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Reforming the law
Comisiwn y Gyfraith
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Devolved Tribunals in Wales Consultation Paper



Law Commission

Consultation Paper No 251

Devolved Tribunals in Wales

Consultation Paper

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Topic of this consultation: We are consulting on the devolved tribunals in Wales. We focus on issues which affect the system of tribunals in Wales as a whole, looking at the structure of tribunals, common processes (such as powers to appoint and discipline tribunal members, or make procedural rules), and the roles of the President of Welsh Tribunals and Welsh Tribunals Unit.

Geographical scope: This consultation applies to the law of England and Wales.

Duration of the consultation: We invite responses from 16 December 2020 to 19 March 2021.

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If you send your comments by post, it would be helpful if, whenever possible, you could also send them by email.

Availability of materials: The consultation paper is available on our website at <https://www.lawcom.gov.uk/project/devolved-tribunals-in-wales>.

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Glossary

Adjudication Panel for Wales (“APW”): The APW hears cases relating to alleged breaches of authorities’ codes of conduct by members of Welsh county, county borough, and community councils, and 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. These were 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”): The ALTW hears disputes between agricultural landlords and tenants and drainage disputes.

Administrative Justice and Tribunals Council, Welsh Committee, *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.

Commission on Justice in Wales, *Justice in Wales for the People of Wales*: The Commission on Justice in Wales (“the Thomas Commission”), chaired by Lord Thomas of Cwmgiedd, undertook a comprehensive review of the operation of the justice system in Wales. It published its report, entitled “Justice in Wales for the People of Wales”, in October 2019.

Committee on Administrative Justice and Tribunals, Wales, *A Cornerstone of Social Justice in Wales* (“2016 Report”): In 2016, the Committee for Administrative Justice and Tribunals, Wales published this report, commissioned by the Welsh Government. 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.

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

Her Majesty’s Courts 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”): The JACO is responsible for investigating the handling of complaints about both judicial appointments processes and judicial discipline or conduct.

Judicial Appointments Commission (“JAC”): The 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 the 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 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.

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 TCEA 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 Head of the Judiciary of England and Wales and President of the Courts of England and Wales.

The Mental Health Review Tribunal for Wales ("MHRTW"): The MHRTW hears applications by and in respect of persons detained under the Mental Health Act 1983.

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

President of Scottish Tribunals ("PST"): 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 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"): Nursery education inspectors are contained within a register provided in the Education Act 2005. Section 27 of the Education Act 2005 allows inspectors to disagree with a decision to remove them from the register, or to impose conditional registration, by applying to the RNEIAT.

Registered Schools Inspectors Appeal Tribunal ("RSIAT"): School inspectors are contained within a register provided in the Education Act 2005. Section 27 of the Education Act 2005 allows inspectors to disagree with a decision to remove them from the register, or to impose conditional registration, by applying to the RSIAT.

Residential Property Tribunal Wales ("RPTW"): The 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 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 Consultation Paper 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"): The SENTW hears appeals from children, their parents or young people, against the decisions made by a local authority about their education. The SENTW will be renamed the Education Tribunal for Wales when the relevant provision of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 comes into force.

Tribunal members: In the context of this Consultation Paper, a tribunal member means all those sitting on a tribunal panel, whether they are legal members, have some other professional expertise, or are lay members. It does not include judicial leads.

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 Wales ("VTW"): The VTW predominantly hears appeals relating to non-domestic rating decisions and council tax evaluations. The VTW is not included in the list of tribunals at section 59(1) of the 2017 Act.

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"): The 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 have developed haphazardly. Most of them were established before devolution, and in response to the policy needs of individual government departments. As a result of devolution, they were not included in the rationalisation of tribunals effected by the Tribunals, Courts and Enforcement Act 2007 and are still mainly governed by their original legislation; processes and procedures vary from one tribunal to another, and there are gaps and inconsistencies. The underlying legislation has not been updated to reflect either devolution or the creation of the office of President of Welsh Tribunals in 2017.
- 1.2 That office has helped to unify the tribunals, by providing some of them with a focal point, and a senior judicial figure to represent their interests to the Welsh Government and the Senedd. Additional consistency has been achieved by centralising administration of some of the tribunals within the Welsh Government's Welsh Tribunals Unit ("the WTU"). But the legislation underpinning the tribunals is still fragmented, and it is difficult to describe the existing tribunals as forming part of a "system".
- 1.3 This Consultation Paper examines the gaps and inconsistencies, and makes provisional proposals to remedy them. Our proposals aim to create a system of devolved tribunals in Wales which is flexible and responsive to future changes in demand, which will avoid future inconsistencies arising.
- 1.4 We seek responses to this consultation by 19 March 2021. Although we are happy to receive responses in any form, consultees may find it convenient to use the response form available on our website, at <https://www.lawcom.gov.uk/project/devolved-tribunals-in-wales>.

THE ORIGINS OF THIS PROJECT

- 1.5 The Law Commission's 13th programme 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.
- 1.6 The then First Minister, Carwyn Jones MS, made a written statement to the Assembly in July 2018, announcing the project.¹ A further statement announcing that the project had commenced was made by the current First Minister, Mark Drakeford MS, in August 2020.²

¹ <https://gov.wales/written-statement-welsh-tribunals-law-commission-project> (All hyperlinks were last visited on 1 December 2020).

² <https://gov.wales/written-statement-law-commission-project-devolved-tribunals-wales>.

OUR TERMS OF REFERENCE

1.7 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.³ Our Memorandum of Understanding with the Welsh Government records that our review includes issues such as:

- (1) the scope of a tribunal system for 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.

1.8 The Memorandum of Understanding does not specify the tribunals that fall within the remit of the project. Identifying these is not entirely straightforward. We make provisional proposals, and seek views on what decision-making bodies should be included, in Chapter 2. Obvious candidates for inclusion are 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”);⁴
- (4) the Special Educational Needs Tribunal for Wales (“SENTW”) (to be renamed the Education Tribunal for Wales);

³ Welsh Government, *The future of Welsh law: classification, consolidation and codification* (October 2019) <https://gov.wales/sites/default/files/consultations/2020-01/the-future-of-welsh-law-consultation-document.pdf>.

⁴ 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)”.

- (5) a tribunal constituted in accordance with Schedule 3 to the Education Act 2005 (registration of inspectors in Wales; tribunals hearing appeals under section 27);⁵
- (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”, our preliminary view is that any tribunal which meets the Government of Wales Act 2006 definition of “devolved tribunal” should fall within the scope of the project. In Chapter 2 we consider which bodies should be regarded as “devolved tribunals” for the purposes of this project, and make provisional proposals about our approach to identifying which decision-making bodies are tribunals that should be within its scope. Our provisional view is that this approach brings within scope the Valuation Tribunal for Wales (“VTW”), which determines appeals against council tax and non-domestic rating decisions, as well as school exclusion and admission appeal panels.⁶
- 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 routes of appeal. Instead we have focussed on making provisional proposals which will improve the operation of the existing tribunals, while creating a resilient, flexible structure which is capable of evolving over time. Our provisional proposal at Chapter 3.90 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.

THE 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 provisional 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 and Wales.

⁵ There are two tribunals constituted pursuant to these provisions, respectively titled the Registered School Inspectors Appeal Tribunal and the Registered Nursery Education Inspectors Appeal Tribunal. Appeals to these tribunals are rare; their functions may be performed by the members of the SENTW.

⁶ For further discussion of these bodies, see paragraphs 2.57 to 2.61 below.

Other examples include the SENTW and the VTW (previously part of a wider regional network of valuation tribunals).⁷ The most recently created of the section 59 tribunals is the Welsh Language Tribunal, established in 2015.

- 1.13 As 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 functions under the Rent Act 1977 which included responsibility for Rent Assessment Committees.⁸

- 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 Leggatt review and were not included in the subsequent reforms enacted by the Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”). Those 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 most obvious 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).
- 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

⁷ Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) p 43.

⁸ H Pritchard, “Building a Welsh Jurisdiction Through Administrative Justice” (2017) in *Administrative Justice in Wales and Comparative Perspectives*, p 225.

tribunals operating in Wales (discussed in greater detail below), the devolved tribunals were administered by various Welsh Assembly Government departments.⁹

- 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 1.27 and 9.7 to 9.9 below). That unit was later renamed the WTU, which still administers the section 59 tribunals.
- 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.¹⁰

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 2007,¹¹ 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

⁹ Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) p 12.

¹⁰ 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, p 235.

¹¹ 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.

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 to assess the progress made in implementing the recommendations made by the AJTC Welsh Committee in its 2010 report.
- 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 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.¹²
- 1.29 This issue was addressed by the Wales Act 2017, which created the role of President of Welsh Tribunals ("PWT").¹³ We discuss the role of the PWT in further detail at Chapter 8.
- 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".¹⁴ Again, some progress has been made towards this; there is now a formal

¹² Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) para 31.

¹³ Wales Act 2017, s 60.

¹⁴ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) para 24.

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’”.¹⁵
- 1.32 This project builds on this previous work and, as noted at 1.7 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.

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 and created the list of “Welsh tribunals”; 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. 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.¹⁶ 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.¹⁷
- 1.35 As explained above, the list of tribunals in section 59 of the 2017 Act is not comprehensive. Significantly, it does not include the VTW or school admission and exclusion appeal panels, which we provisionally propose should be covered by our proposed reforms.¹⁸

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.

¹⁵ 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.

¹⁶ 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”.

¹⁷ Wales Act 2017, s 63.

¹⁸ See paras 2.57 to 2.61 below.

- 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.¹⁹
- 1.38 We are aware that in response to the Commission's proposals the Senedd's Legislation, Justice and Constitution Committee has started an inquiry into the operation of justice functions and how the justice system could operate more effectively in Wales.²⁰ The Welsh Government is also currently considering the implementation of parts of the Commission's proposals.

PRINCIPLES INFORMING OUR ANALYSIS

- 1.39 When preparing this Consultation Paper we have found it helpful to refer to the "Principles for Welsh tribunals" prepared as part of the AJTC Welsh Committee's 2010 Report.²¹ 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".

¹⁹ Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) paras 6.50 and 6.59.2.

²⁰ <https://business.senedd.wales/mglIssueHistoryHome.aspx?Ild=27933>.

²¹ Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) pp 24 and 25.

THE STRUCTURE OF THIS CONSULTATION PAPER

1.40 This Consultation Paper is divided into nine further chapters, broadly corresponding to the terms of reference of the project.

- (1) Chapter 2 sets out some of our preliminary thinking about the project. It explores what we mean by “tribunal” and the devolutionary framework as it applies to this project. We then apply that analysis to particular decision-making bodies in Wales to arrive at a provisional view on what bodies should be within or outside the scope of this project.
- (2) Chapter 3 discusses the structure of the tribunal system at the first-tier level. It looks at the current system of section 59 tribunals, and provisionally proposes the establishment of a new unified tribunal, subdivided into chambers by secondary legislation. It also considers whether other tribunals such as the VTW and school exclusion appeal panels should form part of a new unified tribunal, provisionally proposing that the VTW should do so and that the functions of school exclusion appeal panels should be transferred to SENTW. It proposes that school admission panels should remain as they are for the time being, but that the possibility of transferring their functions to SENTW be kept under review.
- (3) Chapter 4 considers onward appeals from the devolved tribunals. It asks whether the appeal routes should be the same from each tribunal, and where those appeals should be heard. It evaluates the benefits of the High Court and of the existing Upper Tribunal as appellate bodies for the devolved tribunals, and explores the possibility of creating an Appeal Tribunal for Wales, seeking the views of consultees on these options. It also provisionally proposes the creation of a right of appeal from school admission panels to SENTW.
- (4) Chapter 5 considers how the procedural rules of the devolved tribunals are made, and to what extent those rules could be standardised. It provisionally proposes the creation of a Tribunals Procedure Committee for the devolved tribunals.
- (5) Chapter 6 looks at the varied approach taken to appointments to the devolved tribunals, of both judicial leads and members, and explores what principles could be used to underpin a more consistent approach. We provisionally propose a system whereby appointments of members are made by the PWT, and appointments of judicial leads²² are made jointly by the PWT and Welsh Ministers. We also consider selection processes and the role of the Judicial Appointments Commission.
- (6) Chapter 7 considers who should be responsible for disciplining judicial leads and tribunal members, and what kind of process should be adopted. It also explores how complaints processes within the devolved tribunals could be improved.

²² We use this term to refer to the President or Chairperson of a tribunal.

- (7) Chapter 8 looks at the role of the PWT, building on our discussion of the role in other areas such as appointments and discipline. It considers whether the PWT should be entitled to sit as a judge in the tribunals. It also explores whether the role should be expanded to include judicial supervision of school admission appeal panels.
- (8) Chapter 9 discusses the role of the WTU, and possible ways in which it could be restructured to provide greater independence from the Welsh Government.
- (9) Finally, Chapter 10 reflects on the principle of judicial independence and how it can be protected within the devolved tribunals. We provisionally propose 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 judicial leads and members of tribunals should take the judicial oath.

1.41 Appendix 1 to this Consultation Paper gives background information on each of the tribunals which, in our provisional view, should fall within the scope of our provisionally proposed reforms.

THE DRAFT IMPACT ASSESSMENT

1.42 The Law Commission produces impact assessments in relation to its reform proposals. We are publishing a preliminary impact assessment of our provisional reform proposals, which will be available online alongside this Consultation Paper. We hope that our public consultation will provide an opportunity to consolidate our evidence base, and to provide the basis for a robust impact assessment to accompany our recommendations for reform, and final report. We invite consultees to comment on the impact of our provisional proposals. As we set out below at paragraphs 3.36 to 3.38, assessing whether amalgamated tribunal structures deliver the benefits they are designed to is difficult. We particularly welcome consultees' insight into the impact of amalgamating tribunals.

1.43 Another challenge when preparing the draft impact assessment has been finding up-to-date and comprehensive information about the operation of school admission and exclusion appeal panels. These are administered by local authorities, with the result that there is no central, comprehensive source of information about the operation of these panels across Wales, or single person or office who can speak for them. We welcome consultees' comments on the impact of our proposals on those panels, as well as any information consultees are able to share on the operation of those panels and their volume of hearings.

ACKNOWLEDGEMENTS

1.44 We are grateful to all those who have shared their views with us while working on this Consultation Paper. That work has coincided with a testing period for the devolved tribunals in Wales, as they have had to rapidly react to the challenges posed by the global COVID-19 pandemic. Nonetheless, the current PWT, Sir Wyn Williams, the Welsh Government's Justice and Policy team, the staff of the WTU 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 particularly grateful for the

assistance of members both of the Law Commission's Wales Advisory Committee, and of our devolved tribunals in Wales advisory group, which held its first meeting on 1 October 2020. Attendees of the advisory group meeting are listed at Appendix 2.

- 1.45 We also owe thanks to those involved in the organisation of the Legal Wales conference, who kindly invited us to speak about the project in both October 2019 and October 2020.

THE TEAM WORKING ON THE PROJECT

- 1.46 The following members of staff have contributed to this Consultation Paper at various stages: Henni Ouahes (team manager); Sarah Smith (lawyer in the public law and law in Wales team at the Law Commission); Liam Evans and Awen Edwards (research assistants).

Chapter 2: Tribunals in Wales: devolved competence and devolved tribunals

INTRODUCTION

- 2.1 This chapter sets out the devolutionary framework within which this project fits and explains how we have approached identifying the tribunals within the scope of our review. We start by providing some technical detail on the current devolutionary framework in Wales. We pay particular attention to the effect of the devolution settlement on the various topics within our terms of reference, and identify where consent or consultation of UK Ministers would be required before our provisional proposals could be pursued by the Senedd.
- 2.2 In the second part of the chapter, we move on to consider a related question: which decision-making bodies in Wales are devolved tribunals for the purposes of this project? Determining which bodies are devolved tribunals is not straightforward. We take the view that a body is a devolved tribunal if: (1) it is a body whose functions are exercisable only in relation to Wales; (2) its functions do not relate to reserved matters,²³ and (3) it has the hallmarks of a tribunal, specifically that it adjudicates upon disputes between parties by making binding decisions. We ask consultees whether they agree both with those criteria and with our application of them to various decision-making bodies in Wales.

THE DEVOLUTIONARY FRAMEWORK

- 2.3 In this section we discuss both legislative competence (the ability of the Senedd to pass legislation in a particular area) and executive competence (the capacity of the Welsh Ministers to exercise power, including by making secondary legislation). We focus on how devolution applies to a specific number of aspects of this project, including the President of Welsh Tribunals and the Welsh Tribunals Unit (“WTU”), appointments to tribunals, the power to make their procedural rules and to specify appeal processes and complaints processes.
- 2.4 Legislative and executive competence are not coextensive. For example, while the law governing appointments of members of devolved tribunals falls within the legislative competence of the Senedd, the power to appoint members of some tribunals is currently exercised by the Lord Chancellor and Lord Chief Justice. The Government of Wales Act 2006 (the “2006 Act”) provides that transfers of functions from UK Ministers (such as the Lord Chancellor) may be made to Welsh Ministers by Order in Council.²⁴ The Senedd may also legislate to remove functions from the Lord

²³ Criteria (1) and (2) are derived from the Government of Wales Act 2006, sch 7A, para 9(2).

²⁴ Government of Wales Act 2006, s 58.

Chief Justice, though in this case consent from the appropriate Minister is likely to be required.²⁵

Legislative competence

2.5 Following the coming into force of the Wales Act 2017 (the “2017 Act”), the model of devolution in Wales moved from a “conferred powers” model to a “reserved powers” model. Instead of specifying which subjects the Senedd could legislate for, Schedule 7A to the 2006 Act now specifies which areas are reserved to the UK Parliament. Section 108A of the 2006 Act, as inserted by the 2017 Act, sets out the legislative competence of the Senedd. It provides that a provision will be outside its competence if:

- (1) it extends otherwise than only to England and Wales;²⁶
- (2) it applies otherwise than in relation to Wales, or confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales;²⁷
- (3) it “relates to” any of the reserved matters listed in Schedule 7A;
- (4) it breaches any of the general restrictions listed in Schedule 7B; or
- (5) it is incompatible with the Convention rights²⁸ or with EU law.

Schedule 7A: reserved matters

2.6 Schedule 7A to the 2006 Act includes a number of general and specific reservations. Significantly for this project, paragraph 8 of Schedule 7A reserves the single legal jurisdiction of England and Wales. Paragraph 9 reserves tribunals, with the important exception of devolved tribunals. This reservation and exception are discussed in more detail at paragraph 2.14 below.

2.7 Part 3 of Schedule 7A contains general provisions qualifying the reservations made earlier in the Schedule. One of the most important qualifications is provided by paragraph 194(1), which states that the Senedd is not prevented from legislating in respect of certain matters concerning devolved Welsh authorities. For example, the Senedd can confer, impose, modify or remove functions specifically exercisable in

²⁵ Government of Wales Act 2006, sch 7B para 8; except for fiscal matters, the appropriate Minister is the Secretary of State.

²⁶ The “extent” of an Act means the territory in which it forms part of the law. Currently, all Acts of the Senedd are part of the law of England and Wales, though they can only have application in relation to Wales.

²⁷ This restriction is qualified by s 108A(3), which (as amended by the Senedd and Elections (Wales) Act 2020) states it does not apply to a provision which is “ancillary to a provision of any Act of the Senedd or Senedd Measure or to a devolved provision of an Act of Parliament” and “has no greater effect otherwise than in relation to Wales, or in relation to functions exercisable otherwise than in relation to Wales, than is necessary to give effect to the purpose of that provision”.

²⁸ That is to say, rights under the European Convention on Human Rights that are referred to in the Human Rights Act 1998, s 1: see Government of Wales Act 2006, s 81.

relation to a devolved Welsh authority.²⁹ Paragraph 196 adds that the Senedd can also legislate in respect of the same matters in relation to devolved tribunals.

- 2.8 There are two approaches taken to the definition of “devolved Welsh authority” in the 2006 Act; a general definition, and a list.³⁰ The list of devolved Welsh authorities, located in Schedule 9A, includes the Welsh tribunals listed in section 59 of the 2017 Act,³¹ the Valuation Tribunal for Wales (“VTW”) and school admission and exclusion appeal panels.

Schedule 7B: general restrictions

- 2.9 Schedule 7B contains several general restrictions on the legislative competence of the Senedd. It also contains restrictions on the amendment of functions of a public nature of “reserved authorities”, defined as Ministers of the Crown, a government department or “any other public authority apart from a devolved Welsh authority”.
- 2.10 The provisions in Schedule 7B require consent of or consultation with the appropriate Minister to remove, modify or confer functions of reserved authorities. The table below summarises when consent of or consultation with the Minister is required:

	Conferring or imposing functions	Removing or modifying functions
Public authorities (other than devolved Welsh authorities)	Sch 7B para 8(1): <u>Consent</u> [Exceptions in para 9]	Sch 7B para 10: <u>Consent</u> [Does not apply to bodies listed in para 10(2). Exemptions for certain functions of courts and tribunals set out in para 10(4)]
Ministers of the Crown	Sch 7B para 8(1): <u>Consent</u> [Exceptions in para 9]	Sch 7B para 11: Functions listed in para 11(1) (including qualified devolved functions and those relating to Welsh language): ³² <u>Consent</u> Other functions: <u>Consultation</u>

²⁹ Paragraph 194(1), in full, provides that the schedule does not reserve: (a) the constitution of an authority that has reserved functions; (b) conferring or imposing (or giving power to confer or impose) accounting or public procurement functions on such an authority; (c) modifying or removing (or giving power to modify or remove) any accounting or public procurement functions of such an authority; or (d) conferring, imposing, modifying or removing (or giving power to confer, impose, modify or remove) functions specifically exercisable in relation to such an authority, if the authority is a devolved Welsh authority.

³⁰ A third category of devolved Welsh authority, not presently relevant, consists of certain higher education institutions. Section 157A(2) provides a public authority will be a devolved Welsh authority if its functions are: (a) exercisable only in relation to Wales; and (b) are wholly or mainly functions that do not relate to reserved matters.

³¹ See paras 1.33 to 1.35 above.

³² Paragraph 11(3) of Schedule 7B defines a qualified devolved function as “a function that (a) is conferred or imposed on or transferred to the Welsh Ministers, the First Minister or the Counsel General by any Act (whenever passed) or by an instrument made under any Act (whenever made), and (b) is to any extent exercisable (i) concurrently or jointly with a Minister of the Crown, or (ii) only with the consent or agreement of, or after consultation with, a Minister of the Crown.”

Executive competence

- 2.11 When considering how devolution affects an area of law, it is important to consider the executive competence of the Welsh Ministers (their capacity to exercise executive power) as well as the legislative competence of the Senedd. The two are not necessarily coextensive.
- 2.12 Determining the extent of executive competence is often necessary in the Welsh context because of the restrictions contained in Schedule 7B. As just mentioned, if executive competence is exercised by a UK Minister or reserved authority, the Senedd may be required to consult with or obtain the consent of the appropriate Minister before it can legislate to remove or modify those functions. This is the case even if the subject area is not reserved under Schedule 7A. For transfers of functions from UK Ministers to Welsh Ministers, an Order in Council under section 58 of the 2006 Act may be used.

DEVOLUTION IN RELATION TO DEVOLVED TRIBUNALS

- 2.13 This section considers particular aspects of the project and whether they fall within the legislative competence of the Senedd.
- 2.14 The starting point is that tribunals are reserved by paragraph 9(1) of Schedule 7A of the 2006 Act. This includes their membership, members' appointments and remuneration, functions and procedure, and appeals from their decisions. However, paragraph 9(2) explicitly excludes "devolved tribunals". These are defined as tribunals all of whose functions:
- (1) are exercisable only in relation to Wales, and
 - (2) do not relate to reserved matters.
- 2.15 We return to this definition later when identifying which tribunals fall within the scope of the project.

The President of Welsh Tribunals

- 2.16 The President of Welsh Tribunals is not a devolved Welsh authority.³³ As such, the Senedd may not confer or impose powers on the President without the consent of the appropriate Minister.³⁴

The Welsh Tribunals Unit

- 2.17 The WTU does not currently have its own legal identity, being made up of a team of staff employed by the Welsh Government.³⁵ Potential models for a reformed WTU

³³ Wales Act 2017, s 60(2).

³⁴ Government of Wales Act 2006, sch 7B, para 8. The President of Welsh Tribunals meets the definition of "reserved authority" under sch 7B, para 8(3): The President is a public authority, as defined by para 8(4) ("a body, office or holder of an office that has functions of a public nature") and is not a devolved Welsh authority (Wales Act 2017, s 60(2)).

³⁵ President of Welsh Tribunals, *Annual Report 2018 – 2019* (March 2019) p 9 <https://www.assembly.wales/laid%20documents/gen-ld12494/gen-ld12494-e.pdf>.

include an executive agency and a non-ministerial department. Our preliminary view is that the creation of such a body would be within the competence of the Senedd, so long as its responsibilities were restricted to the administration of devolved tribunals.³⁶

Appointments

- 2.18 As noted above, paragraph 9(1) of Schedule 7A to the 2006 Act specifically reserves tribunals, including (a) their membership and (b) the appointment and remuneration of their members. The reservation is qualified by paragraph 9(2), which excludes “devolved tribunals”.
- 2.19 The starting point, then, is that the appointment and discipline of devolved tribunal members are devolved. This is subject to two potential qualifications.
- 2.20 The first qualification is that “judges (including, in particular, their appointment and remuneration)” are reserved by the 2006 Act.³⁷ The paragraph is not explicitly restricted to courts. This raises a question about its application to devolved tribunals. Does the reference to judges include legal members of tribunals, meaning that their appointment is a reserved matter? Neither the 2006 Act nor the 2017 Act provide any guidance on the meaning of “judges”, as opposed to “members”,³⁸ and the procedural rules for the devolved tribunals use the term inconsistently. Some (but not all) members and judicial leads of the devolved tribunals are included within a definition of “judiciary” in section 3 of the Constitutional Reform Act 2005, and listed in Schedule 14 to that Act.³⁹ That is not conclusive, however.
- 2.21 Even if the reservation of judges were found to apply to tribunal judges, the effect of paragraphs 194 and 196 of Schedule 7A (discussed above at paragraph 2.7) must be considered. Those paragraphs provide that reservations in Schedule 7A do not prevent the Senedd conferring, imposing, modifying or removing functions specifically exercisable in relation to devolved tribunals. An ability to appoint judges to a tribunal would, in our provisional view, fall within that definition.
- 2.22 The second qualification is that the appointment of tribunal members is currently the responsibility of a number of different persons, a topic which we discuss in greater detail in Chapter 6 below. In some cases consultation or consent would be required before the Senedd can remove or modify their functions (for example, consultation is required before the Senedd may remove or modify a function of the Lord Chancellor,

³⁶ In our provisional view, the reformed Welsh Tribunals Unit (“WTU”) would satisfy the definition of devolved Welsh authority in the Government of Wales Act 2006, s 157A. The WTU would have functions that are exercisable only in relation to Wales and those functions would be wholly or mainly functions that do not relate to reserved matters. As discussed above the devolved tribunals are a devolved matter.

³⁷ Government of Wales Act 2006, sch 7A, para 8(1)(b).

³⁸ As referred to by the Government of Wales Act 2006, sch 7A, para 9(1)(a) and (b).

³⁹ Constitutional Reform Act 2005, sch 14, p 3, Tribunal-related and other appointments. These include the Chairman of an Agricultural Land Tribunal, a member of a panel of deputy-chairmen of Agricultural Land Tribunal, members of panels set up under Schedule 10 to the Rent Act 1977, the President and members of the Mental Health Review Tribunal for Wales (“MHRTW”) and the President and members of the chairman’s panel of the Special Educational Needs Tribunal for Wales (“SENTW”).

as a Minister of the Crown).⁴⁰ As a result, if our project recommended a change in the current arrangements, consent from and/or consultation with the UK Government would be required before the Senedd could pass the necessary legislation.

Power to make and standardise procedural rules

- 2.23 The starting point again is that legislation in relation to “devolved tribunals”, including their procedural rules, is within the competence of the Senedd. There are existing powers to make procedural rules for particular tribunals; these for the most part lie with the Welsh Ministers.⁴¹ As such, consent or consultation with a UK Minister is not required for the Senedd to legislate to modify these functions. Some of the powers to make procedural rules (for example, in relation to the Mental Health Review Tribunal for Wales (“MHRTW”) and the Agricultural Land Tribunal for Wales (“ALTW”)) previously lay with the Lord Chancellor, but have subsequently been transferred to the Welsh Ministers.⁴²

Appeals processes

- 2.24 As discussed above, Schedule 7A, paragraph 9(1) of the 2006 Act generally reserves “tribunals”, including “appeals against their decisions”.⁴³ The reservation is qualified by subparagraph 2 of paragraph 9, which excludes “devolved tribunals”.
- 2.25 The question whether appeals from devolved tribunals are a devolved matter is complicated by the fact that making changes to an appeal route affects not only the functions of the devolved tribunal, but also of the appellate body. The two bodies which currently hear appeals from devolved tribunals are the Upper Tribunal⁴⁴ and the High Court.⁴⁵ We consider the position of these two bodies below, together with a third possibility, that of the creation of an Appeal Tribunal for Wales.

The Upper Tribunal

- 2.26 It is within the Senedd’s legislative competence to provide for a new appeal or application to be made from a devolved tribunal to the Upper Tribunal, providing that the appeal or application relates to devolved matters. The 2006 Act reserves, however, the procedure which applies to the hearing of those appeals or applications.⁴⁶

⁴⁰ The Ministers of the Crown Act 1975 s 8(1).

⁴¹ The exceptions are the Welsh Language Tribunal (“WLT”) and appeal tribunals of the Adjudication Panel for Wales (“APW”). The Presidents of each of those tribunals have the power to set procedural rules, subject to consultation with the Welsh Ministers (in the case of the APW) and the approval of the Welsh Ministers (in the case of the WLT). For a more detailed discussion of procedural rules see Chapter 5 below.

⁴² Welsh Ministers (Transfer of Functions) Order, SI 2018 No 644, arts 4 and 20.

⁴³ Government of Wales Act 2006, sch 7A, para 9(1)(d).

⁴⁴ Appeals from the following tribunals lie to the Upper Tribunal on a point of law: the SENTW (an arrangement which will continue, when it is renamed the Education Tribunal for Wales), the MHRTW, the ALTW, and the RPTW.

⁴⁵ Appeals from the APW, VTW and the WLT lie to the High Court.

⁴⁶ Government of Wales Act 2006, sch 7A, para 9(3).

The High Court

2.27 Courts generally, including their creation and jurisdiction, are reserved matters.⁴⁷ Moreover, the 2006 Act generally restricts the Senedd from conferring or imposing functions on reserved authorities.⁴⁸ However, paragraph 9(4)(a) of Schedule 7B provides that that restriction does not apply to:

the conferral or imposition on a court of a devolved function (within the meaning of paragraph 6 of Schedule 7A).

2.28 At the time of writing, paragraph 6 of Schedule 7A does not contain a definition of a devolved function. Such a definition was contained in an earlier version of the Wales Bill, but was omitted from the version of the Bill that became the Act.⁴⁹ Partly to correct this omission, an Order in Council under section 109 of the 2006 Act was laid before Parliament and the Senedd on 10 December 2020.⁵⁰ Article 4(4) of the draft order reinserts the definition of devolved function by addition of a new paragraph 9(4A) of Schedule 7B to the 2006 Act.

2.29 A devolved function is defined 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).

The Order must be approved by both Houses of Parliament and the Senedd. If approved, the effect of the exception in paragraph 9(4)(a) of Schedule 7B would be that it was within the Senedd's legislative competence to create a new appeal route from a devolved tribunal to the High Court, or to modify or replace an existing one.

An Appeal Tribunal for Wales?

2.30 While the creation of new courts is explicitly reserved,⁵¹ the creation of new tribunals is not. It would be open to the Senedd to create a new tribunal, so long as that tribunal met the definition of "devolved tribunal" given in paragraph 9(2) of Schedule 7A to the 2006 Act.

2.31 There is one possible complication. When the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") was enacted, it was envisaged that "where a jurisdiction is exercised by separate tribunals for England and Wales, difficulties could arise if there were different routes of onward appeal for the English and Welsh tribunals".⁵² The

⁴⁷ Government of Wales Act 2006, sch 7A, para 8(1)(a).

⁴⁸ Government of Wales Act 2006, sch 7B, para 8(1).

⁴⁹ HL Bill 77, as amended in Committee. <https://publications.parliament.uk/pa/bills/lbill/2016-2017/0077/17077.pdf>.

⁵⁰ The draft Order is titled the Government of Wales Act (2006) (Amendment) Order 2021. <https://senedd.wales/laid%20documents/lco-ld13919/lco-ld13919-e.pdf>

⁵¹ Government of Wales Act 2006, sch 7A, para 8(1)(a).

⁵² Tribunals, Courts and Enforcement Act 2007, explanatory notes, paras 180 to 183.

Lord Chancellor was therefore given power to make regulations providing that appeals from a number of tribunals in Wales should be to the Upper Tribunal.⁵³ These tribunals are listed in part 7 of Schedule 6 to the TCEA 2007, and comprise all of the Welsh tribunals listed under section 59 of the 2017 Act, with the exception of the Welsh Language Tribunal (“WLT”).⁵⁴

- 2.32 It would be incongruous for the Lord Chancellor to retain that power if a new appeal route for Welsh tribunals were created by the Senedd. Consultation with the appropriate Minister would however be required before the power could be removed by the Senedd.⁵⁵

Complaints and discipline

- 2.33 The 2006 Act does not mention complaints made against tribunal members. Our view is that such complaints, they are not being explicitly reserved, fall within the exception of devolved tribunals, and are therefore within the legislative competence of the Senedd.
- 2.34 The Lord Chancellor and Lord Chief Justice currently exercise some powers in relation to discipline of tribunal members and Presidents listed in Schedule 14 to the Constitutional Reform Act 2005.⁵⁶ We discuss those powers in greater detail in Chapter 7 below. Removing these powers from the Lord Chancellor and Lord Chief Justice will be subject to Schedule 7B of the 2006 Act. As a result, consultation would be required to remove the functions of the Lord Chancellor, and consent to remove the functions of the Lord Chief Justice.

WHAT IS A DEVOLVED TRIBUNAL?

- 2.35 Having considered the extent of devolution, in this section we consider the question: what is a “devolved tribunal” for our purposes? An answer is necessary to decide which bodies should fall within the scope of our recommendations. There are a large number of decision-making bodies operating in Wales, not all of which are tribunals. They come in a variety of shapes and sizes, have a wide range of jurisdictions and powers, and the terminology used to describe them varies. Even the list of Welsh tribunals set out in the 2017 Act includes bodies described as committees and panels, as well as bodies explicitly labelled tribunals. It is necessary to look behind these labels to consider what work a decision-making body is performing.
- 2.36 Our provisional view is that tribunals meeting the 2006 Act definition of devolved tribunal outlined at paragraph 2.14 above should fall within the scope of our project.

⁵³ Tribunals, Courts and Enforcement Act 2007, s 32(3), and sch 6, part 7.

⁵⁴ The SENTW will be removed from the list by the Additional Learning Needs and Education Tribunal Act 2018, anaw 2, sch 1, para 13, when those provisions of that Act come into force.

⁵⁵ Government of Wales Act 2006, sch 7B, para 11(2).

⁵⁶ Constitutional Reform Act 2005, ss 108(1) and (7), and 109(4), and sch 14, p 3, Tribunal-related and other appointments. The list of appointments includes the Chairman of an Agricultural Land Tribunal, a member of a panel of deputy-chairmen of an Agricultural Land Tribunal, members of panels set up under Schedule 10 to the Rent Act 1977, the President and members of the MHRTW and the President and members of the chairman’s panel of the SENTW.

That definition is wide and, in our view, includes the tribunals which have been designated “Welsh tribunals” by section 59 of the 2017 Act.

- 2.37 Although the statutory definition of “devolved tribunal” assists us to determine when a tribunal is devolved, it does not provide guidance on how to identify a tribunal in the first place. We discuss below how a body should be identified as a tribunal and differentiated from other decision-making mechanisms. We also explain our rationale for excluding bodies such as ombudsmen from the scope of the review. The chapter concludes with a brief discussion of a number of tribunals and decision-making bodies and sets out our provisional view as to whether they fall in or out of the scope of the review.

What is a tribunal?

- 2.38 There is no generally agreed definition of a tribunal. As Lord Justice Fry commented in the *Royal Aquarium* case, “that word has not, like the word ‘court’, an ascertainable meaning in English Law”.⁵⁷ According to Edward Jacobs, that is because the question always arises in a particular legal context.⁵⁸ A body may be a tribunal for one purpose, and a court for another.
- 2.39 Tribunals within the UK do, however, appear to share a mode of adjudication. Their primary function is to hear disputes between parties. Usually, but not always, those disputes are between the citizen and the state. For example, SENTW hears disputes between a child (or parent) and a local authority.
- 2.40 Not only do they hear those disputes, but they determine them. Peter Cane, in his book *Administrative Tribunals and Adjudication*, articulates the “paradigm mode of decision-making by tribunals” and concludes that “at the end of the process, the reviewer’s job is to make a decision”.⁵⁹
- 2.41 Beyond that, identifying a tribunal becomes more difficult. Many bodies commonly known as tribunals share a number of characteristics, which we explore below. Not all of them are shared by all tribunals, and many of them are shared by courts. But taken together, most tribunals demonstrate a significant number of the following characteristics.

Independence or impartiality

- 2.42 There is an important distinction to be drawn between these terms in relation to tribunals. Some tribunals, such as school admission and exclusion appeal panels, retain links with government, and so cannot be described as independent, at least in structural terms. They are however required to make impartial decisions. As described by Baroness Hale in *Gillies*:

Impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal’s approach to deciding the cases before it. Independence

⁵⁷ *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 at [446].

⁵⁸ E Jacobs, *Tribunals Practice and Procedure* (5th ed 2019) para 1.16.

⁵⁹ P Cane, *Administrative Tribunals and Adjudication* (2009) heading 6.5.1.1, p 238.

is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members, but also in the perception of the public.⁶⁰

Accessibility

- 2.43 Tribunals are usually designed to be more accessible to users than courts. This accessibility is often achieved by having less formal procedures, and by the use of a lay panel.⁶¹
- 2.44 Another aspect of accessibility is financial; tribunals typically charge lower fees than courts (if they charge fees at all). Most tribunals were designed on the basis that a user would not necessarily need legal representation.⁶²

Speed

- 2.45 Closely linked to the idea of informality is speed. Having simpler procedures is supposed to enable a tribunal to make decisions more quickly than a court. This is of great importance to many tribunal users, who may be waiting for decisions about schooling, or their detention in hospital. The 2017 Act charges the President of Welsh Tribunals to have regard to the need for proceedings before tribunals to “be handled quickly and efficiently”.⁶³

Specialist knowledge within a narrow jurisdiction

- 2.46 Lord Carnwath described one of the main distinguishing features of tribunals as “the specialist expertise of their members, including both lawyers and non-lawyers (such as doctors or accountants or others with relevant experience)”.⁶⁴ This was also identified as an important characteristic in the Leggatt review.⁶⁵

Previous approaches

- 2.47 Some assistance in defining devolved tribunals can be found in the work of previous reviews and pieces of legislation. For example, the Administrative Justice and Tribunals Council (Listed Tribunals) Wales Order 2007 (the “2007 Order”), discussed at paragraph 1.21 above, listed Welsh bodies that the Council was required to keep under review. Fourteen bodies were designated “tribunals” and listed in the 2007 Order.⁶⁶

⁶⁰ *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 WLR 781 at [38].

⁶¹ Tribunal Procedure (Upper Tribunal) Rules SI 2008 No 2698 r 2(2)(b) and E Jacobs, *Tribunals Practice and Procedure* (5th ed 2019) para 1.50.

⁶² A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (17th ed 2018) p 602.

⁶³ Wales Act 2017, s 60(4)(b)(ii).

⁶⁴ Carnwath LJ, “Tribunal justice – a new start” [2009] *Public Law* 48.

⁶⁵ Sir Andrew Leggatt, *Tribunals for Users: One System, One Service: Report of the Review of Tribunals* (March 2001) para 1.12.

⁶⁶ Administrative Justice and Tribunals Council (Listed Tribunals) (Wales) Order, SI 2007 No 2876 (W 250) art 2, and sch 1 (now repealed). The tribunals listed were the tribunals drawn from the APW, Board of Medical Referees, Forestry Committees for Wales, independent review of determination panels in Wales, NHS Independent Complaints Panels, Parking Adjudicators in Wales, the Registered Nursery Education

- 2.48 The list is however of limited use today. It does not include the Agricultural Land Tribunal for Wales, the Mental Health Review Tribunal for Wales or the Welsh Language Tribunal. It also includes several bodies which no longer exist in the same form; for example, NHS Independent Complaints Panels and Social Services Independent Complaints Panels.
- 2.49 Of more assistance is the report of the Committee on Administrative Justice and Tribunals, Wales (the “2016 Report”), discussed in paragraphs 1.28 to 1.32 above. The 2016 Report was not restricted to tribunals, but considered “the whole administrative justice landscape in Wales”. In addition to the section 59 tribunals it considered:
- (1) the VTW;
 - (2) school admission and school exclusion appeal panels;
 - (3) the Planning Inspectorate for England and Wales;
 - (4) the independent review of determinations panel;
 - (5) the discretionary assistance fund for Wales;
 - (6) the independent appeals process for farmers and forest owners; and
 - (7) continuing NHS healthcare panels.
- 2.50 The 2016 Report also appended a “Table of Constitution and Functions of the Welsh Tribunals”, originally produced by the Welsh Government. The table included bodies that were not considered in detail in the 2016 Report:
- (1) the Board of Medical Referees;
 - (2) the Forestry Committee for Wales;
 - (3) the Traffic Penalty Tribunal; and
 - (4) the Social Services Independent Complaints Panel.⁶⁷
- 2.51 The 2016 Report did concede, however, that not all of these should be considered as tribunals. In particular it notes that the independent review of determinations panel might better be considered an “ad hoc redress scheme”. Such schemes are described in the report as follows.

The Welsh Government has established various ad hoc redress schemes through legislation enacted by the Assembly which have some of the characteristics of a

Inspectors Appeal Tribunal and Registered School Inspectors Appeal Tribunal, rent assessment committees, school admission and exclusion appeals panels in Wales, social services independent complaints panels, the SENTW, and the VTW.

⁶⁷ The independent panels have been replaced by a procedure which requires complaints to be made to local authorities about their social services functions. See the Social Services Complaints Procedure (Wales) Regulations, SI 2014 No 1794 (W 187), reg 3.

tribunal but which do not, and are not intended, to meet all the standards required of the tribunal in relation to such matters as the extent of their independence from Government, their structure, their openness to public scrutiny and their procedures.⁶⁸

Determining disputes between parties by making binding decisions

2.52 As discussed above, any attempt to define a tribunal must be contextual. In this context, it is clear which bodies operating in Wales are courts. The task is to distinguish tribunals from other decision-making bodies, sometimes referred to as ad hoc redress schemes or internal review mechanisms. These expressions describe decision-making bodies which are less formal, and/or less independent from Government than a tribunal.

2.53 The test that we have found most helpful is whether the decision – making body adjudicates upon disputes between parties by making binding decisions. As we mention above, Cane concludes that “at the end of the process, the reviewer’s job is to make a decision”.⁶⁹ This view is echoed by Jacobs. He notes that:

tribunals are exclusively judicial bodies, created by statute with their own specific jurisdiction, that are independent and *whose decisions are binding by virtue of their status*.⁷⁰

2.54 We think that asking whether a body adjudicates upon disputes between parties, by making binding decisions, provides a relatively simple test for determining whether a decision-making body is a tribunal. We provisionally propose only those decision-making bodies issuing binding determinations should be categorised as tribunals within the scope of this project. Some of the bodies that have been considered by previous reviews fail to meet this test. We discuss below the examples of the Forestry Committees for Wales, and independent review of determinations panels in Wales.

2.55 However, our provisional view is that the criterion of issuing binding decisions is not itself determinative. Some decision-making bodies, such as the Planning Inspectorate for England and Wales (although not currently exercising functions solely in relation to Wales) and the Board of Medical Referees, issue binding determinations but do not possess other generally accepted characteristics of tribunals, which we outline below. For those decision-making bodies we consider a broader range of characteristics to determine if the decision-making body should fall within the scope of our project.

⁶⁸ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) p 7.

⁶⁹ P Cane, *Administrative Tribunals and Adjudication* (2009) heading 6.5.1.1, p 238.

⁷⁰ E Jacobs, *Tribunals Practice and Procedure* (5th ed 2019) para 1.2 (emphasis added).

Which bodies, other than the section 59 tribunals, should be regarded as tribunals for the purposes of this project?

2.56 Here we discuss the bodies, other than the section 59 tribunals, that could potentially fall within the scope of this project. Most of these fell within the remit of the 2016 Report.⁷¹ We apply the provisional criteria outlined above in order to form a provisional view on whether they should be the subject of the proposals in this Consultation Paper. We seek consultees' views on these and any other bodies that we may have omitted from consideration.

Bodies we provisionally consider to be within the scope of the project

The Valuation Tribunal for Wales

2.57 The Valuation Tribunal for Wales ("VTW") has the statutory power to determine appeals regarding non-domestic rates and council tax decisions made by billing authorities, which in Wales are defined as a county council or county borough council.⁷² It also hears some appeals relating to drainage rates. It is funded by the Welsh Government, but is not administered by the WTU.

2.58 The disputes that the VTW determines (in relation to non-domestic rates and council tax) are devolved matters, with the result that the VTW appears to fall within the 2006 Act definition of "devolved".⁷³ Moreover, the VTW exhibits a number of the other characteristics of a tribunal discussed above. It conducts hearings at which it receives submissions from the parties to the dispute and issues a binding determination. While members of the panels are local, unpaid volunteers, they are assisted by a clerk who has expertise in the matter under consideration – a method of adjudication similar to that of Justices of the Peace.⁷⁴ In our provisional view, the VTW is a devolved tribunal.

School admission and exclusion appeal panels

2.59 Unlike most other tribunals in Wales, school admission and exclusion appeal systems in Wales are administered by the local authority responsible for the school in question. The requirements for the constitution of panels are set out in regulations, which are supplemented by a statutory code produced by the Welsh Government.⁷⁵ Education is a devolved matter.

⁷¹ We do not consider the Independent Social Services Complaints Panel as this procedure has now been superseded. See para 2.48 above.

⁷² Local Government Finance Act 1992, ss 1(2)(b) and 16.

⁷³ Government of Wales Act 2006, sch 7A, para 15.

⁷⁴ 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>.

⁷⁵ The Education (Admission Appeals Arrangements) (Wales) Regulations SI 2005 No 1398 (W 112) sets out the requirements for the constitution of panels and a School Admissions Appeals Code issued by the Welsh Government provides additional guidance to local authorities. School exclusion appeals are governed by legislation including the Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations SI 2003 No 3227 (W 308) and the Education (Pupil Exclusions and Appeals) (Pupil Referral Units) (Wales) Regulations SI 2003 No 3246 (W 321) (as amended).

- 2.60 School admission appeal panels hear and determine appeals against admission authority decisions. Admission appeal panels 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.⁷⁶ Conversely, school exclusion appeal panels hear appeals against decisions of governing body discipline committees on permanent exclusions.⁷⁷ Exclusion appeal panels issue binding decisions and can order that a pupil be reinstated.⁷⁸ For that reason, we provisionally propose that schools admission and exclusion appeal panels are devolved tribunals and should fall within the scope of our review.
- 2.61 While these bodies are referred to as panels, rather than tribunals, it seems to be generally accepted that they are sufficiently like other tribunals to be considered alongside them. They were listed in the Schedule to the Administrative Justice and Tribunals Council (Listed Tribunals) (Wales) Order 2007, and considered in the Leggatt Report.⁷⁹

Bodies that we provisionally consider to be outside the scope of the project

Boards of Medical Referees

- 2.62 Boards of Medical Referees determine appeals against decisions relating to issues “of a medical nature” made by fire and rescue authorities under the firefighters’ pension compensation schemes in Wales.⁸⁰ Their procedure is, in outline, as follows. When the relevant scheme manager receives a notice of appeal, it must supply the Welsh Ministers with the notice of appeal, the notice of the relevant decision, the opinion, response or evidence supplied to the appellant and every other relevant document in their possession. The Welsh Ministers must then refer the appeal to a Board of Medical Referees.⁸¹
- 2.63 The Board “is to consist of not less than three medical practitioners appointed by, or in accordance with arrangements made by, the Welsh Ministers”.⁸² The functions of the Boards of Medical Referees are not administered by the Welsh Government, but are

⁷⁶ School Standards and Framework Act 1998, s 94(6).

⁷⁷ Education Act 2002, s 52.

⁷⁸ The Education (Pupil Exclusion and Appeals) (Maintained Schools) (Wales) Regulations SI 2003 No 3227 (W 308), regs 7(4) and 7(5).

⁷⁹ Sir Andrew Leggatt, *Tribunals for Users: One System, One Service: Report of the Review of Tribunals* (March 2001) Part II, Individual Tribunals – continued.

⁸⁰ The Firefighters’ Pension Scheme (Wales) Order SI 2007 No 1072 (W 110) (the “Firefighters’ Pension Scheme Order 2007”), sch 1, part 8, para 4, and the Firefighters’ Pension Scheme (Wales) Regulations (the “Firefighters’ Pension Scheme Regulations 2015”) SI 2015 No 622 (W 50), reg 164.

⁸¹ Firefighters’ Pension Scheme Order 2007, sch 1, annex 2, para 2, and the Firefighters’ Pension Scheme Regulations 2015, reg 166.

⁸² Firefighters’ Pension Scheme Order 2007, sch 1, annex 2, para 3(1), and Firefighters’ Pension Scheme Regulations 2015, reg 166(3).

contracted out. The Boards determine appeals by means of a written report of their decision, relayed to the Welsh Ministers.⁸³

- 2.64 We have provisionally concluded that the functions of Boards of Medical Referees are devolved; fire and rescue services and fire safety are devolved matters, as are occupational and personal pension schemes of fire and rescue authorities.⁸⁴ But we have provisionally concluded that they are not a tribunal.
- 2.65 The Boards make decisions, rather than recommendations, and so according to the reasoning set out above should qualify. In other respects however, the Boards differ from other tribunals that we are provisionally proposing fall within the scope of this project. They are comprised of medical members only, and do not have the equivalent of a magistrates' clerk. Their members are selected by a process that is uncharacteristic of judicial appointment, and can be (and in fact is) entrusted to a commercial contractor. They do not hold the equivalent of a hearing. Instead they must interview and medically examine the appellant.⁸⁵
- 2.66 Any interview may be attended by persons appointed for the purpose by the appellant and the scheme manager, who may submit written evidence or a written statement in advance of the interview;⁸⁶ nevertheless, the interview is not described as a hearing, and the Regulations make no provision for oral submissions.⁸⁷ We have provisionally concluded from the combination of factors just referred to that Boards of Medical Referees are not a tribunal that should be included within the scope of this project.

Ombudsmen

- 2.67 The most prominent ombudsman in Wales is the Public Services Ombudsman for Wales ("the PSOW"). The PSOW was created in 2005 by the Public Services Ombudsman for Wales Act 2005, an Act of the UK Parliament. The relevant legislation is now the Public Services Ombudsman for Wales Act 2019 (the "2019 Act"), an Act of the Senedd.
- 2.68 The 2019 Act provides that the PSOW can investigate matters on their own initiative or complaints from members of the public concerning:
- (1) alleged maladministration by a listed authority in connection with relevant action;

⁸³ Firefighters' Pension Scheme Order 2007, sch 1, annex 2, para 8, and Firefighters' Pension Scheme Regulations 2015, reg 168.

⁸⁴ Government of Wales Act 2006, sch 7A, para 134.

⁸⁵ Firefighters' Pension Scheme Order 2007, sch 1, annex 2, para 6(1), and Firefighters' Pension Scheme Regulations 2015, reg 167. This is not of itself sufficient to exclude the Boards from characterisation as a tribunal; medical examinations are a feature of appeals to the MHRTW and of certain social security appeals to the First-tier Tribunal.

⁸⁶ Firefighters' Pension Scheme Order 2007, sch 1, annex 2, paras 6(5) and 7, and Firefighters' Pension Scheme Regulations 2015, reg 167(6) and (7).

⁸⁷ Firefighters' Pension Scheme Order 2007, sch 1, annex 2, paras 6(5) and 7, and Firefighters' Pension Scheme Regulations 2015, reg 167(6) and (7).

- (2) an alleged failure in a relevant service provided by a listed authority; or
 - (3) an alleged failure by a listed authority to provide a relevant service.
- 2.69 Schedule 3 sets out listed authorities. The only decision-making bodies considered in this chapter that are defined as listed authorities are school admission appeals panels and school exclusion appeals panels.
- 2.70 The PSOW is an important element of the Welsh administrative justice system, and there is some overlap between their work and that of tribunals. In particular the PSOW can refer questions about whether local authority members have breached a local authority's statutory code of conduct to the Adjudication Panel for Wales.⁸⁸ Our provisional view is, however, that an ombudsman is distinct from a tribunal and should not be included in this project. As noted above, the PSOW can consider a complaint on their own initiative. Acting upon a complaint does not amount to adjudicating a dispute between parties.
- 2.71 The grounds on which the PSOW investigates complaints also differ from those generally considered by tribunals; the focus of an ombudsman is usually on maladministration,⁸⁹ or failure to provide a service. Our overall provisional conclusion is that ombudsmen cannot properly be described as "tribunals".

Planning Inspectorate for England and Wales: inquiries

- 2.72 It has been suggested to us that the Planning Inspectorate for England and Wales might be considered a tribunal, and so could fall within the scope of this review. At present, the inspectorate operates in both England and Wales, and would therefore be ineligible for inclusion in the project since their functions are not exercisable only in relation to Wales. The Planning Inspectorate itself is not referred to expressly in the underlying legislation, which refers instead to "determination of certain appeals by person appointed by the [Welsh Ministers]".⁹⁰
- 2.73 If a Wales-only equivalent were introduced which had the same features as the current Planning Inspectorate, we provisionally consider it unlikely that it would meet our definition of a tribunal. It is significant, for example, that although some decisions are taken by inspectors, the Welsh Ministers are responsible for determining the procedure by which appeals take place (at a local inquiry, at a hearing or on the basis of written representations only)⁹¹ and that the Welsh Ministers retain the ability to recall cases of particular public importance. Where an appeal has been recalled the inspector will conduct the appeal, write a report and make a recommendation to the Welsh Ministers; but it is ultimately the Welsh Ministers who make the decision. We do

⁸⁸ Local Government Act 2000, ss 71(3) and 72(4).

