rules governing tribunal procedure. These currently take the form of secondary legislation including regulations, rules and orders.

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<sup>123</sup> For example, the Mental Health Act 1983, s 78 and Welsh Language (Wales) Measure 2011 (nawm 1), s 123.

<sup>124</sup> For example, the Local Government Finance Act 1988, sch 11, para 8(1); Education Act 1996, s 336; and the Local Government Act 2000, s 77(4).

<sup>125</sup> Agriculture Act 1947, s 73(3).

<sup>126</sup> Commonhold and Leasehold Reform Act 2002, sch 12.

## Power to make procedural rules

- 6.6 Initially, for most tribunals the power to make procedural rules was vested in the Lord Chancellor. Over time, this function has been gradually devolved as regards devolved tribunals. For the school admission appeal panels and the Valuation Tribunal for Wales (“VTW”), the power to make procedural rules was transferred to the devolved administration in Wales upon its inception in 1999.<sup>127</sup> The power to make procedural rules for other tribunals, such as the Mental Health Review Tribunal for Wales (“MHRTW”) and the Agricultural Land Tribunal for Wales (“ALTW”) was transferred to the Welsh Ministers more recently, in 2018.<sup>128</sup>
- 6.7 Section 61 of the Wales Act 2017 provides for directions as to practice and procedure. Firstly, the President of Welsh Tribunals may give directions as to the practice and procedure to be followed by the Welsh tribunals. Secondly, the President or Chairman of a tribunal may give direction as to the practice and procedure to be followed by that tribunal.<sup>129</sup>
- 6.8 Section 61(4) of the Wales Act 2017 specifies that directions may not be given without the approval of the Welsh Ministers. In practice, the judicial lead of a tribunal will make a practice direction alongside the President of Welsh Tribunals, with the approval of the Welsh Ministers.<sup>130</sup>

## TRIBUNAL PROCEDURE COMMITTEES

- 6.9 Here we review Tribunal Procedure Committees elsewhere in the UK, before focusing on our recommendation to establish a Tribunal Procedure Committee for Wales.

### The Tribunals, Courts and Enforcement Act 2007

- 6.10 Section 22 of the Tribunals, Courts and Enforcement Act 2007 creates a Tribunal Procedure Committee (“TPC”) for the purpose of making rules governing the practice and procedure for the UK First-tier and Upper Tribunals. Schedule 5 to the Act contains a non-exhaustive list of matters that may be covered by rules. The TPC currently maintains nine sets of Tribunal Procedural Rules. It has subcommittees responsible for different sets of rules.
- 6.11 The TCEA 2007 sets out the composition of the TPC. It consists of:
- (1) the Senior President of Tribunals, or a person nominated by him;

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<sup>127</sup> National Assembly for Wales (Transfer of Functions) Order SI 1999 No 672; the power was subsequently transferred to the Welsh Ministers under the Government of Wales Act 2006, sch 11 para 30(2)(d).

<sup>128</sup> Welsh Ministers (Transfer of Functions) (Wales) Order SI 2018 No 644.

<sup>129</sup> Wales Act 2017, s 61. These powers relate only to the tribunals listed in s 59 of the Act.

<sup>130</sup> See for example the Mental Health Review Tribunal for Wales, *Practice Direction, Statements and Reports for Mental Health Review Tribunals in Wales* (October 2019). See <https://mentalhealthreviewtribunal.gov.wales/sites/mentalhealthreview/files/2019-12/MHRT%20Practice%20Direction%20Oct%202019.pdf>

- (2) three persons appointed by the Lord Chancellor, each of whom must have experience of either practising in the tribunals or advising persons involved in tribunal proceedings;
- (3) three persons appointed by the Lord Chief Justice, including one judge of the First-tier Tribunal, one judge of the Upper Tribunal, and one member of either tribunal (who is not a judge);
- (4) one person appointed by the Lord President of the Court of Session, with experience in and knowledge of the Scottish legal system; and
- (5) a maximum of four persons with experience of a particular issue or subject area, appointed by the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, or Lord Chief Justice of Northern Ireland, at the invitation of the Senior President of Tribunals. These persons may be appointed to the Committee only in relation to the matters in which they have expertise.<sup>131</sup>

6.12 The Senior President of Tribunals may also appoint a person with experience in and knowledge of a particular issue or subject area to assist the TPC with that issue or subject area.<sup>132</sup>

#### Guiding principles of the UK Tribunal Procedure Committee

6.13 The Tribunal Procedural Rules are made by the UK TPC in line with statutory objectives, and further guiding principles based on the underlying statutory objectives.

6.14 Section 22(4) of the TCEA 2007 requires the power to make tribunal procedure rules to be exercised with a view to securing:

- (1) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done;
- (2) that the tribunal system is accessible and fair;
- (3) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently;
- (4) that the rules are both simple and simply expressed; and
- (5) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

6.15 A recent recruitment campaign information pack set out the guiding principles of the TPC as follows:

- 1) to make the rules as simple and streamlined as possible;

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<sup>131</sup> Tribunals, Courts and Enforcement Act, sch 5 (21), (22) and (23).

<sup>132</sup> Tribunals, Courts and Enforcement Act, sch 5 (24).

- 2) to avoid unnecessary technical language;
- 3) to enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and
- 4) to adopt common rules across tribunals wherever possible so that rules specific to a chamber of tribunal are permitted only where there is clear and demonstrable need for them.<sup>133</sup>

## Scotland

- 6.16 The Scottish Civil Justice Council was established in May 2013. It prepares draft rules of procedure for civil courts in Scotland, which are presented to the Court of Session who then create the rule by Act of Sederunt.
- 6.17 The Tribunals (Scotland) Act 2014 amended the functions of the Scottish Civil Justice Council to include a duty to “review the practice and procedure followed in proceedings in the Scottish Tribunals”.<sup>134</sup> The amendment is not yet in force; in the meantime tribunal rules are made by the Scottish Ministers.

## A TRIBUNAL PROCEDURE COMMITTEE FOR WALES

- 6.18 Our Consultation Paper provisionally concluded that forming a Tribunal Procedure Committee for Wales (“TPCW”) would solve some of the problems highlighted above. Establishing such a committee would ensure that the rules are reviewed on a regular basis and remain up to date. It would also reduce the duplication of effort involved in updating sets of rules individually.
- 6.19 We therefore proposed a TPCW should be formed. We also made further provisional proposals concerning how such a Committee would work. In particular we proposed that the President of Welsh Tribunals should be responsible for chairing the TPCW and appointing its members, and that the President should be guided in this process by factors set out in legislation. Finally, we sought respondents’ views on whether rules should be made by a majority of the TPCW, or by the President of Welsh Tribunals. In either case we envisaged the Welsh Ministers being required to approve the rules.

## Establishing a Tribunal Procedure Committee for Wales

- 6.20 At Consultation Question 31, we provisionally proposed that there should be a TPCW. Of the 27 respondents who answered this question, 26 agreed.
- 6.21 Those in favour included the Law Society, who suggested that the TPCW should “initially be tasked with identifying appropriate areas for standardisation of procedural rules and thereafter ongoing maintenance of said rules”.

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<sup>133</sup> Cabinet Office Public Appointments, *Candidate Information Pack – August 2019* (2019) para 3. See <https://publicappointments.cabinetoffice.gov.uk/appointment/tribunal-procedure-committee-members/>

<sup>134</sup> The Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 s2 (1) (ba) (as amended by sch 9 para 13 to the Tribunals (Scotland) Act 2014).

6.22 Several respondents who were in favour of the provisional proposal thought that a TPCW could ensure consistency of rules across tribunals. This was a view expressed by the Governing Council of the VTW, the National Deaf Children's Society Cymru, Public Law Wales and Keith Bush QC (Wales Governance Centre at Cardiff University).

6.23 Dr Huw Pritchard set out in his article "Building a Welsh Jurisdiction Through Administrative Justice" that:

Rationalising different rules and procedures could be a way of promoting a set of Welsh procedural rules that could be adapted to different jurisdictions whilst still reinforcing the sense of a specifically Welsh tribunal system.<sup>135</sup>

6.24 Huw Williams, the Chief Legal Adviser to the Senedd, responding in his personal capacity, went into further detail in relation to what the structure of the TPCW should be:

Each Chamber should have its own rules sub-committee chaired by the Chamber's judicial lead, with the Rules Committee exercising an overview role to ensure coherence across the system and with the ability to disallow rule changes proposed by individual chambers which affect overall coherence without good reason.

For this reason, the membership of the Rules Committee should be drawn from the judicial leads of the chambers with the addition of members with special knowledge of administrative and tribunal decision-making thereby enabling them to take a "system-wide" view.

6.25 We discuss the structure of the TPCW at paragraph 6.28 to 6.37 below.

6.26 The only respondent to disagree with the provisional proposal was the MHRTW, who thought a TPCW would be an "entirely unnecessary additional layer of bureaucracy", explaining that:

If the parts of the rules common to all devolved tribunals are limited to the overriding objective etc, these are unlikely to require review often if at all. There are regular meetings (chaired by the President of Welsh Tribunals) of the judicial leads of the devolved tribunals and any points relating to the rules can be aired in that forum. Monitoring differences between the rules of the devolved tribunals and their reserved equivalents is a matter for the individual tribunals as happens now, certainly in the MHRTW.

6.27 We recognise that judicial leads are uniquely placed to advise on the procedural rules relating to their own tribunal. However, we are persuaded of the advantages of a central body with oversight of the procedural rules across the tribunals as a whole. We recognise the need for subject matter expertise in formulating the procedural rules of individual tribunals, and believe that this can be achieved through careful appointment

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<sup>135</sup> H Pritchard, "Building a Welsh Jurisdiction Through Administrative Justice" (2017) in *Administrative Justice in Wales and Comparative Perspectives*, p 239.



of members to the TPCW. We would expect the membership of the TPCW to reflect the various jurisdictions of the First-tier Tribunal for Wales.

## **CONSTITUTION AND FUNCTIONS OF THE TRIBUNAL PROCEDURE COMMITTEE FOR WALES**

### **Structure of the Tribunal Procedure Committee for Wales**

6.28 The TPC in the reserved tribunals system has a number of subgroups. Some of these are formed of particular jurisdictions; for example, there is a health, social entitlement and war pensions and armed forces compensation sub-group. That group covers work relating to the Health, Education and Social Care Chamber, the Social Entitlement Chamber, the War Pensions and Armed Forces Compensation Chamber and the Upper Tribunal Administrative Appeals Chamber (except those appeals deriving from the General Regulatory Chamber). There are also sub-groups which address costs and confidentiality, and an overview subgroup which considers proposed rule changes which affect more than one of the other subgroups.

6.29 Huw Williams suggested to us that a TPC for Wales should also have subgroups. He put forward the following structure:

Each Chamber should have its own rules sub-committee chaired by the Chamber's judicial lead, with the Rules Committee exercising an overview role to ensure coherence across the system and with the ability to disallow rule changes proposed by individual chambers which affect overall coherence without good reason.

For this reason, the membership of the Rules Committee should be drawn from the judicial leads of the chambers with the addition of members with special knowledge of administrative and tribunal decision-making thereby enabling them to take a "system-wide" view.

6.30 We see merit in having focused groups within a Welsh TPC to focus on particular issues, and recommend that the TPC should be able to create these. It may well be that the best way to organise these sub-groups would be by chamber. There may however be a need to create additional sub-groups to focus on particular issues; and it might be that multiple chambers wish to have a joint sub-group, if they find there are common problems or themes in their procedural rules.

6.31 In our view it would not be helpful for us to attempt to predict at this stage what sub-groups the TPCW would find helpful. We recommend below that the President of Welsh Tribunals should chair the Committee, and would expect the President to evaluate what sub-groups are necessary as the work of the TPCW develops.

### **Chairing the Tribunal Procedure Committee for Wales**

6.32 At Consultation Question 32 we provisionally proposed that the President of Welsh Tribunals should be responsible for chairing the TPCW and appointing its members. A majority of 22 respondents agreed with the provisional proposal. The MHRTW marked their answer as "other", not believing that a TPCW is necessary. Sir Wyn Williams, the current President of Welsh Tribunals, agreed that the President should chair the TPCW and appoint its members, as it would "be an important judicial leadership role

for the President”. It would further develop the role of the President of Welsh Tribunals under section 61 of the Wales Act 2017.

- 6.33 We also provisionally proposed at Consultation Question 33 that the appointment of members of the TPCW should be guided by factors set out in legislation, including the need for the Committee to have access to a range of expertise. Again, a majority of respondents (22 of the 24 who answered the question) were in favour.

## Composition

### Tenure

- 6.34 Public appointments are normally for a fixed term. In the UK Tribunal Procedure Committee, appointments are usually made on a fixed term basis for three years, with a possibility of reappointment.<sup>136</sup> The Cabinet Office Governance Code on Public Appointments contains a “strong presumption” that no individual should, in a public appointment, serve more than two terms or serve in any one post for more than ten years.<sup>137</sup> It may not be possible to observe this limit in the case of appointments to the TPCW. The pool of members is likely to be small, and specialism may be lost if a limit on tenure is rigidly imposed. We consider that a more flexible approach to length of service on the TPCW would be acceptable.

### Membership

- 6.35 The membership of the UK TPC is prescribed by statute, as set out in paragraph 6.11 above. We do not consider that such a prescriptive approach would be appropriate for the TPCW, and could be impractical where members are drawn from a small pool of candidates. However, we see merit in setting out general principles that should guide the approach of the President of Welsh Tribunals. We consider that the President should have regard to the need, when making appointments, to ensure:

- (1) that the interests of each Chamber of the First-tier Tribunal for Wales and, in due course, the Appeal Tribunal for Wales are represented;
- (2) that the Committee has access to persons with relevant expertise; and
- (3) that the Committee includes persons who have experience of appearing in front of the tribunal or advising those that do.

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<sup>136</sup> Cabinet Office Public Appointments, *Candidate Information Pack – August 2019* (2019) para 4. See <https://publicappointments.cabinetoffice.gov.uk/appointment/tribunal-procedure-committee-members/>

<sup>137</sup> Cabinet Office, *Governance Code on Public Appointments* (December 2016) para 3.6 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/578498/governance\\_code\\_on\\_public\\_appointments\\_16\\_12\\_2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578498/governance_code_on_public_appointments_16_12_2016.pdf)

### Proportional representation

6.36 One concern raised at consultation was that larger chambers would dominate decision making with the TPCW. The Adjudication Panel for Wales (“APW”) explained that:

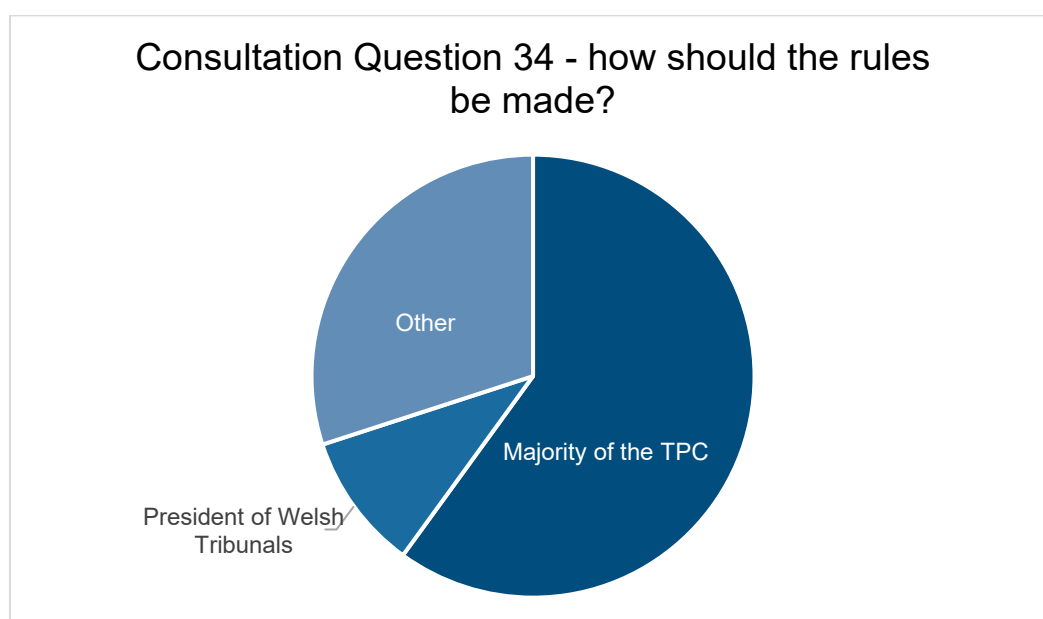
some members are concerned that as a smaller tribunal, our concerns may be ignored or overlooked, but the majority believe that the President of Welsh Tribunals is unlikely to allow this to happen.

6.37 We trust that observance of the principle that each chamber should be represented on the TPCW will contribute to avoiding this problem.

### RULE MAKING POWER

6.38 In the UK TPC, rules are made by the members of the Committee, after consultation with such persons as they think appropriate (including Chamber Presidents). Draft rules are submitted to the Lord Chancellor who allows or disallows them. If allowed, the rules are made by a majority of the TPC membership by statutory instrument.

6.39 At Consultation Question 34, we sought respondents’ views as to how the rules of the devolved tribunals should be made. We thought it important that the Welsh Ministers should have an opportunity to approve or disapprove the rules. We asked who should be able to present draft rules to the Welsh Ministers; whether it: should be a majority of the Tribunal Procedure Committee or the President of Welsh Tribunals. Twenty respondents answered this question.



6.40 Twelve respondents thought that the rules should be made by a majority of the TPCW and two thought they should be made by the President of Welsh Tribunals. Six respondents answered “other”. Most of those supported a combination of the rules being made by a majority of the TPCW or by the President of Welsh Tribunals and of the approval of the Welsh Ministers.

## Majority of the Tribunal Procedure Committee

- 6.41 Both the Bar Council and the Wales and Chester Circuit believed that the rules should be “made by a simple majority of the Tribunal Procedure Committee”. Dr Calum Delaney (a member of the Special Educational Needs Tribunal for Wales or “SENTW”; renamed the Education Tribunal for Wales or “ETW” in September 2021) argued that the rules should be made by “a qualified majority, somewhat greater than 50%”.
- 6.42 Roger Handy (a chair of the VTW) expressed the view that the rules should be made by a majority of the Tribunal Procedure Committee, as it would be chaired by the President of Welsh Tribunals in any event.
- 6.43 Dr Sarah Nason (senior lecturer at Bangor University) and Dr Huw Pritchard (lecturer at Cardiff University) explained why they believed this to be the best option:
- We believe that placing the rule-making authority with the majority of the Tribunal Procedure Committee would help to empower and ensure the credibility of that committee. It would also be consistent with other rule committees such as the Tribunal Procedural Committee (Tribunals, Courts and Enforcement Act 2007 (Schedule 5)) and the Civil Procedure Rule Committee (Civil Procedure Act 1997, s 2(8)).
- 6.44 Christopher McNall, the Chairperson of the ATW, agreed as this would increase “separation of powers”.
- 6.45 Dr Angela Ash, a member of the Residential Property Tribunal for Wales (“RPTW”), also agreed with the suggestion. She thought this was preferable to the President of Welsh Tribunals making the rules, cautioning that “checks and balances would be needed if the President were charged with making rules, to prevent too great a consolidation of power within this one role”.
- 6.46 The Governing Council of the VTW and Richard Payne (the President of the RPTW) also preferred that the rules were made by a majority of the TPCW with the approval of the Welsh Ministers. The APW expressed its neutrality on this point but added that “it is unlikely the President of Welsh Tribunals would impose rules which the majority of the committee did not support”.

## The President of Welsh Tribunals

- 6.47 Two respondents believed that the rules should be made by the President of Welsh Tribunals. One (Denbighshire Council) did not give reasons for its answer.
- 6.48 Huw Williams expressed the view that the President of Welsh Tribunals should make the rules, being “best placed to lead the development of a coherent approach to procedural rules”. He further detailed how these should be made in practice:
- Proposals to reform the Rules should be initiated by the President who should have a statutory remit to keep the rule under review. The rules should be made by statutory instrument by the Welsh Tribunals service as a non-ministerial department and laid before the Senedd.

## Other combinations

- 6.49 Sir Wyn Williams believed that all three should play a part in making the rules. He explained that in practice, he would envisage

... the initial rules and future amendments thereto being formulated and accepted by the Rules Committee. Majority approval within the Committee would be necessary for such rules to be taken forward. I would anticipate that the mechanics of actually making the rules would be that they would be made by the President of Welsh Tribunals with the agreement of Welsh Ministers.

- 6.50 The Law Society was content with “rules being made, with the approval of the Welsh Ministers, by the President of Welsh Tribunals, but not by a majority of Tribunal Procedure Committee members”. They had concerns regarding the:

legitimacy of potentially enabling a majority of committee members to agree changes to the rules of a tribunal/chamber even if the tribunal/chamber directly affected is opposed.

- 6.51 The MHRTW explained that it had no views as to whether the rules should be formally approved by the President of Welsh Tribunals or the Welsh Ministers as “in practice, this would amount to the same thing – the Welsh Ministers would rely on the advice of the President of Welsh Tribunals in approving the rules or otherwise”.

## Conclusion

- 6.52 We have concluded that the best approach is the one suggested by Sir Wyn Williams, that the rules be made by the President of Welsh Tribunals, having been formulated and accepted by a majority of the Committee, subject to being approved by the Welsh Ministers.

- 6.53 We agree with Huw Williams that the President of Welsh Tribunals is best placed to “lead the development of a coherent approach to procedural rules”. We agree with Sir Wyn Williams’ suggestion that the President of Welsh Tribunals should only be able to make rules in terms agreed upon by a majority of the Committee; this seems to us to meet the wish of tribunal members for checks and balances and will also help to empower and ensure the credibility of the Committee. At the same time, it should prevent a majority of the committee from imposing their views, since the President would not be compelled to make an objectionable rule. Finally, given that the terms of the rules can have cost implications, we consider that the rules should also require the approval of the Welsh Ministers.

- 6.54 We further recommend a duty of the Committee to consult with whomever it thinks appropriate before the rules are made.

### Recommendation 21.

- 6.55 We recommend that there should be a Tribunal Procedure Committee for Wales.

**Recommendation 22.**

- 6.56 We recommend that the Tribunal Procedure Committee for Wales should be able to establish sub-groups to focus on particular areas of work.

**Recommendation 23.**

- 6.57 We recommend that the President of Welsh Tribunals should be responsible for chairing the Tribunal Procedure Committee for Wales and appointing its members.

**Recommendation 24.**

- 6.58 We recommend that the President of Welsh Tribunals, when appointing members of a Tribunal Procedure Committee for Wales, should have regard to factors set out in legislation, including the need for:
- (1) the interests of each Chamber of the First-tier Tribunal for Wales and, in due course, the Appeal Tribunal for Wales to be represented;
  - (2) the Committee to have access to persons with relevant expertise; and
  - (3) the Committee to include persons who have experience of appearing in front of the tribunal or advising those that do.

**Recommendation 25.**

- 6.59 We recommend that the rules be made by the President of Welsh Tribunals, in a form agreed by a majority of the Tribunal Procedure Committee, subject to their being approved by the Welsh Ministers.

**Recommendation 26.**

- 6.60 We recommend that the Tribunal Procedure Committee for Wales should consult with whomever it considers appropriate (including members of the tribunal, members of the broader judiciary, practitioners and tribunal users) before making the rules.

## STANDARDISING PROCEDURAL RULES

- 6.61 As we set out in the Consultation Paper, we saw merit in standardising some aspects of the procedural rules of the devolved tribunals. This could achieve consistency, greater accessibility for users,<sup>138</sup> and simplicity for administrative staff and cross-ticketed judges. We thought, however, that any process of standardisation should be undertaken cautiously, identifying where differences in rules are justified by the needs of individual tribunals and should be retained.
- 6.62 We asked respondents two questions in relation to standardisation of procedural rules. First, we provisionally proposed in Consultation Question 27 that the procedural rules should be standardised as far as possible. Consultation Question 29 then asked whether there should continue to be a separate set of rules for each tribunal or chamber. Consultation Question 28 addressed the topic of divergence of devolved tribunal rules from those of the UK First-tier Tribunal; we discuss this separately below.

### Standardising common features

- 6.63 Twenty-five respondents answered Consultation Question 27, of whom a majority, 23, agreed and two marked their answers as “other”.
- 6.64 The APW, the Governing Council of the VTW, Sir Wyn Williams, Public Law Wales, Keith Bush QC, Dr Sarah Nason and Dr Huw Pritchard and Richard Payne all agreed with standardising the rules as far as possible. The APW also suggested that the rules should deal with hearings both in public and in private.
- 6.65 Dr Sarah Nason and Dr Huw Pritchard drew our attention to the work of Professor Robin Creyke. Her research on the Australian tribunal system concluded that minimising variations between rules on different types of matters has the potential to produce procedural advantages of enhanced accessibility to applicants.<sup>139</sup>
- 6.66 Huw Williams considered that:

the balance of the arguments favours a system where each Chamber has its own set of rules, developed utilising the experience and expertise of those who regularly advise and adjudicate on the subject matter.

However, he took the view that

... there will be a range of matters, for example, remote hearings, electronic filing of cases and papers, protection of vulnerable parties or persons under disability, local sitting arrangements, site visits, review of own decisions, and doubtless many more, where a common approach across the different sets of rules should be adopted. The aim should be a sense that the system as a whole has a common approach to common problems. A consequence of this is that practitioners across the devolved

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<sup>138</sup> See further discussion on the accessibility benefits of streamlining procedural rules in the Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010), para 84.

<sup>139</sup> R Creyke, “Amalgamation of Tribunals in Australia: Whether ‘tis Better...?” S Nason (ed.) *Administrative Justice in Wales and Comparative Perspectives* (UWP 2017) pp 336 to 337.

tribunals system will develop over time a more instinctive feel for procedural approach of the Welsh system.

- 6.67 He concluded his response by suggesting that the TPCW should have a “specific remit to develop and maintain common approaches”.

### **Separate sets of rules for each chamber**

- 6.68 In the Consultation Paper, we set out the options for presenting the procedural rules. The first option is to create a single set of procedural rules that applies in all chambers of a tribunal. The other option is to maintain a separate set of procedural rules for each chamber, that nonetheless may contain some identical provisions (such as the overriding objective).

### **Comparative perspectives**

- 6.69 The Upper Tribunal currently has two sets of procedural rules: one applying to the Administrative Appeals Chamber, Immigration and Asylum Chamber and Tax and Chancery Chamber and the other applying to the Lands Chamber.<sup>140</sup>
- 6.70 The UK and Scottish First-tier Tribunals, however, have separate sets of procedural rules for each chamber. There are seven sets of procedural rules in the UK First-tier Tribunal, containing an identical overriding objective and duty of the parties to cooperate with the tribunal.

### **Consultation**

- 6.71 In the Consultation Paper, we provisionally proposed that there should continue to be a separate set of rules for each chamber. Twenty-two respondents agreed, one disagreed and two marked their answers as “other”.
- 6.72 The MHRTW and Dr Sarah Nason and Dr Huw Pritchard agreed with the provisional proposal, on the grounds that keeping the rules separate will reflect the distinct identities of chambers and “maintain the specialism of each jurisdiction and the varied work undertaken by different Welsh tribunals”.
- 6.73 Keith Bush QC, Roger Handy and Richard Payne all agreed with the proposal on the basis that one amalgamated set of rules would be unworkable. Richard Payne drew attention to the 90 page long 2008 set of Rules of the Administrative Appeals, Immigration and Asylum and Tax and Chancery Chambers of the Upper Tribunal Rules, commenting that a single set of procedural rules is “unwieldy and entirely user unfriendly for litigants and (less importantly) lawyers alike”.
- 6.74 We are encouraged that the majority of respondents agree with the provisional proposal and recommend below that the TPCW maintain a separate set of rules for each chamber.

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<sup>140</sup> The Tribunal Procedure (Upper Tribunal) Rules SI 2008 No 2698 and The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules SI 2010 No 2600.



## Conclusion

6.75 One of the guiding principles followed by the UK TPC is that the Committee should strive to:

adopt common rules across tribunals wherever possible, so that rules specific to a chamber or a tribunal are permitted only where there is a clear and demonstrated need for them.

6.76 We are persuaded that a similar approach would be appropriate for the procedural rules across the devolved tribunals. Provision on a particular topic should only differ as between chambers to the extent that there is a need for the difference. What the standard provision should be, and the extent to which it is departed from, is a matter for the TPCW.

6.77 There should not, however, be a single set of procedural rules applicable to all chambers, which would be likely to create a complex set of procedural rules, difficult for lay tribunal users to use, and for tribunal members to navigate. We think that there should be a separate set of procedural rules for each chamber of the First-tier Tribunal for Wales. If in due course the Appeal Tribunal for Wales is divided into chambers, we leave it to the TPCW to decide whether to make separate sets of rules for each chamber.

### Recommendation 27.

6.78 The Tribunal Procedure Committee for Wales should adopt common procedural rules across the tribunals as far as is appropriate.

### Recommendation 28.

6.79 There should be a set of procedural rules for each chamber of the First-tier Tribunal for Wales and for the Appeal Tribunal for Wales. If the Appeal Tribunal for Wales is divided into chambers, the Tribunal Procedure Committee for Wales should consider whether to make a separate set of rules for each chamber.

## Divergence of rules

6.80 In Consultation Question 28 we sought views on whether there are instances of undesirable divergence between devolved tribunal and First-tier Tribunal procedural rules and how the risk of divergence might be managed. We received 15 responses to this question.

6.81 Huw Williams made the point that:

The greatest issue appears to derive from the fact that the various sets of current rules have each been developed over decades under various pieces of primary legislation...

The problem appears not so much to be one of undesirable divergence but rather that the devolved tribunal rules taken as a whole do not all reflect the current norms of a fair, just and proportionate disposal of cases that stems from the thinking of the Woolf reforms.

6.82 The Consultation Paper identified two differences between the procedural rules applying to the First-tier Tribunal (Mental Health) and the MHRTW. First, unlike the First-tier Tribunal (Mental Health) procedural rules, the MHRTW procedural rules do not contain an express requirement for the parties to cooperate (a point we discuss further at paragraph 6.112 below). Secondly, although both sets of rules contain a nearly identical overriding objective, the MHRTW rules omit the need to deal with a case “in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties”.

6.83 The MHRTW explained that, in addition to the discrepancy around the duty to cooperate, there were also divergences as regards the duty to strike out. The response added that:

When a mechanism for altering our rules is confirmed, we would be happy to achieve greater conformity to the First-tier Tribunal (Mental Health) rules.

6.84 However, Richard Payne (who is a judge of the MHRTW as well as the President of the RPTW) regarded the differences highlighted in our Consultation Paper as “academic points that in my opinion ... have had no impact on clients” and are “not undesirable per se”. We nevertheless regard divergence where no difference of outcome is intended as something better avoided. In paragraph 6.166 below we recommend the introduction of a duty of parties to cooperate with each other, the First-tier Tribunal for Wales, and the Appeal Tribunal for Wales.

6.85 We share the view of respondents, including the Wales and Chester Circuit, Bar Council and the Law Society, that the risk of divergence will be managed through the TPCW’s role in overseeing the development of the system as a whole. We have already mentioned, as one of the benefits of a TPCW, that it will be in a position to take stock of the state of procedural rules across the tribunals as a whole. It will also be able to observe any emerging divergence between the procedural rules of the devolved tribunals and those of the First-tier Tribunal.

6.86 We would not wish to tie the TPCW to following the rules of other tribunals, but consider that the Committee should have regard to the desirability of consistency, both within the procedural rules of the devolved tribunals and between them and those of other courts and tribunals in the UK. As a result, we recommend that such a duty is contained in legislation.

### **Recommendation 29.**

- 6.87 We recommend that the Tribunal Procedure Committee for Wales should be required by legislation to have regard to the desirability of consistency within the procedural rules of the devolved tribunals and between them and those of other courts and tribunals in the UK.

### **Amalgamating the rules of the Residential Property Tribunal for Wales**

- 6.88 The rules within the RPTW do not currently take the form of a single set of rules. The term “Residential Property Tribunal” is used to describe a body comprising residential property tribunals, leasehold valuation tribunals and rent assessment committees. Each jurisdiction of the RPTW has its own specific procedural rules, with the power to make the rules being found in different pieces of UK primary legislation.
- 6.89 There are inconsistencies across the three sets of procedural rules. This creates unnecessary complexity for tribunal members, practitioners and users, with no principled justification. As a result, we provisionally proposed at Consultation Question 30 that the procedural rules for the RPTW be amalgamated to create one set. Fourteen respondents answered this question, all of whom agreed.
- 6.90 Notably, Richard Payne, the President of the RPTW, strongly agreed with our provisional proposal. He explained that the:
- ... current three different sets of rules are unfit for purpose. To give one example, there is nothing about the ability to withdraw a case in the leasehold valuation tribunal rules but there is in the residential property tribunal rules. The single set of RPTW rules would still need some subdivisions to reflect the work that is currently done by the residential property tribunal, leasehold valuation tribunal and rent assessment committee though.
- 6.91 In Chapter 3 we recommend the creation of a Property Chamber, amalgamating the jurisdictions of the ALTW and the RPTW. In accordance with Recommendation 28 above, we would anticipate that if this recommendation is accepted, there would be a single set of rules for the new chamber; if separate agricultural and residential chambers are retained, each would have a separate but single set of rules.

