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Reforming the law

Devolved tribunals in Wales Summary of the Consultation Paper

**Consultation Paper No 251 (Summary)
December 2020**

RESPONDING TO THIS PAPER

This is a summary of the full consultation paper, available on our website at <https://www.lawcom.gov.uk/project/devolved-tribunals-in-wales/>.

We are committed to providing accessible publications. An easy-read version of this consultation paper will be made available on our website. If you require this consultation paper to be made available in a different format please email DevolvedTribunalsWales@lawcommission.gov.uk

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

Responses to the consultation may be submitted using a form which can be downloaded from <https://www.lawcom.gov.uk/project/devolved-tribunals-in-wales/>. Where possible, it would be helpful if this form was used. Forms should be returned to DevolvedTribunalsWales@lawcommission.gov.uk

Alternatively, comments may be sent:

By email to DevolvedTribunalsWales@lawcommission.gov.uk

OR

By post to Devolved Tribunals in Wales Team, Law Commission, 1st Floor, Tower,
52 Queen Anne's Gate, London, SW1H 9AG.

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

Responses may be made public

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CHAPTER 1: INTRODUCTION

- 1.1 The Law Commission of England and Wales is carrying out a review into devolved tribunals in Wales. This is a summary of the Consultation Paper in that review.¹ We seek responses by **19 March 2021** from all interested parties. Details of how to respond are set out on the inside cover.

Background to the project

- 1.2 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. Because they are devolved, they were not included in the general rationalisation of tribunals brought about by the Tribunals, Courts and Enforcement Act 2007. Instead they are still mainly governed by their original legislation. Processes and procedures vary from one tribunal to another, and there are gaps and inconsistencies. Later developments, like the creation of the office of President of Welsh Tribunals in 2017, are not properly reflected.
- 1.3 The President of Welsh Tribunals has helped to unify the tribunals, by providing some of them with a focal point and a senior judicial figure to represent their interests. Additional consistency has also been achieved by centralising administration of some of the tribunals within the Welsh Government's Welsh Tribunals Unit. But not all tribunals are included in these arrangements. And the legislation underpinning the tribunals remains fragmented. It is difficult to describe the existing tribunals as forming part of a "system".

Our terms of reference

- 1.4 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 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.
- 1.5 Our approach throughout this project has been to focus on the existing tribunals, and the overarching structures which govern them. We have considered it to be beyond

¹ The full consultation paper can be found here: <https://www.lawcom.gov.uk/project/devolved-tribunals-in-wales/>

the scope of the project to undertake a review of 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, and create a resilient, flexible structure which is capable of evolving over time.

Questions and cross-references to the full consultation paper

- 1.6 This summary provides some background to each of our provisional proposals and questions included in the Consultation Paper. For provisional proposals we ask if you agree; for more open questions we seek views. The discussion refers to the question number in brackets. The questions themselves are listed at the end of the summary (and again in Chapter 11 of the Consultation Paper).
- 1.7 In this summary we have tried to keep citations to a minimum. Consultees who wish to know more are referred to the full Consultation Paper. That Consultation Paper also includes an appendix, giving details of all the devolved tribunals discussed in the paper (Appendix 1).

Next steps

- 1.8 In 2021 we intend to publish a final report which will draw on the responses to our Consultation Paper and make final recommendations. The report will be presented to the Senedd.

CHAPTER 2: TRIBUNALS IN WALES: DEVOLVED COMPETENCE AND DEVOLVED TRIBUNALS

- 2.1 This chapter explores two interrelated questions: the devolutionary framework within which this project fits, and how we have approached identifying the tribunals which fall within the scope of the review.

The devolutionary framework

- 2.2 Devolution in Wales currently operates on a “reserved powers” model. That means that the Senedd can legislate on any topic, so long as it has not been explicitly “reserved” to the UK Parliament. The Government of Wales Act 2006 sets out those reserved topics.
- 2.3 The starting point to note on the devolutionary framework for this project is that “tribunals” are reserved to the UK Parliament by Schedule 7A of the Government of Wales Act 2006. “Devolved tribunals” however are an exception, meaning that the Senedd can legislate in respect of those tribunals. A tribunal is “devolved” if all of its functions are exercisable only in relation to Wales, and do not relate to reserved matters.
- 2.4 The bulk of our provisional proposals therefore fall within the legislative competence of the Senedd. But there are exceptions; in several areas, consent from or consultation with UK officials is likely to be required before the Senedd may make changes. For example, the office of President of Welsh Tribunals is not a “devolved Welsh authority”, within the meaning of the Government of Wales Act 2006, with the result

that the Senedd may not confer or impose powers on the President without the consent of the appropriate Minister.