⁸⁹ This is not defined in statute. The Law Commission Report on Public Services Ombudsmen defined it broadly as "considering whether the actions of the public body are of a standard which individual citizens should be able to expect from public service providers". Public Services Ombudsmen (2011) Law Com No 329, para 1.20 https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc329_ombudsmen.pdf.

⁹⁰ Town and Country Planning Act 1990, sch 6.

⁹¹ Town and Country Planning Act 1990, s 319B.

not think, therefore, that the current Planning Inspectorate has the level of independence usually expected of tribunals.

Independent review of determinations panels in Wales

- 2.74 These panels provide a review process which can be used by prospective adopters to challenge certain decisions made by adoption agencies in Wales. The panels were listed by the 2007 Order, and are featured in the list of “Welsh tribunals operating in Wales” in the 2010 Report on Tribunals Operating in Wales, by the Administrative Justice and Tribunals Council’s Welsh Committee.
- 2.75 However, the panels do not issue binding decisions, and so do not meet our provisional criteria for inclusion in the project. The 2015-2016 annual report of IRM Cymru (the most recent available) refers to the process as an “independent review mechanism” and states that “the IRM is not an appeals process, and the final decision... remains with the agency, but they must take into account the views of the IRM panel when they make their final decision”.⁹² For that reason, we provisionally propose that they should not be considered as part of our project.

Forestry Committees for Wales

- 2.76 The Forestry Committees for Wales (often referred to as “reference committees”) are tasked with advising Welsh Ministers on reviews of refusals or conditions of a tree felling licence and appeals against a restocking notice under the Forestry Act 1967.
- 2.77 The Forestry Committees make recommendations, rather than decisions; on receipt of their recommendation, a Welsh minister may confirm, overturn or modify the original decision.⁹³ Dr Sarah Nason’s report “Understanding administrative justice in Wales” notes that this gives rise to some doubt as to whether the Forestry Committees for Wales constitute a tribunal, or are better thought of as an internal review mechanism:

given its adjudicative function is by way of making a recommendation of its findings to the Welsh Ministers as opposed to independently determining the dispute.⁹⁴

- 2.78 We provisionally propose to exclude Forestry Committees for Wales from the scope of this review.

Discretionary assistance fund for Wales

- 2.79 The discretionary assistance fund was listed by the 2016 Report as an “ad hoc redress scheme”.⁹⁵ It provides two types of grant: emergency assistance payments, to provide assistance in an emergency involving an immediate threat to the health or wellbeing of the applicant, and individual assistance payments, to meet an urgent

⁹² IRM Cymru, *Annual Report 2015-2016* (2017) p 2.

⁹³ Forestry Act 1967, ss 16(3) and 17B(2).

⁹⁴ S Nason, *Understanding administrative justice in Wales* (2015) para 7.2, n 1.

⁹⁵ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) appendix 6.

identified need that supports vulnerable citizens to live independently in the community.

- 2.80 There is a two-tier appeal process. In the first instance, decisions are reviewed internally by the Northgate Public Services (the entity which holds the contract to administer the scheme in Wales). Applicants dissatisfied with the outcome of the internal review can request an external review by the Family Fund Trust, another corporate entity.⁹⁶ In our provisional view, this process of review does not amount to adjudicating upon a dispute between parties. We provisionally conclude that it lies outside the scope of our project.

Independent appeals process for farmers and forest owners

- 2.81 Appeals against Welsh Government decisions in relation to Common Agricultural Policy scheme claims or applications are made through the independent appeals process for farmers and forest owners (another process described as an “ad hoc redress scheme” in the 2016 Report).⁹⁷ The first stage involves a review by officials within the group responsible for administering the policy. The second stage comprises a review by an independent panel, which then makes recommendations to the Welsh Minister for Natural Resources.
- 2.82 Given that the independent panel only makes recommendations, rather than issuing binding decisions, in our view the independent panel should not be considered a tribunal. Huw Pritchard has noted that the panel has adjudicative functions, but does “not fit neatly” into the categorisation of tribunals.⁹⁸ The Welsh Government has recently consulted on simplifications to the Common Agricultural Policy regulatory framework. More significant changes are expected to be introduced in due course by the Agriculture (Wales) Bill; if these were to extend to the creation of a tribunal, it could be brought into our provisionally proposed scheme at a later date.⁹⁹

Continuing NHS healthcare review panels

- 2.83 Continuing healthcare (or “CHC”) is a package of ongoing care funded by the NHS through Local Health Boards, where an individual’s primary need has been categorised as health-based. Patients may contest a Local Health Board decision concerning eligibility for CHC. Boards make use of a standing panel, the “Independent Review Panel”, which comprises an independent chair, and representatives of both the Local Health Board and the local authority. The role of the panel is advisory; its decisions are not formally binding but the expectation is that its recommendations will

⁹⁶ See <https://gov.wales/sites/default/files/publications/2018-06/requesting-a-review-to-your-discretionary-assistance-fund-application.pdf>.

⁹⁷ Agricultural Subsidies and Grants Schemes (Appeals) (Wales) Regulations SI 2006 No 3342 (W 303), reg 3. See also Welsh Government, *Independent appeals process for farmers and foresters in Wales*, (2018) for more details of the process. <https://gov.wales/sites/default/files/publications/2018-03/appeal-a-farming-or-forestry-grant-guidance.pdf>.

⁹⁸ H Pritchard, “Building a Welsh Jurisdiction Through Administrative Justice”, in *Administrative Justice in Wales and Comparative Perspectives*, S Nason (ed) (2017) p 73.

⁹⁹ Welsh Government, *Sustainable farming and our land: proposals to continue and simplify agricultural support for farmers and the rural economy* (July 2020) <https://gov.wales/sites/default/files/consultations/2020-07/sustainable-farming-consultation-document.pdf>.

be accepted.¹⁰⁰ It too was described by the 2016 Report as an “ad hoc redress scheme”.

- 2.84 Given that the independent review panel’s role is advisory only, we provisionally consider that it is not sufficiently like that of a tribunal to justify including it within the scope of this project.

Independent appeals process for farmers and landowners in Wales

- 2.85 Projects for the restructuring of rural land holdings and for the use of uncultivated land or semi-natural areas for intensive agricultural purposes are subject to a consent regime, to protect these areas from environmental damage. Various public decisions taken under the regime may be challenged through an independent appeals process.
- 2.86 The regulations prescribe that the Welsh Ministers appoint an independent person to hear the appeal, which can take place orally or through written representations.¹⁰¹ In practice the Welsh Ministers will usually appoint the Planning Inspectorate as the independent person.¹⁰² Following the hearing, the independent person compiles a report recommending how the appeal should be determined. This report is then submitted to the Welsh Ministers.
- 2.87 Again, given that the independent person only makes recommendations, rather than issuing a binding decision, we provisionally consider that the independent appeals process cannot be considered to be a tribunal.

Traffic Penalty Tribunal

- 2.88 The Traffic Penalty Tribunal considers appeals against traffic penalties issued in England (outside London) and Wales by enforcement authorities. The term Traffic Penalty Tribunal is not used in statute; instead the Traffic Management Act 2004 refers to “adjudicators”.¹⁰³
- 2.89 Pursuant to the Civil Enforcement of Road Traffic Contraventions (General Provisions) (Wales) Regulations 2013 (the “2013 Regulations”) Welsh enforcement authorities (in practice, local authorities) have the power to appoint traffic adjudicators. Under the 2013 Regulations, the functions of Welsh enforcement authorities relating to adjudicators must be discharged jointly, by a joint committee.¹⁰⁴ That joint committee

¹⁰⁰ *Continuing NHS Healthcare: The National Framework for Implementation in Wales* (2014) para A.5.18, <http://www.wales.nhs.uk/sitesplus/documents/866/Continuing%20NHS%20Healthcare%20The%20National%20Framework%20for%20Implementation%20in%20Wales%202014.pdf>.

¹⁰¹ The Environmental Impact Assessment (Agriculture) (Wales) Regulations SI 2017 No 565 (W 134), reg 30(5).

¹⁰² Welsh Government, *Guidance on Independent Appeals Process for Farmers and Landowners in Wales under the Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017* (2019) p 5.

¹⁰³ Traffic Management Act 2004, s 81.

¹⁰⁴ SI 2013 No 362, reg 15(1).

may include county or county borough councils in England.¹⁰⁵ The joint committee currently comprises both Welsh and English local authorities.¹⁰⁶

2.90 The Welsh Committee of the Administrative Justice and Tribunals Council in 2010 considered the adjudicators to be a devolved Welsh tribunal, when sitting in Wales.¹⁰⁷ However, the position now must be considered under the 2006 Act as amended by the 2017 Act.

2.91 In our provisional view the tribunal fails to meet the 2006 Act definition of a devolved tribunal, as its functions are not exercisable only in relation to Wales.¹⁰⁸ We do not think it possible to treat the Traffic Penalty Tribunal adjudicators as a separate tribunal when they decide cases in Wales. Pursuant to the 2013 Regulations, outlined above, Welsh local authorities could have chosen to exercise their powers to appoint adjudicators separately for Wales. But they did not. They chose to exercise powers of appointing adjudicators through the joint committee. We therefore provisionally consider the Traffic Penalty Tribunal to fall outside of the scope of this project.

Consultation Question 1.

2.92 We provisionally consider that decision-making bodies which adjudicate disputes between parties by way of issuing binding determinations should be categorised as tribunals for the purposes of this project.

Do you agree?

¹⁰⁵ Civil Enforcement of Road Traffic Contraventions (General Provisions) (Wales) Regulations SI 2013 No 362, reg 15(2).

¹⁰⁶ See PATROL, *Local Authority Directory* <https://www.patrol-uk.info/authority-directory/>.

¹⁰⁷ Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) para 7.

¹⁰⁸ Wales Act 2017, sch 7A, para 9(2).

Consultation Question 2.

2.93 We provisionally propose that the following bodies are devolved tribunals:

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

Do you agree?

Consultation Question 3.

2.94 We provisionally propose that the following decision-making bodies or schemes are not “devolved tribunals”:

- (1) ombudsmen, including the Public Services Ombudsman for Wales;
- (2) the Planning Inspectorate for England and Wales;
- (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.

Do you agree?

Chapter 3: A tribunals system for Wales

3.1 In 1977, Sir William Wade wrote that:

The tribunal system has an inherent resistance to uniformity and simplicity. When legislation is in preparation the line of least resistance is usually to create new tribunals rather than to reorganize those already existing. This tendency, if unchecked, leads to a jungle of different jurisdictions which are as inconvenient to the citizen as they are bewildering.¹⁰⁹

3.2 The tendency was ultimately checked for the reserved tribunals which fell within the scope of the Leggatt Review and subsequently the Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”). But that report did not extend to tribunals operating only in Wales at the time.¹¹⁰ As a result, devolved tribunals can best be described as “heterogeneous”.¹¹¹

3.3 Some, such as the Valuation Tribunal for Wales (“VTW”), hear thousands of cases a year. The Adjudication Panel for Wales (“APW”) might hear two or three (which are nonetheless of great importance to local democracy in Wales). Most tribunals are administered by central government, while others, such as school admission and exclusion appeal panels, remain closely tied to local government. Some, such as the Residential Property Tribunal for Wales (“RPTW”), hear a wide variety of cases relating to a particular subject area. Others, such as the Welsh Language Tribunal (“WLT”), focus on a limited number of types of claim.¹¹²

3.4 This chapter considers attempts made elsewhere to impose a structure on tribunals. It reviews the progress made so far in this regard in Wales, and considers possibilities for the future.

REFORMS ELSEWHERE

3.5 The problem of proliferation of tribunals is not limited to Wales, or even to the UK. This chapter considers in detail reforms made to the system of reserved tribunals in the UK, and later reforms in Scotland. These systems share many similarities with the devolved tribunals in Wales. Many of the tribunals (such as the mental health

¹⁰⁹ W Wade, *Administrative Law*, 4 edn (1977) p 763.

¹¹⁰ Sir Andrew Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (March 2001) para 11.2.

¹¹¹ Welsh Government, Written Evidence submitted to the Commission on Justice in Wales, p 7.

¹¹² The abbreviations used in this Consultation Paper are as follows: Agricultural Land Tribunal for Wales (“ALTW”), Residential Property Tribunal for Wales (“RPTW”), Adjudication Panel for Wales (“APW”), Mental Health Review Tribunal for Wales (“MHRTW”), Registered School Inspectors Appeal Tribunal and Registered Nursery Education Inspectors Appeal Tribunal (“RSIAT” and “RNEIAT”), Special Educational Needs Tribunal for Wales (“SENTW”), Valuation Tribunal for Wales (“VTW”) and Welsh Language Tribunal (“WLT”).

tribunals) share a common ancestry with counterparts in England, having originally been one tribunal or network of regional tribunals.

The Leggatt Review

- 3.6 In 2000 Sir Andrew Leggatt was tasked with reviewing the system of tribunals to ensure (amongst other objectives) that “tribunals overall constitute a coherent structure for the delivery of administrative justice”.¹¹³ At the time of the review, there were:

70 different administrative tribunals in England and Wales, leaving aside regulatory bodies... But of these 70 tribunals only 20 each hear more than 500 cases a year and many are defunct.¹¹⁴

- 3.7 The subsequent report, published in 2001 (the “Leggatt Report”) summarised the situation as follows:

... the present collection of tribunals has grown up in an almost entirely haphazard way. Individual tribunals were set up, and usually administered by departments, as they developed new statutory schemes and procedures. The result is a collection of tribunals, mostly administered by departments, with wide variations of practice and approach, and almost no coherence. The current arrangements seem to us to have been developed to meet the needs and conveniences of the departments and other bodies which run tribunals, rather than the needs of the user.¹¹⁵

- 3.8 The Leggatt Report concluded that:

If it is to be capable of handling its workload effectively, and ensuring the consistent development of the law, the Tribunals System must have a coherent structure to enable the effective management of workload, encourage consistency, and further a common approach in decision-making and case handling and management.¹¹⁶

- 3.9 The solution was to replace a number of tribunals with just two: the First-tier Tribunal (“FTT”) and the Upper Tribunal. This created another problem. Existing tribunals heard a huge number of different types of cases, ranging from mental health to asylum claims. Consolidating all of these risked losing the existing expertise of both members and support staff. The report itself recognised that without divisions such a tribunal would be “impracticably large and diverse”.

- 3.10 The report therefore recommended grouping the tribunals by subject matter into “sensibly coherent areas of work” in a structure which was “at once apparent to the

¹¹³ Sir Andrew Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (March 2001) foreword, para 2.

¹¹⁴ Above, overview, para 2.

¹¹⁵ Above, para 1.3.

¹¹⁶ Above, para 6.2.

user". The recommendation was to bring together all the tribunals supported by particular government departments.¹¹⁷

- 3.11 Crucially, the report considered that any structure would have to be flexible. It would have to be able to adapt to: the progressive addition of jurisdictions, as the system came together; the transfer of existing jurisdictions, in response to changes in workload or procedural requirements; and the addition of new rights of appeal. The report suggested that the Lord Chancellor should be able to create divisions and allocate jurisdictions to them by Practice Direction, or, at the very most, by secondary legislation passed using the negative resolution procedure.¹¹⁸

The Tribunals, Courts and Enforcement Act 2007

- 3.12 The Leggatt Report was followed first by a White Paper,¹¹⁹ and then by the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"), which implemented many of the report's recommendations.
- 3.13 Section 7(1) of the TCEA 2007 enabled the Lord Chancellor to make orders dividing up the First Tier Tribunal into chambers (with the agreement of the Senior President of Tribunals). While the terminology changed from "division" to "chamber", it is clear that the Government was convinced by the reasons Leggatt gave for subdividing the tribunal.
- 3.14 The explanatory note to the TCEA 2007 explains:

The tribunals will bring together a wide range of specialist jurisdictions. It would dilute expertise and damage the service provided to the public if they were organised on the basis that all judges and members can deal with all kinds of case. Instead, jurisdictions will be grouped so that similar work is dealt with by judges and members with the relevant skills to deal with it.¹²⁰

- 3.15 The FTT was accordingly divided into chambers. The Ministry of Justice's 2007 consultation noted that:

In some respects Chambers replace existing tribunals, but there are a number of important differences. Individual jurisdictions will be grouped together so that similar work, or jurisdictions requiring similar skills, will be dealt with in a single Chamber. Unlike existing jurisdictions, Chambers will be flexible groupings, able to maintain and expand expertise and incorporate new jurisdictions where they fit best.¹²¹

¹¹⁷ Sir Andrew Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (March 2001) foreword, para 2., para 6.3.

¹¹⁸ Above, para 6.4.

¹¹⁹ Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (July 2004) Cm 6243.

¹²⁰ Tribunals, Courts and Enforcement Act 2007, explanatory note, para 78.

¹²¹ Ministry of Justice, *Transforming Tribunals: Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007* (December 2007) para 150.

- 3.16 Initially, there were three chambers; the Social Entitlement Chamber, the War Pensions and Armed Forces Compensation Chamber, and the Health, Education and Social Care Chamber. The General Regulatory Chamber, the Immigration and Asylum Chamber, the Tax Chamber and the Property Chamber were added later.¹²²
- 3.17 Judges are appointed to either the FTT or the Upper Tribunal, and are then assigned to particular chambers. Each chamber is headed by a President, and has its own procedural rules, overseen by the Tribunal Procedure Committee.
- 3.18 Although tribunals have now been grouped together into chambers, there is recognition that the work within chambers differs. The organisational chart of the FTT lists the key jurisdictions belonging to each chamber.¹²³ In practice, judges assigned to a chamber may not sit in all of its jurisdictions.¹²⁴
- 3.19 The reforms have generally been considered to be successful. Lord Justice Sedley, in the Court of Appeal in *R (Cart) v Upper Tribunal*, expressed the view that:
- The edifice of administrative and adjudicative tribunals created by the Tribunals, Courts and Enforcement Act 2007 (TCEA) is a landmark in the development of the United Kingdom's organic constitution. For the first time, a single structure has been created within which a huge variety of existing tribunals is gathered.¹²⁵

Scotland

- 3.20 The Leggatt Report did not consider what Leggatt termed “Scottish devolved bodies”.¹²⁶ The result was that, as in Wales, a number of individual Scottish tribunals were left untouched by the subsequent reforms. For a number of years these tribunals continued to operate in isolation from each other. In 2014 however, the Tribunals (Scotland) Act 2014 (“the 2014 Act”) was passed.
- 3.21 Like the TCEA 2007, the 2014 Act aimed to bring together individual tribunals (listed in Schedule 1 to the 2014 Act) into a first-tier tribunal: the “First-tier Tribunal for Scotland”. This would redress the “narrowness of outlook” created by the existing set up, by creating a structure that would “reduce overlap, eliminate duplication, ensure better deployment and allow for the wider sharing of available resources”.¹²⁷ Appeals would be heard by the Upper Tribunal for Scotland.

¹²² The current chamber structure is provided for in the First-tier Tribunal and Upper Tribunal (Chambers) Order SI 2010 No 2655.

¹²³ Senior President of Tribunals, *Annual Report 2020*, p 10
https://www.judiciary.uk/wp-content/uploads/2020/07/6.6755_The-Senior-President-of-Tribunals-Annual-Report-2020_WEB-CS-amend-1.pdf.

¹²⁴ See <https://www.judiciary.uk/about-the-judiciary/judges-career-paths/becoming-a-tribunal-judge/>

¹²⁵ *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859, [2011] QB 120 at [1].

¹²⁶ Sir Andrew Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (March 2001) para 11.12.

¹²⁷ Tribunals (Scotland) Act 2014, policy memorandum, para 3. Available at [https://www.parliament.scot/S4_Bills/Tribunals%20\(Scotland\)%20Bill/b30s4-introd-pm.pdf](https://www.parliament.scot/S4_Bills/Tribunals%20(Scotland)%20Bill/b30s4-introd-pm.pdf).

3.22 Also like the TCEA 2007, the framers of the 2014 Act concluded that it would be necessary to subdivide the work of the First-tier Tribunal for Scotland into chambers, to allow similar functions to be grouped together and to preserve existing expertise. The policy memorandum explains that the power to divide the tribunal into chambers:

is designed to establish boundaries within the First-tier Tribunal according to the subject-matter of the functions it is to exercise so as to allow similar functions to be grouped together.¹²⁸

3.23 Section 20 of the 2014 Act permits the Scottish Ministers to make regulations through the affirmative resolution procedure to allocate functions of the First-tier Tribunal for Scotland to chambers. The power may be delegated to the Lord President.¹²⁹ The policy memorandum stresses that one of the key advantages of this approach is flexibility. Delegating the power to the Lord President:

would allow the Lord President to adapt the chamber structure within the confines permitted by the regulations. It would also allow this to happen without the need for further legislation, as long as it adhered to the limits of the delegated authority. For example, the regulations could provide for certain core chambers to exist but allow the Lord President to organise the structure out-with those particular chambers. The chamber structure will need to be flexible to allow changes to be made as the Scottish Tribunals acquire more functions and additional functions are conferred on them.¹³⁰

3.24 The First-Tier Tribunal for Scotland currently consists of the following chambers:

- (1) Mental Health;
- (2) Housing and Property;
- (3) Health and Education;
- (4) General Regulatory;
- (5) Tax; and
- (6) Social Security.

3.25 The process of transferring jurisdictions into the First-tier Tribunal for Scotland is ongoing. There are a number of differences between the organisation of chambers in the reserved tribunals and in Scotland. In Scotland for example, mental health has been allocated to its own chamber, and not amalgamated with broader health and education. When the Scottish Government consulted on its proposals for reforming the tribunal structure, a number of consultees expressed the view that the Mental Health Tribunal for Scotland should not be consolidated with other tribunals. The Scottish Government's policy memorandum for the 2014 Act explains that:

¹²⁸ Tribunals (Scotland) Act 2014, policy memorandum, para 41.

¹²⁹ Tribunals (Scotland) Act 2014, ss 20 and 10(1)(a).

¹³⁰ Tribunals (Scotland) Act 2014, policy memorandum, para 41.

The Scottish Government has made a commitment that initially mental health will be in a chamber on its own... The Scottish Government recognises the uniqueness of the Mental Health Tribunal for Scotland and is committed to ensuring that all of its distinctive and valued characteristics can be protected and maintained in the new structure.¹³¹

- 3.26 Another notable difference in Scotland is that education appeal committees, which hear appeals relating to school exclusions (amongst other matters), are listed at Schedule 1 to the 2014 Act. They are expected to transfer to the First-tier Tribunal for Scotland in April 2021.¹³²

THE ADVANTAGES OF AMALGAMATION

- 3.27 A variety of different rationales have been given for imposing a structure on tribunals. Dr Sarah Nason has in the past noted that an amalgamated tribunal could provide “a structure that is more efficient, expert, accessible and flexible”.¹³³

Economies of scale

- 3.28 The pooling of resources has the potential to make various aspects of the running of a tribunal more efficient, and ultimately improve the service that can be offered to tribunal users. Sharing tribunal administration in particular can lead to savings. Greater numbers of staff mean that more specialist and sophisticated services can be offered to tribunals. A bigger budget and greater IT expertise also makes it easier to invest in new technological solutions, and to update them regularly in response to demand from tribunal users.
- 3.29 Pooling resources can also improve the quality of procedural rules. Reviewing and updating these is specialist and time-consuming work, but pooling resources makes regular review more feasible. It also allows tribunals to share best practice.
- 3.30 The same argument can be made about judicial expertise. So long as judges have the appropriate expertise, allowing them to sit in multiple jurisdictions increases the judicial resource available to a tribunal. That in turn may make the process of listing and hearing cases faster and the tribunal more able to respond to unexpected increases in demand.

Coherence

- 3.31 One of the other values cited frequently by the Leggatt Report was coherence. Under that heading the report notes:

The necessary skills for tribunal decision-makers, and the services provided by their staff, will be greatly improved if they are brought together to form a coherent system and services; and without that coherence the improvements which are necessary for

¹³¹ Tribunals (Scotland) Act 2014, policy memorandum, para 43.

¹³² Judicial Office for Scotland, *The Scottish Tribunals: Annual Report Prepared by the President of the Scottish Tribunals – 1 April 2018 – 31 March 2019* (2019) p 14.

¹³³ S Nason, *Understanding Administrative Justice in Wales* (November 2015) p 17.

tribunals to remain a distinctive and viable alternative to courts cannot be achieved.¹³⁴

3.32 There are different views on what exactly “coherence” means for a tribunals system. Craig states the principle means that “the citizen should be presented with a single, overarching structure, which gave access to all tribunals.”¹³⁵ This focuses on the experience of individual tribunal users; the argument is that a single structure reduces the risk that an individual will approach the wrong tribunal, or fail to locate relevant information for their application.

3.33 Mr Justice Hickinbottom identified three types of coherence considered by the Leggatt Report. The first was administrative coherence: having administrative support systems consolidated in one place. The second was “systemic coherence”. That referred to the organisational structure of the tribunals; he referred in particular to the variety of routes of appeal from tribunals. Finally there was “jurisprudential coherence”. He noted that:

The new system will have long-term and sustained benefits for administrative justice. While some jurisdictions with a strong second-tier appeal tribunal were able to develop their own specialist jurisprudence, the splintered nature of tribunals before the reforms meant that the development of the law in a coherent way elsewhere was at best difficult. Where the right of challenge was restricted to judicial review in the Administrative Court such effective development was nigh on impossible. The new system allows the development of the relevant law, by a dedicated cadre of specialist judges.¹³⁶

Public profile

3.34 Another potential benefit of amalgamating tribunals is to increase their public profile. On this topic Professor Robin Creyke has noted that:

if the combined tribunal, because of its size and multiple jurisdictions, acquires an enhanced stature, this could improve the acceptance by agencies of its jurisprudence.¹³⁷

3.35 Other potential benefits of an increased public profile include making it easier for potential applicants and for those that advise them to find relevant information about the tribunal. An enhanced stature could also ensure that the tribunal is at the forefront of the mind of policy makers considering new rights of appeal against government decisions.

¹³⁴ Sir Andrew Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (March 2001) para 1.15.

¹³⁵ P Craig, *Administrative Law*, (8th ed 2016) para 9-012.

¹³⁶ Hickinbottom J, “Tribunal reform: a new coherent system” (2010) 15(2) *Judicial Review* 103, 107.

¹³⁷ R Creyke, “Amalgamation of Tribunals in Australia: Whether ‘tis Better...?” in *Administrative Justice in Wales and Comparative Perspectives*, S Nason (ed) (2017) p 322.

Evidence for these advantages

- 3.36 Assessing whether rationalised structures such as the Leggatt system or the Scottish reforms actually achieve the benefits that they set out to do is difficult. There is some evidence available from those who work within the system. For example, the Senior President of Tribunals issues an annual report. In 2012 Lord Justice Carnwath introduced the report by saying:

I am proud that the radical transformation of the tribunals structure has been completed without major public controversy, or disruption to services, but with important gains in efficiency, productivity and access for users, and substantial financial savings.¹³⁸

- 3.37 And on the tenth anniversary of the Leggatt Report, in 2017, Sir Ernest Ryder concluded that:

the Act's modern and coherent framework continues to assure jurisdictional leadership and operational delivery of tribunal justice across the United Kingdom, requiring us to deliver our statutory hallmark of specialist, innovative and accessible justice. The Act gives us a structure that combines effectiveness, simplicity and fairness.¹³⁹

- 3.38 We have however been unable to find empirical research on whether the introduction of the unified tribunal system led to all the benefits claimed. Isolating and evaluating the impact of the reforms is difficult. The work of the tribunals is “demand led”, and varies due to changes in government policy and the general state of the economy, amongst other factors.

THE WELSH TRIBUNALS

Progress so far

- 3.39 While the example of the Leggatt reforms and the Scottish tribunals are useful ones, there are important differences between the state of those tribunals before the reforms and the Welsh tribunals today. There have been some efforts to amalgamate the tribunals and to achieve some of the advantages discussed above.
- 3.40 One example is the RPTW. Its annual report describes it as an “umbrella institution”; strictly speaking, it is made up of residential property tribunals, leasehold valuation tribunals, and rent assessment committees. The underlying legislation provides that any jurisdiction conferred on a residential property tribunal or leasehold valuation tribunal is exercisable by a rent assessment committee, and that when exercising that jurisdiction, the rent assessment committee should be known as a residential property tribunal or leasehold valuation tribunal.¹⁴⁰

¹³⁸ Senior President of Tribunals, *Annual Report* (2012) p 5.

¹³⁹ Senior President of Tribunals, *Annual Report* (2017) p 3.

¹⁴⁰ Housing Act 2004, s 229(1) and (2); Commonhold and Leasehold Reform Act 2002, s 173.

- 3.41 This is not a particularly elegant solution, especially given that the three types of tribunal continue to have different procedural rules. But it does represent a degree of amalgamation.
- 3.42 Broader attempts at rationalisation of the tribunals occurred following two key reports of the Welsh Committee of the Administrative Justice and Tribunals Council (“AJTC Welsh Committee”) (“the 2010 Report”) and later the Committee for Administrative Justice and Tribunals, Wales (“CAJTW”) (“the 2016 Report”). The first review in 2010 by the AJTC Welsh Committee identified many of the same problems that are explored in the Leggatt Report. In particular the committee was concerned that tribunals continued to be administered by their sponsoring government departments, raising concerns about the independence of the tribunals. It recommended that policy and organisational responsibility for Welsh tribunals be transferred to a “focal point” for administrative justice in the Department for the First Minister and Cabinet.¹⁴¹
- 3.43 These recommendations led to the creation of the Administrative Justice and Tribunals Unit of the Welsh Government. Following a further review by the Welsh Government in 2013/2014, that unit was separated into the Welsh Tribunals Unit (“WTU”) (responsible for the administration of the tribunals) and the Justice Policy team within the Welsh Government, which is responsible for justice policy.¹⁴²
- 3.44 In practice the establishment of the WTU has achieved many of the efficiency savings suggested above. For example, the APW, the RPTW and the Welsh Language Tribunal share accommodation at Cleppa Park in Newport, while the Special Educational Needs Tribunal for Wales (“SENTW”) and the Agricultural Land Tribunal for Wales (“ALTW”) are based in Llandrindod Wells. Another good example is the response of the devolved tribunals to the COVID-19 pandemic. There the WTU has been instrumental in ensuring that those tribunals which are able to hear cases remotely have access to virtual hearing rooms. This is more efficient than each tribunal having to procure the technology separately.
- 3.45 Further reforms were recommended by the 2016 Report of CAJTW. One of the key obstacles it identified to reform of the system was the “absence of a judicial leader in the devolved tribunals able to represent all the devolved jurisdictions with whom the Welsh Government needs to engage on practical justice administration issues”.¹⁴³
- 3.46 This issue was addressed by the Wales Act 2017, which created the role of President of Welsh Tribunals (“PWT”).¹⁴⁴ The role includes responsibility for the supervision and leadership of those tribunals listed in section 59 of the Wales Act 2017 (“the section 59 tribunals”). Sir Wyn Williams’s work in that role over the last few years has been

¹⁴¹ Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) p 3 (recommendations 1 and 2).

¹⁴² Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales*, (2016) p 22.

¹⁴³ Above, p 23.

¹⁴⁴ Wales Act 2017, s 60.

extremely important in lending coherence to the existing Welsh tribunals and helping them to operate as part of one system.

- 3.47 Another problem identified by the 2016 Report was that the “only partial existence of formal agreements between the Welsh Government and the Judicial Office (“JO”), Judicial Appointments Commission (“JAC”), the Judicial College and Judicial Conduct Investigations Office (“JCIO”)”.¹⁴⁵ Again, some progress has been made towards this; there is now a section 83 agreement in place with the JAC for those appointments for which the Welsh Ministers are responsible.¹⁴⁶

Previous recommendations for amalgamation

- 3.48 While significant progress has been made to improve the independence, leadership and administration of tribunals, it is noticeable that other recommendations relating to the amalgamation of tribunals have not been taken up. The 2010 Report recommended that the then Welsh Assembly Government “adopt a consistent and coherent approach to the establishment of new tribunals”, and that the Welsh Assembly Government and local authorities consider the appropriate amalgamation of Welsh tribunal jurisdictions according to subject matter.¹⁴⁷ That led to a feasibility study on the possibility of transferring functions of school admission and exclusion appeal panels to the Welsh Government.

- 3.49 The 2016 Report was more cautious. It noted reforms in Scotland and commented that:

There are of course significant differences between the administrative justice systems in Wales and Scotland and we do not envisage that a comparable restructuring is necessarily appropriate or a realistic prospect for devolved Welsh tribunals over the life of the next Assembly.¹⁴⁸

- 3.50 The 2016 Report did however recommend that:

The Welsh Government should explore the merits of extending the jurisdiction of the Special Educational Needs Tribunal for Wales (which may be suitably renamed as the Education Tribunal for Wales) to create a national tribunal for school admissions and exclusion appeals within the next 5 years.¹⁴⁹

- 3.51 The SENTW will in due course be renamed the Education Tribunal for Wales. However, the Welsh Government did not agree that amalgamation of the school

¹⁴⁵ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) p 23.

¹⁴⁶ Government of Wales Act 2006, s 83. This enables the Welsh Ministers to arrange for any of their functions to be performed by another public authority.

¹⁴⁷ Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) pp 29 and 37 (recommendations 4 and 19).

¹⁴⁸ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) p 22.

¹⁴⁹ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) recommendation 24, p 33.

appeals processes with the SENTW would be an improvement, concluding that “SENTW is not the appropriate vehicle for admissions and exclusions appeals”.¹⁵⁰

What problems remain?

- 3.52 Devolved tribunals have not been “left behind”. They are not in the same position as tribunals in England and Wales before the Leggatt reforms, or in Scotland before the Tribunals (Scotland) Act 2014. Some steps have been taken towards bringing them 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’”.¹⁵¹
- 3.53 What more could, and should, be done? The first point to make is that not all devolved tribunals form part of the existing system in any meaningful way. As discussed in paragraphs 2.57 to 2.61 above, there are bodies that we have provisionally identified as devolved tribunals which are not administered by the WTU. As they are not listed in section 59 of the Wales Act 2017, they are not subject to the supervision of the PWT. These are school exclusion and admission appeal panels and the VTW. Whether and to what extent they should be brought into alignment with the other devolved tribunals is discussed further below at paragraphs 3.98 to 3.128.
- 3.54 Leaving those tribunals aside for the moment, one of the key differences between the devolved tribunals and the reformed Leggatt and Scottish systems is structural. The devolved tribunals were each set up to meet specific policy needs at a particular point in time, and are therefore rooted in individual pieces of legislation. There is no overarching, comprehensive structure. No systematic attempt has been made to consider how existing jurisdictions of the tribunals relate to each other, or to ensure that the tribunal system is able to respond effectively to future changes in its jurisdiction.
- 3.55 The difference can be seen clearly by looking at the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010,¹⁵² which allocates functions to particular chambers. Article 5(1) of the Order provides that:

To the Immigration and Asylum Chamber of the First-tier Tribunal are allocated **all functions related to immigration and asylum matters**, with the exception of matters allocated to—

(a) the Social Entitlement Chamber by article 6(a);

(b) the General Regulatory Chamber by article 3(a).

¹⁵⁰ Additional Learning Needs and Education Tribunal (Wales) Act 2018, s 91(1). Welsh Government, *Response to Committee for Administrative Justice and Tribunals, Wales (CAJTW) Legacy Report*, March 2016 (July 2016) p 4.

¹⁵¹ H Pritchard, “Building a Welsh jurisdiction through administrative justice” in *Administrative Justice in Wales and Comparative Perspectives*, S Nason (ed) (2017) p 229.

¹⁵² First-tier Tribunal and Upper Tribunal (Chambers) Order SI 2010 No 2655, art 5(1) (emphasis added).

- 3.56 That is not the approach taken by underlying legislation regulating the devolved tribunals.

Effect on future development of the law in Wales

- 3.57 The current system of *ad hoc* tribunals set up to hear specific types of claim may not pose problems for users of particular tribunals, who are aware of the type of claim they wish to make and the right tribunal to bring it in. It does however present problems for policy makers, and, ultimately, for the development of the law in Wales.
- 3.58 The legislative competence of the Senedd has expanded markedly since the National Assembly was set up in 1999. The UK's exit from the European Union also opens up new fields of regulatory activity to the Senedd. The result is that there is considerable scope for new appeal routes to be created by Welsh legislation, and a demand for an effective tribunal system.
- 3.59 This was made clear in the Welsh Government's evidence to the Silk Commission, which explained that the long-term aim was to "develop a coherent system of tribunals in Wales to hear appeals on all matters falling within devolved areas".¹⁵³ More recently, the Commission on Justice in Wales recommended that devolved tribunals should be used for dispute resolution relating to future Welsh legislation.¹⁵⁴
- 3.60 If a policy maker within the Welsh government wishes to create a new appeal route, and would like that appeal route to lie to a devolved tribunal, he or she must look carefully at existing tribunals to examine whether their work is sufficiently similar to the new appeal route under consideration. This involves understanding the expertise already acquired by particular tribunals. In some cases (for example the WLT) that may be relatively easy to ascertain. However, the expertise of other tribunals may be less obvious.
- 3.61 In cases where no existing tribunal hears cases which are sufficiently similar to the proposed new appeals, the options for the policy maker are to:
- (1) set up a new tribunal;
 - (2) direct an appeal to the existing FTT; or
 - (3) direct an appeal to the courts instead.
- 3.62 There are drawbacks to each of these options. Setting up a tribunal involves a considerable amount of work. The policy maker has to consider, at a minimum, most of the questions discussed in this Consultation Paper. Even if there were a "template" available for the creation of a new tribunal, putting in place the arrangements is time-consuming and costly. Panels need to be appointed and procedural rules written.

¹⁵³ Welsh Government, *Evidence submitted by the Welsh Government to the Commission on Devolution in Wales*, WG17658 (February 2013) para 20.

¹⁵⁴ Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) recommendation 27.

Whether all this work is justified is difficult to predict in advance, as it is hard to tell how popular an appeal route will prove to be.

- 3.63 Creating new tribunals for all new appeal routes is also an unsustainable approach in the long-term. It risks fragmenting the structure of tribunals further and contributing to the “jungle” referred to by Wade.¹⁵⁵
- 3.64 Directing an appeal to the existing FTT seems to be reasonably common. More than twenty new appeal routes to the FTT have been created by the Senedd. In particular it can provide a good solution where similar legislation is being passed by both the Westminster Parliament and the Senedd. In that case directing appeals to the same body, at least at first instance, can allow one tribunal to build up some expertise in hearing cases. But if the Senedd is creating legislation which has no counterpart in England, a unified system of devolved tribunals would be a possible destination for appeals.
- 3.65 The final option is directing appeals to the courts. This might be suitable for some types of appeal, but not necessarily all. Tribunals still offer a particular type of dispute resolution. They are typically easier and cheaper to use for litigants in person, as they have less formal procedures. Their members often have particular expertise in the subject matter of the appeal. An appeal which lies to the courts instead risks losing these advantages, and failing to provide an effective means of redress for some users.

A location for general regulatory appeals

- 3.66 One other difference between the system of devolved tribunals in Wales compared to the TCEA 2007 and Scottish systems is that the system in Wales lacks a tribunal hearing “general regulatory” appeals. This is linked to the point above about the value in having a system which caters for all types of appeals. A general regulatory tribunal or chamber can be a useful place to hear claims that do not fit easily within other categories.
- 3.67 Mr Justice Warren, writing in the 2012 Annual Report of the Senior President of Tribunals, noted:

Is the [General Regulatory Chamber] anything more than an oddity – a place to park cases which do not seem to belong elsewhere? It certainly looks different from the great chambers of, for example, immigration and social entitlement. It must work differently too – and a rationale for its workings is beginning to emerge.

... it does make sense to have a place where new smaller jurisdictions can “start off”. In the past, it has often been necessary to create a new tribunal when Parliament created a new right of appeal with that tribunal at risk of later isolation especially if work was less than predicted.

Now the GRC can offer an immediate home.¹⁵⁶

¹⁵⁵ W Wade, *Administrative Law*, 4 edn (1977) p 763.

¹⁵⁶ Senior President of Tribunals, *Annual Report* (2012) p 39.

- 3.68 The need for somewhere where smaller jurisdictions can “start off” is not limited to the system of reserved tribunals. As explained above, the increased legislative competence of the Senedd coupled with the UK’s exit from the European Union is likely to increase the volume of new regulation introduced by the Senedd. That new regulation is likely to include both enforcement mechanisms and appeals against those mechanisms, which could lie to the devolved tribunals.

OPTIONS FOR THE FUTURE

- 3.69 There are a number of different options to develop the structure of the devolved tribunals.

Maintaining a system of individual tribunals

- 3.70 One possibility is to leave the current system of separate tribunals in place. Some changes could be made for particular areas; for example, to standardise appointments, complaints processes, appeals and discipline, as discussed elsewhere in the Consultation Paper. Making amendments in those areas would require an Act of the Senedd. But that Act could simply re-establish the existing tribunals with their existing jurisdictions. The legislative basis of the tribunals would have changed, but they would still remain separate legal entities.
- 3.71 That approach could include extending some the current features of the devolved tribunals system to tribunals which do not currently fall within it. The possibility of some amalgamation of school admission and exclusion appeals is discussed further below.
- 3.72 An advantage of this approach would be that it would not unduly disrupt the working of the existing tribunals. Changes might be made to make appointments, discipline, and procedural rules consistent across the tribunals, but ultimately, they would continue working much as they did before.
- 3.73 The main drawback would be that the system would continue to lack coherence, and might prove too rigid to respond to the needs of policy makers in the future. Policy makers would still face the challenge of identifying where their new appeal route could “fit in” within the existing *ad hoc* system.
- 3.74 Rationalisation of various aspects of tribunals would make setting up a new tribunal easier even under this model. Standardising matters such as procedural rules, appointments and appeal routes could help create a template that could be followed by future policy makers. But the setting up of new tribunals for each new type of appeal risks exacerbating the existing *ad hoc* pattern of tribunals in Wales. The other risk is that policy makers neglect devolved tribunals in favour of directing appeals to the FTT.

Introducing a system of chambers

- 3.75 An alternative would be to follow the approach of the TCEA 2007 and Scottish reforms, and create a “First-tier tribunal for Wales”. That tribunal would have to be subdivided into chambers, to accommodate and preserve judicial expertise.
- 3.76 One advantage of designing a system along these lines is that its ambitions are broader than just standardising existing tribunals. It could be designed to be comprehensive, providing a place for hearing all tribunal appeals relating to devolved matters in Wales. The hope is that this would make the system more intuitive for both policy makers and tribunal users.
- 3.77 The other principal advantage of the system is that it would be designed to accommodate future developments within the devolved tribunals. It would avoid the risk that new tribunals continue to be set up, fragmenting the system still further, while providing policy officials with an obvious place to situate new appeals.
- 3.78 In order to maintain this system, some flexibility would be required to ensure the system was responsible to changes in demand. The chamber structure would need to be able to adapt progressively to absorb existing jurisdictions, to transfer jurisdictions between chambers, and to accommodate new jurisdictions. In practice that would mean that chambers could be provided for in secondary legislation. We provisionally propose that the Welsh Ministers should be able to make such legislation, with the agreement of the President of Welsh Tribunals.
- 3.79 There may, however, be potential drawbacks to this system. These are explored below.

Size of the tribunals system

- 3.80 Some may query whether the chamber model is appropriate for the devolved tribunals, given their relatively small size. The Mental Health jurisdiction of the Health, Education and Social Care Chamber of the FTT alone received over 33,000 applications in the year 2019 – 2020.¹⁵⁷ By contrast, all section 59 tribunals received only 2,267 applications in that year.¹⁵⁸ The chamber system could be seen as an overly complex model for this smaller system.
- 3.81 We note however that a similar model has been adopted for the Scottish tribunals system, which closer in size to the devolved tribunals in Wales. In the year 2018-19, the First-tier Tribunal for Scotland counted 3,956 receipts. The majority of these (3,782) were received by the Housing and Property Chamber, with the next busiest chamber, the Health & Education Chamber, receiving 113 receipts.¹⁵⁹ (These figures do not, however, include tribunals which are currently not within the First-tier Tribunal

¹⁵⁷ Senior President of Tribunals, *Annual Report 2020*, p 31.

¹⁵⁸ President of Welsh Tribunals, *Annual Report 2019-2020* p 4. That figure excludes the Valuation Tribunal for Wales. In 2019-20 the VTW listed 4,183 rating cases, 687 council tax valuation cases and 118 other types of appeal (principally council tax liability matters). Many of the cases listed were settled prior to the hearing. See Valuation Tribunal for Wales, *Annual Report 2019-20 (2020)* p 6.

¹⁵⁹ President of Scottish Tribunals, *Annual Report 2018-2019 (2019)* p 52.

for Scotland, but which are expected to be in future. For example, the Mental Health Tribunal Scotland received 4,631 applications in 2019/2020.¹⁶⁰)

- 3.82 There may also be advantages in having chambers in a smaller system. Some of the chambers of the FTT are extremely large. This can lead to a situation where jurisdictions, while technically being part of the same chamber, in practice have little to do with each other. Smaller chambers within the Welsh system might mean that different jurisdictions benefit more from each other's expertise.
- 3.83 Finally, we note that the work of the devolved tribunals is likely to grow in future, due both to increased legislative competencies of the Senedd under the existing devolution settlement and to the impact of EU exit on the Senedd's regulatory activity.¹⁶¹ To give one example, the Senedd's Legislation, Justice and Constitution Committee has recently recommended that the Minister for Housing and Local Government examine whether there is a need for a dedicated housing tribunal in Wales.¹⁶²

Increasing legalism

- 3.84 Some critics have argued that amalgamating tribunals involves a decision to favour a particular set of legal values and way of working. Peter Cane has noted that:

It is a matter of choice whether members of tribunals with relatively narrow jurisdiction will be lawyers or non-lawyers; and the choice turns on what are considered to be the appropriate decision-making values and criteria.... although it is also a matter of choice whether members of tribunals with relatively broad jurisdiction will be lawyers or non-lawyers, we might hypothesise that replacement of a larger number of tribunals with relatively narrow jurisdiction by one or a small number of tribunals with relatively broad jurisdiction will favour one set of decision-making values and criteria.¹⁶³

- 3.85 Creating chambers within a larger, amalgamated tribunal then is an "attempt to prevent total legalisation of administrative adjudication and to leave room for application of non-legal values and criteria".¹⁶⁴

Tidiness as an end in itself

- 3.86 Another criticism of grouping a tribunal into chambers is that it reflects a lawyerly concern with order. Administrative effort is required to maintain specialism and ultimately to preserve the status quo, as far as many tribunals and their users are

¹⁶⁰ Mental Health Tribunal Scotland, *Annual Report 2019 – 2020* p 4 https://www.mhtscotland.gov.uk/mhts/files/Annual_Report_2019_2020.pdf.

¹⁶¹ Department for Business, Energy and Industrial Strategy, UK Internal Market Bill, *Memorandum to the Delegated Powers and Regulatory Reform Committee* (2020) para 4 <https://publications.parliament.uk/pa/bills/cbill/58-01/0177/UK%20Internal%20Market%20Bill%20-%20Final%20DPRRC%20Memo%2008092020.pdf>.

¹⁶² Legislation, Justice and Constitution Committee, *Report on the rented homes (amendment) (Wales) Bill* (October 2020) p 29. <https://senedd.wales/laid%20documents/cr-ld13553/cr-ld13553-e.pdf>.

¹⁶³ P Cane, *Administrative tribunals and adjudication* (2009) pp 125 and 126.

¹⁶⁴ P Cane, *Administrative tribunals and adjudication* (2009) p 126.

concerned. An example of this type of criticism emerged during the consultation on the Tribunals (Scotland) Act 2014. In written evidence to the Justice Committee, the Lands Tribunal for Scotland noted:

The tribunals in the list in Schedule 1 [to the Tribunals (Scotland) Bill] are all active and comparatively modern. Much work has gone into each to tailor the workings to the needs of their users. We think they work quite efficiently by that test. We are not persuaded that the approach of putting a number of tribunals into one and then seeking to discover how to preserve the characteristics of each is an efficient use of time and resources.

- 3.87 The Scottish Government's response to the Justice Committee's first stage written report countered:

... having a separate pillar outwith the structure is contrary to what the Bill is trying to achieve. The Bill seeks to provide coherence to the current disparate tribunals landscape. The structure will be flexible enough to cater for the many different tribunals and their varying specialisms. Having tribunals sitting outside the structure goes against the whole principle of the Bill.

All tribunals are unique. Every tribunal that will come into the new structure is different and will have its own specialist subject supported by its specialist members and staff. However all of these complexities can be catered for within the proposed new structure.¹⁶⁵

Conclusion on a chamber structure

- 3.88 We do not underestimate the volume of work required to create a First-tier tribunal and then split it into chambers. However, we also provisionally consider that this is desirable in order to create a sustainable, flexible system of Welsh tribunals that will be able to evolve to meet future demand. We therefore provisionally propose that the existing section 59 tribunals be replaced by a First-tier Tribunal for Wales, to be subdivided into chambers.
- 3.89 In the event that our provisional proposal for a First-tier Tribunal for Wales does not find favour, we nevertheless propose that the other reforms proposed in this Consultation Paper be effected.

¹⁶⁵ Justice Committee, *Tribunals (Scotland) Bill, Response from the Scottish Government to the Committee's Stage 1 Report*, paras 31 and 32. The Lands Tribunal for Scotland is currently on the list of tribunals in Schedule 1 to the Tribunals (Scotland) Act 2014, meaning it can be transferred into the new Scottish structure. The Scottish Government recently consulted on whether it should be amalgamated with the Scottish Land Court and, if so, whether the resulting body should be a court or tribunal. See Scottish Government, *The Future of the Land Court and the Lands Tribunal: consultation* (July 2020).

Consultation Question 4.

- 3.90 We provisionally propose that the Welsh Tribunals listed in section 59 of the Wales Act 2017 should be consolidated into a First-tier Tribunal for Wales, subdivided into chambers.

Do you agree?

Consultation Question 5.

- 3.91 We provisionally propose that the Welsh Ministers be empowered to provide for the First-tier Tribunal for Wales to be subdivided into chambers, and work allocated to chambers, by way of secondary legislation made with the concurrence of the President of Welsh Tribunals.

Do you agree?

OTHER DEVOLVED TRIBUNALS

- 3.92 This section of the chapter considers whether the other devolved tribunals that we have provisionally identified should be brought into our proposed unified tribunal.

The Valuation Tribunal for Wales

- 3.93 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.¹⁶⁶ It relies on lay panels, advised by a specialist clerk, rather than requiring panel members to have legal qualifications. Further detail on its constitution and operations can be found in Appendix 1.

¹⁶⁶ Valuation Tribunal for Wales, *Annual Report 2019-2020* (2020) para 2.1. See https://www.valuationtribunal.wales/fileadmin/resources/docs/publications/en/Annual_report_2019-2020.pdf.

Valuation tribunals in other parts of the UK

- 3.94 The Valuation Tribunal for England (“VTE”) was created in 2007, when it replaced 56 regional tribunals. There has been discussion in the past of whether the VTE should fall within the TCEA 2007 structure. On the recommendation of the Leggatt Report, the Law Commission investigated the possibility, and recommended that:

The current land, valuation and housing tribunals should be unified so as to create a generic Property and Valuation Tribunal (PVT) and a reformed Lands Tribunal.¹⁶⁷

- 3.95 The recommendation was not implemented, and when the Property Chamber of the FTT was established, the VTE did not form part of it.
- 3.96 The Ministry of Justice’s “Administrative Justice and Tribunals: Final report of progress against the Strategic Work Programme 2013-2016” notes that:

The VTE was identified for transfer into the Property Chamber in the First-tier Tribunal when it was established in 2013 and the [Valuation Tribunal Service] was listed for abolition in the Public Bodies Act 2011. However, after consideration of the scope for such a transfer, Ministers concluded that the transfer should not proceed and that, instead, both bodies should be subject to a Triennial Review, as set out in Cabinet Office guidelines.¹⁶⁸

- 3.97 A different approach has been taken in Scotland. Valuation Appeals Committees are expected to transfer into the First-tier Tribunal for Scotland in April 2022.¹⁶⁹

Incorporation of the Valuation Tribunal for Wales within the unified tribunal

- 3.98 In our view there would be a number of advantages in bringing the VTW within the system of devolved tribunals. These include the following.

- (1) Combined administration. Administration by a reformed WTU is likely to bring efficiency savings, as duplication of effort is avoided. It will enable the VTW to take advantage of technological solutions sourced by a reformed WTU, such as access to remote virtual hearing rooms. Both organisations could also benefit from pooling administrative support in areas such as IT and human resources.
- (2) Increased profile. Bringing the VTW within the family of devolved tribunals could increase its profile with both tribunal users and policy makers. The President and CEO of the VTW have previously expressed the view that the VTW could have played a role in hearing appeals relating to the recently devolved taxes on

¹⁶⁷ Land, Valuation and Housing Tribunals: The Future (2002) Law Com No 218. The Report’s recommendations did not extend to Wales. See paras 2.4 and 4.96 https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc281_Land_Valuation_and_Housing_Tribunals_The_Future.pdf

¹⁶⁸ Ministry of Justice, *Administrative Justice and Tribunals: Final report of progress against the Strategic Work Programme 2013–2016*, para 3.9.

¹⁶⁹ President of Scottish Tribunals, *Annual Report 2018-2019* (2019) p 6.

landfill and land transaction tax. Locating the VTW within a broader structure of devolved tribunals reduces the risk that it is overlooked in future.¹⁷⁰

- (3) Judicial leadership. As a member of the family of devolved tribunals, the VTW would benefit from the leadership of the PWT. The PWT is able to represent the interests of tribunals at a high level within both the Welsh and UK government, and within the judiciary. The VTW would in our view benefit from his representation of its interests.

3.99 We provisionally propose that the VTW should be brought into the First-tier Tribunal for Wales. In the event that our provisional proposal of a unified tribunal does not find favour, we nevertheless propose that the VTW be brought under the supervision of the PWT and that the other reforms proposed in this Consultation Paper be effected.

3.100 In either case it has to be acknowledged that the VTW currently operates differently from the other tribunals in a number of respects. Where these intersect with other topics discussed within this Consultation Paper, the specific situation of the VTW is discussed there. In particular, for the following topics, see:

- (1) appeals, at paragraphs 4.66 to 4.68;
- (2) appointments, at paragraphs 6.9 to 6.13;
- (3) complaints and discipline, at paragraphs 7.109 to 7.111;
- (4) the role of the PWT, at paragraphs 8.54 and 8.55; and
- (5) governance and the role of the WTU, at paragraph 9.12.