### **SPECIFIC ISSUES IN PROCEDURAL RULES**

- 6.92 Our Consultation Paper identified some issues with the existing procedural rules of the section 59 tribunals, and made some provisional proposals as to how the rules could be improved.

### **An overriding objective**

- 6.93 The procedural rules of the MHRTW, the Education Tribunal for Wales (“ETW”), residential property tribunals forming part of the RPTW and the Welsh Language Tribunal (“WLT”) contain an overriding objective. Although each overriding objective

differs in its wording, they have in common the requirement that appeals and claims should be dealt with “fairly and justly”.<sup>141</sup>

6.94 Professor Kris Gledhill noted in an article in the journal *Tribunals* that:

The inclusion of the overriding objective is an example of a trend in the way that statute law is structured, making use of statements of principle to guide exercises of discretion.<sup>142</sup>

6.95 We saw merit in including an overriding objective in the new standardised procedural rules and applying it consistently across tribunals. In the Consultation Paper, we gave an example of what the overriding objective could contain, drawing on examples taken from the statements of overriding objective contained in the existing procedural rules:

- (1) dealing with cases in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and the resources of the parties and the tribunal;<sup>143</sup>
- (2) avoiding unnecessary formality;<sup>144</sup>
- (3) ensuring that parties are able to participate fully in the proceedings;<sup>145</sup>
- (4) ensuring that the tribunal uses its expertise effectively; and<sup>146</sup>
- (5) treating the languages of the tribunal equally.<sup>147</sup>

6.96 We provisionally proposed at Consultation Question 21 that the procedural rules of the devolved tribunals should contain an overriding objective. Twenty-seven respondents answered this question, all of whom agreed.

6.97 The responses in support of this provisional proposal can be broadly categorised into three themes, discussed in turn below.

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<sup>141</sup> An example of variation can be found in Mental Health Review Tribunal for Wales Rules SI 2008 No 2705 (“MHRTW Rules”), r 3 which states the overriding objective of the rules is to enable the tribunal to deal with cases “fairly, justly, efficiently and expeditiously”.

<sup>142</sup> K Gledhill, “Evolution Rather than Revolution” in *Tribunals Journal* (Autumn 2009) p 13.

<sup>143</sup> Special Educational Needs Tribunal for Wales Regulations SI 2012 No 322 (W 53) (“SENTW Regulations”), reg 6(2)(a), Welsh Language Tribunal Rules SI 2015 No 1028 (W 76) (“WLT Rules”), r 3(2)(a), Residential Property Tribunal Procedures and Fees (Wales) Regulations SI 2016 No 1110 (W 267) (“RPTW Regulations”), reg 3(2)(a) and the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 No 2685 r 2(2)(a).

<sup>144</sup> MHRTW Rules, r 3(2)(a), The Education Tribunal for Wales Regulations SI 2021 No 406 (W 132) (“ETW Regulations”), reg 4(1)(b); and WLT Rules, r 3(2)(b). The MHRTW Rules also state that this includes “seeking flexibility in the proceedings”.

<sup>145</sup> MHRTW Rules, r 3(2)(b); ETW Regulations, reg 4(1)(c); reg 6(2)(c); WLT Rules, r 3(2)(c); and the RPTW Regulations, reg 3(2)(b).

<sup>146</sup> MHRTW Rules, r 3(2)(c); ETW Regulations, reg 4(1)(d); WLT Rules, r 3(2)(e); and the RPTW Regulations, reg 3(2)(d).

<sup>147</sup> WLT Rules, r 3(2)(d).

## Promoting justice

6.98 The APW explained that the overriding objectives “support tribunals and their members in ensuring cases are dealt with fairly and justly”.

6.99 A tribunal member who wished to remain anonymous explained that:

...fair treatment before the law is a fundamental cornerstone of an effective and inclusive justice system. Including an overriding objective to deal with cases fairly and justly emphasises this principle and underpins all functions of the tribunal.

## Assisting in judicial decision making

6.100 The MHRTW, Keith Bush QC and Roger Handy all agreed that having an overriding objective aids tribunal members in reaching their decisions, the MHRTW explaining that it “provides useful judicial guidance in difficult situations”. Keith Bush QC drew on his experience as the former judicial lead of the WLT, stating that the “overriding objective is a statement that is of vital assistance as a guide when making difficult decisions on procedural questions”.<sup>148</sup>

## Assisting tribunal users

6.101 Two respondents told us that having an overriding objective is beneficial because above all else, it assists the tribunal users. The VTW expressed the view that procedural rules should contain an overriding objective so “that tribunal users will better understand what to expect from all tribunals”. Roger Handy expressed the opinion that this would “give parties confidence in the Tribunals’ decisions”. The APW also commented on the benefits for public perception, as an overriding objective could “be used to demonstrated to the parties and the public the fairness of the proceedings”.

## A list of illustrative examples

6.102 Further to the provisional proposal of including an overriding objective, at Consultation Question 22 we sought respondents’ views as to whether that overriding objective should contain a non-exhaustive list of illustrative examples, and, if so, what those examples should be. Of the 24 respondents who answered this question, 17 agreed with having a non-exhaustive list of examples, three disagreed and four marked their answers as “other”.

6.103 Some respondents provided further examples in their responses, in addition to the examples we have given above, including:

- (1) avoiding unfair discrimination on the grounds of race, gender, disability, sexual orientation, religion, age or economic or social background (an anonymous tribunal member and Alun Green, a member of the schools appeal panels for both Newport and Monmouthshire Councils);

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<sup>148</sup> This response has been translated from the Welsh original.

- (2) ensuring that parties are able to participate fully in the proceedings, including having their communication needs met (National Deaf Children's Society Cymru);
- (3) ensuring that claims are dealt with fairly and justly (the Bar Council and the Wales and Chester Circuit);
- (4) promoting balanced, unbiased and independent decision making based on factual evidence and information (Alun Green); and
- (5) facilitating transparent and proportional decision making (Roger Handy).

6.104 The APW suggested that:

The classic examples from the Civil Procedure Rules or the Law Commission's own report are appropriate. A non-exhaustive list guides litigants in person as to what factors may be relevant.

6.105 Richard Payne agreed that it might be useful to adopt the examples given by the Civil Procedure Rules.<sup>149</sup>

6.106 Dr Sarah Nason and Dr Huw Pritchard suggested the adoption of an "Administrative Procedure Code for Wales" that could be adapted for use by the tribunals. They outline the relevant principles as being:

Systems and Procedures - All appeal and review systems and procedures should:

- include opportunities for reviewing decisions and for informal dispute resolution prior to any formal process of appeal, provided that the citizen's right to a fair and open appeal is not thereby impaired;
- be prompt, accessible, independent, impartial and open;
- be proportionate, efficient and effective;
- demonstrate respect for human rights, equalities, sustainability and the needs of the most vulnerable;
- ensure the interests of unrepresented parties are accommodated and that they are not disadvantaged.

Values and Behaviours

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<sup>149</sup> Civil Procedure Rules, r 1.1(2) states that dealing with a case justly and at proportionate cost includes, so far as is practicable – (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence; (b) saving expense; (c) dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and (f) enforcing compliance with rules, practice directions and orders.

- Citizens' rights and needs should be treated with respect at all times;
- appellants should be kept informed throughout dispute resolution processes and enabled to seek resolution of their problems as expeditiously as possible;
- all decisions, including decisions made on appeal or review, should ensure equal treatment of all citizens regardless of language preference between the English and Welsh languages.

### Overly definitive?

6.107 Both Huw Williams and Keith Bush QC believed that to include a non-exhaustive list of illustrative examples risked being overly definitive and would be constraining. Huw Williams outlined his view as follows:

The danger of a non-exhaustive list is that the examples given nevertheless come to be seen as part of the overall overriding principle. Some examples are sufficiently “timeless” to be properly regarded as a feature of the overriding objective such as the proportionate disposal of cases; others, such as the need to avoid unnecessary formality are too vague to add to the value of the overriding principle and ideas of formality or lack of it may change over time. A better approach might be to use practice directions issued by the President of Welsh Tribunals as a means of developing and guiding the application of the overarching principle and responding in a more agile fashion to emerging trends than amending the non-exhaustive list in the Rules themselves.

6.108 Keith Bush QC summarised his view as being that “examples would be open to misunderstanding and treated as definitive guidelines. On the other hand, it would not be possible to provide sufficiently comprehensive examples”. Christopher McNall also thought that introducing an overriding objective risked leading to satellite litigation.

6.109 Both Noel Edwards (a retired technical adviser for the Valuation Office Agency) and Ceredigion Council expressed the view that the variety of work of the tribunals might create a need for a different list of illustrative examples, or give rise to different priorities. As a result, they did not believe that a single overriding objective for all tribunals would be appropriate.

6.110 The MHRTW did not express firm views on the inclusion of examples to the overriding objective, but explained that if such a list were included, it would “favour keeping very closely to that already contained in the First-tier Tribunal (Health, Education and Social Care Chamber)”.

6.111 Given the unanimous support for our provisional proposal from respondents, and in particular the strong support expressed by individual tribunals, we are persuaded that there is a need for procedural rules to include a version of an overriding objective. The majority of respondents favoured including a non-exhaustive list of illustrative examples to accompany the overriding objective. The risks of this, as several respondents identified, are that these examples are interpreted as limiting the generality of the objective, or that they become outdated. Nonetheless, we are persuaded that they are helpful in giving further guidance to panels who may find the instruction to deal with cases “fairly and justly” insufficiently detailed to be of

assistance in particular cases. We believe however that the drafting of the overriding objective and the selection of illustrative examples should fall to the Tribunals Procedure Committee.

### **A duty to cooperate and to assist the tribunal**

6.112 An overriding objective could be accompanied by a duty of the parties to cooperate with each other and the tribunal. The procedural rules of the tribunals which contain an overriding objective, the RPTW, ETW and WLT currently contain such a provision, while the APW and ALTW rules do not. Neither do the procedural rules for the MHRTW, though such a duty does exist in the equivalent procedural rules of the First-tier Tribunal (Mental Health).<sup>150</sup>

6.113 At paragraphs 5.21 to 5.23 of the Consultation Paper, we considered whether such a duty was also appropriate for the MHRTW. We asked whether it would be fair to expect applicants to the MHRTW to comply with a duty to cooperate, or else face adverse consequences. Twenty respondents shared their view on the matter at Consultation Question 23, 18 of whom agreed that there should be a duty to cooperate across all tribunals, including the MHRTW.

6.114 The APW explained why such a duty would be relevant to its jurisdiction:

While the PSOW is conscious of his duty to act fairly and co-operate with the accused member, members facing APW proceedings have been known to attempt to frustrate proceedings or prevent hearings from taking place. The duty could be referred to when panels are making directions or dealing with applications and assist with decision-making. However, costs are rarely applied for, let alone awarded, so the sanction if there is a breach is limited.

6.115 Two respondents, the Governing Council of the VTW and Keith Bush QC, agreed with the provisional proposal but added that “it might be reasonable for a tribunal to exercise discretion regarding non-compliance of parties in individual and unusual circumstances. This could be particularly useful for the MHRTW”. Keith Bush QC called for judicial discretion in implementing the duty.

6.116 Dr Sarah Nason and Dr Huw Pritchard agreed with the Governing Council, explaining that a duty to cooperate with another party:

could be seen as imposing and counter-productive particularly in some contexts... where there is a significant imbalance in power and resources between the parties (for example in relation to health and education contexts).

6.117 Their view, marked as “other”, explained that cooperation between parties should be encouraged “especially where there is likely to be a continuing relationship of service provision but expressing co-operation as a duty can conflict with fostering genuine and good faith interaction”.

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<sup>150</sup> The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules SI 2008 No 2699, r 2(4).



6.118 One tribunal member, who wished to remain anonymous, believed that the duty should not apply in relation to the MHRTW. In Huw Williams's view, the issue of creating the duty in relation to the MHRTW:

... illustrates the point that examples of specific conduct that is thought to ensure a fair and just disposal of a case needs to be sensitive to the realities of the jurisdiction of particular tribunals or chambers under a reformed system. In view of the fact that a party to a Mental Health Tribunal case could well be too ill to co-operate in the normal sense of the term, the duty to co-operate in such cases would need to be adjusted to reflect the special roles of those appointed to look after the interests of such a party.

6.119 The Law Society, Wales and Chester Circuit and Bar Council Legal Services Committee supported the provisional proposal, and its extension to the MHRTW. They pointed to the rules of the First-tier Tribunal (Mental Health) as evidence that the duty could be applied sensitively to different contexts.<sup>151</sup>

6.120 Notably, the MHRTW itself supported extending the duty to cover its jurisdiction. The response acknowledged the concerns associated with imposing such a duty on patients living with mental illness, but qualified its statement by explaining that "it exists in the First-tier Tribunal (Mental Health) rules without difficulty and if incorporated in our rules would be handled with appropriate sensitivity."

## Conclusion

6.121 We have concluded that there should be a duty of tribunal users to cooperate with the tribunal and other parties. This would assimilate the procedural rules of the devolved tribunals to the UK tribunals. Such a duty would also bolster the inquisitorial rather than adversarial nature of a tribunal. We agree with the MHRTW, that the duty should apply to mental health cases.

6.122 In other respects, those cases may require less stringent rules. We note that the First-tier Tribunal (Health, Education and Social Care Chamber) procedural rules dealing with striking out a party's case do not apply to the Mental Health jurisdiction.<sup>152</sup>

## Service of documents

6.123 The rules on service of documents across the devolved tribunals are inconsistent and out of date. Case law of the devolved tribunals highlights the problem. Recently the Upper Tribunal (Lands Chamber) has found it necessary to consider the ALTW's rules on service, when a dispute arose regarding whether service on the sole director of a company was sufficient when the company itself should have been party to the proceedings.<sup>153</sup>

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<sup>151</sup> The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules SI 2008 No 2699, r 2(4).

<sup>152</sup> The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules SI 2008 No 2699, r 8. The only exception to this rule is that a mental health case may be struck out if the tribunal has no jurisdiction in relation to the proceedings.

<sup>153</sup> *Adams v Jones* [2021] UKUT 9 (LC); [2021] All ER (D) 65 (Jan).

6.124 Edward Jacobs, writing in *Tribunal Practice and Procedure*, explains that “it is at least desirable, if not actually essential, that there should be consistency in the application of principles to different forms of service”.<sup>154</sup> No such consistency exists within the devolved tribunals. For example, only the ETW, VTW and residential property tribunal rules specifically state that documents can be sent by email.<sup>155</sup>

6.125 Other rules use various formulations which appear to permit documents to be sent by email.

- (1) The MHRTW rules provide that documents may be sent by post, facsimile transmission (“fax”) or any other method as the Tribunal may permit.<sup>156</sup>
- (2) The APW rules provide that documents may be sent by fax or any other means which produces a document containing a text of the communication.<sup>157</sup>
- (3) The ALTW rules provide that documents may be sent by fax or other means of electronic communication which produces a text which is received in legible form.<sup>158</sup>
- (4) The leasehold valuation tribunal rules provide that documents can be served by fax or other means of electronic communication which produces a text of the document.<sup>159</sup>

6.126 The RPTW issued a practice direction during the COVID-19 pandemic, which expressly permits parties to serve documents by email. In the recent revision of the practice direction, there continues to be provision for applications and communications to be made by email.<sup>160</sup>

6.127 The rules for the school admission and exclusion appeal panels are silent as to the method of service, although the admission appeals code suggests that a school admission authority may send documents by email to the clerk of the appeal panel and appellant if all parties agree.<sup>161</sup>

6.128 These inconsistencies reflect the haphazard development of tribunals. The rules do not address modern tribunal practice and are not reflective of technological advances.

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<sup>154</sup> E Jacobs, *Tribunal Practice and Procedure* (5th ed 2019), para 7.133.

<sup>155</sup> SENTW Regulations, reg 79(2)(c); ETW Regulations, reg 75(4); Valuation Tribunal for Wales Regulations SI 2010 No 713 (W 69), reg 46(5); RPTW Regulations, reg 39 provides a document can only be sent by fax, email or other electronic communication if the person receiving the document provides written consent.

<sup>156</sup> MHRTW Rules, r 9(1).

<sup>157</sup> Adjudications by Case Tribunals and Interim Case Tribunals (Wales) Regulations SI 2001 No 2288 (W 176), reg 24(b).

<sup>158</sup> Agricultural Land Tribunals (Rules) Order SI 2007 No 3105, r 49(b).

<sup>159</sup> Leasehold Valuation Tribunals (Procedure) (Wales) Regulations SI 2004 No 681 (W 69), reg 23(c)(ii).

<sup>160</sup> Residential Property Tribunal for Wales, *Practice Direction Corona Virus (COVID 19)*, para 6 (20 September 2021) See <https://residentialpropertytribunal.gov.wales/sites/residentialproperty/files/2021-09/rpt-practice-direction-0921.pdf>

<sup>161</sup> Welsh Government, *School admission appeals code* (2013), para 4.22. See <https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>.

As a result, we provisionally proposed at Consultation Question 24 that the devolved tribunal procedural rules should provide for service of documents by electronic means. Twenty-eight respondents agreed and three marked their answers as “other”.

6.129 Keith Bush QC drew on his experience as the former judicial lead of the WLT, and explained that “this already exists under the WLT rules and has worked well” and that “it is impossible to think of an example, in the case of that tribunal, of documents being presented in any way other than electronic means”.

6.130 The APW, a tribunal with rules that appear to allow electronic communication (although not explicitly) agreed with the provisional proposal. It explained that it would be preferable for the deemed service provisions to be set out clearly, as its current rules:

...do not make the use of electronic communications as clear as modern regulations. ... Electronic means is how most of our users contact the APW and ask for documents to be provided and enables consistent working even during a pandemic or other events with potential to disrupt provision.

6.131 The MHRTW agreed, but only if the provision was intended to be “enabling and not prescriptive”. It explained that although the tribunal is likely to communicate with professional participants electronically, some participants in their hearings were “community patients, for whom service of papers in hard copy is the only satisfactory (or indeed available) method of service”.

6.132 The First-tier Tribunal (Health, Education and Social Care) procedural rules are enabling and not prescriptive. There is specific provision that:

... where the Tribunal or a party sends a document to a party or the Tribunal by email or any other electronic means of communication, the recipient may request that the sender provide a hard copy of the document to the recipient.<sup>162</sup>

### Digital exclusion

6.133 One common concern expressed by respondents was that permitting the electronic service of documents could hamper the participation of digitally excluded people. Huw Williams, Roger Handy, the Law Society, Bar Council, Equality and Human Rights Commission and a tribunal member who wished to remain anonymous all drew our attention to this issue. Nevertheless, all of them agreed with the principle of the provisional proposal.

6.134 Roger Handy suggested that electronic communication should be the default, with individual opt-outs permitting other methods of communication. Huw Williams stressed that proper protection should be afforded to the digitally excluded “especially having regard to the subject matter of some of the jurisdictions of the Welsh Tribunals”.

6.135 Dr Sarah Nason and Dr Huw Pritchard welcomed the proposal in principle but referred to their work in which they concluded that “in terms of wider digitalisation of tribunals,

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<sup>162</sup> The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules SI 2008 No 2699, r 13(4).

a ‘one-size-fits-all’ approach may not be appropriate in all circumstances”. They subsequently propose a “review of digital strategy for tribunals in Wales that would consider digital skills and inclusion, access to justice for unrepresented users, and adapting the digital strategy to context”.

## Discussion

6.136 We share the concerns raised in relation to digital exclusion, as does the Welsh Government which reviewed its digital inclusion framework in 2020.<sup>163</sup> That review noted that 474,000 adults in Wales do not use digital technologies, and that this was one of the greatest challenges facing the Government in their digital strategy, Delivering a Digital Wales.

6.137 Digital exclusion has a larger effect on those living in Wales’ most deprived areas, with 71% of the households living in the 20% most deprived areas in Wales having internet access, compared with 86% of households living in the 20% least deprived areas. It also has a disproportionate effect on disabled people, with 38% of disabled people facing digital exclusion (compared to 19% of other adults).<sup>164</sup> However, COVID-19 has increased the momentum in internet take-up and use across the UK. Ofcom figures suggest that the proportion of homes without internet access has fallen from 11% in March 2020, to 6% of homes in March 2021.<sup>165</sup>

6.138 This is not a problem unique to Wales. 2018 figures from the Office for National Statistics demonstrate that although there is a digital disparity across the UK, only 10.9% of the UK internet non-users reside in Wales (compared to 14.2% in Northern Ireland and 12.1% in the North East of England).<sup>166</sup>

6.139 The procedural rules of all the chambers of the UK First-tier Tribunal make express provision for the electronic service of documents.<sup>167</sup> However, none of them prescribes electronic service of documents as the only method of service. We are persuaded that the devolved tribunal procedural rules should provide for service of documents by electronic means, but not exclusively.

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<sup>163</sup> Welsh Government, *Digital inclusion framework* (March 2016 reviewed in December 2020), p 13.

<sup>164</sup> Welsh Government, *Digital inclusion framework* (March 2016, reviewed in December 2020), p 14.

<sup>165</sup> Ofcom, *Digital divide narrowed by pandemic, but around 1.5m homes remain offline* (28 April 2021). See <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2021/digital-divide-narrowed-but-around-1.5m-homes-offline>

<sup>166</sup> Office for National Statistics, *Exploring the UK’s digital divide* (4 March 2019) para 4. See <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/articles/exploringtheuksdigitaldivide/2019-03-04>

<sup>167</sup> The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules SI 2008 No 2699, r 13; The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules SI 2013 No 1169, r16; The Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules SI 2008 No 2686 r 13; The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules SI 2008 No 2685 r 13; The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules SI 2009 No 1976 r 13; The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) SI 2009 No 273, r 13; and The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules SI 2014 No 2604 r 12.

## Power to review decisions

- 6.140 The power to review decisions can be useful to tribunals, as it gives them an opportunity to correct obvious errors without the need for an appeal. Unsurprisingly, the power of devolved tribunals to review their decisions varies. The ETW, ALTW, VTW, WLT and school admission appeals panels all have variously formulated powers to review their decisions. The rules of the MHRTW, the APW and the three constituent bodies of the RPTW procedural rules lack such a provision. We provisionally proposed at Consultation Question 25 that devolved tribunals should all have the ability to review their decisions. All but one of the 27 responses to this question agreed with the provisional proposal.
- 6.141 Sir Wyn Williams agreed on the basis that “reviews are sensible, proportionate and cost-effective means of avoiding unnecessary appeals and correcting obvious errors”. The Governing Council of the VTW concurred with this view, adding that the power to review decisions “can provide a quick, less formal and cost-effective procedure to scrutinise the decision-making process in specific circumstances”.
- 6.142 The MHRTW strongly supported our provisional proposal, explaining that the tribunal had been seeking this power since the equivalent power had been introduced in the First-tier Tribunal (Mental Health Chamber) following the coming into force of the TCEA in 2007. It explained that “at present, the only option is a formal appeal” and that the tribunal had had to appeal against its own decision (through the Ministry of Justice) in order to “re-hear a case where the panel had quite obviously made a legal error, such as making a disposal which was not one of the legal options open to them”.
- 6.143 Keith Bush QC supported the proposal, but said that the grounds for review must be “strictly defined in order to avoid requests for review which simply restates the original request”.
- 6.144 Two respondents agreed with the proposal on the basis that this would reduce the number of unnecessary appeals. The Wales and Chester Circuit noted that “given the nature of matters before the tribunals, the ability to seek a review as opposed to requiring an appeal to be lodged is beneficial”. The Bar Council went on to explain that:
- inclusion of a review would effectively make the appeal a second bite at a cherry. In those circumstances it would be more proportionate to make the appeal a review-type appeal only, based on a point of law.

## Discussion

- 6.145 We are not persuaded that introducing a review of decisions should alter the grounds of appeal. Reviewing a decision aims principally to rectify obvious errors of law or procedure. The procedural rules of the ETW, for example, allow the tribunal to review, set aside or vary a decision if:
- (1) the decision was wrongly made as a result of a material error on the part of the tribunal administration;

- (2) a party, who was entitled to be heard at the hearing but failed to appear or to be represented, had good and sufficient reason for failing to appear;
- (3) there was an obvious and material error in the decision; or
- (4) the interests of justice so require.<sup>168</sup>

6.146 Most appeals from the devolved tribunals are already restricted to appeal on a point of law; the exceptions are those from the APW, those from a residential property tribunal or leasehold valuation tribunal within the RPTW and non-domestic rating appeals from the VTW. We are not persuaded that including a power to review decisions should lead to those appeals being restricted to appeal on a point of law only. A tribunal's power to correct acknowledged errors of fact is not a substitute for the right to have its findings of fact reviewed at appellate level.

### Remote hearings

6.147 The COVID-19 pandemic forced the devolved tribunals to develop rules on remote hearings rapidly. At the beginning of the pandemic in March 2020, the Welsh Tribunals Unit agreed with Her Majesty's Courts and Tribunals Service that the section 59 tribunals could make use of the Cloud Video Platform used in the UK courts and tribunals.

### Remote hearings in practice

6.148 In his latest annual report ("the Report"), the President of Welsh Tribunals set out some of the practical advantages of switching to mostly remote hearings over the last year. Conducting hearings remotely led almost exclusively to a significant underspend of £582,754. He explained that "there were no costs associated with hiring suitable rooms" and that "there were very little travelling expenses to be paid out to tribunal members and staff".<sup>169</sup>

6.149 The Report set out how each devolved tribunal had adapted to hearing cases remotely, highlighting both the problems and the successes.

6.150 Early in the pandemic, the procedural rules for the MHRTW had to be amended urgently so that the tribunal could deal with a case load of nearly 2000 cases each year. The President of the MHRTW and the President of Welsh Tribunals introduced a Practice Direction, making the following provisions in relation to remote hearings:

For the duration of this Practice Direction the MHRTW shall hold hearings by telephone or by video conference where possible, as provided for by Rule 2 of the Mental Health Review Tribunal for Wales Rules 2008, to determine applications and references unless paragraph 12(2) of Schedule 8 to the Coronavirus Act 2020 applies. Where these provisions apply the Tribunal may dispense with a hearing if it considers that:

- (a) holding a hearing is impractical or would involve undesirable delay,

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<sup>168</sup> ETW Regulations, reg 53(1).

<sup>169</sup> President of Welsh Tribunals, *Annual Report 2020-2021* (April 2021) p 7.

(b) having regard to the issues raised in the case, sufficient evidence is available to enable it to come to a decision without a hearing; and

(c) to dispense with a hearing would not be detrimental to the health of the patient.<sup>170</sup>

6.151 We understand that in practice the MHRTW hearings have been conducted by telephone rather than video conferencing. The Practice Direction was renewed in October 2020, but has since expired.

6.152 The President of Welsh Tribunals also reported the great success of remote hearings in relation to the then SENTW. He explained that:

... a constant theme has been that the parents of children with special educational needs positively prefer hearings by remote means since they are, in the main, able to participate from their own homes and, in consequence, feel more relaxed and better able to participate.<sup>171</sup>

### Scope of the discussion

6.153 In the Consultation Paper, we briefly explored some advantages and disadvantages of remote hearings, provisionally concluding that it was outside the scope of this project to evaluate whether remote hearings are desirable or not. Instead we recognised that remote hearings will continue to be used after the pandemic and considered how existing procedural rules should accommodate them.

6.154 Currently, there is no uniform procedure for remote hearings across the devolved tribunals. For example, the MHRTW, ETW, WLT and school admission appeal panel rules expressly provide that a hearing, or part of a hearing, can be conducted by video link. The ALTW, RPTW and APW rules do not preclude remote hearings, but appear to be drafted with in person rather than remote hearings in mind.<sup>172</sup>

6.155 We saw no principled reason for such inconsistency, and thought that the marked increase in their use since the beginning of the pandemic created a strong case for updating and standardising rules relating to remote hearings across the tribunals. As a result, we provisionally proposed at Consultation Question 26 that rules on remote hearings should be standardised in devolved tribunal procedure rules.

6.156 Twenty-eight respondents answered this question, of whom 21 agreed, one disagreed and six marked their answers as “other”. Many responses agreed with the principle of the provisional proposal, provided that there was sufficient flexibility in the use of remote hearings.

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<sup>170</sup> The Mental Health Review Tribunal for Wales, *Practice Direction, Coronavirus COVID – 19* (2020) para 4.

<sup>171</sup> President of Welsh Tribunals, *Annual Report 2020-2021* (April 2021) p 12.

<sup>172</sup> For further detail on the provisions relating to each devolved tribunal, see paras 5.42 to 5.46 of the Consultation Paper.



### Sufficient flexibility

6.157 Sir Wyn Williams, the APW, Richard Payne and the Governing Council of the VTW, agreed with the proposal providing there is sufficient flexibility to cater to the requirements of each individual tribunal.

6.158 Richard Payne thought that although there would be benefit in standardising some more general rules, “there may be some rules that would need to be tailored for the individual tribunals”. He added that “this could be dealt with by an enabling rule allowing tribunals to prepare their own practice directions about such hearings”.

### Accessibility

6.159 Dr Sarah Nason, Dr Huw Pritchard and Keith Bush QC all discussed how standardising the rules relating to remote hearings will improve the accessibility of the tribunals.

6.160 Dr Sarah Nason and Dr Huw Pritchard highlighted their previous research on this point, agreeing with the provisional proposal on the basis that “remote hearings could be beneficial for rural areas of Wales where there are no longer court or tribunal buildings and where public transport may not be accessible”. They also reflected on the shift towards digitalisation within Her Majesty’s Courts and Tribunals Service, and that failing to develop equivalent remote provision in Wales:

...may lead to a ‘two speed or multiple speed processes’ between England and Wales where Welsh tribunals could be left behind if they could not take advantage of scale of technological developments.

6.161 In discussing access to justice, Keith Bush QC explained that the “inevitable use of remote hearings, and the more common availability of technology that enables this, has shown, during the pandemic, how such practice can facilitate justice and avoid delay”.

6.162 The National Deaf Children’s Society Cymru advised caution. Although the response agreed that remote hearings should be an option in the future, it should not be at the cost of excluding face-to-face and hybrid options. Regardless of the format, the response noted that:

It is important to ensure that protocols allow for communication requirements to be clearly and routinely met. Communication requirements will differ but be just as necessary between online or face to face meetings. For deaf individuals, it is important to work with them to ensure their communication needs are met appropriately.

### The Mental Health Review Tribunal for Wales

6.163 Both Huw Williams and the Law Society gave particular consideration to the MHRTW in relation to standardisation of rules relating to remote hearings. Huw Williams thought that there should be appropriate provision to meet the particular needs of the MHRTW. The Law Society pointed out that:

Whilst recognising the merits of a standardised approach, careful consideration must be given to the unique circumstances of the Mental Health Review Tribunal for



Wales and the fact that it is very difficult to ascertain the physical and mental state of a person remotely.

6.164 Many of the specific issues relating to procedural rules will require an enabling rather than prescriptive approach. We are persuaded that adopting an enabling approach and allowing practice directions which build on the standard rule on remote hearings will cater towards the unique subject matter of all the devolved tribunals.

### Conclusion

6.165 Remote hearings will continue to be deployed by the devolved tribunals. As a result, we are persuaded that there is a need to standardise the rules relating to remote hearings. It is not appropriate for us to specify the content of the rule, but the TPCW should bear in mind the need for sufficient flexibility by adopting an enabling rather than prescriptive approach to the rule.

### **Recommendation 30.**

6.166 The procedural rules of the First-tier Tribunal for Wales and the Appeal Tribunal for Wales should include:

- (1) an overriding objective;
- (2) a duty of the parties to cooperate with each other and the tribunal;
- (3) provision for service of documents by electronic means;
- (4) a power for the First-tier Tribunal to review its own decisions; and
- (5) rules on remote hearings.

## Chapter 7: Appointments

- 7.1 Responsibility for appointments of members and judicial leads is currently inconsistent across the devolved tribunals due to their piecemeal development. Later rules reflect the progress of devolution, while procedures that were developed earlier do not.
- 7.2 Chapter 6 of the Consultation Paper considered two aspects of appointments; the identity of the appointing authority (the body responsible for appointments) and the selection process. We asked respondents whether these should be consistent across the different tribunals. We also asked how the appointment and selection of the members of the Valuation Tribunal for Wales (“VTW”) and school exclusion and admission appeal panels should be conducted.