What is a devolved tribunal?

- 2.5 Our provisional view is that tribunals meeting the Government of Wales Act 2006 definition of a devolved tribunal should fall within our review. That definition certainly includes the “Welsh tribunals” listed by section 59(1) of the Government of Wales Act 2006. These are all presided over by the President of Welsh Tribunals and administered by the Welsh Tribunals Unit. To avoid confusion, we refer to them in this summary as the “section 59 tribunals”. Those tribunals are:
- (1) the Agricultural Land Tribunal for Wales;
 - (2) the Mental Health Review Tribunal for Wales;
 - (3) the Residential Property Tribunal for Wales;
 - (4) the Special Educational Needs Tribunal for Wales (due to be renamed the Education Tribunal for Wales);
 - (5) the Registered School Inspectors Appeal Tribunal and Registered Nursery Inspectors Appeal Tribunal;
 - (6) the Adjudication Panel for Wales; and
 - (7) the Welsh Language Tribunal.
- 2.6 Beyond that, there are a range of decision-making bodies in Wales which could fall within the definition of “devolved tribunal”. While the Government of Wales Act 2006 gives a definition of “devolved” tribunal, it does not give a definition of a tribunal itself.
- 2.7 In our Consultation Paper we explain that any definition of a tribunal will depend on the relevant context. For our purposes, we provisionally conclude that tribunals can be characterised as bodies which adjudicate upon disputes between parties, by making binding decisions. We ask consultees whether they agree with that conclusion (Consultation question 1). We also explore a collection of other characteristics which often, but not always, characterise tribunals: independence and impartiality, accessibility, speed of decision-making, and the specialist knowledge of the decision makers.
- 2.8 In Chapter 2 we apply these criteria to a range of bodies in Wales. We provisionally conclude that, in addition to the tribunals listed above, our review should include the Valuation Tribunal for Wales and school exclusion and admission appeal panels, and ask consultees whether they agree (Consultation question 2). We also list the bodies which we do not believe should fall within the scope of the review, and ask consultees whether they agree with that decision (Consultation question 3).

CHAPTER 3: A TRIBUNALS SYSTEM FOR WALES

- 3.1 This chapter explores what a tribunals system for Wales should look like. It articulates the disadvantages for policy makers in Wales of the current approach to tribunal creation. Currently, if there is a need for a new route of appeal to a tribunal in Wales, the first option is to try and find a tribunal which hears similar cases, or which has panel members with relevant expertise. If no suitable tribunal already exists, either a new tribunal must be set up, or an appeal can be directed instead to the First-tier Tribunal set up by the Tribunals, Courts and Enforcement Act 2007.
- 3.2 Setting up a new tribunal is time-consuming and expensive, and it is difficult to predict in advance how many cases it might hear. It is also inflexible; tribunals are set up in primary legislation, making it difficult to add new ones as demand changes. An *ad hoc* approach to creating new tribunals means that differences in procedures and rules creep in, increasing divergencies across the system of tribunals as a whole. Sending appeals to the First-tier Tribunal is a practical solution, but risks fragmenting the system of devolved tribunals in Wales and preventing it from growing.
- 3.3 These problems are not unique to Wales. The problem of how to manage the creation of new tribunals and appeal routes was considered in detail in relation to non-devolved tribunals in the report of Sir Andrew Leggatt, published in 2001. That report ultimately led to the creation of the First-tier Tribunal by the Tribunals, Courts and Enforcement Act 2007, which replaced many tribunals with a single tribunal divided into chambers dealing with different subject areas. A similar approach has since been taken in the Tribunals (Scotland) Act 2014, which set up the First-tier Tribunal for Scotland.