3.101 As explained above, panels in the VTW are made up of unpaid volunteers (usually three, though in some circumstances a panel can be composed of two members).¹⁷¹ Members are advised by a clerk, who has specialist knowledge of both the substance of the appeals heard and the relevant law. The clerk therefore plays a key role in the operation of the panels. Clerks also play a role in case management. This is in contrast to the existing section 59 tribunals, which tend to use panels with a legally qualified chair and panel members drawn from particular professions, and whose case management is performed by the WTU. In our view, amending the model of adjudication used by the VTW goes beyond the scope of this project.

3.102 Nonetheless, our provisional view is that the VTW should be brought within the wider system and administered by a reformed WTU.

¹⁷⁰ Valuation Tribunal for Wales, *Annual Report 2015 – 2016*, para 7.3.

¹⁷¹ Valuation for Tribunal Wales Regulations SI 2010 No 713 (W 69), reg 37(1) and (2).

Consultation Question 6.

3.103 We provisionally propose that the Valuation Tribunal for Wales should be part of the First-tier Tribunal for Wales.

Do you agree?

School admission and exclusion appeal panels

3.104 School exclusion and admission appeal panels are unusual amongst the devolved tribunals in that they are administered by local authorities, rather than being run centrally. In practice it is common for them to be run together, under the umbrella term of “independent appeal panel”. More detail on their functions can be found in Appendix 1.

Elsewhere in the United Kingdom

3.105 Similar panels to those found in Wales exist in both England and Scotland. However, in recent years those two systems have headed in different directions. In England, exclusion appeal panels have been replaced by exclusion review panels, which have fewer powers. In Scotland, education appeal committees are due to be absorbed into the wider tribunal structure in April 2021.¹⁷²

England

3.106 Exclusion and admission panels in England and Wales are based in the same pieces of primary legislation: for school admission panels, the School Standards and Framework Act 1988, and for exclusion panels, the Education Act 2002. Admission panels continue to operate in a similar way in both countries, although the introduction of academies in England has meant that some admission panels are now run by academy trusts.

3.107 More significant changes have been made to exclusion appeal panels in England. These were replaced by exclusion review panels in 2012.¹⁷³ Exclusion review panels have more limited powers than exclusion appeal panels. They may only review decisions on judicial review grounds (usually illegality, irrationality, and procedural unfairness). Unlike exclusion appeal panels, the new review panels are unable to direct that a school reinstate a pupil. The panel can decide either to:

- (1) uphold the governing board's decision;
- (2) recommend that the board reconsiders reinstatement; or

¹⁷² President of Scottish Tribunals, *Annual report 2018-2019* (2019) p 14.

¹⁷³ Education Act 2002, s 51A (as amended by Education Act 2011, s 4). See also the School Discipline (Pupil Exclusions and Reviews) (England) Regulations SI 2012 No 1033.

(3) quash the decision and direct that the board reconsiders reinstatement.¹⁷⁴

3.108 The 2012 reforms also provided that a review panel may, in some circumstances, be advised by an expert on special educational needs. The expert's role is to "provide impartial advice on how special educational needs may be relevant to the decision to exclude the pupil permanently".¹⁷⁵ The system of exclusion review panels in England was the subject of two major reports in 2019. The first review was conducted by Edward Timpson CBE MP, and was commissioned by the Secretary of State for Education. It made a number of recommendations to "ensure that exclusion is used consistently and appropriately".¹⁷⁶ The second, by JUSTICE, recommended that the panels be transferred to the Health, Education and Social Security Chamber of the FTT.¹⁷⁷

Scotland

3.109 In Scotland, appeals against decisions to place pupils in a particular school ("placing decisions") or to exclude a pupil are heard by education appeal committees, set up by local education authorities.¹⁷⁸ They are included in Schedule 1 to the Tribunals (Scotland) Act 2014, and are due to transfer into the Health and Education chamber of the First-tier Tribunal for Scotland in April 2021.

3.110 The decision to include education appeal committees within the tribunals system followed repeated criticism that they were insufficiently independent. Most tribunal members were appointed by local authority education committees.¹⁷⁹ In oral evidence to the Scottish Parliament's Justice Committee during the passing of the Tribunals (Scotland) Act 2014, Iain Nisbet, an education lawyer, also expressed the view that the:

tendency of the committees is to confirm authorities' decisions, although it varies between authorities. There are 32 different iterations and some authorities are better than others, but by and large there is a tendency to confirm decisions, in some cases without serious scrutiny of the case. The prospect of that jurisdiction being brought within an independent tribunal service is therefore one of the most exciting and beneficial aspects of the bill.

¹⁷⁴ Education Act 2002, s 51A(4).

¹⁷⁵ The School Discipline (Pupil Exclusions and Reviews) (England) Regulations SI 2012 No 1033, reg 16(1)(b).

¹⁷⁶ E Timpson, *Timpson review of school exclusion* (May 2019) p 3. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807862/Timpson_review.pdf.

¹⁷⁷ JUSTICE, *Challenging school exclusions* (2019) para 5.38. <https://justice.org.uk/wp-content/uploads/2019/12/Challenging-School-Exclusions.pdf>.

¹⁷⁸ Education (Scotland) Act 1980, s 28D(1) and sch A1.

¹⁷⁹ See for example the Administrative Justice and Tribunals Council, Scottish Committee, *Options for tribunal reform in Scotland* (2010) para 7.11.

3.111 He also commented on the expertise of education appeal committees, saying:

The members of the education appeal committee are not specialist members but councillors and parents. There is an element of choosing, but when it comes to more complex issues such as exclusion or placements for children with additional support needs in mainstream or special schools, the expertise is not there. The proposed approach [locating education appeal committees in a chamber with the Additional Support Needs Tribunal] presents an opportunity to develop that.¹⁸⁰

Evaluation of school exclusion and admission appeal panels

3.112 This section of the Consultation Paper considers possible reform of school admission and exclusion appeal panels.

Independence

3.113 School admission and exclusion panels have been criticised for a lack of perceived independence. They are organised by the body which made the original decision. Most tribunals were originally set up in this way, but, as described above, the pattern of reform over the last sixty years has been to decouple the administration of tribunals from the body responsible for the decision that is being appealed.

Inconsistency

3.114 There are also concerns that the panels operate inconsistently across Wales. While the Admissions Appeals Code contains guidance, it leaves many decisions to admission authorities. For example, it is for admission authorities to decide whether the panel's clerk needs to be legally trained. We understand that in some local authorities (such as Cardiff) this is standard, but that in other local authorities the need to have a legally qualified clerk present is assessed on a case-by-case basis.

3.115 The problem of inconsistency is arguably more serious for school exclusion appeal panels, which hear relatively few cases, spread out over a large number of education authorities. While no data is collected centrally on school exclusion appeals, a 2016 estimate by CAJTW, was that there were fewer than 60 a year. That suggests that each panel may hear only a handful of claims a year.

Expertise

3.116 One advantage of the existing school exclusion and admission appeal panels is that the panel will have relevant expertise in education, and in particular the educational landscape in the local area. Some members of the admission appeal panels will have been selected because they are "acquainted with educational conditions in the area of the authority" or parents of registered children at a school.¹⁸¹ This type of experience is stipulated for admission panels, but not for exclusion panels. Exclusion panels also include persons with experience of education, but these are education practitioners

¹⁸⁰ SP OR JC 3 September 2013, col 3133.

¹⁸¹ Education (Admission Appeals Arrangements) (Wales) Regulations SI 2005 No 1398 (W 112), sch 1, paras 1(1)(b) and (c), and 2(1)(b) and (c).

(someone currently working in education management) and school governors.¹⁸² Their experience need not be tied to the local area.

- 3.117 Another type of experience derives simply from hearing a significant number of similar cases. In exclusion cases, the relatively low number of appeals means that panels are less likely to have an opportunity to acquire this experience. That can be dealt with partly by local authorities running additional training to refresh panel members' memories of the relevant law. However, fitting in this training is time-consuming, particularly given the relatively short deadlines for hearing exclusion cases. And it is no substitute for building up a body of experience from hearing these types of case.

Location

- 3.118 One advantage of organising exclusion and admission appeals locally is that they are typically also held locally, reducing travel time and cost for tribunal users. The Admissions Appeal Code requires that:

A neutral venue must be used for the appeal hearing, but local authorities could use their own buildings as long as they are not associated with the work of admissions staff. Foundation and voluntary aided schools must arrange a venue other than the school, and LAs are encouraged to assist in providing a suitable venue, so as to support schools and minimise costs.¹⁸³

Judicial oversight

- 3.119 Finally, criticisms have been made about the lack of judicial oversight of the panels. As explained above, there is no appeal route from decisions made by an admissions panel. Instead an applicant must either bring a judicial review of the decision in the High Court or complain to the Public Services Ombudsman for Wales or Welsh Ministers (for further discussion of appeals from the panels, see paragraphs 4.57 to 4.63).

- 3.120 Most recently, the Commission on Justice in Wales noted that the panels “operate without any kind of judicial scrutiny save in those very rare cases in which an exclusion leads to an application for judicial review”.¹⁸⁴

Reform of school exclusion and admission panels

- 3.121 A number of suggestions have been made for the reform of admissions and exclusions panels. The 2016 Report concluded that a “Wales-wide” solution was needed, and recommended that:

The Welsh Government should explore the merits of extending the jurisdiction of the Special Educational Needs Tribunal for Wales (suitably renamed as the Education

¹⁸² Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations SI 2003 No 3227 (W 308), sch 1 para 2(2)(b) and (c), and the Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations SI 2003 No 3246 (W 321), sch 1 para 2(2)(b) and (c).

¹⁸³ Welsh Government, *School admission appeals code* (2013) para 4.19.
<https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>.

¹⁸⁴ Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) para 6.47.

Tribunal for Wales) to create a national tribunal for school admissions and exclusion appeals within the next 5 years.¹⁸⁵

- 3.122 It considered that utilising the expertise of the Special Educational Needs Tribunal for Wales could ensure a “professional and independent cadre of panel chairs”, as well as making information about appeals more accessible. The President of the SENTW has in the past expressed willingness to accommodate those claims within her tribunal, saying in relation to exclusion panels that:

... they could be definitely looked at as if they’re unfair. I’m sure they’re not, but from an outside perspective, they certainly look as if they’re not because they’re basically part of the body that’s excluded the child in the first place. I firmly believe that the tribunal is well placed to take on that sort of work as well in the future.¹⁸⁶

- 3.123 In 2013 the Welsh Government did conduct a feasibility study into centralising administration of the tribunals (though not amalgamating their jurisdiction with the SENTW). One challenge which this discussed was the short timeframe in which appeals must be heard. A large volume of admission appeals take place between April and May each year, in relation to admissions in September. We understand that this was partly behind the Welsh Government’s response to the 2016 Report, which noted simply that:

The feasibility of school admissions and exclusion has been explored in response to recommendations in previous reviews of the devolved tribunals. The Welsh Government has concluded that SENTW is not the appropriate vehicle for admissions and exclusions appeals.¹⁸⁷

- 3.124 Exclusion hearings tend to be more spread out throughout the year, but nonetheless must be heard within a short period of the exclusion. The exclusion guidance requires that “an appeal panel must meet to consider an appeal no later than the fifteenth school day after the day on which the appeal was lodged”.¹⁸⁸

- 3.125 We accept that admission appeal panels generate a large quantity of seasonal work. Incorporating such a quantity of work within the WTU at the moment would be difficult (though may be possible in the future, if the Welsh tribunal system grows). We also understand that, in the case of school admission appeals, panels are valued for their understanding and experience of education provision in the local area. That understanding might be more difficult to replicate in a unified tribunal hearing appeals from across Wales. It would be necessary to make sure that there were panel

¹⁸⁵ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales*, (2016) pp 7 and 12 (recommendation 24).

¹⁸⁶ President of the SENTW, Oral evidence to the Assembly’s Children, Young People and Education Committee on the Additional Learning Needs Bill (2 March 2018) para 505.
<https://business.senedd.wales/documents/s60383/2%20March%202017.pdf>

¹⁸⁷ Welsh Government, *Committee for Administrative Justice and Tribunals, Wales (CAJTW) Legacy Report, March 2016: Welsh Government Response* (July 2016) p 4.

¹⁸⁸ Welsh Government, *Exclusion from schools and pupil referral units* (November 2019) para 4.2.1.
<https://gov.wales/sites/default/files/publications/2019-11/exclusion-from-schools-pupil-referral-units.pdf>

members available with experience of educational conditions across each part of Wales, and then to list cases to be heard by those members.

3.126 In our view these arguments apply less strongly in the case of exclusion appeals. These are heard throughout the year, and there are fewer of them. They are less reliant on local expertise. Indeed, some of the expertise of existing panels members in the SENTW could be relevant to hearing exclusion cases; we understand a significant proportion of permanent exclusion cases involve pupils with additional learning needs.¹⁸⁹ The SENTW already hears disability discrimination claims relating to fixed-term exclusions.¹⁹⁰

3.127 In our view, the hearing of those appeals by the SENTW would enable a greater consistency of approach than exists currently. Incorporating school exclusion appeal panels within the SENTW would also mean that users had a right of appeal which was less expensive, less formal and less adversarial than judicial review. We therefore provisionally propose that the jurisdiction of school exclusion appeal panels should be exercised by the Special Educational Needs Tribunal for Wales.¹⁹¹

Consultation Question 7.

3.128 We provisionally propose that the jurisdiction of the school exclusion appeal panels should be amalgamated into that of the Special Educational Needs Tribunal for Wales.

Do you agree?

3.129 In Chapter 4 we provisionally propose that decisions of school admissions appeal panels should be subject to a right of appeal to the Education Chamber of the proposed First-tier Tribunal (or, alternatively, the Education Tribunal) (see paragraphs 4.57 to 4.63). We anticipate that, if the proposal is adopted, the Education Chamber or Tribunal will develop familiarity with school admissions appeal work without being exposed to the entire volume of work currently handled by the admissions appeal panels. We suggest that, in the light of the experience gained, consideration be given in the future to the possible transfer of the jurisdiction of the panels to the Education Chamber or Tribunal.

¹⁸⁹ Statistics for the number of exclusion appeal panel hearings involving a pupil with additional learning needs are not available. Welsh Government, *Permanent and fixed-term exclusions from schools: September 2018 to August 2019* (October 2020) p 2 states that “overall, pupils with special educational needs have higher rates of exclusions than those without”.

¹⁹⁰ Welsh Government, *Exclusion from schools and pupil referral units* (November 2019) para 1.17.14.

¹⁹¹ As discussed at para 3.51 above, the SENTW will in due course be renamed the Education Tribunal for Wales. This name change would reflect the expanded jurisdiction we propose for the tribunal.

Consultation Question 8.

3.130 We provisionally propose that, for the time being, the jurisdiction of the school admission appeal panels should not be amalgamated with that of the Special Educational Needs Tribunal for Wales.

Do you agree?

POSSIBLE REORGANISATION OF JURISDICTION WITH THE UNIFIED TRIBUNAL

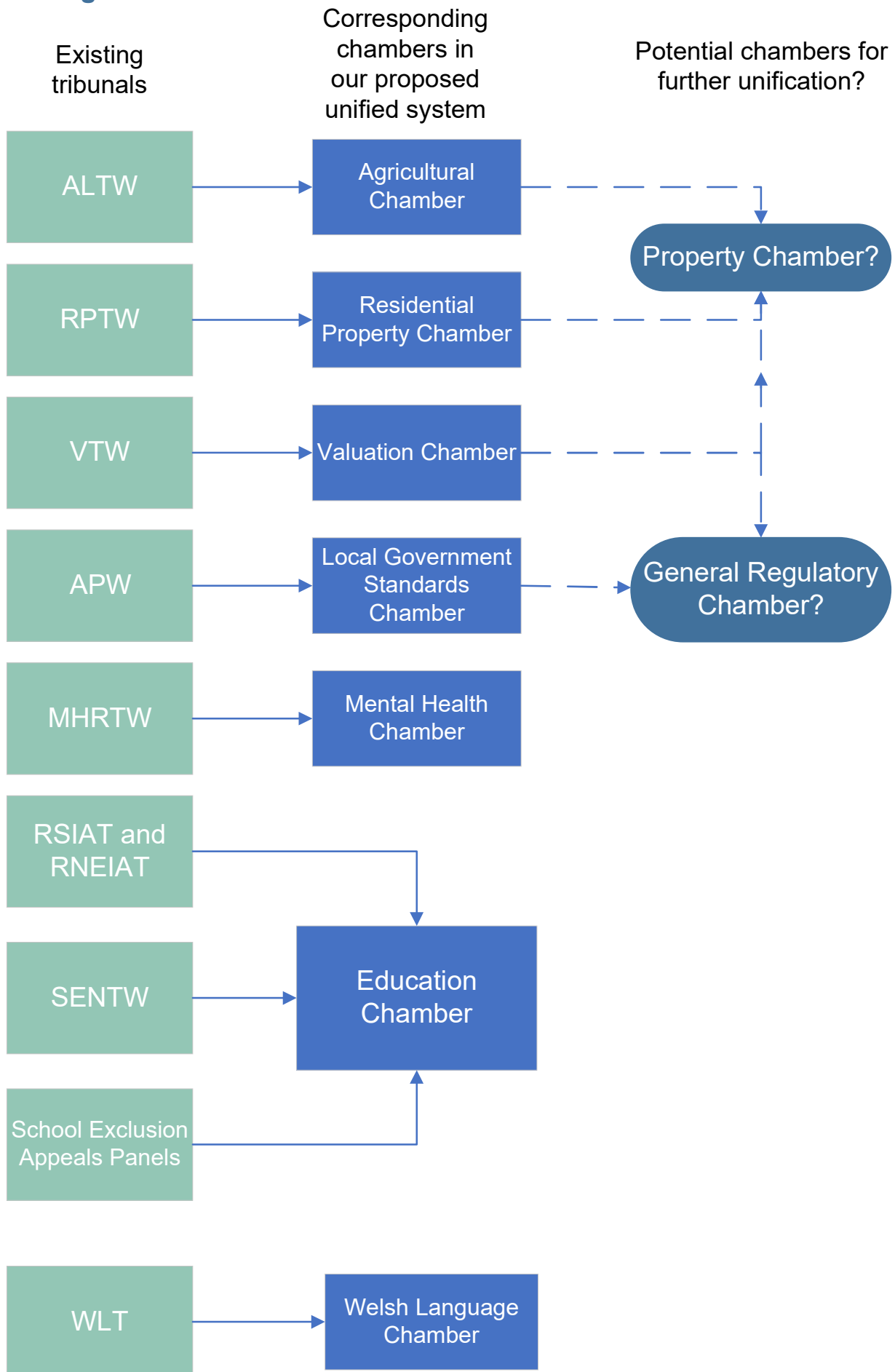
- 3.131 We doubt that it would be possible at this stage to make comprehensive recommendations as to the possible reorganisation of jurisdiction with our proposed unified tribunal. Experience of the TCEA 2007 in the United Kingdom shows that the transfer of jurisdictions into the FTT and Upper Tribunal has been progressive and that the current pattern of jurisdiction does not correspond entirely to the recommendations in the Leggatt Review.
- 3.132 We think that the most suitable contribution that we can make to the development of a devolved tribunals system for Wales is to make proposals for the creation of a unified tribunal and for the various ancillary matters, such as appointments, discipline and procedural rules, that we discuss in this Consultation Paper. We do however put forward a number of proposals for reorganisation that it seems to us to be desirable to make at this stage; on possible more far-reaching reorganisation we seek views.
- 3.133 We have provisionally proposed above that the jurisdiction of school exclusions panels be transferred to the SENTW. In addition, we provisionally propose that the jurisdiction of the registered school and nursery education inspectors appeal tribunals should be formally consolidated with that of the SENTW. The first report of the PWT explains that those tribunals have not been constituted recently, and that they have “no judicial lead appointed by any formal process”. The report notes however that “tribunal members from SENTW are eligible to deal with any cases which arise”.¹⁹²
- 3.134 We also provisionally propose that the underlying bodies of the RPTW be formally combined into a single residential property chamber. As explained at paragraph 3.40 above, the RPTW is currently an umbrella organisation responsible for residential property tribunals, leasehold valuation tribunals, and rent assessment committees.
- 3.135 In addition to these proposals, we seek views on a number of matters. The first is whether one of the chambers of a new unified tribunal should be a general regulatory chamber, in order to facilitate the future development of the law in Wales. A significant proportion of new appeal routes directed to the FTT in recent years have been directed to the General Regulatory Chamber, suggesting there is likely to be demand for such a chamber. That chamber could also accommodate jurisdictions which currently hear few cases; for example, the APW. We note that in the past, the General Regulatory Chamber of the FTT included the English equivalent of the APW.

¹⁹² President of Welsh Tribunals, *Annual Report 2018-2019* (2019) p 5.

- 3.136 We also seek views on whether a single property chamber should be established, which would include the jurisdictions of the RPTW and the ALTW. This approach has been pursued in the TCEA 2007 system. The First-tier Tribunal for Scotland also includes a housing and property chamber. Combining the RPTW and the ALTW may make sense insofar as there may be common legal expertise. The lay expertise in the ALTW (farmers, landowners, and drainage experts) may, however, be less likely to translate into the work of the RPTW.
- 3.137 A property chamber might also accommodate the valuation work of the VTW.¹⁹³ Other elements of the VTW's work that are not strictly speaking concerned with valuation, but instead involve assessing liability to tax, could be assigned to a general regulatory chamber (as discussed above at paragraphs 3.66 to 3.68).
- 3.138 Diagram 1 overleaf sets out these proposals and other possibilities.

¹⁹³ A similar suggestion was made by the Law Commission shortly before the enactment of the Tribunals, Courts and Enforcement Act 2007. See Land, Valuation and Housing Tribunals: The Future (2003) Law Com No 281, para 2.4 https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc281_Land_Valuation_and_Housing_Tribunals_The_Future.pdf.

Diagram 1



Consultation Question 9.

3.139 We provisionally propose that the jurisdictions of the Registered School Inspectors Appeal Tribunal and Registered Nursery Education Inspectors Appeal Tribunal should be amalgamated with that of the Special Educational Needs Tribunal for Wales.

Do you agree?

Consultation Question 10.

3.140 We provisionally propose that the constituent tribunals of the Residential Property Tribunal for Wales (residential property tribunals, leasehold valuation tribunals, and rent assessment committees) should be consolidated into one chamber.

Do you agree?

Consultation Question 11.

3.141 We seek views on:

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

Consultation Question 12.

3.142 We seek views on whether the Residential Property Tribunal for Wales and Agricultural Land Tribunal for Wales should be consolidated into a property chamber.

Consultation Question 13.

3.143 We seek views on whether any of the other existing devolved tribunals should be amalgamated into a single chamber.

Chapter 4: Appeals

- 4.1 The previous chapter considered the need to impose a greater structure on the devolved tribunals in Wales. It provisionally concluded that the needs of the tribunals and tribunal users would be best served by the creation of a “First-tier Tribunal for Wales”. This would be one unified tribunal, split into chambers having responsibility over particular subject areas. The tribunal would be designed to be flexible and responsive to future demands on the administrative justice system in Wales.
- 4.2 The creation of a “First-tier Tribunal for Wales” however gives rise to another question: should there be a second tier? In this chapter we consider the question of onward appeals from the devolved tribunals (referred to throughout this chapter simply as “appeals”).
- 4.3 At present, most appeals from the devolved tribunals lie to the Upper Tribunal established by the Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”), mirroring the route of onward appeal from the corresponding tribunals in England. The Welsh Language Tribunal (“WLT”) is to date still the only tribunal that has been established by Welsh legislation, and in its case the decision was taken to direct appeals to the High Court instead. Appeals from the Adjudication Panel for Wales (“APW”) also lie to the High Court. For school admission and exclusion appeal panels there is no conventional appeal route at all.
- 4.4 Bringing the existing devolved tribunals in Wales into one structure would make these inconsistencies look starker. This chapter considers whether the existing appeal routes should be rationalised, and if so, how. This involves weighing the competing merits of courts and tribunals as appeal venues. Difficult considerations arise, such as the extent to which appeals from devolved tribunals should form part of the broader system of reserved tribunals in England and Wales. Furthermore, to what extent does the creation of a coherent tribunal system for Wales require the creation of an appeal tribunal for Wales?

APPEALS FROM DEVOLVED TRIBUNALS IN WALES

- 4.5 This section of the chapter outlines the current appeal routes from the devolved tribunals, and gives some indication of the volume of appeals. It also considers an inconsistency in the way in which appeals from the Upper Tribunal to the Court of Appeal are treated, depending on whether they originate from the First-tier Tribunal or a devolved tribunal.

Appeal routes and volume of appeals

4.6 The table below outlines appeal routes from the existing devolved tribunals in Wales.

Tribunal ¹⁹⁴	Appellate body	Nature of appeal
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. ¹⁹⁵
RSIAT and RNEIAT	None (judicial review is available; the tribunal may also review its own decision).	-
Independent Appeal Panels	None (judicial review available; applicants may also complain to the Welsh Ministers or Public Services Ombudsman for Wales).	-
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.

¹⁹⁴ The abbreviations used in the 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"), Special Educational Needs Tribunal for Wales ("SENTW") and Welsh Language Tribunal ("WLT").

¹⁹⁵ 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: (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.

4.7 The following table shows the number of applications to the section 59 tribunals for permission to appeal (where applicable) and of applications for permission to appeal to the High Court or Upper Tribunal in the last two years.¹⁹⁶

Tribunal	2019/20		2018/19	
	Applications for permission made to tribunal	Applications for permission made to UT or HC	Applications for permission made to tribunal	Applications for permission made to UT or HC
ALTW	2 (1 dismissed, 1 pending)	-	1 (pending)	-
APW	0	-	0	-
MHRTW	6 (1 granted)	-	4 (2 granted)	1 (granted)
RPTW	13 (all refused)	7 (6 refused, 1 awaiting outcome)	9 (all refused).	4 (all refused)
RSIAT and RNEIAT	-	-	-	-
SENTW	2 (both refused).	1 (granted).	9 (all refused).	5 (2 granted).
WLT	0	-	0	-

4.8 The Valuation Tribunal for Wales (“VTW”) is omitted from the table as appeals from its decisions do not require permission. It too has a low number of appeals. In 2018/2019 there was just one; an appeal to the High Court.¹⁹⁷ The year 2019/2020 saw two statutory appeals to the High Court and one application for permission for judicial review made by one appellant. The application for permission for judicial review was refused. One rating decision was appealed to the Upper Tribunal.¹⁹⁸ There is no appeal from decisions of school admission and exclusion panels; we discuss them below.

¹⁹⁶ Data supplied by the Welsh Tribunals Unit.

¹⁹⁷ Valuation Tribunal for Wales, *Annual report 2018-2019*, para 2.5.

¹⁹⁸ Valuation Tribunal for Wales, *Annual report 2019-2020*, paras 2.6 and 2.7.

The Upper Tribunal

- 4.9 As shown above, appeals from several of the devolved tribunals lie to the Upper Tribunal: either to the Administrative Appeals Chamber, or the Lands Chamber.¹⁹⁹ The contribution from the President of the Administrative Appeals Chamber, contained in the Senior President of Tribunals' Annual Report notes:²⁰⁰

Appeals to UTAAC from those devolved tribunals within its jurisdiction continue to be rare. In the reporting year, the Chamber dealt with three challenges to decisions of the SEN Tribunal for Wales and two cases involving the Mental Health Review Tribunal for Wales. The vast majority of hearings in Wales involve challenges to decisions of the First-tier Tribunal rather than to decisions of Welsh tribunals.

- 4.10 The report also noted that “the Chamber sits regularly in Wales, normally at Cardiff Civil Justice Centre”.²⁰¹ We understand that the Lands Chamber also routinely hears Welsh cases in Wales (principally arising from its first instance jurisdiction). Participants are entitled to be heard in the Welsh language for hearings that take place in Wales. If there is a request to use the Welsh language in a case in the Upper Tribunal, HMCTS will make provision in the first instance to list the case in Wales.²⁰²

School exclusion and admission appeal panels

- 4.11 Decisions of school exclusion and admission appeal panels are binding. There is no appeal route, although parents may judicially review the panel's decision. A recent example is *R (LB) v Independent Appeal Panel of Newport City Council*.²⁰³ In that case the applicant judicially reviewed the decision of the appeal panel not to reinstate her at the school, arguing that the appeal panel had failed to have regard to a relevant consideration (namely whether her violence had been sufficiently serious to justify exclusion for a one-off incident). The application was successful, and the court ordered that the panel reconsider the decision.
- 4.12 Otherwise, a user may complain to the Public Services Ombudsman for Wales (“PSOW”). The ombudsman can only review decisions for maladministration or service failure, and has no power to review the merits of a decision. We understand that the PSOW receives approximately 30 complaints per year relating to school admission appeal panels. Of these, 80 to 90% are not investigated, often because they do not relate to maladministration. The PSOW receives far fewer complaints arising from school exclusions: only one a year.

¹⁹⁹ The Lands Chamber hears appeals from the First-tier Tribunal (Property Chamber) as well as from the ALTW and the RPTW. For historical reasons, it is also the venue for a number of other first instance jurisdictions, listed at <https://www.gov.uk/courts-tribunals/upper-tribunal-lands-chamber>.

²⁰⁰ Senior President of Tribunals, *Annual Report 2019-20*, p 13. https://www.judiciary.uk/wp-content/uploads/2020/07/6.6755_The-Senior-President-of-Tribunals-Annual-Report-2020_WEB-CS-amend-1.pdf.

²⁰¹ Senior President of Tribunals, *Annual Report 2019-20*, p 13.

²⁰² HMCTS, *2018-2021 Welsh Language Scheme* (2019) paras 5.48 to 5.50. <http://www.comisiynyddygymraeg.cymru/Cymraeg/Rhestr%20Cyhoeddiadau/20190131%20DG%20D%20Cynllun%20Iaith%20GLlaThEM.PDF>.

²⁰³ *R (LB) v Independent Appeal Panel of Newport City Council*, [2017] EWHC 2216 (Admin), [2017] 9 WLUK 6.

4.13 Users may also complain to the Welsh Ministers. The statutory Admissions Appeal Code published by the Welsh Government indicates that Welsh Ministers cannot review or overturn decisions of appeal panels in individual cases, but may exercise their powers of intervention if:

- (1) the panel was incorrectly constituted by the admission authority;
- (2) the admission authority has not acted reasonably in exercising functions in respect of the appeal process or;
- (3) the admission authority has failed to discharge any legal duty in relation to that process (including breaching a mandatory provision of the Code).²⁰⁴

4.14 We understand that there are very few complaints to the Welsh Ministers.

The Upper Tribunal and second appeals

4.15 The fact that the section 59 tribunals are not part of the First-tier Tribunal has resulted in an anomaly in the way that appeals from the Upper Tribunal are treated. This issue was considered by the Court of Appeal in *Clarise Properties Limited v Rees*.²⁰⁵ The case involved a decision of the Residential Property Tribunal for Wales (“RPTW”), which was appealed first to the Upper Tribunal (Lands Chamber) and then to the Court of Appeal. The question for the Court of Appeal was whether the appeal originating from the RPTW (a devolved tribunal) should be treated in the same way as appeals originating from the First-tier Tribunal.

4.16 Section 13 of the TCEA 2007 provides that an individual has a right to appeal from the Upper Tribunal to the Court of Appeal. It also enables the Lord Chancellor by order to restrict the grounds on which an appeal can be made to cases where there is some important point or principle or practice, or another compelling reason to hear the appeal (the “second appeal test”).²⁰⁶ But that power is limited to appeals falling within section 11 of the TCEA 2007, which only refers to the right:

to appeal to the Upper Tribunal on any point of law arising from a decision made by the **First-tier Tribunal**....²⁰⁷

4.17 The Court of Appeal held that the RPTW is “clearly not the First-tier Tribunal” and as a result the ordinary, less demanding test applied (whether there is a real prospect of success, or some other compelling reason for the appeal to be heard).²⁰⁸ As a result appeals from the devolved tribunals in Wales face a lower hurdle on a “second appeal” from the Upper Tribunal to the Court of Appeal.

²⁰⁴ Welsh Government, *School admission appeals code* (2013).
<https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>, para 6.14.

²⁰⁵ *Clarise Properties Limited v Rees* [2015] EWCA Civ 1118, [2015] 7 WLUK 904.

²⁰⁶ The relevant order is the Appeals from the Upper Tribunal to the Court of Appeal Order SI 2008 No 2834 art 2.

²⁰⁷ Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”), s 11(1) (emphasis added).

²⁰⁸ Civil Procedure Rules, r 52.6 (1).

- 4.18 This is anomalous when compared to appeals created by Welsh legislation which lie to the First-tier Tribunal (for example, appeals against decisions of the Welsh Revenue Authority). As those appeals lie to the First-tier Tribunal, they would be subject to the stricter second appeals test.

ELSEWHERE IN THE UK

- 4.19 The question of where appeals from tribunals should lie is not unique to Wales. We discuss below the approaches that have been taken in relation to the reserved tribunals and in Scotland. We also discuss past proposals for reform of the tribunals system in Northern Ireland.

Reserved tribunals

- 4.20 One of the key recommendations made by the report of Sir Andrew Leggatt (“the Leggatt Report”) following his review of tribunals was that there ought to be “a single route of appeals for all tribunals”. At that time the appeal routes were widely agreed to be inconsistent and illogical; the result of haphazard historical development, rather than design. Some appeals went to established appellate tribunals, but others went to the courts (the High Court and the Court of Appeal were both relied on). For others there was no appeal route at all, and applicants could only bring judicial review.
- 4.21 His report concluded that:
- there should be a single route for all appeals from tribunals... The appeal body needs to be able to give genuine coherence to the development of the law, and promote consistency effectively both at its own level and in the first-tier tribunals. This points towards a single appellate Division.²⁰⁹
- 4.22 However, there was also a need to preserve the “considerable expertise” that already existed within the appellate tribunals, and to accommodate the variations in numbers of appeals generated by first-tier tribunals.
- 4.23 The solution was the creation of the Upper Tribunal by the TCEA 2007. Although a single appellate body, it is divided into chambers like the First-tier Tribunal. The subsequent consultation run by the Ministry of Justice described the creation of the Upper Tribunal as “probably the most significant innovation in the tribunal system”.²¹⁰

²⁰⁹ Sir Andrew Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (March 2001) para 6.10.

²¹⁰ Ministry of Justice, *Transforming Tribunals: Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007* (December 2007) para 177.

- 4.24 The Upper Tribunal is a superior court of record, like the High Court and the Employment Appeal Tribunal.²¹¹ One key effect of this is that its decisions are legally binding on lower tribunals.²¹² It now consists of four chambers; the Administrative Appeals Chamber, the Immigration and Asylum Chamber, the Tax and Chancery Chamber and the Lands Chamber. The Upper Tribunal as a whole is presided over by the Senior President of Tribunals.
- 4.25 Under the TCEA 2007, there is a right of appeal to the Upper Tribunal on “any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision”. Permission to appeal to the Upper Tribunal can be given either by the First-tier Tribunal or by the Upper Tribunal itself.²¹³ As well as having an appellate jurisdiction over the First-tier Tribunal, the Upper Tribunal also has a judicial review jurisdiction.²¹⁴ Under section 18(6) of the TCEA 2007, the Lord Chief Justice has issued a practice direction transferring particular classes of case to the Upper Tribunal (mainly relating to immigration).²¹⁵ Particular cases may also be transferred if the Administrative Court considers it appropriate; for example, if the case requires decisions on questions of fact or contested evidence.

Appeals from the Upper Tribunal

- 4.26 Appeals from the Upper Tribunal are generally to the Court of Appeal on a point of law.²¹⁶ However, if the case concerns a point of law of “general public importance”, in some circumstances the TCEA 2007 allows the Upper Tribunal to permit a would-be appellant to go straight to the Supreme Court, to request permission for an appeal to be heard there (known as “leapfrogging”).²¹⁷
- 4.27 The decisions of the Upper Tribunal are also themselves subject to judicial review, albeit in very limited circumstances. The Supreme Court decided in *R (Cart) v The Upper Tribunal* that it is possible to judicially review a refusal by the Upper Tribunal to grant permission to appeal from the First-tier Tribunal.²¹⁸ The applicant must however

²¹¹ TCEA 2007, s 3(5).

²¹² See the Divisional Court decision in *R (C, U, XC) v the Upper Tribunal, Special Immigration Appeals Commission* [2009] EWHC 3052 (Admin), [2010] 2 WLR 1012 at [75]. Laws LJ explained that an “attribute of a superior court of record appears to be that its decisions have effect as precedents for lower tribunals. This is no doubt because of the record it keeps. (Originally, a court of record was one whose acts and proceedings were enrolled in parchment.)” Other characteristics cited by Laws LJ were that a superior court of record is presumed to act within its powers unless otherwise shown, and has the power to punish for contempt. The case was appealed to the Supreme Court in *R (Cart) v the Upper Tribunal* [2011] UKSC 28, [2012] AC 663 at [30]. Lady Hale, who gave the leading judgment, did not find it necessary to explore the definition of “superior court of record” but referred to Laws LJ’s judgment as “typically subtle and erudite”.

²¹³ TCEA 2007, ss 11(1) and (4).

²¹⁴ TCEA 2007, s 15.

²¹⁵ Lord Chief Justice’s Direction, Upper Tribunal: Judicial Review Jurisdiction (2013).

²¹⁶ Tribunals, Courts and Enforcement Act 2007, ss 13(1) and 13(11) to (13). An appeal lies to the “relevant appellate court”; the Court of Appeal in England and Wales, Court of Appeal in Northern Ireland, or Court of Session, depending on which the Upper Tribunal considers is most appropriate.

²¹⁷ TCEA 2007, ss 14A and 14B. The leapfrogging procedure was used in *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430.

²¹⁸ *R (Cart) v the Upper Tribunal*, [2011] UKSC 28, [2012] AC 663. See also the Civil Procedure Rules rr 54.7A.

show that the claim raises an important point of principle or practice, or there is another compelling reason to hear it.²¹⁹

Scotland

4.28 The Scottish Committee of the Administrative Justice and Tribunals Council published a report on tribunal reform in Scotland in 2011, in which the committee recommended that the route of appeal from Scottish tribunals should be standardised and directed to a single appellate body. The report considered that this would:

- (1) facilitate the development of expertise among appellate judges;
- (2) make the appeal process more accessible to tribunal users;
- (3) speed up justice in comparison to taking appeals to the Court of Session;
- (4) streamline and simplify case handling processes, thus supporting the development of expertise among administrative support staff; and
- (5) make it easier for support organisations to provide advice to tribunal users who wish to appeal a tribunal's decision.²²⁰

4.29 Those recommendations ultimately led to the creation of an Upper Tribunal for Scotland, which is provided for by the Tribunals (Scotland) Act 2014.²²¹ The tribunal hears both appeals from the First-tier Tribunal for Scotland and some complex tax cases at first instance.

4.30 The Tribunals (Scotland) Act 2014 provides that the work of the Upper Tribunal may be organised into divisions by the Scottish Ministers.²²² As yet however the volume of appeals has not reached the stage where it has been felt necessary to introduce divisions into the Upper Tribunal.²²³ In the year 2018/2019, the tribunal had 35 receipts, 16 disposals, with 8 hearing days.²²⁴ The majority of its cases come from the Housing and Property Chamber.

Northern Ireland

4.31 The Department of Justice in Northern Ireland undertook some work relating to the reform of tribunals in Northern Ireland between 2011 and 2013, including issuing a discussion paper and consultative document. The department consulted on the

²¹⁹ Civil Procedure Rules, r 52.7.

²²⁰ Administrative Justice and Tribunals Council, Scottish Committee, *Tribunal reform in Scotland: a vision for the future* (2011) paras 4.57 and 4.59.
<https://webarchive.nationalarchives.gov.uk/20111013061652/http://www.justice.gov.uk/ajtc/docs/tribunal-reform-scotland.pdf>.

²²¹ Tribunals (Scotland) Act 2014, s 1(b).

²²² Tribunals (Scotland) Act 2014, s 23.

²²³ President of Scottish Tribunals, *Annual report on Scottish Tribunals 2018 – 2019*, p 7. Available at https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/scottish-tribunals-publications/scottish-tribunals-annual-report-2018-19.pdf?sfvrsn=3e64715a_2.

²²⁴ President of Scottish Tribunals, *Annual report on Scottish Tribunals 2018 – 2019*, p 52.

creation of a new tribunal with an integrated structure which would accommodate the existing tribunals.²²⁵

- 4.32 It also considered the possibility of creating an Upper Tribunal for Northern Ireland, but ultimately came to the view that it would hear too few cases. Instead the consultative document proposed to streamline the existing appeal system, by creating an appeal from the new tribunal to the High Court on a point of law.²²⁶ That suggestion was not popular however; of the 26 respondents to that question, 16 disagreed. Respondents objected to the cost and the formality of the High Court. Respondents were also concerned that requiring appellants to go to the High Court would put them at a disadvantage as compared with their equivalents in England and Wales. Several suggested the creation of an upper tier tribunal instead, on the basis that this would have greater understanding of the work of the tribunals.²²⁷

OPTIONS FOR REFORM

- 4.33 Only a small number of appeals are brought each year from devolved tribunals, making it difficult to draw conclusions about how well the system is working. What can be said with certainty is that the appeal routes are inconsistent. The bulk of appeals lie to the High Court or Upper Tribunal, though in the case of school admission and exclusion appeal panels there is no true route of appeal at all. As noted by Dr Sarah Nason and Dr Huw Pritchard:

The only real consistency is that there are no devolved judicial bodies in Wales with the authority to set binding legal precedents.²²⁸

- 4.34 It seems to us that there four potential options for reforming appeal routes from the devolved tribunals.
- (1) No substantive change.
 - (2) Directing appeals to the Administrative Court in Wales.
 - (3) Directing appeals to the Upper Tribunal.
 - (4) Creating a new appellate tribunal: an Appeal Tribunal for Wales.
- 4.35 These options are not necessarily exhaustive. We welcome other views on what might be the best system for appeals from the devolved tribunals. Nor are these options mutually exclusive. It may well be that some current appeal routes should be

²²⁵ Department of Justice in Northern Ireland, *Future administration and structure of tribunals in Northern Ireland – consultative document* (2013) para 3.2.

²²⁶ Department of Justice in Northern Ireland, *Future administration and structure of tribunals in Northern Ireland – consultative document* (2013) para 3.40.

²²⁷ Department of Justice in Northern Ireland, *Future administration and structure of tribunals in Northern Ireland – consultative document, Summary of responses* (2013) paras 4.59 to 4.67.

²²⁸ 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 p 242.

preserved or altered, while others could be routed to a newly created Appeal Tribunal for Wales.

- 4.36 After discussing those four options, we discuss specific issues that arise in the case of certain tribunals. These are the RPTW, school exclusion and admission panels, and the VTW. We make one provisional proposal; for the rest, we seek consultees' views in relation to appeals.

No substantive change

- 4.37 One possibility would simply be to leave some or all current appeal routes broadly as they are. This could include some rationalisation within tribunals (for example, to ensure that the requirements for permission to appeal are the same across the constituent tribunals of the RPTW). It might also include introducing a route of appeal from school admission panels, or making appeals from the VTW consistent (discussed separately below). But it would leave the appeal routes from the section 59 tribunals largely untouched.
- 4.38 This would have the merit of preserving a system which appears to work reasonably well for the existing tribunals. In pre-consultation meetings with judicial leads we found that several were content with the routes of appeal from their tribunals. Where the appeal lay to the Upper Tribunal, advantages cited included access to the specialism that comes from judges hearing a significant volume of appeals on particular issues, and consistent development of the law across England and Wales. The High Court was praised for the technical ability and flexibility of its judges, who are accustomed to familiarising themselves with the legal background to an appeal and applying the relevant legal principles.
- 4.39 A disadvantage of leaving appeal routes unchanged is that they would continue to be inconsistent. The inconsistency risks making things more complicated for tribunal users, who must make sure they use the right route of appeal and face different levels of cost and formality. This may become more confusing if our suggestion of an amalgamated tribunal at first instance is adopted.
- 4.40 It also offers little assistance for the development of new jurisdictions in the future. To alleviate this problem and avoid the possibility of greater inconsistencies arising in the future, it might be desirable to designate a "default" option for new tribunals, which should be adopted by policy makers in the absence of good reasons for preferring another option.

The Administrative Court in Wales

- 4.41 A second possibility would be to direct all appeals from devolved tribunals to the Administrative Court (known, when it sits in Wales, as the Administrative Court in Wales). The Administrative Court is a specialist court within the Queen's Bench Division of the High Court. For some time now, the rule has been that claims brought in the Administrative Court in Wales should normally be heard in Wales.²²⁹ In addition, from 1 October 2020, all Administrative Court claims challenging the decision of a

²²⁹ Civil Procedure Rules, Practice Direction 54D, para 2.2.

Welsh public body must be issued and heard in Wales.²³⁰ Participants in legal proceedings in Wales have the right to use the Welsh language.²³¹

- 4.42 This would involve no change for the APW, WLT or council tax appeals from the VTW.²³² It would however involve changing the appeal routes from the other section 59 tribunals, and in non-domestic rating appeals from the VTW.
- 4.43 While this would bring consistency, there are a number of disadvantages. Directing appeals to the High Court takes them out of the tribunals system altogether, meaning a loss of what Leggatt called the “distinctive enabling approach common to all tribunals”.²³³ That distinctive enabling approach depends on procedural rules being straightforward, expert knowledge of the panel, and low (or no) fees being charged to users. Moving appeals into the High Court risks losing these advantages, and disadvantaging the tribunal user. That could be a high price to pay for consistency.
- 4.44 The move might also be seen as regressive. Before the TCEA 2007, there was no route of appeal from the Mental Health Review Tribunal for Wales (“MHRTW”), with applicants confined to seeking judicial review of decisions. The Leggatt Report concluded (in respect of Mental Health Review Tribunals in England) that this was not satisfactory given the complex and sensitive cases handled by the tribunals.²³⁴

The Upper Tribunal

- 4.45 Another possible method of making the appeal routes consistent would be to move appeals from the WLT, the APW, and VTW council tax appeals to the Upper Tribunal. This would preserve most existing appeal routes, and would, we believe, have the following advantages.
- (1) Appeals would continue to be heard by judges with considerable subject matter expertise.
 - (2) In several jurisdictions the underlying legislation is very similar. Keeping decisions in England and Wales together at an appellate level ensures that the law develops consistently. This is particularly desirable in the field of mental health, where tribunal users can move between England and Wales depending on where they are detained.
 - (3) Appeals would continue to be heard within the tribunals system, with the advantages that brings in terms of accessibility for tribunal users.

²³⁰ Civil Procedure Rules, r 7.1(A).

²³¹ Welsh Language Act 1993, s 22(1) and HMCTS, *2018-2021 Welsh Language Scheme* (revised 2019) paras 5.48 to 5.50.

²³² In relation to the WLT and the APW, Practice Direction 54D provides that appeals lie to the Administrative Court.

²³³ Sir Andrew Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (March 2001) para 6.30.

²³⁴ Sir Andrew Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (March 2001) Part 2, Mental Health Review Tribunals in England, para 14.

- 4.46 One disadvantage of directing all appeals to the Upper Tribunal is that it would run counter to the move towards greater devolution in respect of the devolved tribunals. We also note that the strength of arguments (1) and (2) may well decrease in future. As the Senedd continues to pass new legislation and the law of Wales continues to diverge from that of England, it may be that the expertise of existing judges becomes less relevant in Wales.
- 4.47 It may also be the case that the Upper Tribunal is a less appropriate venue for appeals from the WLT, APW and the VTW council tax decisions than the High Court. We understand that appeals from the APW in particular can involve difficult questions around protection of freedom of expression, which the High Court is well-equipped to assess.

An Appeal Tribunal for Wales?

- 4.48 We finally turn to the bolder option for reform, namely the creation of an Appeal Tribunal for Wales, effectively an equivalent in Wales of the Upper Tribunal. Such a tribunal would hear very few cases; given the figures at paragraph 4.7 above, it might hear only a handful of cases a year, at least initially.²³⁵ As such, it would be too small to be subdivided.
- 4.49 Given that its initial case load would be so low, an Appeal Tribunal for Wales would presumably appoint members with a range of experience gained from other courts and tribunals on a case-by-case basis. An answer might be to cross-ticket or appoint current judges of the High Court, or members of the Upper Tribunal. Any such appointments would have to be made in accordance with the principles explored in Chapter 6 and Chapter 10. The President of Welsh Tribunals could also preside over the Appeal Tribunal and hear appropriate cases.
- 4.50 The creation of a new appellate body would present a number of advantages. These include:
- (1) Consistency. All appeals from the devolved tribunals could be heard in one place. This in turn would make navigating the system easier for tribunal users and for advisers.
 - (2) Coherence with our proposed structure for devolved tribunals. An Appeal Tribunal for Wales would mirror our provisional proposal of an amalgamated tribunal for Wales at first instance (see Chapter 3).
 - (3) Development of case law. For those jurisdictions which are based in devolved legislation and which are distinct to Wales, having one Appeal Tribunal for Wales could help develop coherent and consistent case law at an appellate level.
 - (4) Public profile. Having a single Appeal Tribunal for Wales would increase the profile of tribunal decisions at the appellate level. That could increase

²³⁵ This number may be even smaller if all of the devolved tribunals are given the power to review their own decisions before an appeal is made. We discuss this further in para 5.36 below.

awareness of the tribunal system among advisers, who could ultimately provide a better service for tribunal users.

- (5) Responsiveness. One point which has been made is that an Appeal Tribunal for Wales would sit in Wales and be responsive to the needs of the tribunals of Wales, including, if need be, hearing appeals expeditiously or having in mind the overall tribunal structure when ruling on issues of practice and procedure. This is contingent, of course, on resourcing of a newly created tribunal, and of specialist judges being available, particularly if the majority of their work is in the High Court or Upper Tribunal.

4.51 There are however some disadvantages. The most significant of these is that there may simply not be enough cases to make the establishment of a new body worthwhile. Without a sufficient number of cases, the benefits of building up a consistent line of case law are unlikely to emerge.

4.52 There may also be a sense that the exercise is artificial, particularly if cases are heard by judges who also sit in the Upper Tribunal and or the High Court, simply operating under a different label. This could be particularly so in the case of appeals that currently go to the Upper Tribunal (Lands Chamber). Nearly all of the work of the Lands Chamber in Wales is pursuant to its first instance jurisdiction; appeals to it from the Agricultural Land Tribunal for Wales ("ALTW") and the RPTW are a rarity.

4.53 We welcome consultees' views on the case for creating an Appeal Tribunal for Wales as a venue for appeals from Welsh tribunals. When assessing options for appeal routes, there is always some difficulty in comparing appeal venues which are already in existence with a wholly new option. It may be that there are misgivings about changing current appeal routes, that will take time and resources to address. If that is the case, we are interested in views on whether there is nonetheless merit in creating an Appeal Tribunal for Wales for any tribunals for which the case for an immediate change of appeal route is made out. It could also be a default appeal venue for any newly created tribunal set up in future. And it might, in due course, expand to include existing appeals which, for whatever reason, are not suitable for immediate amalgamation into its portfolio.

Consultation Question 14.

4.54 We seek views on whether routes of appeal from the devolved tribunals should be uniform.

Consultation Question 15.

4.55 We seek views on whether, if a uniform appeal route is adopted, that should be to:

- (1) the Upper Tribunal;
- (2) the Administrative Court in Wales; or
- (3) a newly established Appeal Tribunal for Wales.

Consultation Question 16.

4.56 If no uniform route is adopted, we seek views on:

- (1) whether there should nonetheless be a default route of appeal (for example, for newly created tribunals);
- (2) what that default route should be;
- (3) which tribunals should have their onward appeals heard by that default route; and
- (4) whether the default appeal route could be populated gradually.

School admission and exclusion appeal panels

4.57 As set out above, school admission and exclusion appeal panels are unusual in that they have no dedicated route of appeal. Instead applicants must complain to the PSOW or the Welsh Ministers, or bring a judicial review.

4.58 Our provisional view is that this is unsatisfactory. Neither the PSOW nor the Welsh Ministers are able to consider the merits of a particular decision, while judicial review is relatively slow, inaccessible and expensive. This is of particular concern given that some appeals against admission decisions and exclusions may be brought by young people themselves.²³⁶

4.59 Our provisional proposal for school exclusion appeal panels is that they should be amalgamated with the Special Educational Needs Tribunal for Wales (“SENTW”), as discussed in paragraph 3.128 above. In that case, applicants would use the same route of appeal as for existing SENTW cases (presently, the Upper Tribunal). This

²³⁶ A young person may challenge a sixth form admission decision: see Welsh Government, *School admission appeals code* (2013) para 3.8. <https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>. Learners aged 11 and above may also challenge an exclusions decision: see Welsh Government, *Exclusion from schools and pupil referral units* (November 2019) pp 5 and 6 <https://gov.wales/sites/default/files/publications/2019-11/exclusion-from-schools-pupil-referral-units.pdf>.

would still however leave users of the school admission appeals system without a dedicated route of appeal.

- 4.60 Such a route of appeal would ideally combine specialist expertise with an accessible procedure. It would need to be able to decide applications quickly, in order to ensure that children and young people are able to take up school places and their education is not disrupted. We suspect that these requirements mean that an appeal to the High Court would not be suitable. They also tend against creating an appeal to the Upper Tribunal, which does not have experience of school admissions (although it does have some experience of education more generally).
- 4.61 If the preferred solution for devolved tribunals in Wales as a whole is to create an Appeal Tribunal for Wales, that could provide a solution. Otherwise, we provisionally consider that routing appeals from school admission appeals panels to SENTW might be a possibility.
- 4.62 While it might seem anomalous to have the same body hear both “first instance” and appellate cases, there are precedents (the Upper Tribunal (Lands Chamber), for example, hears both). SENTW also has a number of qualities that make it an attractive option. It has practical experience of schools and education, and is used to sitting locally. As a tribunal, it is relatively accessible to users. It has also given thought to how to make it easier for young people to make their own applications to it.
- 4.63 Our provisional view is that SENTW should hear appeals relating both to issues of fact and law. There is also a question about how onward appeals from SENTW’s appellate decisions should be treated. These would technically be “second appeals”. Should they therefore be limited by the second appeals test described above at paragraphs 4.16 to 4.19? In other words, should they only be permitted if they raise an important issue of principle or practice? We seek views on this question.

Consultation Question 17.