### APPOINTING AUTHORITIES

- 7.3 Currently, the appointing authority for members and judicial leads of those tribunals listed in section 59 of the Wales Act 2017 (“section 59 tribunals”) varies. The responsibility is split between the Lord Chancellor, the Lord Chief Justice, the Welsh Ministers and the Secretary of State, or a combination of more than one of these. These differences are, generally speaking, simply the result of the historical development of the tribunals. As far as we have been able to discover, they do not reflect any policy decision to treat appointments to different tribunals differently.
- 7.4 Still different procedures apply to members of the VTW and school exclusion and admission appeal panels. Members of the VTW are appointed by an appointment panel, formed of three members of the Governing Council of the VTW. School exclusion and admission appeal panels are made up of members appointed by the local authority or school governors.
- 7.5 One notable feature of the present system is that the President of Welsh Tribunals (“PWT”) does not currently have many responsibilities. An exception is the role of the Lord Chief Justice in relation to appointments to the restricted patient panel of the Mental Health Review Tribunal for Wales (“MHRTW”), which has been delegated to the PWT (and is discussed in more detail below). The Public Service Pensions and Judicial Offices Bill, which was introduced to the House of Lords on 19 July 2021, would also make the President responsible for appointing members of the section 59 tribunals to sit in retirement. Any such appointment would, however, require the agreement of the Lord Chancellor.<sup>173</sup>

### Uniform appointing authority

- 7.6 Our provisional view was that, for the sake of consistency, there should be one appointing authority for all the devolved tribunals. At Consultation Question 35, we therefore provisionally proposed that the same appointing authority (or authorities)

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<sup>173</sup> Public Service Pensions and Judicial Offices Bill, as amended on 29 November 2021, clauses 111 to 112.

should make appointments to all devolved tribunals. Of the 27 responses to this question, 21 agreed, three disagreed and three offered other answers.

- 7.7 Both the Wales and Chester Circuit and the Bar Council of England and Wales agreed that “consistency offers clarity” and that “a single appointing authority would bring both rigour and transparency to the process”. Ceredigion Council were also in favour of the proposal, but only “providing that relevant and specific experience and expertise are prioritised”.

- 7.8 Dr Sarah Nason, a senior lecturer at Bangor University, and Dr Huw Pritchard, a lecturer in law at Cardiff University, expressed their support for the proposal, though noted that the:

... administrative relationship between the Welsh Government and the Judicial Appointments Commission means that, in practice, the process of appointment is the same whether the appointing authority is the Lord Chancellor or the Welsh Ministers.

- 7.9 Keith Bush QC, from the Welsh Governance Centre at Cardiff University, disagreed with the provisional proposal, and distinguished between tribunal members and judicial leads or their deputies:

“General” members (ie not the judicial leads or deputy judicial leads) should be appointed by Presidents of the individual tribunals but with the concurrence of the President of the Welsh Tribunals.<sup>174</sup>

- 7.10 The Governing Council of the VTW (which answered “other”) also distinguished between categories of tribunal member, explaining that:

... the requirements underpinning appointments for different jurisdictions may differ in themselves. Accordingly, a single appointing authority may have to exercise different approaches in different circumstances. For example, a different approach may have to be adopted in seeking to appoint lay members rather than legal or expert members.

- 7.11 Overall, however, their view was that it “does not matter whether there is a single appointing authority or multiple appointing authorities” providing that the “appointments are well made”.

- 7.12 The MHRTW expressed strong views in relation to the provisional proposals made in relation to appointments. Its answer to the provisional proposal in favour of uniformity (which was marked “other”) explained that:

We are neutral on the need for uniformity, though as we have a strong preference for appointment to the MHRTW by the Lord Chancellor, uniformity is unlikely as members of some devolved tribunals are already appointed by Welsh Ministers.

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<sup>174</sup> This response has been translated from the Welsh original.

- 7.13 The Equality and Human Rights Commission, which also marked its answer “other”, noted that:

The tribunal appointment processes must promote equality of opportunity. Following the Lammy Review, we highlighted the lack of ethnic diversity within the judiciary in England and Wales, recommending transparent and evidence-based recruitment practices that build a pipeline of underrepresented groups. In calling for systematic change in race inequality, we know that leadership and positive role models are essential to inspiring the next generation.

- 7.14 Roger Handy, a Chairman of the VTW, disagreed with the provisional proposal, as he believed that the current appointments panel was best placed to select and appoint “suitable chairpersons from the membership than a body with less knowledge of a candidate’s suitability”.
- 7.15 Noel Edwards, a retired technical adviser at the Valuation Office Agency, referred to a federal system of tribunals (discussed further at paragraph 3.11 and 3.12, and 3.25 to 3.28) in which each tribunal would have “their own appointment systems and rules”.

### **Identity of the appointing authority**

- 7.16 Above at paragraph 7.3 we refer to the inconsistency between the appointments made to the section 59 tribunals. Some tribunal appointment processes also distinguish between legal and lay members. An example of this can be found in the Residential Property Tribunal for Wales (“RPTW”) where the Lord Chancellor appoints legal members, and the Welsh Ministers appoint the lay members.<sup>175</sup> A full picture can be found in our Consultation Paper at paragraph 6.7, where we set out the varying appointing authorities for the members and judicial leads of the tribunals listed in section 59 of the Wales Act 2017.
- 7.17 At Consultation Question 36, we provisionally proposed that all members of the section 59 tribunals (whether legal or lay) should be appointed by the PWT. Twenty respondents answered this question, of whom 17 agreed and three disagreed.
- 7.18 The Governing Council of the VTW agreed with the proposal, on the basis that the PWT is in a “good position to have a sound appreciation of the required skills and the requisite expertise to appoint members” to the section 59 tribunals.
- 7.19 Both the Wales and Chester Circuit and the Bar Council also agreed with the provisional proposal, on the grounds that it would assimilate the system for appointments to the devolved tribunals to that in the reserved system, where the Senior President of Tribunals appoints the First-tier Tribunal members. They explained that:

this provides independence and an understanding of the expertise needed within the tribunals. There is also a need for senior judicial lead and judicial scrutiny. Independence from the executive is important.

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<sup>175</sup> Rent Act 1977, sch 10 para 2.

- 7.20 Public Law Wales agreed with the proposal, and specifically the abrogation of the Lord Chancellor's role in relation to appointments.
- 7.21 Dr Sarah Nason and Dr Huw Pritchard agreed with our reasoning at paragraphs 6.61 to 6.63 of the Consultation Paper, where we discuss the ability to assess the suitability of candidates. In particular, we note there that the Welsh Ministers (and in practice, the First Minister) are unlikely to have any knowledge of the applicants to the tribunals, and also have extensive other responsibilities. As a result, we concluded that the PWT would be best placed to appoint members to the devolved tribunals as the President is "more likely than the Welsh Ministers to be familiar with the needs of individual tribunals".
- 7.22 Professor Thomas Watkin also agreed with our provisional proposal on the grounds that the PWT will "be familiar with the needs of specific tribunals". He added that there are benefits to judicial independence, as this proposed appointment practice would be "independent of the Welsh Government".<sup>176</sup>

### Opposing views

- 7.23 Keith Bush QC disagreed with the provisional proposal, as it was inconsistent with his view that members of tribunals should be appointed by Presidents of the individual tribunals, with the concurrence of the PWT (referenced above at paragraph 7.9).
- 7.24 The MHRTW also opposed the provisional proposal, on the following grounds:

Appointment by the Lord Chancellor (as now) confers a certain status and causes members (especially non-lawyers) to take their appointment and the rules of conduct which govern it seriously. It also confers a vital sense of independence from local influences in matters of discipline.

Also, appointment by anyone other than the Lord Chancellor is likely to diminish the standing of Welsh members in the eyes of the First-tier Tribunal (Mental Health) with whom we are trying to establish cross-ticketing arrangements for the benefit of our members and to increase their expertise. Quite subtle and apparently inconsequential differences in our processes have already given rise to discrimination along these lines.

In relation to other devolved tribunals, we are neutral on the point.

- 7.25 The third respondent who disagreed with the provisional proposal, Roger Handy, did not elaborate on his reasons.

### Presidents and Deputy Presidents of the First-tier Tribunal for Wales

- 7.26 Having provisionally proposed that the PWT alone should appoint members of the section 59 tribunals, the Consultation Paper envisaged a need for greater seniority in the appointment of judicial leads and deputies of the section 59 tribunals (or Presidents and Deputy-Presidents, in a new First-tier Tribunal for Wales).

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<sup>176</sup> This response has been translated from the Welsh original.

- 7.27 Consultation Question 37 therefore provisionally proposed that the Welsh Ministers should appoint judicial leads and deputies, with the concurrence of the PWT. In our provisional view this satisfies the need for seniority, but balances it with the judicial expertise and independence inherent in the office of the PWT. Twenty-one respondents answered, of whom 19 agreed, one disagreed and one offered another answer.
- 7.28 The Wales and Chester Circuit agreed with our proposal, explaining that the proposal:
- ...would give due weight to the seniority of the roles but also ensure independence and expertise. This approach would preserve a recognition of the status of the office but still allow for a strong judicial lead. If a Justice Minister is appointed within the Welsh Government, that Minister should be the appointing authority.
- We see no logic in the Lord Chancellor continuing to be the appointing authority for some Welsh Tribunals, especially as that responsibility in relation to English and reserved tribunals has been transferred to the Senior President of Tribunals.
- 7.29 The Bar Council and the Governing Council of the VTW were also of the same view, with the Bar Council adding that:
- it is important to require the agreement of the President of Welsh Tribunals, to ensure that the process is not exclusively within the control of the executive.
- 7.30 Public Law Wales also agreed with the provisional proposal, and the cessation of the Lord Chancellor's role in relation to appointments to the devolved tribunals.
- 7.31 Richard Payne, President of the RPTW, expressed qualified agreement:
- As long as the posts are recognised as the equivalent of senior posts in England should there be cross ticketing or other functions to be exercised, and that the appointments in Wales have the equivalence and any associated benefits of a Lord Chancellor's appointment in England.
- 7.32 Dr Sarah Nason and Dr Huw Pritchard observed that the provisional proposal reflects the conclusions of previous reviews of the system, in particular the Committee on Administrative Justice and Tribunals Wales' 2016 report.
- We agree that Welsh Ministers, with agreement of the President of Welsh Tribunals, should be the responsible authority for appointing judicial leads and deputies. Reform to practice and the relationship with the Judicial Appointments Commission highlighted above has fulfilled the 'parity test' set by the Committee on Administrative Justice and Tribunals Wales in 2016 and should uphold confidence in the independence and impartiality of the system.<sup>177</sup>
- 7.33 The MHRTW disagreed with the provisional proposal, for the reasons outlined at paragraph 7.24 above.

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<sup>177</sup> Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) para 31, recommendation 11.

- 7.34 Roger Handy marked his answer “other”. While he supported the idea of the Welsh Ministers making appointments of judicial leads and deputies, he thought this should follow a recommendation from the PWT (rather than requiring the President’s agreement).

### **Discussion: appointments to the First-tier Tribunal for Wales**

- 7.35 In the light of the strong support for our provisional proposals, we recommend that all members of the First-tier Tribunal for Wales should be appointed by the PWT. We recommend that Presidents and Deputy Presidents of chambers of that tribunal are appointed by the Welsh Ministers with the agreement of the PWT. We address particular points made by respondents below.
- 7.36 We also note Keith Bush QC’s response to Consultation Question 35. He disagreed with our provisional proposal for the PWT to appoint members to the devolved tribunals. Instead he argued that, in line with his preference for a federal system of tribunals (discussed further at paragraphs 3.11 and 3.12, and 3.25 to 3.28 above), each tribunal President should be responsible for appointing members to their own tribunal, with the concurrence of the PWT.
- 7.37 We query whether this model would provide sufficient seniority in the appointments process. Currently, most members are appointed to the devolved tribunals by either the Lord Chancellor, Lord Chief Justice, or Welsh Ministers (or some combination of the three). It would be a marked change for members to be appointed by the individual tribunal Presidents, and may raise issues in relation to cross ticketing (discussed further below at paragraph 7.41). Maintaining a separate process for each tribunal would also run counter to standardising common practice across the devolved tribunals.
- 7.38 Nonetheless, we recognise that the Chamber Presidents will continue to play an important part in the selection process. We envisage that in any event, the PWT would discuss, formally or otherwise, the appointment of members with the relevant Chamber President before appointment.

### **Differentiating between legal, professional and lay members**

- 7.39 We are not persuaded that different types of member necessarily require different types of appointing authority. In the Consultation Paper, we identified three principles which we thought relevant to selecting an appointing authority. These were protecting the independence of tribunals, marking the importance of appointments, and the ability of an authority to appraise the recommendations made to it. The first two of these considerations are unlikely to vary as between different types of member.
- 7.40 In relation to the third consideration, we can see that it is possible that different types of appointing authority may be more or less well placed to appraise the merit of recommendations for different types of member. On balance, however, we do not consider that this is sufficient to justify having different appointing authorities, with the additional complexity that this would bring to the system. To the extent that different approaches are required in selecting different types of members, this can be accommodated at the selection stage. We are strengthened in this view by the observation that the Welsh Ministers appoint both legal and lay members of the

Adjudication Panel for Wales, and that the Lord Chancellor currently appoints legal, medical and lay members of the MHRTW.

#### Facilitating cross-ticketing

- 7.41 Both the MHRTW and Richard Payne raised the important point that any new appointments arrangements should not create obstacles to cross-ticketing. We agree that this is a relevant consideration, which is why later in this Chapter we recommend that selection processes should continue to be run by the Judicial Appointments Commission (“the JAC”), which also selects candidates for appointment to the First-tier Tribunal.
- 7.42 We are not persuaded, however, that appointment by anyone other than the Lord Chancellor is likely to diminish the standing of Welsh members in the eyes of the First-tier Tribunal. All members of the First-tier Tribunal (including those of the Health, Education and Social Care Chamber) are now appointed by the Senior President of Tribunals; appointment by the PWT is the closest analogue possible for the devolved tribunals in Wales. The Senior President of Tribunals is also responsible for the appointment of Chamber Presidents and Deputy Presidents.<sup>178</sup> Our proposed arrangements (a combination of the Welsh Ministers and the PWT) would add an additional level of executive input for those offices.

#### Seniority of the appointing authority

- 7.43 The MHRTW also made the point that appointment by the Lord Chancellor “confers a certain status and causes members (especially non-lawyers) to take their appointment and the rules of conduct which govern it seriously”. It is quite possible that the office of Lord Chancellor is more familiar to non-legal members than that of the PWT. It is certainly a role with greater constitutional, political and historical significance.
- 7.44 However, we do not believe this justifies maintaining the role in relation to appointments given that (a) the position is that of a UK Minister and (b) the Lord Chancellor is no longer responsible for appointments to the UK First-tier Tribunal. While the office of the PWT is in the overall scheme of the UK constitution less significant than that of the Lord Chancellor, it is nonetheless a position of significant standing, to which appointments are made by the Lord Chief Justice.
- 7.45 We agree that it is important that members of the tribunal take their responsibilities seriously. We believe that this would be assisted by our recommendation in Chapter 10, that members of the First-tier Tribunal for Wales should be required to take the judicial oath.

#### Appointing members to restricted patient panels of the First-tier Tribunal for Wales (Mental Health Chamber)

- 7.46 The MHRTW hears applications from patients who are both restricted and non-restricted.<sup>179</sup> Restricted patients are those subject to a hospital order made by a criminal court or prisoners who have been detained in hospital for treatment, and are

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<sup>178</sup> Tribunals, Courts and Enforcement Act 2007, s 7 and sch 4 para 5.

<sup>179</sup> Mental Health Act 1983, s 79.



subject to special controls due to the level of risk they pose to the community. The applications of restricted patients are heard by restricted patient panels.

- 7.47 Historically, the Mental Health Review Tribunal Rules 1983 provided for appointments to the Mental Health Review Tribunal for England, and the Mental Health Review Tribunal for Wales. Those Rules specified that the category of members who could hear cases relating to “a restricted patient shall be restricted to those legal members who have been approved for that purpose by the Lord Chancellor”.<sup>180</sup>
- 7.48 At present, the Lord Chief Justice is responsible for appointing legal members to preside over the restricted patient panels of the MHRTW.<sup>181</sup> This power is currently delegated to the PWT.<sup>182</sup>
- 7.49 When the functions of the Mental Health Review Tribunal for England were transferred into the First-tier Tribunal (Mental Health), the Senior President of Tribunals became the appointing authority for legal members of the restricted patient panels. There are however additional criteria for the appointment of restricted patient panel members. In a recent recruitment campaign, candidates were required to be recorders able to demonstrate one or more of the following:
- (1) recent sentencing experience,
  - (2) substantial experience acquired in practice or judicially of mental health or mental capacity law; or
  - (3) substantial experience acquired in practice or judicially of the judicial assessment of serious risk (such as with the Parole Board, or in relation to public law children cases).<sup>183</sup>
- 7.50 We are not persuaded that maintaining the separate appointment process that currently applies to the restricted patient panels of the MHRTW is necessary. In practice, the PWT is already exercising this function (delegated from the Lord Chief Justice).<sup>184</sup>

### The Appeal Tribunal for Wales

- 7.51 In Chapter 4, we recommend that in due course an Appeal Tribunal for Wales should be created. The question therefore arises: who should make appointments to that tribunal? One possibility might be to follow the pattern for appointments to the First-tier

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<sup>180</sup> The Mental Health Review Tribunal Rules SI 1983 No 942.

<sup>181</sup> The Mental Health Review Tribunal for Wales Rules SI 2008 No 2705, r 11(2).

<sup>182</sup> Lord Chief Justice – Delegation of Statutory Functions, sch No1 of 2020, p 194. See <https://www.judiciary.uk/wp-content/uploads/2015/12/LCJ-Delegations-Schedule-No-1-of-2020.pdf>

<sup>183</sup> Judicial Appointments Commission, “Fee-paid Judge of the Restricted Patients Panel, First-tier Tribunal, Health, Education and Social Care Chamber” See <https://apply-prod.web.app/vacancy/dD9W8Z92d4UxjeZzQPPX/>

<sup>184</sup> Lord Chief Justice – Delegation of Statutory Functions, sch No 1 of 2020, p 194. See <https://www.judiciary.uk/wp-content/uploads/2015/12/LCJ-Delegations-Schedule-No-1-of-2020.pdf>

Tribunal, and say that members should be appointed by the PWT. Another would be to require a combination of the PWT and Welsh Ministers.

- 7.52 We are more attracted to the latter option. This reflects the fact that the PWT is likely to sit on the Appeal Tribunal for Wales, and have a close working relationship with members of the Appeal Tribunal. We therefore think it desirable to involve a third party in the appointments process, and so suggest that appointments to the Appeal Tribunal should be treated in the same way as appointments of Presidents of chambers of the First-tier Tribunal.
- 7.53 In addition to appointing members, we believe it is important that the Appeal Tribunal for Wales should be able to “cross-ticket” in members from the existing Upper Tribunal. At least initially, the Appeal Tribunal for Wales is likely to hear few cases, and so is likely to need to draw from judicial expertise elsewhere.
- 7.54 At present members of the Upper Tribunal may be cross-deployed into any of the section 59 tribunals, at the request of the PWT and with the agreement of the Senior President of Tribunals.<sup>185</sup> We hope that these arrangements can be maintained for the First-tier Tribunal for Wales, and extended to the Appeal Tribunal for Wales. We do not make a recommendation to this effect, as it is likely to fall outside of the legislative competence of the Senedd.

#### **Recommendation 31.**

- 7.55 We recommend that members of the First-tier Tribunal for Wales should be appointed by the President of Welsh Tribunals.

#### **Recommendation 32.**

- 7.56 We recommend that Presidents and any Deputy Presidents of the First-tier Tribunal for Wales should be appointed by the Welsh Ministers, with the agreement of the President of Welsh Tribunals.

#### **Recommendation 33.**

- 7.57 We recommend that members of the Appeal Tribunal for Wales should be appointed by the Welsh Ministers, with the agreement of the President of Welsh Tribunals.

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<sup>185</sup> Wales Act 2017, s 63(2).

## The Valuation Tribunal for Wales

### Appointing the President

7.58 The President of the VTW is currently elected by members of the VTW, rather than appointed. At paragraph 6.71 of the Consultation Paper, we explain that this is a long-standing tradition, dating back to before the valuation tribunals were consolidated into one tribunal for Wales. The Valuation Tribunal for England also used to elect its President. The practice was however abolished in respect of that tribunal by the enactment of the Local Government and Public Involvement in Health Act 2007. Appointments of the President and Deputy-Presidents of the Valuation Tribunal for England are now the responsibility of the Lord Chancellor.

7.59 At Consultation Question 38, we sought views on how the President should be appointed. Thirteen respondents answered. A recurring theme in eight of the thirteen answers was that the appointment of the President of the VTW should follow the same appointment process as the section 59 tribunals.

7.60 The Law Society, the Wales and Chester Circuit, the Bar Council, Public Law Wales, Keith Bush QC, Richard Payne, and Dr Sarah Nason and Dr Huw Pritchard all believed that President of the VTW should be appointed by the Welsh Ministers with the agreement of the PWT (bringing the practice in line with that suggested in Consultation Question 37). Bob Chapman, a former member of the Committee for Administrative Justice and Tribunals Wales, and the Welsh Committee of the Administrative Justice and Tribunals Council, also agreed.

7.61 Both Noel Edwards and the Governing Council of the VTW, however, believed that the current system of election by members should remain. The Governing Council expressed the view that:

there are too many differences between the Valuation Tribunal for Wales and section 59 tribunals to be able to bring it within a unified structure at present. We consider that the President of the Valuation Tribunal for Wales should remain an internally elected position under the current structure.

7.62 Huw Williams, the Chief Legal Adviser to the Senedd, responding in his personal capacity, believed that further review and reform of the VTW should be conducted before it is included as part of the proposed reforms of the devolved tribunals. In the interim, he proposed the following solutions:

While the VTW retains its character as a lay tribunal reliant upon expert clerks, then the election of the President by the members is consistent with its character. Pending a specific study on the review and reform of the VTW it is suggested as an interim stage a link is created to the President of Welsh Tribunals in two ways:

1. The election of President of the VTW should be subject to confirmation by the President of Welsh Tribunals.
2. The President of Welsh Tribunals or a representative should sit on the VTW Governing Council.

- 7.63 Roger Handy explained that the process of elections has “both advantages and disadvantages”. Proposing a compromise, he suggested that “if members alone do not elect the President, they should be appointed by the Welsh Ministers from a list of recommendations compiled by the VTW”.

#### Appointing members and chairpersons

- 7.64 Currently, members and chairpersons of the VTW are appointed by an appointment panel. The panel is made up of three members of the Governing Council. The appointments process was last revised in 2017 following a Welsh Government consultation, “Amending the Valuation Tribunal for Wales”.<sup>186</sup>
- 7.65 The appointments processes of the VTW have therefore been considered and reformed relatively recently. They remain, however, different from those adopted by other devolved tribunals. Consultation Question 39 therefore sought respondents’ views at on how members and chairpersons of the VTW should be appointed.
- 7.66 Noel Edwards believed that the current process should remain, as it works “exceedingly well”. He did, however, express the view that this should remain the case “unless a paid judiciary ... is contemplated”.
- 7.67 The Governing Council of the VTW was also in favour of maintaining the status quo, unless the VTW were to be brought within the unified system:

The processes for the appointment of members and chairpersons should remain unchanged for the time being as it has only recently been amended in response to recommendations made in earlier reviews.

However, in the event that the Valuation Tribunal for Wales is brought under a unified tribunal system for Wales, the appointment process will need to be aligned in due course with the prevailing procedure adopted for the First-tier tribunal. Appointment by the President of Welsh Tribunals is the solution proposed within the Consultation Paper.

- 7.68 Roger Handy explained the benefits of an appointment panel, as they are “more likely to be able to select suitable chairpersons from the membership than a body/person with less knowledge of a candidate’s suitability”. He also commented favourably on the reforms carried out by the Welsh Government in 2017,<sup>187</sup> noting that in his opinion “the overall calibre of chairpersons has been improved by the abolition of chairperson elections”.
- 7.69 Huw Williams maintained his position that the VTW should be reformed to “make it suitable to join the Welsh Tribunals system”.

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<sup>186</sup> Welsh Government, *Amending the Valuation Tribunal for Wales 2010* (2017) para 56.

<sup>187</sup> Welsh Government, *Amending the Valuation Tribunal for Wales 2010* (2017).

### Consistency with the section 59 tribunals

- 7.70 The remaining responses to this question were all in favour of ensuring consistency between the appointing authority of the section 59 tribunals and the appointing authority of the VTW.
- 7.71 Sir Wyn Williams, Bob Chapman, the Law Society, the Wales and Chester Circuit, the Bar Council, Public Law Wales, Richard Payne, Dr Sarah Nason and Dr Huw Pritchard all agreed that the appointing authorities should be the same, and as a result members of the VTW should be appointed by the PWT.
- 7.72 Richard Payne explained that:
- ... members should also be appointed in the same manner that other devolved tribunal members are, and crucially, they should be paid, demonstrating the importance of the role and the tribunals in administering justice in Wales.
- 7.73 Dr Sarah Nason and Dr Huw Pritchard suggested that if the aim of reform is to improve coherency and consistency, then:
- ... members and the chairpersons of the VTW should follow the same process as other jurisdictions under the responsibility of the President of Welsh Tribunals, particularly if the VTW is under the First-tier Tribunal for Wales structure.

### Discussion: the Valuation Tribunal for Wales

- 7.74 As set out in Chapter 3, our recommendation is that the VTW should form part of the First-tier Tribunal for Wales. In that case, we think there is a strong argument that it should be subject to the same appointments arrangements as the other devolved tribunals, a view with which the majority of respondents agreed.
- 7.75 That would mean a significant change in the way in which the President of that chamber is selected. We have considered carefully whether the makeup of the tribunal, which consists of a large number of lay members, justifies maintaining a different arrangement. Ultimately we are not persuaded that it does. We note that the Valuation Tribunal for England is made up of lay members and does not elect its President (and has not done so since its creation, following the consolidation of its predecessor regional tribunals).
- 7.76 Part of the justification for moving away from electing chairpersons of the VTW to selecting them through a panel was to “ensure that candidates are selected on the basis of their knowledge and skills”.<sup>188</sup> We believe that the same approach should apply to the President of the tribunal, or, under our system, the President of a valuation chamber. We are therefore minded to make the same recommendations for the VTW as we make for other future chambers of the First-tier Tribunal for Wales.

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<sup>188</sup> Welsh Government, *Amending the Valuation Tribunal for Wales 2010* (February 2017) para 51.

**Recommendation 34.**

- 7.77 We recommend that members of the Valuation Chamber of the First-tier Tribunal for Wales should be appointed by the President of Welsh Tribunals.

**Recommendation 35.**

- 7.78 We recommend that the President and any Deputy President of the Valuation Chamber of the First-tier Tribunal for Wales should be appointed by the Welsh Ministers, with the agreement of the President of Welsh Tribunals.

**Appointing members of school admission and, if retained, exclusion appeal panels**

- 7.79 The general approach that we take in this report to school admission appeal panels is set out in Chapter 1. In our view, these panels, which differ significantly from other tribunals falling within this project, would require specific attention and possibly restructuring before many of the recommendations made in this report would be suitable for them. We are therefore making only limited recommendations in relation to school admission appeal panels. We set out here, however, the consultation questions that we asked about appointments to the panels, and the responses we received.
- 7.80 Presently, members of school admission and exclusion appeal panels are appointed by the relevant local authority (or admission authority, for some schools in relation to admission decisions). This means that the appointment process is notably less independent than the appointment process to the section 59 tribunals, as the bodies involved in the initial decision also appoint members to adjudicate on appeal against that same initial decision.
- 7.81 The panels are therefore not structurally independent of the local authority. In our view, this risked giving the impression that decisions might not be made impartially. We thought one potential solution might be requiring the PWT to appoint members of the panels. Consultation Question 40 therefore sought respondents' views on whether members of school admission appeal panels (and school exclusion appeal panels if these were to be retained) should be appointed by the PWT.
- 7.82 Twenty-four respondents answered this question, of whom 14 thought that appointments should be made by the PWT, six thought they should not and four offered other answers.
- 7.83 Patrick and Hilary Moriarty, both school admission and exclusion appeal panel members, favoured the PWT appointing panel members "for the sake of independence".

7.84 The Law Society noted its view that the:

President of Welsh Tribunals should be responsible for appointing members to both panels following their restructuring as Wales-wide bodies and the collection of centralised data on their operation.

7.85 Both the Wales and Chester Circuit and the Bar Council found the current process, whereby the body making the initial decision also appoints members to the appeal panels, inconsistent with upholding judicial independence. They explained that:

... the body that has made the original decision should not be the appointing authority for the panel. This is key to demonstrate to the public that tribunals are independent and impartial. The fact that there are relatively little data available shows that the current system is not satisfactory. To ensure independence and consistency, the appointing authority should be the President of Welsh Tribunals. This is another argument why the admission and exclusion appeal panels should be within the Welsh Tribunals system.

7.86 Although broadly suggesting a more gradual approach towards full amalgamation of the school appeal panels into the unified system, Public Law Wales was in favour of the PWT appointing members of the school appeal panels.

7.87 Dr Sarah Nason and Dr Huw Pritchard were also in favour, offering the following view.

... It seems consistent, in time, to move responsibilities for appointment of members to the President of Welsh Tribunals to keep enhancing the independence of the panels. Even if the selection process was not undertaken through the JAC, it would be prudent to have an independent authority making the appointment.

7.88 Keith Bush QC, however, disagreed with the proposal. He considered that “management of these panels, including appointments, should remain with local councils”.

7.89 Huw Williams explained his view that in relation to school admission appeal panels, further review and reform should be carried out before inclusion within a unified system. He thought further examination was required given:

... their highly local character and the additional responsibilities that incorporation in the Tribunal system would place on voluntary, unpaid, school governors...

7.90 Dr Sarah Nason and Ann Sherlock, a former research fellow at Bangor University, offered a nuanced response on the matter, which we quote in full below.

We consider that the current system whereby panel members are appointed by local authorities/admission authorities is problematic. Administration of these panels, if retained, by the Welsh Tribunals Unit and appointment of their members by the President of Welsh Tribunals would enhance the bodies’ structural independence from the bodies whose decisions are being challenged and would therefore be welcome. However, on the basis of the research we have conducted thus far, we are unable to provide comments on the practical issues that would undoubtedly arise if this were to be the case.

## Local authority responses

- 7.91 The local authorities who responded to this question were divided. Of the six local authorities that responded to this question, three agreed with the suggestion and three disagreed.
- 7.92 Gwynedd, Anglesey and Denbighshire Councils all favoured the suggestion. Gwynedd Council and Anglesey Council, however, qualified their agreement by explaining that:
- ... there is a need to consider the number of panels and local education arrangements, ie educational provision outside mainstream schools varies considerably across the authorities and there needs to be an awareness of this.<sup>189</sup>
- 7.93 Swansea Council, Pembrokeshire Council and Cardiff City Council all disagreed with the suggestion. Swansea Council stressed the importance of appointing panels who “are experienced, know local conditions, and are well equipped to deal with appeals even when demands are high”.
- 7.94 Pembrokeshire Council explained that:
- the current system of appointments involves panel members being appointed by a local authority on the basis of meeting the criteria in the regulations. If appointments were made by the President of Welsh Tribunals, this may discourage localised panel member applications as it could be seen to be a more complex and rigorous process than the current system.
- 7.95 Cardiff City Council also argued in favour of maintaining the status quo, as “recruitment in accordance with the Code requires regular advertising and encourages applicants from the wider community”. They also went on to explain “meetings have been held to share good practice with a view to consistency of approach by panels”.
- 7.96 A panel member from Cardiff expressed the view that, “the appointment of panel members by the President of Welsh Tribunals or a remote body will not improve the standard of panel members”.

## SELECTION PROCEDURES

### Arrangements for selection for appointment by the Judicial Appointments Commission

- 7.97 At present, the JAC is responsible for selecting candidates to the section 59 tribunals. There are two routes to this process. For Lord Chancellor appointments, the JAC is responsible for the selection of candidates. For Welsh Minister appointments, an agreement has been reached under section 83 of the Government of Wales Act 2006 to procure the services of the JAC.
- 7.98 At paragraph 6.81 of the Consultation Paper, we discuss the advantages of having one body using standard selection processes across the devolved tribunals. In our view, these advantages include clarity, consistency and the ability to cross-ticket across the section 59 tribunals and with the First-tier Tribunal. At this stage, we

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<sup>189</sup> These responses have been translated from the Welsh originals.



thought it unlikely that the devolved tribunals would generate enough work to justify the creation of a similar Wales-only body. At Consultation Question 41, we therefore provisionally proposed that the arrangements for selection for appointment by the JAC should not be altered as part of our reforms.

7.99 Eighteen respondents answered this question, all of whom agreed with the provisional proposal.

7.100 The Rt Rev Dr Barry Morgan, Judicial Appointments Commissioner and Chair of the Welsh Matters Committee of the JAC, noted that:

The JAC has a long-standing section 83 agreement with Welsh Ministers for selection exercises for appointments for which the Welsh Ministers are responsible, and JAC is supportive of the continued use of this or a similar framework in the future.

7.101 Huw Williams agreed with the proposal, whilst also noting that:

there may be resourcing implications arising from the need to run more Welsh competitions. It may also raise the question of whether a single JAC Commissioner with special knowledge of Wales will be sufficient in future.

7.102 Several respondents commented favourably on the way in which the JAC bolstered the impartiality of the appointment process. The MHRTW mentioned specifically the importance of “the detachment afforded to the selection process by a body remote from local influences”. Both the Bar Council and the Wales and Chester Circuit explained that the JAC involvement is “important to demonstrate to the public that tribunals are independent and impartial”.