Advantages and disadvantages of amalgamation

- 3.4 The advantages of bringing existing tribunals together into one unified structure include the following.
- (1) Economies of scale. Pooling of resources could lead to savings, and enable the offering of more specialist and sophisticated services to tribunal users.
 - (2) Coherence. Replacing an assortment of individual tribunals with one, unified structure makes for a more coherent structure, which is easier to navigate for tribunal users.
 - (3) Public profile. Bringing tribunals together can increase the public profile of a unified tribunal.
- 3.5 There is however little empirical research supporting these supposed advantages. And there are potential disadvantages. Bringing the tribunals together risks losing expertise of panel members within each tribunal, and specific practices or procedures which work well for particular tribunals. It has been said to increase the role of lawyers within the tribunals (as lawyers are the “common denominator” across all features of the tribunals, unlike experts in education, or mental health, or land valuation). Bringing together tribunals within one unified structure represents could involve a significant amount of effort and upheaval in some tribunals, simply to maintain existing operations.

- 3.6 In the chapter we evaluate these arguments. Balancing the advantages and disadvantages, we provisionally propose replacing the existing tribunals with a unified first-tier tribunal – a First-tier Tribunal for Wales. This tribunal would be subdivided into chambers in order to preserve existing expertise. Such a structure would allow the devolved tribunal to grow according to the demand on its services.
- 3.7 We ask consultees whether they agree (Consultation question 4). We also provisionally propose that secondary legislation to divide the tribunal into chambers could be made by the Welsh Ministers, with the agreement of the President of Welsh Tribunals (Consultation question 5).

The Valuation Tribunal for Wales

- 3.8 The Valuation Tribunal for Wales hears cases relating to council tax and non-domestic rates. It lists many more cases than the other devolved tribunals; in 2019-2020 it listed 4,183 rating cases, 687 council tax valuation cases and 118 other types of appeal. The tribunal is not listed in section 59 of the Wales Act 2017, and so does not fall within the remit of the President of Welsh Tribunals. It is also unusual in that it is responsible for its own administration, and has a Chief Executive as well as a President. The way in which the tribunal operates also differs from tribunals listed in section 59, with panels made up of unpaid lay members advised by a specialist clerk (similar to the way in which lay magistrates are advised by a clerk).
- 3.9 We provisionally propose that the Valuation Tribunal for Wales should be brought within the system of devolved tribunals (Consultation question 6).