- 4.64 We seek views on
- (1) whether appeals from school admission appeal panels should lie to the Special Educational Needs Tribunal for Wales; and
 - (2) if so, on what grounds applicants should be able to appeal.

Consultation Question 18.

- 4.65 We seek views on whether onward appeals from the Special Educational Needs Tribunal for Wales in relation to school admission appeal panel decisions 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.

The Valuation Tribunal for Wales

- 4.66 As we explain above, 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 ratings appeals.²³⁷ This divergence in appeal routes is similar to the position in England, where appeals against business rates decisions are to the Upper Tribunal (Lands Chamber); decisions on council tax may be judicially reviewed in the High Court.
- 4.67 In Scotland, Valuation Appeal Committees also hear non-domestic rates and council tax cases. At present, appeals lie to the Lands Valuation Appeal Court (for rating cases) and the Court of Session (for council tax appeals). However, the committees were listed for transfer into the new unified system in the Tribunals (Scotland) Act 2014,²³⁸ and are expected to transfer into the tribunal in April 2022.²³⁹
- 4.68 We seek views on whether there should be a uniform route of appeal from the VTW.

Consultation Question 19.

- 4.69 We seek views on whether there should be one route of appeal from the Valuation Tribunal for Wales for both rating and council tax appeals and, if so, what that appeal route should be.

The Residential Property Tribunal for Wales

- 4.70 The first table above highlighted an anomaly in relation to the RPTW. Appeals from residential property tribunals and leasehold valuation tribunals require permission, whereas appeals from rent assessment committees do not.²⁴⁰ This may be because appeals from rent assessment committees are limited to appeals on a point of law, unlike appeals from the residential property tribunals and leasehold valuation tribunals. We provisionally propose that all appeals should require the permission of either the RPTW or the appellate body.

²³⁷ 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.

²³⁸ Tribunals (Scotland) Act 2014, sch 1, part 1.

²³⁹ President of Scottish Tribunals, *Annual report on Scottish Tribunals 2018 – 2019*, p 14.

²⁴⁰ Leasehold Valuation Tribunals (Procedure) (Wales) Regulations SI 2004 No 681 (W 69), reg 20 and the Residential Property Tribunal Procedures and Fees (Wales) Regulations SI 2016 No 1110 (W 267), reg 37.

Consultation Question 20.

- 4.71 We provisionally propose that appeals from rent assessment committees should be subject to the same rules on permission to appeal as the other constituent tribunals of the Residential Property Tribunal for Wales.

Do you agree?

Chapter 5: Procedural rules

INTRODUCTION

- 5.1 The procedural rules for the devolved tribunals in Wales are inconsistent, complex and out of date. Many are still rooted in pre-devolution legislation, some dating back to the 1970s and not written with Wales or with modern tribunal practice in mind. This is a problem for tribunal users, who face difficulties understanding the rules. It is also a problem for tribunal members. Judges lack modern case management powers, limiting their ability to respond to regulate the proceedings in front of them.²⁴¹ The lack of clarity in the rules can also lead to unnecessary appeals.
- 5.2 This chapter looks at some of the common problems with the rules, which illustrate the deficiencies described above. It also makes some suggestions about how they could be improved. We discuss to what extent it might be possible to standardise the rules across the devolved tribunals, or even to amalgamate them into a single set of rules, and explore the advantages and disadvantages of doing so. We do not propose a single set of rules, nor complete standardisation of them, but make some proposals as to areas where standardisation might be beneficial.
- 5.3 The chapter finishes by considering important structural questions. First, who should be responsible for making the tribunal rules? Currently, the Welsh Ministers have a large role in the making of the rules, with limited judicial input. Secondly, how can we ensure that, once improved, they continue to be maintained and respond to the evolving needs of tribunal users? We provisionally conclude that a tribunal procedure committee could have a key role in harmonising and maintaining the procedural rules.
- 5.4 The chapter identifies a number of examples to demonstrate where rules are inconsistent, out of date, or both, noting where judicial leads and other stakeholders have highlighted issues that have caused problems for them in practice. The detailed drafting of tribunal rules lies outside the scope of this project, however; we confine ourselves to a small number of provisional proposals concerning particular features that reformed rules might incorporate.

²⁴¹ For example, the Adjudication Panel for Wales procedural rules do not contain a power to issue restricted reporting orders, which may be necessary to prohibit reporting of sensitive information, such as the identity of victims of alleged misconduct.

HOW ARE PROCEDURAL RULES MADE?

- 5.5 Generally, the power to make procedural rules for the devolved tribunals lies with the Welsh Ministers.²⁴² The two exceptions are the Welsh Language Tribunal (“WLT”) and appeal tribunals of the Adjudication Panel for Wales (“APW”); the Presidents of those tribunals have the power to make procedural rules, subject to the approval of, or consultation with, the Welsh Ministers.²⁴³
- 5.6 The relevant legislation variously refers to the power to make “rules”,²⁴⁴ “regulations”,²⁴⁵ “provision for the procedure”²⁴⁶ and “procedure regulations”.²⁴⁷ Despite this inconsistent terminology, procedural rules are generally made in the form of secondary legislation, which includes regulations, rules and orders. The Welsh Ministers also have the power to issue a code of practice for school admissions and guidance for school exclusions. School admission appeal panels have a statutory duty to act in accordance with the code while school exclusion appeal panels must have regard to the guidance.²⁴⁸
- 5.7 Historically, the National Assembly for Wales or Welsh Ministers were required to consult the Administrative Justice and Tribunals Council or its predecessor, the Council on Tribunals (now both abolished), before making procedural rules for the devolved tribunals. The preambles of the procedural rules made before the

²⁴² Previously, the power to make procedural rules was vested in the Lord Chancellor. However, the functions have been gradually devolved. For some tribunals, including school admission appeal panels and the Valuation Tribunal for Wales, the power to make procedural rules was initially transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order SI 1999 No 672 (“the 1999 Order”), before being transferred to the Welsh Ministers pursuant to the Government of Wales Act 2006 (“the 2006 Act”) sch 11, para 30(2)(d). For other tribunals, specifically the Mental Health Review Tribunal for Wales and the Agricultural Land Tribunal for Wales, the power to make procedural rules was transferred from the Lord Chancellor to the Welsh Ministers by the Welsh Ministers (Transfer of Functions) (Wales) Order SI 2018 No 644. Sch 1, para 5(a) of the Additional Learning Needs and Education Tribunal (Wales) Act 2018, removed the requirement that procedural rules for the Special Educational Needs Tribunal for Wales must be approved by the Secretary of State.

²⁴³ Consultation is required for appeal tribunals of the Adjudication Panel for Wales, whereas approval is necessary in the case of the Welsh Language Tribunal. See Welsh Language (Wales) Measure 2011 (nawm 1), s 123 and Local Government Investigations (Functions of Monitoring Officers and Standards Committees) (Wales) Regulations SI 2001 No 2281 (W 171), reg 11(5).

²⁴⁴ Eg the Mental Health Act 1983, s 78 and Welsh Language (Wales) Measure 2011 (nawm 1), s 123.

²⁴⁵ Eg, 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).

²⁴⁶ Agriculture Act 1947, s 73(3).

²⁴⁷ Commonhold and Leasehold Reform Act 2002, sch 12.

²⁴⁸ School Standards and Framework Act 1998, s 84(3); Education Act 2002, ss 52(4)(b); and the Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations SI 2003 No 3227 (W 308), reg 8(2). The power to issue a code of practice was previously vested in the Secretary of State, but that power was transferred to the National Assembly for Wales pursuant to the 1999 Order, and then later to the Welsh Ministers pursuant to the 2006 Act, sch 11, para 30(2)(d). The power to make guidance in the Education Act 2002, s 54(2)(b) was transferred from the National Assembly to the Welsh Ministers pursuant to the 2006 Act, sch 11, para 30(2)(d).

Administrative Justice and Tribunals Council was abolished in 2013 still contain references to the body in existence at the time the rules were made.

Practice directions

- 5.8 The Wales Act 2017 (“the 2017 Act”) gives the President of Welsh Tribunals (“PWT”) a general power to give directions as to practice and procedure to be followed by the Welsh tribunals listed in section 59(1) (“the section 59 tribunals”).²⁴⁹ Before giving directions, the PWT must consult the judicial lead of each tribunal to which the direction relates.²⁵⁰
- 5.9 The chair or president of a section 59 tribunal also has a specific power to give directions as to the practice and procedure in their tribunal.²⁵¹ Before they give directions they must consult the PWT.²⁵²
- 5.10 Any direction must be approved by the Welsh Ministers, unless it consists of guidance about the application or interpretation of the law or the making of decisions by members of the tribunals, or criteria for determining which members of the tribunal may be chosen to decide particular categories of matter.²⁵³
- 5.11 The procedural rules of the Valuation Tribunal for Wales (“VTW”), school admission appeal panels and school exclusion appeal panels, which are not listed in section 59 of the 2017 Act,²⁵⁴ do not include a power to make practice directions. Instead, the Valuation Tribunal for Wales issues “best practice protocols”.

COMMON PROBLEMS ACROSS THE DEVOLVED TRIBUNALS

- 5.12 As a result of historical accident and increasingly complex devolutionary arrangements, the procedural rules across the devolved tribunals are inconsistent and, in many places, out of date. These two issues are linked; inconsistency has often arisen because some rules have not been updated for significant periods of time. We discuss some specific examples below. In this section we make provisional proposals regarding an overriding objective, a duty to cooperate with the tribunal, service of documents and a power of the tribunal to review its decisions. We then devote a separate section to remote hearings.

²⁴⁹ Wales Act 2017, s 61(1).

²⁵⁰ Wales Act 2017, s 61(7).

²⁵¹ Wales Act 2017, s 61(2).

²⁵² Wales Act 2017, s 61(8).

²⁵³ Wales Act 2017, ss 61(5) and (6). The Welsh Ministers must be consulted in the case of criteria for determining categories of matter to be decided by members.

²⁵⁴ See paras 2.56 to 2.61 above.

Specific issues in procedural rules

An overriding objective

5.13 The procedural rules of the Mental Health Review Tribunal for Wales (“MHRTW”), Special Educational Needs Tribunal for Wales (“SENTW”), residential property tribunals which form part of the Residential Property Tribunal for Wales (“RPTW”) and the 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”.²⁵⁵ Procedural rules generally give a non-exhaustive definition of what it means to deal with cases “fairly and justly”. Examples include:

- (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;²⁵⁶
- (2) avoiding unnecessary formality;²⁵⁷
- (3) ensuring that parties are able to participate fully in the proceedings;²⁵⁸
- (4) ensuring that the tribunal uses its expertise effectively;²⁵⁹ and
- (5) treating the languages of the tribunal equally.²⁶⁰

5.14 The tribunals (or in the case of the SENTW, the President or a tribunal panel) must seek to give effect to the overriding objective when they exercise any function under the procedural rules or interpret any procedural rule.

5.15 The overriding objectives found in the devolved tribunals’ procedural rules borrow aspects from the overriding objective found in Part 1 of the Civil Procedure Rules, which applies to courts in England and Wales.²⁶¹ The overriding objective was introduced in 1999, following Lord Woolf’s report “Access to Justice”. In the report

²⁵⁵ 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”.

²⁵⁶ 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).

²⁵⁷ MHRTW Rules, r 3(2)(a), SENTW Regulations, reg 6(2)(b); and WLT Rules, r 3(2)(b). The MHRTW Rules also state that this includes “seeking flexibility in the proceedings.”

²⁵⁸ MHRTW Rules, r 3(2)(b); SENTW Regulations, reg 6(2)(c); WLT Rules, r 3(2)(c); and the RPTW Regulations, reg 3(2)(b).

²⁵⁹ MHRTW Rules, r 3(2)(c); SENTW Regulations, reg 6(2)(d); WLT Rules, r 3(2)(e); and the RPTW Regulations, reg 3(2)(d).

²⁶⁰ WLT Rules, r 3(2)(d).

²⁶¹ Civil Procedure Rules, r 1.1.

Lord Woolf explained that the overriding objective embodies “the principles of equality, economy, proportionality and expedition which are fundamental to an effective contemporary system of justice”.²⁶²

5.16 The procedural rules which do not contain an overriding objective are those for the Agricultural Land Tribunal for Wales (“ALTW”), the APW, the VTW, school admission appeal panels, school exclusion appeal panels, leasehold valuation tribunals and rent assessment committees (forming part of the RPTW).²⁶³ The ALTW rules were updated in 2007, but contain no reference to an overriding objective.

5.17 As Professor Kris Gledhill has noted:

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.²⁶⁴

5.18 We provisionally propose that all devolved tribunal procedural rules should contain an overriding objective. We seek views as to whether the overriding objective should be accompanied with examples (such as those given at paragraph 5.13 above), and if so, what those examples should be.

Consultation Question 21.

5.19 We provisionally propose that all devolved tribunal procedural rules should contain an overriding objective.

Do you agree?

Consultation Question 22.

5.20 We seek views on whether a new overriding objective should include a non-exhaustive list of illustrative examples and, if so, what those examples should be.

²⁶² Lord Woolf, *Access to Justice* (1996) section 1 para 8
<https://webarchive.nationalarchives.gov.uk/20060214041452/http://www.dca.gov.uk/civil/final/overview.htm>.

²⁶³ However, para 1.9 of the Welsh Government, *School admission appeals code* (2013) (<https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>) sets out the “fundamental objectives” of admission appeals, which include: to provide an independent, impartial but informal forum for parents and the admission authority concerned to present their respective cases and to be confident that they will be given a fair hearing; ensure that appeal panels weigh up all the evidence presented to them carefully and objectively before reaching a final decision on the appeal, and provide a system which is clear, consistent and as easy to understand as possible for everyone involved.

²⁶⁴ K Gledhill, “Evolution Rather than Revolution” in *Tribunals* (Autumn 2009) p 13. https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Training/jsb_tribunals_autumn_2009.pdf.

Duties to cooperate and assist the tribunal

- 5.21 The procedural rules that contain an overriding objective, apart from those of the MHRTW, also provide that the parties have a duty to cooperate with each other and the tribunal. However, a practice direction dating from October 2019 provides that any person providing or adducing evidence to the MHRTW has a duty to assist the tribunal in achieving the overriding objective in the MHRTW rules.²⁶⁵
- 5.22 There may be adverse consequences for a party who does not comply with the duty to cooperate. For example, in *Hertsmere Primary Care Trust v Rabindra-Anandh* Mr Justice Lightman observed:
- [Civil Procedure Rule] 1.4 provides that the court must further the overriding objective by actively case managing cases and active case management includes encouraging the parties to cooperate with each other in the conduct of the proceedings. In my view the Estate was duty bound to cooperate with the Claimants and this duty obliged the Estate to provide the information requested.... I should add that in any event the failure to do so must constitute conduct which can and should be taken into account in exercise of the court's discretion under CPR 44.5 whether to assess costs on an indemnity basis.²⁶⁶
- 5.23 Edward Jacobs further notes that the duty to cooperate affects the allocation between the parties of responsibility for producing evidence and the way that the tribunal approaches the burden of proof on the evidence produced.²⁶⁷ To ensure consistency across the devolved tribunals and assist tribunal judges to further the overriding objective, we provisionally take the view that the devolved tribunal rules, where appropriate, should impose a duty to cooperate on parties. We seek views on whether such a duty is appropriate in the case of the MHRTW.

Consultation Question 23.

- 5.24 We provisionally propose that, where appropriate, devolved tribunal procedural rules should include a duty on the parties to cooperate with each other and the tribunal.
- Do you agree?
- 5.25 Is such a duty appropriate in the case of the Mental Health Review Tribunal for Wales?

²⁶⁵ Mental Health Review Tribunal for Wales, Practice Direction (October 2019). <https://mentalhealthreviewtribunal.gov.wales/sites/mentalhealthreview/files/2019-12/MHRT%20Practice%20Direction%20Oct%202019.pdf>.

²⁶⁶ [2005] EWHC 320 (Ch), [2005] 3 All ER 274 at [11]. The procedural rules for the ALTW, the APW, leasehold valuation tribunals, residential property tribunal, the SENTW and the WLT make provision for the award of costs in various circumstances.

²⁶⁷ E Jacobs, *Tribunal Practice and Procedure* (5th ed 2019) para 1.89.

Service of documents

- 5.26 The rules on service across the devolved tribunals are inconsistent and out of date. We understand that problems have arisen where there is no provision for “deemed” service, or where it is not clear whether documents from the tribunal have been received at a company’s registered address.²⁶⁸
- 5.27 Only the SENTW, the VTW and residential property tribunal rules specifically state that documents can be sent by email.²⁶⁹ Other rules use various formulations (highlighted in italics), 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*.²⁷⁰
 - (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*.²⁷¹
 - (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*.²⁷²
 - (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*.²⁷³
- 5.28 The rules for rent assessment committees, unsurprisingly given that they were introduced in 1971, do not refer to any method of electronic communication. The RPTW issued a practice direction during the COVID-19 pandemic, which expressly permits parties to send documents by email.²⁷⁴
- 5.29 The school admission appeal panel rules and school exclusion appeal panel rules are silent as to the method of service. However, paragraph 4.22 of the admission code states that the school admission authority may send documents by email to the clerk of the appeal panel and appellant if all parties agree.
- 5.30 In our view the discrepancies between the rules on service and, in some places, their inadequacies demonstrate a need for regular review of the procedural rules of the devolved tribunals. The COVID-19 pandemic and the broader trend for remote

²⁶⁸ See Agricultural Land Tribunal for Wales, *Evans v Bodorgan Properties (CI) Limited* ALT 06/2017.

²⁶⁹ SENTW Regulations, reg 79(2)(c); 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.

²⁷⁰ MHRTW Rules, r 9(1).

²⁷¹ Adjudications by Case Tribunals and Interim Case Tribunals (Wales) Regulations SI 2001 No 2288 (W 176), reg 24(b).

²⁷² Agricultural Land Tribunals (Rules) Order SI 2007 No 3105, r 49(b).

²⁷³ Leasehold Valuation Tribunals (Procedure) (Wales) Regulations SI 2004 No 681 (W 69), reg 23(c)(ii).

²⁷⁴ Residential Property Tribunal for Wales Practice Direction; Corona Virus (COVID-19), para 6 (22 June 2020). https://residentialpropertytribunal.gov.wales/sites/residentialproperty/files/2020-07/RPT-CV19-practice-direction_0.pdf.

hearings have also underlined the importance of keeping the rules up to date and of parties being able to serve documents electronically.

Consultation Question 24.

- 5.31 We provisionally propose that devolved tribunal procedural rules should provide for service of documents by electronic means.

Do you agree?

Power to review decisions

- 5.32 A number of the devolved tribunals have the power to review their decisions, either on an application by a party or their own initiative, on specified grounds. For example, the SENTW rules provide that the President of the tribunal or a tribunal panel can 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.²⁷⁵

- 5.33 There is inconsistency in the grounds of review across the tribunal procedural rules. The ALTW can also review, set aside or vary a decision, but on grounds different from those provided in the SENTW rules. The ALTW can review, set aside or vary a decision if satisfied that:

- (1) the decision contains a clerical mistake or error arising from an accidental slip or omission or contains an ambiguity that should be clarified or removed;
- (2) the tribunal should make an additional order or direction which relates to a matter which was presented to the tribunal but was not dealt with in its decision or which is consequential to its decision;
- (3) a party, who was entitled to be heard at a hearing but failed to be present or represented, had a good reason for failing to be present or represented; or

²⁷⁵ SENTW Regulations, reg 56(1)(d).

- (4) new evidence, to which the decision relates, has become available since the conclusion of the proceedings and its existence could not reasonably have been known or foreseen before then.²⁷⁶

5.34 The VTW rules, WLT rules and school admission appeals code also provide that the tribunal can review a decision on various grounds.²⁷⁷

5.35 The MHRTW rules, APW rules, all three sets of RPTW rules and school exclusion appeal panel rules lack a provision enabling the tribunal to review their decisions. We have been informed that this may lead to unnecessary appeals, in cases where the tribunal itself is better placed to correct the decision.

Consultation Question 25.

5.36 We provisionally propose that devolved tribunals should have the power to review their decisions.

Do you agree?

REMOTE HEARINGS

Introduction

5.37 The COVID-19 pandemic has caused significant disruption to hearings in the devolved tribunals. The Welsh Tribunals Unit has worked hard to ensure that hearings could be moved online, agreeing with Her Majesty's Courts and Tribunals Service ("HMCTS") that the section 59 tribunals could use the Cloud Video Platform ("CVP") used in the UK courts and tribunals.²⁷⁸

5.38 The focus of this section is on how the current tribunal procedure rules accommodate (or do not accommodate) remote hearings, and whether procedural rules should specifically provide a power to hold remote hearings. A significant amount of research on the advantages and disadvantages of remote hearings is being conducted by HMCTS and organisations such as the Nuffield Foundation, the Legal Education Foundation and Public Law Project.²⁷⁹ Moreover, in March 2020 HMCTS, in

²⁷⁶ Agricultural Land Tribunals (Rules) Order SI 2007 No 3105, r 32(1)(d).

²⁷⁷ Valuation Tribunal for Wales Regulations SI 2010 No 713 (W 69), reg 42; WLT Rules, r 48; Welsh Government, *School admission appeals code* (2013) para 6.9 <https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>. The Public Services Ombudsman can recommend that a school admission appeal panel should review its decision.

²⁷⁸ CVP can be accessed directly from an internet browser on a PC, laptop, tablet or smartphone. Members of the tribunal, as well as parties, advocates and witnesses can be seen and heard via CVP.

²⁷⁹ M Rossner and M McCurdy, *Video Hearings Process Evaluation (Phase 2) Final Report* (HM Courts and Tribunals Service) (July 2020); Nuffield Family Justice Observatory, *Remote hearings in the family justice system: a rapid consultation* (April 2020); Nuffield Family Justice Observatory, *Remote hearings in the family justice system: follow-up consultation* (September 2020); Public Law Project, *Submission to the Justice Committee inquiry on the access to justice impacts of court and tribunal reforms* (January 2019).

collaboration with the Society for Computers and Law, and the UK LawTech Delivery Panel, launched Remote Court Worldwide. The service is designed to provide a platform for judges, lawyers, court officials, litigants and court technologists across the world to share their experiences of developing remote alternatives to traditional court hearings.²⁸⁰

5.39 Advantages of remote hearings include reducing the need for users to travel, take time off work and make childcare arrangements. Some users also prefer the relative lack of formality, though others prefer the solemnity of a physical hearing. Disadvantages, however, include a lack of accessibility for some users, whether because of disability, a lack of digital skills, or poor broadband connection. Providing simultaneous translation between Welsh and English can also pose difficulties.

5.40 We do not consider it within the scope of this project to evaluate whether remote hearings in general are desirable. Instead we proceed on the basis that remote or partly remote hearings will continue to be used after the pandemic, and consider how existing procedural rules should accommodate them. Going forward the Senior President of Tribunals has anticipated “mixed methods” of remote and in person hearings. In his most recent annual report he notes that the final stage of recovery from the pandemic:

will involve a new mixed methods approach to each of our jurisdictions, learning from our experiences during the emergency and from existing tribunal practices that have stood the test of time. From first principles, we will design a new tribunals justice system.²⁸¹

5.41 Below we outline how the devolved tribunals have adapted to remote hearings. We then provisionally propose that all devolved tribunal procedural rules should include a consistently-drafted power to hold remote hearings.

Current provision for remote hearings in the devolved tribunals

Capacity for remote hearings

5.42 The MHRTW, the SENTW, the WLT and school admission appeal panel rules expressly provide that a hearing, or part of a hearing, can be conducted by video link or telephone. The rules adopt different formulations to permit the use of video link or telephone:

- (1) The MHRTW, WLT and SENTW rules provide that a hearing means an oral hearing and includes a hearing conducted in whole or in part by video link, telephone, or other means of instantaneous two-way electronic communication.²⁸²

²⁸⁰ For further information see <https://remotecourts.org/>

²⁸¹ Senior President of Tribunals, *Annual Report 2019-2020*, p 7.

²⁸² MHRTW Rules, r 2, SENTW Regulations, reg 2 and the WLT Rules, r 2. Additionally, under the Coronavirus Act 2020 sch 8, the MHRTW may determine an application without a hearing if to hold a hearing would be impractical or cause and undesirable delay.

- (2) The SENTW and the WLT rules expressly provide that the president of the tribunal, or the tribunal themselves, may permit a party or witness to give evidence by telephone, through a video link or by any other means of communication, if satisfied it would not prejudice the achievement of the overriding objective of the regulations.²⁸³
- (3) The rules for residential property tribunals provide that the tribunal may permit the use of telephone, video link or any other method of communication to make representations to the tribunal or for the purpose of a case management conference or hearing.²⁸⁴
- (4) The school admission appeal rules, amended in response to the pandemic, provide that an appeal panel may decide to hold an appeal hearing using remote access provided (a) the parties are able to present fully their case; (b) each participant has access to the electronic means to allow them to hear and be heard and (where using a video link) see and seen, throughout the appeal hearing; and (c) the panel considers that the appeal is capable of being heard fairly and transparently.²⁸⁵

5.43 On the other hand, a number of the devolved tribunal procedural rules do not specifically preclude remote hearings, but appear to be drafted with in person hearings in mind. By way of example, the ALTW rules provide that:

All hearings by the Tribunal must be in public unless the Tribunal is satisfied that, by reason of disclosure of confidential matters it is just and reasonable to hold the hearing or part of a hearing in private.²⁸⁶

5.44 Similar provision is made in all three sets of RPTW rules and the APW rules.²⁸⁷ In June 2020 the President of the RPTW and the PWT issued a practice direction, which directs that “where it is not possible to hold public in person hearings, hearings will be held remotely via CVP”.²⁸⁸ Where an individual does not have internet access the

²⁸³ SENTW Regulations, reg 49 and the WLT Rules, r 42.

²⁸⁴ RPTW Regulations, reg 26(c).

²⁸⁵ Education (Admission Appeal Arrangements) (Wales) (Coronavirus) (Amendment) Regulations SI 2020 No 479 (W110), reg 12, inserting a new sch 3, para 2 into the Education (Admission Appeals Arrangements) (Wales) Regulations SI 2005 No 1398 (W112). Reg 6 of the 2020 Regulations also inserts a new reg 6 into the 2005 Regulations which provides that remote access means “access to an appeal hearing to enable those who are not all present together at the same place to attend or participate simultaneously in the hearing by electronic means, including by live audio link and live video link”.

²⁸⁶ The Agricultural Land Tribunals (Rules) Order SI 2007 No 3105, r 21(1).

²⁸⁷ Adjudications by Case Tribunals and Interim Case Tribunals (Wales) Regulations SI 2001 No 2288 (W 176), reg 16; the RPTW Regulations, reg 30; the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations SI 2004 No 684 (W 69), reg 14(6); and the Rent Assessment Committees (England and Wales) Regulations SI 1971 No 1065, reg 3(1).

²⁸⁸ *Residential Property Tribunal for Wales Practice Direction; Corona Virus (COVID-19)* (22 June 2020) para 13. https://residentialpropertytribunal.gov.wales/sites/residentialproperty/files/2020-07/RPT-CV19-practice-direction_0.pdf.

hearing can be conducted by telephone.²⁸⁹ The ALTW has also conducted remote hearings.

5.45 The VTW rules also provide that:

The hearing must take place in public unless the Appeal Panel otherwise orders on being satisfied that it is in the interests of justice to hold a hearing, or part of a hearing, in private.²⁹⁰

5.46 We understand that the VTW has interpreted “take place in public” to mean the panel must sit together in person, but parties can attend remotely or by video link.

The transition to remote hearings

5.47 A number of the tribunal procedural rules make provision for whether hearings must be public. The ALTW, APW, WLT, RPTW and VTW rules provide that hearings must be in public. Where procedural rules do not mention video link or telephone hearings they do not, perhaps unsurprisingly, explore how the Tribunal should ensure public access to a hearing if it takes place remotely.

5.48 In order to comply with the public hearing requirement, the RPTW practice direction provides that forthcoming public hearings will be listed on the RPTW website, and members of the public can apply to the RPTW’s business manager or clerk to access the hearing.²⁹¹ We think this is a workable solution. However, the CVP used in the section 59 tribunals can only accommodate 22 users at any one time. This could cause problems if a case is of significant public interest.

5.49 We also accept that for some tribunals, remote hearings may be inappropriate. The MHRTW, for example, usually holds hearings in private in hospitals, in order to allow patients to attend and participate. Some patients do not have access to the internet and so could not access the CVP. For other tribunals, there may be parts of the operation of the tribunal that are difficult to replicate remotely. For example, the RPTW and the ALTW incorporate site inspections as part of their procedures.

Accommodating remote hearings in tribunal procedural rules

5.50 In the light of the increased use of remote hearings due to the COVID-19 pandemic, we think there is a strong case for updating the procedural rules on remote hearings. Consistently with our proposal in Consultation Question 27 below, we suggest that the rules on remote hearings should be standardised across the devolved tribunals.

²⁸⁹ *Residential Property Tribunal for Wales Practice Direction; Corona Virus (COVID-19)* (22 June 2020) para 14. https://residentialpropertytribunal.gov.wales/sites/residentialproperty/files/2020-07/RPT-CV19-practice-direction_0.pdf.

²⁹⁰ The Valuation Tribunal for Wales Regulations SI 2010 No 713 (W 69), reg 37(3).

²⁹¹ *Residential Property Tribunal for Wales Practice Direction; Corona Virus (COVID-19)* (22 June 2020) para 15 https://residentialpropertytribunal.gov.wales/sites/residentialproperty/files/2020-07/RPT-CV19-practice-direction_0.pdf.

Consultation Question 26.

- 5.51 We provisionally propose that the rules on remote hearings should be standardised in devolved tribunal procedure rules.

Do you agree?

STANDARDISING TRIBUNAL PROCEDURE RULES

- 5.52 One way to manage inconsistency is to standardise procedural rules so that unnecessary divergences across the system are reduced. The desirability of consistency across the system must, however, be balanced against ensuring that procedural rules reflect the different needs of tribunal jurisdictions.
- 5.53 In this section we set out the possible advantages and disadvantages of standardising procedural rules. We then discuss whether the disparate procedural rules should be amalgamated into one common set of procedural rules applicable to all tribunals.

Advantages of standardisation

Removing unnecessary inconsistencies

- 5.54 From a technical perspective, unnecessary inconsistency across tribunal procedural rules is undesirable. As discussed above, most procedural rules permit service of documents by email, but this is expressed differently in each set of rules. Standardising tribunal rules would provide an opportunity to remove those inconsistencies.

Accessibility for users

- 5.55 The 2010 Report of the Administrative Justice and Tribunals Council recommended that procedural rules should be designed with tribunal users in mind. This meant they should be as short, clear, simple and up to date as possible.²⁹²
- 5.56 We think a by-product of standardisation could be greater accessibility for tribunal users. Any standardisation exercise would require the current disparate procedural rules to be analysed in detail, including a review of the similarities and differences, the purpose of the rules and the simplest drafting that can be used to achieve that purpose. Where the different rules currently have a common purpose, but are drafted differently, the simplest drafting could be adopted.

Simplicity for administrative staff and cross-ticketed judges

- 5.57 Removal of unjustified disparities between procedural rules should make it easier to administer proceedings in different tribunals or chambers by the same administrative staff. Moreover, a number of judges are cross-ticketed across a number of the section 59 tribunals. We have been told, for example, that one member sits on the MHRTW,

²⁹² Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) para 84.

the RPTW and the APW. Various other members sit on both the RPTW and the ALTW, or the MHRTW and the SENTW. In his first annual report, the PWT explained:

It is clear that one of the primary aims of [cross-ticketing] is to create a cohort of Welsh Tribunal judges who are capable of exercising their judicial skills in a variety of case types thereby promoting significant flexibility and efficiency in the system.²⁹³

- 5.58 Standardising procedural rules may potentially encourage individuals to apply to sit in more than one devolved tribunal.

Disadvantages of standardisation

Losing tribunal-specific rules

- 5.59 The list of Welsh tribunals in the 2017 Act covers a broad range of jurisdictions and subject areas including mental health, special educational needs, agricultural property, land drainage, residential property and the conduct of elected officials. The needs of applicants across the tribunals also differ greatly.

- 5.60 There are a number of tribunal-specific provisions that would not be appropriate or necessary across all tribunals. For example:

- (1) All three sets of RPTW rules and the ALTW rules provide for the tribunal to inspect the property to which the case relates, or the surrounding area.²⁹⁴
- (2) The MHRTW rules provide that prior to the hearing a medical member of the tribunal must, so far as practicable, examine the patient or take necessary steps to form an opinion on the patient's mental condition.²⁹⁵
- (3) The SENTW rules provide that if the appellant is a child they must have a case friend to assist them to participate in and understand proceedings.²⁹⁶
- (4) The APW rules have a number of rules regulating the relationship between the tribunal and the Public Services Ombudsman for Wales.²⁹⁷

- 5.61 The danger of over-standardising rules has been highlighted before. The Franks report, published in 1957, concluded that the distinctive nature of tribunals in the UK meant that tribunal procedural rules should not be amalgamated. The report states:

Because of the great variety of the purposes for which tribunals are established, however, we do not think it would be appropriate to rely upon either a single code or a small number of codes. We think that there is a case for greater procedural

²⁹³ President of Welsh Tribunals, *Annual Report 2018-2019* (March 2019) p 6.

²⁹⁴ RPTW Regulations, reg 23; Leasehold Valuation Tribunals (Procedure) (Wales) Regulations SI 2004 No 681 (W 69), reg 17; Rent Assessment Committees (England and Wales) Regulations SI 1971 No 1065, reg 7; and Agricultural Land Tribunals (Rules) Order SI 2007 No 3105, r 25.

²⁹⁵ MHRTW Rules, r 20.

²⁹⁶ SENTW Regulations, regs 64 to 68.

²⁹⁷ See, for example, Adjudications by Case Tribunals and Interim Case Tribunals (Wales) Regulations SI 2001 No 2288 (W 176), regs 2, 8 and 9(1).

differentiation and prefer that the detailed procedure for each type of tribunal should be designed to meet its particular circumstances. This is not a task which we feel ourselves properly equipped to discharge....²⁹⁸

Increasing divergence between devolved tribunal rules and the First-tier Tribunal procedural rules

- 5.62 Some stakeholders have informed us that it is beneficial for the devolved tribunal procedural rules to be similar to those in the First-tier Tribunal (“FTT”). We accept that divergence could have undesirable consequences in some areas. In particular, divergences between procedural rules adopted by the MHRTW and the FTT (Health, Education and Social Care Chamber) (“HESC”) may cause difficulties for tribunal users. The 2018 Independent Review of the Mental Health Act 1983 mentioned this project, stating:

We hope this will lead to changes that enable any changes to the [Mental Health Act 1983] to be applied in the same way across England and Wales. This is important because we do not want patients in Wales, who are subject to the same [Mental Health Act 1983] powers as patients in England, having different levels of access to the MHRTW. It is also important because, due to the types of beds required (for example medium secure forensic beds, many of which are in Wales) many of the patients in Welsh hospitals come from England, and vice versa.²⁹⁹

- 5.63 Gledhill pointed out some inconsistencies between the MHRTW rules and HESC rules. The overriding objective in the MHRTW rules makes no mention of the “need to deal with cases in a manner proportionate to the importance of the case, complexity of the issues, costs and resources, although the express list is non-exclusive”.³⁰⁰ He went on to note that:

There is, of course, no reason why the rules in Wales should be identical. The statutory basis for the rule-making power is different, being the Mental Health Act 1983 rather than the 2007 Act, which does introduce some additional powers. Having said that, there is no obvious reason why two bodies exercising the same statutory powers as to the merits of the decision should operate under different regimes.³⁰¹

- 5.64 The point that Gledhill raised is not limited to the MHRTW, with a number of the devolved tribunals applying the same substantive law as chambers of the FTT. Of the devolved tribunals, the exceptions to this are the WLT, which was established by Welsh legislation, and the APW, whose English counterpart no longer exists.

²⁹⁸ Report of the Committee on Administrative Tribunals and Enquiries (the Franks Report) (1957) Cmnd 218, para 63.

²⁹⁹ Independent Review of the Mental Health Act, *Modernising the Mental Health Act: increasing choice, reducing compulsion* (2018) p 221.

³⁰⁰ K Gledhill, “Evolution Rather than Revolution” in *Tribunals* (Autumn 2009) p 13.

³⁰¹ Above.

Provisional proposals on standardisation of tribunal rules

- 5.65 We provisionally consider that some standardisation of the rules is desirable, and make a provisional proposal to that effect. The benefits include ease for tribunal users, eliminating unnecessary inconsistencies and aiding the development of a unified devolved tribunal structure.
- 5.66 We also agree, however, that there is a case for procedural differentiation and are conscious that any broad-brush standardisation could lead to tribunal-specific rules being lost. This could be avoided by ensuring wide consultation with judicial leads, tribunal members, policy-makers and tribunal users before standardising rules. Those standardised rules could be drafted to accommodate any necessary tribunal-specific rules. Communication with the Tribunal Procedure Committee established under the Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”) could help to limit unnecessary divergences between Welsh and UK rules.³⁰²
- 5.67 We provisionally propose that procedural rules be standardised as far as possible. Above we have discussed a number of rules that we think could be standardised, such as the overriding objective, method of service, and the power to review decisions.

Consultation Question 27.

- 5.68 We provisionally propose that devolved tribunal procedural rules should, where appropriate, be standardised.

Do you agree?

Consultation Question 28.

- 5.69 We seek views on:
- (1) whether there are instances of undesirable divergence of devolved tribunal procedural rules from the First-tier Tribunal procedural rules; and
 - (2) how the risk of divergence might be managed.

³⁰² We discuss this committee, and the possibility of a similar committee in Wales, later in this chapter.

SHOULD THE TRIBUNAL RULES BE AMALGAMATED INTO A SINGLE SET OF RULES?

- 5.70 In this section we discuss the structure of standardised procedural rules, and in particular whether they should be amalgamated (combined into one common set of rules). We also consider the case of the RPTW, which has different sets of procedural rules for each of its jurisdictions.

Amalgamating tribunal rules

- 5.71 The 2017 Act brought together a number of disparate tribunals under the leadership of the PWT. This was the first piece of legislation introduced that sought to bring together the devolved tribunals. As Dr Sarah Nason and Dr Huw Pritchard have noted this has been “seen by some as the nucleus containing the DNA ... for a fully devolved Welsh tribunals system”.³⁰³

- 5.72 Amalgamation of tribunals was a key aspect of the Leggatt reform of the UK tribunal system. The Senior President of Tribunals 2012 Annual Report notes:

The new First-tier and Upper Tribunals has provided a flexible two-tier structure which, since November 2008, have absorbed over 30 individual tribunals as well as taking on a number of new jurisdictions. A vital unifying element, as proposed by Leggatt, was the introduction of a common set of procedural rules across the whole system.³⁰⁴

- 5.73 The question therefore arises, in the event that our provisional proposal for a unified devolved tribunal at Consultation Question 4 is adopted, whether it should have a single set of procedural rules or separate rules for each division or chamber. We discuss those options below.

Options for procedural rules

One set of rules for all tribunals

- 5.74 One option for structuring a common set of standardised procedural rules is a single set of procedural rules that applies in all chambers of a tribunal. None of the UK jurisdictions have taken this approach, however.
- 5.75 The UK Upper Tribunal has two sets of procedural rules: The Tribunal Procedure (Upper Tribunal) Rules 2008 (“the 2008 UT Rules”) and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.³⁰⁵
- 5.76 The 2008 UT Rules contain procedural rules applying to proceedings in the Administrative Appeals Chamber, Immigration and Asylum Chamber and Tax and Chancery Chamber. The 2008 UT Rules contain generic provisions which apply

³⁰³ S Nason and H Pritchard, “Administrative Justice and the Legacy of Executive Devolution: Establishing a Tribunals System for Wales” (2000) 26(4) *Australian Journal of Administrative Law* p 233.

³⁰⁴ Senior President of Tribunals, *Annual Report 2011-2012* (March 2012) pp 5 to 6.

³⁰⁵ SI 2008 No 2698 and SI 2010 No 2600. The Employment Appeal Tribunal, which is not part of the Upper Tribunal, also has its own set of rules, the Employment Appeal Tribunal Rules SI 1993 No 2854.

across all three chambers; those rules include the overriding objective and sending and delivering documents. The 2008 UT Rules also contain a significant number of specific rules applying to types of case.³⁰⁶ This is unsurprising considering the various jurisdictions covered by the 2008 UT Rules. Case-specific rules appear in three forms.

- (1) To supplement generic rules. For example, rule 5 contains generic case management powers while rule 5A provides a specific case management power in financial sanctions cases.
- (2) To provide exceptions to generic rules. For example, rule 7(d) provides that the Tribunal may restrict a party's participation in proceedings if they fail to comply with the rules or practice directions; however, that rule does not apply to mental health, asylum or immigration cases.
- (3) In schedules to the 2008 UT Rules. For example, Schedule 2 contains additional procedural rules that apply in national security certification cases.

5.77 The Scottish Upper Tribunal has two sets of procedural rules: The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 and the Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018.³⁰⁷ Unlike the 2008 UT Rules, the 2016 Scottish Regulations contain only generic procedural rules.

Distinct sets of procedural rules that are consistent

5.78 Both the UK and Scottish First-tier Tribunals have a separate set of procedural rules for each chamber. The seven sets of procedural rules of the FTT contain an identical overriding objective and duty for the parties to cooperate with the tribunal. Six sets of the tribunal procedural rules also give the tribunal identical case management powers.³⁰⁸

Discussion

5.79 We do not think one set of amalgamated procedural rules across the devolved tribunals is a desirable option. The 2008 UT Rules run to over 90 pages and use complex drafting to accommodate case-specific rules. We think this is an inevitable by-product of amalgamating different tribunal jurisdictions within one set of procedural rules. Based on our analysis above, we are not confident that the 2008 UT Rules are easy to navigate for tribunal users.

5.80 We provisionally propose, therefore, that each tribunal, whether they are brought within a unified system (as proposed by Consultation Question 4) or not, should

³⁰⁶ Tribunal Procedure (Upper Tribunal) Rules SI 2008 No 2698, r 1 defines various types of cases, including asylum cases, disability discrimination in school cases and financial sanctions cases.

³⁰⁷ The Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations SSI 2018 No 274, reg 2 provides that the Upper Tribunal for Scotland (Rules of Procedure) Regulations SSI 2016 No 232 do not apply to proceedings before the Upper Tribunal for Scotland relating to the exercise of the Scottish Ministers' functions under the Social Security (Scotland) Act 2018 or regulations made under it.

³⁰⁸ The exception is the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules SI 2013 No 1169. The additional powers granted to the tribunal are: the power to direct enquires be made of any person; the power to require that any party state whether they intend to attend the hearing, be represented or call witnesses, and the power to require any party to give an estimate of the length of the hearing.

continue to have its own separate set of procedural rules. However, as we provisionally propose at paragraphs 5.65 to 5.68 above, we think those separate sets of tribunal rules could and should be standardised where appropriate.

- 5.81 As discussed above, the overriding objective, methods of service and the power to review decisions could be a starting point. We provisionally propose that the devolved tribunal rules should remain separate, but be made consistent so far as possible.

Consultation Question 29.

- 5.82 We provisionally propose that there should continue to be a separate set of rules for each tribunal or chamber.

Do you agree?

The Residential Property Tribunal for Wales

- 5.83 As noted above, the RPTW is made up of 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 procedural rules being found in various pieces of UK primary legislation.
- 5.84 There are various inconsistencies across the three sets of procedural rules. Using the examples discussed above: only the residential property tribunal rules contain an overriding objective and duty to cooperate, only the rent assessment committee rules do not refer to service by electronic means and only the rent assessment committee rules contain a power for the tribunal to correct accidental omissions.³⁰⁹ We can see no principled reason for those inconsistencies.
- 5.85 We think the current framework is unnecessarily complicated for tribunal members, practitioners and tribunal users, specifically those who bring a case in more than one division of the tribunal. For that reason, we provisionally propose that the three sets of rules should be amalgamated.

Consultation Question 30.

- 5.86 We provisionally propose that the procedural rules for the Residential Property Tribunal for Wales should be amalgamated into one set of rules.

Do you agree?

³⁰⁹ Rent Assessment Committees (England and Wales) Regulations SI 1971 No 1065, reg 10(2).

MAKING AND MAINTAINING THE PROCEDURAL RULES

5.87 In this section we discuss the benefits of establishing a Tribunal Procedure Committee to standardise and maintain the devolved tribunal procedure rules. We then consider who should sit on such a committee and how members should be appointed. We conclude the section with provisional proposals.

Tribunal Procedure Committee

5.88 The procedural rules of the FTT and Upper Tribunal are overseen by the Tribunal Procedure Committee. The Committee was established by the TCEA 2007, in provisions based broadly on the Civil Procedure Act 1997.³¹⁰ In a consultation paper published shortly after the coming into force of the TCEA 2007, the government noted that the:

historical tendency to over-prescribe procedure in primary legislation and rules contributed to unnecessary legalism and the inaccessibility of tribunals identified by Sir Andrew Leggatt.³¹¹

It also thought that that tendency was responsible for the discrepancies between rules. It concluded that there was scope for greater consistency in tribunal procedure rules, while continuing to take into account the needs of individual jurisdictions.³¹²

5.89 The consultation paper envisaged that the first task of the Committee would be to make the rules necessary to bring the TCEA 2007 into effect, and conduct a dialogue with judges, members, staff and users to see what other changes were necessary. This was to be followed by a programme of broad harmonisation.³¹³

5.90 The Committee's power to make procedural rules is exercised with a view to ensuring:

- (a) that in proceedings before the FTT and Upper Tribunal, justice is done,
- (b) that the tribunal system is accessible and fair,
- (c) that proceedings before the FTT or Upper Tribunal are handled quickly and efficiently,
- (d) that the rules are both simple and simply expressed, and
- (e) that the rules where appropriate confer on members of the FTT, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.³¹⁴

³¹⁰ Tribunals, Courts and Enforcement Act 2007, s 22(2) and sch 5.

³¹¹ Ministry of Justice, *Transforming Tribunals: Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007* (2007) para 244. <http://data.parliament.uk/DepositedPapers/Files/DEP2008-1295/DEP2008-1295.pdf>.

³¹² Above, para 243.

³¹³ Above, paras 245 to 247.

³¹⁴ Tribunals, Courts and Enforcement Act 2007, s 22(4)(e).

5.91 The Tribunal Procedure Committee consists of:

- (1) the Senior President of Tribunals, or a person nominated by him;
- (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 FTT, 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.³¹⁵

5.92 Before making their respective appointments, the Lord Chancellor or the Lord Chief Justice must consult the other.

5.93 Rules are made by the Committee, after consultation with such persons as they think appropriate (including Chamber Presidents). Draft rules are submitted to the Lord Chancellor, who may allow or disallow them. If allowed, the rules are made by the Committee by statutory instrument.

5.94 In practice the Committee meets approximately nine times a year. It consults regularly on changes to the rules.

Tribunal rule-making for devolved Scottish tribunals

5.95 The Tribunals (Scotland) Act 2014 envisaged that procedural rules for the tribunals would eventually be made by a committee of the Scottish Civil Justice Council ("SCJC"). That body was set up in 2013, and has a broad responsibility for advising and making recommendations on the civil justice system in Scotland. Its rules, once prepared, are submitted to the Court of Session and then brought into force by an Act of Sederunt.

5.96 The Tribunals (Scotland) Act 2014 amended the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 to provide for a sub-committee of the SCJC to be set up with responsibility for rules of procedure of the Scottish tribunals. The amendment is not yet in force. It envisages that the tribunals committee would be chaired and its panel members selected by the President of Scottish Tribunals.³¹⁶ The

³¹⁵ Tribunals, Courts and Enforcement Act 2007, sch 5, paras 20 to 24.

³¹⁶ Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 s 13A, as amended by the Tribunals (Scotland) Act 2014 sch 9, para 13.

policy memorandum accompanying the Tribunals (Scotland) Act 2014 explains that this:

will ensure that the distinctiveness and ethos of tribunals is protected in the new structure and the person with the most knowledge of the tribunals within their charge was responsible for ensuring representation from the right people in each case.³¹⁷

- 5.97 The policy memorandum explains that as the SCJC had only recently been set up, responsibility for tribunal rule-making would not be transferred immediately. In the meantime, the Scottish Ministers are able to make rules for the Scottish tribunals.

Tribunal rule-making for tribunals in Northern Ireland

- 5.98 The Department of Justice in Northern Ireland has in the past consulted on the merits of rationalising tribunal procedural rules in Northern Ireland. A discussion paper from 2011 notes that:

a generic procedural platform could enhance accessibility and increase coherence in the system. It is also recognised that harmonisation may be particularly beneficial to those tribunals where a number of different sets of rules already apply and that standardisation would assist in the training of new members, particularly in the event that a tribunal with generic jurisdiction were established.³¹⁸

- 5.99 The discussion paper led to a consultative document, published in 2013. It suggested that the Department of Justice would continue to make procedural rules. Those rules would be made after consulting a new advisory body, which would be responsible for keeping the proposed system of tribunals under review. The tribunal rules would incorporate the overriding objective to deal with cases justly. The Department would be under a statutory objective to ensure rules were expressed simply, so far as reasonably practicable.³¹⁹ Unfortunately, tribunal reform in Northern Ireland did not progress further.

A Tribunal Procedure Committee for Wales

- 5.100 We see value in establishing a tribunal procedure committee for Wales, as suggested previously by Pritchard.³²⁰ This would enable the rules to be reviewed regularly, which would prevent them becoming out of date. Improvements to the rules could be made at the same time for all tribunals, preventing discrepancies between tribunals creeping in. We also think that a committee could play a role in monitoring differences between procedural rules in the reserved and devolved tribunals.

³¹⁷ Tribunals (Scotland) Act 2014, policy memorandum, para 72.
[https://www.parliament.scot/S4_Bills/Tribunals%20\(Scotland\)%20Bill/b30s4-introd-pm.pdf](https://www.parliament.scot/S4_Bills/Tribunals%20(Scotland)%20Bill/b30s4-introd-pm.pdf).

³¹⁸ Department for Justice Northern Ireland, *Tribunal Reform: Discussion Paper on the Future Administration and Structure of Tribunals in Northern Ireland* (October 2011) paras 4.5 to 4.8.

³¹⁹ Department for Justice Northern Ireland, *Future Administration and Structure of Tribunals in Northern Ireland – consultative document* (January 2013) para 3.43.

³²⁰ H Pritchard, “Building a Welsh jurisdiction through administrative justice” in *Administrative Justice in Wales and Comparative Perspectives*, S Nason (ed) (2017) 218 at p 239.

- 5.101 We envisage that the committee would initially be responsible for standardising tribunal rules, so far as practicable. It would then have an ongoing responsibility to maintain the rules. This could include a responsibility for ensuring that rules promote a fair and accessible tribunal system, and (to adopt the phrasing from section 22(4) of the TCEA 2007) that the rules themselves are simple and simply expressed.
- 5.102 The TCEA 2007 provides in section 22 for “rules, to be called ‘tribunal procedure rules’, governing the practice and procedure to be followed in” the First-tier and Upper Tribunals”.³²¹ Individual sets of rules are in fact made for each First-tier chamber, with some Upper Tribunal Chambers sharing a set of rules. We envisage a similarly flexible arrangement in Wales. In line with our provisional proposal at Consultation Question 29 above, we envisage single sets of procedural rules for each chamber within the proposed First-tier tribunal for Wales.

Composition and operation of a Tribunal Procedure Committee for Wales

- 5.103 In our view the natural choice to chair such a committee would be the PWT. Under the 2017 Act the PWT is already under a duty to have regard to the need for proceedings before the section 59 tribunals to be fair, and to be handled quickly and efficiently.³²² The PWT’s duty to have regard to innovative methods of dispute resolution is also relevant to the task of maintaining the procedural rules.
- 5.104 We do not see the need for the new legislation to be as prescriptive about the membership of the tribunal as the provisions of the TCEA 2007, which were designed for a larger tribunal structure. We envisage the committee including the PWT as chair, at least one or two judicial leads of the devolved tribunals, one or more legal members and one or more lay members, together with representatives of practitioners and users.
- 5.105 We provisionally consider that it can be left to the PWT to come to a view as to the expertise required by the committee and to make the necessary appointments, guided by principles contained in legislation to guide the exercise of the power of appointment. The PWT could, for example, be required to have regard to the need for the committee to benefit from a broad range of expertise, including from those who work within the tribunals, or advise persons involved in tribunal proceedings.
- 5.106 Once the committee has agreed on a new set of rules, or changes to the rules, how should these rules be made? Under the TCEA 2007, the committee itself makes the rules. Rules must be signed by a majority of the members of the committee, and then submitted to the Lord Chancellor.³²³ The majority approach prevents rules being vetoed by one committee member. An alternative might be that the PWT, as chair of the committee, could make the rules. We seek views on these alternatives below. In either case, our provisional view is that the rules should be subject to approval by the Welsh Ministers before being made.

³²¹ Tribunals, Courts and Enforcement Act 2007, s 22(1)(a).

³²² Wales Act 2017, s 60(4)(b).

³²³ Tribunals, Courts and Enforcement Act 2007, sch 5(3) para 28(2).

Consultation Question 31.

5.107 We provisionally propose that there should be a Tribunal Procedure Committee for Wales.

Do you agree?

Consultation Question 32.

5.108 We provisionally propose that the President of Welsh Tribunals should be responsible for chairing the Tribunal Procedure Committee for Wales and appointing its members.

Do you agree?

Consultation Question 33.

5.109 We provisionally propose that the President of Welsh Tribunals' ability to appoint members of a Tribunal Procedure Committee for Wales should be guided by factors set out in legislation, including the need for the Committee to have access to a range of expertise.

Do you agree?

Consultation Question 34.

5.110 We seek views on whether rules should be made, with the approval of the Welsh Ministers, by a majority of the Tribunal Procedure Committee for Wales, or by the President of Welsh Tribunals.

Chapter 6: Appointments

- 6.1 Appointments to the devolved tribunals are key to demonstrating to the public that the tribunals are independent and impartial. The procedures employed should be fair, open and based on merit. The current system meets those standards. Responsibilities for appointments are, however, inconsistent, largely because of the piecemeal development of the tribunals. Later rules reflect the progress of devolution, while procedures that were developed earlier do not.
- 6.2 Appointment functions are generally split between the Lord Chancellor and the Welsh Ministers. There are however outliers; the President of the Valuation Tribunal for Wales (“VTW”) is elected by its members, and governing bodies of schools are in some cases responsible for appointing members to the panels that hear appeals relating to admissions. This chapter considers whether the body responsible for appointments (the “appointing authority”) should be the same across devolved tribunals in Wales.
- 6.3 The chapter also considers selection processes. In practice all appointments to the Welsh tribunals listed in section 59 of the Wales Act 2017 (the “section 59 tribunals”) follow a selection process run by the Judicial Appointments Commission (“JAC”). Again, however, the JAC has no involvement in appointments to the VTW or to school admission and exclusion appeal panels.