7.103 Dr Sarah Nason and Dr Huw Pritchard also agreed with the provisional proposal, drawing on the past success of the collaboration, as “building arrangements with JAC has been a key part of the Welsh Government’s development of impartiality and independence for Welsh Tribunals”.

7.104 At paragraph 6.85 of the Consultation Paper, we provisionally concluded that the low volume of appointments to the devolved tribunals did not, at present, justify the investment and administrative effort required to set up a separate appointments body for Wales. The Bar Council and the Wales and Chester Circuit were of the same view, concurring that “in the foreseeable future the selection numbers remain too small to justify a separate Welsh Judicial Appointments Commission”.

7.105 In view of the unanimous support for our provisional proposal, we recommend that the JAC should be responsible for all appointments to the First-tier Tribunal for Wales. We also recommend that the JAC should select candidates for appointment to the Appeal Tribunal for Wales (discussed in Chapter 4).

## **The Valuation Tribunal for Wales**

### **Selecting the President**

7.106 Following on from Consultation Question 38, at Consultation Question 42 we sought respondents’ views on how the President of the VTW should be selected.

7.107 Thirteen respondents answered this question. There were two prevailing themes among the responses: firstly, those in favour of maintaining the status quo; secondly were those who believed that the President of the VTW should be selected by the JAC.

#### Maintaining the status quo

7.108 The Governing Council of the VTW expressed the view that the “President of the VTW should, for the time being, remain an internally elected position”. They did, however, note that if the VTW were to be “brought under a unified tribunal system for Wales, the process will need to be aligned with other devolved tribunals”, and as a result the selection process would be carried out by the JAC.

7.109 Roger Handy simply expressed the view that he did not see any benefit in moving away from the current approach of electing the President of the VTW.

#### Judicial Appointments Commission

7.110 Bob Chapman, the Law Society, the Wales and Chester Circuit, the Bar Council, Public Law Wales and Richard Payne were all of the view that, in line with the selection processes for the judicial leads and deputies of the section 59 tribunals, the President of the VTW should be selected by the JAC.

7.111 The Law Society remarked that this would “professionalise the tribunal”, while the Wales and Chester Circuit and Bar Council noted that “the status quo of being elected by fellow members is unsatisfactory and inconsistent with other tribunals”. Richard Payne also described the current process as being “outdated and anomalous”, and suggested that the JAC run the selection process.

7.112 The Wales and Chester Circuit also noted that introducing a selection process run by the JAC for selecting the President of the VTW would bring the position in line with that followed by the Valuation Tribunal for England.

#### Selection of the members

7.113 At Consultation Question 43, we asked respondents how members of the VTW, including chairpersons, should be selected. As with the previous question, there were two prevailing themes to the responses. Some were content with the current position; others believed that the members of the VTW should be selected by the JAC.

#### Maintaining the current procedure

7.114 Noel Edwards and the Governing Council of the VTW were both in favour of maintaining the current election process, described further at paragraph 7.64 above.

7.115 The Governing Council of the VTW again alluded to the recent reforms made as a result of the Welsh Government consultation. The response did, however, note that were the VTW to be brought within the unified system, the “appointment process will need to be aligned with the prevailing procedure adopted for the First-tier Tribunal”.

7.116 Roger Handy suggested a hybrid approach. He suggested that for chairpersons, the current system should remain, but that for other members a “skills/attitudes based process, involving a questionnaire and interview” should be adopted.

## Judicial Appointments Commission

7.117 Bob Chapman, the Law Society, the Wales and Chester Circuit, the Bar Council and Public Law Wales were all in favour of the selection process being run by the JAC.

7.118 The Wales and Chester Circuit outlined the advantages of the JAC running the selection process.

Use of the JAC ensures a clear and transparent process and would reflect good practice as adopted in the present judicial process. It is independent and impartial. Taking on this responsibility would not in our view hinder the process rather it enhances its value and status as an important panel. We note that the concerns expressed over the use of the JAC as to expense and a fear that the process is elaborate, thus putting off volunteers. We are satisfied that these concerns can be managed within the process by adopting simple forms and the efficiencies that this will bring outweigh the fear of the suggested expense. The selection process could also be made less onerous, for example by only having an application and interview stage, to take into account that this is an unpaid role.

7.119 Richard Payne was in agreement, noting that the JAC should run the process “going forward for new members”.

## Discussion

7.120 Given our recommendation in Chapter 3 that the VTW should be brought within the broader system of tribunals, our recommendation is that selection procedures for that chamber should be the same as the rest of the First-tier Tribunal for Wales. That would mean that both members and the President and any Deputy President of the chamber would be selected by the JAC. Given the experience of the JAC in selecting members of the Valuation Tribunal for England, we are confident that the Commission has the expertise in order to run these recruitment exercises.

7.121 We therefore recommend that the JAC should also select candidates for appointments to the Valuation Chamber of the First-tier Tribunal for Wales.

### **Recommendation 36.**

7.122 We recommend that the Judicial Appointments Commission should select candidates for all appointments to the First-tier Tribunal for Wales and Appeal Tribunal for Wales.

### **Recommendation 37.**

- 7.123 We recommend that the Judicial Appointments Commission should select candidates for all appointments to the Valuation Chamber of the First-tier Tribunal for Wales.

### **Selection of members of school admission and (if retained) exclusion appeal panels**

- 7.124 As mentioned above at paragraph 7.79, we make only limited recommendations about school admission appeal panels in this report. We therefore make no recommendation here about how members of school admission and (if retained) school exclusion appeal panels should be selected. We do, however, set out the questions we asked in the Consultation Paper, and the responses we received.
- 7.125 At paragraphs 6.87 to 6.91 of the Consultation Paper, we outlined the advantages and disadvantages of using the selection process run by the JAC to select independent appeal panel members. In our view, the JAC would provide a rigorous procedure and is likely to reinforce the impartiality of the candidates that are appointed. The process is, however, expensive, and we were concerned that it could act as a deterrent to potential candidates who are currently unpaid volunteers.
- 7.126 At Consultation Question 44, we sought respondents' views on how members of school admission and (if retained) exclusion appeal panels should be selected. Twenty-two respondents answered this question. Many, but not all, of those respondents were in favour of the JAC running the selection process to select members of the school admission and (if retained) exclusion panels.
- 7.127 Bob Chapman, Denbighshire Council and Dr Calum Delaney (a member of the Education Tribunal for Wales) were all in favour of using the JAC selection procedures, but only if the panels were to be brought within a unified system.
- 7.128 The Law Society, the Wales and Chester Circuit, the Bar Council and Richard Payne were all in favour of using the JAC selection procedures.
- 7.129 The Catholic Education Service and Ceredigion Council stressed the importance of selecting panel members who would have the requisite local knowledge. The Catholic Education Service explained that:
- ... it is important that locally sourced panel members are used as they are best placed to determine whether or not particular admission arrangements have been correctly applied.
- 7.130 They also explained the particular situation of faith schools, explaining that local knowledge is:
- particularly important in Catholic schools where it is important that panel members understand admission arrangements in the context of Catholic schools as well as the local education context.

7.131 Gwynedd Council and Anglesey Council both expressed the view that there is a “need to consider the training element in this field and the panels’ understanding of local system”. They also reflected on the potential opportunities arising from the current shift to virtual working:

It is useful to consider lay membership for authorities and a central pool if it is possible to adopt a virtual system.<sup>190</sup>

7.132 The Governing Council of the VTW considered it “inappropriate for the school admission and exclusion appeal panels to form part of the unified tribunal system in Wales” and as a result thought that the way “in which members are selected should remain unchanged”.

7.133 As noted above, we thought it possible that introducing a JAC selection procedure might deter potential applicants. In response to this, Patrick and Hilary Moriarty remarked that the number of applications are likely to remain low as the role was time-consuming and unpaid.

7.134 Finally, Pembrokeshire Council expressed the view that “the current selection criteria has been proven to be fit for purpose” and as a result, there was no need for reform. Nadia Alabere, a member of the independent appeal panels, was also in favour of maintaining the current procedure, as “set out in the admissions appeal code”.

7.135 While we make no recommendations on this point, we hope that the reflections above will be of assistance to the Welsh Government when considering the future of the admissions appeal panels.

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<sup>190</sup> This response has been translated from the Welsh original.

## Chapter 8: Complaints and discipline

- 8.1 In Chapter 7 of the Consultation Paper we outlined the complaints and discipline procedures in the devolved tribunals, and found the current procedures complex and inconsistent. Indeed, for some tribunals they are non-existent. The procedures were also not easily accessible for tribunal users. We made provisional proposals to put in place common procedures for all tribunals.
- 8.2 The Consultation Paper differentiated between complaints about the administration of a tribunal and complaints about the conduct of members of them. While a tribunal user might reasonably expect these topics to be dealt with in the same complaints policy, from the perspective of the tribunal they present different issues. We therefore asked separate consultation questions about each type of complaint.
- 8.3 We also separated out discussion of who should investigate complaints, and who should ultimately be responsible for disciplining and dismissing members of tribunals and judicial leads. We adopt the same approach in this Chapter.

### REFORM OF COMPLAINTS PROCESSES

- 8.4 At present most devolved tribunals have their own complaints policies. Some have policies that cover only complaints about the conduct of tribunal members, while others have policies that also cover complaints about the administration of the tribunal. What is common across the tribunals is that very few complaints are received from the public. The table below sets out complaints received from tribunal users in relation to the section 59 tribunals in the last three years.

<b>Tribunal</b>	<b>Number of complaints 2018/19</b>	<b>Number of complaints 2019/20</b>	<b>Number of complaints 2020/21</b>
ALT	0	0	0
APW	0	0	0
MHRTW	4	2	3
RPT	1	0	0
SENTW (now renamed the Education Tribunal for Wales ("ETW"))	7	1	4
WLT	0	0	1

## Uniform complaints policies and procedures

8.5 Consultation Question 45 provisionally proposed that standard complaints policies and procedures should apply to all devolved tribunals. Twenty-five respondents answered Consultation Question 45, with 23 answering in the affirmative and two respondents marking their answers “other”.

8.6 One of those, who responded with “other”, was the Law Society of England and Wales, who agreed that standardisation would improve clarity and consistency but noted that “complaints are not standard in their nature and that particular sensitivities warrant a particular approach”. Accordingly, the Law Society suggested:

... a “standardised-plus” model which establishes a baseline of policies and procedures that apply across the board but allows scope for individual variation where there is a well-evidenced need, subject to the agreement of the Tribunal Procedure Committee for Wales.

8.7 The other was the Mental Health Review Tribunal for Wales (“MHRTW”), who disagreed with standardising complaints policies and procedures across all devolved tribunals, explaining that:

If this relates to internal consistency for all categories of members within a tribunal, then yes, but we are not in favour of a standard complaints policy across all devolved tribunals. The nature of the complaints we receive is esoteric and requires a sensitive and straightforward process easily understood by our service users. Other devolved tribunals favour a more complex process, some involving a triage layer by staff of the Welsh Tribunals Unit. This would be inappropriate for our tribunal where our complaints system (regularly reviewed) has been used successfully for many years.

8.8 Carolyn Kirby, the President of the MHRTW, has explained in the past why the MHRTW’s position differs from other devolved tribunals. Giving evidence to the Commission on Justice in Wales, she noted that:

We discharge around 12% of patients, so 88% are potentially disappointed with the outcome and their perceptions of the experience may be affected by their mental disorder.<sup>191</sup>

8.9 Nonetheless, the majority of respondents supported the introduction of a standard complaints policy. Huw Williams, the Chief Legal Adviser to the Senedd who responded in a personal capacity, agreed that there should be a common approach to handling of complaints across the tribunals and added that “variations... should have a clear and evident basis”.

8.10 We remain of the view that a standard complaints policy should apply across the devolved tribunals, and that that complaints policy should apply both to complaints about administration of tribunals, and about conduct of members. The division

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<sup>191</sup> Commission on Justice in Wales: Oral Evidence Session (22 March 2019) p 2. See [https://gov.wales/sites/default/files/publications/2019-05/Oral%20evidence%20to%20the%20Justice%20Commission%20on%20Tribunals%20in%20Wales\\_0.pdf](https://gov.wales/sites/default/files/publications/2019-05/Oral%20evidence%20to%20the%20Justice%20Commission%20on%20Tribunals%20in%20Wales_0.pdf)

between “conduct” and “administrative” complaints is not likely to be widely understood amongst tribunal users.

- 8.11 Given our view that one complaints policy should cover both administrative and conduct complaints, it would be incongruous to have multiple differing policies covering different chambers of a new system. As administration would be done centrally by a reformed Tribunals Service for Wales, that would have the effect that different policies would apply to different elements of that organisation’s work.
- 8.12 We also can see little reason why, on most points, complaints processes should diverge from one another. All complaints policies have to cover similar topics such as timescales for handling complaints, the necessary format for a complaint, whether a complaint about a tribunal member can be shared with the member in question, and whether it is possible for vexatious complaints to be rejected. In most cases, there is no good reason why the position adopted on these questions should vary from tribunal to tribunal.
- 8.13 That said, we can see that there are occasions where the type of work dealt with by a tribunal could justify dealing with matters differently. In cases where there is a clear need for a different approach, we consider it would be appropriate to provide for departures from the standard policy. Such departures should however be kept to a minimum.

#### **Availability of complaints policies**

- 8.14 Our Consultation Paper noted that not all complaints policies were available on the websites of tribunals. To increase accessibility for tribunal users, Consultation Question 46 provisionally proposed that the complaints policies should be made available both online and in hard copy on request. Unsurprisingly, all 27 respondents who answered this question agreed with our provisional proposal and therefore we make our recommendation accordingly.

#### **Complaints against members of the Valuation Tribunal for Wales**

- 8.15 The existing complaints policy of the Valuation Tribunal for Wales (“VTW”) does not encompass complaints about the conduct of members. As a result, at Consultation Question 48, we provisionally proposed that there should be provision for complaints regarding the conduct of members of the VTW.
- 8.16 Nineteen respondents answered this question, of whom 18 were in favour of providing for complaints regarding the conduct of members of the VTW.
- 8.17 Some common themes amongst those who agreed included improving accountability and trust, as well as bringing the standards to which members of the VTW are held in line with the other devolved tribunals.
- 8.18 The Governing Council of the VTW also agreed, noting that:

... there should be redress for those who wish to complain about the conduct of members. Informally, complaints would currently be referred to the Valuation Tribunal for Wales’ President for consideration and complaints about the President would be considered by the Governing Council (excluding the President). No formal



complaints procedure is published at present, which it is agreed is unsatisfactory and will be addressed.

- 8.19 The only respondent who answered “other” was Huw Williams, who suggested postponing reform of the VTW’s complaints procedures pending a review into its future structure. As an interim measure, he thought it might be possible to appoint the President of Welsh Tribunals (“PWT”) to consider complaints.
- 8.20 In Chapter 3 we recommend that the VTW should be brought within a new First-tier Tribunal for Wales, to form a valuation chamber of that tribunal. If that recommendation is implemented, then we would expect the common complaints policy (discussed above at paras 8.5 to 8.13) to apply to it. In the meantime, we welcome the commitment from the Governing Council of the VTW to addressing the current gap in the formal policy.

### **Uniform procedure for complaints about administration**

- 8.21 As explained above, different processes are required for complaints about administration and complaints about conduct of tribunal members. Our provisional view is that all complaints about the administration of tribunals should be dealt with by the tribunal secretariat. For the section 59 tribunals that is currently the Welsh Tribunals Unit (“WTU”). However, as we discuss further in Chapter 9, in future we expect that the administration of the tribunals will be the responsibility of a new Tribunals Service for Wales.
- 8.22 In Chapter 9, we recommend that the tribunals service supporting a First-tier Tribunal for Wales should be a non-ministerial department, which would have a governing body with a chief executive. If that recommendation is implemented, the chief executive would be the natural person to oversee the determination of complaints about administration.
- 8.23 At Consultation Question 49, we provisionally proposed that there should be a uniform procedure for complaints about the administration of the devolved tribunals. Of the 24 respondents who answered this question, 23 agreed. As Keith Bush QC (from the Welsh Governance Centre at Cardiff University) put it, ensuring uniform complaints for the administration of the devolved tribunals “is a matter of ensuring the same fairness for all complainants – across the devolved tribunals”.
- 8.24 Huw Williams expressed in response to Consultation Question 45 his view that “complaints in relation to the administration of the Tribunals system should be handled by an internal complaints system within a Welsh Tribunals Service”.
- 8.25 Responding “other”, MHRTW was of the view that the Welsh Government should address this question, as the “actions of the administrative staff are a matter for them”.
- 8.26 We agree that complaints about administrative staff should be directed to those who have responsibility for their everyday activities. Under our proposed scheme, the Tribunals Service for Wales would be a non-ministerial department and will have a greater degree of independence from the Welsh Government. In consequence we continue to consider that a reformed Tribunals Service for Wales should have a uniform policy about complaints about the administration of the tribunals. In view of

the support from respondents for our provisional proposal at Consultation Question 49, we make a recommendation along those lines below.

### **Uniform procedure for complaints about the conduct of members and judicial leads of the devolved tribunals**

- 8.27 The Consultation Paper outlined discrepancies in the legislation prescribing how complaints about the conduct of members and judicial leads of the devolved tribunals should be treated. The Judicial Discipline (Prescribed Procedures) Regulations 2014 provide that complaints regarding an office holder must be made to the Judicial Conduct Investigations Office (“the JCIO”),<sup>192</sup> a body which supports the Lord Chancellor and the Lord Chief Justice in their joint responsibility for judicial discipline.<sup>193</sup> By way of exception to this general rule, the Judicial Conduct (Tribunals) Rules 2014 provide that complaints about office holders listed as “tribunal members” must be made to the “relevant President” listed in the schedule to the Rules.<sup>194</sup>
- 8.28 The relevant President (or a delegate) must conduct an investigation; if dismissal or suspension is recommended, the tribunal member may request that a disciplinary panel be convened by the JCIO.<sup>195</sup> Where the 2014 Rules do not apply, the investigation is carried out by the JCIO or a judge nominated by the JCIO. Again, if dismissal or suspension is recommended, the tribunal member may request a disciplinary panel.
- 8.29 For historical reasons, however, the 2014 Rules do not apply to all members of the section 59 tribunals. In particular that procedure does not apply to members of the MHRTW, members of the land drainage panel of the Agricultural Land Tribunal for Wales (“ALTW”), members of the rent assessment committee of the Residential Property Tribunal for Wales (“RPTW”), members of the Welsh Language Tribunal (“WLT”) or members of the Adjudication Panel for Wales (“APW”). The Rules direct complaints about members of the MHRTW to the “liaison judge”; a position that is currently unfilled.
- 8.30 To rectify this and other inconsistencies, at Consultation Question 50 we provisionally proposed that there should be a uniform procedure for complaints about the conduct of members and judicial leads of all devolved tribunals. Twenty-four respondents agreed with our provisional proposal, and two respondents offered other responses.
- 8.31 The two respondents who marked their answers “other” nonetheless agreed with the more detailed explanation of the provisional proposal laid out at paragraph 7.93 of the Consultation Paper and developed in Consultation Questions 51 and 52, that:
- (1) complaints regarding the conduct of members of tribunals should be investigated by the relevant judicial lead; and

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<sup>192</sup> Judicial Discipline (Prescribed Procedures) Regulations SI 2014 No 919.

<sup>193</sup> The JCIO is constituted under the Judicial Discipline (Prescribed Procedures) Regulations 2014, reg 4. See <https://judicialconduct.judiciary.gov.uk/about-us/>

<sup>194</sup> Judicial Conduct (Tribunals) Rules 2014, r 16.

<sup>195</sup> Judicial Conduct (Tribunals) Rules 2014, r 72.

- (2) the investigation of complaints regarding the judicial leads should be coordinated by the JCIO, or an equivalent body.<sup>196</sup>

**Recommendation 38.**

- 8.32 We recommend that a standard complaints policy should apply to all chambers of the First-tier Tribunal for Wales, allowing for variations for individual chambers where necessary.

**Recommendation 39.**

- 8.33 We recommend that the complaints policy applying to the First-tier Tribunal for Wales should be available both online and in hard copy on request.

**Recommendation 40.**

- 8.34 We recommend that there should be a uniform procedure for complaints about the administration of the Tribunals Service for Wales.

**Recommendation 41.**

- 8.35 We recommend that there should be a uniform procedure for complaints about the conduct of members, Presidents and Deputy Presidents of the First-tier Tribunal for Wales.

## **INVESTIGATION OF CONDUCT COMPLAINTS**

### **Investigation of complaints about members of the section 59 tribunals**

- 8.36 After provisionally proposing a uniform procedure for complaints about members' conduct, the Consultation Paper considered who should be responsible for investigating those complaints. We considered there to be good reasons to have different procedures for investigating complaints about the judicial lead of a tribunal and other members. At Consultation Question 51, we provisionally proposed that complaints regarding members of the section 59 tribunals should be investigated by the relevant judicial lead. This is the model which is currently followed in the First-tier Tribunal of England and Wales.

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<sup>196</sup> The JCIO is an independent office which supports the Lord Chancellor and Lord Chief Justice in considering complaints about the personal conduct of judicial office holders.

- 8.37 We envisage that the results of the investigation should be included in a report, submitted to the PWT, which should contain a recommendation as to the appropriate sanction. If the judicial lead had recommended removal or suspension, then if requested by the member, a disciplinary panel would be convened to consider the matter. That panel would report back to the PWT. We did not consult on the composition of the panel. However, we envisage that it may take a similar form to the disciplinary panels currently convened by the JCIO. These panels consist of four members; two judicial (one of senior rank and one of the same rank as the subject of the complaint) and two lay members.<sup>197</sup>
- 8.38 Twenty-one respondents answered this question, of whom 20 were in favour of providing for complaints regarding members of the section 59 tribunals to be investigated by the relevant judicial lead.
- 8.39 The Bar Council and the Wales and Chester Circuit expressed their agreement with the proposal, explaining that:
- We agree with the statement at paragraph 7.93 of the Consultation Paper, that “the current position regarding complaints is too complex”. We agree that a uniform complaints procedure is necessary and that complaints regarding members of tribunals should be investigated by the relevant judicial lead.
- 8.40 Some responses explicitly supported our suggestion at paragraph 7.95 of the Consultation Paper that, in cases where judicial leads felt they did not have sufficient distance to investigate a complaint, the PWT could nominate another judicial lead to investigate. Dr Sarah Nason and Dr Huw Pritchard for example agreed that:
- ... judicial leads should investigate complaints regarding members of their tribunals with an appropriate formal role for the President of Welsh Tribunals and flexibility for the President to direct other investigating processes as appropriate according to paras. 7.94-7.95...
- 8.41 The APW, a tribunal with a small membership, agreed with this reasoning, “including the ability for the smaller tribunals to ask for another judicial lead to investigate”.
- 8.42 The PWT suggested, however, that the answer to both this question and Consultation Question 52 should be considered further “in the light of the proposals for reform of the complaints procedure which may emerge for the reserved tribunals”. We discuss these proposals next.

#### Proposed reforms to the process in the First-tier Tribunal

- 8.43 Since the closing of our consultation period, the Lord Chancellor and Lord Chief Justice have published provisional proposals on the reform of judicial discipline in England and Wales (excluding the devolved tribunals). The proposals were developed following a review by a working group, which was led by Lady Justice Rafferty until her retirement, and then Lady Justice Carr. The review’s overarching aim was “to examine

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<sup>197</sup> Judicial Conduct and Investigations Office, The Judicial Conduct (Judicial and other office holders) Rules 2014, Supplementary Guidance (August 2014) para 7.

all aspects of the system to ensure that allegations of misconduct are dealt with efficiently, fairly and proportionately”.<sup>198</sup>

- 8.44 The most relevant proposal from the perspective of this project is Proposal 3. This proposal states that complaints about tribunal members should be referred to the JCIO, rather than the tribunal president. This proposal was put forward for the following reasons.
- (1) Dealing with complaints is a significant burden on chamber presidents.
  - (2) There is a risk of conflicts arising between chamber presidents dealing with complaints and their leadership and pastoral roles.
  - (3) The Judicial Conduct (Tribunals) Rules 2014 are convoluted and confusing in places.<sup>199</sup>
- 8.45 We have taken into account the views of the working group and the proposals that have been made in consequence; we cannot, of course, predict the outcome of the consultation, which remains open at the time of publication of this report. We are not persuaded that the first and third reasons for the proposed reforms in the reserved system apply in the context of devolved tribunals and consider that the issue underlying the second reason for the proposals can be resolved.
- 8.46 The first reason cited by the consultation is that dealing with complaints is a significant burden on chamber presidents in the reserved system. As set out in the table at paragraph 8.4 above, the number of complaints made against tribunal members in the devolved tribunals remains low. As a result, we are not persuaded that considering complaints would be an excessive burden on chamber presidents of the First-tier Tribunal for Wales.
- 8.47 Secondly, the consultation notes a risk of conflict arising between chamber presidents dealing with complaints and their leadership and pastoral roles. We recognise that this may potentially be a problem in the devolved tribunals also, due to the small size of the system, and the close working relationships that can develop. However, the responses to our own consultation lead us to the view that this risk can be managed by way of the suggestion in our Consultation Paper at paragraph 7.95 that another judicial lead can be nominated to undertake an investigation, if it is felt that there is insufficient distance between a chamber president and a member.
- 8.48 Finally, the consultation criticises the Judicial Conduct (Tribunals) Rules 2014 for being convoluted and confusing. We regard this as a drafting issue which can be avoided by with appropriately clear drafting of judicial conduct rules relating to members of the devolved tribunals.
- 8.49 We are also encouraged that the large majority of respondents expressed support for our provisional proposal at Consultation Question 51. We therefore recommend that

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<sup>198</sup> Lord Chancellor and Lord Chief Justice, *Consultation on proposals about the judicial disciplinary system in England and Wales*, (November 2021) para 10.

<sup>199</sup> Lord Chancellor and Lord Chief Justice, *Consultation on proposals about the judicial disciplinary system in England and Wales*, (November 2021) para 30.

complaints about members are directed to judicial leads (or Chamber Presidents in our new system), as is the practice in most of the devolved tribunals at present.

- 8.50 That said, we recognise that our consultation (and the responses we received to it) were based on the existing arrangements, part of which are common to the devolved and the reserved tribunals. We expect that the Welsh Government will wish to consider the results of the Lord Chancellor and Lord Chief Justice's consultation before making final policy decisions in this area.

### **Investigation of complaints about judicial leads of the section 59 tribunals**

- 8.51 Although most complaints made against judicial leads of the section 59 tribunals are investigated by the JCIO, this is not the case for the APW or the WLT. At Consultation Question 52, we provisionally proposed that the investigation of complaints regarding judicial leads of the section 59 tribunals should be coordinated by the JCIO, or an equivalent body. In response to this question, 19 respondents agreed, and one respondent offered another answer.
- 8.52 The Governing Council of the VTW supported our proposal on the basis that it "provides the necessary independence and separation of duties, particularly as the President of Welsh Tribunals is responsible for members' disciplinary matters".
- 8.53 Dr Sarah Nason and Dr Huw Pritchard regarded the JCIO as an acceptable solution for the present, but thought that the question may need to be revisited as the internal expertise of a reformed Welsh Tribunals Unit ("WTU") develops:

The previous work on fostering a more independent tribunal system with recourse to the JCIO through agreement with the Welsh Government should be maintained for as long as this is appropriate and suitable for the Welsh system of tribunals. Our research (Nason & Pritchard 2020, 244) highlights how the WTU, in coordination with the President of Welsh Tribunals and judicial leads, is developing internal expertise and equivalent roles to HMCTS, the JCIO and Judicial Office. The proposals for formalising the independent structure of the WTU, below, could help to enhance potential equivalent processes to the JCIO in the long-term.

- 8.54 Huw Williams had in a previous answer to Consultation Question 41 already expressed his support for the handling of complaints about judicial conduct (meaning complaints about those who have taken the judicial oath) to be handled "independently as far as possible". He suggested that:

there should be a statutory requirement for the Welsh Ministers to establish either a Welsh Tribunals Judicial Conduct Investigations Office or (which would be a preferred option) to conclude an agreement under section 83 of the Government of Wales Act 2006 with another appropriate body (such as the JCIO).<sup>200</sup>

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<sup>200</sup> Government of Wales Act 2006, s 83 enables arrangements to be made for the provision of administrative, professional or technical services to the Welsh Ministers by public bodies in England and Wales.

8.55 Keith Bush QC, the only respondent to answer “other”, explained that although he is in broad agreement:

...there is a need to have some sort of system (under the supervision of the President of the Welsh Tribunals) in order to be able to filter out complaints that are obviously frivolous.

8.56 Given the consensus expressed in responses to the consultation, we recommend that the JCIO investigate complaints about Presidents and Deputy Presidents of the First-tier Tribunal. This would allow complaints to be investigated independently, without the need for setting up a new body (a step which would be difficult to justify, given the small number of complaints which are received annually).

### **Complaints regarding the conduct of members of the Valuation Tribunal for Wales**

8.57 At Consultation Question 54, we provisionally proposed that complaints regarding the conduct of members of the VTW should be investigated by the President of the VTW. Eighteen respondents answered this question, of whom 15 agreed, two disagreed and one answered “other”. The respondents who disagreed did not give reasons for their view, and the respondent who answered “other” was Sir Wyn Williams, who reiterated his view that the recommendations to be made in relation to the conduct of members of tribunals should be considered in light of the proposals that were likely to emanate from the working group on judicial discipline.

8.58 In its response, the Governing Council of the VTW explained that this is currently the informal procedure followed by the tribunal, as complaints against members’ conduct would be referred to the President of the tribunal. Nonetheless, it agreed that the procedure should be formalised and that the process should be published.

8.59 Huw Williams agreed with the proposal as an “interim arrangement, with an oversight role for the President of Welsh Tribunals”.

8.60 The Wales and Chester Circuit, the Bar Council, Public Law Wales, Keith Bush QC, Dr Sarah Nason and Dr Huw Pritchard all agreed with the proposal, on the grounds that it would ensure uniformity between the complaints procedure followed by the VTW and that of the other devolved tribunals.

### **Discussion**

8.61 Given our conclusion in Chapter 3 that the VTW should be brought within the First-tier Tribunal for Wales, our view is that the same procedure that applies to other chambers in that tribunal should also apply to our proposed valuation chamber. In practice that would mean that investigation of conduct complaints about members would be the responsibility of the chamber president. In the meantime, we welcome the Governing Council of the VTW’s commitment to formally extending the scope of the tribunal’s complaints policy to include complaints about conduct of tribunal members.

### **Complaints regarding the conduct of the President of the Valuation Tribunal for Wales**

8.62 Having considered the position regarding complaints about VTW members, the Consultation Paper then considered the position regarding complaints about the conduct of the tribunal’s President. In line with our provisional proposals for the other



devolved tribunals, we provisionally proposed at Consultation Question 55 that complaints regarding the conduct of the President of the VTW should be investigated by the JCIO or an equivalent body.

8.63 Eighteen respondents answered this question, of whom 15 agreed, two disagreed (the Governing Council of the VTW and Noel Edwards, a retired technical adviser at the Valuation Office Agency) and one offered another answer.

8.64 The Governing Council of the VTW expressed its view as follows:

We have previously accepted that the President of Welsh Tribunals should have some supervisory powers in relation to the Valuation Tribunal for Wales and it is our view that the power to discipline the Valuation Tribunal President should form part of these responsibilities.

If the Valuation Tribunal for Wales is brought under a unified tribunal system for Wales, all processes will need to be aligned with the prevailing procedures adopted for the First-tier tribunal. It would follow, in this instance, that complaints against the President of the Valuation Tribunal for Wales would be investigated by the Judicial Conduct Investigations Office.

8.65 Public Law Wales, Dr Sarah Nason and Dr Huw Pritchard agreed with the proposed procedure, as it would bring the VTW in line with the other devolved tribunals.

8.66 Noel Edwards expressed the view that it “is a difficult decision” and that “if the President remains as a lay person, it would be preferable for the complaint to be investigated by a panel of members”.

8.67 Huw Williams, marking his answer as “other”, explained that the decision should be deferred pending a further review into the future structure of the VTW, and that the President of Welsh Tribunals be given an interim role pending such review.

## Discussion

8.68 Again, given our conclusion in Chapter 3 that the VTW should be brought within the First-tier Tribunal for Wales, our view is that same procedure should apply to that chamber as to the other chambers. Conduct complaints about chamber presidents would therefore be investigated by the JCIO.

8.69 If our recommendation in Chapter 3 is not adopted, we nonetheless are of the view that there should be an external body involved in assessing complaints against the President of the VTW. We have considered whether, as suggested by the Governing Council of the VTW, that external body should be the President of Welsh Tribunals. That office would bring gravitas to the role, is known in Wales, and is demonstrably independent from the Welsh Government. It would however mean that the VTW was the only tribunal for which complaints about judicial leads were investigated by the President of Welsh Tribunals. It would also work differently from the Valuation Tribunal



for England, where complaints about the conduct of the President of that tribunal are directed to the JCIO.<sup>201</sup>

- 8.70 A separate policy would, therefore, need to be developed for the VTW as the only tribunal where complaints about the President were heard by the President of the Welsh Tribunals. In our view that would contradict the general aims of the project to promote coherent and consistent procedures across the devolved tribunals. We are therefore minded to recommend that complaints about the President of the VTW be heard by the JCIO, regardless of whether the VTW is brought within the framework of a First-tier Tribunal for Wales.

### **Investigation of complaints about members of the Appeal Tribunal for Wales**

- 8.71 In Chapter 4 of this Report we recommended the creation, in due course, of an Appeal Tribunal for Wales. This raises a further question not considered in our Consultation Paper: who should be responsible for investigating complaints about the conduct of members of the Appeal Tribunal?
- 8.72 In the reserved tribunals system, complaints are initially made to the President of the Chamber of the Upper Tribunal to which the member is assigned.<sup>202</sup> The President's investigation report and recommendation is sent to the Lord Chancellor and the relevant Chief Justice through the JCIO.<sup>203</sup> Recommendations will then usually be made by a nominated judge, or, if the case is particularly complex or serious, an investigating judge.<sup>204</sup>
- 8.73 In Scotland, complaints about ordinary and legal members of the Upper Tribunal for Scotland are made to the Judicial Office for Scotland (a part of the Scottish Courts and Tribunals Service, set up to support the Lord President in his role as head of the Scottish judiciary).<sup>205</sup>
- 8.74 We recommend that, consistently with complaints about Chamber Presidents and Deputy-Presidents of the First-tier Tribunal for Wales, complaints about members of the Appeal Tribunal for Wales are investigated by the JCIO. This has the advantage that a Chamber President is not required; given the likely volume of work of the Appeal Tribunal for Wales, it may not initially be subdivided into chambers.

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<sup>201</sup> Constitutional Reform Act 2005, s 109(4) and sch 14, and Judicial Discipline (Prescribed Procedures) Regulations 2014.

<sup>202</sup> Judicial Conduct (Tribunals) Rules 2014, sch.

<sup>203</sup> Judicial Conduct and Investigations Office, The Judicial Conduct (Judicial and other office holders) Rules 2014, Supplementary Guidance (August 2014) section 5.

<sup>204</sup> Judicial Conduct and Investigations Office, The Judicial Conduct (Judicial and other office holders) Rules 2014, Supplementary Guidance (August 2014), sections 6 and 7.

<sup>205</sup> Complaints About Members of the Scottish Tribunals Rules 2018, r 2(1). For further detail, see our Consultation Paper at paras 7.58 to 7.69.

#### **Recommendation 42.**

- 8.75 We recommend that complaints about the conduct of tribunal members of the First-tier Tribunal for Wales are investigated by the relevant Chamber President.

#### **Recommendation 43.**

- 8.76 We recommend that complaints about the conduct of Chamber Presidents and Deputy Presidents of the First-tier Tribunal for Wales are investigated by the Judicial Conduct Investigations Office.

#### **Recommendation 44.**

- 8.77 We recommend that complaints about the conduct of members of the Appeal Tribunal for Wales are investigated by the Judicial Conduct Investigations Office.

### **REFORM OF DISCIPLINARY POWERS**

- 8.78 If the conduct of a member or judicial lead has been investigated and found wanting, the next question is who should be responsible for disciplining that individual. That could ultimately encompass dismissal, but will also include lesser sanctions. In this section of the Consultation Paper we considered where this responsibility should lie as regards the tribunals listed in section 59 of the Wales Act 2017, the VTW, and school exclusion and admission appeal panels. We began by considering the position of members (Consultation Questions 56, 57 and 58) before looking at the position of judicial leads (Consultation Questions 59 and 60).
- 8.79 Throughout this section of the Consultation Paper, our aim was to balance the need to protect judicial independence and the need to have a robust and transparent system of discipline that met the expectations of tribunal users. We provisionally considered that protecting judicial independence required some limit on the involvement of the executive (in this case, the Welsh Ministers); ensuring the independent exercise of the powers also required sufficient distance between those being disciplined and the holders of disciplinary powers.

#### **Should the President of Welsh Tribunals have the power to discipline and dismiss members of the tribunals listed in section 59 of the Wales Act 2017?**

- 8.80 At Consultation Question 56, we provisionally proposed that the PWT should have the power to discipline and dismiss members of the section 59 tribunals. Twenty-four respondents answered this question, of whom 23 (including Sir Wyn Williams, the current PWT) agreed.

8.81 Huw Williams was of the view that:

the enhanced status and role of the President of Welsh Tribunals supports the view that the President is a figure of sufficient stature and detachment to fulfil the proposed disciplinary role, supported if necessary, by the JCIO.

8.82 Public Law Wales expressed support for “the establishment of a common system, across the reformed Welsh tribunals, for dealing with complaints and discipline, under the jurisdiction of the President of Welsh Tribunals”, adding that any such system will only be effective if it is provided with sufficient administrative resources.

8.83 The APW agreed with our reasoning on this matter (set out at paragraphs 7.122 to 7.124 of the Consultation Paper) but added that “the President of Welsh Tribunals should be required to consult the relevant judicial lead”.

8.84 The only response to disagree with our provisional proposal was the response from the MHRTW.

We strongly favour continuation of appointment of all members to this tribunal by the Lord Chancellor, in which case only s/he can discipline or dismiss members.

If that view doesn’t prevail, then the power of discipline and dismissal should rest with whoever has the power to appoint.

8.85 The Law Society also argued that the power to discipline and dismiss should rest with the appointing authority.

## Discussion

8.86 Given the views of the majority of respondents, we recommend that discipline and dismissal of members of the First-tier Tribunal for Wales should be the responsibility of the PWT. In Chapter 7 we recommend that tribunal members should also be appointed by the President of Welsh Tribunals, and we favour symmetry between appointment and dismissal powers. We note that the MHRTW also expressed a preference for symmetry between appointment and dismissal powers, in the event that its first preference (for the continued role of the Lord Chancellor) was not adopted.

8.87 For the reasons discussed in Chapter 7, we do not believe that maintaining the Lord Chancellor’s role in relation to appointments and discipline for some of the devolved tribunals in Wales is appropriate or sustainable (particularly as the Lord Chancellor no longer makes appointments to the First-tier Tribunal).

8.88 We agree with the APW that any exercise of the powers of the PWT should follow engagement with the relevant Chamber President. Recommendation 42 above envisages that the investigation into the misconduct will have taken place by the relevant judicial lead. The results of that investigation should be included in a report, submitted to the President, which should contain a recommendation as to the appropriate sanction. Thus the President would be fully appraised of the judicial lead’s views. If the judicial lead had recommended removal or suspension, then a disciplinary panel would be convened to consider the matter. The disciplinary panel would report back to the President.

#### **Recommendation 45.**

- 8.89 We recommend that the President of Welsh Tribunals should have the power to discipline and dismiss members of the First-tier Tribunal for Wales.

#### **Discipline and dismissal of members of the Valuation Tribunal for Wales**

- 8.90 Having considered the position in relation to the section 59 tribunals, at Consultation Question 57 we provisionally proposed that the PWT should also have the power to discipline and dismiss members of the VTW.
- 8.91 Nineteen respondents answered this question, of whom 16 agreed with our provisional proposal, and two disagreed. Huw Williams (whose answer was marked “other”) reiterated his view that the VTW should undergo wholesale reform first.
- 8.92 Public Law Wales and the joint response of Dr Sarah Nason and Dr Huw Pritchard agreed on the grounds that the proposal would achieve uniformity between the VTW and the other devolved tribunals. A similar position was taken by the Law Society, which reiterated its view that the powers to appoint, discipline and dismiss should rest with the same authority.
- 8.93 Roger Handy, a chairperson of the VTW, was of the view that the President of Welsh Tribunals should have the power to discipline and dismiss members of the VTW “on the recommendation of the VTW President”.
- 8.94 Noel Edwards disagreed with the provisional proposal. He was of the view that the power to discipline and dismiss members of the VTW “should be a matter for the President of the VTW and possibly panel members”.
- 8.95 Also opposed to the proposal was the Governing Council of the VTW. In its response to the question, it outlined why it believed that the President of the VTW should remain responsible for imposing disciplinary sanctions on tribunal members unless and until the tribunal were brought within the unified system:

Tribunal members are able to be dismissed by the appointments panel, if so directed by Welsh Ministers, and the President is able to terminate the office of a chairperson or a national representative, after consultation with the Governing Council.

If the Valuation Tribunal for Wales is brought within the unified tribunal system for Wales at some point in the future, the President of Welsh Tribunals should then assume this responsibility to be consistent with the other jurisdictions within his/her purview.

#### **Discussion**

- 8.96 As discussed in Chapter 3, our recommendation is that the VTW should form part of a new First-tier Tribunal for Wales. Accordingly, we recommend that it should be subject to the same procedures as other parts of that tribunal, and the PWT should have the ability to discipline and, if necessary, dismiss its members.

#### **Recommendation 46.**

- 8.97 We recommend that the President of Welsh Tribunals should have the power to discipline and dismiss members of the Valuation Chamber of the First-tier Tribunal for Wales.

#### **Discipline and dismissal of judicial leads of the section 59 tribunals**

- 8.98 At present judicial leads of the section 59 tribunals are subject to varying disciplinary and dismissal measures. Most are identified as judicial office holders under Schedule 14 to the Constitutional Reform Act 2005, and are consequently subject to the disciplinary powers of the Lord Chancellor and Lord Chief Justice,<sup>206</sup> but the President of the WLT may be dismissed by the Welsh Ministers. In the case of the APW it is unclear who is responsible for discipline.
- 8.99 In order to rectify this inconsistency, at Consultation Question 59 we provisionally proposed that judicial leads of the section 59 tribunals should be disciplined by the PWT with the concurrence of the Welsh Ministers. The involvement of the PWT would, we believed, bolster judicial independence. The concurrence of the Welsh Ministers would prevent the system appearing as though judges were disciplining “one of their own”, particularly given the close working relationship between the President and judicial leads.
- 8.100 Twenty-one respondents answered this question, of whom 18 were in support of our provisional proposal, two were against, and one offered another answer.
- 8.101 The Governing Council of the VTW, the Law Society, the Wales and Chester Circuit and the Bar Council were all in favour of the provisional proposal. The Law Society thought that, combined with the imposition of a duty on Welsh Government to respect judicial independence, the arrangements were acceptable and would provide necessary safeguards for upholding the rule of law. The Bar Council agreed that limiting the power of the Welsh Ministers to one of concurrence with the PWT alleviated concerns about protecting the independence of judicial leads and deputies, suggesting that the process could be carried out by the JCIO.
- 8.102 Huw Williams was on balance in favour of the provisional proposal, but suggested that in practice greater collaboration with other judicial figures might be beneficial:

I agree, on balance, that this is a workable solution, subject to legislative safeguards in the legislation regarding the maintenance of judicial independence.

However, unlike the Ministry of Justice the Welsh Government does not have experience of involvement in judicial disciplinary matters. There may thus be a legitimate question over whether this is a sufficient check in practice on the

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<sup>206</sup> Those identified as judicial office holders under Schedule 14 to the Constitutional Reform Act 2005 are the judicial leads of the Residential Property Tribunal for Wales (who fall under the category of a member of a panel convened under para 2(1) of Schedule 10 to the Rent Act 1977), the Agricultural Land Tribunal for Wales, the Education Tribunal for Wales and the Mental Health Review Tribunal for Wales.

President of Welsh Tribunals. Consideration should therefore be given to requiring the Welsh Ministers to consult with the Lord Chief Justice (who has a Wales and England judicial role) or the senior judicial figure for Wales recommended by the Thomas Commission (see further my other comments below), before concurring to a disciplinary action by the President.

8.103 Professor Thomas Watkin, marking his answer as “other”, also suggested that there might be a role for the Lord Chief Justice, suggesting that the PWT’s powers could be exercised “with the consent of the Lord Chief Justice”, as opposed to the Welsh Ministers.

8.104 The MHRTW disagreed with the proposal, offering the following remarks:

We feel that this is a matter for the Lord Chancellor, even more strongly than is the case with members. Judicial independence requires clear demarcation between the executive and the judiciary.

8.105 Alun Green, a member of the Schools Appeal Panel for both Newport County Council and Monmouthshire Council, also disagreed with the proposal, but did not give reasons.

## Discussion

8.106 For the reasons we gave in the Consultation Paper, we do not consider it appropriate to expand the Lord Chancellor’s role in relation to the devolved tribunals to include responsibility for discipline of judicial leads of the devolved tribunals. While traditionally the holder of that office was head of the judiciary, since the Constitutional Reform Act 2005 the office is more clearly an executive position, albeit with special responsibility for justice. The present situation is largely a result of the historical development of the tribunals. Giving the office of Lord Chancellor (which is held by a minister of the United Kingdom government), greater responsibilities in relation to the devolved tribunals is difficult to rationalise.

8.107 We agree with the MHRTW that designing the disciplinary system requires a clear understanding of the roles of the judiciary and the executive. We believe, however, that a properly functioning system requires both judicial and executive input. In the judicial disciplinary system in England and Wales that balance is provided by a combination of the Lord Chancellor and the Lord Chief Justice; in the case of the devolved tribunals we consider that the input of the executive should come from the devolved administration.

8.108 We have considered carefully whether the Lord Chief Justice, as the most senior judicial figure in England and Wales, should supply the judicial element that we think is necessary in discipline. However, we remain of the view expressed in the Consultation Paper that the PWT occupies a sufficiently senior role to carry this responsibility.

8.109 If a Court of Appeal judge were appointed with special responsibility for Wales, as advised by the Commission on Justice in Wales,<sup>207</sup> we can see that he or she might play a useful role in the process. But, in the meantime, we recommend, as we provisionally proposed, that the PWT be able to discipline and dismiss Presidents and Deputy Presidents of chambers of the First-tier Tribunal for Wales of the devolved tribunals, with the concurrence of the Welsh Ministers.

#### **Recommendation 47.**

8.110 We recommend that the President of Welsh Tribunals should have the power to discipline and dismiss Presidents and Deputy Presidents of chambers of the First-tier Tribunal for Wales, with the concurrence of the Welsh Ministers.

### **Discipline and dismissal of the President of the Valuation Tribunal for Wales**

8.111 Currently, the President of the VTW may be dismissed by the Welsh Ministers following consultation with such members of the VTW as they see fit.<sup>208</sup> There do not appear to be any statutory provisions governing the discipline of the President, short of dismissal. Consistently with our other provisional proposals, Consultation Question 60 provisionally proposed that the President of the VTW should be disciplined and dismissed by the PWT with the concurrence of the Welsh Ministers.

8.112 Eighteen respondents answered this question, of whom 15 agreed, one disagreed and two offered other answers.

8.113 The Governing Council of the VTW agreed with the proposal, explaining that:

Regardless of whether the Valuation Tribunal for Wales remains outside the unified tribunal structure, we consider that the President of Welsh Tribunals should have an increased supervisory role, which includes powers to discipline and dismiss the Valuation Tribunal for Wales' judicial head. The continued involvement of Welsh Ministers provides the necessary safeguards.

8.114 The responses of Public Law Wales and Dr Sarah Nason and Dr Huw Pritchard were both in favour of the provisional proposal, on the basis that it would ensure consistency with the other devolved tribunals.

8.115 The only respondent who disagreed with the provisional proposal was Noel Edwards, who, in referring to an answer he gave in an earlier question, expressed the view that "this is a difficult decision if the President remains as a lay person, it would be preferable for the complaint to be investigated by a panel of members".

8.116 Two respondents marked their answer "other". One was Professor Thomas Watkin, who reiterated his suggestion that the PWT should discipline the President of the

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<sup>207</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019), para 12.142. See [https://gov.wales/sites/default/files/publications/2019-10/Justice%20Commission%20ENG%20DIGITAL\\_2.pdf](https://gov.wales/sites/default/files/publications/2019-10/Justice%20Commission%20ENG%20DIGITAL_2.pdf)

<sup>208</sup> The Valuation Tribunal for Wales Regulations SI 2010 No 713 (W 69), reg 11(6).



VTW, with the consent of the Lord Chief Justice. The other was Huw Williams, who repeated the comment previously made in response to Consultation Question 48: that the development of a complaints procedure should be deferred pending a further review into the future structure of the VTW, during which time the PWT could be given an interim role in considering complaints.

## Discussion

8.117 Again, as our recommendation in Chapter 3 is that the VTW form part of the new First-tier Tribunal for Wales, our view is that the same arrangements that apply to the other chambers should apply to the VTW. As such, the President of the VTW would be disciplined by the PWT, with the concurrence of the Welsh Ministers.

### **Recommendation 48.**

8.118 We recommend that the President of the Welsh Tribunals should have the power to discipline and dismiss the President of the Valuation Chamber of the First-tier Tribunal for Wales, with the concurrence of the Welsh Ministers.

## **Discipline and dismissal of members of the Appeal Tribunal for Wales**

8.119 At paragraphs 8.71 to 8.74, we recommend that complaints about members of the Appeal Tribunal for Wales should be investigated by the JCIO. This was not a topic considered by the Consultation Paper, as at that stage we were still considering whether there should be an Appeal Tribunal for Wales.

8.120 The next question is who, following investigation of a complaint, should be responsible for disciplining and dismissing members of the Appeal Tribunal for Wales. In the case of the UK Upper Tribunal, the Lord Chief Justice and Lord Chancellor must decide jointly on disciplinary sanctions; only the Lord Chancellor can formally remove a judge from office.<sup>209</sup> Judges are dismissed following investigations by a disciplinary panel.<sup>210</sup>

8.121 In Scotland, ordinary and legal members of the Upper Tribunal for Scotland may be dismissed by the First Minister, if a fitness assessment tribunal has concluded the member is unfit to hold office.<sup>211</sup> If a fitness assessment tribunal is not established, the Judicial Office must refer the allegation to a person nominated by the President of Scottish Tribunals for investigation (known as the nominated judicial office holder).<sup>212</sup> The nominated judicial officer holder produces a report determining the facts of the matter, and suggesting an appropriate sanction (eg formal advice, a formal warning,

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<sup>209</sup> Constitutional Reform Act 2005, ss 108(1) and (2).

<sup>210</sup> Judicial Conduct and Investigations Office, The Judicial Conduct (Judicial and other office holders) Rules 2014, Supplementary Guidance (August 2014), section 8.

<sup>211</sup> Tribunals (Scotland) Act 2014, sch 8, para 23.

<sup>212</sup> Complaints About Members of the Scottish Tribunals Rules 2018, r 12(2).



or a reprimand).<sup>213</sup> The report is then considered by the Lord President, who determines the appropriate sanction.<sup>214</sup>

8.122 The dismissal of a judge of an Appeal Tribunal for Wales would plainly be a very serious matter. We consider that a decision to dismiss such a judge should be taken by the First Minister. We would expect the First Minister only to take such a decision with the support of the PWT, and possibly of the other members of the Welsh Government, such as the Counsel General.

8.123 We do not recommend a formal requirement of the concurrence of the PWT. The only practical effect of such a requirement would be to create the possibility for deadlock over a judge's dismissal, which would be damaging to relations between the executive and the judiciary. We note that the absence of judicial involvement in the final decision to dismiss a judge of the ATW would be consistent with the position both in Scotland and in the reserved tribunals system.

8.124 The giving of advice about conduct and the imposition of sanctions falling short of dismissal, such as a reprimand or warning, should in our view be done with the concurrence of the PWT. Such sanctions presuppose that the judge in question will continue in a close working relationship with the PWT, and we consider it appropriate that the PWT be associated with any measures relevant to the judge's future conduct.

#### **Recommendation 49.**

8.125 We recommend that the First Minister should have power to dismiss judges of the Appeal Tribunal for Wales. Sanctions falling short of dismissal should be imposed by the First Minister with the concurrence of the President of Welsh Tribunals.

#### **Further safeguards on disciplinary powers**

8.126 Finally, Consultation Question 61 sought views on whether any further safeguards attaching to the exercise of disciplinary powers are required to protect the independence of the judiciary.

8.127 Nine respondents offered further views on this matter. The APW, the Governing Council of the VTW, Roger Handy, the Law Society, the Wales and Chester Circuit and the Bar Council all made further comments to the effect that if our provisional proposals were implemented (notably those detailed at paragraph 7.130 of the Consultation Paper), no further safeguards would be necessary.

8.128 Although not within the terms of reference of the Consultation Paper, Huw Williams considered the discipline of the PWT:

Attention is also drawn to my response to the invitation for other comments suggesting that the appointment of the President of Welsh Tribunals should be

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<sup>213</sup> Complaints About Members of the Scottish Tribunals Rules 2018, r 13(2). R 13(2)(b) refers to the disciplinary powers granted to the Lord President in the Tribunals (Scotland) Act 2014.

<sup>214</sup> Complaints About Members of the Scottish Tribunals Rules 2018, rr 13(3)(c) and 16(2).

made by the Sovereign in line with other senior judicial appointments as this also raises the question of disciplining of the President of Welsh Tribunals. Although this is not covered by the consultation paper as it would require amendment to the Wales Act 2017, it is suggested that in order to bring the position of the President broadly within the structure proposed for the Welsh Tribunals that further consideration is given to Schedule 5, Part 3, Paragraph 10 of the Wales Act to at least require the Lord Chancellor to seek the concurrence of the Welsh Ministers and the Senedd before recommending to the Sovereign the removal of a President of Welsh Tribunals.

8.129 Schedule 5, part 3, paragraph 10(2) of the Wales Act 2017 currently provides that the PWT holds office during good behaviour, subject to a power of removal by Her Majesty on an address presented to Her by both Houses of the UK Parliament. Subparagraph (3) provides that it is for the Lord Chancellor to recommend to Her Majesty the exercise of that power.

8.130 The appointment or dismissal of the PWT fall outside the terms of reference for this project. It is a matter for the Welsh Government whether it wishes to raise this issue with the UK Government.

## **SCHOOL ADMISSION APPEAL PANELS: COMPLAINTS AND DISCIPLINE**

8.131 As explained in Chapter 1, having decided that school admission appeal panels should be administered locally, we are not proposing to make substantive recommendations about how they operate. We set out here however the thinking behind the consultation questions we asked, and the responses we received.

### **The current position**

8.132 At paragraph 7.42 of the Consultation Paper, we explored the current role played by the Public Services Ombudsman for Wales (“PSOW”) in relation to school admission and exclusion appeal panels. Currently, there is no single procedure whereby complaints about school admission and exclusion appeal panels can be made to the panels themselves or the relevant local authority, and there is limited information available in the public domain.

8.133 The Public Services Ombudsman (Wales) Act 2019 empowers the PSOW to investigate maladministration, a failure to provide a service or a failure in a service that is provided. In relation to school admissions, the PSOW’s website explains that it can:

- (1) look at complaints about school admissions procedures in Wales and the admission appeal process;
- (2) look at complaints from parents who consider a local authority has implemented its school admissions procedure unfairly; and

- (3) look at complaints from parents who consider an admissions appeal panel has acted improperly.<sup>215</sup>

8.134 As noted in our Consultation Paper, we understand that the PSOW received 27 complaints in relation to school admission and appeals in 2018-2019 and 30 the following year. Over 80% of these were not investigated, as there was no evidence of maladministration or service failure. Other cases were found not to be within the Ombudsman's jurisdiction, with the result that only one in each year was resolved by the Ombudsman (using the early resolution procedure).

8.135 The other potential recourse available to young people and parents is to apply to the Welsh Ministers. The School Admissions Appeal Code notes that the Welsh Ministers cannot review or overturn decisions of panels, but may exercise their powers of intervention if:

the panel was [in]correctly constituted by the admission authority; and

the admission authority has acted [un]reasonably in exercising functions in respect of the appeals process, eg in constituting the panel or acting in breach of the mandatory provision of the Code.<sup>216</sup>

8.136 The Code makes clear that the Welsh Ministers may not consider complaints about the "way [the panels] conduct their business"; if appellants believe that the panel which heard their appeal acted improperly or unreasonably, they are directed to the PSOW.<sup>217</sup>

8.137 The Education (Admission Appeals Arrangements) (Wales) Regulations 2005 make provision for the appointment of members of admission panels. They do not specify how long appointments should last, or in what circumstances a panel member may be removed (though they do require advertisement for lay members every three years).<sup>218</sup>

## The problem

8.138 We see advantages in the resolution of complaints by the Ombudsman. The Ombudsman is demonstrably independent of admission authorities, which should give parents and young people confidence in his or her decisions. There is also an advantage in having a single point of contact which can be referred to in the Admissions Code; it creates an important point of unity in what is otherwise a regionalised process.

8.139 Nonetheless, we had (and continue to have) concerns about the appropriateness of relying on the Ombudsman for all complaints relating to the school appeals panels. In

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<sup>215</sup> Public Service Ombudsman for Wales, School Appeals Factsheet, see <https://www.ombudsman.wales/factsheets/education-school-admission-appeals/>

<sup>216</sup> Welsh Government, *School Admission Appeals Code* (December 2013) para 6.14. See <https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>

<sup>217</sup> Welsh Government, *School Admission Appeals Code* (December 2013) para A15. See <https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>

<sup>218</sup> Education (Admission Appeals Arrangements) (Wales) SI 2005 No 1398 (W 112), reg 4.

particular we are not persuaded that the Ombudsman's role in relation to complaints about conduct is satisfactory. His or her processes are designed to evaluate the effectiveness of systems of administration, rather than the conduct of an individual. While individuals are entitled to see allegations made against them, the protections are not as great as for members of other tribunals (where, for example, a member is entitled to a disciplinary panel if there is a threat of dismissal).

8.140 It is also unclear what the consequences would be of any negative finding from the Ombudsman. The Ombudsman may only make recommendations; it is for admission authorities to implement these. The Admissions Code is silent on this point.

8.141 It is likely that in practice issues of panel members' conduct come up so infrequently that there is no established practice; certainly, an analysis of the Ombudsman's work for the last two years suggests that this is the case. It is also possible that in practice panel members criticised are not formally disciplined or dismissed, but are simply not invited to sit on further panels. Whatever the position in practice, we found the lack of clarity concerning. As we set out above, having transparent processes around discipline and dismissal is important to maintaining the independence of tribunals. Leaving an admissions authority to decide what approach to take following a negative report from an Ombudsman, with no guidance from the underlying regulations or School Admissions Appeals Code, may impact the independence of school admission appeal panels.

8.142 We therefore asked three questions of respondents. The first (Consultation Question 47) asked whether there was a need for a complaints policy in relation to school admission and (if retained) exclusion panels, in addition to the role currently played by the PSOW. The second (Consultation Question 53) asked who should investigate complaints about conduct of panel members, and the third (Consultation Question 58) sought views on whether the President of Welsh Tribunals should be able to exercise disciplinary powers over panel members.

### **A complaints policy for school admission appeal panels**

8.143 The views of respondents were divided on Consultation Question 47. Of the 23 who responded, nine believed there should be a complaints policy, six disagreed and eight offered other answers. Some of those who offered other answers believed that both school exclusion and admission appeal panels should become part of the First-tier Tribunal, and as a result required no additional complaints policy.

8.144 Sir Wyn Williams expressed the view that:

any body having a decision making role of such significance should have a complaints policy which is readily accessible and easily understood.

8.145 Some respondents were influenced by the fact that there is currently no dedicated route of appeal from school admission and exclusion appeal panels. Hilary Moriarty and Patrick Moriarty, both members of admission appeals panels, thought that a complaints policy was needed because:

at present the PSOW cannot consider the merits of a panel's decision. Some I have seen are bordering on perverse and should be re-examined.

8.146 The PSOW's own view was that:

Should school exclusions and admission appeals be brought within the devolved tribunal system, I consider that such a change would align my role with the system in relation to complaints concerning Special Educational Needs matters, where I may consider complaints which fall outside matters which are appropriate for consideration by SENTW. (For example, complaints of delays in the assessment process of a local authority or a failure of a local authority to implement the decision of a SENTW appeal tribunal).

8.147 Conversely, many of those involved with the school admission and exclusion appeal panels on a regular basis (both panel members and local authorities) did not see benefit in having a complaints policy in addition to the roles currently played by the PSOW.

8.148 John Travers (who clerks admission appeals for Catholic schools in the Archdiocese of Cardiff) and another panel member both believed that the role currently played by the PSOW was sufficient. Alun Green, an independent appeal panel member, saw adding a complaints policy in addition to the role played by the PSOW as being simply “further bureaucracy”, whereas Nadia Alabere, also an independent appeal panel member, added that “one or the other should be satisfactory”.

8.149 Pembrokeshire County Council and Cardiff City Council were also opposed, with Pembrokeshire County Council stating that “if an additional complaints policy was implemented, this is likely to involve additional unnecessary resource implications”.

### **Who should investigate complaints made regarding the conduct of members of the school admission and exclusion appeal panels?**

8.150 In the Consultation Paper we sought views on who should investigate complaints made regarding the conduct of members of school admission and exclusion appeal panels. We considered a number of possibilities, including the PSOW, other local authorities, the President of the Special Educational Needs Tribunal for Wales (now renamed the Education Tribunal for Wales, a term we will use for the remainder of this Chapter) or the PWT.

8.151 We provisionally decided against a system where complaints were investigated by other local authorities, as this risked creating an inconsistent approach. We took the provisional view that the PWT was too senior to consider complaints about members of the school admission and exclusion appeal panels.

8.152 Twenty-one respondents offered their views on Consultation Question 53, some of whom suggested one person or office in conjunction with another. As is explored further in Chapter 3, some respondents were in favour of amalgamating the jurisdiction of the school admission appeal panels with that of the Education Tribunal for Wales. If that reform were effected, then consistently with our provisional proposals above, the President of the Education Tribunal would consider complaints made regarding the conduct of school admission appeals. The Bar Council and Wales and

Chester Circuit supported giving the role to the President of the Education Tribunal for Wales on this basis.

8.153 Others gave answers that were more neutral on the topic of reform, suggesting that if the panels remained administered by local authorities, the PSOW was the better option, but that the President of the Education Tribunal for Wales would be preferable if the panels were brought within the First-tier Tribunal for Wales. This was the view of the PWT and the Law Society.

8.154 The Governing Council of the VTW however, while not supporting the amalgamation of the school panels into the unified tribunal system (described above at paragraphs 3.91 to 3.111), nonetheless supported giving the President of the Education Tribunal for Wales a role in investigating complaints. It explained that:

...the appeal panels should not be drawn into the unified tribunal system for Wales. We consider that complaints regarding the conduct of these panels should be conducted by the judicial lead of the Special Education Needs Tribunal for Wales, which would provide the necessary independence of the process.

8.155 Both Pembrokeshire County Council and Cardiff City Council took the view that the PSOW was the best person to assess conduct complaints, and, indeed, that this already fell within the definition of “maladministration” and could therefore be considered by the PSOW.

8.156 Others thought that the PWT could play a role in these cases. Keith Bush QC was in favour of setting up a complaints system “in collaboration between the councils but on the advice of the President of Welsh Tribunals”.

8.157 Looking at the broader picture of school exclusion and admission appeal panels, Public Law Wales suggested the following:

It may be that, at least in the short term, something falling short of full integration of local authority appeals panels into the Welsh tribunals system would be a safer first step. Their (school appeal panels) administration might, for example, be left in local authority hands whilst the President of Welsh Tribunals and the proposed Welsh Tribunal Rules Committee could acquire statutory roles in relation to procedures, complaints and discipline (and even, in the case of the President of Welsh Tribunals to appointments).

### **Should the President of Welsh Tribunals have the power to discipline and dismiss members of school admission and exclusion appeal panels?**

8.158 At Consultation Question 58, we asked respondents whether the PWT should have the power to discipline and dismiss members of school admission and (if retained) exclusion appeal panels. Twenty respondents answered this question, of whom 14 believed that the PWT should have this power, one disagreed and five gave responses marked “other”.

8.159 Sir Wyn Williams, marking his answer as “other”, expressed the view that the PWT should not have the power to discipline and dismiss members of school appeal panels unless they became devolved tribunals within section 59 of the Wales Act 2017. He

added that if they were not brought into the unified tribunal system, they should remain the responsibility of the local authorities.

8.160 Professor Thomas Watkin and Roger Handy supported the proposal, on the basis that it would ensure uniformity with the other devolved tribunals. The Law Society and Denbighshire Council also agreed, in so far as the PWT would also be the appointing authority, ensuring consistency.

8.161 The Governing Council of the VTW was in favour of the PWT having the power to discipline and dismiss members, despite not supporting the inclusion of admission or exclusion appeal panels within a unified system. The Governing Council of the VTW explained that:

It seems sensible that the President of Welsh Tribunals should have supervisory powers in respect of school admission and exclusion appeals panels, even though we believe that they should remain outside the proposed unified tribunal system for Wales.

In the absence of a judicial lead for these panels, it would seem appropriate for the President to be given the power to discipline and dismiss members of these panels.

8.162 Bob Chapman (a former member of the Committee for Administrative Justice and Tribunals Wales, and the Welsh Committee of the Administrative Justice and Tribunals Council) thought that the PWT should have this power, but that it should be exercised on a recommendation from the President of the Education Tribunal for Wales.