APPOINTMENTS WITHIN THE DEVOLVED TRIBUNALS IN WALES

- 6.4 For most devolved tribunals, appointments are the responsibility of either the Lord Chancellor or the Welsh Ministers; occasionally the Lord Chief Justice has a role. The Lord Chancellor’s involvement reflects a deliberate choice made from the 1950s onwards to increase independence of tribunals, by moving responsibility for appointments away from sponsoring departments. This move focused on more senior members of the tribunals, such as presidents and chairs. The appointment of tribunal members was seen as a more administratively onerous process, and was often left to the sponsoring department.
- 6.5 This pattern is replicated to some extent in the section 59 tribunals today. The Lord Chancellor tends still to be responsible for appointments of judicial leads, while the Welsh Ministers are more usually responsible for appointing members. Most tribunal appointment processes distinguish between legal and lay members; the Lord Chancellor is more likely to be responsible for appointing the former.
- 6.6 It is noticeable, however, that appointments to tribunals set up more recently, since the commencement of the process of devolution, tend to be the responsibility of the Welsh Ministers. They are responsible for appointing all members and Presidents of the Adjudication Panel for Wales (“APW”) and Welsh Language Tribunal (“WLT”). This suggests a desire to use Welsh institutions and processes.

- 6.7 The table below sets out who is responsible for appointing members of the section 59 tribunals. In practice, appointments by the Welsh Ministers are made by the First Minister.

Tribunal ³²⁴	Appointment of members	Appointment of judicial leads
ALTW	Majority of appointments made by Lord Chancellor.	Lord Chancellor appoints Chairman and Deputy Chairman.
APW	Welsh Ministers.	Welsh Ministers appoint President and Deputy President.
MHRTW	Lord Chancellor appoints legal, medical and lay members. Lord Chief Justice, after consultation with the Lord Chancellor, appoints legal members of restricted patient panel (power currently delegated to President of Welsh Tribunals).	President appointed by Lord Chancellor from legal members.
RPTW	Legal members appointed by Lord Chancellor. Professional and lay members appointed by Welsh Ministers.	Welsh Ministers appoint President and Vice President from members.
RSIAT and RNEIAT	Two members other than the Chair are appointed by the Welsh Ministers.	Chair is appointed by the Lord Chief Justice, after consulting the Lord Chancellor.
SENTW ³²⁵	Legal chairs appointed by Lord Chancellor. Non-legal members appointed by Welsh Ministers, with agreement of Secretary of State.	Lord Chancellor appoints President.
WLT	Welsh Ministers.	Welsh Ministers.

³²⁴ The abbreviations used in the table 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”), Special Educational Needs Tribunal for Wales (“SENTW”) and Welsh Language Tribunal (“WLT”).

³²⁵ The SENTW will in due course be renamed the Education Tribunal for Wales (“ETW”) when the relevant provisions of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 come into force. Appointments to the ETW will be governed by ss 91(3) and (4) of the Additional Learning Needs and

- 6.8 The table does not cover all tribunals. Some of the devolved tribunals (notably, the ones not administered centrally) do not fit into this pattern. They are considered below.

Valuation Tribunal for Wales

- 6.9 The VTW follows its own system, with some limited involvement by the Welsh Ministers. It is governed by a Governing Council, made up of the President, national representatives, and up to three individuals appointed by the Welsh Ministers.³²⁶
- 6.10 Appointments to the various roles within the VTW are made as follows.
- (1) Members (who are unpaid) are appointed by an appointment panel.
 - (2) Chairpersons are also appointed by the appointment panel.
 - (3) The President of the VTW is elected by its members (although if they fail to make an appointment, the Welsh Ministers must appoint the President).³²⁷
 - (4) There are three national representatives, who are also elected by members.³²⁸ This position is unique; the national representatives are the successors to regional representatives. Regional representatives were necessary when there were four valuation tribunals spread across Wales, before these were consolidated into the VTW in 2010. National representatives must be drawn from both members and chairpersons.
- 6.11 The appointment panel is made up of three members of the Governing Council. When the appointment panel appoints chairpersons, the Welsh Ministers are excluded from the panel.
- 6.12 The practice of elections by members in the VTW dates from the previous system of valuation tribunals in England and Wales. Before 2017, chairs of the tribunal and members of the Governing Council were also elected. The 2016 report of the Committee for Administrative Justice and Tribunals, Wales (“the 2016 Report”) noted that:

Education Tribunal (Wales) Act 2018. The provisions, as amended by reg 2 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (Supplementary Provisions) Regulations SI 2019 No 794, are largely identical to those for the SENTW. The appointment of lay members will remain the responsibility of the Welsh Ministers, subject to the agreement of the Secretary of State, but there will also be an additional requirement for the agreement of the tribunal President. Arrangements for the appointment of the tribunal President and legal chairs remain unchanged.

³²⁶ The Valuation Tribunal for Wales Regulations SI 2010 No 713 (W 69) part 2.

³²⁷ Above, reg 11 and sch 2, part 1.

³²⁸ Above, reg 13 and sch 2, part 1.

The system of election of valuation tribunal chairs, the tribunal presidents and members of the Governing Council is an anachronism and, as far as we are aware, unique in tribunals in England and Wales.³²⁹

- 6.13 The procedure for appointing members was also criticised by the 2016 Report. At the time the report was published, members were appointed jointly by the President and local councils.³³⁰ The 2016 Report recommended removal of any local authority involvement in the appointment of members.³³¹ As a result of the recommendation, the regulations were amended in 2017. The requirement to elect chairpersons, described as “cumbersome” in the Welsh Government’s consultation paper on the topic, was abolished.³³² The role of local authorities in relation to the selection of members was also removed.

School admission and exclusion appeal panels

- 6.14 School admission appeals panels also follow a different pattern. In most cases, the local authority appoints members of the panel. In the case of foundation or voluntary aided schools, the governing body is responsible for appointments.³³³ Joint arrangements may be made between foundation or voluntary aided schools maintained by the same local authority,³³⁴ or between a local authority and foundation or voluntary aided school.³³⁵

- 6.15 The School Admissions Appeal Code published by the Welsh Government notes:

In some areas, local authorities (with agreement of other admission authorities) take responsibility for recruitment, training and appointment of all members to appeal panels. This is a cost-effective way to achieve consistency across an area.³³⁶

- 6.16 It is unclear to what extent this approach is taken in practice.

- 6.17 Local authorities also appoint members of school exclusion appeal panels. This power of appointment extends to panels hearing appeals about exclusion from maintained

³²⁹ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) para 45.

³³⁰ The Valuation Tribunal for Wales Regulations SI 2010 No 713 (W 69) reg 9 (as originally enacted).

³³¹ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) para 47.

³³² Welsh Government, *Amending the Valuation Tribunal for Wales 2010* (2017) para 56.

³³³ School Standards and Framework Act 1998, s 94. Voluntary aided schools tend to be faith schools. In Wales these are commonly run by the Roman Catholic Church or Church in Wales.
<https://law.gov.wales/publicservices/education/school-and-other-education-for-children/Schools-maintained-by-local-authorities/?lang=en#/publicservices/education/school-and-other-education-for-children/Schools-maintained-by-local-authorities/?tab=overview&lang=en>

³³⁴ School Standards and Framework Act 1998, s 94(3).

³³⁵ School Standards and Framework Act 1998, s 94(4).

³³⁶ This is a statutory code made under section 84 of the School Standards and Framework Act 1998, which requires the Welsh Ministers to issue a code for school admissions. See the Welsh Government, *School admission appeals code* (2013) para 2.7 <https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>.

schools, such as voluntary aided schools and foundation schools.³³⁷ The composition of appeal panels is provided for by regulations.³³⁸ These require that the panel should consist of three or five members. Members are appointed by the local authority from lay members, persons working in education, and governors of maintained schools, or people who have been governors in the past. The Welsh Government has also provided guidance on how local authorities should proceed when appointing members of appeal panels.³³⁹

- 6.18 In practice many local authorities appoint an “independent appeals panel”, which hears both admission and exclusion appeals. We are aware of at least one example where three local authorities work together to recruit members. Wrexham, Flintshire and Denbighshire county councils published a joint advertisement for members of independent appeals panels in 2018.³⁴⁰
- 6.19 Administration of these panels is not centralised, making it difficult to find accurate information about the operation of these panels. We seek evidence from consultees on how these panels work in practice, and the extent to which local authorities work together.

The Welsh Language Tribunal

- 6.20 The WLT was the first tribunal set up by the Assembly, and has no English counterpart. All its appointments are made by the Welsh Ministers. Additional safeguards have been introduced to guide how these appointments are made. When making appointments, the Welsh Ministers are required by regulations to have regard to the need to uphold the principles of
- (1) the independence of the tribunal; and
 - (2) the rule of law.³⁴¹
- 6.21 The regulations also include duties similar to the statutory duties of the Judicial Appointments Commission; appointments must be made on merit, and appointees must be of good character. The Welsh Ministers must also have regard to the need to encourage diversity in the range of persons appointed to the tribunal.³⁴²

³³⁷ Education Act 2002, s 52(3)(c).

³³⁸ Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations SI 2003 No 3227 (W 308), sch 1(2).

³³⁹ Welsh Government, Exclusion from schools and pupil referral units (2009) para 4.47 <https://gov.wales/sites/default/files/publications/2019-11/exclusion-from-schools-pupil-referral-units.pdf>.

³⁴⁰ See http://old.wrexham.gov.uk/english/education/appeal_panel.htm

³⁴¹ The Welsh Language Tribunal (Appointment) Regulations SI 2013 No 3139 (W 312), reg 3.

³⁴² The Welsh Language Tribunal (Appointment) Regulations SI 2013 No 3139 (W 312), regs 2 and 5. Constitutional Reform Act 2005, ss 63 and 64.

- 6.22 In the past, appointments to the Welsh Language Tribunal were made under a separate policy.³⁴³ However, all appointments to all Welsh tribunals are now made by the JAC and in accordance with its procedures. Its role is discussed further below.

Cross-ticketing

- 6.23 Cross-ticketing now forms an important part of the system of appointments to Welsh tribunals. Also known as “cross-deployment”, this practice was introduced by the Wales Act 2017. It enables a member of one of the Welsh tribunals to sit as a member of another, with the approval of the President of Welsh Tribunals and, in most cases, the agreement of the judicial lead of the second tribunal.³⁴⁴ The Wales Act 2017 also permits members of Welsh tribunals to sit in the First-tier Tribunal, and members and judges of the First-tier Tribunal to sit in the Welsh tribunals.³⁴⁵

- 6.24 The President of Welsh Tribunals reported that he had begun the process of cross-ticketing in his 2019 annual report.³⁴⁶ His 2020 report gave the following update.

Three legal members of Welsh Tribunals have been identified as being suitable for cross ticketing to the MHRTW although only two of those persons have completed the necessary training and been cross-ticketed. Two legal members of Welsh Tribunals have been cross-ticketed to the RPTW and one legal member of the First Tier Property Tribunal in England has been cross-ticketed to RPTW. Two lay members of Welsh Tribunals have been cross-ticketed to the WLT and one lay member has been cross-ticketed to the APW.³⁴⁷

- 6.25 Cross-ticketing can be a useful way for members to gain more experience of hearing cases, particularly in tribunals which receive a limited number of applications. The JAC is not involved in selecting or approving applications to cross-ticket; instead the President of Welsh Tribunals will consider applications. In our view the increasing use of cross-ticketing strengthens the argument that appointments procedures should be consistent across the devolved tribunals.

Role of the Judicial Appointments Commission

- 6.26 The JAC is an independent statutory body, created by the Constitutional Reform Act 2005.³⁴⁸ Despite its name, it does not appoint candidates to judicial office. Instead it selects candidates for appointment to courts and tribunals in England and Wales, and some tribunals with a UK jurisdiction. It is required to make selections on merit, but is

³⁴³ Welsh Government, *Appointment of the President and other members of the Welsh Language Tribunal: Statement of appointment policy and procedure* (2013).

³⁴⁴ Wales Act 2017, s 62.

³⁴⁵ Above, s 63.

³⁴⁶ President of Welsh Tribunals, *Annual report 2018 – 2019* (2019) p 7.

³⁴⁷ Above, para 2.5.

³⁴⁸ Constitutional Reform Act 2005, s 61 and sch 12.

able to prefer a candidate over another for the purpose of increasing diversity within the group of persons who are judges.³⁴⁹

- 6.27 The candidates it selects are usually appointed. Graham Gee, Robert Hazell, Kate Malleson and Patrick O'Brien report that:

In practice, Lord Chancellors almost always accepted the recommendation [of the JAC], with only five occasions from nearly 3,500 recommendations between 2006 and 2013 when this was not so.³⁵⁰

- 6.28 The JAC is composed of a number of Commissioners, including Commissioners who hold judicial office, legal practitioners, and people who are not lawyers (referred to as lay members). The Lord Chancellor is empowered to make regulations about how those Commissioners are to be appointed. The Constitutional Reform Act 2005 requires that those powers be exercised with a view to:

ensuring, so far as may be practicable, that the Commissioners who are lay members include at any time at least one person who appears to have special knowledge of Wales.³⁵¹

- 6.29 The Rt Rev Dr Barry Morgan took up appointment as “lay” Commissioner with special responsibility for Wales in July 2020.³⁵²

Selection processes for the devolved tribunals

- 6.30 The JAC runs selection processes for all the devolved tribunals, with the exception of the Valuation Tribunal for Wales and school admission and exclusion appeal panels. Its involvement in appointments made by the Lord Chancellor is regulated by the Constitutional Reform Act 2005. The Lord Chancellor may ask the JAC to conduct selection processes for any of the offices listed under Schedule 14 of that Act.³⁵³ These include the appointments listed as being the responsibility of the Lord Chancellor by the table at paragraph 6.7 above.³⁵⁴

- 6.31 In addition to running the selection process for Lord Chancellor appointments, the JAC also handles selection processes for the Welsh Ministers pursuant to an agreement under section 83 of the Government of Wales Act 2006, which permits the Welsh Ministers to arrange for their functions to be exercised by other authorities. While the Welsh Tribunals Unit is more likely to provide administrative support to the JAC when

³⁴⁹ Constitutional Reform Act 2005, s 27(5) and (5A).

³⁵⁰ G Gee, R Hazell, K Malleson and P O'Brien, *The politics of judicial independence in the UK's changing constitution* (2015) p 163.

³⁵¹ Constitutional Reform Act 2005, sch 12 para 6B.

³⁵² <https://www.gov.uk/government/news/appointment-of-3-commissioners-and-the-reappointment-of-5-commissioners-to-the-judicial-appointments-commission>

³⁵³ Constitutional Reform Act 2005, s 87(1) and 85(1)(c).

³⁵⁴ Appointments for which the Lord Chancellor is responsible are listed by the Constitutional Reform Act 2005, sch 14, part 3 table 1.

it is conducting Welsh Minister appointments, the JAC's processes remain the same as those employed for Lord Chancellor appointments.

ELSEWHERE IN THE UK

6.32 Useful comparisons can be drawn between devolved tribunals in Wales and tribunals in the remainder of the UK. We discuss briefly below the position in relation to some reserved tribunals (focussing on those which form part of the First-tier Tribunal and Upper Tribunal system), and tribunals in Scotland and Northern Ireland.

Reserved tribunals

6.33 The Tribunals, Courts and Enforcement Act 2007 created a two-tier system for the reserved tribunals; the First-tier Tribunal, and the Upper Tribunal, which is an appellate body. Judges and other (non-judicial) members of the First-tier Tribunal are appointed by the Senior President of Tribunals.³⁵⁵

6.34 In the case of the Upper Tribunal, judges are appointed by Her Majesty, on the recommendation of the Lord Chancellor.³⁵⁶ Non-judicial members are appointed by the Senior President of Tribunals.³⁵⁷ Chamber Presidents of the First-tier Tribunal and the Upper Tribunal are also appointed by the Senior President of Tribunals.³⁵⁸

6.35 All appointments are made following a selection process run by the JAC.

Scotland

6.36 The Tribunals (Scotland) Act 2014 organised devolved Scottish tribunals into two tiers; the First-tier Tribunal for Scotland ("FTTS") and Upper Tribunal for Scotland ("UTS"). Tribunals in Scotland are overseen by the President of Scottish Tribunals, who is appointed by the Lord President.³⁵⁹

6.37 Each chamber of the FTTS is headed by a Chamber President (or two).³⁶⁰ Chamber Presidents are appointed by the Scottish Ministers, after consulting the Lord President.³⁶¹ If requested to do so by the President of Tribunals, the Scottish Ministers may appoint a Deputy Chamber President to a particular chamber in the FTTS.³⁶² Before such a request is made, the President of Tribunals must consult the Chamber President of the relevant chamber.³⁶³

³⁵⁵ Tribunals, Courts and Enforcement Act 2007, sch 2 paras 1 and 2.

³⁵⁶ Above, sch 3 para 1.

³⁵⁷ Above, sch 3 para 2.

³⁵⁸ Above, s 7(6) and (7).

³⁵⁹ Tribunals (Scotland) Act 2014 s 4(1) and (2).

³⁶⁰ Above, s 21.

³⁶¹ Above, s 21.

³⁶² Above, sch 4 para 1.

³⁶³ Above, sch 4 para 4.

- 6.38 Divisions of the UTS are presided over by one or two Vice-Presidents.³⁶⁴ The President of Tribunals may assign any judicial member of the UTS to the role of Vice-President, with the agreement of the Lord President. The President of Tribunals may appoint himself or herself as Vice-President, to preside over one or more division.³⁶⁵ The Scottish Ministers may also appoint a Vice-President, if requested to do so by the President of Tribunals.³⁶⁶
- 6.39 Both ordinary and legal members of the FTTS are appointed by the Scottish Ministers.³⁶⁷ The Scottish Ministers also appoint ordinary and legal members of the UTS.³⁶⁸

Role of Judicial Appointments Board for Scotland

- 6.40 The Judiciary and Courts (Scotland) Act 2008 established the Judicial Appointments Board for Scotland. It is a non-departmental public body (rather than a body corporate).³⁶⁹ Its role is to recommend individuals be appointed to particular judicial offices, and to advise in relation to those appointments. The recommendations and advice are provided to the Scottish executive.
- 6.41 The Judicial Appointments Board for Scotland is responsible for appointment procedures for the following tribunal roles:
- (1) Vice-President of the UTS, if appointed by the Scottish Ministers;
 - (2) Chamber President in the FTTS;
 - (3) Deputy Chamber President in the FTTS, if appointed by the Scottish Ministers; and
 - (4) ordinary and legal members of the FTTS or the UTS.³⁷⁰
- 6.42 The Scottish Ministers may not appoint any person to those roles unless his or her appointment has been recommended by the Judicial Appointments Board for Scotland.³⁷¹

³⁶⁴ Tribunals (Scotland) Act 2014, s 24(1).

³⁶⁵ Above, s 25.

³⁶⁶ Above, s 26.

³⁶⁷ Tribunals (Scotland) Act 2014 sch 3, para 1(1) and 4(1).

³⁶⁸ Above, sch 5 paras 1(1) and 4(1).

³⁶⁹ Judiciary and Courts (Scotland) Act 2008, s 9(1).

³⁷⁰ Above, s 10(2A).

³⁷¹ Above, s 11(1).

Northern Ireland

- 6.43 The Northern Ireland Judicial Appointments Commission (“NIJAC”) is a body corporate.³⁷² It is made up of 13 members; five judicial members, two legal members, five lay members, and the chair (the Lord Chief Justice of Northern Ireland).³⁷³ Judicial members are nominated by the Lord Chief Justice, and appointed by the First Minister and Deputy First Minister acting jointly. They also appoint the lay members. One legal member is a solicitor, and is nominated by the Law Society of Northern Ireland. The other is a barrister, and is nominated by the Bar Council of Northern Ireland.³⁷⁴
- 6.44 Its statutory duties include selecting persons to be appointed, or recommended for appointment to particular judicial offices. The selection must be made “solely on the basis of merit”. Subject to that, it may engage in a programme of action to ensure that the holders of judicial offices are reflective of the community in Northern Ireland.³⁷⁵
- 6.45 The list of bodies for which it is responsible can be found at Schedule 1 to the Justice (Northern Ireland) Act 2002 (as amended). The list includes some, but not all, positions within the tribunals in Northern Ireland. For example, it includes the President, Deputy President and other members of the Lands Tribunal for Northern Ireland; the President and some members of the Special Educational Needs and Disability Tribunal for Northern Ireland; and members of the Mental Health Review Tribunal for Northern Ireland. Professor Gráinne McKeever and Brian Thompson’s report on reform of tribunals in Northern recommended that the NIJAC should appoint all members of the Northern Ireland tribunals.³⁷⁶
- 6.46 Some appointments to judicial offices are formally made by Her Majesty. Appointments are made on the recommendation of the Lord Chancellor for Northern Ireland. When the NIJAC has selected a person for appointment, it must inform the Lord Chancellor. The Lord Chancellor must then, as soon as reasonably practicable, recommend that person for appointment.³⁷⁷
- 6.47 In the case of other judicial offices, the NIJAC is responsible for both selecting and appointing persons to those offices.³⁷⁸ In some cases, this is done after agreement with the relevant department. For example, the President of the Lands Tribunal for Northern Ireland is appointed following agreement between the Ministry of Finance and the NIJAC.³⁷⁹

³⁷² Justice (Northern Ireland) Act 2002, s 3.

³⁷³ Justice (Northern Ireland) Act 2002, s 3(4).

³⁷⁴ Above, s 3(5).

³⁷⁵ Above, sch 3 para 6.

³⁷⁶ G McKeever and B Thompson, *Redressing Users’ Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (2010) p 14.

³⁷⁷ Justice (Northern Ireland) Act 2002, sch 3 part 1, para 2.

³⁷⁸ Above, sch 3 part 2.

³⁷⁹ Lands Tribunal and Compensation Act (Northern Ireland) 1964, s 1(2).

REFORM OF APPOINTMENTS IN WALES

Standardising the appointing authority

6.48 Previous work on appointments in Wales has focused on ensuring that the appointing authority was either the Welsh Ministers or the Lord Chancellor. The 2010 Administrative Justice and Tribunals Council report, for example, noted that the rules governing the selection of members were “neither uniform nor consistent” and that the appointment processes for tribunal members:

vary but they are often administered by the government departments or Local Authorities whose decisions are under review and in some instances they are not on a merit-based selection process.³⁸⁰

6.49 The report recommended that all appointments should be made by the Welsh Ministers or the Lord Chancellor.³⁸¹ This is now the case in relation to most appointments to the Welsh tribunals. However, as we discuss above, there are still exceptions for devolved tribunals (as well as other bodies) which are not administered by the WTU: in particular the VTW and school admission and exclusion appeals panels.

6.50 Calls for standardisation continue. Dr Sarah Nason has suggested that:

there needs to be greater clarity and uniformity in the system, and it is suggested that in the longer-term Welsh Ministers should take responsibility for all appointments to Devolved Welsh Tribunals.³⁸²

6.51 We provisionally agree that in principle the appointing authorities for the devolved tribunals ought to be standardised. The current mixed position is the result of historical development, rather than any policy choice reflecting differences between the tribunals. The divergence creates problems in practice: Lord Chancellor appointments are subject to different terms and conditions from Welsh Minister appointments. With increasing cross-ticketing within the Welsh tribunals, these differences are hard to justify.

Consultation Question 35.

6.52 We provisionally propose that the same appointing authority (or authorities) should make appointments for all devolved tribunals.

Do you agree?

³⁸⁰ Administrative Justice and Tribunals Council, Welsh Committee, *Review of tribunals operating in Wales* (2010) para 71.

³⁸¹ Above, recommendation 3, p 28.

³⁸² S Nason, *Understanding Administrative Justice in Wales* (2015) para 7.13.

Who should the appointing authority be?

6.53 It appears to us that there are a number of possible answers to this question:

- (1) the Lord Chancellor;
- (2) the Welsh Ministers; or
- (3) the President of Welsh Tribunals.

6.54 It is possible that more than one of these could be involved together in appointments. It is also possible that different appointing authorities could be responsible for appointment of judicial leads (and their deputies) and of other legal and non-legal members of tribunals.

6.55 There are a number of principles that can be considered when deciding who should make appointments. These include;

- (1) protecting the independence of tribunals;
- (2) marking the importance of appointments by ensuring the appointing authority or office is sufficiently senior; and
- (3) ensuring that the appointing authority is in a position to appraise the recommendations made to it.

6.56 We consider these in turn.

Independence

6.57 The first principle is the protection of judicial independence (which is discussed further in Chapter 10). It has long been recognised that the departments that are responsible for taking appealable decisions should not be involved in the appointment process for tribunals that review those decisions. Even if in practice departments do not exert improper pressure on tribunals through the appointments process, the possibility that they may do so can damage users' perception of the independence of the tribunal.

6.58 One way of increasing separation between the decision-making authority and the tribunal is to transfer the responsibility out of the hands of the executive and into the hands of the judiciary. That may partly have been the reason for requiring appointments to be made by the Lord Chancellor in the past; before the Constitutional Reform Act 2005, the Lord Chancellor was also the head of the judiciary in England and Wales. Today that role is performed by the Lord Chief Justice, but the Lord Chancellor continues to have particular obligations to respect the rule of law and to defend the independence of the judiciary.³⁸³

6.59 We have seen that one way the Welsh tribunals have tried to replicate these duties is by requiring the Welsh Ministers to have regard to the independence of the Tribunal when appointing members to the WLT.³⁸⁴ In Chapter 10 we make a provisional

³⁸³ Constitutional Reform Act 2005, s 1(b) and s 3(6)(a).

³⁸⁴ The Welsh Language Tribunal (Appointment) Regulations SI 2013 No 3139 (W 312), reg 3.

proposal that all those responsible for the administration of justice in Wales, including the Welsh Ministers, should have a statutory responsibility to uphold the independence of the judiciary.

Seniority

- 6.60 Another principle which is sometimes invoked in this context is seniority of the appointing authority. Involving an important figure within government in the appointments process underlines the importance of the office itself. This was recognised as far back as the Franks report, which recognised that requiring the Lord Chancellor to make appointments might “by reason of the esteem in which the office of Lord Chancellor is held, enhance [chairmen’s and members’] status”.³⁸⁵ This helps to explain why the Welsh Ministers and Lord Chancellor share these responsibilities at present.

Ability to assess candidates

- 6.61 A final principle, which tends to run counter to the second, is that the appointing authority should be in a position to make an assessment of the merits of the recommendation made by the selection authority. A useful comparison can be made here with the system for appointments to First-Tier and Upper Tribunals. The Lord Chancellor was originally responsible for making appointments of members of those tribunals, including Chamber Presidents. However, that responsibility was transferred to the Senior President of Tribunals by the Crime and Courts Act 2013, amending the Constitutional Reform Act 2005 and Tribunals, Courts and Enforcement Act 2007.³⁸⁶

- 6.62 The transfer of responsibility was made following a public consultation by the Ministry of Justice. The consultation concluded that:

In relation to judicial appointments below the High Court, we do not consider that it is necessary for the Executive to have a role in relation to individual appointments. In effect this is often a rubber-stamping process as it is not feasible for the Lord Chancellor to have personal knowledge of the applicants across the range of courts and tribunals for which he has to make appointments. We consider that such appointments should be made by the judiciary themselves....³⁸⁷

- 6.63 In practice many of these arguments apply also to appointments to the devolved tribunals. Appointments by the Welsh Ministers are in practice made by the First Minister, who is unlikely to have any knowledge of the applicants to the tribunals. He also has extensive other responsibilities. This problem is likely to increase as more tribunals are brought within the Welsh tribunals system.

Conclusion

- 6.64 Our provisional view is that the President of Welsh Tribunals is the most appropriate person to appoint members of the devolved tribunals. The President is more likely than the Welsh Ministers to be familiar with the needs of individual tribunals, and is

³⁸⁵ Report of the Committee on Administrative Tribunals and Enquiries (1957) Cmnd 218, para 46.

³⁸⁶ Crime and Courts Act 2013, sch 13 part 4.

³⁸⁷ Ministry of Justice, Appointments and Diversity, *A judiciary for the 21st Century, response to public consultation* (2012) para 121.

already consulted in relation to appointments of legal members of the restricted patient panel of the MHRTW (the MHRTW rules require that the Lord Chief Justice must be consulted on the Lord Chancellor's appointment of those members, but enable the Lord Chief Justice to delegate that function; he has done so to the President of Welsh Tribunals).³⁸⁸ The President is also demonstrably independent of the Welsh Government.

- 6.65 In relation to judicial leads, our provisional view is that they should be appointed by the Welsh Ministers, but with the agreement of the President of Welsh Tribunals. This satisfies the "seniority" criterion outlined above, but balances it with the judicial expertise and independence inherent in the office of President of Welsh Tribunals.
- 6.66 Our provisional view is that requiring the Lord Chancellor to be responsible for appointments would run counter to the more recent trend in legislation to require appointments to be made by the Welsh Ministers. This seems to us an appropriate reflection of the political decision to devolve legislative powers for the devolved tribunals to the Senedd. Requiring the Lord Chancellor to be responsible for appointments would also be inconsistent with current appointments practice in England, where the Senior President of Tribunals appoints Chamber Presidents.
- 6.67 Our proposals extend to the section 59 tribunals, whether as currently constituted or as chambers of a unified tribunal. We discuss the other devolved tribunals separately.

Consultation Question 36.

- 6.68 We provisionally propose that members of the tribunals listed in section 59 of the Wales Act 2017 should be appointed by the President of Welsh Tribunals.

Do you agree?

Consultation Question 37.

- 6.69 We provisionally propose that judicial leads and their deputies of the tribunals listed in section 59 of the Wales Act 2017 should be appointed by the Welsh Ministers, with the agreement of the President of Welsh Tribunals.

Do you agree?

³⁸⁸ Lord Chief Justice of England and Wales, Delegation of Statutory Functions – Issue 1 of 2020, p 194. Mental Health Review Tribunal for Wales Rules SI 2008 No 2705, r 11(3) provides that the Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005(1)) to exercise his functions referred to in r 11(2).

The Valuation Tribunal for Wales

- 6.70 We explain above that the appointment of the President of the VTW is unusual, in that candidates are elected by members, rather than appointed. National representatives, of which there are three, are also elected by members. Members and chairs are appointed by an appointment panel.
- 6.71 The practice of elections is long-standing, dating back to before the valuation tribunals were consolidated. It has been abolished in England, where the Lord Chancellor has been responsible for appointing the President of the Valuation Tribunal for England since the enactment of the Local Government and Public Involvement in Health Act 2007. The Lord Chancellor also appoints Vice-Presidents, chairmen and other members to the Valuation Tribunal for England.³⁸⁹
- 6.72 The VTW appointment arrangements are out of line with other devolved tribunals. As set out above, we consider that the procedures for all devolved tribunals should be consistent, unless there is a good policy reason for difference.
- 6.73 However, we are aware that the regulations for appointments procedures for the VTW were revised as recently as 2017. At that point a decision was taken to retain the system of elections for the President and national representatives (but not for chairs). It may be that there are particular reasons why the President and national representatives of the VTW should be elected by members, rather than appointed. We therefore do not make any provisional proposals, but seek views on the VTW appointments procedures.

Consultation Question 38.

- 6.74 We seek views on how the President of the Valuation Tribunal for Wales should be appointed.

Consultation Question 39.

- 6.75 We seek views on how members and chairpersons of the Valuation Tribunal for Wales should be appointed.

School admission and exclusion appeal panels

- 6.76 We propose in paragraphs 3.126 to 3.128 above that the functions of school exclusion appeal panels should be transferred to the SENTW. If that took place, appointments would be governed by the appointment procedures for the SENTW, which are discussed above.

³⁸⁹ Local Government and Public Involvement in Health Act 2007, sch 15 para 2 (A7).

- 6.77 Therefore, we focus here on appointments to school admission panels and to exclusion panels (if their jurisdiction is retained). Their appointment processes are notably less independent than the ones applying to section 59 tribunals; the bodies making the initial decision are also involved in appointing appeal panel members. Moving this responsibility elsewhere would increase the perceived independence of these panels.
- 6.78 It is not clear how easy this would be to do in practice. Some information is available at a local authority level on the operation of school admission panels, but it is inconsistent. Little centralised data is available.
- 6.79 Because of this, we do not make a provisional proposal about appointments to admission or exclusion panels. Instead, we ask whether appointments to school admission and (if they are retained) exclusion appeal panels should be the same as we propose for members of the section 59 tribunals. If our provisional proposals on those appointments were accepted, this would mean that the President of Welsh Tribunals would be responsible for appointing members of these panels.

Consultation Question 40.

- 6.80 We seek views on whether members of school admission and, if retained, exclusion appeal panels should be appointed by the President of Welsh Tribunals.

Role of the Judicial Appointments Commission

- 6.81 The advantage of having one body using standard selection processes across the devolved tribunals is clear, and has been recognised by previous reviews of the tribunal system.³⁹⁰ Consistency is particularly important given that cross-ticketing enables members of section 59 tribunals to sit in other section 59 tribunals, and in the First-tier Tribunal. Utilising the JAC for the selection of appointees ensures that all are assessed to the same standard by the same body.

A separate appointments body for Wales?

- 6.82 There have been suggestions that Wales might benefit from its own appointments body, following the examples of Northern Ireland and Scotland, or at least a dedicated panel of the JAC.³⁹¹ The report of the Welsh Government's 2014 review of devolved tribunals advised that "consideration needs to be given to designing purpose-built machinery for Wales" (referring to the JAC, but also other UK judicial bodies: the Judicial Office, the Judicial Conduct Investigations Office and the Judicial College).
- 6.83 Others have concluded that, at least for the present, the current system meets the needs of the devolved tribunals. Dr Huw Pritchard has noted:

³⁹⁰ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) recommendation 9, p 25.

³⁹¹ Pill LJ, *Speech to the Legal Wales Conference* (2009) p 5 <http://legalwales.org/downloads/legal-wales-conference-cardiff.pdf>

... recent arrangements between Welsh Ministers and JAC show that the system can adapt to accommodate the differences in Wales. It can be argued that this sort of collaboration is in line with the Welsh Government's notion of a distinct jurisdiction where much of the administration of the justice system would initially remain across England and Wales. Establishing a separate JAC may be an ambition in the longer term, especially if a separate jurisdiction was created.³⁹²

- 6.84 In her report "Understanding administrative justice", Dr Sarah Nason reported the opinion expressed in one of the project workshops that:

whilst there is some merit to having Welsh badged solutions to Welsh problems, it could be more efficient to replicate the broader England and Wales approach to judicial appointments, utilising the JAC and confirmation by Welsh Ministers.³⁹³

- 6.85 We provisionally agree. Given the relatively low volume of appointments to the devolved tribunals in Wales, we suspect that the level of investment and administrative effort required to set up a separate appointments body for Wales is not justified at present.

Consultation Question 41.

- 6.86 We provisionally propose that arrangements for selection for appointment by the Judicial Appointments Commission should not be altered as part of our reforms.

Do you agree?

- 6.87 There is a further question regarding how candidates for appointment to the Valuation Tribunal for Wales and school admission and (if retained) exclusion appeal panels should be selected.

- 6.88 Requiring the JAC to make these appointments would ensure that a rigorous procedure is used. The JAC has extensive experience in administering appointments processes, which may well improve the quality of those processes. The volume of appointments procedures that it administers means it is better able to learn from those procedures, and is likely to be quicker in reflecting best practice in public and judicial appointments. Another benefit is its independence. Its involvement in selection processes reinforces the impartiality of the candidates that are appointed. The JAC also has experience of appointing Presidents, members and chairs of the Valuation Tribunal for England. That experience may make it easier for the JAC to take on additional responsibilities in relation to the VTW.

- 6.89 However, it is possible that requiring such an elaborate process may be counterproductive in some cases. Members of the VTW and school admission and

³⁹² H Pritchard, "Building a Welsh jurisdiction through administrative justice" in *Administrative justice in Wales and Comparative Perspectives*, S Nason (ed) (2017) p 236.

³⁹³ S Nason, *Understanding Administrative Justice in Wales* (2015) para 7.12.

exclusion appeals panels are unpaid volunteers. There is a risk that potential candidates might be discouraged by having to undergo JAC procedures.

6.90 JAC procedures are also comparatively expensive. There are currently 85 members of the VTW, which is a comparable figure to other devolved tribunals (the MHRTW, by way of comparison, has 110).³⁹⁴ The number of members of independent appeal panels is unknown.

6.91 We therefore seek views as to how candidates for appointment to the Valuation Tribunal for Wales and school admission and (if retained) exclusion appeal panels should be selected.

Consultation Question 42.

6.92 We seek views on how the President of the Valuation Tribunal for Wales should be selected.

Consultation Question 43.

6.93 We seek views on how members of the Valuation Tribunal for Wales, including chairpersons, should be selected.

Consultation Question 44.

6.94 We seek views on how members of school admission and (if retained) exclusion appeal panels should be selected.

³⁹⁴ Mental Health Review Tribunal for Wales, *Annual Report 2019 – 2020* (2020) p 5.

Chapter 7: Complaints and discipline

- 7.1 The statutory framework governing complaints about the conduct of members of the devolved tribunals is complex, inconsistent and not accessible for tribunal users. The complex picture appears to be the result of a number of interrelated factors: the *ad hoc* development of tribunals, the changes brought about by the Tribunals, Courts and Enforcement Act 2007 and later constitutional reforms under the Constitutional Reform Act 2005. These developments occurred as the devolution settlement expanded, adding an additional layer of complexity.
- 7.2 As a result, responsibility for aspects of the administration of devolved tribunals is now split between the Lord Chancellor and Lord Chief Justice and the Welsh Ministers and President of Welsh Tribunals. This has led to a lack of coherence across the devolved tribunal system as a whole. In some cases members of the devolved tribunals who are now appointed by Welsh Ministers are still disciplined by the Lord Chancellor and Lord Chief Justice.
- 7.3 Tribunals which were set up more recently, as the devolution settlement progressed, tend to be more independent of the system for reserved tribunals. The Adjudication Panel for Wales (“APW”) and the Welsh Language Tribunal (“WLT”), for example, have their own bespoke arrangements.
- 7.4 Having a transparent and consistent framework for complaints and judicial discipline seems to us to be a desirable feature of a reformed system of devolved tribunals. The approach to discipline in particular raises questions of separation, both from government (which should not be able to “punish” judges for decisions it does not like) and from other judges (who might be perceived as overly sympathetic to fellow judges). We explore these tensions below.
- 7.5 We start this chapter by outlining the UK-wide statutory framework which governs complaints. That framework also applies to a number of the devolved tribunals. We then explore the statutory framework governing conduct complaints and disciplinary procedures in the devolved tribunals, before outlining how the other UK jurisdictions approach these issues. Finally, we discuss our proposals for reform.

COMPLAINTS AND DISCIPLINARY PROCESSES IN THE RESERVED TRIBUNALS

Who are complaints made to?

- 7.6 Schedule 14 to the Constitutional Reform Act 2005 (“the 2005 Act”) contains a list of judicial office holders who are appointed by the Lord Chancellor. The Judicial Discipline (Prescribed Procedures) Regulations 2014 (“the 2014 Regulations”) provide that complaints regarding an office holder must be made to the Judicial Conduct Investigations Office (“the JCIO”). Office holder is not defined within those regulations, but it includes an individual who holds a judicial office, the term used in Schedule 14 of the 2005 Act.³⁹⁵ Therefore, it appears that complaints relating to those judicial

³⁹⁵ The Judicial Discipline (Prescribed Procedures) Regulations SI 2014 No 919, reg 3(1).

offices listed in Schedule 14 of the 2005 Act must be made to the JCIO, subject to an exception that we discuss below.

- 7.7 The JCIO is a body which supports the Lord Chancellor and the Lord Chief Justice in their joint responsibility for judicial discipline.³⁹⁶ It operates under the 2014 Regulations, which provide that the Lord Chancellor must (with the agreement of the Lord Chief Justice, Lord President of the Court of Session, and Lord Chief Justice of Northern Ireland) designate officials to perform functions under the 2014 Regulations. Those officials are known collectively as the JCIO. It employs 16 full-time members of staff.³⁹⁷
- 7.8 There is an exception to the general rule in the 2014 Regulations. The Judicial Conduct (Tribunals) Rules 2014 (“the 2014 Tribunals Rules”) provide that complaints about office holders listed as “tribunal members” must be made to the “relevant President”. The list of tribunal members and relevant Presidents is located in the Schedule to the 2014 Tribunals Rules.
- 7.9 The relevant President may delegate their role in hearing complaints to a tribunal member from their own tribunal, so long as that tribunal member has suitable experience. In some cases, if there is no tribunal member who is both available and has suitable experience, the relevant President may delegate their role to another tribunal member or relevant President listed in the Schedule.³⁹⁸

Disciplinary and dismissal powers

- 7.10 As noted above, the Lord Chancellor and (in England and Wales) the Lord Chief Justice³⁹⁹ are jointly responsible for the dismissal and discipline of the judicial office holders listed in Schedule 14 to the 2005 Act.⁴⁰⁰ The 2005 Act gives them the following powers:⁴⁰¹
- (1) The Lord Chancellor can remove a person from office, so long as the prescribed procedures are followed.
 - (2) The Lord Chief Justice may, with the agreement of the Lord Chancellor, offer a judicial office holder formal advice, or a formal warning or reprimand.

³⁹⁶ See <https://judicialconduct.judiciary.gov.uk/about-us/>. The JCIO is constituted under the Judicial Discipline (Prescribed Procedures) Regulations SI 2014 No 919, reg 4.

³⁹⁷ Judicial Conduct Investigations Office, *Annual Report 2018/2019*, p 6. <https://s3-eu-west-2.amazonaws.com/jcio-prod-storage-1xuw6pgd2b1rf/uploads/2019/11/JCIO-Annual-Report-2018-19.pdf>

³⁹⁸ Judicial Conduct (Tribunals) Rules 2014, rr 8 and 13.

³⁹⁹ In the case of judicial office holders exercising functions wholly or mainly in Scotland or Northern Ireland, the judicial role is performed by the Lord President of the Court of Session or Lord Chief Justice of Northern Ireland, respectively; see the Constitutional Reform Act 2005, ss 120(1) and 121(1).

⁴⁰⁰ In some cases a power of dismissal is also found in the legislation creating the relevant tribunal.

⁴⁰¹ Constitutional Reform Act 2005, s 108.

- (3) The Lord Chief Justice may, with the agreement of the Lord Chancellor, suspend a person from judicial office if the person is subject to criminal proceedings or has been convicted of a criminal offence.
- (4) The Lord Chief Justice may, with the agreement of the Lord Chancellor, suspend a senior judge (which includes the President of Welsh Tribunals)⁴⁰² for the period the judge is subject to proceedings for an Address of both Houses of Parliament requesting that the judge be dismissed.⁴⁰³

7.11 The Judicial Executive Board's paper on the accountability of the judiciary observes that the requirement for the Lord Chancellor and Lord Chief Justice to agree in many cases is "fundamentally important". It goes on to point out that:

The fact that both have a role ensures that the independence of an individual judge is not improperly infringed, either by the executive, or internally by another member of the judiciary.⁴⁰⁴

Complaints processes

7.12 This section outlines the complaints processes for tribunal members and other office holders. It also outlines the role of the Judicial Appointments and Conduct Ombudsman ("the JACO").

Complaints regarding tribunal members

- 7.13 The 2014 Tribunals Rules set out the procedure for complaints regarding the conduct of tribunal members. Complaints must contain an allegation of misconduct,⁴⁰⁵ and be made within three months of the latest event or matter complained of.⁴⁰⁶
- 7.14 The relevant President must make an initial assessment of the complaint and dismiss it if, amongst other grounds: it does not adequately particularise the matter complained of, is about a judicial decision or judicial case management, raises no question of misconduct or is without substance.⁴⁰⁷
- 7.15 If the relevant President does not dismiss the complaint, they must follow either the summary process or the procedure provided in Part 4 of the 2014 Tribunals Rules. The summary process provides a number of grounds on which the relevant President may advise the Lord Chancellor and relevant Chief Justice that the tribunal member

⁴⁰² Constitutional Reform Act 2005, s 109 (5)(db).

⁴⁰³ The Wales Act 2017 sch 5 para 10 provides that the President of Welsh Tribunals holds that office during good behaviour, subject to a power of removal by Her Majesty on an address presented to Her by both Houses of Parliament. Para 10(3) provides that it is for the Lord Chancellor to recommend to Her Majesty the exercise of the power of removal.

⁴⁰⁴ Judicial Executive Board, *Accountability of the judiciary* (October 2007) p 6 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/accountability.pdf>.

⁴⁰⁵ Judicial Conduct (Tribunals) Rules 2014, r 17.

⁴⁰⁶ Judicial Conduct (Tribunals) Rules 2014, r 22. Pursuant to r 25 the Tribunal President may extend the time limit in exceptional circumstances.

⁴⁰⁷ Judicial Conduct (Tribunals) Rules 2014, r 34.

should be removed from office without further investigation (for example, if the tribunal member has committed a criminal offence, or is subject to bankruptcy proceedings).⁴⁰⁸

- 7.16 The procedure in Part 4 applies where the relevant President has not dismissed the complaint following an initial assessment and has not applied the summary process.⁴⁰⁹ At this stage the relevant President must determine the facts of the case and whether they amount to misconduct.⁴¹⁰ The relevant President may dismiss the complaint, deal with the complaint informally, recommend that disciplinary action should be taken or ask the relevant Chief Justice to refer the complaint to an investigating judge.⁴¹¹ The President must present their conclusions in a report, which the JCIO then sends to the Lord Chancellor and relevant Chief Justice.⁴¹²
- 7.17 If the President recommends the tribunal member should be removed or suspended from office, the tribunal member can request that a disciplinary panel be convened to consider the complaint.⁴¹³ The JCIO is responsible for convening the disciplinary panel and sending any comments or representations made by the tribunal member to the disciplinary panel.

Complaints regarding other judicial office holders

- 7.18 The procedure for complaints regarding judicial office holders is set out in the Judicial Conduct (Judicial and other office holders) Rules 2014 (“the 2014 Judicial Office Rules”). Under the rules the JCIO must make an initial assessment of the complaint, referred to as the “investigation process”.⁴¹⁴
- 7.19 The JCIO may dismiss the complaint on grounds identical to those listed in the 2014 Tribunals Rules. If the JCIO does not dismiss the complaint after the initial investigation process, they must either deal with the complaint under the summary process or refer the complaint to a nominated judge.⁴¹⁵
- 7.20 Where the JCIO refers the complaint to a nominated judge, the nominated judge carries out the next stages of the complaints procedure. This includes determining the facts of the case and whether the facts amount to misconduct.⁴¹⁶

⁴⁰⁸ Judicial Conduct (Tribunals) Rules 2014, s 41. The “relevant Chief Justice” is the Lord Chief Justice of England and Wales or of Northern Ireland or the Lord President of the Court of Session.

⁴⁰⁹ Above, r 50.

⁴¹⁰ Above, rr 51(a)-(b).

⁴¹¹ Above, r 54. The procedure to be followed by an investigating judge is set out in part 5.

⁴¹² Above, r 64.

⁴¹³ Above, r 72. The disciplinary panel procedure is set out in part 6.

⁴¹⁴ Judicial Conduct (Judicial and other office holders) Rules 2014, r 20.

⁴¹⁵ Above, rr 24 and 25. A nominated judge means an office holder who is nominated by the Lord Chief Justice pursuant to the Judicial Discipline (Prescribed Procedures) Regulations SI 2014 No 919, reg 7.

⁴¹⁶ Above, rr 38(a)-(b).

- 7.21 The nominated judge may dismiss the complaint, deal with it informally, recommend disciplinary action should be taken or refer the complaint to an investigating judge.⁴¹⁷ If the nominated judge recommends that the complaint should be dismissed or disciplinary action should be taken, they must prepare a report.⁴¹⁸
- 7.22 The nominated judge must send the report to the JCIO. Where the report recommends removal or suspension from office, the JCIO must ask the office holder concerned if they want a disciplinary panel to consider the complaint.⁴¹⁹ Similarly to the 2014 Tribunals Rules, the JCIO are responsible for referring a complaint to the disciplinary panel and providing the panel with the nominated judge's report.⁴²⁰
- 7.23 In the year 2018/2019 the JCIO received 1,672 complaints in total, of which 1,173 concerned judicial decisions and case management and were therefore dismissed. The second largest category of complaints (293) alleged inappropriate behaviour and comments. The remainder of complaints (206) related to other matters such as judicial delay, conflict of interest, and failure to meet sitting requirements. The statistics do not specify how many of those complaints concerned tribunal members. 55 complaints led to disciplinary action.⁴²¹

The Judicial Appointments and Conduct Ombudsman

- 7.24 The role of the JACO is set out in section 62 of and Schedule 13 to the 2005 Act. The JACO is appointed by Her Majesty on the recommendation of the Lord Chancellor.⁴²²
- 7.25 The JACO investigates concerns regarding handling of complaints by the JCIO, tribunal presidents and magistrates' advisory committees. Complaints to the JACO can be brought both by individuals who have made a complaint about a judicial office holder and judicial office holders who have been the subject of a conduct complaint.⁴²³ The JACO can review the exercise of disciplinary powers by both the Lord Chancellor and Lord Chief Justice (or Lord President, or Lord Chief Justice of Northern Ireland, as appropriate).⁴²⁴
- 7.26 On receipt of a complaint, the JACO first conducts an initial check to determine whether the complaint falls outside their remit. The next stage is a detailed initial evaluation, known as the "remit check stage", to determine whether a full investigation

⁴¹⁷ The procedure that must be followed by an investigating judge is contained in the Judicial Conduct (Judicial and other office holders) Rules 2014, part 5.

⁴¹⁸ Judicial Conduct (Judicial and other office holders) Rules 2014, r 46.

⁴¹⁹ Above, r 52.

⁴²⁰ Above, r 55.

⁴²¹ Judicial Conduct Investigations Office, *Annual Report 2018/2019*, p 15.

⁴²² Constitutional Reform Act 2005, s 62.

⁴²³ Judicial Appointment and Conduct Ombudsman, *How to complain about the Judicial Conduct Investigation Process*, p 5
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759413/jaco-investigation-booklet.pdf.

⁴²⁴ Constitutional Reform Act 2005, ss 110, 120(5)(b), 121(5)(b) and Judicial Discipline (Prescribed Procedures) Regulations SI 2014 No 1919, reg 22.

is required. Full investigations are conducted by an investigating officer, who will then report back to the JACO. The JACO must prepare a report for the Lord Chancellor and Lord Chief Justice and can recommend the complainant be paid compensation for the loss suffered as a result of maladministration by the JCIO or tribunal president.⁴²⁵ The JACO can also set aside the decision of the JCIO or tribunal president.⁴²⁶

- 7.27 In the year 2019/2020 the JACO received 991 complaints and enquiries, of which 562 related to conduct. Of the conduct complaints 365 were related to the JCIO, 169 related to conduct complaints investigated by Tribunal Presidents and 28 to magistrates' advisory committees. Of the conduct complaints 418 were dismissed as falling outside the JACO remit and only 84 reached the full investigation stage: 30 relating to the JCIO, 25 relating to tribunals, 8 relating to magistrates' advisory committees and 1 relating to magistrates' advisory committees and the JCIO.⁴²⁷

COMPLAINTS PROCESSES WITHIN THE DEVOLVED TRIBUNALS IN WALES

- 7.28 In this section we outline the complaints processes in the devolved tribunals, drawing on the analysis of complaints in the Tribunals, Courts and Enforcement Act 2007 tribunals system where there is overlap in the statutory framework. We also outline the position in the devolved tribunals that do not fall within the UK statutory framework, including the Valuation Tribunal for Wales ("VTW"), school admission and school exclusion appeal panels and the APW.
- 7.29 At the outset we note there are few complaints made against members of devolved tribunals. The table below shows the number of complaints received by the section 59 tribunals and the VTW in 2017/2018, the most recent year for which complete data is available:

Tribunal⁴²⁸	Number of complaints 2017/18
ALTW	0
APW	0
MHRTW	5
RPTW	0
SENTW	1
VTW	1
WLT	0

⁴²⁵ Constitutional Reform Act 2005, ss 111(2) to (4).

⁴²⁶ Constitutional Reform Act 2005, s 111(5).

⁴²⁷ Judicial Appointments and Conduct Ombudsman, *Annual Report 2019/2020* (2020) pp 37 to 38.

⁴²⁸ The abbreviations used in the table 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"), Special Educational Needs Tribunal for Wales ("SENTW"), Valuation Tribunal for Wales ("VTW") and Welsh Language Tribunal ("WLT").

Who are complaints made to?

7.30 A number of the devolved tribunals follow the pattern for complaints and discipline used by the reserved tribunals and outlined in the 2014 Tribunals Rules and 2014 Regulations.

Complaints regarding “tribunal members”

7.31 The Schedule to the 2014 Tribunals Rules lists the following tribunal members and the corresponding relevant President, to whom complaints must be made.⁴²⁹

Column 1 – Tribunal member	Column 2 – President
Member of panel of deputy-chairmen of the Agriculture Land Tribunal appointed under paragraph 14(1) of Schedule 9 to the Agriculture Act 1947	The most senior of the Chairmen of the Agricultural Land Tribunal as determined by the Lord Chief Justice of England and Wales
Member of panel appointed under paragraph 15(1) of Schedule 9 to the Agriculture Act 1947	The most senior of the Chairmen of the Agricultural Land Tribunal as determined by the Lord Chief Justice of England and Wales
Member of the Mental Health Review Tribunal for Wales appointed under paragraph 1 of Schedule 2 to the Mental Health Act 1983	Liaison Judge for the Mental Health Review Tribunal for Wales, designated by the Lord Chief Justice of England and Wales
Member of the chairmen’s panel of the Special Educational Needs Tribunal for Wales appointed under section 333(2) of the Education Act 1996 ⁴³⁰	President of the Special Educational Needs Tribunal for Wales appointed under section 333(2) of the Education Act 1996

7.32 The general pattern adopted by the Schedule is that complaints about tribunal members are heard by the most senior judge within that tribunal. Thus complaints concerning the conduct of chairs of the Special Educational Needs Tribunal for Wales (“SENTW”) and panels of deputy chairs, farmers and owners of agricultural land in the Agricultural Land Tribunal for Wales (“ALTW”), must be made to the relevant

⁴²⁹ The schedule previously contained an entry for the “Chairman of the Mental Health Review Tribunal for Wales appointed under paragraph 3 of Schedule 2 of the Mental Health Act 1983”, with the corresponding President listed as the “Liaison Judge for the Mental Health Review Tribunal for Wales, designated by the Lord Chief Justice of England and Wales”. This entry was removed by the Judicial Conduct (Tribunals) (Amendment of Offices) Rules 2017, r 2(2).