8.163 Keith Bush QC was the only respondent who disagreed, expressing the view that “the panels should remain under the control of local councils” and so the power to discipline and dismiss member should “remain in the hands” of the local authorities.

8.164 Nadia Alabere noted that in her experience “no one has ever been dismissed from a school appeal panel”.

#### Local authority responses

8.165 Although not expressing any definite view, Pembrokeshire County Council explained that “this could be a duplication of PSOW powers” and that it would need to be clear when the powers could be used. Cardiff Council also thought more information was required before forming an answer, such as what the structure of the tribunals would be, as well as lines of reporting and management.

8.166 Ceredigion Council and Denbighshire Council were in favour of the PWT exercising this power, with Denbighshire Council arguing that it would ensure consistency between the appointing and dismissing authorities.

#### Discussion

8.167 We recognise that complaints about the conduct of school admission appeal panels will be rare, and may even be unheard of. However, as the School Admission Appeal Code points out, panel members perform a judicial function. The absence of a procedure for handling complaints about their conduct seems anomalous in



comparison with the section 59 tribunals, and the position we recommend for the First-tier Tribunal for Wales.

8.168 Despite respondents' support for a role for the PWT in discipline, we do not think it would be practicable to give the PWT partial involvement in the work of the panels. We do however recommend that, for consistency with the position in the other devolved tribunals, the School Admissions Appeals Code should provide for complaints about the conduct of panel members. We do not make any substantive recommendations about what that provision should be, given our general approach to appeal panels (outlined in Chapter 1). We would expect however that it should consider the proper role of the PSOW.

**Recommendation 50.**

8.169 We recommend that the School Admissions Appeal Code should provide for complaints about the conduct of members of school admission appeal panels.





## Chapter 9: Tribunals administration

- 9.1 In Chapter 3 we recommended the creation of a First-tier Tribunal for Wales, which would encompass the existing section 59 tribunals and the Valuation Tribunal for Wales (“VTW”), and the creation in due course of an Appeal Tribunal for Wales. In this chapter we consider how the administrative support for those tribunals should be organised. Key questions include how independent that support should be from the Welsh Government, and the level of judicial involvement in it.
- 9.2 At present, the Welsh Tribunals Unit (“WTU”) provides administrative support for the section 59 tribunals. Its origins lie in the Administrative Justice and Tribunals Unit (“AJTU”), formed in 2010 to create a focal point for administrative justice within the Welsh Government. It does not however provide administrative support for the VTW. Instead, the legislation provides for the appointment of a Chief Executive, amongst other administrative matters.<sup>219</sup>
- 9.3 The WTU is part of the Welsh Government and is staffed by civil servants. The WTU works closely with the President of Welsh Tribunals (“PWT”) but without formal accountability. There is no statutory relationship between the PWT and the WTU. Nevertheless, there is a strong working relationship between them.
- 9.4 In Chapter 9 of the Consultation Paper, we highlighted the lack of structural independence of the WTU in its current form as part of the Welsh Government. In our provisional view this arrangement did not sufficiently establish the principle of judicial independence. We considered other models of tribunal administration adopted in other parts of the UK, namely Her Majesty’s Courts and Tribunals Service (“HMCTS”), which is an executive agency of the Ministry of Justice, and the Scottish Courts and Tribunals Service (“SCTS”), which is a non-ministerial department.
- 9.5 While we thought both models represented an improvement on the existing situation, we provisionally proposed that transition to being a non-ministerial department model would give the WTU a greater degree of independence. Having considered the question further during the consultation period and while analysing responses, we remain of the view that this is the right model for the future administration of the devolved tribunals in Wales. Given our recommendation in Chapter 3 that the VTW should become part of the unified tribunal, we envisage that its administration would also become part of a new Tribunals Service for Wales.

### THE COMPETING MODELS

- 9.6 There are broadly two models which have been adopted elsewhere in the UK for the administration of tribunals. These are the executive agency model (adopted by HMCTS) and the non-ministerial department model (adopted by the SCTS). We summarise here briefly the key features of both models, as well as a third possibility: the Welsh Government Sponsored Body (“WGSB”).

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<sup>219</sup> Valuation Tribunal for Wales Regulations SI 2010 No 713 (W 69), part 3.

- 9.7 While these are three possible models, it should be remembered that even among public bodies falling in the same category there is considerable variation in the way they operate. In particular the extent of their financial and operational independence from a sponsoring minister can vary quite considerably.
- 9.8 Some guidance on setting up new public bodies in Wales can be found in the document “Managing Welsh Public Money”. It is based partly on Managing Public Money (published by HM Treasury) but has been adapted to conform to the Government of Wales Act 2006 and the devolution settlement more generally.
- 9.9 The document explains that:
- There should be a clear perceived advantage in establishing a new organisation, such as separating implementation from policy making; demonstrating the integrity of independent assessment; establishing a specialist identity for a professional skill; or introducing a measure of commercial discipline. It is sensible to be sceptical about setting up a new public body, since it will often add to costs.
- 9.10 It also sets out some direction on when a particular model for a public body should be chosen, adding that “innovation often makes sense. The standard models are all capable of a good deal of customisation”.<sup>220</sup>

### The executive agency

- 9.11 Executive agencies are typically parts of government departments that have been separated off in order to focus on particular administrative functions. While they are usually led by a Chief Executive Officer, Ministers retain control of the direction of the agency and are able to take key decisions. In the case of Wales, *Managing Welsh Public Money* notes that executive agencies usually publish plans and resource accounts as part of Welsh Government’s annual accounts. The Chief Executive Officer is also the accounting officer for the agency, but is subject to the oversight of the Principal Accounting Officer for the Welsh Ministers (a role fulfilled by the Permanent Secretary to the Welsh Government).<sup>221</sup>
- 9.12 HMCTS is generally described as an executive agency, sponsored by the Ministry of Justice. Unlike other executive agencies, however, it operates on the basis of a partnership between the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals. It is governed by a framework agreement. That agreement provides for a Board, which is responsible for approving the allocation of the annual budget and approving the corporate governance framework. It is also responsible for overseeing the leadership and direction of HMCTS in “delivering the aim and

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<sup>220</sup> Welsh Government, *Managing Welsh Public Money* (2016), para 7.2.6. See <https://gov.wales/sites/default/files/publications/2018-10/managing-welsh-public-money.pdf>

<sup>221</sup> Welsh Government, *Managing Welsh Public Money* (2016), annex 7 See <https://gov.wales/sites/default/files/publications/2018-10/managing-welsh-public-money.pdf>

objectives set by the Lord Chancellor, Lord Chief Justice and Senior President of Tribunals”.<sup>222</sup>

9.13 The Board is made up of:

- (1) an independent non-executive Chair (appointed on the basis of a recommendation from a selection panel including a person nominated by the Permanent Secretary and a senior judge appointed by the Lord Chief Justice);
- (2) the Senior Presiding Judge for England and Wales, and two other judicial representatives (one nominated by the Lord Chief Justice and the other by the Senior President of Tribunals);
- (3) the Chief Executive (appointed with advice from a selection panel including a senior judge nominated by the Lord Chief Justice);
- (4) three Executive Directors (nominated by the Chief Executive); and
- (5) three Non-Executive Directors (appointments based on a recommendation from a panel including the Chair, the Chief Executive, and a senior judge nominated by the Lord Chief Justice).

9.14 The Chief Executive is responsible for the efficient and cost-effective management of HMCTS. The current holder of the office is Susan Acland-Hood. She is also the Accounting Officer, meaning that she is accountable to the Ministry of Justice’s Permanent Secretary and Principal Accounting Officer and, ultimately, to Parliament.

9.15 HMCTS’s budget is allocated from the wider Ministry of Justice budget by the Lord Chancellor. The framework agreement provides that the Lord Chancellor “will endeavour to reach agreement with the Lord Chief Justice in relation to the allocation”.<sup>223</sup>

### The non-ministerial department

9.16 *Managing Welsh Public Money* summarises the features of the non-ministerial department as follows:

Non-ministerial departments do not answer directly to Ministers. They have their own Accounting Officers, their own budget, publish their own annual reports and are staffed by civil servants. Ministers however, maintain a watching brief over each non-ministerial department so that they can answer for the non-ministerial department’s business, and if necessary, take action to, eg adjust the legislation under which they operate. A framework document should define such a relationship.

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<sup>222</sup> Her Majesty’s Courts and Tribunals Service (“HMCTS”), *Annual Report and Accounts 2020-21* (July 2021), p 32. See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1002585/HMCTS\\_Annual\\_Report\\_and\\_Accounts\\_2020-21.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002585/HMCTS_Annual_Report_and_Accounts_2020-21.pdf)

<sup>223</sup> HMCTS, *Framework document* (July 2014) para 7.2. See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384922/hmcts-framework-document-2014.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf)

This limited degree of parliamentary accountability must be carefully justified. It can be suitable for a public sector organisation with professional duties where Ministerial input would be inappropriate or detrimental to its integrity. The need for independence however, is rarely enough to justify non-ministerial department status. It is possible to craft arrangements for Welsh Government Sponsored Bodies which confer robust independence. Where this is possible it provides better parliamentary accountability and so is to be preferred.

### The Scottish Courts and Tribunals Service

- 9.17 The Scottish Courts and Tribunals Service is a non-ministerial department established in April 2015 by the Judiciary and Courts (Scotland) Act 2008. Its statutory purpose is to provide property, services, officers and other staff required for the purposes of the Scottish courts and tribunals and their members.<sup>224</sup>
- 9.18 As a non-ministerial department, the SCTS has a separate budget from the Justice budget. The Board is responsible for preparing the budget, which is approved by the Scottish Parliament.
- 9.19 Scottish Ministers are not accountable to the Scottish Parliament for the operation of the SCTS. Instead the principal route of accountability is through the Chief Executive Officer. The Scottish Parliament may require before it the attendance of any non-judicial member or officer of the SCTS, but cannot require the attendance of a judicial member; this is prevented by section 23 of the Scotland Act 1998. The relevant framework document does however provide that the Lord President will consider any invitations, and after consulting with judicial members and the relevant Committee, decide whether it would be appropriate for a judicial member to attend. Judicial members are not however expected to answer questions about the exercise of their judicial functions.<sup>225</sup>
- 9.20 The SCTS is marked by a greater degree of judicial control than HMCTS; a majority of the board members are judges. The judicial members are the Lord President, the Lord Justice Clerk, the president of Scottish Tribunals, a sheriff principal, two sheriffs or summary sheriffs, a justice of the peace and one Chamber President from the First-tier Tribunal for Scotland. The non-judicial members comprise an advocate, a solicitor (both practising in Scotland), the Chief Executive of SCTS and three other individuals.
- 9.21 The move towards greater judicial involvement in the running of courts and tribunals was commented on by the Lord President in his address at the beginning of the 2009 legal year. Lord Hamilton saw this move as challenging, but constitutionally necessary:

The judicial majority will ensure that the voice of those who have the daily task of delivering justice can be heard and have influence. The tasks ahead will not be easy. Individuals whose training is in the law and in its application will require to obtain mastery in new fields - in administration and particularly in financial

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<sup>224</sup> Judiciary and Courts (Scotland) Act 2008, s 60.

<sup>225</sup> Scottish Courts and Tribunals Service, *Framework document* (April 2015), paras 4.1 to 4.4. See <https://www.scotcourts.gov.uk/docs/default-source/scs---taking-action/scts-framework-document---april-201549d5cea6898069d2b500ff0000d74aa7.pdf?sfvrsn=2>

administration. They will require to do so in what are likely to be hard economic times. Difficult and, in some cases, unpopular decisions will have to be taken. But the fact that judges are instrumental in the taking of these decisions means that they accept responsibility for the way the courts are managed. With that responsibility comes a recognition of the importance of the judiciary as the third arm of government.<sup>226</sup>

### The Welsh Revenue Authority

9.22 While *Managing Welsh Public Money* warns that non-ministerial departments should be set up infrequently, we note that this model was adopted for the Welsh Revenue Authority (established in 2015). Its framework document gives some of the background to the body, explaining that:

With the devolution of tax powers to Wales, the WRA was devised to follow international best practice as a non-Ministerial department staffed by civil servants, but where Welsh Ministers are not involved in the day-to-day administration and can take no part in decisions about individual taxpayers' affairs.<sup>227</sup>

### Welsh government sponsored bodies

9.23 A third possible model, not discussed in our Consultation Paper, is the Welsh government sponsored body (or "WGSB"). Outside Wales these are usually referred to as non-departmental public bodies.

9.24 These can take a number of legal forms (including corporate bodies and charities). *Managing Welsh Public Money* notes that they "show considerable variety of structures and working methods, with scope for innovation and customisation". Their employees are not usually civil servants. These bodies vary in size, varying from Natural Resources Wales (employing 1,972 staff members),<sup>228</sup> to Qualifications Wales (employing 81 staff members).<sup>229</sup>

9.25 They are usually established in legislation. In terms of independence from the Welsh Government they fall somewhere in-between an executive agency and a non-ministerial department. They will have a sponsor branch in Welsh Government, and so are not accountable directly to Parliament. *Managing Welsh Public Money* explains that:

In practice WGSBs operate with some independence and are not under day-to-day Ministerial control. Nevertheless, the Welsh Ministers are ultimately accountable to the National Assembly for Wales for WGSBs' efficiency and effectiveness. This is

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<sup>226</sup> "Address on opening of the legal year", (2009) 32, *Scots Law Times*, 193 to 195.

<sup>227</sup> Welsh Revenue Authority, *Framework Document* (March 2018) para 1.4. See <https://gov.wales/sites/default/files/publications/2018-08/agreement-between-the-welsh-government-and-welsh-revenue-authority.pdf>

<sup>228</sup> Wales Fiscal Analysis, Cardiff University, *The Public Sector in Wales* (June 2019) p 26. See [https://www.cardiff.ac.uk/\\_data/assets/pdf\\_file/0019/1517041/public\\_sector\\_june\\_final2.pdf](https://www.cardiff.ac.uk/_data/assets/pdf_file/0019/1517041/public_sector_june_final2.pdf)

<sup>229</sup> Qualifications Wales, *Annual Report and Accounts 2019-2020* (2020), p 51, See <https://www.qualificationswales.org/media/6473/qualifications-wales-annual-accounts-2019-2020-final-eng-260820.pdf>

because the Welsh Ministers: are responsible for WGSBs' founding legislation; have influence over WGSBs' strategic direction; (usually) appoint their boards; and have the ultimate sanction of winding up unsatisfactory WGSBs.<sup>230</sup>

- 9.26 The VTW is an example of a WGSB,<sup>231</sup> sponsored by the Local Government Finance Policy Division.

## RESPONSES TO THE CONSULTATION

- 9.27 Our provisional view expressed in the Consultation Paper was that the non-ministerial department model was the best one to adopt for future tribunals administration. We thought both the executive agency and non-ministerial department options would represent improvements on existing arrangements for the WTU, which is not structurally independent of the Welsh Government. We provisionally considered, however, that the model which offered the greater independence, the non-ministerial department, was preferable. At Consultation Question 65 we therefore provisionally proposed that the WTU should be established as a non-ministerial department. Twenty-three respondents answered this question, of whom a majority of 21 agreed with the provisional proposal and two offered other answers.

- 9.28 Nine responses supported the proposal specifically on the grounds that it would increase independence, impartiality or separation from the Welsh Government.

- 9.29 The Governing Council of the VTW explained that:

... the proposal would appear to strengthen the independence of the Welsh Tribunals Unit and distance it from Welsh Government. This organisational separation is a necessary component in establishing a truly independent tribunal system for Wales in the eyes of its users. The organisation as a whole, from a judicial and administrative standpoint, would be much better placed in making its claim that it is not under the influence of any other organisation.

- 9.30 This may reflect the experience of the VTW, which is responsible for its own administration.

### Non-ministerial department or executive agency?

- 9.31 No respondents thought that an executive agency would be a more appropriate model for a reformed WTU. The Wales and Chester Circuit explained that it is, in their view, "important that the WTU should enjoy similar status to the SCTS model in Scotland, as has already been recommended by the Commission on Justice in Wales",<sup>232</sup> while the Law Society thought it would "ensure an appropriate degree of independence from Welsh Government".

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<sup>230</sup> Welsh Government, *Managing Welsh Public Money* (January 2016) para 7.6.5. See <https://gov.wales/sites/default/files/publications/2018-10/managing-welsh-public-money.pdf>

<sup>231</sup> Valuation Tribunal for Wales, *Framework Document*, See [https://www.valuationtribunal.wales/fileadmin/resources/docs/publications/en/Framework\\_Document.pdf](https://www.valuationtribunal.wales/fileadmin/resources/docs/publications/en/Framework_Document.pdf)

<sup>232</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) para 6.59.1. "The Welsh Tribunals Unit should have structural independence which it currently lacks, and be placed under judicial control, similar to the way in which the Scottish Tribunals are arranged".



- 9.32 Dr Sarah Nason and Dr Huw Pritchard expressed their support on the additional ground that the proposal would formalise the relationship between the WTU and the PWT.

We agree that the non-ministerial department model would provide the appropriate level of independence and impartiality from the Welsh Government. We also welcome a formalised role for the President of Welsh Tribunals as part of a governing structure for the WTU.

- 9.33 They also referred to one of their previous publications on the matter, referred to in the Consultation Paper and quoted below:

If the WTU is reformed as an executive agency this may well then be short-lived, with the Justice Commission (and the President of Welsh Tribunals who was also a Commissioner) now openly favouring an independent tribunals service chaired by the President (based on the Scottish model). This would be desirable not only for the immediate benefits, but also in anticipation of a longer-term transfer of additional justice functions to Wales.<sup>233</sup>

- 9.34 In the PWT's own response to this question, he reiterated his view that the non-ministerial department model is a "more satisfactory basis for the Unit being independent than the creation of an executive agency".<sup>234</sup>
- 9.35 Huw Williams, Chief Legal Adviser to the Senedd, responding in his personal capacity, expressed the view that not only would a non-ministerial department model ensure the "most appropriate degree of separation" but would also establish a "future structure for the administration of the Welsh Tribunals".
- 9.36 Richard Payne, the President of the Residential Property Tribunal for Wales ("RPTW"), agreed with the provisional proposal, and further suggested that "there should be a physically separate building outside of Welsh government offices in Cathays Park to house the WTU".

### Welsh language obligations

- 9.37 One respondent, who wished to remain anonymous, outlined the potential consequences of becoming a non-ministerial department for the Unit's Welsh language obligations.

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<sup>233</sup> S Nason and H Pritchard, "Administrative Justice and the Legacy of Executive Devolution: Establishing a Tribunals System for Wales" (2020) 26 *Australian Journal of Administrative Law* 240

<sup>234</sup> For further discussion on the President of Welsh Tribunals' views on this point, see para 24 of the oral evidence session of Sir Wyn Williams and Rhian Davies Rees to the Legislation, Justice and Constitution Committee on 13 July 2020 <https://record.assembly.wales/Committee/6414>



- 9.38 At present, the Agricultural Land Tribunal for Wales (“ALTW”), Mental Health Review Tribunal for Wales (“MHRTW”), RPTW and Special Educational Needs Tribunal for Wales (“SENTW”) fall under the Welsh Language Standards Regulations (No 4).<sup>235</sup> The explanatory note to those regulations explains that:

The Regulations do not authorise the Commissioner to require [the ALTW, MHRTW, RPTW and SENTW] to comply with the operational standards in Schedule 3, and hereby record keeping standards relating to operational standards, and supplementary standards which relate to operational standards. This is due to the fact that the organisations are administered by Welsh Government staff and those staff are covered by the operational standards that the Welsh Ministers are required to comply with.<sup>236</sup>

- 9.39 If tribunals administration were to be reformed so that it was the responsibility of a non-ministerial department, then that department would not be subject to the operational standards required of the Welsh Ministers. Instead, steps would need to be taken to ensure that the non-ministerial department was subject to appropriate Welsh language standards.

## DISCUSSION

### Independence and accountability

- 9.40 The principal attraction of the non-ministerial department model is its demonstrable independence from government. Typically, ministers do not become involved in the day-to-day administration of non-ministerial departments. They may or may not be involved in setting the high-level direction of the organisation; in the case of the Welsh Revenue Authority, for example, section 15 of the Tax Collection and Management (Wales) Act 2016 provides that the Welsh Ministers may give directions of a “general nature” to the WRA, with which it must comply. The operational independence of non-ministerial departments is usually matched by a measure of financial independence; budgets for non-ministerial departments are typically voted directly by the relevant Parliament.
- 9.41 This more distant relationship with Government means that non-ministerial departments are usually accountable directly to Parliament. This typically takes the form of laying documentation and appearing in front of committees; either those that are dedicated to scrutiny of public finances, or those with an interest in the work of the body in question. In the case of the WRA, its corporate plan, annual report, certified accounts and tax statement must be laid before the Senedd. The Chief Executive of the WRA, in his or her capacity as accounting officer, also owes responsibilities to the Senedd.<sup>237</sup> In the case of the SCTS, its annual report and accounts and corporate plan must be laid before the Scottish Parliament.<sup>238</sup>

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<sup>235</sup> Welsh Language Standards (No 4) Regulations SI 2016 No 405 (W 125).

<sup>236</sup> Explanatory note to the Welsh Language Standards (No 4) Regulations SI 2016 No 405 (W 125) p 3 <https://senedd.wales/media/l3xgbnm/sub-ld10586-em-e.pdf>

<sup>237</sup> Tax Collection and Management (Wales) Act 2016, ss 27(4), 28(1), 31(2), and 33(3)(d).

<sup>238</sup> Judiciary and Courts (Scotland) Act 2008, ss 18 and 66.

- 9.42 In our view the non-ministerial department model is preferable to both the executive agency model and the WGSB model from the perspectives of independence and accountability. Though it is possible, as in the case of HMCTS, for an executive agency to be set up with functional independence, it nevertheless remains formally part of a ministerial department. In the case of a non-ministerial department, the separation is more complete. A WGSB, on the other hand, is constituted as a distinct body but the notion of government sponsorship implies government influence.
- 9.43 While the relationships between WGSBs and Welsh Ministers vary, typically the Welsh Ministers have influence over a WGSB's strategic direction. That includes assessing financial performance against plans and whether targets have been achieved.<sup>239</sup> The Welsh Ministers remain accountable to the Senedd for a WGSB's performance.<sup>240</sup>
- 9.44 An additional practical issue is that employees of WGSBs are not usually civil servants. The WTU in its current form is staffed by civil servants, and it is important that the expertise currently contained in the WTU is carried over to the future tribunal administration body. Establishing a body whose members of staff were not civil servants could hamper this if existing staff wish to remain within the civil service, with its potential for career development.
- 9.45 As regards accountability, we consider it preferable that the tribunals service be directly accountable to the Senedd. Both the Legislation, Justice and Constitution Committee and Public Accounts and Public Administration Committee might be expected to scrutinise a new tribunals service. We envisage that provision for accountability to the Senedd would be made in respect of the new body, whatever its form.

### Extent of judicial involvement

- 9.46 One key question is to what extent judges should be involved in tribunals administration. As explained above, the level of formal involvement at present is low. The administration of the section 59 tribunals, is conducted by the Welsh Government's Welsh Tribunals Unit, overlaid with a statutory responsibility of the PWT for tribunal members' training, guidance and welfare.<sup>241</sup>
- 9.47 Any of the models would offer greater scope for judicial involvement than exists at present. At a lower level of involvement, an executive agency could be charged with implementing objectives agreed between the PWT and the Welsh Ministers. This would be similar to the partnership approach adopted by HMCTS. Greater judicial involvement could be achieved by having judicial members on the Board of a new body. Again, this could range from having one or two judicial members, through to having a majority of judicial members. The composition of the Boards of HMCTS (an executive agency) and the SCTS (a non-ministerial department) has been described at paragraphs 9.13 and 9.20 above. We do not regard it as a matter for us to make

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<sup>239</sup> See, for example, the Valuation Tribunal for Wales Framework Document [https://www.valuationtribunal.wales/fileadmin/resources/docs/publications/en/Framework\\_Document.pdf](https://www.valuationtribunal.wales/fileadmin/resources/docs/publications/en/Framework_Document.pdf), para 2.2.8.

<sup>240</sup> See para 9.25 above.

<sup>241</sup> Wales Act 2017, s 60(5)(a).

detailed recommendations on the composition of a new Board, although we do set out some high-level principles below.

- 9.48 In either case, the Board would also have to include non-judicial members with financial and other expertise. We expect that any such appointments would be made in accordance with the Governance Code on Public Appointments.<sup>242</sup>

## Size

- 9.49 One question which was raised during the consultation period was whether a Tribunals Service for Wales would be sufficiently large to justify the creation of a non-ministerial department. The Tribunals Service for Wales would certainly be small compared to other such departments. However, we note that another non-ministerial department of the Welsh Government, the WRA, had an average of 69 staff in the last financial year, while Ministers' original estimate was between 25 and 32 members of staff.<sup>243</sup> This latter figure is similar to the size of the WTU, which as at 15 November 2021, had 34 members of staff (the equivalent of 31.09 full time employees).
- 9.50 It is also not dissimilar in size to the Supreme Court, another non-ministerial department. Excluding justices and judicial assistants, there were 41 full-time equivalent persons employed at the Supreme Court in 2020-2021.<sup>244</sup>

## Conclusion

- 9.51 Given the strong support of respondents, and the reasons given above, we are persuaded that the non-ministerial department model is the one that should be adopted for the future administration of the system of devolved tribunals in Wales.
- 9.52 We do not make any detailed recommendations as to the composition of the board of such a non-ministerial department, its governance or staffing arrangements or the ways in which it should interact with the Senedd. We did not consult at this level of detail, which might in any case have risked straying into areas that are properly for decision by the Welsh Government. Following the discussion above we do however believe that there are some general principles which should be used to guide the design and establishment of the tribunals service. These are as follows.
- (1) The tribunals service should be operationally independent from the Welsh Government.

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<sup>242</sup> Cabinet Office, *Governance Code on Public Appointments* (December 2016) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/578498/governance\\_code\\_on\\_public\\_appointments\\_16\\_12\\_2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578498/governance_code_on_public_appointments_16_12_2016.pdf)

<sup>243</sup> Welsh Revenue Authority, *Annual Report and Accounts 2020 to 2021*, (July 2021) <https://gov.wales/welsh-revenue-authority-annual-report-and-accounts-2020-2021-html>, and Letter from Minister for Finance and Government Business (November 2015) FIN(4)-26-15 P3 <https://senedd.assembly.wales/documents/s46133/FIN4-26-15%20P3%20Letter%20from%20Minister%20for%20Finance%20and%20Government%20Business%20to%20Chair%20-%204%20November%202015.pdf>

<sup>244</sup> Supreme Court, *Annual Report and Accounts 2020-21* (June 2021) p 117. See <https://www.supremecourt.uk/docs/annual-report-2020-21.pdf>

- (2) There should be a significant level of judicial involvement in the strategic direction and operation of the service. This should include the involvement of the President of Welsh Tribunals.
- (3) The Board of the tribunals service should include a member (or members) who are representative of users of the tribunals. This is the principle that underlies the requirement in Scotland for the SCTS board to include an advocate and a solicitor. We do not think it would be helpful to transpose this requirement directly into this context, given that the SCTS administers a much larger system, which includes Scottish courts. We believe however that the general principle is applicable and that the Board would benefit from the expertise of tribunal users.
- (4) The tribunals service should be staffed by civil servants.

**Recommendation 51.**

9.53 We recommend the establishment of a Tribunals Service for Wales as a non-ministerial department.



## Chapter 10: Judicial independence

- 10.1 The need to protect judicial independence was explicitly included in the Terms of Reference of this project, and has heavily influenced our thinking throughout this report. It is central to our recommendations on appointments, and on discipline and complaints. Protecting judicial independence is also the main reason why, in Chapter 9, we recommend the creation of a non-ministerial department to administer the tribunals. Chapter 10 of the Consultation Paper focused specifically on whether there was more that could be done to protect the independence of the devolved tribunals' judiciary.
- 10.2 Tribunals were initially established by Government departments as and when the need arose, and were often administered within those same Government departments. As early as 1957, the Franks Committee highlighted that having a department administering the appeal against its own decision raised issues regarding the perception of independence.<sup>245</sup> Since then, steps have been taken to increase the structural and judicial independence of the tribunals.
- 10.3 In 2017 the Counsel General, Mick Antoniw MS, highlighted some of the mechanisms already in place to uphold the independence of the devolved tribunals. These include the involvement of the Judicial Appointments Commission and Judicial Conduct Investigations Office in selection of members and handling of complaints, and the office of the President of Welsh Tribunals.<sup>246</sup>
- 10.4 Our Consultation Paper provisionally proposed two further mechanisms to protect the independence of the devolved tribunals:
- (1) introducing a statutory duty on the Welsh Ministers and others responsible for the administration of justice in Wales to uphold the independence of the devolved tribunals; and
  - (2) requiring the judicial leads, legal members and other members of the devolved tribunals to take the judicial oath.

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<sup>245</sup> Report of the Committee on Administrative Tribunals and Enquiries (the Franks Report) (1957) Cmnd 218.

<sup>246</sup> Mick Antoniw MS, Written Cabinet Statement, "Independence of the Welsh Tribunals" (March 2017) See <https://gov.wales/written-statement-independence-welsh-tribunals>

## **A STATUTORY DUTY TO UPHOLD THE INDEPENDENCE OF THE DEVOLVED TRIBUNALS**

10.5 The Constitutional Reform Act 2005 (“the 2005 Act”) provides a guarantee of continued judicial independence at UK level:

The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.<sup>247</sup>

10.6 The 2005 Act then goes on to specify that “The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary”.<sup>248</sup>

10.7 In addition to the general duty imposed on all UK Ministers, the Lord Chancellor must also have regard to:

- (1) the need to defend that independence;
- (2) the need for the judiciary to have the support necessary to enable them to exercise their functions;
- (3) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.<sup>249</sup>

10.8 The additional duties of the Lord Chancellor reflect a broader aim within the 2005 Act to uphold the separation of powers between the executive and judiciary. Examples of this include the sharing of duties between the Lord Chancellor and the Lord Chief Justice, and the replacement of the Appellate Committee of the House of Lords by the Supreme Court.

### **The extension of the guarantee of independence to members of the tribunal judiciary**

10.9 Following the enactment of the Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”), the duty to protect independence was extended to include the members of tribunals designated as “office-holders” under Schedule 14 to the 2005 Act.<sup>250</sup>

10.10 Schedule 14 to the 2005 Act includes the following members of the devolved tribunals:

- (1) the President of the Mental Health Review Tribunal for Wales and members of that tribunal;
- (2) the President of the Education Tribunal for Wales, and members of the legal chair panel of that tribunal;

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<sup>247</sup> Constitutional Reform Act 2005, s 3 (1).

<sup>248</sup> Constitutional Reform Act 2005, s 3 (5).

<sup>249</sup> Constitutional Reform Act 2005, s 3 (6).

<sup>250</sup> Constitutional Reform Act 2005, sch 14, part 3.

- (3) some members of rent assessment committees for Wales (others are appointed by the Welsh Ministers); and
- (4) the Chairman and members of the Agricultural Land Tribunal for Wales.

10.11 As a result, the guarantee of independence does not apply to all members of the devolved tribunals.

### **The duty of the executive**

10.12 The duty imposed by the 2005 Act does not apply explicitly to the Welsh Ministers. In our view, there is a need to ensure that Welsh Ministers, and others responsible for the administration of justice, are subject to a similar duty to that of their UK counterparts to protect the independence of the tribunals. Our recommendation that the Welsh Ministers should have greater powers in relation to the appointment and discipline of the tribunals judiciary makes the need for such a duty greater.

10.13 The Welsh Ministers themselves have recognised the need for such a provision. In drafting the appointment regulations for the Welsh Language Tribunal in 2013, the Welsh Ministers responded to concerns raised by the judiciary surrounding the need to strengthen judicial independence by including the following provision:

In appointing the members of the Tribunal the Welsh Ministers must have regard to the need to uphold the principles of the –

- (1) independence of the Tribunal; and
- (2) the rule of law.<sup>251</sup>

### **Consultation responses**

10.14 In our Consultation Paper, we provisionally proposed that the Welsh Ministers and others responsible for the administration of justice in Wales should be subject to a statutory duty to uphold the independence of the devolved tribunals.

10.15 Twenty-five respondents answered this question, all of whom agreed with the provisional proposal. The Bar Council, Wales and Chester Circuit, Sir Wyn Williams and the Adjudication Panel for Wales (“APW”) all expressed agreement with the reasoning set out in Chapter 10 of the Consultation Paper.

### **Parity with the reserved tribunals**

10.16 Keith Bush QC, at the Wales Governance Centre of Cardiff University, and the Governing Council of the VTW both agreed with the provisional proposal as it would bring the devolved tribunals in line with the existing duty under the 2005 Act.

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<sup>251</sup> The Welsh Language Tribunal (Appointment) Regulations 2013, reg 3.



10.17 Dr Sarah Nason (senior lecturer at Bangor University) and Dr Huw Pritchard (lecturer in law at Cardiff University) also agreed with our reasoning, adding that:

as well as constitutional propriety it is a necessary step in ensuring consistency between different jurisdictions and so is consistent with the development of a tribunal system in Wales.

10.18 The Bar Council and Wales and Chester Circuit supported the proposal on the grounds that it would establish parity with the reserved tribunals. It would also be consistent with the Senedd's previous approach in relation to the Welsh Language Tribunal ("WLT"), as demonstrated in the Welsh Language Tribunal (Appointment) Regulations 2013, discussed above at paragraph 10.13.

10.19 For the reasons outlined in our Consultation Paper, and the unanimity expressed by the responses, we are persuaded that the Tribunals Bill should impose a statutory duty on the Welsh Ministers and others responsible for the administration of justice in Wales to uphold the independence of the devolved tribunals.

## JUDICIAL OATH

10.20 Historically in the UK, judges are required to take the judicial oath, as a sign of commitment to upholding judicial independence. The oath is formed of two separate oaths; the oath of allegiance and the judicial oath. The oath of allegiance commits the person taking it to:

be faithful and bear allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors, according to law.

10.21 A version of the oath of allegiance is also sworn by those becoming British citizens, Church of England clergy and parliamentarians.<sup>252</sup> Only judges take the judicial oath, which reads:

I, \_\_\_\_\_, do swear by Almighty God that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of \_\_\_\_\_, and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.<sup>253</sup>

10.22 There are also secular versions of the judicial oath and oath of allegiance known as a judicial affirmation and affirmation of allegiance respectively.<sup>254</sup> Other forms of the oaths include oaths for members of the Hindu, Jewish, Muslim and Sikh faiths.

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<sup>252</sup> At paragraph 10.20 of the Consultation Paper, we erroneously referred to "Anglican clergy" in the list of those who take the oath of allegiance, as opposed to clergy of the Church of England. We are grateful to Professor Thomas Watkin for drawing our attention to this error.

<sup>253</sup> Both oaths appear in their original forms in the Promissory Oaths Act 1868.

<sup>254</sup> Both of which omit "I \_\_\_\_\_ do swear by Almighty God" and are replaced by "I \_\_\_ do solemnly sincerely and truly declare and affirm".

- 10.23 The President of Welsh Tribunals is required to take the judicial oath before the Lord Chief Justice.<sup>255</sup> There is no statutory requirement for the members (legal or otherwise) nor judicial leads of the devolved tribunals to swear the oath.
- 10.24 The Guide to Judicial Conduct explains that by taking the oath “the judge acknowledges that he or she is primarily accountable to the law which he or she must administer”.<sup>256</sup> The guide recognises that this is a symbol, noting that “some fee paid judges do not take the judicial oath, but they too are primarily accountable to the law which they administer”. This includes the members and judicial leads of the devolved tribunals.<sup>257</sup>
- 10.25 We regard it as important that members of the devolved tribunals should affirm publicly that their duty lies not to the executive or the State but to the rule of law and to the people. In our Consultation Paper, we therefore provisionally proposed that judicial leads and legal and other members of devolved tribunals should be required to take the judicial oath. Twenty-three respondents answered this question, of whom 17 agreed, four disagreed and two marked their answers as “other”.
- 10.26 Sir Wyn Williams agreed with the provisional proposal, expressing the view that:
- This requirement will enhance the confidence of the public in the decision-making process. It will also recognise without any room for doubt that tribunals are engaged in judicial decision making.
- 10.27 Although they are not legally required to do so at present, the APW explained in its response that “members of the APW have all taken the oath and specifically referred to it in the decisions when challenged about the independence of its members”.

### Parity with the reserved tribunals

- 10.28 The Mental Health Review Tribunal for Wales (“MHRTW”) expressed its support as the current situation “puts us (the MHRTW) at variance with the First-tier Tribunal (Mental Health)”. The response explained the effect this anomaly has on cross-ticketing arrangements:
- This means that only members who have taken the oath in connection with other judicial posts will be able to benefit from the proposed cross-ticketing arrangements, as anyone who sits in the First-tier Tribunal (Mental Health) is required to have taken the oath.
- 10.29 The Wales and Chester Circuit, the Bar Council, Dr Sarah Nason and Dr Huw Pritchard all agreed with the provisional proposal as it would ensure parity and consistency with the reserved tribunals. Dr Sarah Nason and Dr Huw Pritchard added

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<sup>255</sup> Wales Act 2017, sch 5 para 14(1)(a).

<sup>256</sup> Courts and Tribunals Judiciary, *Guide to judicial conduct* (March 2018) p 8 See <https://www.judiciary.uk/wp-content/uploads/2016/07/judicial-conduct-v2018-final-2.pdf>.

<sup>257</sup> Courts and Tribunals Judiciary, *Guide to judicial conduct* (March 2018) p 8 See <https://www.judiciary.uk/wp-content/uploads/2016/07/judicial-conduct-v2018-final-2.pdf>.

that this is relevant “where members are cross-ticketed and are required to undertake an oath for one tribunal but not the other”.

## Reservations

10.30 Four respondents took issue with swearing allegiance to the monarch. One respondent who did not wish to be named explained that:

... there is some benefit to judicial leads and legal and other members of devolved tribunals taking a form of judicial oath or affirmation that relates to judicial independence, fairness and impartiality, for example the element of the judicial oath that states: “I will do right to all manner of people... without fear or favour, affection or ill will.” I do not agree that members or leads should be required to take the oath of allegiance, or to swear the part of the judicial oath that promises service to the Queen.

10.31 The respondent gave the following reasons:

The legal requirement to take the oath of allegiance can only serve to exclude. It is likely to result in some experienced and skilled potential legal and non-legal members being excluded from taking up a role in a devolved tribunal, and may even lead to the loss of some existing members. There is a risk that this impact may fall disproportionately on those from less privileged backgrounds, and/or people from black and ethnic minority backgrounds.

...

If the intention of this recommendation is to improve or emphasise impartiality, then this could be served equally well, or better, by an amended version of the judicial oath which makes no reference to the monarchy, or by the inclusion of an overriding principle that underlines and focuses attention on this point.

10.32 Dr Angela Ash, a lay member of the Residential Property Tribunal for Wales, told us that she would personally struggle to swear an oath to the monarch, whilst Roger Handy, a chair of the Valuation Tribunal for Wales, acknowledged that:

existing and potential members, whilst happy to discharge what they consider to be their civic duty, may have reservations about “serving ... Queen” and consequently feel unable to accept or continue with tribunal membership.

10.33 Keith Bush QC recalled his experience as former judicial lead of the WLT, describing an instance in which the suggestion of taking the oath was made some years ago.

There is currently no duty on members of the Welsh Language Tribunal to take the judicial oath / make the judicial declaration. When a suggestion was made, a few years ago, that they should do so in the interests of consistency with members of those tribunals where taking the judicial oath is required, the members had a discussion. Some strongly felt that the wording of the current oath, which includes an oath of allegiance to the Crown, was feudal and incompatible with the ethos of a modern tribunal that is part of a democratic society. As there was no legal duty on members to take the oath (and the tribunal had been operating for several years before the suggestion was made), it was decided not to ask those members who

had not already taken the oath (for other judicial offices) to do so in relation to the Tribunal.

- 10.34 Both the respondent who wished to remain anonymous and Keith Bush QC were of the view that an amended oath making no reference to the monarch would be preferable. Keith Bush QC suggested the wording of section 19 of the Justice (Northern Ireland) Act 2002, namely:

“I..... do swear that I will well and faithfully serve in the office of..... and that I will do right to all manner of people without fear or favour, affection or ill-will according to the laws and usages of this realm.”

## Discussion

- 10.35 These responses have led us to consider the position in the other devolved administrations. We summarise those positions below.

### Northern Ireland

- 10.36 Paragraph 1(i) of the Belfast Agreement declares that the British and Irish Governments will:

recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland.<sup>258</sup>

- 10.37 Against the background of the Belfast Agreement, a review of the criminal justice system in Northern Ireland was commissioned, publishing its recommendations in March 2000 (“the Review”).<sup>259</sup>

- 10.38 Paragraph 6.44 of the Review recognised the need to increase the diversity of the Northern Ireland judiciary to better reflect the makeup of its society. It outlined what it described as “a strategy for addressing any ‘blockages’ in the way of potential applicants and removing perceived ‘chill factors’”.<sup>260</sup>

- 10.39 The public consultation preceding the publication of the Review identified oaths requiring allegiance to Her Majesty the Queen, Royal Crests in courthouses and the use of the term “Royal” as potential “blockages” which could prevent Nationalists from seeking judicial office.<sup>261</sup>

- 10.40 The Review drew the following conclusion:

A substantial element of the community in Northern Ireland aspires to the unification of Ireland. That they should do so has no bearing on their suitability or otherwise for judicial office and we can envisage circumstances where members of the Nationalist

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<sup>258</sup> The Belfast Agreement 1998, para 1(i).

<sup>259</sup> Review of the Criminal Justice System in Northern Ireland (March 2000) See [https://webarchive.nationalarchives.gov.uk/200102040608/http://www.nio.gov.uk:80/cjr/main\\_report.htm](https://webarchive.nationalarchives.gov.uk/200102040608/http://www.nio.gov.uk:80/cjr/main_report.htm)

<sup>260</sup> As above, para 6.44.

<sup>261</sup> As above, para 6.44.

community would feel uncomfortable with being required to swear allegiance to or to serve Her Majesty the Queen. We also note the recognition in the preamble to the Belfast Agreement of the equal legitimacy of differing political aspirations.<sup>262</sup>

10.41 As a result, the review recommended that both oaths (the oath of allegiance and judicial oath) were to be replaced with a single politically neutral judicial oath in modern language with no reference to Her Majesty the Queen.

10.42 The judicial oath in Northern Ireland contains the following:

“I \_\_\_\_\_ do swear that I will well and faithfully serve in the office of \_\_\_\_\_ and that I will do right to all manner of people without fear or favour, affection or ill-will according to the laws and usages of this realm”.<sup>263</sup>

## Scotland

10.43 Members of the Scottish judiciary (including members of the Scottish tribunals) take the same oath as those within the England and Wales judiciary.<sup>264</sup> We are unaware of any examples of Scottish judges refusing to take the oath of allegiance on political grounds.

## Conclusion

10.44 We are encouraged that all but two of the respondents who answered this question agreed with the principle of affirming a commitment to judicial independence, impartiality and duty. We also acknowledge the concerns that some members of the devolved tribunals may have with pledging allegiance to the monarch, as illustrated by the responses discussed at paragraphs 10.30 to 10.34 above.

10.45 We are persuaded that it is important for all the judicial leads and members of the devolved tribunals to take an oath. We are also persuaded that, as in the case of Northern Ireland,<sup>265</sup> all judicial leads and members of the devolved tribunals should take the same oath, save for variance between the oath and affirmation, and various religious versions of the oath.

10.46 There are advantages to adopting the oaths as they appear in the Promissory Oaths Act 1868.<sup>266</sup> This would ensure parity with members of the UK tribunals, as well as parity with all other judicial offices to which Welsh candidates might be appointed. It would mean that the President of Welsh Tribunals would take the same oath as members of those tribunals. It could also facilitate cross-ticketing.

10.47 On the other hand, it would clearly be unfortunate if potential tribunal members who are otherwise well qualified for the role feel they have to turn it down because they are uncomfortable with the content of the oath. A similar oath to that adopted in Northern

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<sup>262</sup> Review of the Criminal Justice System in Northern Ireland (March 2000) para 6.125 See [https://webarchive.nationalarchives.gov.uk/200102040608/http://www.nio.gov.uk:80/cjr/main\\_report.htm](https://webarchive.nationalarchives.gov.uk/200102040608/http://www.nio.gov.uk:80/cjr/main_report.htm)

<sup>263</sup> Justice (Northern Ireland) Act 2002, s 19(2).

<sup>264</sup> Promissory Oaths Act 1868, ss 2 and 4.

<sup>265</sup> Justice (Northern Ireland) Act 2002, s 19(1).

<sup>266</sup> Promissory Oaths Act 1868, ss 2 and 4.

Ireland could prevent that problem. Whether candidates will in fact be dissuaded from taking up office in Wales is difficult to say. We note in passing that the requirement to swear the oath of allegiance does not appear to have caused problems within the Scottish tribunals system.

10.48 We also think that the example of Northern Ireland could be distinguished. There the reform of the judicial oath was a necessary amendment given the long historical backdrop of unrest and division in the country. Although no direct link can be proven, since the reform of the judicial oath in the Justice (Northern Ireland) Act 2002, the diversity of the Northern Ireland judiciary now better reflects the makeup of the society that it serves.<sup>267</sup>

10.49 The nature of the oath is therefore a difficult question. We are persuaded however that it is a political one, rather than a legal one. As a non-political expert law reform institution, we are not well-placed to make the decision in this case. We have therefore concluded that the formulation of the oath is a question for the Welsh Government and the Senedd.

10.50 We recommend below that judicial leads and members of the devolved tribunals in Wales should take an oath or affirmation as a sign of their independence and impartiality. The same oath or affirmation should be taken by all judicial leads and members, save for secular and religious alternatives.

#### **Recommendation 52.**

10.51 We recommend that the Welsh Ministers and others responsible for the administration of justice in Wales should be subject to a statutory duty to uphold the independence of the devolved tribunals.

#### **Recommendation 53.**

10.52 We recommend that all members of the First-tier Tribunal for Wales (including Chamber Presidents and Deputy Presidents) and members of the Appeal Tribunal for Wales should be required to take a judicial oath or affirmation.

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<sup>267</sup> As at 1 August 2011, 53% of judicial officers declared a Protestant community background, 41% declared a Catholic background and 6% stated that they were from neither. This is broadly reflective of Northern Ireland society - Judicial Appointments Process, written evidence to the House of Lords Committee on the Constitution (January 2011) pp 85 and 208 – see <https://www.parliament.uk/globalassets/documents/lords-committees/constitution/JAP/Compiled-written-evidence131011.doc.pdf>



## Chapter 11: Recommendations

### **Recommendation 1.**

- 11.1 We recommend that the tribunals listed in section 59 of the Wales Act 2017 should be replaced by a single First-tier Tribunal for Wales, which may then be subdivided into chambers.

**Paragraph 3.31**

### **Recommendation 2.**

- 11.2 We recommend that chambers of the First-tier Tribunal for Wales should be led by chamber Presidents, supported by Deputy Presidents where necessary.

**Paragraph 3.32**

### **Recommendation 3.**

- 11.3 We recommend that the Welsh Ministers should be empowered to subdivide the First-tier Tribunal for Wales into chambers, and to allocate work to those chambers, by way of secondary legislation made with the concurrence of the President of Welsh Tribunals.

**Paragraph 3.33**

### **Recommendation 4.**

- 11.4 We recommend that the jurisdictions of the Valuation Tribunal for Wales should be transferred to a new Valuation Chamber of the First-tier Tribunal for Wales.

**Paragraph 3.54**



**Recommendation 5.**

11.5 We recommend that school exclusion appeals should be transferred to the Education Chamber of a First-tier Tribunal for Wales.

**Paragraph 3.90**

**Recommendation 6.**

11.6 We recommend that school admission appeal panels in Wales should continue to be administered by admission authorities.

**Paragraph 3.111**

**Recommendation 7.**

11.7 We recommend that social care appeal panels should continue to be administered by Social Care Wales.

**Paragraph 3.113**

**Recommendation 8.**

11.8 We recommend that the Welsh Ministers exercise their power to create chambers of the First-tier Tribunal for Wales so as to form an Education Chamber to exercise the jurisdictions of the Registered School Inspectors Appeal Tribunal, the Registered Nursery Education Inspectors Appeal Tribunal and the Education Tribunal for Wales.

**Paragraph 3.155**

**Recommendation 9.**

11.9 We recommend that the Welsh Ministers exercise their power to create chambers of the First-tier Tribunal for Wales so as to form a Property Chamber of the First-tier Tribunal for Wales to exercise the jurisdictions of the Agricultural Land Tribunal for Wales and Residential Property Tribunal for Wales.

**Paragraph 3.156**

**Recommendation 10.**

11.10 We recommend that the Welsh Government should keep the organisation of chambers of First-tier Tribunal for Wales, including the possible creation of a General Regulatory Chamber, under review as new tribunal jurisdictions are created.

**Paragraph 3.157**

**Recommendation 11.**

11.11 We recommend that legislation should create an Appeal Tribunal for Wales.

**Paragraph 4.80**

**Recommendation 12.**

11.12 We recommend that the Welsh Ministers should have power by statutory instrument to establish chambers of the Appeal Tribunal and to transfer appellate jurisdiction to it.

**Paragraph 4.81**

**Recommendation 13.**

11.13 We recommend that the Appeal Tribunal for Wales should, in the absence of positive reason for different provision, be the appeal venue for appeals from the First-tier Tribunal for Wales.

**Paragraph 4.82**

**Recommendation 14.**

11.14 We recommend that appeals from rent assessment committees should require permission.

**Paragraph 4.95**

**Recommendation 15.**

11.15 We recommend that appeals from school admission appeals panels should be available on a point of law to the Education Chamber of the First-tier Tribunal for Wales.

**Paragraph 4.135**

**Recommendation 16.**

11.16 We recommend that onward appeals from decisions of the Education Chamber on appeals from school admission appeals panels should be limited to cases which raise some important point of principle or practice, or where there is some other compelling reason to hear the appeal.

**Paragraph 4.136**

**Recommendation 17.**

11.17 We recommend that the President of Welsh Tribunals should be a judge of the First-tier Tribunal for Wales and the Appeal Tribunal for Wales. Provision for the President of Welsh Tribunals to sit should be made in procedural rules or directions.

**Paragraph 5.26**

**Recommendation 18.**

11.18 We recommend that the President of Welsh Tribunals should be the presiding judge of the First-tier Tribunal for Wales and the Appeal Tribunal for Wales.

**Paragraph 5.27**

**Recommendation 19.**

11.19 We recommend that the Welsh Government should consult with the President of Welsh Tribunals on the School Admissions Appeal Code pursuant to section 85(2) of the School Standards and Framework Act 1998.

**Paragraph 5.52**

**Recommendation 20.**

11.20 If the Valuation Tribunal for Wales remains outside the unified system of tribunals, it should nonetheless be subject to the supervision of the President of Welsh Tribunals.

**Paragraph 5.63**

**Recommendation 21.**

11.21 We recommend that there should be a Tribunal Procedure Committee for Wales.

**Paragraph 6.55**

**Recommendation 22.**

11.22 We recommend that the Tribunal Procedure Committee for Wales should be able to establish sub-groups to focus on particular areas of work.

**Paragraph 6.56**

**Recommendation 23.**

11.23 We recommend that the President of Welsh Tribunals should be responsible for chairing the Tribunal Procedure Committee for Wales and appointing its members.

**Paragraph 6.57**

**Recommendation 24.**

11.24 We recommend that the President of Welsh Tribunals, when appointing members of a Tribunal Procedure Committee for Wales, should have regard to factors set out in legislation, including the need for:

- (1) the interests of each Chamber of the First-tier Tribunal for Wales and, in due course, the Appeal Tribunal for Wales to be represented;
- (2) the Committee to have access to persons with relevant expertise; and
- (3) the Committee to include persons who have experience of appearing in front of the tribunal or advising those that do.

**Paragraph 6.58**

**Recommendation 25.**

11.25 We recommend that the rules be made by the President of Welsh Tribunals, in a form agreed by a majority of the Tribunal Procedure Committee, subject to their being approved by the Welsh Ministers.

**Paragraph 6.59**

**Recommendation 26.**

11.26 We recommend that the Tribunal Procedure Committee for Wales should consult with whomever it considers appropriate (including members of the tribunal, members of the broader judiciary, practitioners and tribunal users) before making the rules.

**Paragraph 6.60**

**Recommendation 27.**

11.27 The Tribunal Procedure Committee for Wales should adopt common procedural rules across the tribunals as far as is appropriate.

**Paragraph 6.78**

**Recommendation 28.**

11.28 There should be a set of procedural rules for each chamber of the First-tier Tribunal for Wales and for the Appeal Tribunal for Wales. If the Appeal Tribunal for Wales is divided into chambers, the Tribunal Procedure Committee for Wales should consider whether to make a separate set of rules for each chamber.

**Paragraph 6.79**

**Recommendation 29.**

11.29 We recommend that the Tribunal Procedure Committee for Wales should be required by legislation to have regard to the desirability of consistency within the procedural rules of the devolved tribunals and between them and those of other courts and tribunals in the UK.

**Paragraph 6.87**

**Recommendation 30.**

11.30 The procedural rules of the First-tier Tribunal for Wales and the Appeal Tribunal for Wales should include:

- (1) an overriding objective;
- (2) a duty of the parties to cooperate with each other and the tribunal;
- (3) provision for service of documents by electronic means;
- (4) a power for the First-tier Tribunal to review its own decisions; and
- (5) rules on remote hearings.

**Paragraph 6.166**

**Recommendation 31.**

11.31 We recommend that members of the First-tier Tribunal for Wales should be appointed by the President of Welsh Tribunals.

**Paragraph 7.55**

**Recommendation 32.**

11.32 We recommend that Presidents and any Deputy Presidents of the First-tier Tribunal for Wales should be appointed by the Welsh Ministers, with the agreement of the President of Welsh Tribunals.

**Paragraph 7.56**

**Recommendation 33.**

11.33 We recommend that members of the Appeal Tribunal for Wales should be appointed by the Welsh Ministers, with the agreement of the President of Welsh Tribunals.

**Paragraph 7.57**

**Recommendation 34.**

11.34 We recommend that members of the Valuation Tribunal for Wales should be appointed by the President of Welsh Tribunals.

**Paragraph 7.77**

**Recommendation 35.**

11.35 We recommend that the President and any Deputy President of the Valuation Chamber of the First-tier Tribunal for Wales should be appointed by the Welsh Ministers, with the agreement of the President of Welsh Tribunals.

**Paragraph 7.78**

**Recommendation 36.**

11.36 We recommend that the Judicial Appointments Commission should select candidates for all appointments to the First-tier Tribunal for Wales and Appeal Tribunal for Wales.

**Paragraph 7.122**

**Recommendation 37.**

11.37 We recommend that the Judicial Appointments Commission should select candidates for all appointments to the Valuation Chamber of the First-tier Tribunal for Wales.

**Paragraph 7.123**

**Recommendation 38.**

11.38 We recommend that a standard complaints policy should apply to all chambers of the First-tier Tribunal for Wales, allowing for variations for individual chambers where necessary.

**Paragraph 8.32**

**Recommendation 39.**

11.39 We recommend that the complaints policy applying to the First-tier Tribunal for Wales should be available both online and in hard copy on request.

**Paragraph 8.33**

**Recommendation 40.**

11.40 We recommend that there should be a uniform procedure for complaints about the administration of the Tribunals Service for Wales.

**Paragraph 8.34**

**Recommendation 41.**

11.41 We recommend that there should be a uniform procedure for complaints about the conduct of members, Presidents and Deputy Presidents of the First-tier Tribunal for Wales.

**Paragraph 8.35**



**Recommendation 42.**

11.42 We recommend that complaints about the conduct of tribunal members of the First-tier Tribunal for Wales are investigated by the relevant Chamber President.

**Paragraph 8.75**

**Recommendation 43.**

11.43 We recommend that complaints about the conduct of Chamber Presidents and Deputy Presidents of the First-tier Tribunal for Wales are investigated by the Judicial Conduct Investigations Office.

**Paragraph 8.76**

**Recommendation 44.**

11.44 We recommend that complaints about the conduct of members of the Appeal Tribunal for Wales are investigated by the Judicial Conduct Investigations Office.

**Paragraph 8.77**

**Recommendation 45.**

11.45 We recommend that the President of Welsh Tribunals should have the power to discipline and dismiss members of the First-tier Tribunal for Wales.

**Paragraph 8.89**

**Recommendation 46.**

11.46 We recommend that the President of Welsh Tribunals should have the power to discipline and dismiss members of the Valuation Chamber of the First-tier Tribunal for Wales.

**Paragraph 8.97**

**Recommendation 47.**

11.47 We recommend that the President of Welsh Tribunals should have the power to discipline and dismiss Presidents and Deputy Presidents of chambers of the First-tier Tribunal for Wales, with the concurrence of the Welsh Ministers.

**Paragraph 8.110**

**Recommendation 48.**

11.48 We recommend that the President of the Welsh Tribunals should have the power to discipline and dismiss the President of the Valuation Chamber of the First-tier Tribunal for Wales, with the concurrence of the Welsh Ministers.

**Paragraph 8.118**

**Recommendation 49.**

11.49 We recommend that the First Minister should have power to dismiss judges of the Appeal Tribunal for Wales. Sanctions falling short of dismissal should be imposed by the First Minister with the concurrence of the President of Welsh Tribunals.

**Paragraph 8.125**

**Recommendation 50.**

11.50 We recommend that the School Admissions Appeal Code should provide for complaints about the conduct of members of school admission appeal panels.

**Paragraph 8.169**

**Recommendation 51.**

11.51 We recommend the establishment of a Tribunals Service for Wales as a non-ministerial department.

**Paragraph 9.53**

**Recommendation 52.**

11.52 We recommend that the Welsh Ministers and others responsible for the administration of justice in Wales should be subject to a statutory duty to uphold the independence of the devolved tribunals.

**Paragraph 10.51**

**Recommendation 53.**

11.53 We recommend that all members of the First-tier Tribunal for Wales (including Chamber Presidents and Deputy Presidents) and members of the Appeal Tribunal for Wales should be required to take a judicial oath or affirmation.

**Paragraph 10.52**

# Appendix 1: List of attendees of the advisory group meetings

## ATTENDEES OF THE FIRST ADVISORY GROUP MEETING HELD 1 OCTOBER 2020, MS TEAMS

Andrew Shipsides (Chief Executive of the Valuation Tribunal for Wales)

Claire Sharp (President of the Adjudication Panel for Wales)

Carol Cobert (President of the Valuation Tribunal for Wales)

Carolyn Kirby OBE (President of the Mental Health Review Tribunal for Wales)

Christopher Warner (Welsh Government)

Elizabeth Price (Welsh Government)

Emma Morris (Welsh Government)

James Gerard (Welsh Government)

Dr Huw Pritchard (Cardiff University)

Huw Williams (Welsh Tribunals Unit)

Imogen Sherriff (Welsh Government)

Iwan Jenkins (President of the Welsh Language Tribunal)

Maria Payne (Welsh Tribunals Unit)

Rhian Davies Rees (Welsh Tribunals Unit)

Rhiannon Walker (President of the Special Educational Needs Tribunal Wales, now renamed the Education Tribunal for Wales)

Richard Payne (President of the Residential Property Tribunal Wales)

Dr Sarah Nason (Bangor University)

Sir Wyn Williams (President of Welsh Tribunals)

## **ATTENDEES OF THE SECOND ADVISORY GROUP MEETING HELD ON 08 JUNE 2021, MS TEAMS**

Carolyn Kirby OBE (President of the Mental Health Review Tribunal for Wales)

Claire Sharp (President of the Adjudication Panel for Wales)

David Slade (Welsh Government)

Dr Huw Pritchard (Cardiff University)

James Gerard (Welsh Government)

Maria Payne (Welsh Tribunals Unit)

Merisha Hunt (Welsh Government)

Nicola Charles (Welsh Government)

Rhian Davies Rees (Head of the Welsh Tribunals Unit)

Rhiannon Walker (President of the Special Educational Needs Tribunal for Wales,  
now renamed the Education Tribunal for Wales)

Richard Payne (President of the Residential Property Tribunal for Wales)

Dr Sarah Nason (Bangor University)

## Appendix 2: List of consultation events

- (1) Administrative Justice Council (5 February 2021),
- (2) Law Commission's Wales Advisory Committee (9 February 2021),
- (3) Monmouthshire Council (11 February 2021),
- (4) Legislation, Justice and Constitution Committee evidence session (22 February 2021),
- (5) Catholic Education Service (22 February 2021),
- (6) Pembrokeshire Council (23 February 2021),
- (7) Public webinar (conducted jointly with Public Law Wales) (24 February 2021),
- (8) Newport Council (5 March 2021),
- (9) Cardiff City Council and members of independent appeals panel (10 March 2021),
- (10) Judicial Conduct and Investigations Office (15 March 2021),
- (11) Welsh Tribunals Unit staff (17 March 2021); and
- (12) Residential Property Tribunal for Wales Annual Conference (19 March 2021).



## Appendix 3: List of respondents<sup>268</sup>

Alun Green

Angela Keller, Catholic Education Service

Anglesey Council

Bob Chapman

Cardiff City Council

Ceredigion Council

Christopher McNall

Claire Sharp on behalf of the Adjudication Panel for Wales

Denbighshire Council

Dr Angela Ash

Dr Calum Delaney

Dr Huw Pritchard and Dr Sarah Nason

Dr Sarah Nason and Ann Sherlock

Equality and Human Rights Commission

Governing Council of the Valuation Tribunal for Wales

Gwynedd Council

Hilary Moriarty

Huw Williams

John Travers, Catholic Education Service

Keith Bush QC

Nadia Alabere

National Deaf Children's Society Cymru

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<sup>268</sup> We also received three further responses from individuals who requested that their responses be kept anonymous.



Noel Edwards

Panel member(s) from the Cardiff school panels

Patrick Moriarty

Pembrokeshire Council

Professor Thomas G Watkin

Public Law Wales

Public Services Ombudsman for Wales

Richard Payne

Roger Handy

Rt Rev Dr Barry Morgan

Sir Wyn Williams

Swansea Council

The Bar Council

The Law Society

The Mental Health Review Tribunal for Wales

Wales and Chester Circuit

## Appendix 4: Tribunals within the scope of this project

- 4.1 This appendix gives a brief overview of each of the tribunals which fall within the scope of the project.

### SECTION 59 TRIBUNALS

- 4.2 The following tribunals are Welsh tribunals listed in section 59(1) of the Wales Act 2017, and are therefore subject to the supervision of the President of Welsh Tribunals.<sup>269</sup> Members of one Welsh tribunal may be cross-deployed to another Welsh tribunal at the request of the second tribunal's judicial lead and with the approval of the President of Welsh Tribunals.<sup>270</sup> All Welsh tribunals are administered by the Welsh Tribunals Unit of the Welsh Government.

### Adjudication Panel for Wales

- 4.3 The Adjudication Panel for Wales ("APW") was established by the Local Government Act 2000,<sup>271</sup> with its first members appointed in 2002. The equivalent English tribunal, the Adjudication Panel for England, was also established by the Local Government Act 2000. It was abolished in 2010.<sup>272</sup>
- 4.4 The APW is responsible for determining alleged breaches of authorities' codes of conduct by members of Welsh county, county borough and community councils, and fire and national park authorities. It has two statutory functions. The first is to consider references made by the Public Services Ombudsman for Wales following the Ombudsman's investigation into a breach of a statutory code of conduct by an authority member. These references are heard by case or interim case tribunals.<sup>273</sup> The APW also determines appeals from local authority standards committees, which are heard by appeals tribunals.<sup>274</sup>
- 4.5 The APW is led by the Tribunal President, who is a legal member. The tribunal also has a Deputy President. A hearing panel is typically formed of three members; two lay members and the chairperson, who is a legal member. More than one legal member may sit on the panel; we understand this approach has been taken for the purposes of training, or where there is a conflict of interest, or a shortage of lay members.

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<sup>269</sup> Wales Act 2017, s 60.

<sup>270</sup> As above, s 62.

<sup>271</sup> Local Government Act 2000 s 75(2).

<sup>272</sup> Transfer of Tribunal Functions Order SI 2010 No 22, art 1(1), sch 2 para 57(b) and sch 5.

<sup>273</sup> Local Government Act 2000 s 69 (4).

<sup>274</sup> As above, s 80.

4.6 The APW has a small caseload, with only four applications received in the reporting period 2020-2021.<sup>275</sup> The COVID-19 pandemic saw the use of video hearings in order to facilitate the APW to work remotely. At present, the APW is reviewing each case in order to decide whether the hearing should be heard remotely or face-to-face.<sup>276</sup>

4.7 There is a right of appeal from case tribunals to the High Court.<sup>277</sup>

### **Agricultural Land Tribunal for Wales**

4.8 Agricultural tribunals were established by the Agriculture Act 1947. The Act did not originally provide for an Agricultural Land Tribunal for Wales (“ALTW”), instead giving the Lord Chancellor the power to make orders establishing tribunals for particular areas within England and Wales. That power was exercised in respect of Wales by the Agricultural Land Tribunals (Area) Order 1982.<sup>278</sup> The Transfer of Tribunal Functions Order 2013 abolished agricultural land tribunals for areas in England, transferring their functions to the First-tier Tribunal. The Order also provided for the continuance of an Agricultural Land Tribunal for Wales.<sup>279</sup>

4.9 The tribunal hears disputes and other issues arising between parties to agricultural tenancy agreements held under the Agricultural Holdings Act 1986,<sup>280</sup> for example, the provision of fixed equipment by a landlord which a tenant requires in order to comply with a statutory obligation.<sup>281</sup> The Land Drainage Act 1991 also gives it jurisdiction over disputes relating to the drainage of agricultural land.