⁴³⁰ This entry was not included in the original schedule but added by the Judicial Conduct (Tribunals) (Amendment of Offices) Rules 2017, r 2(3).

President.⁴³¹ Oddly, members of the land drainage panel of the ALTW are not included in the list.

- 7.33 The position of the MHRTW is incongruous. Unlike the other tribunals, the “relevant President” is not the President of the tribunal. Instead, for what appear to be historical reasons, the Schedule requires complaints to be made to a “liaison judge”.⁴³² In practice no liaison judge has been appointed, and it is not an easy task to identify a liaison role. This has left a lacuna in the existing complaints regime.

Complaints regarding “office holders”

- 7.34 A number of members of the devolved tribunals who are not listed as “tribunal members” in the 2014 Tribunals Rules, are listed in Schedule 14 to the 2005 Act and are therefore “office holders” for the purposes of the 2014 Regulations. They are:

- (1) a Chairman of the ALTW;
- (2) members of rent assessment committees for Wales;⁴³³
- (3) the President of the MHRTW;
- (4) members of the land drainage panel of the ALTW; and
- (5) the President of the SENTW.

- 7.35 The effect of those provisions is that complaints regarding the office holders listed above must be made to the JCIO.

Members of the devolved tribunals outside the statutory framework

- 7.36 A number of members of the devolved tribunals are not listed as either “tribunal members” or “office holders”. Those definitions do not include the President and members of the VTW, the President and members of the WLT, members of the APW, or members of school admission and exclusion appeal panels.

⁴³¹ The SENTW will be renamed the Education Tribunal for Wales by the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (“ALNET”). The Additional Learning Needs and Education Tribunal (Wales) Act 2018 (Supplementary Provisions) Regulations SI 2019 No 794, reg 3, when in force, will make corresponding amendments to sch 14 to the Constitutional Reform Act 2005.

⁴³² Prior to the transfer of the jurisdiction of mental health review tribunals in England to the First-tier Tribunal, there was a liaison judge for the then regionally organised English tribunals.

⁴³³ Rent assessment committees form one of the three types of tribunal that, together, make up the RPTW. The underlying legislation for the other two, the residential property tribunals and leasehold valuation tribunals, states that those jurisdictions can be exercised by a rent assessment committee. References to rent assessment committees can therefore in some cases be read as a global reference to members of the RPTW.

- 7.37 Of those five tribunals, only the VTW has a complaints policy published on its website. That policy is primarily designed to accommodate administrative complaints, rather than complaints about panel members. It states:

This policy covers matters where you feel we have not handled your dealings with us correctly or well at an administrative level. The issues involved could include our being discourteous, or giving you wrong or misleading information, or failing to do something that we should have done when dealing with your enquiry or when processing your appeal.⁴³⁴

- 7.38 The published complaints policy also states that an individual who is not satisfied with the way their complaint was handled by the Tribunal may make a complaint to the Public Services Ombudsman for Wales (“PSOW”). The role of the PSOW is discussed below.
- 7.39 The WLT complaints policy provides that complaints about the personal conduct of a tribunal member will be handled by the judicial lead of the tribunal in question. If the complaint relates to the conduct of the judicial lead, the policy requires the head of the Welsh Tribunals Unit (“WTU”) to forward the complaint to the JCIO.
- 7.40 The complaints policy for the APW exists in draft form. Like the WLT policy it provides for complaints about members to be handled by the judicial lead. However, uniquely, the policy provides that complaints about the judicial lead will either be forwarded to the JCIO or the President of Welsh Tribunals.

Complaints against members of school admission appeal panels and school exclusion appeal panels

- 7.41 Local authorities are responsible for the administration of school admission and exclusion appeal panels. There is no single procedure whereby complaints about members of those panels can be made to the panels themselves, or the local authority, and there is limited information publicly available. Instead users may complain to the Public Services Ombudsman for Wales (“PSOW”) or to the Welsh Ministers.
- 7.42 The Public Services Ombudsman (Wales) Act 2019 provides that the PSOW may investigate maladministration, a failure to provide a service or a failure in a relevant service that is provided.⁴³⁵ Further guidance published by the PSOW suggests its focus is on the conduct of the panel generally, rather than complaints regarding the conduct of individual panel members. For example, the guidance on school admissions states that the PSOW can:

- (1) look at complaints about school admissions procedures in Wales and the admissions appeals process;

⁴³⁴ Valuation Tribunal for Wales, *Complaints Policy and Procedure*, para 3.3. https://www.valuationtribunal.wales/fileadmin/resources/docs/guidance-notes/en/2019/Complaints_Policy.pdf

⁴³⁵ Public Services Ombudsman (Wales) Act 2019, s 11(1) and sch 3.

- (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.⁴³⁶

7.43 Guidance on school exclusions states that the PSOW can consider whether or not the panel followed the correct procedures,⁴³⁷ and whether or not the hearing was conducted fairly.⁴³⁸

7.44 We understand that the PSOW received 27 complaints in relation to school admission and exclusion panels in 2018-2019 and 30 the following year. The majority of these (over 80% in both cases) were not investigated, as there was no evidence of maladministration or service failure.

7.45 Applicants to the school exclusions and admissions panels may also complain to the Welsh Ministers, also on limited grounds.⁴³⁹

The roles of the President of Welsh Tribunals and the Public Services Ombudsman for Wales

7.46 The complaints processes for “tribunal members” and “office holders”, like those for the reserved tribunals, are set out in the 2014 Tribunals Rules and the 2014 Judicial Office Rules and have been described at paragraphs 7.12 to 7.23 above. However, in the devolved tribunal system both the President of Welsh Tribunals and the PSOW play a role in complaints. This is discussed below.

The President of Welsh Tribunals

7.47 The duties and responsibilities of the President of Welsh Tribunals are set out in the Wales Act 2017 (“the 2017 Act”).⁴⁴⁰ The 2017 Act does not expressly provide that the President of Welsh Tribunals is to determine complaints made regarding tribunal members. However, in his first annual report the President states:

The Wales Act 2017 does not purport to define, exhaustively, the duties and powers of the President. It is commonly understood and accepted that the President is the most senior judge within the devolved tribunal system and, accordingly, that he has a supervisory role over each of the Welsh Tribunals which is complementary to the

⁴³⁶ See <https://www.ombudsman.wales/fact-sheets/education-school-admission-appeals/>.

⁴³⁷ Examples given in the guidance include whether: the panel was properly constituted and independent, and the evidence to be relied upon in the hearing was provided in good time before the hearing. <https://www.ombudsman.wales/fact-sheets/education-school-exclusions-appeals/?emergency=1>.

⁴³⁸ Examples given in the guidance include whether the complainant was allowed to call witnesses, and whether the panel satisfied itself: (a) that the events that led to the exclusion happened, and, if so, (b) that exclusion was the appropriate course of action.

⁴³⁹ Welsh Government, *Exclusion from schools and pupil referral units* (November 2019) para 4.13.2. Available at <https://gov.wales/sites/default/files/publications/2019-11/exclusion-from-schools-pupil-referral-units.pdf>. Welsh Government, *School admission appeals code* (2013) paras 6.14 and 6.15. <https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>.

⁴⁴⁰ Wales Act 2017, ss 60 to 63.

duties specifically referred to in the Act. I have exercised that role, in relation to the very small number of complaints which have been received about decision-making in individual cases. In each case reported to me, I have taken appropriate steps to ascertain whether such complaints were investigated reasonably and proportionately in accordance with the complaints' procedure applicable...⁴⁴¹

The Public Services Ombudsman for Wales

- 7.48 The PSOW was created in 2005 by the Public Services Ombudsman for Wales Act 2005, an Act of the UK Parliament. The relevant legislation is now the Public Services Ombudsman for Wales Act 2019 ("the 2019 Act"), an Act of the Senedd. We discuss above the role of the PSOW in relation to school admission and exclusion appeal panels.
- 7.49 The 2019 Act provides that the PSOW can investigate matters on his own initiative or complaints from members of the public concerning:
- (1) alleged maladministration by a listed authority in connection with relevant action;
 - (2) an alleged failure in a relevant service provided by a listed authority; or
 - (3) an alleged failure by a listed authority to provide a relevant service.
- 7.50 Schedule 3 to the 2019 Act sets out listed authorities, including the Welsh Government (which we take to include the WTU). The only devolved tribunals explicitly listed are school admission appeals panels and school exclusion appeals panels.
- 7.51 The 2019 Act specifies a number of excluded matters, which the PSOW cannot investigate. These include action taken by a member of the administrative staff of a relevant tribunal so far as taken at the direction, or on the authority (whether express or implied), of a person acting in the capacity of a member of the tribunal.⁴⁴² A "relevant tribunal" is defined as one specified by regulations made by the Welsh Ministers. No such regulations have yet been made.⁴⁴³ Other excluded matters are action relating to the giving of instruction or to discipline in a school taken by an admission appeal panel, governing body or exclusion appeal panel.⁴⁴⁴

⁴⁴¹ President of Welsh Tribunals, *Annual report 2018 – 2019* (March 2019) p 3.

⁴⁴² Public Services Ombudsman for Wales Act 2019, s 14(1) and sch 2, para 3.

⁴⁴³ Public Services Ombudsman for Wales Act 2019, s 78(1).

⁴⁴⁴ Public Services Ombudsman for Wales Act 2019, s 14(1) and sch 2, para 6.

DISCIPLINARY POWERS WITHIN THE DEVOLVED TRIBUNALS IN WALES

Discipline and dismissal of judicial office holders

- 7.52 As outlined at paragraphs 7.10 and 7.11 above, the Lord Chancellor and Lord Chief Justice exercise disciplinary powers over members of the devolved tribunals listed in Schedule 14 to the 2005 Act.

Discipline and dismissal of other members of devolved tribunals

- 7.53 A number of the members of the devolved tribunals are not listed as office holders in Schedule 14 to the 2005 Act. Specific provision is made for the VTW and the WLT in the legislation which governs those tribunals, and we discuss those below. In relation to the RPTW, only members of rent assessment committees are listed in Schedule 14 to the 2005 Act. However, given that the underlying legislation for residential property tribunals and leasehold valuation tribunals provide that those jurisdictions are exercisable by a rent assessment committee, it appears to us that in practice the 2005 Act extends to all members of the RPTW.⁴⁴⁵
- 7.54 For other persons not listed in Schedule 14 to the 2005 Act, it is not entirely clear who, if anyone, has the power to dismiss and discipline either members of the tribunal or the judicial lead following allegations of misconduct. We have been unable, for example, to identify powers explicitly permitting the dismissal of members or Presidents of the APW or members of school admission and exclusion appeal panels.

The Valuation Tribunal for Wales

- 7.55 The Valuation Tribunal for Wales Regulations 2010 provide that the Welsh Ministers, after consultation with the Appointments Panel, may terminate a member's appointment.⁴⁴⁶ The Welsh Ministers may also terminate the President's appointment following consultation with members of the VTW.⁴⁴⁷
- 7.56 The President of the tribunal can dismiss a chairperson following consultation with the Governing Council, and must dismiss a chairperson under direction of the Welsh Ministers.⁴⁴⁸ It does not appear there are any statutory provisions governing the discipline (short of dismissal) of tribunal members or the President.

The Welsh Language Tribunal

- 7.57 The Welsh Language (Wales) Measure 2011 provides that the Welsh Ministers can dismiss a member of the WLT if satisfied that the member is unfit to continue in the post or unable or unwilling to carry out their duties. The Welsh Ministers must consult with the President of the tribunal before dismissing any member of the tribunal.⁴⁴⁹ The Measure does not provide for disciplinary sanctions short of dismissal.

⁴⁴⁵ For more detail on the nature of the RPTW, see Appendix 1 paras 1.110 to 1.113 below.

⁴⁴⁶ The Valuation Tribunal for Wales Regulations SI 2010 No 713 (W 69), reg 10(3).

⁴⁴⁷ Above, reg 11(6).

⁴⁴⁸ Above, reg 12(5).

⁴⁴⁹ Welsh Language (Wales) Measure 2011 (nawm 1), sch 11, para 12.

COMPLAINTS AND DISCIPLINARY PROCESSES IN SCOTLAND AND NORTHERN IRELAND

Scotland

7.58 The Tribunals (Scotland) Act 2014 organised devolved Scottish tribunals into two tiers; the First-tier Tribunal for Scotland (“the FTTS”) and Upper Tribunal for Scotland (“the UTS”). Tribunals in Scotland are overseen by the President of Scottish Tribunals who is appointed by the Lord President.⁴⁵⁰ The Scottish tribunals are made up of ordinary, legal and judicial members.⁴⁵¹

Complaints against ordinary and legal members

7.59 The procedure for determining complaints regarding ordinary and legal members is set out in the Complaints About Members of the Scottish Tribunals Rules 2018 (“the 2018 Rules”). The Rules apply to ordinary and legal members of both the FTTS and UTS.⁴⁵²

7.60 Complaints under the 2018 rules 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).⁴⁵³ The Judicial Office carries out an initial assessment of the complaint, and then either dismisses it or refers it to the President of Scottish Tribunals.⁴⁵⁴

7.61 If the President of Scottish Tribunals thinks the allegation, if substantiated, would raise a possible question of fitness for office, the Judicial Office must inform the Lord President. The Lord President will then decide whether to request the establishment of a fitness assessment tribunal. The First Minister may dismiss an ordinary or legal member of the Scottish tribunals if a fitness assessment tribunal has concluded the member is unfit to hold office.⁴⁵⁵

7.62 If a fitness assessment tribunal is not established, the Judicial Office must refer the allegation to a person nominated by the President of the Scottish Tribunals for investigation (known as the nominated judicial office holder).⁴⁵⁶ The nominated judicial

⁴⁵⁰ Tribunals (Scotland) Act 2014, s 4(1) and (2).

⁴⁵¹ Tribunals (Scotland) Act 2014, s 13(1). Ordinary members are those satisfying criteria, if any, prescribed by the Scottish Ministers and legal members are, broadly speaking, legal practitioners: Tribunals (Scotland) Act 2014, sch 3. A judicial member is defined in Tribunals (Scotland) Act 2014, s 19 and includes (1) sheriffs authorised to act as a member of the FTTS (2) the Lord President or the President of tribunals and (3) a sheriff, judge of the Court of Session or Chairman of the Scottish Land Court who is authorised to act as a member of the UTS.

⁴⁵² Complaints About Members of the Scottish Tribunals Rules 2018, r 2(1). The President of the Mental Health Tribunal for Scotland has also appointed the Judicial Office for Scotland to handle complaints made against members of the tribunal. The policy can be found at https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/complaints/complaintsaboutmembersofthescottishtribunalsrules2018.pdf?sfvrsn=8546be94_2

⁴⁵³ Complaints About Members of the Scottish Tribunals Rules 2018, r 5(1).

⁴⁵⁴ Complaints About Members of the Scottish Tribunals Rules 2018, r 11.

⁴⁵⁵ Tribunals (Scotland) Act 2014, sch 8, para 23.

⁴⁵⁶ Complaints About Members of the Scottish Tribunals Rules 2018, r 12(2).

office holder must produce a report determining the facts of the matter, whether the allegation is substantiated, and if so whether the Lord President should give the tribunal member formal advice, a formal warning, or a reprimand.⁴⁵⁷ It is then considered by the Lord President, who determines the appropriate sanction.⁴⁵⁸

- 7.63 There appear to be very few complaints made against ordinary and legal tribunal members. From 1 September 2018 to 31 August 2019, the Judicial Office received only two complaints concerning the conduct of tribunal members.⁴⁵⁹

Complaints against judicial members

- 7.64 The procedure for determining complaints regarding judicial members of the Scottish tribunals is set out in the Complaints About Members of the Scottish Judiciary Rules 2017 (“the 2017 Rules”).
- 7.65 The procedure is similar to that in the 2018 Rules. However, under the 2017 Rules the functions of the President of Scottish Tribunals are carried out by the disciplinary judge. The disciplinary judge is appointed by the Lord President and is a judge of the Inner House of the Court of Session.⁴⁶⁰ The disciplinary judge supervises the operation of the 2017 Rules and reports to the Lord President as appropriate.
- 7.66 As is the case under the 2018 Rules, the nominated judicial office holder’s report is submitted to the Lord President who then must decide whether to give the judicial office holder formal advice, a formal warning or a reprimand.⁴⁶¹

The Judicial Complaints Reviewer

- 7.67 The role of the Judicial Complaints Reviewer (“the JCR”) was created by the Judiciary and Courts (Scotland) Act 2008.⁴⁶² Initially the role applied to judicial office holders but the Tribunals (Scotland) Act 2014 expanded its remit to include Scottish tribunals.⁴⁶³ The JCR role is twofold:

- (1) It reviews investigations into complaints against judicial office holders which are undertaken by the Judicial Office for Scotland to check that they have been carried out in accordance with the 2017 and 2018 Rules. If the JCR considers

⁴⁵⁷ 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.

⁴⁵⁸ Complaints About Members of the Scottish Tribunals Rules 2018, rr 13(3)(c) and 16(2).

⁴⁵⁹ This was a decrease of four for the same period in 2017/2018. Judicial Complaints Reviewer, *Annual Report 2018/2019*, p 7.
<https://www.judicialcomplaintsreviewer.org.uk/sites/default/files/publications/JCR%20Annual%20Report%202018-19.pdf>.

⁴⁶⁰ Complaints About Members of the Scottish Judiciary Rules 2017, r 3(1).

⁴⁶¹ The Lord President’s disciplinary powers in regard to judicial office holders is found in the Judiciary and Courts (Scotland) Act 2008 asp 6, s 29(1).

⁴⁶² Judiciary and Courts (Scotland) Act 2008 asp 6, s 30.

⁴⁶³ Tribunals (Scotland) Act 2014, s 9(d).

that an investigation has not been conducted in accordance with the Rules they must refer the case to the Lord President.⁴⁶⁴

- (2) It makes written representations to the Lord President regarding procedures for investigating conduct of judicial office holders. The Lord President must have regard to the JCR's representations.⁴⁶⁵

7.68 The remit of the JCR is narrow. It cannot consider the merits of a complaint, require a complaint to be reinvestigated or overturn a decision. Neither can it order the payment of compensation, the making of an apology or other redress.

7.69 Between 1 September 2018 and 31 August 2019, the JCR received seven requests for review. All of those requests were made in relation to judicial office holders, rather than tribunal members. This number appears to be gradually declining. In the same period in 2017/18 there were 17 requests for review and in 2015/16 there were 37.

Northern Ireland

7.70 The Justice (Northern Ireland) Act 2002 requires the Lord Chief Justice of Northern Ireland to prepare a code of practice relating to any complaints against a person who holds a protected judicial office.⁴⁶⁶ Section 16(2) provides that the Code must include provision for complaints to be referred to a tribunal if they:

- (1) involve a serious allegation of misbehaviour or inability to perform the functions of an office, and
- (2) have a reasonable prospect of being substantiated.

7.71 On 3 April 2006 the Lord Chief Justice of Northern Ireland issued a Code of Practice entitled, *Complaints about the Conduct of Judicial Office Holders*. The Code has been periodically revised, most recently in February 2013.

7.72 The Code provides that any complaint must be made promptly and, save in exceptional circumstances, within three months of the conduct complained of.⁴⁶⁷ The Code has a procedure for "serious" complaints,⁴⁶⁸ and a separate procedure for "less serious" complaints.⁴⁶⁹

⁴⁶⁴ Judiciary and Courts (Scotland) Act 2008 asp 6, s 30(2)(b).

⁴⁶⁵ Judicial Complaints Reviewer, *Annual Report 2018/2019*, p 5.

⁴⁶⁶ Justice (Northern Ireland) Act 2002, s 16(1). S 2(5) defines a protected judicial office as the office of Lord Chief Justice of Northern Ireland, the office of Lord Justice of Appeal or a listed judicial office. Sch 1 contains a list of judicial offices and includes judges, Tribunal Presidents and tribunal members.

⁴⁶⁷ *Code of Practice issued by the Lord Chief Justice under Section 16 of the Justice (Northern Ireland) Act 2002*, para 2.6. https://judiciaryni.uk/sites/judiciary/files/media-files/14G.%20CODE%20OF%20PRACTICE%20Judicial%20~%2028%20Feb%2013%20%28Final%29%20updated%20with%20new%20comp.___1.pdf

⁴⁶⁸ Defined as a complaint which fulfils both limbs of Justice (Northern Ireland) Act 2002, s 16(2).

⁴⁶⁹ *Code of Practice issued by the Lord Chief Justice under Section 16 of the Justice (Northern Ireland) Act 2002*, para 2.7.

- 7.73 The Code provides that complaints should be sent to the complaints office in the Lord Chief Justice of Northern Ireland's Office. Complaints about tribunal members may be made to the Tribunal President's Office.⁴⁷⁰ The relevant complaints officer will determine whether the complaint concerns a relevant judicial office holder and relevant judicial conduct.
- 7.74 Any serious complaints are retained by the Lord Chief Justice for Northern Ireland's Office and will be referred to a complaints tribunal.⁴⁷¹ The complaints tribunal provides advice on how to deal with the complaints. Following a hearing the tribunal must produce a report and any recommendations made will be considered by the Lord Chief Justice of Northern Ireland. The Lord Chief Justice of Northern Ireland can issue advice, recommend training, issue informal and formal warnings or refer the case to a statutory tribunal to consider removing the individual from office.⁴⁷²
- 7.75 Less serious complaints are investigated by a complaints officer in the Lord Chief Justice for Northern Ireland's Office (in the case of judicial members) or a complaints officer in the Tribunal President's Office (in the case of tribunal members). The complaints officer will submit a report and the Lord Chief Justice of Northern Ireland or Tribunal President will decide what action should be taken.

REFORM OF COMPLAINTS PROCESSES IN THE DEVOLVED TRIBUNALS

- 7.76 In this section, we discuss possible reforms that could be made to complaints processes within the Welsh tribunals. This includes both complaints relating to the administration of a tribunal and the conduct of members. While we see no reason why these policies could not be contained within the same document (and, indeed, there are good reasons why they should be), the two types of complaints play different roles. Complaints about the conduct of members and tribunal presidents may result in discipline of tribunal members. Those disciplinary processes are discussed separately below at paragraph 7.114 onwards.

A uniform complaints policy and procedure

- 7.77 Previous work on Welsh tribunals has called for a more consistent complaints procedure across the Welsh tribunals. In its 2010 report the AJTC recommended that the Welsh Assembly Government and Welsh tribunal judicial leads establish a complaints policy and procedure for all Welsh tribunals, based on guidance from the PSOW.⁴⁷³

⁴⁷⁰ *Code of Practice issued by the Lord Chief Justice under Section 16 of the Justice (Northern Ireland) Act 2002*, para 4(1).

⁴⁷¹ *Code of Practice issued by the Lord Chief Justice under Section 16 of the Justice (Northern Ireland) Act 2002*, Annex C gives guidance on the type of complaint that is likely to be considered serious. The examples include making exceptionally inappropriate remarks, such as comments on a person's religion or racial background, and failure to disclose a serious and fundamental conflict of interest.

⁴⁷² *Code of Practice issued by the Lord Chief Justice under Section 16 of the Justice (Northern Ireland) Act 2002*, para 8.2 refers to a statutory tribunal convened pursuant to s 9 of the Justice (Northern Ireland) Act 2002. S 9 was repealed by the Justice Act (Northern Ireland) 2015 para 1.

⁴⁷³ See recommendation 11 of the Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operation in Wales* (2010) p 33.

7.78 This recommendation has not been fully implemented, with complaints procedures for Welsh tribunals continuing to be inconsistent and based in a number of different pieces of legislation. Some tribunals also fall outside the statutory regime outlined at paragraphs 7.12 to 7.23 above. This means that some of those tribunals, specifically the WLT and the APW (whose policy exists in draft form only) have developed their own arrangements. Other tribunals falling outside the statutory regime do not have complaints policies which apply to the conduct of tribunal members at all, specifically the VTW and school admission and exclusion appeal panels.

7.79 Because of this complexity, it is difficult for the public to ascertain which complaints procedures apply to which tribunals. We have heard from some members of the devolved tribunals that even they are unsure which procedures apply to their tribunals. This is a cause for concern. If members of tribunals are not aware which rules apply, then the procedures are unlikely to be accessible for tribunal users.

7.80 That there is no consistent policy at present may be due to differences of view about the content of the policy. Giving evidence to the Commission on Justice in Wales, the President of the Mental Health Review Tribunal for Wales, Judge Kirby noted:

There has been pressure to standardise complaints procedures across the devolved Welsh tribunals, based on the procedure developed by the President of the Welsh Language Tribunal, which involves an initial triage by the WTU. I have resisted that. Our complaints system works for the MHRTW and, from a perspective of judicial independence, I think our procedure is more appropriate.⁴⁷⁴

7.81 These concerns may be allayed if the WTU is reformed into either an executive agency or non-ministerial department.⁴⁷⁵ We discuss the possibility of directing administrative complaints to the WTU at paragraph 7.96 below.

7.82 In view of the current level of complexity, we take the preliminary view that a consistent complaints policy would improve accessibility for tribunal users and would also be easier to navigate for tribunal members and judicial leads.

7.83 As well as being consistent, it is important that complaints policies are accessible. During our research we found that complaints policies for a number of the devolved tribunals are not easily accessible online. As the Administrative Justice and Tribunals Council highlighted in its 2010 report, accessibility for users is a key principle in any tribunal system.⁴⁷⁶ We agree and think accessibility would be improved if complaints policies for all devolved tribunals are published online, including for users who may access the policies on a mobile device, and available in hard copy upon request.

⁴⁷⁴ Commission on Justice in Wales: Oral Evidence Session (22 March 2019) p 5. Transcript available at https://gov.wales/sites/default/files/publications/2019-05/Oral%20evidence%20to%20the%20Justice%20Commission%20on%20Tribunals%20in%20Wales_0.pdf

⁴⁷⁵ The principle of judicial independence is discussed in detail in Chapter 10.

⁴⁷⁶ Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operation in Wales* (2010) para 61.

School admission appeal panels and school exclusion appeal panels

- 7.84 Our general position, as set out above, is that tribunal users ought to be able to complain about both the administration of a panel and the conduct of its members. Above, we also outlined the PSOW role in determining complaints about school admission and exclusion appeal panels. We are unsure however whether the PSOW's role is sufficient in this regard, or whether there is a need for another complaints policy. It appears that the PSOW can currently investigate matters relating to the administration of the panels, and also the conduct of members, insofar as that relates to the panel behaving improperly. We would welcome consultees' views on this point.

The Valuation Tribunal for Wales

- 7.85 The VTW's published complaints policy does not make it clear that an individual can formally complain about the conduct of a member. We think this is unsatisfactory. We provisionally propose at paragraphs 3.98 to 3.103 above that the VTW should be brought within the Welsh tribunals system. In that case it would be subject to the overarching proposals for all tribunals we discuss below. However, regardless of whether our provisional proposal at Consultation Question 6 is accepted, we provisionally propose that the VTW should have a complaints policy relating to the conduct of members and of the President of the VTW. We make that provisional proposal below.

Consultation Question 45.

- 7.86 We provisionally propose that there should be standardised complaints policies and procedures that applies to all devolved tribunals.

Do you agree?

Consultation Question 46.

- 7.87 We provisionally propose that the complaints policies should be made available both online and in hard copy on request.

Do you agree?

Consultation Question 47.

- 7.88 We seek views on whether there is a need for a complaints policy in relation to school admission and (if retained) exclusion appeal panels, in addition to the role currently played by the Public Services Ombudsman for Wales.

Consultation Question 48.

7.89 We provisionally propose that there should be provision for complaints regarding the conduct of members of the Valuation Tribunal for Wales.

Do you agree?

Who should investigate complaints?

The Welsh tribunals: complaints about conduct

- 7.90 As outlined above, at present complaints relating to the conduct of those defined as “tribunal members” are made to persons listed as the “relevant President” in the 2014 Tribunals Rules and complaints against others defined as “judicial office holders” are made to the JCIO. This means that, in general, complaints about tribunal presidents or chairs (referred to collectively below as “judicial leads”) are made to, and the investigation of them supervised by, the JCIO, while complaints about members are investigated by those judicial leads. The logic to this is presumably that tribunal presidents are best placed to deal with most complaints about matters relating to their tribunal. It would however be inappropriate for them to hear complaints relating to their own conduct.
- 7.91 There are exceptions to this pattern. We highlight above at paragraph 7.33 above the case of the MHRTW: the “relevant President” is defined as a “liaison judge”, rather than the President of the tribunal. A further inconsistency is that members of land drainage panels of the ALTW and members of rent assessment committees are not listed as tribunal members, meaning that under the 2014 Judicial Office Rules complaints must be made to the JCIO rather than the relevant judicial lead.
- 7.92 Moreover, some members of the section 59 tribunals do not fall within the definition of either tribunal member or judicial office holder. This includes members of the WLT and APW. This means those tribunals have had to draft their own complaints policy. We understand the WLT is the subject of an agreement with the JCIO which permits the JCIO to handle complaints made against members or the President (disciplinary powers, discussed further below, remain with the Welsh Ministers).
- 7.93 We think the current position regarding complaints is too complex, and could confuse tribunal users. We provisionally consider that a preferable option would be a uniform complaints procedure for all devolved tribunals and that:
- (1) complaints regarding the conduct of members of tribunals should be investigated by the relevant judicial lead; and
 - (2) the investigation of complaints regarding the judicial leads should be coordinated by the JCIO, or an equivalent body.
- 7.94 Our provisional view (discussed below) is that the President of Welsh Tribunals should have a formal role in the discipline of tribunal members and judicial leads. In our view it would be undesirable for the President to exercise those powers while also being

involved in the investigation or review of complaints, which is why we suggest that complaints about judicial leads should be directed to the JCIO, or an equivalent body.

- 7.95 We are aware that for some of the smaller Welsh tribunals, judicial leads of those tribunals may not feel that they have sufficient distance to investigate complaints about members. In those cases, we suggest that the President of Welsh Tribunals could instead nominate another judicial lead to undertake an investigation into the complaint. This approach could also be taken where the complaint against the tribunal member has been made by the judicial lead in question, and it would be inappropriate for the judicial lead to investigate the complaint.

The Welsh tribunals: complaints about administration

- 7.96 Our provisional view is that complaints about the administration of tribunals should be dealt with by the tribunal secretariat. For most cases this would be what is currently the WTU. A reformed WTU, as discussed in Chapter 9, is likely to have a governing body with a chief executive, who could be the ultimate arbiter of complaints about administration (a similar procedure to that currently used by the VTW).

The role of the JCIO

- 7.97 If implemented, our provisional proposals would remove the role of the Lord Chancellor and Lord Chief Justice in the disciplinary processes for members of the devolved tribunals (see paragraphs 7.121 to 7.133 below).
- 7.98 As noted above, the JCIO supports the Lord Chancellor and Lord Chief Justice in their joint responsibility for judicial discipline. We think removing the role of the Lord Chancellor and Lord Chief Justice in discipline requires moving away from the current position in which the JCIO is automatically required to hear complaints regarding judicial office holders. However, our provisional proposals would not preclude the Welsh Government reaching a section 83 agreement with the JCIO to adopt a procedure similar to that set out in the 2014 Tribunals Rules.⁴⁷⁷

Consultation Question 49.

- 7.99 We provisionally propose that there should be a uniform procedure for complaints about the administration of the devolved tribunals.

Do you agree?

⁴⁷⁷ This refers to an agreement pursuant to Government of Wales Act 2006, s 83 which permits the Welsh Ministers to reach agreements with agencies that can assist the Welsh Ministers in discharging their functions.

Consultation Question 50.

7.100 We provisionally propose that there should be a uniform procedure for complaints about the conduct of members and judicial leads of the devolved tribunals.

Do you agree?

Consultation Question 51.

7.101 We provisionally propose that complaints regarding members of the tribunals listed in section 59 of the Wales Act 2017 should be investigated by the relevant judicial lead.

Do you agree?

Consultation Question 52.

7.102 We provisionally propose that the investigation of complaints regarding judicial leads of tribunals listed in section 59 of the Wales Act 2017 should be coordinated by the Judicial Conduct Investigations Office, or an equivalent body.

Do you agree?

School admission and exclusion appeal panels

7.103 We discuss above whether there is a need for school admission and (if retained) exclusion appeals panels to have a uniform complaints procedure. If this question is answered in the affirmative, who should investigate those complaints? The complaints structure outlined above could not be applied to school admission and school exclusion appeal panels, as they do not have a judicial lead. We propose in Chapter 3 that the jurisdiction of school exclusion appeal panels should be transferred to the SENTW, which would mean that complaints in respect of school exclusion cases would be treated in the same way as for other tribunals.

7.104 However, we do not propose amalgamating school admission panels with the SENTW, meaning they would continue to lack a judicial lead. Who then should investigate complaints about members of panels? Our provisional view is that a complaints procedure that directs complaints about members of panels to local authorities may not sufficiently uphold the principle of independence. Local authorities are parties to the appeals as well as being responsible for funding the panels. We would not want to make a proposal that adversely impacts judicial independence or the perception of it.

7.105 Other possibilities might include expanding the remit of the PSOW beyond that of maladministration (if that is felt to be insufficient). Alternatively complaints could be considered by:

- (1) other local authorities;
- (2) the President of the SENTW; or
- (3) the President of Welsh Tribunals.

7.106 In the currently decentralised structure one possibility is that complaints regarding the conduct of panel members could be made to a different local authority not responsible for convening the panel. This would ensure a degree of independence. However, we provisionally consider it preferable for complaints about members of all devolved tribunals to be subject as far as possible to a uniform procedure.

7.107 If it is decided that appeals from school admission appeal panels should lie to the SENTW (as discussed at paragraphs 4.59 to 4.65 above) then it might be appropriate for the President of the SENTW to investigate complaints. Alternatively, the President of Welsh Tribunals could be responsible for investigating conduct complaints. However, it might be thought that the President of Welsh Tribunals is too senior to consider complaints about members of school exclusion and school admission appeal panel. It would also be difficult for the President to both investigate complaints and exercise disciplinary powers, as discussed at paragraph 7.94 above. We welcome consultees' views on this issue.

Consultation Question 53.

7.108 We seek views on who should investigate complaints made regarding the conduct of members of school admission and exclusion appeal panels.

The Valuation Tribunal for Wales

7.109 The published complaints procedure for the VTW provides that administrative complaints must be made to the Executive Manager. If the complainant is not satisfied with the Executive Manager's investigation the complaint can then be escalated to the Chief Executive Officer ("CEO").⁴⁷⁸ If the individual is still dissatisfied they may make a complaint to the PSOW.

7.110 We do not think this complaints procedure would be suitable for complaints regarding the conduct of members of the VTW, given that the CEO is a member of administrative staff. We think the preferable position, as with other devolved tribunals, is for complaints about judicial members to be investigated by the President. We suggest that any new complaints policy should provide for complaints about the

⁴⁷⁸ Valuation Tribunal for Wales, *Complaints Policy and Procedure*, para 4.
https://www.valuationtribunal.wales/fileadmin/resources/docs/guidance-notes/en/2019/Complaints_Policy.pdf

conduct of members to be investigated by the President of the VTW. This would make the position consistent across the devolved tribunals.

7.111 Although the VTW is not currently listed as a Welsh tribunal in the Wales Act 2017, we have taken the provisional view at paragraphs 3.98 to 3.103 above that it should be brought into the same structure as the existing section 59 tribunals. To ensure the position is consistent across the devolved tribunals we provisionally propose, as we did in relation to the section 59 tribunals, that complaints regarding the President of the VTW should be investigated by the JCIO or an equivalent body. We welcome consultees' views on this issue.

Consultation Question 54.

7.112 We provisionally propose that complaints regarding the conduct of members of the Valuation Tribunal for Wales should be investigated by the President of the tribunal.

Do you agree?

Consultation Question 55.

7.113 We provisionally propose that complaints regarding the conduct of the President of the Valuation Tribunal for Wales should be investigated by the Judicial Conduct Investigations Office or an equivalent body.

Do you agree?

REFORM OF DISCIPLINARY POWERS IN THE DEVOLVED TRIBUNALS

7.114 Currently the Lord Chancellor has the power to dismiss members of the devolved tribunals listed in Schedule 14 of the 2005 Act. The Lord Chief Justice can, with the agreement of the Lord Chancellor, also issue formal advice, formal warnings and reprimands. The process varies in relation to other members and judicial leads of devolved tribunals. In the case of the Welsh Language Tribunal, the Welsh Ministers may dismiss members, but not the President.⁴⁷⁹

7.115 As with complaints processes, we think there should be consistency in who exercises the power to discipline and, ultimately, dismiss members of the devolved tribunals and their judicial leads. We also think there should be consistency in the disciplinary processes which are relied upon. We outline our proposals below.

⁴⁷⁹ Welsh Language Measure 2011 (nawm 1), sch 11 para 12.

The procedure for investigating complaints against tribunal members and judicial leads

Tribunal members

- 7.116 Our provisional view is that the 2014 Tribunals Rules provide a useful model for disciplinary procedures which could be adopted as a uniform practice across the devolved tribunals (see paragraphs 7.12 to 7.133 above).
- 7.117 For complaints which are not immediately dismissed, that would mean that the judicial lead would have to decide whether to follow a summary process (for example, if a tribunal member has committed a criminal offence), or undertake a more thorough investigation. That investigation would require the judicial lead to determine the facts of the case and whether they amount to misconduct. The findings of that investigation would be included in a report which would be submitted to the holder of disciplinary powers (who this should be is discussed further below).
- 7.118 If the tribunal lead decided to advise that a tribunal member should be removed or suspended from office, the tribunal member would be able to request that a disciplinary panel be convened to consider the complaint.

Judicial leads

- 7.119 For judicial leads, a similar process could be adopted to that which currently applies to office holders under the 2014 Judicial Office Rules (see paragraphs 7.12 to 7.18 above). That would involve the JCIO (or an equivalent body) referring the matter to a nominated judge. If the nominated judge concluded that disciplinary action was required, then the JCIO could offer the judicial lead the option of a disciplinary panel to consider the complaint. The conclusions of the panel would then be provided to the holder of disciplinary powers.
- 7.120 There is a difficulty in transposing the 2014 Judicial Office Rules procedure to the devolved tribunals, because of the small number of senior judges within the system who are able to act as a “nominated judge”. A nominated judge could instead be selected from elsewhere in the judiciary.

Who should hold the disciplinary powers?

- 7.121 As explained above, we think that the most important principle is that the exercise of disciplinary powers should be consistent. The next question is who should exercise them. The persons or offices who could be made responsible for discipline appear to us to be the following (or a combination of them):
- (1) the Lord Chief Justice and/or Lord Chancellor;
 - (2) the Welsh Ministers;
 - (3) the President of Welsh Tribunals; or
 - (4) the Counsel General.

Tribunal members

7.122 We take the provisional view that the power to dismiss and discipline members of the devolved tribunals, who are not judicial leads, should be exercised by the President of Welsh Tribunals. This should include members of the WLT, the APW and the VTW. These powers could also extend to school admission and (if retained) exclusion appeal panels.

7.123 We have also considered whether the better option would be to make the Lord Chancellor and/or the Lord Chief Justice responsible for discipline across all Welsh devolved tribunals. We doubt the appropriateness of giving a role to the Lord Chancellor, a UK Minister. Equally however we think that making the Welsh Ministers solely responsible for disciplining tribunal members would raise legitimate concerns about judicial independence.

7.124 The argument for involving the Lord Chief Justice is that the LCJ is the head of the judiciary in England and Wales. Nevertheless, at paragraphs 6.64 to 6.69 above we have provisionally proposed transferring the Lord Chief Justice's current role in appointments to the President of Welsh Tribunals. Whilst recognising that powers of discipline and dismissal should be accompanied by stronger protections than powers of appointment, because of the reputational repercussions, we provisionally consider that the President of Welsh Tribunals occupies a sufficiently senior role to discipline or dismiss members of the devolved tribunals on the grounds of misconduct. The President is also far enough removed from the day-to-day working of the tribunals and tribunal members to be able to carry out the role with integrity, following the process that we have proposed in paragraphs 7.116 to 7.118 above.

Consultation Question 56.

7.125 We provisionally propose that the President of Welsh Tribunals should have the power to discipline and dismiss members of the tribunals listed in section 59 of the Wales Act 2017.

Do you agree?

Consultation Question 57.

7.126 We provisionally propose that the President of Welsh Tribunals should have the power to discipline and dismiss members of the Valuation Tribunal for Wales.

Do you agree?

Consultation Question 58.

- 7.127 We seek views on whether the President of Welsh Tribunals should have the power to discipline and dismiss members of school admission and (if retained) exclusion appeal panels.

Judicial leads

- 7.128 Our preliminary view is that the President of Welsh Tribunals should not be solely responsible for exercising disciplinary powers over judicial leads. Even with the support of a disciplinary panel (as described above), it is likely that the President of Welsh Tribunals works too closely with judicial leads on a day-to-day basis to have the appropriate distance to be solely responsible for dismissing them. This could negatively impact the perceived independence of the process.
- 7.129 Another possibility might be to make the President of Welsh Tribunals jointly responsible for discipline with the Counsel General. As the law officer of the Welsh Government, the Counsel General is a senior legal figure within Wales. While a member of the Welsh Government, the Counsel General does exercise some statutory functions independently of Welsh Government, and in the public interest.⁴⁸⁰ He or she would be fully versed in the need to respect the independence of the judiciary. There is a risk, however, that the role of the Counsel General as chief legal adviser to the Welsh Government, and possible involvement in legal cases, may be incompatible with playing a part in judicial discipline.
- 7.130 Instead, we provisionally propose that judicial leads should be disciplined and dismissed by the President of Welsh Tribunals, but with the concurrence of the Welsh Ministers. This procedure would have similarities with the position in the UK, whereby the Lord Chancellor and Lord Chief Justice are jointly responsible for exercising disciplinary powers. The Courts and Judiciary website describes the benefits of this joint approach:

For a government minister to be involved in this way in judicial discipline may appear to strain the principle of judicial independence. However, the procedure helps to dispel any suspicion that judges would not wish to take action against a fellow judge, and also provides a safeguard. Equally, making the responsibility for discipline a joint responsibility of the Lord Chief Justice and the Lord Chancellor ensures that the suspicion cannot arise that judges can be disciplined on political grounds: a further safeguard of judicial independence and the rule of law.⁴⁸¹

- 7.131 We accept it is a fundamental aspect of the rule of law that judges cannot be disciplined on political grounds, and appreciate that any involvement of the Welsh

⁴⁸⁰ For further analysis of the role of Counsel General, see Form and Accessibility of the Law Applicable in Wales (Law Com No 366) para 3.41 https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/10/lc366_form_accessibility_wales_English.pdf

⁴⁸¹ See <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/jud-conduct/>.

Ministers in discipline of judges raises concerns about protecting the independence of the judiciary. Our provisional view is that these concerns are alleviated by restricting the power to one of concurrence in a decision of the President of Welsh Tribunals and would be further alleviated by the imposition on Welsh Ministers of a statutory duty to respect judicial independence (discussed further in Chapter 10).

7.132 We welcome consultees' views on this issue.

Consultation Question 59.

7.133 We provisionally propose that judicial leads of the tribunals listed by section 59 of the Wales Act 2017 should be disciplined and dismissed by the President of Welsh Tribunals, with the concurrence of the Welsh Ministers.

Do you agree?

Consultation Question 60.

7.134 We provisionally propose that the President of the Valuation Tribunal for Wales should be disciplined and dismissed by the President of Welsh Tribunals, with the concurrence of the Welsh Ministers.

Do you agree?

Consultation Question 61.

7.135 We seek views on whether any further safeguards attaching to the exercise of disciplinary powers are required to protect the independence of the judiciary.

Chapter 8: The President of Welsh Tribunals

- 8.1 The creation of the office of President of Welsh Tribunals (“PWT”) in 2017 has had a considerable impact on devolved tribunals in Wales. Grouping some of the tribunals under the PWT’s leadership has given them a figurehead and a common identity. In the past two years the PWT’s role in facilitating communication among the tribunals judiciary and with the Welsh Government, and in representing the interests of the tribunals to the Senedd, has been instrumental in building and developing a common system of tribunals. The office is also of significance to justice in Wales as a whole, being the first senior judicial appointment relating only to Wales since 1830.
- 8.2 The provisional proposals made in this Consultation Paper, would, if pursued, entail the creation of a unified tribunal to replace the existing individual tribunals. The PWT would play an important role in steering tribunals through this process, ensuring that the benefits of consolidation are achieved while also making sure that practical experience and valuable ways of working are preserved.
- 8.3 Some particular aspects of the role of PWT are considered elsewhere in this Consultation Paper. For example, we make a provisional proposal in Chapter 3 that the President, together with the Welsh Ministers, decide upon the chamber structure for a unified first-tier tribunal, and in Chapter 5 we discuss the creation of a Tribunal Procedure Committee, chaired by the President. We make provisional proposals in Chapter 6 that the President should appoint tribunal members and be involved in the appointment of judicial leads. In Chapter 7 we explore the role the President could play in relation to discipline and complaints. We also consider an enhanced role for the President within a reformed Welsh Tribunals Unit in Chapter 9.
- 8.4 In this chapter we take a comprehensive view of the role of the PWT, and make some suggestions for reform of the role which are not considered in other chapters.

THE ROLE OF PRESIDENT OF WELSH TRIBUNALS

- 8.5 The office of PWT was created by section 60 of the Wales Act 2017 (“the 2017 Act”). It is currently held by Sir Wyn Williams (formerly Mr Justice Wyn Williams). The Act gives the President two responsibilities in relation to the tribunals listed in section 59 of the 2017 Act (the “section 59 tribunals”; referred to in the 2017 Act as the “Welsh tribunals”). The first is “inward-looking”, and charges the President with:
- the maintenance of appropriate arrangements for the training, guidance and welfare of members of the Welsh tribunals within the resources made available by the Welsh Ministers.⁴⁸²
- 8.6 The second responsibility of the PWT is outward looking; to represent the views of members of the section 59 tribunals to the Welsh Ministers and other members of the

⁴⁸² Wales Act 2017, s 60(5)(a). The “Welsh tribunals” are those listed in s 59(1) of the Act (though others may be added to the list by an Order in Council).

Senedd.⁴⁸³ This is usually done through annual meetings with the First Minister and an annual report, which is presented to the First Minister and the Presiding Officer of the Senedd. The President has also recently given oral evidence to the Senedd's Legislation, Justice and Constitution Committee.⁴⁸⁴

8.7 The President may also give directions as to the practice and procedure to be followed by the section 59 tribunals, after consultation with the relevant judicial lead.⁴⁸⁵ Most recently, this power has been used to issue a joint practice direction with the President of the MHRTW in response to the COVID-19 pandemic.⁴⁸⁶

8.8 When exercising the functions given to him by the 2017 Act, the President must have regard to a number of statutory considerations. These are:

- (a) the need for the Welsh tribunals to be accessible;
- (b) the need for proceedings before those tribunals—
 - (i) to be fair, and
 - (ii) to be handled quickly and efficiently;
- (c) the need for members of those tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters;
- (d) the need to develop innovative methods of resolving disputes that are of a type that may be brought before those tribunals.⁴⁸⁷

8.9 In addition to those statutory duties, in his first annual report the President explained that:

... the Wales Act 2017 does not purport to define, exhaustively, the duties and powers of the President. It is commonly understood and accepted that the President is the most senior judge within the devolved tribunal system and, accordingly, that he has a supervisory role over each of the Welsh Tribunals which is complementary to the duties specifically referred to in the Act. I have exercised that role, in relation to the very small number of complaints which have been received about decision-making in individual cases....⁴⁸⁸

⁴⁸³ Wales Act 2017, s 60(5)(b).

⁴⁸⁴ 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>.

⁴⁸⁵ Wales Act 2017, s 61(1).

⁴⁸⁶ Mental Health Review Tribunal for Wales, Practice Direction, Coronavirus COVID-19, <https://mentalhealthreviewtribunal.gov.wales/sites/mentalhealthreview/files/2020-04/Practice%20Direction%20COVID-19.pdf>

⁴⁸⁷ Wales Act 2017, s 60(4).

⁴⁸⁸ President of Welsh Tribunals, *Annual Report 2018 - 2019* (March 2019) p 3.

- 8.10 The President was also of the view that, “as a senior judge, the President is entitled to sit as the legal chair of each of the Welsh Tribunals”. However, the President should only do so if the President and judicial lead of the tribunal agreed that it would be inappropriate for the judicial lead to sit on a particular case.⁴⁸⁹
- 8.11 The President has no formal relationship with the Welsh Tribunals Unit. In practice, however, Sir Wyn Williams works closely with both the head of the Welsh Tribunals Unit and the judicial leads of the section 59 tribunals.
- 8.12 The President is appointed by the Lord Chief Justice. There are two routes to selection. The first requires the candidate to be, or have been, a High Court judge or judge of the Court of Appeal. If the Lord Chief Justice, Lord Chancellor and the Welsh Ministers all agree on appointing such a candidate, then he or she must be appointed.
- 8.13 However, if this process does not yield a successful candidate, the Judicial Appointments Commission is responsible for selecting a candidate. To be eligible for consideration by the Judicial Appointments Commission, candidates must have held a qualification as a barrister, solicitor, or another relevant legal qualification for seven years (known as satisfying the “judicial-appointment eligibility condition on a 7-year basis”).⁴⁹⁰ Regulations made under the 2017 Act set out in more detail the selection process for the office, including the composition of a selection panel.⁴⁹¹
- 8.14 Carwyn Jones MS has explained that requiring the Lord Chief Justice to make the appointment was a “compromise position”, to avoid the “incongruous” position of the President being appointed by the Lord Chancellor.⁴⁹²
- 8.15 The PWT is a reserved authority under the Government of Wales Act 2006, meaning that consent of the relevant Minister (in this case the Secretary of State) is required to modify the functions of the office.⁴⁹³

ELSEWHERE IN THE UK

- 8.16 The PWT’s role has some similarity to that of the Senior President of Tribunals and the President of Scottish Tribunals. The creation of these roles over recent decades is part of a pattern of increasing judicial involvement in the administration of justice. Graham Gee, Robert Hazell, Kate Malleon and Patrick O’Brien explain that:

In the last ten years or so, the judiciary has assumed increasing influence over judicial appointments, deployment and discipline, and the management of the courts

⁴⁸⁹ President of Welsh Tribunals, *Annual Report 2018 - 2019* (March 2019) p 3.

⁴⁹⁰ Wales Act 2017, sch 5 pt 2 para 3.

⁴⁹¹ The Selection of the President of Welsh Tribunals Regulations SI 2017 No 1282, reg 3.

⁴⁹² Carwyn Jones MS’ question at the oral evidence session of Sir Wyn Williams and Rhian Davies Rees to the Legislation, Justice and Constitution Committee on 13 July 2020, para 31.

⁴⁹³ Wales Act 2017, s 60(2).

service. This has led to increasingly prominent roles for senior judges, such as the Lord Chief Justice and the Senior President of Tribunals.⁴⁹⁴ ...

There is less reliance on the single channel of the Lord Chancellor as the buckle between the judiciary and the government, with a much wider range of people involved in negotiating the parameters of independence and accountability.⁴⁹⁵

Senior President of Tribunals

8.17 The office of Senior President of Tribunals (“SPT”) was created by the Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”), as part of wider reforms to the tribunal system. Steering the system through that reform was seen as an important part of the role. The White Paper which preceded the TCEA 2007 noted that:

Without a clear single voice able to speak for the tribunal judiciary collectively there is a danger that proposals for the reform of the administration of tribunals will be developed in isolation or without taking on board the needs of all the disparate jurisdictions in the new organisation....

In the immediate future the role of a Senior President is strategic, co-ordinating and directing judicial input into the development of the Tribunals Service. When the new system is operational the Senior President will have a major role in setting its direction, developing new services and balancing the judicial needs of the individual jurisdictions.⁴⁹⁶

8.18 A later White Paper, published following the passing of the TCEA 2007, stressed the role of the SPT in ensuring that “the needs of the various jurisdictions are met, there is cohesion and continuity across both tiers, and the unified tribunal system has a strong identity within the justice system as a whole”.⁴⁹⁷

8.19 Today the SPT leads the tribunals judiciary. The SPT’s responsibilities extend to non-devolved tribunals in Scotland and in Northern Ireland. They also extend beyond the TCEA 2007 tribunal structure; the Senior President also provides leadership for the employment tribunals and the Employment Appeal Tribunal.⁴⁹⁸

8.20 The responsibilities of the SPT were originally modelled on those of the President of the Courts of England and Wales (an office held by the Lord Chief Justice) under the Constitutional Reform Act 2005.⁴⁹⁹ The SPT has similar responsibilities for ensuring the training, guidance and welfare of the tribunals judiciary and representing them to

⁴⁹⁴ G Gee, R Hazell, K Malleson and P O’Brien (2015) *The politics of judicial independence in the UK’s changing constitution*, pp 25 and 26.

⁴⁹⁵ Above, p 29.

⁴⁹⁶ Department for Constitutional Affairs, *Transforming public services: complaints, redress and tribunals* (2004) Cm 6243, paras 6.59 and 6.60.

⁴⁹⁷ Ministry of Justice consultation paper, *Transforming tribunals: implementing part 1 of the Tribunals, Courts and Enforcement Act 2007* (2007) para 136.

⁴⁹⁸ Employment Tribunals Act 1996, s 5A and Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”), s 2.

⁴⁹⁹ Constitutional Reform Act 2005, s 7(2).

Parliament, the Lord Chancellor and Ministers of the Crown.⁵⁰⁰ The SPT may also make practice directions for the Upper Tribunal and First-tier Tribunal.⁵⁰¹ The Lord Chancellor and the SPT share the power to make, or concur in making, provision by statutory instrument for the organisation of the First-tier and Upper Tribunals into chambers and the allocation of functions to chambers.⁵⁰² The considerations the SPT must have regard to were clearly the template for the PWT's responsibilities under section 60 of the 2017 Act; the SPT is also required to ensure, for example, that the tribunals are accessible, and that proceedings are dealt with quickly and efficiently.⁵⁰³

- 8.21 It is a challenging set of responsibilities. As Gee, Hazell, Malleson and O'Brien explain:

The position of SPT is a burdensome administrative role and also one that demands considerable political skill. It has required the SPT not only to radically transform the internal structures of the tribunal system, but also to maintain good relations with the heads of the judiciaries in England and Wales, Northern Ireland and Scotland, given that the jurisdiction of some tribunals extends across the UK. It is also a critical role for disseminating cultural changes, as the emphasis placed by tribunal judges on user-focus, cost-effectiveness and training percolates through the wider judicial family.⁵⁰⁴

- 8.22 The SPT is appointed by Her Majesty, usually on the recommendation of the Lord Chancellor.⁵⁰⁵ The TCEA 2007 envisages that the SPT will usually be a judge of the Court of Appeal, a member of the First or Second Division of the Inner House of the Court of Session, or a Lord Justice of Appeal in Northern Ireland.⁵⁰⁶ By virtue of the appointment the SPT is a judge of both the First-tier Tribunal and Upper Tribunal.⁵⁰⁷

President of Scottish Tribunals

- 8.23 The role of President of Scottish Tribunals was created after that of the SPT and before that of the PWT. It is provided for by the Tribunals (Scotland) Act 2014,⁵⁰⁸ which also reformed the system of devolved Scottish tribunals into a unified, two-tier structure, similar to that found in the TCEA 2007.
- 8.24 The role of President of Scottish Tribunals differs in some respects from that of the SPT or the PWT. That is because the Lord President is head of the Scottish tribunals, rather than the President of Scottish Tribunals (who is instead referred to by the Act

⁵⁰⁰ TCEA 2007, sch 1, para 14; sch 2, para 8; and sch 3, para 9.

⁵⁰¹ Above, s 23(1).

⁵⁰² Above, s 7.

⁵⁰³ Above, s 2(3).

⁵⁰⁴ G Gee, R Hazell, K Malleson and P O'Brien (2015) *The politics of judicial independence in the UK's changing constitution*, p 140.

⁵⁰⁵ TCEA 2007, s 2(1) and sch 1.

⁵⁰⁶ Above, sch 1, part 1, para 2(2)(a).

⁵⁰⁷ Above, ss 4(1)(c) and 5(1)(a).

⁵⁰⁸ Tribunals (Scotland) Act 2014, s 4.

as the senior member of the Scottish tribunals).⁵⁰⁹ The Lord President is responsible for assigning a judge of the Court of Session to the office of the President of Scottish Tribunals.⁵¹⁰ Both the Lord President and President of Scottish Tribunals are members of the Upper Tribunal for Scotland.⁵¹¹

- 8.25 As the head of Scottish tribunals, it is the Lord President who is responsible for ensuring that appropriate arrangements are in place for the welfare, training and guidance of members,⁵¹² and representing the views of members of the Scottish Tribunals to the Scottish Ministers and Scottish Parliament.⁵¹³ The Lord President also has responsibility for publishing an assignment policy, which ensures that appropriate use is made of the knowledge and experience of members of the Scottish tribunals when assigning them to particular chambers.⁵¹⁴
- 8.26 The Lord President is, however, able to delegate the “inward-looking” duties of the office in respect of welfare, training and guidance to the President of Scottish Tribunals (though not the “outward-looking” duty of representation). The policy memorandum which accompanied the Tribunals (Scotland) Bill explained that “it is anticipated that the Lord President will delegate the responsibility for the efficient disposal of business of the Scottish Tribunals to the President of Tribunals”.⁵¹⁵
- 8.27 Various regulation-making powers relating to the organisation and business of the Scottish Tribunals may be delegated by the Scottish Ministers to the Lord President or the President of Scottish Tribunals.⁵¹⁶ When making regulations under the Tribunals (Scotland) Act 2014, the Lord President or President of Scottish Tribunals must have regard to the principle that proceedings should be accessible and fair, and handled quickly and efficiently. Scottish Ministers must also have regard to that principle when making regulations under the Act.⁵¹⁷

⁵⁰⁹ Tribunals (Scotland) Act 2014, ss 2 and 5.

⁵¹⁰ Above, ss 4(2) and (5).

⁵¹¹ Above, s 17(5).

⁵¹² Above, ss7(2) and 34(1).

⁵¹³ Above, s 6.

⁵¹⁴ Above, s 33.

⁵¹⁵ Tribunals (Scotland) Bill, policy memorandum, para 17
[https://www.parliament.scot/S4_Bills/Tribunals%20\(Scotland\)%20Bill/b30s4-introd-pm.pdf](https://www.parliament.scot/S4_Bills/Tribunals%20(Scotland)%20Bill/b30s4-introd-pm.pdf).

⁵¹⁶ Tribunals (Scotland) Act 2014, s 12.

⁵¹⁷ Above, s 12.

8.28 As with the TCEA 2007, it was envisaged that there would be a need for judicial leadership to help establish a new unified tribunal system. This role was however envisaged for the Lord President. The policy memorandum explained that:

In providing leadership, the Lord President will be able to ensure, amongst other things, that specialism, ethos and desirable distinctiveness are retained, in addition to supporting coherence across the new structure where this is required.⁵¹⁸

BACKGROUND TO THE OFFICE OF PRESIDENT OF WELSH TRIBUNALS

8.29 The 2016 Report of the Committee for Administrative Justice and Tribunals, Wales expressed the view that reform of the devolved tribunals had been slowed by three main issues. One of these was “the absence of a judicial leader in the devolved tribunals able to represent all the devolved jurisdictions with whom the Welsh Government needs to engage on practical justice administration issues”.⁵¹⁹

8.30 That criticism ultimately led to the creation of the office of PWT. Sir Wyn Williams, the first incumbent, was also instrumental in the creation and framing of the office. In evidence to the Legislation, Justice and Constitution Committee of the Senedd, he has explained that he thought the role was necessary for two principal reasons:

... one, because each of the tribunals appeared to me to be operating properly and efficiently within their own sphere, but without really having much relationship to each other, and that didn't seem to me to be a very good thing. Secondly, there was a need for a clear point of contact between the tribunals themselves and the administration that supported them.⁵²⁰

POTENTIAL REFORMS

8.31 While the creation of the office of PWT is relatively recent, there have been calls for its reform, from both the Commission on Justice in Wales (“the Thomas Commission”) and the PWT himself. We explain these below before making provisional proposals.

Calls for reform from the PWT

8.32 In his evidence to the Senedd’s Legislation, Justice and Constitution Committee, and in his annual reports, Sir Wyn Williams has made clear that he believes reforms to the role are needed. In particular he has stressed that the role should be:

much easier for the public to understand, much more specific so that there's no doubt that he or she is a judge, as well as a kind of administrator.⁵²¹

⁵¹⁸ Tribunals (Scotland) Bill, policy memorandum, para 14
[https://www.parliament.scot/S4_Bills/Tribunals%20\(Scotland\)%20Bill/b30s4-introd-pm.pdf](https://www.parliament.scot/S4_Bills/Tribunals%20(Scotland)%20Bill/b30s4-introd-pm.pdf).

⁵¹⁹ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) para 24.

⁵²⁰ Oral evidence of Sir Wyn Williams and Rhian Davies Rees to the Legislation, Justice and Constitution Committee on 13 July 2020, para 10.

⁵²¹ Above, para 17.

- 8.33 This returned to a topic which was given careful consideration in the President's second annual report, which is worth quoting at length.

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 and there has been no reason, in practice, (save on one occasion when it did not come to fruition) for the President to sit in a tribunal. In my view, 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. ... I have reservations about the President sitting in the Welsh Tribunals except when the Judicial Lead of a particular Tribunal and the President agree that the circumstances prevailing in a particular case make it inappropriate for the Judicial Lead to sit as the chair of the Tribunal. However, if a new appellate structure was considered appropriate for Welsh Tribunals the President could be given a specific role within that structure. Further, and/or alternatively, the President could be authorised to sit in the Administrative Court in Wales. While, in practice, a serving or retired High Court Judge might from time to time sit in the Administrative Court in Wales that is not guaranteed. In my view, it would enhance the role of the President if he/she was nominated to sit in the Administrative Court in Wales by reason of holding the Presidency.⁵²²

The Commission on Justice in Wales ("the Thomas Commission")

- 8.34 The Thomas Commission has also considered the role of the PWT, and 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.⁵²³

- 8.35 Our project is concerned only with devolved tribunals, and so we do not consider here whether the PWT's supervisory role should be extended to other public bodies or ombudsmen. We do however consider below whether the President should have a role in relation to school admission and exclusion appeal panels and the Valuation Tribunal for Wales ("VTW").

A judicial role

- 8.36 The 2017 Act does not expressly confer on the PWT the role of judge in any of the section 59 tribunals. This contrasts with the position of the Senior President of Tribunals (who is a judge of both the First-tier Tribunal and the Upper Tribunal) and the President of Scottish Tribunals (who is a judge of the Upper Tribunal for Scotland).
- 8.37 Our provisional view is that there is value in specifying a judicial role for the PWT within the tribunals. Not only does this make the role more attractive to applicants, but

⁵²² President of Welsh Tribunals, *Annual Report 2019 – 2020* (2020) para 3.10.

⁵²³ Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) recommendation 25, p 21.

it could also assist in ensuring the PWT continues to have a day-to-day understanding of the work of the tribunals. A similar advantage in respect of the Lord Chief Justice was identified by Gee, Hazell, Malleson and O'Brien. Having interviewed a number of the judiciary, they reported that:

Many of our judicial interviewees emphasised that the LCJ must be viewed as the chief judge, not merely as chief administrator, and must set an example to others by taking a lead on the judicial duty to decide cases. For this reason, the LCJ sits not only on high-profile cases, but on more routine appeals as well. This is felt by judges to underscore the LCJ's ability to speak authoritatively on the development of the law as and when necessary.⁵²⁴

- 8.38 We therefore provisionally propose that the PWT be a judge of each of the tribunals or of the new unified first-tier tribunal proposed by Consultation Question 4. We note that the current PWT has reservations about the PWT sitting in any case except as a replacement for a judicial lead, where the PWT and judicial lead agree it would be inappropriate for the judicial lead to sit. We can however envisage cases where it might be appropriate for the PWT to sit, perhaps alongside the judicial lead, to deal with a point of principle or practice affecting more than one jurisdiction. Our provisional view is that the circumstances under which the PWT could sit as a member of a new unified tribunal could be provided for in guidance issued by the PWT.
- 8.39 The question of appeal routes from that unified tribunal is complex, and is discussed in Chapter 4. There we explored the possibility of the creation of an Upper Tribunal for Wales. Should that option be pursued, we provisionally propose that the PWT should be one of its judges.
- 8.40 We note the final suggestion of the PWT, that the PWT should be authorised to sit in the Administrative Court in Wales. In most cases the PWT will be either a sitting or retired High Court judge, and so will have the necessary experience to sit in the High Court. It is however possible for a person to be appointed to the office of PWT without being a High Court judge, if the "second route" for appointments is followed (discussed at paragraph 8.13 above). And even if the PWT is a sitting High Court judge, there is no guarantee that he or she would necessarily be assigned to sit in the Administrative Court in Wales.
- 8.41 Making recommendations about the extent of the involvement of the PWT in the work of the Administrative Court in Wales is beyond the scope of our review. Proper consideration of the topic would require a general review of listing procedures within the Administrative Court, which are not within our terms of reference.

⁵²⁴ G Gee, R Hazell, K Malleson and P O'Brien (2015) *The politics of judicial independence in the UK's changing constitution*, p 137.

Consultation Question 62.

- 8.42 We provisionally propose that the President of Welsh Tribunals should be a judge of the tribunal or tribunals over which the President presides.

Do you agree?

Extending the supervisory role of the President of Welsh Tribunals

- 8.43 As noted above, the Thomas Commission recommended that the supervisory role of the PWT be extended to other tribunals established under Welsh law or by the Welsh Government. We consider below the particular cases of school appeal panels and the Valuation Tribunal for Wales.

School admission and exclusion appeal panels

- 8.44 Under our provisional proposals at 3.126 to 3.128 above, the functions of school exclusion appeal panels would be transferred to the Special Educational Needs Tribunal for Wales, and so would automatically become subject to the jurisdiction of the PWT. This section of the consultation paper considers whether the remit of the PWT ought to be extended in relation to school admission appeal panels, and to exclusion appeal panels if they are retained.

- 8.45 Before its abolition in 2013, school admission and exclusion appeal panels were subject to the supervision of the Administrative Justice and Tribunals Council. The Council had a statutory duty to keep under review and report on the constitution and working of tribunals. This supervision included observing hearings and publishing guidance on statutory codes. Since its abolition there has not been a single independent body responsible for keeping the entire system of school admission and exclusion appeal panels under review. While the role of PWT is very different from that of the Administrative Justice and Tribunals Council, the PWT's supervision of school appeal panels could provide some of the same benefits.

- 8.46 One of the challenges for any involvement of the PWT in appeals panels is that the panels are run by local authorities. There is no readily apparent person within the current structure who could represent the interests of the panels to the President, in the way in which judicial leads of the existing section 59 tribunals currently do.

- 8.47 If a representative for each local authority could be identified, that would still amount to more than 20 representatives who would need to liaise with the PWT. In practice it might be necessary for authorities to agree on regional representatives to liaise with the President. While this presents an operational challenge, it could also point to a lack of judicial leadership which makes the involvement of the PWT particularly desirable.

- 8.48 As discussed above, there are two elements to the President's role. The first is inward-facing, involving responsibility for training, guidance and welfare of members. The second is outward-facing, representing the bodies under the PWT's supervision to the Welsh Ministers and the Senedd. We consider these in turn.

8.49 Starting with the first element of the role, might appeal panel users and members benefit from involvement of the PWT in training, guidance and welfare of members? At present, the training of admission appeal panel members is the responsibility of each local authority. The statutory School Admissions Appeal Code (the “Admissions Code”) requires panel members to receive appropriate training,⁵²⁵ while Welsh Government guidance on exclusions from schools and pupil referral units also stresses that panel members should receive suitable training.⁵²⁶ Making the PWT responsible for training could help to ensure consistency across appeal panels in Wales.

8.50 The President could also be involved in the provision of guidance to panel members. When fulfilling this function in relation to the section 59 tribunals, the President must have regard to the need for tribunals to be accessible and for proceedings to be fair, and to be handled quickly and efficiently. A similar role for the President in relation to appeal panels has been considered by Dr Sarah Nason, Ann Sherlock, Dr Huw Pritchard and Dr Helen Taylor when considering the Thomas Commission recommendation on the supervisory function of the President. In the Bangor University Report, Public Administration and a Just Wales, the authors found it likely that the recommendation:

... is aimed at the need to review whether such ad hoc processes are complying with standards of fairness, independence, transparency, accessibility and so on in their proceedings; in short whether they are complying with relevant parts of CAJTW’s Administrative Justice Principles.⁵²⁷

8.51 The second element of the role is outward-facing. At present, the PWT represents the views of members of the section 59 tribunals both to the Welsh Ministers and to the Senedd. The PWT’s annual reports and appearances before the Senedd both enable the tribunals to speak with one voice and make the tribunals system more transparent. Might school appeal panels benefit from a similar arrangement? As discussed above, the panels have no collective voice at present. Giving the PWT a representative role could enable them to identify common concerns.

8.52 Another potential benefit of the supervision of the PWT would be to bolster the independence of school appeal panels. Currently appeals panels are administered by the authority whose decision is under review. This is administratively convenient, but means that the panels lack structural independence from local authorities. The Admissions Code seeks to remedy this by stressing that independent appeals panels should act, and should be seen to act, independently of the local authority or

⁵²⁵ Welsh Government, *School admissions appeal code* (2013) para 2.8
<https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>

⁵²⁶ Welsh Government, *Exclusions from schools and pupil referral units* (April 2015) para 4.4.7
<https://gov.wales/sites/default/files/publications/2018-03/exclusion-from-schools-and-pupil-referral-units.pdf>.

⁵²⁷ S Nason, A Sherlock, H Pritchard and H Taylor, *Public administration and a just Wales – Full report* (March 2020) para 13.7
[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).

governing body.⁵²⁸ Welsh Government guidance on exclusions also requires the chairs of panels to explain to users that the panel is independent.⁵²⁹ The supervision of the PWT could provide a degree of protection to appeal panels from any perception of susceptibility to pressure by local authorities.

Consultation Question 63.

- 8.53 We seek views on whether school admission and (if retained) exclusion appeal panels be subject to the supervision of the President of Welsh Tribunals.

The Valuation Tribunal for Wales

- 8.54 We provisionally propose at paragraphs 3.98 to 3.103 above that the VTW should be brought within a unified first-tier system for devolved tribunals. That would mean that it would be subject to the supervision of the PWT.
- 8.55 Even if this proposal is not pursued, and the VTW remains structurally separate from other devolved Tribunals, we provisionally consider that supervision by the President would bring a number of benefits. Giving the PWT responsibility for training could mean that general training already shared by the section 59 tribunals (for example, on “judgecraft”) could be shared between the tribunals. The VTW would also benefit from the PWT’s representation of its interests to the Senedd and the Welsh Ministers.

Consultation Question 64.

- 8.56 We provisionally propose that the President of Welsh Tribunals should supervise the Valuation Tribunal for Wales.

Do you agree?

⁵²⁸ Welsh Government, *School admissions appeal code* (2013) para 3.7
<https://gov.wales/sites/default/files/publications/2018-03/school-admission-appeals-code.pdf>

⁵²⁹ Welsh Government, *Exclusion from schools and pupil referral units* (April 2015) para 4.7.2
<https://gov.wales/sites/default/files/publications/2018-03/exclusion-from-schools-and-pupil-referral-units.pdf>.

Chapter 9: The Welsh Tribunals Unit

- 9.1 In this chapter we consider the Welsh Tribunals Unit (“the WTU”). The WTU is the body responsible for providing administrative support to the tribunals listed in section 59 of the Wales Act 2017 (“the section 59 tribunals”). It has been instrumental over the last few years in lending a sense of coherence to the existing devolved tribunals. We expect that it will also be crucial to the success of any future system.
- 9.2 The WTU differs from other bodies that administer tribunals in the UK. Unlike its equivalents in England and Wales, Scotland and Northern Ireland, it is neither an executive agency nor a non-ministerial department. Instead it is simply a “unit” within the Welsh Government. This has in the past led to questions about whether it is sufficiently independent. While the importance of the unit and its independence is understood and respected by the Welsh Government, greater structural independence could ensure that this is clearly seen to be the case.
- 9.3 Another unusual feature of the WTU is that its governance does not include a formal role for the judiciary. The administration of courts and tribunals poses a potential problem with regard to the separation of powers; the government is responsible for the efficient functioning of these institutions, and so the civil servants who run the tribunals report to the government. However, judges are not accountable to government, and their involvement is also necessary to ensure that courts and tribunals function as they should.
- 9.4 In practice judicial input is achieved by the close cooperation of the WTU and the President of Welsh Tribunals. But in other systems this input is more formalised, and judges are members of a governance board.
- 9.5 This chapter starts by outlining the development of the WTU before explaining its current composition and structure. We then go on to discuss comparative examples from across the UK tribunals systems, Her Majesty’s Courts and Tribunals Service (“HMCTS”), the Scottish Courts and Tribunals Service (“the SCTS”), and the Northern Ireland Courts and Tribunals Service (“NICTS”). In the final section we consider possible options for reform, and the advantages and disadvantages of those options. We provisionally propose that the WTU should be a non-ministerial department.

DEVELOPMENT OF THE WELSH TRIBUNALS UNIT

The Administrative Justice and Tribunals Unit

- 9.6 In 2010 the Welsh Committee of the Administrative Justice and Tribunals Council (the “AJTC Welsh Committee”) published its review into the operation of tribunals in Wales.⁵³⁰ At that time the administrative support for a number of tribunals operating in

⁵³⁰ Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010). The review covered all of the tribunals now listed in s 59 of the Wales Act 2017, and also included a number of other decision-making bodies including the Forestry Committee for Wales, school admission and school exclusion appeal panels in Wales and Parking Adjudicators in Wales and the Traffic Penalty Tribunal.

Wales was provided by the Government department whose decisions were under challenge.⁵³¹ The AJTC Welsh Committee observed that this created:

an apparent lack of independence of Welsh tribunals, with responsibility for tribunals and their administration lying with those whose decisions it is the tribunals' duty to consider.⁵³²

9.7 After noting the inconsistency in structure, procedure and appointments across the Welsh tribunals, the AJTC Welsh Committee recommended that policy and administrative responsibility for the Welsh tribunals should be transferred to an administrative justice focal point, located in the then Department for the First Minister and the Cabinet. That recommendation led to the creation of the Administrative Justice and Tribunals Unit ("AJTU") in March 2010.⁵³³

9.8 The AJTU had two primary functions: to support the operation of the Welsh Tribunals for which it was responsible, and to be a focal point for developing policy and supporting Ministers on all issues relating to administrative justice and tribunals in Wales.⁵³⁴ Responsibility for providing administrative support for devolved tribunals was transferred to the AJTU gradually, as follows.

(1) April 2011: The Special Educational Needs Tribunal for Wales.⁵³⁵

(2) April 2012: The Agricultural Land Tribunal for Wales.⁵³⁶

(3) May 2012: The Mental Health Review Tribunal for Wales.

(4) August 2012: The Residential Property Tribunal for Wales.

(5) April 2013: The Adjudication Panel for Wales.

(6) 2014: The Welsh Language Tribunal.

9.9 Following a further review of the operation of devolved tribunals conducted by the Welsh Government in late 2013, the AJTU's policy functions were transferred to a newly created Justice Policy team within the Welsh Government. Separating out the

⁵³¹ This had also been highlighted by Sir Andrew Leggatt in *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (March 2001) para 1.19. Available at <https://webarchive.nationalarchives.gov.uk/20070815230000/http://www.tribunals-review.org.uk/leggatthtm/leg-01.htm#1.19>

⁵³² Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) para 2.

⁵³³ Following the reorganisation of the Department for the First Minister and the Cabinet the AJTU was transferred to the Department of the Permanent Secretary of the Welsh Government in August 2011. See Welsh Government, *Review of Devolved Tribunals Operating in Wales* (2014) para 49.

⁵³⁴ Welsh Government, *Review of Devolved Tribunals Operating in Wales* (2014) para 49.

⁵³⁵ Special Educational Needs Tribunal for Wales, *Annual Report 2010-2011* (November 2011) p 6.

⁵³⁶ Welsh Government, *Review of Devolved Tribunals Operating in Wales* (2014) para 52. The same paragraph also gives the dates for the Mental Health Review Tribunal for Wales, Residential Property Tribunal for Wales, and Adjudication Panel for Wales.

functions in this way was designed to allow the Justice Policy team to focus on strategic longer-term goals. The administration of the tribunals remained within the purview of the AJTU, which was renamed the Welsh Tribunals Unit.

The structure and composition of the Welsh Tribunals Unit

- 9.10 The WTU is part of the Welsh Government, formally part of the Constitution and Justice Division, and has no separate constitutional status. The WTU works closely with the President of Welsh Tribunals (“PWT”), but is not formally accountable to the PWT.⁵³⁷ It is comprised of a team of 34 Welsh Government civil servants, headed by Ms Rhian Davies Rees. The team is split across Cathays Park in Cardiff, Cleppa Park on the outskirts of Newport, Llandrindod Wells and Llandudno Junction.⁵³⁸
- 9.11 The budget for the WTU is set by the Welsh Government, and covers the running costs of the unit and the tribunals it administers. In the financial year 2018-2019 the allocated budget was approximately £4.068 million.⁵³⁹ We understand that many of its overheads, such as the cost of its premises, are borne by the Welsh Government.

The Valuation Tribunal for Wales

- 9.12 The WTU is not responsible for the administration of the Valuation Tribunal for Wales (“VTW”), nor that of school admission and exclusion appeals panels, which are administered by local authorities. The VTW is the only devolved tribunal operating across Wales that is responsible for its own administration. As well as a President, the VTW has its own Chief Executive. The VTW is governed by a Governing Council, which includes the President of the VTW, three national representatives, and up to three members appointed to the Council by the Welsh Government.⁵⁴⁰ The Governing Council meets at least four times a year.

TRIBUNAL ADMINISTRATION ELSEWHERE IN THE UK

- 9.13 In this section we consider the development and structure of HMCTS, SCTS and NICTS. We discuss the example of SCTS in detail as a number of commentators have suggested that it could provide a model for the WTU.

Her Majesty’s Courts and Tribunals Service

- 9.14 HMCTS was created in 2011 by the merger of Her Majesty’s Court Service and the Tribunals Service. It is generally described as an executive agency sponsored by the Ministry of Justice.⁵⁴¹ HMCTS provides the system of support, including infrastructure and resources, for courts in England and Wales, for tribunals in England and for tribunals with non-devolved jurisdictions in Scotland, Wales and Northern Ireland. In

⁵³⁷ Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) para 2.83.

⁵³⁸ President of Welsh Tribunals, *Annual Report 2018 - 2019* (March 2019) p 8 and *Annual Report 2019 - 2020* (April 2020) para 2.7.

⁵³⁹ President of Welsh Tribunals, *Annual Report 2018 - 2019* (March 2019) p 8.

⁵⁴⁰ Valuation Tribunal for Wales Regulations SI 2010 No 713 (W 69), reg 6.

⁵⁴¹ Including on its website. See <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service>. For a different view, see para 9.21 below.

contrast, the UK Supreme Court has a separate body of staff, and a Chief Executive who controls (in agreement with the President of the Supreme Court) the Supreme Court's resources, infrastructure and support.⁵⁴²

What is an executive agency?

9.15 A guide issued by the Cabinet Office ("the Guide") defines executive agencies as:

clearly designated units of a central government department, administratively distinct, but remaining legally part of it.⁵⁴³

9.16 Executive agencies proliferated following a report published in 1988 on the structure of the civil service.⁵⁴⁴ The Guide explains they are intended "to allow the delivery of executive functions of government to be carried out separately from – but within a policy and resources framework set by – a primarily policy-focused department".⁵⁴⁵ Executive agencies have a sponsoring department, and ultimately the Minister of the sponsoring department ("the sponsoring Minister") is accountable to Parliament for all matters concerning the executive agency. The relationship between the executive agency and the sponsoring department is usually set out in a framework document establishing the executive agency.

9.17 The Guide explains that executive agencies are typically led by a Chief Executive. The Chief Executive is accountable directly to the relevant departmental minister for delivery and day-to-day activities, and to the sponsoring department's Permanent Secretary for responsible use of public funds. Staff of executive agencies are civil servants.

9.18 The Guide outlines two possible models for executive agencies:

- (1) Model 1 – Where an executive agency operates closer to the home department, or is too small to warrant a full management board, quality assurance functions should be provided by the home department's audit and risk committee.
- (2) Model 2 – Where an executive agency needs a greater level of independence from its home department in order to carry out its functions effectively, or is of sufficient size and importance to require independent quality assurance, the agency should be led by a management board, headed by a non-Executive Chair, and with executive and non-executive board members.

⁵⁴² Constitutional Reform Act 2005 ss 48 to 51.

⁵⁴³ Cabinet Office, *Executive Agencies: A Guide for Departments* (2018) p 4.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/690636/Executive_Agencies_Guidance.PDF.

⁵⁴⁴ Sir Robin Ibbs, *Improving management in government: next steps* (1988).

⁵⁴⁵ Cabinet Office, *Executive Agencies: A Guide for Departments* (2018) p 4.

The status of HMCTS

9.19 As noted above, HMCTS is generally described as an executive agency, sponsored by the Ministry of Justice. Unlike other executive agencies of the Ministry of Justice, HMCTS operates on the basis of a partnership between the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals. All staff have a joint responsibility to those office holders for the effective, efficient and speedy operation of courts and tribunals.⁵⁴⁶

9.20 In contrast, other executive agencies of the Ministry of Justice, such as the Legal Aid Agency, the Criminal Injuries Compensation Authority and HM Prison and Probation Service, are accountable to either the Lord Chancellor or the Secretary of State for Justice.⁵⁴⁷ The involvement of the Senior President of Tribunals in the work of HMCTS is deliberate. The White Paper leading to the creation of the Tribunals service noted that

The Chief Executive and the management team will work in close partnership with the Senior President and the jurisdictional Presidents. The Senior President will have responsibility for judicial functions and so will remain independent. This partnership is absolutely essential for the success of the new organisation as a whole. The judiciary cannot as a matter of constitutional principle be accountable to government and Parliament for judicial decisions in the way that the Chief Executive and the other civil servants within the organisation are, but, from the point of view of the user, judiciary and staff are delivering a service together. The governance arrangements within the new organisation need to reflect the joint nature of this endeavour.⁵⁴⁸

9.21 The unique nature of HMCTS' structure led the Commission on Justice in Wales ("the Thomas Commission") to doubt its categorisation as an executive agency. The report expressly states HMCTS is "not an Executive agency", but instead:

an agency with a special constitutional status under the framework agreement which reflects the fact that the judiciary is the third branch of the state, independent of the legislature and the executive.⁵⁴⁹

9.22 Nevertheless, HMCTS has many of the hallmarks of an executive agency outlined in the Guide. For example, the HMCTS's framework agreement provides for a Chief Executive responsible for the efficient and cost-effective management of HMCTS,

⁵⁴⁶ The framework agreement specifically states all staff have a joint responsibility to the Lord Chancellor and the Lord Chief Justice. However, para 1.4 states that any reference to the Lord Chief Justice should be taken as including references to the Senior President of Tribunals (modified so far as necessary to take account of any differences in his statutory functions for the time being). See HMCTS, *Framework document* (July 2014) para 2.4. Available at <https://www.gov.uk/government/publications/hm-courts-and-tribunals-service-framework-document>.

⁵⁴⁷ While these are different offices, they are commonly held by the same person.

⁵⁴⁸ Department for Constitutional Affairs, *Transforming public services, Complaints redress and tribunals* (2004) Cm 6243, para 6.87.

⁵⁴⁹ Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) para 2.82.

effective leadership of HMCTS staff and developing HMCTS' strategy and business plans.⁵⁵⁰

- 9.23 HMCTS also has a Board which is responsible for approving the allocation of the annual budget, monitoring the delivery of strategic objectives and performance targets and approving HMCTS' corporate governance framework. The Board is comprised of an independent non-executive Chair, the Senior Presiding Judge for England and Wales,⁵⁵¹ two other judicial representatives,⁵⁵² the Chief Executive, three Executive Directors nominated by the Chief Executive and three Non-Executive Directors.⁵⁵³
- 9.24 HMCTS's budget is allocated from the wider Ministry of Justice budget by the Lord Chancellor.⁵⁵⁴ The framework agreement states that the Lord Chancellor "will endeavour to reach agreement with the Lord Chief Justice in relation to the allocation."⁵⁵⁵ As noted above, the Board is responsible for approving the allocation of the budget within HMCTS.

The Scottish Courts and Tribunals Service

- 9.25 The SCTS is a non-ministerial department established in April 2015, by the Judiciary and Courts (Scotland) Act 2008 ("the 2008 Act").⁵⁵⁶ It merged what was previously the Scottish Courts Service ("SCS") and the Scottish Tribunals Service ("STS"). The 2008 Act gives the SCTS the function of providing the property, services, officers and other staff required for the purposes of the Scottish Courts and the Scottish Tribunals and their members.⁵⁵⁷

What is a non-ministerial department?

- 9.26 Non-ministerial departments, like executive agencies, have a Chief Executive responsible for the day-to-day running of the department, and a management board responsible for significant operational decisions. However, unlike executive agencies, non-ministerial departments have a separate legal personality (being established by

⁵⁵⁰ HMCTS, *Framework document* (July 2014) paras 3.1 to 3.7. Available at <https://www.gov.uk/government/publications/hm-courts-and-tribunals-service-framework-document>.

⁵⁵¹ A member of the Court of Appeal appointed by the Lord Chief Justice to supervise the presiding judges of the circuits in England and Wales.

⁵⁵² One member is nominated by the Lord Chief Justice and the other is nominated by the Senior President of Tribunals. See HMCTS, *Framework document* (July 2014) para 4.5.

⁵⁵³ HMCTS, *Framework document* (July 2014) para 4.5.

⁵⁵⁴ Ministry of Justice, *Supplementary Estimate 2018-2019: Estimates Memorandum*, p 2. Available at <https://www.parliament.uk/documents/commons-committees/Justice/estimates-memoranda/Ministry-Justice-Estimate-Memorandum-17-19.pdf>.

⁵⁵⁵ HMCTS, *Framework document* (July 2014) para 7.2.

⁵⁵⁶ Judiciary and Courts (Scotland) Act 2008 s 60, as amended by sch 4(1), para 1(12)(b) of the Courts Reform (Scotland) Act 2014.

⁵⁵⁷ Judiciary and Courts (Scotland) Act 2008, ss 61 and 61A.

statute) and operate separately from any sponsoring department.⁵⁵⁸ Non-ministerial departments typically have their own budget, set directly by Parliament.⁵⁵⁹

- 9.27 Non-ministerial departments are not directly accountable to a government minister. Instead, a ministerial department provides some level of oversight so a minister can account for the non-ministerial department's business in Parliament. The minister could, for example, recommend that legislation governing the non-ministerial department should be modified.⁵⁶⁰

The development of the Scottish Courts and Tribunals Service

- 9.28 The STS, one of the bodies that later merged to form the SCTS, was established in December 2010 in response to a number of reports published by the Administrative Justice Steering Group ("the AJSG") and the Scottish Committee of the Administrative Justice and Tribunals Council ("the AJTC Scottish Committee"). In *Options for the Future Administration of Tribunals in Scotland* ("the 2008 Report"), the AJSG concluded that Scotland's tribunal system did not meet the key principles of independence and coherence discussed in Chapters 2 and 3 of the Leggatt Report.⁵⁶¹ In particular the report stressed the importance of independent and impartial processes. It noted that the administration of some of the devolved tribunals, while provided by an independent secretariat, was funded and sponsored by directorates within the Scottish Government.

- 9.29 The 2008 Report highlighted five options for reform.

- (1) Retain the *status quo*.
- (2) Put mechanisms in place to ensure better integration and co-operation between the then Tribunals Service and Scottish tribunals.
- (3) Bring all Scottish tribunals within the remit of the then Tribunals Service.
- (4) Establish a new Scottish tribunals service to support all Scottish tribunals.
- (5) Establish a new Scottish Tribunals Service to support both England, Wales and Scotland wide tribunals ("GB tribunals") within Scotland and all Scottish tribunals.

- 9.30 The AJSG dismissed options (1) and (2) as not effectively addressing the issues of independence and impartiality, and option (3) as being inconsistent with the increasing devolution of responsibilities to the Scottish Parliament. The AJSG went on to note

⁵⁵⁸ The Cabinet Office, *Classification of Public Bodies: Guidance for Departments* (April 2016) para 1.21. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/519571/Classification-of-Public_Bodies-Guidance-for-Departments.pdf.

⁵⁵⁹ J Rutter, *The Strange Case of Non-Ministerial Departments*, Institute for Government (2012) p 6.

⁵⁶⁰ HM Treasury, *Managing Public Money* (July 2013) para 7.9.2. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742188/Managing_Public_Money__MPM__2018.pdf.

⁵⁶¹ Scottish Consumer Council, *Options for the Future Administration and Supervision of Tribunals in Scotland: A Report by the Administrative Justice Steering Group* (2008) p 5.

that options (4) and (5) would address the issues of independence and impartiality, but option (4) would lead to continued fragmentation of reserved tribunals and Scottish devolved tribunals.

- 9.31 Although the 2008 report did not make any explicit recommendations, it expressed support for option (5), stating:

there is a strong argument in favour of such a solution from a purely legal perspective, given that justice, both civil and criminal, is almost entirely devolved in Scotland.⁵⁶²

- 9.32 Notwithstanding the support expressed for (5), the AJSG noted that that option could entail a loss of access to resources shared amongst UK and GB tribunals, such as premises and training. The AJSG considered this could be addressed by ensuring a high level of cooperation between a new Scottish Tribunals Service and the existing Tribunals Service.

- 9.33 In December 2008 the Scottish Government asked the AJTC Scottish Committee for its view on how tribunals in Scotland should be reformed. The AJTC Scottish Committee ultimately agreed with the AJSG, noting “with anything short of [option (5)] there would be two tribunals systems within Scotland, the first overseeing UK and GB tribunals and the second, Scottish tribunals.”⁵⁶³

The Scottish Tribunals Service

- 9.34 Following the advice of the AJTC Scottish Committee, the STS was established in December 2010. The STS initially operated as a delivery unit of the Justice Directorate in the Scottish Government and provided administrative support to six devolved Scottish tribunals.⁵⁶⁴

- 9.35 In the 2011 report, *Tribunal Reform in Scotland: A Vision for the Future*, the AJTC Scottish Committee expressed reservations about administrative support for tribunals being provided by a delivery unit of the Scottish Government. To that end, the Committee recommended that the STS should be a statutory body entirely

⁵⁶² Scottish Consumer Council, *Options for the Future Administration and Supervision of Tribunals in Scotland: A Report by the Administrative Justice Steering Group* (2008) para 98.

In the 2009 report *Administrative Justice in Scotland – The Way Forward*, the AJSG reiterated their view that there were “strong arguments” for pursuing option (5). See Consumer Focus Scotland, *Administrative Justice in Scotland – The Way Forward: The Final Report of the Administrative Justice Steering Group* (June 2009) para 8.50.

⁵⁶³ Administrative Justice and Tribunals Council: Scottish Committee, *Options for Tribunal Reform in Scotland: Discussion Paper* (June 2010) para 4.1.

⁵⁶⁴ Those tribunals were the Additional Support Needs Tribunal for Scotland; the Lands Tribunal for Scotland; the Mental Health Tribunal for Scotland; the Pension Appeals Tribunal Scotland; the Private Rented Housing Panel/Homeowners Housing Panel; and the Scottish Charity Appeals Panel. See Scottish Government, *Consultation Report on the Proposed Merging of the Scottish Tribunals Service and the Scottish Courts Service* (March 2014) para 3.

independent of the Scottish Government and chaired by a Senior President of Scottish Tribunals.⁵⁶⁵

- 9.36 A number of the AJTC Scottish Committee's recommendations were implemented in the Tribunals (Scotland) Act 2014 ("the 2014 Act"), which established the First-tier tribunal for Scotland and the Upper Tribunal for Scotland. The 2014 Act enshrines judicial independence, and lists those office holders responsible for upholding the independence of the Scottish Tribunals.⁵⁶⁶
- 9.37 Pursuant to the 2014 Act the Lord President is the head of the Scottish Tribunals and has responsibility for representing the views of the membership of the Scottish Tribunals to the Scottish Ministers and Scottish Parliament.⁵⁶⁷ The 2014 Act also gives the Lord President the power to assign a person to the office of President of Scottish Tribunals.⁵⁶⁸ However, the 2014 Act did not separate the STS from the Justice Directorate division of the Scottish Government.
- 9.38 Later in 2014 the Scottish Government announced its decision to merge STS and SCS to create the SCTS. The Consultation Report explained:

the Scottish Ministers agreed that it was neither tenable nor desirable in the longer-term to have the Lord President as head of the court and tribunal judiciary with the tribunal administration staying with the Scottish Ministers in the long-term. This would lead to a situation where the judiciary was independent from Government and the administrative support was not.⁵⁶⁹

Structure of the Scottish Courts and Tribunals Service

- 9.39 The SCTS was created in April 2015, with administrative support for the tribunals previously administered by the STS now being provided by a dedicated delivery unit within the SCTS, Tribunals Operations.⁵⁷⁰ The SCTS is responsible for administering the following tribunals:
- (1) The First-tier Tribunal for Scotland (itself subdivided into five chambers);
 - (2) The Upper Tribunal for Scotland;
 - (3) The Mental Health Tribunal for Scotland (to be transferred to the First-tier Tribunal for Scotland);

⁵⁶⁵ Administrative Justice and Tribunals Council: Scottish Committee, *Tribunal Reform in Scotland: A Vision for the Future* (January 2011) para 4.35.

⁵⁶⁶ Namely: The First Minister, the Lord Advocate, the Scottish Ministers, members of the Scottish Parliament and all other persons with responsibility for matters relating to the members of the Scottish Tribunals or the administration of justice. See Tribunals (Scotland) Act 2014, s 3.

⁵⁶⁷ Tribunals (Scotland) Act 2014, ss 2 and 6.

⁵⁶⁸ Above, s 4(2).

⁵⁶⁹ Scottish Government, *Consultation Report on the Proposed Merging of the Scottish Tribunals Service and the Scottish Courts Service* (March 2014) para 4.

⁵⁷⁰ Scottish Courts and Tribunals Service, *Annual Reports and Accounts 2018-2019* (September 2019) p 75.

- (4) The Council Tax Reduction Review Panel;
 - (5) The Pensions Appeal Tribunal; and
 - (6) The Lands Tribunal for Scotland (to be transferred to the Upper Tribunal for Scotland).⁵⁷¹
- 9.40 As a statutory non-ministerial department SCTS has a Board and a Chief Executive. The SCTS provides leadership and broad direction to the staff it employs and holds the Chief Executive Officer (“CEO”) to account for the performance of the SCTS. The CEO is responsible for the day-to-day running of the SCTS. The staff of the SCTS are civil servants, appointed by and accountable to the SCTS.⁵⁷²
- 9.41 The SCTS has a separate budget distinct from the Justice budget, and the Board is responsible for preparing its budget for each financial year. The budget forms part of the budget presented to, and is subject to approval by, the Scottish Parliament.⁵⁷³
- 9.42 The SCTS Board is comprised of judicial and non-judicial members. The judicial membership comprises the Lord President, the Lord Justice Clerk, the President of Scottish Tribunals, a sheriff principal, two sheriffs or summary sheriffs,⁵⁷⁴ a justice of the peace and one Chamber President from the First-tier Tribunal for Scotland. The non-judicial membership comprises an advocate practising in Scotland, a solicitor practising in Scotland, the Chief Executive of SCTS and three other individuals who are not qualified for appointment as a judicial member.⁵⁷⁵ The members of the Board other than the Lord Justice Clerk, the President of the Scottish Tribunals, the Chief Executive and the Lord President are appointed by the Lord President.⁵⁷⁶
- 9.43 The members of the SCTS Board are corporately responsible for the leadership and broad direction of the organisation, for ensuring that it carries out its functions effectively and efficiently, and for ensuring that it meets the aims and objectives

⁵⁷¹ See <https://www.scotcourts.gov.uk/the-courts/the-tribunals/about-scottish-tribunals>.

Following the Smith Commission Report in 2014 the Scottish and UK governments agreed that powers over the management and operation of reserved tribunals would be devolved to the Scottish Parliament. However, as noted in the SCTS Corporate Plan for 2020-2023: “an agreement on whether and when such a transfer will take place is yet to be reached between the Scottish and UK Governments.” It is likely when the transfer takes place, those tribunals will also be administered by SCTS. See Scottish Courts and Tribunals Service, *Corporate Plan 2020-2023* (May 2020) p 18.

⁵⁷² Scottish Courts and Tribunal Service, *Framework document* (April 2015) para 1.5. Available at <https://www.scotcourts.gov.uk/docs/default-source/scs---taking-action/scts-framework-document---april-201549d5cea6898069d2b500ff0000d74aa7.pdf?sfvrsn=2>.

⁵⁷³ Scottish Courts and Tribunal Service, *Framework document* (April 2015) paras 5.1 to 5.3.

⁵⁷⁴ Sheriffs sit in the Sheriff Courts and have the power to determine civil cases and some criminal cases. For more information on the role of sheriffs see <https://www.judiciary.scot/home/judiciary/judicial-office-holders/sheriffs/sheriffs-1>.

⁵⁷⁵ Judiciary and Courts (Scotland) Act 2008, sch 3, para 2.

⁵⁷⁶ Above, sch 3, para 3.

agreed between the SCTS and the Scottish Ministers and recorded in the SCTS Corporate Plan.⁵⁷⁷

9.44 The 2008 Act also gives the Board the power to create committees.⁵⁷⁸ The Board have created three committees: the Audit and Risk Committee, the People Committee and the Estates, Health and Safety, Fire and Security Committee. The functions of the Committees are as follows.

- (1) The Audit and Risk Committee support the Board in its responsibilities in relation to issues of risk, control, governance and best value and advises the Board on the effectiveness of governance and risk management processes.⁵⁷⁹
- (2) The People Committee acts on behalf of the Board to ensure staff have the skills, support and motivation, now and in the future, to fulfil the organisation's core functions.⁵⁸⁰
- (3) The Estates, Health and Safety, Fire and Security Committee acts on behalf of Board to ensure the SCTS has the buildings, facilities and practices it needs to fulfil the organisation's core functions.⁵⁸¹

9.45 The SCTS has agreed a framework document with the Scottish Ministers. The Framework Document provides that the Board is accountable to the Scottish Parliament for the efficient use of public resources,⁵⁸² but expressly provides that Scottish Ministers are not accountable through Parliamentary Questions for the operation of the SCTS.⁵⁸³ However, the Document states:

[Parliamentary Questions] to Ministers may, however, seek information from Ministers about matters for which the Scottish Government has a general responsibility, which Ministers cannot provide without assistance from the SCTS. In particular, [Parliamentary Questions] may seek statistical information from the

⁵⁷⁷ Scottish Courts and Tribunal Service, *Framework document* (April 2015) para 3.4. <https://www.scotcourts.gov.uk/docs/default-source/scs---taking-action/scts-framework-document---april-201549d5cea6898069d2b500ff0000d74aa7.pdf?sfvrsn=2>.

⁵⁷⁸ Judiciary and Courts (Scotland) Act 2008, sch 3, para 10(1).

⁵⁷⁹ Scottish Courts and Tribunals Service, *Audit and Risk Committee Remit* (June 2015) para 1. <https://www.scotcourts.gov.uk/docs/default-source/scs-board/scts-audit-amp-risk-committee---remit---june-2015.pdf?sfvrsn=2>.

⁵⁸⁰ Scottish Courts and Tribunals Service, *SCTS People Committee Remit* (November 2019) para 1. [https://www.scotcourts.gov.uk/docs/default-source/scs-minutes/scts-people-committee-remit-\(revised-november-2019\).pdf?sfvrsn=2](https://www.scotcourts.gov.uk/docs/default-source/scs-minutes/scts-people-committee-remit-(revised-november-2019).pdf?sfvrsn=2).

⁵⁸¹ Scottish Courts and Tribunals Service, *SCTS Estates, Health & Safety, Fire and Security Committee Remit*, para 1. <https://www.scotcourts.gov.uk/docs/default-source/default-document-library/scts-estates-health-safety-fire-and-security-committee---remit---revised-april-2020.pdf?sfvrsn=0>.

⁵⁸² Scottish Courts and Tribunal Service, *Framework document* (April 2015) para 4.1. <https://www.scotcourts.gov.uk/docs/default-source/scs---taking-action/scts-framework-document---april-201549d5cea6898069d2b500ff0000d74aa7.pdf?sfvrsn=2>.

⁵⁸³ Scottish Courts and Tribunal Service, *Framework document* (April 2015) para 4.5. <https://www.scotcourts.gov.uk/docs/default-source/scs---taking-action/scts-framework-document---april-201549d5cea6898069d2b500ff0000d74aa7.pdf?sfvrsn=2>.

Scottish Ministers about the performance of the justice system, and Ministers may seek information from the SCTS to enable them to respond to such questions.⁵⁸⁴

The Northern Ireland Courts and Tribunals Service

9.46 In Northern Ireland, the NICTS administers all of Northern Ireland's courts and the majority of tribunals. In 2016-17, 120,021 cases were received and 13,028 cases were disposed of.⁵⁸⁵ It follows the executive agency model, being an executive agency of the Department of Justice. Strategic direction is provided by the NICTS Board, which is chaired by a Chief Executive and also includes judicial representatives. The Chief Executive is responsible for day-to-day operations and is accountable to the Northern Irish Assembly (in relation to the NICTS budget and NICTS business).

9.47 NICTS operations are governed by a framework document, which explains that:

The NICTS is subject to the overall direction and control of the Minister.

The Minister determines the policy framework within which the NICTS operates and the scope of its activities. The Minister determines the resources to be made available to the NICTS following consultation with the Chief Executive and the Lord Chief Justice, approves its Corporate and Business Plans, sets key performance targets and will be advised by Departmental officials on the performance of the NICTS.

The Minister delegates the day to day operation of the NICTS to the Chief Executive but expects to be consulted by the Chief Executive on the handling of operational matters which could give rise to significant public, judicial or Assembly concern.⁵⁸⁶

REFORMING THE WELSH TRIBUNALS UNIT

Previous proposals for reform

9.48 A number of different models for the WTU have been suggested since it was established in 2014. A common aim in the proposals is ensuring greater independence from Welsh Government. This section outlines those previous proposals and summarises possible advantages and disadvantages.

The AJTC Welsh Committee of the Administrative Justice and Tribunals Council

9.49 Although the AJTC Welsh Committee's 2010 Report predated the creation of the WTU, it took the view that:

⁵⁸⁴ Scottish Courts and Tribunal Service, *Framework document* (April 2015) para 4.6.
<https://www.scotcourts.gov.uk/docs/default-source/scs---taking-action/scts-framework-document---april-201549d5cea6898069d2b500ff0000d74aa7.pdf?sfvrsn=2>.

⁵⁸⁵ NICTS provides clerking and hosting of tribunal hearings for HMCTS under a service level agreement. See NICTS *Annual report and accounts* 2016-17, pp 10 and 21.

⁵⁸⁶ Northern Ireland Courts and Tribunals Service, *Framework document* (updated October 2013) p 9.
https://wayback.archive-it.org/11112/20170206203048/http://www.courtsni.gov.uk/en-GB/Publications/NICTS_Agency_Governance/Documents/Northern%20Ireland%20Courts%20and%20Tribunals%20Framework%20Document/NICTS-Framework-Doc.pdf.

Given the relatively small size and scope of the Welsh tribunals, a separate executive agency is not the most efficient or economical solution. Rather, policy and administrative responsibility for all Welsh tribunals should be transferred to an area of the Welsh Assembly Government which has no specific responsibility for any of the government decisions under dispute. This would also have the advantage of increasing cost effectiveness by creating economies of scale and spreading resources more fairly across Welsh tribunals.⁵⁸⁷

The President of Welsh Tribunals

- 9.50 In his first annual report the PWT expressed the view that the WTU should have a similar status to HMCTS Wales which, as a subdivision of HMCTS, operates under the Framework Agreement discussed above. The PWT explained the advantages of that reform as follows.

As well as providing substantial advantages for the operation of the Welsh Tribunal system in terms of efficiency and direction, the conferring of executive agency status on the WTU would provide an element of independence from Welsh Government which can only assist in reinforcing the constant need for the Welsh Tribunal system to be and to be seen to be independent of Welsh Government. Judicial independence is a cornerstone of our democratic system and there is always a need to be vigilant to ensure that it is maintained and seen to be maintained.⁵⁸⁸

- 9.51 More recently the President gave evidence, along with the head of the WTU, to the Senedd's Legislation, Justice and Constitution Committee. He explained that:

When I wrote my first report, I favoured creating an agency-type situation, because, putting it simply, I thought that it might be easier to achieve in the shorter term than the model that Scotland has adopted. Since time has gone by, I'm wondering—and I use the word 'wondering' advisedly because obviously there's a political element to this, as well as an administration of justice element—whether or not Wales should be considering seriously the Scottish model.⁵⁸⁹

- 9.52 He also noted that Northern Ireland could serve as a useful point of comparison, being closer in size to Wales than England.⁵⁹⁰ Regardless of the model adopted, the PWT's most recent annual report stresses that "whatever structure emerges in Wales for the WTU there may be a significant role for the President of Welsh Tribunals to play if the aim of "structural independence" is to be achieved".⁵⁹¹

⁵⁸⁷ Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) para 70.

⁵⁸⁸ President of Welsh Tribunals, *Annual Report 2018 - 2019* (March 2019) p 10.

⁵⁸⁹ Oral evidence of Sir Wyn Williams and Rhian Davies Rees to the Legislation, Justice and Constitution Committee on 13 July 2020, para 24. Available at <https://record.assembly.wales/Committee/6414>.

⁵⁹⁰ Above, paras 23 to 26.

⁵⁹¹ President of Welsh Tribunals, *Annual Report 2019 - 2020* (April 2020) para 3.14.

The Commission on Justice in Wales Report

9.53 The Thomas Commission (which included Sir Wyn Williams, the current PWT, as a Commissioner) preferred the non-ministerial department model adopted in Scotland. Chapter 6 of the Commission's report recommends that the WTU should "be placed under judicial control similar to the way in which the Scottish Tribunals are arranged."⁵⁹² The Commission envisaged reform of the WTU as a stepping stone to wider reform of tribunals and courts in Wales. In Chapter 12 the Commission goes on to state:

with legislative devolution, a Welsh Courts and Tribunals Service should be developed from the base of a Welsh Tribunals Unit reformed on the model of the Scottish Courts and Tribunals Service.⁵⁹³

9.54 We are conscious that any recommendations must take account of reforms already being undertaken by the Welsh Government. We will continue to monitor any steps taken to implement the Thomas Commission recommendations during the course of our project.

Options for reform

9.55 As discussed above, there have been various proposals for reforming the WTU. The broad options for reform are the executive agency model, similar to HMCTS, or a non-ministerial department model, sometimes referred to as the "Scottish model". However, as Dr Sarah Nason, Dr Huw Pritchard, Dr Helen Taylor and Ann Sherlock have pointed out above, the term "Scottish model" is imprecise as:

there are various 'Scottish models' that have developed over time due to reforms establishing a Scottish Courts and Tribunals Service, which has included the transfer of administration for tribunals covering reserved matters.⁵⁹⁴

9.56 Another term often used imprecisely is independence. We take this to mean, broadly, greater separation from Welsh Government. This could include separate legal personality, budgetary independence, independence from processes used by the Welsh Government or simply physical separation from Welsh Government personnel. Any reform could involve some or all those options.

⁵⁹² Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) para 6.59.1.

⁵⁹³ Chapter 12 is entitled "Governance, the law of Wales and the judiciary". The Chapter contains three types of recommendation: recommendations on the devolution of justice, recommendations to be implemented under the current scheme of devolution and recommendations for implementation with legislative devolution. The recommendation at para 1.43 above is listed as a recommendation for implementation with legislative devolution. Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) p 502.

⁵⁹⁴ S Nason, A Sherlock, H Pritchard, and H Taylor, *Public administration and a just Wales – Full report* (March 2020) para 9.12.