4.10 The Chairperson of the ALTW is appointed by the Lord Chancellor and must be a barrister or solicitor of at least seven years’ experience. Panels are chaired by a legal member, who is accompanied by lay panel members with knowledge and experience of farming, drainage and landowner matters in Wales.<sup>282</sup>

4.11 In the 2020-2021 reporting period, ALTW received 13 applications in total, a decrease on previous years.<sup>283</sup> In the President of Welsh Tribunals’ Annual Report, it was observed that “it is reasonable to infer that the pandemic has been a major factor in the diminution in work”.<sup>284</sup> As the tribunal’s work is heavily reliant on site visits, its hearings are usually conducted in hotels, town halls or council buildings in the locality of the land in question. These became difficult to arrange during 2020-2021 as a result

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<sup>275</sup> Adjudication Panel for Wales, *Annual Report 2020-2021* (2021) p 8.  
<https://adjudicationpanel.gov.wales/sites/adjudicationpanel/files/2021-06/apw-annual-report-2020-21.pdf>

<sup>276</sup> As above, p 3.

<sup>277</sup> The Local Government Act 2000 s 78 (as amended by The Transfer of Tribunal Functions Order SI 2010 No 22 art 1(1), sch 2 para 60(f) and sch 5.

<sup>278</sup> SI 1982 No 97, art 2 and sch 1, para 1.

<sup>279</sup> Agriculture Act 1947 s 73 (as amended by Transfer of Tribunal Functions Order SI 2013 No 1036).

<sup>280</sup> Agricultural Holdings Act 1986, s 1.

<sup>281</sup> As above, s 11.

<sup>282</sup> The Agricultural Land Tribunal Wales, “About” webpage,  
<https://agriculturallandtribunal.gov.wales/secretariat-and-members>.

<sup>283</sup> The Agricultural Land Tribunal Wales, *Annual Report 2020-2021* (2021), p 9.

<sup>284</sup> President of Welsh Tribunals, *Annual Report 2020-2021* (April 2021), p 11.

of the COVID-19 pandemic.<sup>285</sup> During this period the ALTW has sought to “deal with as many matters as possible on the papers rather than at hearings”.<sup>286</sup> The ALTW is able to hear matters remotely where necessary.

- 4.12 The ALTW can review its own decisions, either on its own initiative or on application by a party, should more evidence become available, or if the decision contains a clerical error.<sup>287</sup> An appeal may also be made to the Upper Tribunal (Lands Chamber) on any point of law.<sup>288</sup>

### Education Tribunal for Wales

- 4.13 The Special Educational Needs Tribunal was established by the Education Act 1996, with the Special Educational Needs Tribunal for Wales established by the Education Act 2002.<sup>289</sup> In September 2021 the tribunal was renamed the Education Tribunal for Wales (“ETW”) by the Additional Learning Needs and Education Tribunal (Wales) Act 2018.<sup>290</sup> The English equivalent of ETW is the First-tier Tribunal (Special Educational Needs and Disability) which is part of the Health, Education and Social Care Chamber of the First-tier Tribunal.
- 4.14 The ETW hears appeals from children, the parents of a child, or young people against decisions made by a local authority about a child or young person and their education.<sup>291</sup> It also hears disability discrimination claims under section 116 of the Equality Act 2010.
- 4.15 The ETW is led by a President, who is appointed by the Lord Chancellor and must be a barrister or solicitor of at least seven years’ experience. Panels are made up of a chairperson, who must possess a legal qualification, and lay members who have experience in education or a related subject.
- 4.16 The ETW hears cases in public buildings that are usually within one hour travelling distance from the child or young person’s home. The COVID-19 pandemic led to the hearings of the Special Educational Needs Tribunal for Wales being held remotely. As has been noted by the President of Welsh Tribunals, the feedback has shown ‘that hearings by video conference have proved to be a great success’.<sup>292</sup> This is because the remote hearings enable parents of children with special educational needs to

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<sup>285</sup> President of Welsh Tribunals, *Annual Report 2020-2021* (April 2021), p 11.

<sup>286</sup> The Agricultural Land Tribunal Wales, *Annual Report 2020-2021* (2021), p 3  
<https://agriculturallandtribunal.gov.wales/sites/agriculturalland/files/2021-07/alt-annual-report-20-21.pdf>

<sup>287</sup> Agricultural Land Tribunals (Rules) Order 2007 No 3105 sch 1, para 32.

<sup>288</sup> Agriculture (Miscellaneous Provisions) Act 1954 s 6(1).

<sup>289</sup> Education Act 2002 s 195.

<sup>290</sup> The Additional Learning Needs and Education Tribunal (Wales) Act 2018, s 91. That section was brought into force by Additional Learning Needs and Education Tribunal (Wales) Act 2018 (Commencement No 2) Order SI 2021 No 373 reg 8(h).

<sup>291</sup> The Additional Learning Needs and Education Tribunal (Wales) Act ss 70 and 72. Previously ss 325, 326, 328, 329 and 329A of the Education Act 1996.

<sup>292</sup> President of Welsh Tribunals, *Annual Report 2020-2021* (April 2021) p 12.

remain in their homes, meaning that they are ‘more relaxed and better able to participate’.<sup>293</sup>

- 4.17 The Special Educational Needs Tribunal for Wales received 172 applications in the year 2019 – 2020.<sup>294</sup> Appeals may be made from the ETW to the Upper Tribunal (Administrative Appeals Chamber) on a point of law.<sup>295</sup>

### **The Mental Health Review Tribunal for Wales**

- 4.18 Mental Health Review Tribunals were initially established on a regional basis under the Mental Health Act 1959. The Mental Health Review Tribunal for Wales (“MHRTW”) was specifically provided for by the Mental Health Act 1983.<sup>296</sup> The MHRTW hears applications from or on behalf of those detained in a hospital in Wales under the Mental Health Act 1983, or a person residing in Wales who is subject to conditional community discharge or guardianship. In England, the Health Education and Social Care Chamber of the First-tier tribunal hears equivalent claims.
- 4.19 The President of the MHRTW, who is the only salaried judge in the section 59 tribunals, is responsible for the members and the decisions of the tribunal. There are invariably three tribunal members on the hearing panel: a legal member, a medical (psychiatric) member and a lay member.<sup>297</sup>
- 4.20 Notably, the MHRTW handles the largest volume of applications of all the devolved tribunals that fall within section 59 of the Wales Act 2017, receiving 2016 applications and hearing 913 cases in 2020-21.<sup>298</sup>
- 4.21 Hearings are usually held in either the hospitals in which patients are detained, or, for community patients, at venues close to where they live.<sup>299</sup>
- 4.22 There is a right of appeal to the Upper Tribunal (Administrative Appeals Chamber) on a point of law arising from a decision made by the MHRTW.<sup>300</sup>

### **The Registered Schools Inspectors Appeal Tribunal and the Registered Nursery Education Inspectors Appeal Tribunal**

- 4.23 The School Inspections Act 1996 (which applied to England and Wales) provided for a register of school inspectors. A similar register of nursery education inspectors was created by the School Standards and Framework Act 1998. Each piece of legislation

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<sup>293</sup> President of Welsh Tribunals, *Annual Report 2020-2021* (April 2021) p 12.

<sup>294</sup> President of Welsh Tribunals, *Annual Report 2019-2020* (April 2020), para 2.1.

<sup>295</sup> The Additional Learning Needs and Education Tribunal (Wales) Act s 81(1).

<sup>296</sup> Mental Health Act 1959 s 3 and Mental Health Act 1983 s 65.

<sup>297</sup> Temporary provision made by the Coronavirus Act 2020, sch 98 para 11 and subsequently a Practice Direction of the President of the MHRTW and the President of Welsh Tribunals, for panels to be constituted by a legal member sitting alone or with one other member, was never used and the Practice Direction expired in Spring 2021.

<sup>298</sup> Mental Health Review Tribunal for Wales, *Annual Report 2020-2021* (June 2021) pp 10-12.

<sup>299</sup> As above, p 16.

<sup>300</sup> Mental Health Act 1983, s 78A.

creates a right of appeal to a tribunal in respect of a decision to remove an inspector from the register or to impose conditions on their registration. The Education Act 2005 subsequently abolished the requirement of registration of both school and nursery education inspectors in England.<sup>301</sup>

- 4.24 Provision for registration of school and nursery school inspectors was retained for Wales by section 25 of the 2005 Act, together with a right to apply to a tribunal under section 27 of the Act; provision as to the constitution of tribunals is made by schedule 3, which among other things empowers members of another section 59 tribunal to sit on them.<sup>302</sup> The tribunals are referred to as two separate tribunals by the regulations which govern their procedure: the Registered Schools Inspectors Appeal Tribunal (“RSIAT”) and the Registered Nursery Education Inspectors Appeal Tribunal (“RNEIAT”).<sup>303</sup>
- 4.25 No applications have been made to the tribunals since 2007/2008. The annual report of the President of Welsh Tribunals for 2018/2019 noted that members of SENTW were eligible to deal with any cases which arose in the jurisdiction.<sup>304</sup>
- 4.26 A tribunal established under section 27 of the 2005 Act may review, set aside or vary its decision if: a decision is wrongly made as a result of an error on the part of the tribunal staff; a party fails to appear with reasonable cause; new evidence becomes available; or the interests of justice require.<sup>305</sup> There is no provision for appeal from the tribunal; judicial review is available.

### **The Residential Property Tribunal for Wales**

- 4.27 The Residential Property Tribunal for Wales (“RPTW”) comprises three different tribunals, each based in different pieces of underlying legislation: rent assessment committees, leasehold valuation tribunals and residential property tribunals.<sup>306</sup> Those pieces of legislation confer additional jurisdictions on rent assessment committees created by schedule 10 to the Rent Act 1977 and provide that when exercising those jurisdictions they should be known as either a “residential property tribunal” or “leasehold valuation tribunal”, as appropriate. In practice they are usually referred to simply as the Residential Property Tribunal for Wales.

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<sup>301</sup> Education Act 2005, s 60, and sch 7 para 7.

<sup>302</sup> As above, s 27 and sch 3 para 1(3A).

<sup>303</sup> The Education (Registered Inspectors of Schools Appeal Tribunal and Registered Nursery Education Inspectors Appeal Tribunal) (Procedure) Regulations SI 1999 No 265.

<sup>304</sup> President of Welsh Tribunals, *First Annual Report* (March 2019), p 5  
<https://gov.wales/sites/default/files/publications/2019-12/president-of-welsh-tribunals-first-annual-report.pdf>.

<sup>305</sup> Education (Registered Inspectors of Schools Appeal Tribunal and Registered Nursery Education Inspectors Appeal Tribunal) (Procedure) Regulations SI 1999 No 265, reg 29(1)(d).

<sup>306</sup> Rent Act 1977, s 65 and sch 10; Commonhold and Leasehold Reform Act 2002, s 173; and Housing Act 2004, s 229.

- 4.28 The RPTW hears applications to privately rented and leasehold property under a number of pieces of legislation.<sup>307</sup> In England similar applications are made to the First-tier tribunal (Property Chamber).
- 4.29 The Lord Chancellor appoints tribunal chairpersons, who are legally qualified. The Welsh Ministers appoint a president and vice-president from among those chairpersons. All other members of the tribunal are appointed by the Welsh Ministers.<sup>308</sup> Tribunal hearings are conducted by a legally qualified chairperson, a professional member, and in some cases, a lay member.<sup>309</sup>
- 4.30 In 2020/2021, the RPTW received 106 applications: 60 of these related to the work of the leasehold valuation tribunals, 19 to the rent assessment committees, and 27 to the residential property tribunals.<sup>310</sup> Hearings are conducted in town or village halls or hotels in the locality of the disputed property. Some cases are heard in the tribunal's office, at Cleppa Park in Newport, but these are rare. One large case involving 30 to 40 participants was heard in Cardiff County Court.
- 4.31 The COVID-19 pandemic led to the President of Welsh Tribunals and the President of the RPTW issuing a joint Practice Direction, under the powers in the Wales Act 2017,<sup>311</sup> in order to "combat the challenges faced by the Tribunal as a consequence of the pandemic."<sup>312</sup> The Practice Direction enabled the RPTW to use remote hearings and to operate electronically.
- 4.32 As the RPTW is composed of three different tribunals, the provisions governing its appeals differ. All appeals go to the Upper Tribunal (Lands Chamber), but appeals from rent assessment committees are explicitly limited by primary legislation to appeals on a point of law.<sup>313</sup>

### The Welsh Language Tribunal

- 4.33 The Welsh Language Tribunal ("WLT") was established in 2015 under section 120 of the Welsh Language (Wales) Measure 2011 ("the Measure"). It hears appeals against the Welsh Language Commissioner's decisions in relation to the Welsh Language Standards.<sup>314</sup> There is no equivalent tribunal in England.

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<sup>307</sup> Including the Housing Act 1985, Housing Act 2004, Landlord and Tenant Act 1985 and 1987, Rent Act 1977 and the Mobile Homes (Wales) Act 2013.

<sup>308</sup> Rent Act 1977 sch 10 paras 2 to 5.

<sup>309</sup> The Residential Property Tribunal for Wales, "About" webpage, <https://residentialpropertytribunal.gov.wales/secretariat-and-members>.

<sup>310</sup> Residential Property Tribunal for Wales, *Annual Report 2020 – 2021* (2021) p 9. <https://residentialpropertytribunal.gov.wales/sites/residentialproperty/files/2021-07/rpt-annual-report-2020-21.pdf>

<sup>311</sup> Wales Act 2017, s 61.

<sup>312</sup> *The President of Welsh Tribunals Annual Report 2020-2021* (April 2021) p 5.

<sup>313</sup> See Rent Act 1997, s 65A; Housing Act 2004, s 231(1); and Commonhold and Leasehold Reform Act 2002, s 175(1).

<sup>314</sup> Regulated by the Welsh Language (Wales) Measure 2011 part 4.

4.34 There are three types of appeal.

- (1) where the Commissioner notifies a person of a determination that the requirement to comply with a Standard is not unreasonable or disproportionate, the Tribunal can determine whether the requirement is unreasonable or disproportionate;<sup>315</sup>
- (2) a person who has made a complaint to the Commissioner that another person has failed to comply with a Standard may appeal
  - (a) against the Commissioner's decision that the other person has not failed to comply with the Standard;<sup>316</sup> or
  - (b) against the Commissioner's decision not to carry out an investigation, not to consider whether to carry out an investigation or to discontinue an investigation.<sup>317</sup>

4.35 The tribunal received 13 new applications in 2020-2021,<sup>318</sup> the majority of which (nine applications) were brought under section 103 of the Measure and so fell under category 2(b) above.<sup>319</sup>

4.36 The WLT's President is responsible for organising the work of the members, and for making decisions in relation to appeals and complaints. The President is appointed by the Welsh Ministers and must either be a barrister or a solicitor with at least ten years' experience. Cases are heard by a legal member, and two lay members.

4.37 The COVID-19 pandemic meant that, much like the tribunals above, the WLT moved to using virtual hearings in order to continue working.<sup>320</sup>

4.38 The WLT can review, vary or revoke its own decisions.<sup>321</sup> There is a right of appeal to the High Court on any point of law arising from a decision made by the WLT.<sup>322</sup> To date, no appeals from the WLT to the High Court have been brought.<sup>323</sup>

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<sup>315</sup> Welsh Language (Wales) Measure 2011, s 58.

<sup>316</sup> As above, s 99.

<sup>317</sup> As above, s 103. An appeal under s 103 is dealt with in accordance with the principles of judicial review.

<sup>318</sup> The Welsh Language Tribunal, *Annual Report 2020-2021* (July 2021) p 10  
<https://welshlanguagetribunal.gov.wales/sites/welshlanguage/files/2021-07/wlt-annual-report-20-21.pdf>

<sup>319</sup> Welsh Language (Wales) Measure 2011, s 103.

<sup>320</sup> The Welsh Language Tribunal, *Annual Report 2020-2021* (July 2021) p 3  
<https://welshlanguagetribunal.gov.wales/sites/welshlanguage/files/2021-07/wlt-annual-report-20-21.pdf>

<sup>321</sup> Welsh Language (Wales) Measure 2011, s 123(4)(i).

<sup>322</sup> As above, s 105(2).

<sup>323</sup> The Welsh Language Tribunal, *Annual Report 2019-2020* (July 2020), p 12  
<https://welshlanguagetribunal.gov.wales/sites/welshlanguage/files/2020-07/wlt-annual-report-19-20.pdf>



## OTHER TRIBUNALS

- 4.39 The following tribunals are not “Welsh tribunals” listed in section 59 of the Wales Act 2017. They have no formal relationship with the President of Welsh Tribunals and are not administered by the Welsh Tribunals Unit.

### The Valuation Tribunal for Wales

- 4.40 The history of valuation tribunals is a long one, and can be traced back to the Union Assessment Committees Act 1862.<sup>324</sup> The VTW differs in a number of respects from the section 59 tribunals. It was historically closely linked to local government, with valuation tribunals for each local authority. It also hears many more cases than the other devolved tribunals. In 2019-2020 the VTW listed 4,183 rating cases, 687 council tax valuation cases and 118 other types of appeal (principally council tax liability matters).<sup>325</sup>
- 4.41 Cases are heard by a large body of members, who are unpaid volunteers. There are currently 85 members, as against a statutory maximum of 105. Three members typically hear appeals, supported by a clerk. Clerks are employees of the VTW, who have detailed expertise and training in the underlying substance of the appeal – some of whom are also legally qualified. Their role is to advise on the relevant law and procedure.<sup>326</sup> The VTW has six tribunal clerks and two senior tribunal clerks.<sup>327</sup>
- 4.42 The VTW has the ability to review its own decisions. Further appeals are to the High Court (on a point of law, for council tax valuation cases) or the Lands Tribunal (in relation to non-domestic rating cases). The VTW hear cases locally across Wales.
- 4.43 The VTW conducts its own administration and has its own Chief Executive. It is governed by a Governing Council, which includes the President of the VTW, three national representatives, and up to three members appointed by the Welsh Government.<sup>328</sup> The framework document which regulates the relationship between the VTW and the Welsh Government was drawn up by its Local Government Directorate.<sup>329</sup>

### Historical development of the valuation tribunals

- 4.44 Valuation tribunals were originally regional bodies. They were consolidated in England by the Local Government and Public Involvement in Health Act 2007 (“LGPIHA 2007”), which replaced the existing 56 tribunals in England with a single Valuation

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<sup>324</sup> <https://www.valuationtribunal.gov.uk/about-us/who-we-are/>

<sup>325</sup> Valuation Tribunal for Wales, *Annual Report 2019 – 2020* (2020) para 2.1. The President of the Valuation Tribunal for Wales explains at p 3 that the appeal figures recorded in 2019 – 2020 are lower than usual, as the Valuation Office has been undertaking other work, reducing its capacity to deal with appeals. The President anticipates the figures will return to their usual higher volume in the next reporting period.

<sup>326</sup> For further detail on the role of the clerk, see Best Practice Direction 2B: <https://www.valuationtribunal.wales/fileadmin/resources/docs/best-practice-protocols/en/vtw-best-practice-protocol-2b.pdf>.

<sup>327</sup> Valuation Tribunal for Wales, *Annual Report 2019-2020* (2020) p 26.

<sup>328</sup> Valuation Tribunal for Wales Regulations SI 2010 No 713 (W 69), reg 6.

<sup>329</sup> [https://www.valuationtribunal.wales/fileadmin/resources/docs/publications/en/Framework\\_Document.pdf](https://www.valuationtribunal.wales/fileadmin/resources/docs/publications/en/Framework_Document.pdf).

Tribunal for England (“VTE”). The Act retained the Valuation Tribunal Service established under the Local Government Act 2003, which provides administrative support for the VTE. LGPIHA 2007 also created new positions of VTE President and Vice-Presidents. Appointments to those positions are made by the Lord Chancellor on the advice of the Judicial Appointments Commission.

- 4.45 At the time of these reforms in England, there were still four independent valuation tribunals in Wales (East, West, South and North). They were supported by a centralised administration service (the Valuation Tribunal Service for Wales), which had been established in 2006.<sup>330</sup> That system was replaced by the Valuation Tribunal for Wales Regulations 2010 (the “2010 Regulations”) which replaced the four existing tribunals and the Valuation Tribunals Service for Wales with the current Valuation Tribunal for Wales.<sup>331</sup>

#### Reform of the VTW in 2017

- 4.46 The 2016 report of the Committee for Administrative Justice and Tribunals, Wales (“the 2016 Report”) made a number of further recommendations in relation to the VTW. It noted that “Wales-wide” structures were preferable to a regional structure. However, the report stopped short of recommending that the VTW could be administered by the Welsh Tribunals Unit, stating:

It would seem that there is no realistic prospect that the VTW could be transferred to and administered by the Welsh Tribunal Unit within the next five years. There are substantial logistical hurdles linked, inter alia, to the tribunal’s IT system which is linked to the VOA and to the pension arrangements of the VTW staff.<sup>332</sup>

- 4.47 The 2016 Report did however consider that reforms could be made to the 2010 regulations to remove the role of local authorities in the appointment of members, which it considered undermined the appearance of independence of the tribunal.<sup>333</sup> The Report also criticised the then system for election of members, calling the system of election of valuation tribunal chairs, presidents and members of the Governing Council an “anachronism”. It recommended instead a merit-based appointment system.

- 4.48 In response to these recommendations the Welsh Ministers made the Valuation Tribunal for Wales (Amendment) Regulations 2017 (the “2017 Regulations”).<sup>334</sup> The key changes made were:

- (1) removing the role of local authorities in the appointment process;

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<sup>330</sup> Established by the Valuation Tribunals (Wales) Regulations SI 2005 No 3364 (W 261) (now repealed).

<sup>331</sup> SI 2010 No 713 (W 69).

<sup>332</sup> Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone for Social Justice in Wales* (2016), para 42.

<sup>333</sup> As above, para 43.

<sup>334</sup> SI 2017 No 941 (W 234).

- (2) replacing the four “regional representatives” (and their four deputies) with three “national representatives”, to “help the VTW to progress from a regional structure to a pan-Wales structure”<sup>335</sup>
- (3) removing the election process for chairpersons, and providing that both members and chairpersons should be appointed by selection panels, comprised of members of the Governing Council;
- (4) introducing a maximum number of members, which would gradually decline to 105 from 1 April 2020; and
- (5) simplifying the election procedure for the president, and national representatives.

4.49 Though not a “Welsh tribunal” as defined by section 59(1) of the Wales Act 2017, the VTW is a devolved Welsh authority.<sup>336</sup>

4.50 The COVID-19 pandemic led to tribunal staff working remotely, a change which led to the cancellation of some hearings.<sup>337</sup> The VTW began issuing notices for in-person hearings in June 2020,<sup>338</sup> but video hearings remain the ‘usual way of attending a hearing’.<sup>339</sup>

### Independent appeal panels

4.51 School admission panels hear appeals from admission authorities, who decide which school a child should attend. Exclusion appeal panels hear appeals from school governors, who have decided that a pupil should be excluded from a school. Both panels are usually administered by local authorities. In practice it is common for them to be run together, under the umbrella term of “independent appeal panel”.

4.52 While administering the panel is usually the responsibility of the local authority, the Welsh Government has published a statutory code on admission appeals (the “Admissions Appeals Code”).<sup>340</sup> It has also published guidance on exclusion from schools and pupil referral units (the “Exclusion Guidance”).<sup>341</sup>

4.53 Because the administration of these panels is decentralised, it is difficult to obtain reliable data about how they operate. Some local authorities release details of the number of school admission appeals they hear, partly to assist parents who may be

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<sup>335</sup> Explanatory memorandum, para 43.

<sup>336</sup> Government of Wales Act 2006, s 157A and sch 9A.

<sup>337</sup> Valuation Tribunal for Wales, *The Valuation Tribunal for Wales Annual Report 2019-2020* (2020) p 4.

<sup>338</sup> <https://valuationtribunal.wales/home.html>

<sup>339</sup> <https://www.valuationtribunal.wales/latest-news/archive/article/video-hearings.html?cHash=e572d46111b7b3b9527051ed8bdb8794>

<sup>340</sup> The School Admission Appeals Code is made under section 84 of the School Standards and Framework Act 1998. Welsh Government, *School admission appeals code* (2013). See <https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>

<sup>341</sup> Welsh Government, *Exclusion from schools and pupil referral units* (November 2019). <https://gov.wales/sites/default/files/publications/2019-11/exclusion-from-schools-pupil-referral-units.pdf>

considering whether to make an appeal. But this data is inconsistent, and we have not been able to find any local authorities which publish details of school exclusion panel hearings.

- 4.54 Both school admission and exclusion appeal panels should be heard in neutral locations, and not in the admitting/excluding school itself. Local authority buildings are permissible locations, so long as the hearing is conducted in a building that is not associated with the education department or admissions or exclusion teams of the local authority.
- 4.55 While school admission and exclusion appeal panels are not listed as Welsh tribunals in section 59(1) of the Wales Act 2017, they are listed as devolved Welsh authorities in schedule 9A to the Government of Wales Act 2006.

### School admission appeal panels

- 4.56 In Wales, section 94(5) of the School Standards and Framework Act 1998 provides that admission authorities are responsible for administering admission appeal panels.<sup>342</sup> Local authorities are the admission authorities for community and voluntary controlled schools (the majority of schools in Wales), while governing bodies are the admission authorities for foundation and voluntary aided schools. In Wales these are often faith schools, run by the Roman Catholic Church or the Church in Wales.
- 4.57 In practice, governing bodies may decide to ask the local authority to arrange the appeal panels for which the governing body is responsible. The Admissions Appeals Code also envisages the possibility of collaboration between local authorities. In relation to panel members, the Admissions Appeals Code notes that “pooling resources with neighbouring admission authorities and local authorities can help ensure that the same members do not sit on panels for a school on a repeated basis”.<sup>343</sup>
- 4.58 School admission appeal panels are made up three or five members. One of those members must have experience in education, or be the parent of a pupil registered at another school. Another must be a “lay” member: someone “without personal experience in the management of any school or the provision of education in any school”.<sup>344</sup> Admissions authorities are required to re-advertise for lay members every three years.
- 4.59 The appeal panel can direct that a child be given a place at a particular school. That decision is binding on both the admissions authority and the governing body of a community or voluntary controlled school at which the panel determines the child should be placed.<sup>345</sup>

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<sup>342</sup> School Standards and Framework Act 1998 s 95(3) also permits a governing body to appeal to a panel against a local authority’s decision to admit a child who has previously been excluded from two or more schools.

<sup>343</sup> Welsh Government, *School admission appeals code* (2013), paras A.7 and 2.9.

<sup>344</sup> Education (Admission Appeals Arrangements) (Wales) Regulations SI 2005 No 1398 (W 112) sch 1 para 1.

<sup>345</sup> School Standards and Framework Act 1998, s 94(6).

- 4.60 School admission appeals are far more common than exclusion appeals. The 2016 Report reported a 2013 estimate of 600 school admission appeals in Wales each year.<sup>346</sup> These vary between individual local authorities. In the area of Cardiff County Council, for example, there were 408 appeals in the year 2018 to 2019, of which 26 were successful.<sup>347</sup> In the Vale of Glamorgan, there were 132 appeals, of which six succeeded.<sup>348</sup>
- 4.61 In response to the COVID-19 pandemic, the Welsh Government issued non-statutory guidance which explained temporary measures that had been implemented. These measures are contained in the Education (Admissions Appeals Arrangements (Wales) Coronavirus (Amendment) Regulations 2020 and take precedence over the Appeals code where the two conflict.<sup>349</sup>

### School exclusion appeal panels

- 4.62 School exclusion panels are provided for by the Education Act 2002, and hear appeals against decisions of governing body discipline committees on permanent exclusions.<sup>350</sup> They are arranged by the local authority.<sup>351</sup> Composition of the panels is similar to that of admissions panels; a panel consists of three or five members, including lay members, members working in education or education management, and members who are or have been governors of maintained schools.<sup>352</sup>
- 4.63 A panel is able to order that:
- (1) the exclusion be upheld;
  - (2) the pupil be reinstated; or
  - (3) the case is an exceptional one where reinstatement is not a practical way forward, but would otherwise have been the appropriate direction.<sup>353</sup>
- 4.64 There are fewer exclusion appeals than there are admission appeals. Information is not collated by the Welsh Government, and so it is difficult to know how many take place each year. The 2016 Report cites a previous feasibility study carried out by the Welsh Government, which reported that there were 21 appeals in 2011- 2012.<sup>354</sup>

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<sup>346</sup> Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) para 49.

<sup>347</sup> See <https://www.cardiff.gov.uk/ENG/resident/Schools-and-learning/Schools/Applying-for-a-school-place/Appealing-a-decision-about-a-school-place/Pages/default.aspx>

<sup>348</sup> Vale of Glamorgan Council, *A Parental Guide to School Admissions in the Vale 2019/20, Educating Children in the Vale of Glamorgan*, p 26.

<sup>349</sup> <https://gov.wales/changes-admission-appeals-regulations-during-coronavirus-outbreak-html>

<sup>350</sup> Education Act 2002, s 52.

<sup>351</sup> The Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations SI 2003 No 3227 (W 308) reg 7(1).

<sup>352</sup> Above, sch 1 para 2(2).

<sup>353</sup> Above, reg 7(5).

<sup>354</sup> Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: A Cornerstone of Social Justice in Wales* (2016) para 50.

Recent research suggests that the total may now be a little higher. The authors of *Public Administration and a Just Wales: Education* (a report published in 2020), explain that they attempted to obtain information by making Freedom of Information Act requests to all 22 local authorities in Wales, asking how many exclusion panels they had convened in the previous year. The report explains that:

Of the 12 local authorities who responded to our FOI asking how many school exclusion appeal panels they had convened over the past 12 months, 3 declined to disclose the information due to the low numbers involved and the risk of students being identified. The other 9 had, between them, convened a total of 18 panels: one authority had convened no panels, 4 had convened one each, one had convened 3, one had convened 4, and one had convened 7 in the 12 month period.<sup>355</sup>

4.65 The statutory guidance from the Welsh Government allows for exclusion meetings to take place virtually where certain conditions are met.<sup>356</sup> These include

- (1) when it is not reasonably practicable for the meeting to take place in person and;
- (2) when the discipline committee, local authority or arranging authority are satisfied that
  - (a) all participants agree to remote access hearings;
  - (b) all the participants have access to the technology required to participate;
  - (c) all participants can put forward their point of view and;
  - (d) the meeting can be held fairly and transparently through remote access.

4.66 During the COVID-19 pandemic, the Welsh Government provided leniency for discipline committees and independent appeal panels when preparing hearings based on the timescales provided.<sup>357</sup>

### **Social Care Wales panels**

4.67 Social Care Wales, previously known as the Care Council for Wales, is a body corporate. Its statutory functions can be found in the Regulation and Inspection of Social Care (Wales) Act 2016. One of its duties is to keep a register of all social workers and social care workers in Wales.<sup>358</sup> If the registrar refuses to register an applicant or refuses to renew their registration, the applicant may appeal to the registration appeals panel, which is set up by Social Care Wales. An interim orders panel may decide whether to place an interim order on a registration if they decide

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<sup>355</sup> S Nason, A Sherlock, H Taylor and H Pritchard, *Public administration and a just Wales* (March 2020), p 67. [http://adminjustice.bangor.ac.uk/documents/Public\\_Administration\\_and\\_a\\_Just\\_Wales\\_\(Final\\_Full\).pdf](http://adminjustice.bangor.ac.uk/documents/Public_Administration_and_a_Just_Wales_(Final_Full).pdf)

<sup>356</sup> Welsh Government, School exclusions guidance. See <https://gov.wales/school-exclusions-guidance-meetings-html>

<sup>357</sup> As above.

<sup>358</sup> Regulation and Inspection of Social Care (Wales) Act 2016, s 80(2).

there is a risk to the public, or it is in the public's interest pending the outcome of an investigation. Finally, Social Care Wales also administers fitness to practise panels.<sup>359</sup>

- 4.68 Social Care Wales is responsible for making rules regarding the constitution of the panels, which are made up of three or five members. Members are either lay members (defined as a member of the general public who is not a social worker, or involved in social work) or social care members (a person who is a registered social worker or otherwise professionally involved in social care).<sup>360</sup> A clerk, employed by SCW, assists the panel. The panel is also assisted by a legal adviser.
- 4.69 Appeals from the panels lie to the First-tier Tribunal (Care Standards), part of the Health, Education and Social Care Chamber.
- 4.70 Rules for the different types of hearings are made by Social Care Wales, although the Welsh Government may also publish guidance as to their content, including model rules.<sup>361</sup> It does not appear that the Welsh Government has published model rules; but if it did so, then Social Care Wales would be obliged to have regard to them.

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<sup>359</sup> Regulation and Inspection of Social Care (Wales) Act 2016, pt 8.

<sup>360</sup> Regulation and Inspection of Social Care (Wales) Act 2016, s 174(2), (4), (8) and (9), Social Care Wales (Constitution of Panels: Prescribed Persons) Regulations SI 2016 No 1099 (W 263) regs 3, 4 and 5 and schedules 1, 2 and 3, Social Care Wales (Constitution of Panels) Rules 2020 r 7.

<sup>361</sup> The Social Care Wales (Proceedings before Panels) Regulations SI 2016 No 1100 (W 264) regs 13 and 26.