9.57 We think the broad options for reform under the current devolution settlement are as follows.

- (1) Option One – retain the *status quo*.
- (2) Option Two – reform the WTU as an executive agency of the Welsh Government (“the executive agency model”).
- (3) Option Three – reform the WTU as a non-ministerial department (“the non-ministerial department model”).

Retaining the *status quo*

9.58 Option One would not address the PWT’s and Thomas Commission’s concerns that the WTU lacks independence from the Welsh Government. Under this current model the PWT would continue to be responsible for the devolved tribunal judiciary, with the Welsh Government responsible for tribunal administration. This was flagged as a problem by the Scottish Government who thought it undesirable to have “a situation where the judiciary was independent from Government and the administrative support was not.”⁵⁹⁵

9.59 On the other hand, Dr Sarah Nason and Dr Huw Pritchard have observed that some tribunal leaders and officials are satisfied that the current arrangements are both sufficiently independent from the Welsh Government and perceived to be independent. They highlight that:

a research interviewee from the WTU explained that the WTU is perceived differently to other Welsh Government departments and workstreams, and that there is a growing element of respect and understanding particularly for judicial independence and expertise, though this has taken some time to establish. It was also suggested that having a judicial lead (the President of Welsh Tribunals) creates space between the individual tribunal presidents and ministers.⁵⁹⁶

The executive agency model

9.60 Option Two would go some way to addressing concerns about the independence of the WTU. The benefits of this model were outlined in the extract from the PWT Annual Report above. If this model were adopted, responsibility for the day-to-day activities of the WTU would be transferred to a newly created Chief Executive, and significant operational decisions would be taken by a Board. However, the executive agency model would provide a limited degree of separation from the Welsh Government, as executive agencies are ultimately accountable to the sponsoring Minister and have no separate constitutional status.

9.61 As discussed above, the AJTC Welsh Committee took the view that the executive agency model would be inefficient given the small number of cases heard by Welsh

⁵⁹⁵ Scottish Government, *Consultation Report on the Proposed Merging of the Scottish Tribunals Service and the Scottish Courts Service* (March 2014) para 4.

⁵⁹⁶ 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, p 240.

tribunals. However, since 2008, the last year of data used in the 2010 report, a number of the tribunals have experienced a gradual increase in caseload. For example, in 2008 the Mental Health Review Tribunal for Wales received 1,450 applications. This increased to 1,942 in 2019-2020.⁵⁹⁷

- 9.62 The caseload of the devolved tribunals will also increase in the future, if further appeals to devolved tribunals are created by the Senedd. Our own provisional proposals, if pursued, would lead to the WTU administering the caseload of the Valuation Tribunal for Wales and school exclusion appeals. For those reasons, we are not convinced that the WTU administers too few cases to justify reform along the executive agency model.

The non-ministerial department model

- 9.63 Adopting Option Three would give the WTU a greater degree of independence compared to Option Two. Non-ministerial departments have a separate legal identity and operate separately from any sponsoring department. Under this model the PWT could be chair of the Board, and responsible for representing the views of the Welsh tribunal members to the Senedd. Legislation would be required to establish the WTU as a non-ministerial department.

- 9.64 As discussed at paragraphs 9.53 and 9.54 above, the non-ministerial department model is the one preferred by the Thomas Commission. As Dr Sarah Nason and Dr Huw Pritchard have noted:

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.⁵⁹⁸

- 9.65 Some commentators have suggested other Welsh bodies as a possible template for the structure of the WTU. Nason, Pritchard, Taylor and Sherlock discuss the Welsh Revenue Authority ("the WRA") as an illustrative example. The WRA is the first Welsh non-ministerial department, established by the Tax Collection and Management (Wales) Act 2016 as a body corporate.⁵⁹⁹ Its relationship with the Welsh Government is regulated by a framework document, which explains:

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.... Its general function

⁵⁹⁷ Mental Health Review Tribunal for Wales, *Annual Report 2019-2020* (July 2020) p 8.

⁵⁹⁸ 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.

⁵⁹⁹ Tax Collection and Management (Wales) Act 2016, s 2.

and therefore main responsibility is the collection and management of the devolved taxes.⁶⁰⁰

9.66 The WRA is governed by a Board and run by a Chief Executive, who is a civil servant. The Board is made up of non-executive members, who are appointed by the Welsh Ministers, and executive members (including an executive member elected by WRA staff). The Welsh Ministers appointed the first Chief Executive. Subsequent Chief Executives will be selected by the non-executive members of the WRA, on such terms as they, with the approval of the Welsh Ministers, may determine.⁶⁰¹

9.67 The Board is responsible for leadership and strategic direction of the WRA and ensures that its statutory functions can be fulfilled. It is accountable to the Senedd and Welsh Ministers for assuring it achieves the objectives and priorities agreed with the Welsh Ministers. As Nason, Pritchard, Taylor and Sherlock explain:

The WRA non-ministerial model is in close alignment with the current WTU structure in terms of civil service staffing arrangements and current operation. It would formalise the relationship between the WTU and Welsh Ministers and extend the level of impartiality from government. This is attractive in terms of incrementally developing the WTU further and giving it its own recognisable identity. It is also consistent with the 'Scottish model' as envisaged by the Commission on Justice as the Scottish Courts and Tribunal Service is also established as a non-ministerial department under the Judiciary and Courts (Scotland) Act 2008.⁶⁰²

9.68 While the WRA is legally separate from the Welsh Government, Welsh Ministers retain the power to issue directions. The statement of policy intent which accompanied the Tax Collection and Management (Wales) Bill 2014 explains that:

it is intended that this power could be used, for example, by the Welsh Ministers to set out an annual remit for WRA to specify policy priorities. Any such remit would be published. In exceptional circumstances, the Welsh Ministers might direct the WRA where they consider an intervention is necessary to ensure the efficient and effective collection and management of devolved taxes.⁶⁰³

Analysis

9.69 We are of the preliminary view that the WTU should have greater structural independence from the Welsh Government. While we understand that its independence is currently respected by the Welsh Government, a more formal structure for the WTU would ensure that that continues and is seen to be the case.

⁶⁰⁰ Welsh Revenue Authority, *Framework document* (March 2018) para 1.4.
<https://gov.wales/sites/default/files/publications/2018-08/agreement-between-the-welsh-government-and-welsh-revenue-authority.pdf>.

⁶⁰¹ Tax Collection and Management (Wales) Act 2016, s 9.

⁶⁰² S Nason, A Sherlock, H Pritchard, and H Taylor, *Public administration and a just Wales – Full report* (March 2020) para 9.23.

⁶⁰³ Welsh Government, *Statement of policy intent* (July 2014) p 3.
<https://business.senedd.wales/documents/s42603/Statement%20of%20policy%20intent%20-%202014%20July%202015.pdf>

Such a structure could take the form of a non-ministerial department or an executive agency.

- 9.70 Either model would also create the possibility of a more formal role for the PWT in the running of the WTU, as a member of a governance board. We think this would be a valuable improvement. Again, we have observed that there is currently a very strong relationship between the WTU and the PWT. But the relationship is relatively informal, and so vulnerable to changes in personnel and other changes within the Welsh Government. A governance board would also allow for other voices to play a part in the running of the WTU.
- 9.71 A further advantage of both models is the increased profile and transparency they would lend to the WTU. Despite the WTU's critical role in administering the tribunals, it is not very visible to the general public. Annual reports of the tribunals tend to refer to the "secretariat", rather than the WTU, and it does not have its own website. Its profile has been raised by its increased engagement with the Senedd; as mentioned above, earlier this year the PWT and the head of the WTU gave evidence to the Legislation, Justice and Constitution Committee.⁶⁰⁴ But its profile is still relatively low. Being reformed into an executive agency or non-ministerial department would increase both the visibility of the WTU and its transparency to the general public, as it would need to produce an annual report and accounts.
- 9.72 Either the executive agency or non-ministerial department options would therefore offer a number of improvements to the current status of the WTU. Is there a good reason then to prefer one over the other? There may be differences in relation to the costs incurred in setting up a non-ministerial department rather than an executive agency. The precise cost is likely to depend on the detail of the model adopted. Some guidance is provided by the set-up costs of the WRA. The 2019 report from the Finance Committee of the then National Assembly for Wales gave an estimate of implementation costs of £6.3 million over the two year period 2016/17 to 2017/18.⁶⁰⁵ But that was for the creation of an entirely new body, rather than the reform of an existing one. We welcome views from consultees as to the relative costs of setting up an executive agency and non-ministerial department.
- 9.73 Otherwise, the principal difference between the executive agency and non-ministerial department options are in the level of independence that would result for the WTU. A non-ministerial department is typically expected to have greater control over its strategic and operational decision-making, as well as its own budget.
- 9.74 That is not to say that the Welsh Ministers have no role; we would expect them to agree policy objectives with a reformed WTU. They could, as in the case of the WRA, be enabled to issue directions. But it would be clear that they were not expected to direct a reformed WTU's operational decisions.

⁶⁰⁴ Oral evidence of Sir Wyn Williams and Rhian Davies Rees to the Legislation, Justice and Constitution Committee on 13 July 2020. Available at <https://record.assembly.wales/Committee/6414>.

⁶⁰⁵ National Assembly for Wales, Finance Committee, *The implementation of fiscal devolution in Wales* (2019) (March 2019) para 22. <https://senedd.wales/laid%20documents/cr-ld12477/cr-ld12477-e.pdf>.

9.75 Our preliminary view is that the WTU would benefit from this greater level of control, and therefore should be constituted as a non-ministerial department. We note that this view is shared by the authors of *Public Administration and a Just Wales*.⁶⁰⁶ A reformed WTU would have a Chief Executive responsible for day-to-day administration and a Board, chaired by the PWT, to provide leadership. The Board would also play a role in agreeing the WTU's budget with the Welsh Ministers. While a reformed WTU could still have a sponsoring minister, it would be ultimately accountable to the Senedd. This would remove any residual impression that the Welsh Government plays a role in the decisions made by tribunals.

Consultation Question 65.

9.76 We provisionally propose that the Welsh Tribunals Unit should be established as a non-ministerial department.

Do you agree?

⁶⁰⁶ S Nason, A Sherlock, H Pritchard, and H Taylor, *Public administration and a just Wales – Full report* (March 2020) recommendation 17.

Chapter 10: Judicial independence

INTRODUCTION

10.1 Judicial independence is explicitly included within the terms of reference for this project. It is particularly relevant to a number of topics which have already been considered: appointments and discipline (Chapters 6 and 7), and the structure of the Welsh Tribunals Unit (Chapter 9). This chapter addresses in more detail what is meant by the concept of judicial independence, and explores other ways in which the independence of the devolved tribunals can be protected. In particular it considers whether the Welsh Ministers should provide a statutory guarantee of independence, and whether members of the devolved tribunals should be required to take the judicial oath.

10.2 The importance of upholding judicial independence has been recognised in relation to the devolved tribunals in Wales. In 2017, Mick Antoniw MS, then Counsel General, made a statement in response to media attacks on judges. He highlighted the mechanisms already in place to protect the independence of the devolved tribunals (including access to the Judicial Appointments Commission, the expertise of the Judicial Conduct Investigations Office, and the President of Welsh Tribunals). He concluded that:

it will increasingly be a test of this Assembly's maturity as a legislature and Parliament that it recognises and understands the importance of the independence of its judicial institutions and the principles on which they are founded and operate.⁶⁰⁷

10.3 This Consultation Paper seeks to build on the work done to protect judicial independence so far and to embed the principle within a new Tribunals Bill for Wales.

WHAT IS JUDICIAL INDEPENDENCE?

Protecting impartial decision-making

10.4 There is no shortage of commentary on the importance of judicial independence, and how it should be protected. The starting point frequently taken is that judges need to be impartial in order to perform their role. Graham Gee, Robert Hazell, Kate Malleon and Patrick O'Brien explain this as follows.

... few would disagree that judges should be equipped, personally and professionally, to resolve disputes impartially, according to law and free from improper pressure – whether from the parties to the dispute, governmental actors, pressure groups or other judges. This core understanding of judicial independence

⁶⁰⁷ Mick Antoniw, written Cabinet Statement, "Independence of the Welsh Tribunals" (March 2017) <https://gov.wales/written-statement-independence-welsh-tribunals>.

is based on the 'social logic of the courts'.⁶⁰⁸ If judges are induced to decide disputes and hold the government to account other than through a good-faith adjudication of the facts and determination of the relevant law, then the logic of courts as a method of impartial dispute resolution breaks down. The losing party no longer has a reason to accept the legitimacy of the court's decision.⁶⁰⁹

10.5 As Peter Cane puts it, judicial independence is thus:

a function of institutional design that promotes, but is not synonymous with, 'impartiality', which is a characteristic of reasoning processes or a frame of mind.⁶¹⁰

10.6 In other words, judicial independence is the principle used to shape legal and political institutions in order to allow judges to act impartially and protect them from improper influence. The most obvious source of this potential interference is from government. That is why such importance is placed on having robust systems for appointment and discipline. There should be no risk that a judge feels compelled to decide a case in a particular way out of gratitude for being appointed, or fear that that appointment will be taken away.⁶¹¹

10.7 As well as being protected from improper interference by government, judges also need in some cases protection from members of the public, which is why they are "immune from suit". Lord Denning in *Sirros v Moore* explained the rationale for the principle as follows:

A judge is not liable to an action in damages. The reason is not because the judge has any privilege to make mistakes or do wrong. It is so that he should be able to do his duty with complete independence and free from fear.⁶¹²

10.8 The principle is not absolute; since the enactment of the Human Rights Act 1998, claimants may bring proceedings in respect of a breach of the right to liberty by judicial acts. But those proceedings are still against the Crown, not the individual judge.⁶¹³

Structural independence

10.9 As important as the need to protect judges from actual interference is the need to ensure judges are perceived as independent. There is a risk otherwise that tribunal applicants are unable to trust the decisions made in their cases. This is why the

⁶⁰⁸ M Shapiro, *Courts: a comparative and political analysis* (1981) p 1.

⁶⁰⁹ G Gee, R Hazell, K Malleson and P O'Brien, *The politics of judicial independence in the UK's changing constitution* (2015) p 10.

⁶¹⁰ P Cane, *Administrative tribunals and adjudication* (2009) p 105.

⁶¹¹ The personal commitment that judges make to this method of impartial decision-making is by taking the judicial oath; judges promise to act "without fear or favour, affection or ill will". The judicial oath is discussed later in this chapter.

⁶¹² *Sirros v Moore* [1975] QB 118 at [132].

⁶¹³ Human Rights Act 1998, s 9(3) and (4).

Leggatt Report recommended that administration of tribunals should be by a tribunals service, stating:

we have concluded that the only way in which users can be satisfied that tribunals are truly independent is by developing clear separation between the ministers and other authorities whose policies are tested by tribunals, and the minister who appoints and supports them.”⁶¹⁴

10.10 It is also one of the reasons why many devolved tribunals are administered by the Welsh Tribunals Unit, following the recommendation of the Administrative Justice and Tribunals Council’s Welsh Committee in 2010,⁶¹⁵ and why we provisionally propose in Chapter 9 that the WTU should have even greater structural independence from the Welsh Government.

A STATUTORY GUARANTEE OF INDEPENDENCE

10.11 The Constitutional Reform Act 2005 made significant changes to the legal system in the UK, modifying the office of the Lord Chancellor and establishing the Supreme Court. One of the principles agreed between the Lord Chief Justice and Lord Chancellor during the reform process was that the “new arrangements should reinforce the independence of the judiciary”.⁶¹⁶ This is done in the 2005 Act through a guarantee of continued judicial independence. Section 3(1) provides that:

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.⁶¹⁷

10.12 The Lord Chancellor and Ministers of the Crown are also prevented from seeking “to influence particular judicial decisions through any special access to the judiciary”.⁶¹⁸ The Lord Chancellor has particular responsibilities, including to have regard to the need to defend judicial independence.⁶¹⁹

10.13 When the Tribunals, Courts and Enforcement Act 2007 was passed, the guarantee was extended to chamber presidents and deputy presidents of the First-tier and Upper Tribunal, as well as members of both of those tribunals. It also extends to the President, Vice-President, members of the panel of chairmen and other members of the Valuation Tribunal for England.⁶²⁰

⁶¹⁴ Sir Andrew Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (March 2001) para 2.23.

⁶¹⁵ Administrative Justice and Tribunals Council, *Review of Tribunals Operating in Wales* (2010) p 2.

⁶¹⁶ *The Lord Chancellor’s Judiciary-Related Functions: Proposals* (the “concordat”) (January 2004) para 5. <https://publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/12514.htm>.

⁶¹⁷ Constitutional Reform Act 2005, s 3(1).

⁶¹⁸ Above, s 3(5).

⁶¹⁹ Above, s 3(6)(a).

⁶²⁰ Above, sch 14 pt 3.

10.14 Its application to the devolved tribunals in Wales is, however, inconsistent. It applies only to those members of the devolved tribunals who are listed in Schedule 14 to the Constitutional Reform Act 2005.⁶²¹ As explored in Chapters 6 and 7, those persons are:

- (1) the President of the Mental Health Review Tribunal for Wales and members of that tribunal;
- (2) the President of the Special Educational Needs Tribunal for Wales, and members of the chairmen's panel of that tribunal;
- (3) some members of rent assessment committees for Wales (others are appointed by the Welsh Ministers);⁶²² and
- (4) the Chairman and members of the Agricultural Land Tribunal for Wales.

10.15 The Welsh Ministers making appointments of tribunal members to the Welsh Language Tribunal must also have regard to the need to uphold the independence of the tribunal and the rule of law.⁶²³

10.16 In her address at the Public Law Project conference in 2012, Tribunal Judge Elisabeth Arfon-Jones, then Vice-President of the Upper Tribunal Immigration and Asylum Chamber, considered the status of the devolved tribunals. She noted that while judges of the First-tier Tribunal and Upper Tribunal take the judicial oath and are subject to a statutory safeguard of judicial independence, "the judges of the devolved tribunals in Wales do not benefit from this protective structural umbrella". She added that "the devolved tribunal judges in Wales are particularly vulnerable because of the absence of appropriate judicial or ministerial protection".⁶²⁴

10.17 Since then, additional protection has been provided by the creation of the President of Welsh Tribunals. But in our view there is still a need to ensure that Welsh Ministers are subject to a similar duty to that of their UK counterparts to protect the independence of the judiciary. We provisionally propose 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.

⁶²¹ Constitutional Reform Act 2005, s 3(7A).

⁶²² Rent assessment committees form one of the three types of tribunal that, together, make up the Residential Property Tribunal for Wales ("RPTW"). The underlying legislation for the other two, the residential property tribunals and leasehold valuation tribunals, state that those jurisdictions can be exercised by a rent assessment committee. References to rent assessment committees can therefore in some cases be read as a global reference to members of the RPTW.

⁶²³ The Welsh Language Tribunal (Appointment) Regulations SI 2013 No 3139 (W 312) reg 3.

⁶²⁴ Public Law Project Conference, Elisabeth Arfon-Jones, "The Tribunal System in Wales: Map and update on jurisdictions" (April 2012) <https://publiclawproject.org.uk/resources/the-tribunal-system-in-wales-map-and-update-on-jurisdictions/>.

Consultation Question 66.

10.18 We provisionally propose 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.

Do you agree?

THE JUDICIAL OATH

10.19 Judges in the UK are required to take the “judicial oath”. As mentioned above, this represents a personal commitment to impartial decision-making. What is collectively known as the judicial oath is in fact formed of two separate oaths; the oath of allegiance and the judicial oath.⁶²⁵ 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.

10.20 As well as judges, a version of the oath of allegiance is sworn by those becoming a British citizen, Anglican clergy, and parliamentarians. The judicial oath is sworn by judges only, and 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.

10.21 Both oaths also exist in the form of an affirmation, in which the words “I do swear by Almighty God” are replaced by “I do solemnly sincerely and truly declare and affirm”. Alternative versions of the religious oath may be used by members of the Hindu, Muslim and Sikh faiths.⁶²⁶

10.22 The Judicial Conduct Guide explains that, in taking the judicial oath, a judge “acknowledges that he or she is primarily accountable to the law which he or she must administer”.⁶²⁷ In *Helow v Secretary of State for the Home Department* Lord Mance considered the role of the judicial oath when considering an allegation of apparent judicial bias. He concluded that the oath was “more a symbol than a guarantee of the impartiality that any professional judge is by training and experience expected to practice and display”.⁶²⁸ It is nonetheless an important symbol. It is a public affirmation

⁶²⁵ Both in their original forms are found in the Promissory Oaths Act 1868.

⁶²⁶ Courts and Tribunals Judiciary, *Oaths*, <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/oaths/>.

⁶²⁷ Courts and Tribunals Judiciary, *Guide to judicial conduct* (March 2018) p 8 <https://www.judiciary.uk/wp-content/uploads/2016/07/judicial-conduct-v2018-final-2.pdf>.

⁶²⁸ *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416 at [57].

given by the judge that his or her duty lies not to the executive or the State but to the rule of law and to the people, as embodied by the Crown.

The judicial oath and tribunals

10.23 Following the enactment of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”), members, judges and judicial leads of both the UK First-tier and Upper Tribunals must take the judicial oath.⁶²⁹ In Scotland, all members and judicial leads of tribunals are considered part of the judiciary and are consequently required to take the same judicial oath.⁶³⁰

10.24 When Lord Carnwath was the first Senior President of Tribunals, he described how he was struck by the strength of emotion experienced by judges and members taking the judicial oath, noting that “one described the occasion as only slightly less nerve wracking and emotional than getting married”.⁶³¹

The devolved tribunals in Wales

10.25 The President of Welsh Tribunals is required to take the judicial oath before the Lord Chief Justice.⁶³² Currently however there is no statutory requirement for either judicial leads or members of devolved tribunals to take the oath (though several may in practice have taken it by virtue of being appointed to other judicial offices).

10.26 This appears to us be anomalous. We provisionally propose that all judicial leads and members of the devolved tribunals (including legal and other members) should be required to take the judicial oath.

Consultation Question 67.

10.27 We provisionally propose that judicial leads and legal and other members of devolved tribunals should be required to take the judicial oath.

Do you agree?

⁶²⁹ Tribunals, Courts and Enforcement Act 2007, sch 3 para 10.

⁶³⁰ Tribunals (Scotland) Act 2014, sch 7 para 11.

⁶³¹ Senior President of Tribunals, *Annual Report: tribunals transformed* (February 2010) para 60. <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/senior-president-tribunals-report-2010.pdf>.

⁶³² Wales Act 2017, sch 5 para 14(1)(a).

Appendix 1: Tribunals within the scope of this project

- 1.1 This appendix gives a brief overview of each of the tribunals which we provisionally consider to fall within the scope of the project.

SECTION 59 TRIBUNALS

- 1.2 The following tribunals are Welsh tribunals listed in section 59(1) of the Wales Act 2017 (the “section 59 tribunals”), and are therefore subject to the supervision of the President of Welsh Tribunals.⁶³³ 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.⁶³⁴ All Welsh tribunals are administered by the Welsh Tribunals Unit of the Welsh Government.

The Agricultural Land Tribunal for Wales

- 1.3 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. 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.⁶³⁵
- 1.4 The tribunal hears both disputes between agricultural landlords and tenants⁶³⁶ and drainage disputes.⁶³⁷ In the 2019-2020 reporting period, the ALTW received 22 applications in total.⁶³⁸ As the tribunal’s work is heavily reliant on site visits, its hearings are conducted in hotels, town halls or council buildings in the locality of the land in question.
- 1.5 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

⁶³³ Wales Act 2017, s 60.

⁶³⁴ Wales Act 2017, s 62.

⁶³⁵ Agriculture Act 1947 s 73 (as amended by Transfer of Tribunal Functions Order SI 2013 No 1036).

⁶³⁶ Agricultural Holdings Act 1986 s 13.

⁶³⁷ Land Drainage Act 1991 s 31.

⁶³⁸ The Agricultural Land Tribunal Wales, *Annual Report 2019-2020* (2020) p 8
<https://agriculturallandtribunal.gov.wales/sites/agriculturalland/files/2020-07/annual-report-29-20.pdf>

clerical error.⁶³⁹ An appeal may also be made to the Upper Tribunal (Lands Chamber) on any point of law.⁶⁴⁰

- 1.6 The President of the ALTW is appointed by the Lord Chancellor and must be a barrister or solicitor of at least seven years' experience. The chairperson of the panel must have a legal qualification and is accompanied by lay panel members who have knowledge and experience of farming, drainage and landowner matters in Wales.⁶⁴¹

The Mental Health Review Tribunal for Wales

- 1.7 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 1983.⁶⁴² It hears applications by and in respect of persons detained under the Mental Health Act 1983, as amended by the Mental Health Act 2007.⁶⁴³ The MHRTW hears applications from or on behalf of those detained in a hospital in Wales, 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.
- 1.8 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 1943 applications and hearing 2286 cases in 2019-2020.⁶⁴⁴ Due to the nature of its work, most of its hearings take place in psychiatric hospitals. There is a right of appeal to the Upper Tribunal (Administrative Appeals Chamber) on any point of law arising from a decision made by the MHRTW.⁶⁴⁵
- 1.9 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.⁶⁴⁶ Members of the MHRTW are appointed by the Lord Chancellor, except for legal members who sit on the restricted patient panel. They are appointed by the Lord Chief Justice in consultation with the Lord Chancellor.

⁶³⁹ Agricultural Land Tribunals (Rules) Order 2007 No 3105 sch 1, para 32.

⁶⁴⁰ Agriculture (Miscellaneous Provisions) Act 1954 s 6(1).

⁶⁴¹ The Agricultural Land Tribunal Wales, "About" webpage, <https://agriculturallandtribunal.gov.wales/secretariat-and-members>.

⁶⁴² Mental Health Act 1959 s 3 and Mental Health Act 1983 s 65.

⁶⁴³ Mental Health Act 1983, s 65.

⁶⁴⁴ President of Welsh Tribunals, *Annual report 2019-2020* (2020) para 2.1, and the Mental Health Review Tribunal Wales, *Annual Report 2019-2020* (2020) p 8 <https://mentalhealthreviewtribunal.gov.wales/sites/mentalhealthreview/files/2020-08/mhrtw-annual-report-2019-20.pdf>.

⁶⁴⁵ Mental Health Act 1983, s 78A.

⁶⁴⁶ The Coronavirus Act 2020, sch 8, paras 11(1) and (2) provide that the President of the Mental Health Review Tribunal for Wales may appoint, to constitute the Tribunal, one legal member or one legal member and one other member who is not a legal member. We understand that this power has not been used.

The Lord Chief Justice has delegated the appointment function to the President of Welsh Tribunals.

The Residential Property Tribunal for Wales

- 1.10 The Residential Property Tribunal for Wales (“RPTW”) hears appeals relating to privately rented and leasehold property under a number of pieces of legislation.⁶⁴⁷ The RPTW is in fact 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.⁶⁴⁸ In England similar claims are heard within the First-tier tribunal (Property Chamber).
- 1.11 Because 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.⁶⁴⁹
- 1.12 Due to the nature of the RPTW’s workload, hearings are conducted in town/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. We are aware of one large case involving 30 to 40 participants that was heard in Cardiff County Court.
- 1.13 The Lord Chancellor appoints tribunal chairpersons, who are legally qualified. The Welsh Ministers then appoint a president and vice-president from among those chairpersons. All other members of the tribunal are appointed by the Welsh Ministers.⁶⁵⁰ Tribunal hearings are conducted by a legally qualified chairperson, a professional member, and in some cases, a lay member.⁶⁵¹

The Special Educational Needs Tribunal for Wales

- 1.14 The Special Educational Needs Tribunal was established by the Education Act 1996, with the Special Educational Needs Tribunal for Wales (“SENTW”) established by the Education Act 2002.⁶⁵² The SENTW 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.⁶⁵³ The SENTW also hears disability discrimination claims under section 116 of the Equality Act 2010. The English equivalent of the

⁶⁴⁷ 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.

⁶⁴⁸ Rent Act 1977, s 65 and sch 10; Commonhold and Leasehold Reform Act 2002, s 173; and Housing Act 2004, s 229.

⁶⁴⁹ See Rent Act 1997, s 65A; Housing Act 2004, s 231(1); and Commonhold and Leasehold Reform Act 2002, s 175(1).

⁶⁵⁰ Rent Act 1977 sch 10 paras 2 to 5.

⁶⁵¹ The Residential Property Tribunal for Wales, “About” webpage, <https://residentialpropertytribunal.gov.wales/secretariat-and-members> (last visited 29 September 2020).

⁶⁵² Education Act 2002 s 195.

⁶⁵³ The Additional Learning Needs and Education Tribunal (Wales) Act ss 70 and 72. Previously s 325, 326, 328, 329 and 329A of the Education Act 1996.

SENTW 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.

- 1.15 The SENTW is currently governed by the Education Acts 1996 and 2002, but will soon be renamed, in accordance with the Additional Learning Needs and Education Tribunal (Wales) Act 2018, as the Education Tribunal for Wales. Although not yet in force, section 70 of that Act will provide a list of all the occasions in which a child, young person or parent can appeal to the Tribunal. Section 72 relates to the rights to appeal decisions which impact upon detained persons.⁶⁵⁴
- 1.16 The SENTW received 172 applications in the year 2019 – 2020.⁶⁵⁵ Appeals may be made from the SENTW to the Upper Tribunal (Administrative Appeals Chamber) on a point of law.⁶⁵⁶
- 1.17 The SENTW hears cases in public buildings that are usually within one hour travelling distance from the child or young person's home.
- 1.18 The SENTW 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. In 2019 there were six legal members and ten lay members of the SENTW.⁶⁵⁷

The Registered Schools Inspectors Appeal Tribunal and the Registered Nursery Education Inspectors Appeal Tribunal

- 1.19 The School Inspections Act 1996 (which applied to both 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. An inspector who disagreed with a decision to remove them from or not include them on the register, or which imposed conditions on their registration, could apply to a tribunal. The Education Act 2005 ("EA 2005") abolished the requirement to keep registers of both school and nursery education inspectors in England.⁶⁵⁸
- 1.20 The provisions in relation to school inspectors were kept for Wales by section 27 of the EA 2005. Inspectors of nurseries in Wales are also still able to apply to a tribunal constituted under section 27 of the EA 2005.⁶⁵⁹ The tribunals are referred to as two separate tribunals by the regulations which govern their procedure: the Registered

⁶⁵⁴ The Additional Learning Needs and Education Tribunal (Wales) Act s 70.

⁶⁵⁵ President of Welsh Tribunals, *Annual report 2019-2020* (2020) para 2.1.

⁶⁵⁶ The Additional Learning Needs and Education Tribunal (Wales) Act s 81(1).

⁶⁵⁷ The Special Educational Needs Tribunal for Wales, *Annual Report 2017-2018* (2018) p 6
<https://specialeducationalneedtribunal.gov.wales/sites/specialeducationalneeds/files/2020-05/sentw-annual-report-2017-18.pdf>.

⁶⁵⁸ Education Act 2005, s 60, and sch 7 para 7.

⁶⁵⁹ School Standards and Framework Act 1998, sch 26 para 10(1).

Schools Inspectors Appeal Tribunal (“RSIAT”) and the Registered Nursery Education Inspectors Appeal Tribunal (“RNEIAT”).⁶⁶⁰

- 1.21 We understand that the tribunal has not been constituted, and no applications have been received since 2007/2008. Members of the SENTW are, however, eligible to deal with any cases which arise in the jurisdiction of the RSIAT and the RNEIAT.⁶⁶¹ RSIAT and RNEIAT cases could presumably, if the need arose, be heard in the same locations as used by the SENTW.
- 1.22 A tribunal established under section 27 EA 2005 may review, set aside or vary its own decisions 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.⁶⁶² There is no appeal from the tribunal.
- 1.23 The tribunal chair is appointed by the Lord Chief Justice in consultation with the Lord Chancellor. Two other tribunal members are appointed by the Welsh Ministers.⁶⁶³

The Adjudication Panel for Wales

- 1.24 The Adjudication Panel for Wales (“APW”) has its origins in the Local Government Act 2000, with its first members appointed in 2002. It 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 a local authority member. These references are heard by case or interim case tribunals.⁶⁶⁴ The APW also determines appeals from local authority standards committees, which are heard by appeals tribunals.⁶⁶⁵ The equivalent English tribunal, the Adjudication Panel for England, was abolished in 2010.⁶⁶⁶
- 1.25 There is a right of appeal from case tribunals to the High Court.⁶⁶⁷ The APW has a small caseload, with only two applications received in the reporting period 2019-2020.⁶⁶⁸

⁶⁶⁰ The Education (Registered Inspectors of Schools Appeal Tribunal and Registered Nursery Education Inspectors Appeal Tribunal) (Procedure) Regulations SI 1999 No 265.

⁶⁶¹ President of Welsh Tribunals, *Annual Report 2018 – 2019* (2019) p 5
<https://gov.wales/sites/default/files/publications/2019-12/president-of-welsh-tribunals-first-annual-report.pdf>.

⁶⁶² Education (Registered Inspectors of Schools Appeal Tribunal and Registered Nursery Education Inspectors Appeal Tribunal) (Procedure) Regulations SI 1999 No 265, reg 29(1)(d).

⁶⁶³ Education Act 2005 sch 3, para 1(1).

⁶⁶⁴ Local Government Act 2000 69(4).

⁶⁶⁵ Local Government Act 2000 s 80.

⁶⁶⁶ Transfer of Tribunal Functions Order SI 2010 No 22, art 1(1), sch 2 para 57(b) and sch 5.

⁶⁶⁷ 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).

⁶⁶⁸ President of Welsh Tribunals, *Annual report 2019-2020* (2020) para 2.1.

- 1.26 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.

The Welsh Language Tribunal

- 1.27 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.⁶⁶⁹ There is no equivalent tribunal in England.

- 1.28 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;⁶⁷⁰
- (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;⁶⁷¹ 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.⁶⁷²

- 1.29 The tribunal received 16 applications in 2019-2020,⁶⁷³ the majority of which (14 applications) were brought under section 103 of the Measure.⁶⁷⁴

⁶⁶⁹ Regulated by the Welsh Language (Wales) Measure 2011 (nawm 1) part 4.

⁶⁷⁰ Above, s 58.

⁶⁷¹ Above, s 99.

⁶⁷² Above, s 103. An appeal under s 103 is dealt with in accordance with the principles of judicial review.

⁶⁷³ The Welsh Language Tribunal, *Annual Report 2019-2020* p 10
<https://welshlanguage tribunal.gov.wales/sites/welshlanguage/files/2020-07/wlt-annual-report-19-20.pdf>.

⁶⁷⁴ Welsh Language (Wales) Measure 2011 (nawm 1), s 103.

- 1.30 The WLT can review, vary or revoke its own decisions.⁶⁷⁵ There is also a right of appeal to the High Court on any point of law arising from a decision made by the WLT.⁶⁷⁶ To date, no appeals from the WLT to the High Court have been brought.⁶⁷⁷
- 1.31 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.

OTHER TRIBUNALS

- 1.32 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

- 1.33 The history of valuation tribunals is a long one, and can be traced back to the Union Assessment Committees Act 1862.⁶⁷⁸ 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).⁶⁷⁹
- 1.34 Cases are heard by a large body of members, who are local 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.⁶⁸⁰ The VTW has six tribunal clerks and two senior tribunal clerks.⁶⁸¹

⁶⁷⁵ Welsh Language (Wales) Measure 2011 (nawm 1), s 123(4)(i).

⁶⁷⁶ Above, s 105(2).

⁶⁷⁷ The Welsh Language Tribunal, *Annual Report 2019-2020* (2020) p 12
<https://welshlanguage tribunal.gov.wales/sites/welshlanguage/files/2020-07/wlt-annual-report-19-20.pdf>

⁶⁷⁸ <https://www.valuationtribunal.gov.uk/about-us/who-we-are/>.

⁶⁷⁹ 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

⁶⁸⁰ 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>.

⁶⁸¹ Valuation Tribunal for Wales, *Annual Report 2019-2020* (2020) p 26

- 1.35 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.
- 1.36 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.⁶⁸² The framework document which regulates the relationship between the VTW and the Welsh Government was drawn up by its Local Government Directorate.⁶⁸³

Historical development of the valuation tribunals

- 1.37 Valuation tribunals were originally regional bodies. They were consolidated in England by the Public Involvement in Health Act 2007 (“PIHA 2007”), which replaced the existing 56 tribunals in England with a single Valuation 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. PIHA 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.
- 1.38 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 2006.⁶⁸⁴ 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.⁶⁸⁵

Reform of the VTW in 2017

- 1.39 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.⁶⁸⁶

⁶⁸² Valuation Tribunal for Wales Regulations SI 2010 No 713 (W 69), reg 6.

⁶⁸³ https://www.valuationtribunal.wales/fileadmin/resources/docs/publications/en/Framework_Document.pdf.

⁶⁸⁴ Established by the Valuation Tribunals (Wales) Regulations SI 2005 No 3364 (W 261) (now repealed).

⁶⁸⁵ SI 2010 No 713 (W 69).

⁶⁸⁶ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone for Social Justice in Wales* (2016) para 42.

- 1.40 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.⁶⁸⁷ 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.
- 1.41 In response to these recommendations the Welsh Ministers made the Valuation Tribunal for Wales (Amendment) Regulations 2017 (the “2017 Regulations”).⁶⁸⁸ The key changes made were:
- (1) removing the role of local authorities in the appointment process;
 - (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”⁶⁸⁹
 - (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.
- 1.42 Though not a “Welsh tribunal” as defined by section 59(1) of the Wales Act 2017, the VTW is a devolved Welsh authority.⁶⁹⁰

Independent appeal panels

- 1.43 School admission appeal panels hear appeals against decisions of admission authorities, who decide which school a child should attend. Exclusion appeal panels hear appeals against decisions by 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”.
- 1.44 While administering the panel is usually the responsibility of the local authority, the Welsh Government has published a statutory code on admission appeals (the

⁶⁸⁷ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone for Social Justice in Wales* (2016) para 43.

⁶⁸⁸ SI 2017 No 941 (W 234).

⁶⁸⁹ Valuation Tribunal for Wales (Amendment) Regulations SI 2017 No 941 (W 234), Explanatory memorandum, para 43.

⁶⁹⁰ Government of Wales Act 2006, s 157A and sch 9A.

“Admissions Appeals Code”).⁶⁹¹ It has also published guidance on exclusion from schools and pupil referral units (the “Exclusion Guidance”).⁶⁹²

- 1.45 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 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 appeal panel hearings.
- 1.46 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.
- 1.47 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

- 1.48 In Wales, section 94(5) of the School Standards and Framework Act 1998 provides that admission authorities are responsible for administering admission appeal panels.⁶⁹³ 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.
- 1.49 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”.⁶⁹⁴
- 1.50 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

⁶⁹¹ 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>.

⁶⁹² 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>.

⁶⁹³ 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.

⁶⁹⁴ Welsh Government, *School admission appeals code* (2013) paras A.7 and 2.9.

experience in the management of any school or the provision of education in any school".⁶⁹⁵ Admissions authorities are required to re-advertise for lay members every three years.

1.51 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.⁶⁹⁶

1.52 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.⁶⁹⁷ 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.⁶⁹⁸ In the Vale of Glamorgan, there were 132 appeals, of which six succeeded.⁶⁹⁹

School exclusion appeal panels

1.53 School exclusion appeal panels are provided for by the Education Act 2002, and hear appeals against decisions of governing body discipline committees on permanent exclusions.⁷⁰⁰ They are arranged by the local authority.⁷⁰¹ 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.⁷⁰²

1.54 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.⁷⁰³

⁶⁹⁵ Education (Admission Appeals Arrangements) (Wales) Regulations SI 2005 No 1398 (W 112) sch 1 para 1.

⁶⁹⁶ School Standards and Framework Act 1998, s 94(6).

⁶⁹⁷ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: a Cornerstone of Social Justice in Wales* (2016) para 49.

⁶⁹⁸ 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>

⁶⁹⁹ Vale of Glamorgan Council, *A Parental Guide to School Admissions in the Vale 2019/20, Educating Children in the Vale of Glamorgan*, p 26.

⁷⁰⁰ Education Act 2002, s 52.

⁷⁰¹ The Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations SI 2003 No 3227 (W 308) reg 7(1).

⁷⁰² Above, sch 1 para 2(2).

⁷⁰³ Above, reg 7(5).

1.55 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- 2012.⁷⁰⁴ 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.⁷⁰⁵

⁷⁰⁴ Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: A Cornerstone of Social Justice in Wales* (2016) para 50.

⁷⁰⁵ S Nason, A Sherlock, H Taylor and H Pritchard, *Public administration and a just Wales* (March 2020) p 67. <https://mk0nuffieldfounpg9ee.kinstacdn.com/wp-content/uploads/2019/11/Admin-Justice-Wales-Education-Full.pdf>.

Appendix 2: List of attendees of the first advisory group meeting held 01 October 2020, MS Teams

Andrew Shippides (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)

Richard Payne (President of the Residential Property Tribunal Wales)

Dr Sarah Nason (Bangor University)

Sir Wyn Williams (President of Welsh Tribunals)

Chapter 11: Consultation Questions

CHAPTER 2: TRIBUNALS IN WALES: DEVOLVED COMPETENCE AND DEVOLVED TRIBUNALS

Consultation Question 1.

11.1 We provisionally consider that decision-making bodies which adjudicate disputes between parties by way of issuing binding determinations should be categorised as tribunals for the purposes of this project.

Do you agree?

Paragraph 2.92

Consultation Question 2.

11.2 We provisionally propose that the following bodies are devolved tribunals:

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

Do you agree?

Paragraph 2.93

Consultation Question 3.

11.3 We provisionally propose that the following decision-making bodies or schemes are not “devolved tribunals”:

- (1) ombudsmen, including the Public Services Ombudsman for Wales;
- (2) the Planning Inspectorate for England and Wales;
- (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.

Do you agree?

Paragraph 2.94

CHAPTER 3: A TRIBUNALS SYSTEM FOR WALES

Consultation Question 4.

11.4 We provisionally propose that the Welsh Tribunals listed in section 59 of the Wales Act 2017 should be consolidated into a First-tier Tribunal for Wales, subdivided into chambers.

Do you agree?

Paragraph 3.90

Consultation Question 5.

11.5 We provisionally propose that the Welsh Ministers be empowered to provide for the First-tier Tribunal for Wales to be subdivided into chambers, and work allocated to chambers, by way of secondary legislation made with the concurrence of the President of Welsh Tribunals.

Do you agree?

Paragraph 3.91

Consultation Question 6.

11.6 We provisionally propose that the Valuation Tribunal for Wales should be part of the First-tier Tribunal for Wales.

Do you agree?

Paragraph 3.103

Consultation Question 7.

11.7 We provisionally propose that the jurisdiction of the school exclusion appeal panels should be amalgamated into that of the Special Educational Needs Tribunal for Wales.

Do you agree?

Paragraph 3.128

Consultation Question 8.

11.8 We provisionally propose that, for the time being, the jurisdiction of the school admission appeal panels should not be amalgamated with that of the Special Educational Needs Tribunal for Wales.

Do you agree?

Paragraph 3.130

Consultation Question 9.

11.9 We provisionally propose that the jurisdictions of the Registered School Inspectors Appeal Tribunal and Registered Nursery Education Inspectors Appeal Tribunal should be amalgamated with that of the Special Educational Needs Tribunal for Wales.

Do you agree?

Paragraph 3.139

Consultation Question 10.

11.10 We provisionally propose that the constituent tribunals of the Residential Property Tribunal for Wales (residential property tribunals, leasehold valuation tribunals, and rent assessment committees) should be consolidated into one chamber.

Do you agree?

Paragraph 3.140

Consultation Question 11.

11.11 We seek views on:

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

Paragraph 3.141

Consultation Question 12.

11.12 We seek views on whether the Residential Property Tribunal for Wales and Agricultural Land Tribunal for Wales should be consolidated into a property chamber.

Paragraph 3.142

Consultation Question 13.

11.13 We seek views on whether any of the other existing devolved tribunals should be amalgamated into a single chamber.

Paragraph 3.143

CHAPTER 4: APPEALS**Consultation Question 14.**

11.14 We seek views on whether routes of appeal from the devolved tribunals should be uniform.

Paragraph 4.54

Consultation Question 15.

11.15 We seek views on whether, if a uniform appeal route is adopted, that should be to:

- (1) the Upper Tribunal;
- (2) the Administrative Court in Wales; or
- (3) a newly established Appeal Tribunal for Wales.

Paragraph 4.55

Consultation Question 16.

11.16 If no uniform route is adopted, we seek views on:

- (1) whether there should nonetheless be a default route of appeal (for example, for newly created tribunals);
- (2) what that default route should be;
- (3) which tribunals should have their onward appeals heard by that default route; and
- (4) whether the default appeal route could be populated gradually.

Paragraph 4.56

Consultation Question 17.

11.17 We seek views on

- (1) whether appeals from school admission appeal panels should lie to the Special Educational Needs Tribunal for Wales; and
- (2) if so, on what grounds applicants should be able to appeal.

Paragraph 4.64

Consultation Question 18.

11.18 We seek views on whether onward appeals from the Special Educational Needs Tribunal for Wales in relation to school admission appeal panel decisions 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.

Paragraph 4.65

Consultation Question 19.

11.19 We seek views on whether there should be one route of appeal from the Valuation Tribunal for Wales for both rating and council tax appeals and, if so, what that appeal route should be.

Paragraph 4.69

Consultation Question 20.

11.20 We provisionally propose that appeals from rent assessment committees should be subject to the same rules on permission to appeal as the other constituent tribunals of the Residential Property Tribunal for Wales.

Do you agree?

Paragraph 4.71

CHAPTER 5: PROCEDURAL RULES

Consultation Question 21.

11.21 We provisionally propose that all devolved tribunal procedural rules should contain an overriding objective.

Do you agree?

Paragraph 5.19

Consultation Question 22.

11.22 We seek views on whether a new overriding objective should include a non-exhaustive list of illustrative examples and, if so, what those examples should be.

Paragraph 5.20

Consultation Question 23.

11.23 We provisionally propose that, where appropriate, devolved tribunal procedural rules should include a duty on the parties to cooperate with each other and the tribunal.

Do you agree?

5.25 Is such a duty appropriate in the case of the Mental Health Review Tribunal for Wales?

Paragraph 5.24

Consultation Question 24.

11.24 We provisionally propose that devolved tribunal procedural rules should provide for service of documents by electronic means.

Do you agree?

Paragraph 5.31

Consultation Question 25.

11.25 We provisionally propose that devolved tribunals should have the power to review their decisions.

Do you agree?

Paragraph 5.36

Consultation Question 26.

11.26 We provisionally propose that the rules on remote hearings should be standardised in devolved tribunal procedure rules.

Do you agree?

Paragraph 5.51

Consultation Question 27.

11.27 We provisionally propose that devolved tribunal procedural rules should, where appropriate, be standardised.

Do you agree?

Paragraph 5.68

Consultation Question 28.

11.28 We seek views on:

- (1) whether there are instances of undesirable divergence of devolved tribunal procedural rules from the First-tier Tribunal procedural rules; and
- (2) how the risk of divergence might be managed.

Paragraph 5.69

Consultation Question 29.

11.29 We provisionally propose that there should continue to be a separate set of rules for each tribunal or chamber.

Do you agree?

Paragraph 5.82

Consultation Question 30.

11.30 We provisionally propose that the procedural rules for the Residential Property Tribunal for Wales should be amalgamated into one set of rules.

Do you agree?

Paragraph 5.86

Consultation Question 31.

11.31 We provisionally propose that there should be a Tribunal Procedure Committee for Wales.

Do you agree?

Paragraph 5.107

Consultation Question 32.

11.32 We provisionally propose that the President of Welsh Tribunals should be responsible for chairing the Tribunal Procedure Committee for Wales and appointing its members.

Do you agree?

Paragraph 5.108

Consultation Question 33.

11.33 We provisionally propose that the President of Welsh Tribunals' ability to appoint members of a Tribunal Procedure Committee for Wales should be guided by factors set out in legislation, including the need for the Committee to have access to a range of expertise.

Do you agree?

Paragraph 5.109

Consultation Question 34.

11.34 We seek views on whether rules should be made, with the approval of the Welsh Ministers, by a majority of the Tribunal Procedure Committee for Wales, or by the President of Welsh Tribunals.

Paragraph 5.110

CHAPTER 6: APPOINTMENTS

Consultation Question 35.

11.35 We provisionally propose that the same appointing authority (or authorities) should make appointments for all devolved tribunals.

Do you agree?

Paragraph 6.52

Consultation Question 36.

11.36 We provisionally propose that members of the tribunals listed in section 59 of the Wales Act 2017 should be appointed by the President of Welsh Tribunals.

Do you agree?

Paragraph 6.68

Consultation Question 37.

11.37 We provisionally propose that judicial leads and deputies of tribunals listed in section 59 of the Wales Act 2017 should be appointed by the Welsh Ministers, with the agreement of the President of Welsh Tribunals.

Do you agree?

Paragraph 6.69

Consultation Question 38.

11.38 We seek views on how the President of the Valuation Tribunal for Wales should be appointed.

Paragraph 6.74

Consultation Question 39.

11.39 We seek views on how members and chairpersons of the Valuation Tribunal for Wales should be appointed.

Paragraph 6.75

Consultation Question 40.

11.40 We seek views on whether members of school admission and, if retained, exclusion appeal panels should be appointed by the President of Welsh Tribunals.

Paragraph 6.80

Consultation Question 41.

11.41 We provisionally propose that arrangements for selection for appointment by the Judicial Appointments Commission should not be altered as part of our reforms.

Do you agree?

Paragraph 6.86

Consultation Question 42.

11.42 We seek views on how the President of the Valuation Tribunal for Wales should be selected.

Paragraph 6.92

Consultation Question 43.

11.43 We seek views on how members of the Valuation Tribunal for Wales, including chairpersons, should be selected.

Paragraph 6.93

Consultation Question 44.

11.44 We seek views on how members of school admission and (if retained) exclusion appeal panels should be selected.

Paragraph 6.94

CHAPTER 7: COMPLAINTS AND DISCIPLINE**Consultation Question 45.**

11.45 We provisionally propose that there should be standardised complaints policies and procedures that applies to all devolved tribunals.

Do you agree?

Paragraph 7.86

Consultation Question 46.

11.46 We provisionally propose that the complaints policies should be made available both online and in hard copy on request.

Do you agree?

Paragraph 7.87

Consultation Question 47.

11.47 We seek views on whether there is a need for a complaints policy in relation to school admission and (if retained) exclusion appeal panels, in addition to the role currently played by the Public Services Ombudsman for Wales.

Paragraph 7.88

Consultation Question 48.

11.48 We provisionally propose that there should be provision for complaints regarding the conduct of members of the Valuation Tribunal for Wales.

Do you agree?

Paragraph 7.89

Consultation Question 49.

11.49 We provisionally propose that there should be a uniform procedure for complaints about the administration of the devolved tribunals.

Do you agree?

Paragraph 7.99

Consultation Question 50.

11.50 We provisionally propose that there should be a uniform procedure for complaints about the conduct of members and judicial leads of the devolved tribunals.

Do you agree?

Paragraph 7.100

Consultation Question 51.

11.51 We provisionally propose that complaints regarding members of the tribunals listed in section 59 of the Wales Act 2017 should be investigated by the relevant judicial lead.

Do you agree?

Paragraph 7.101

Consultation Question 52.

11.52 We provisionally propose that the investigation of complaints regarding judicial leads of tribunals listed in section 59 of the Wales Act 2017 should be coordinated by the Judicial Conduct Investigations Office, or an equivalent body.

Do you agree?

Paragraph 7.102

Consultation Question 53.

11.53 We seek views on who should investigate complaints made regarding the conduct of members of school admission and exclusion appeal panels.

Paragraph 7.108

Consultation Question 54.

11.54 We provisionally propose that complaints regarding the conduct of members of the Valuation Tribunal for Wales should be investigated by the President of the tribunal.

Do you agree?

Paragraph 7.112

Consultation Question 55.

11.55 We provisionally propose that complaints regarding the conduct of the President of the Valuation Tribunal for Wales should be investigated by the Judicial Conduct Investigations Office or an equivalent body.

Do you agree?

Paragraph 7.113

Consultation Question 56.

11.56 We provisionally propose that the President of Welsh Tribunals should have the power to discipline and dismiss members of the tribunals listed in section 59 of the Wales Act 2017.

Do you agree?

Paragraph 7.125

Consultation Question 57.

11.57 We provisionally propose that the President of Welsh Tribunals should have the power to discipline and dismiss members of the Valuation Tribunal for Wales.

Do you agree?

Paragraph 7.126

Consultation Question 58.

11.58 We seek views on whether the President of Welsh Tribunals should have the power to discipline and dismiss members of school admission and (if retained) exclusion appeal panels.

Paragraph 7.127

Consultation Question 59.

11.59 We provisionally propose that judicial leads of the tribunals listed by section 59 of the Wales Act 2017 should be disciplined and dismissed by the President of Welsh Tribunals, with the concurrence of the Welsh Ministers.

Do you agree?

Paragraph 7.133

Consultation Question 60.

11.60 We provisionally propose that the President of the Valuation Tribunal for Wales should be disciplined and dismissed by the President of Welsh Tribunals, with the concurrence of the Welsh Ministers.

Do you agree?

Paragraph 7.134

Consultation Question 61.

11.61 We seek views on whether any further safeguards attaching to the exercise of disciplinary powers are required to protect the independence of the judiciary.

Paragraph 7.135

CHAPTER 8: THE PRESIDENT OF WELSH TRIBUNALS**Consultation Question 62.**

11.62 We provisionally propose that the President of Welsh Tribunals should be a judge of the tribunal or tribunals over which the President presides.

Do you agree?

Paragraph 8.42

Consultation Question 63.

11.63 We seek views on whether school admission and (if retained) exclusion appeal panels be subject to the supervision of the President of Welsh Tribunals.

Paragraph 8.53

Consultation Question 64.

11.64 We provisionally propose that the President of Welsh Tribunals should supervise the Valuation Tribunal for Wales.

Do you agree?

Paragraph 8.56

CHAPTER 9: THE WELSH TRIBUNALS UNIT**Consultation Question 65.**

11.65 We provisionally propose that the Welsh Tribunals Unit should be established as a non-ministerial department.

Do you agree?

Paragraph 9.76

CHAPTER 10: JUDICIAL INDEPENDENCE**Consultation Question 66.**

11.66 We provisionally propose 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.

Do you agree?

Paragraph 10.18

Consultation Question 67.

11.67 We provisionally propose that judicial leads and legal and other members of devolved tribunals should be required to take the judicial oath.

Do you agree?

Paragraph 10.27