School admission and exclusion appeal panels

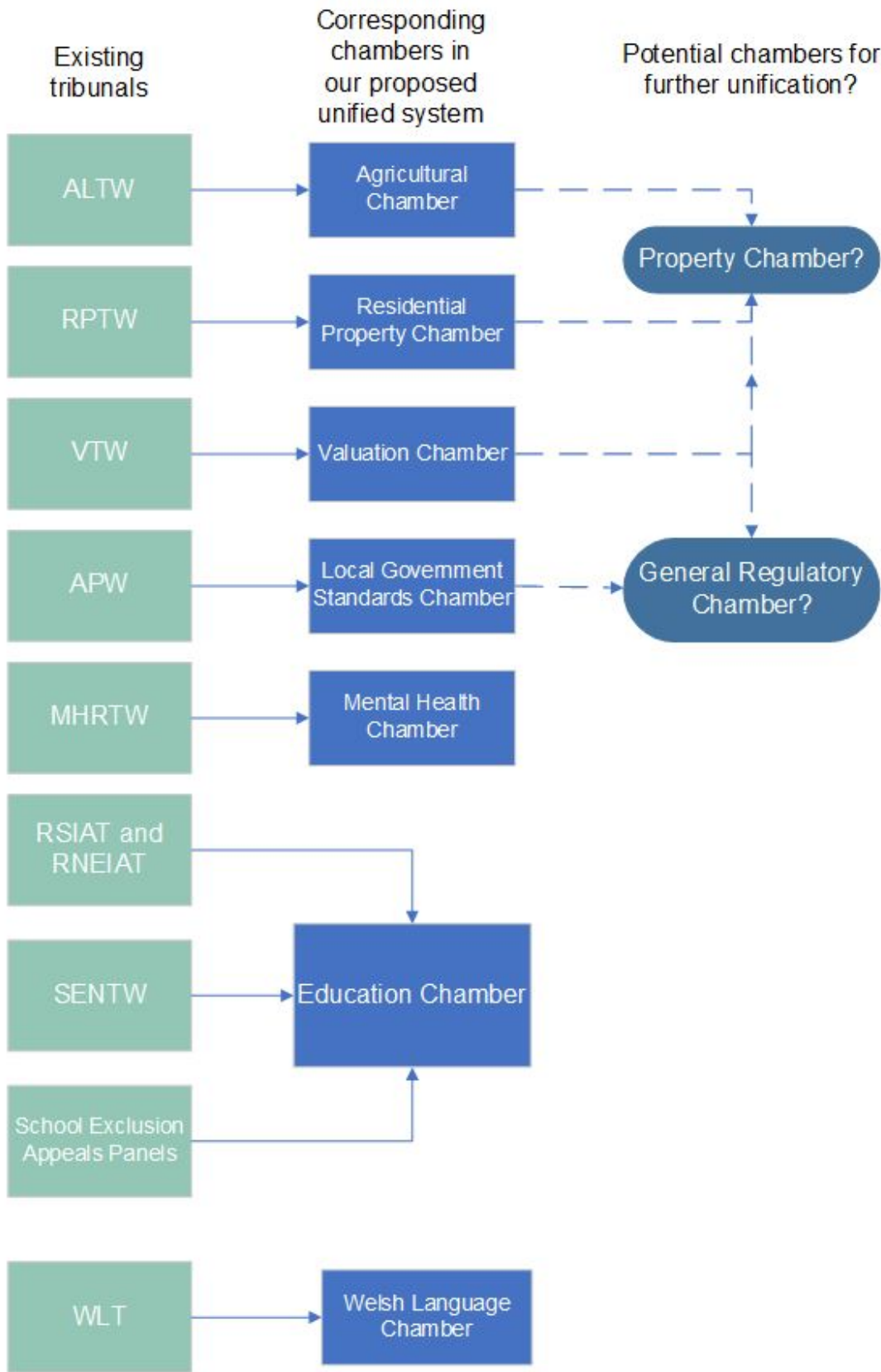
- 3.10 School admission appeal panels hear appeals from admission authorities: local authorities or governing bodies which have made decisions about whether or not to offer a pupil a place at a school. Exclusion appeal panels hear appeals by pupils excluded from schools and pupil referral units. The panels are unusual amongst the devolved tribunals in being administered locally rather than centrally. In practice it is common for the panels to be run together, under the umbrella term of “independent appeal panel”.
- 3.11 The panels have been criticised for a perceived lack of independence, because they are administered by the body making the decision under challenge. Most tribunals used to be organised this way, but in time it was decided that judicial independence requires a separate administration. There are however a number of benefits to organising the panels locally. It allows for the creation of panels which have expertise in the educational landscape of a particular area. It also facilitates hearing cases locally, reducing travel time and costs for users of the panel.
- 3.12 We have considered whether school admission appeal panels might benefit from being brought within the unified tribunal system. Our provisional view is that the large quantity of seasonal work (most cases are heard in the spring, for admission to school in the autumn) and the tight deadlines suggest that, at least for the present, there are advantages in a regional approach. That approach also allows for the selection of panel members with experience of education provision within a local area.

- 3.13 These arguments apply less strongly to exclusion appeals. These are heard throughout the year, and there are fewer of them. Allowing them to be heard by the Special Educational Needs Tribunal for Wales (to be renamed the Education Tribunal) would allow for a more consistent approach to hearing these cases. It would also mean that users had a right of appeal that was less expensive, less formal and less adversarial than judicial review. We provisionally propose that the jurisdiction of school exclusion appeal panels should be amalgamated with that of the Special Educational Needs Tribunal for Wales (Consultation question 7), while the school admission appeal panels should remain separate for the time being (Consultation question 8).

Possible reorganisation of jurisdiction within a unified tribunal

- 3.14 We also discuss what chambers could make up a First-tier Tribunal for Wales. We do not think it possible at this stage to make comprehensive recommendations as to reorganisation of jurisdiction; that will depend on whether any new tribunals or appeal routes are introduced, amongst other factors. But we do make some provisional proposals about individual tribunals.
- 3.15 The Registered School Inspectors Appeal Tribunal and Registered Nursery Education Inspectors Appeal Tribunal have not heard a case in many years, and do not have a judicial lead. We provisionally propose that they should be absorbed into the Special Educational Needs Tribunal for Wales (Consultation question 9).
- 3.16 The Residential Property Tribunal for Wales is unusual in being made up of three different but related tribunals: residential property tribunals, leasehold valuation tribunals, and rent assessment committees. Each of these have their own procedural rules. We provisionally propose that the Residential Property Tribunal for Wales should be formally consolidated (Consultation question 10).
- 3.17 We also seek views on the creation of a general regulatory chamber. Such a chamber might prove a suitable venue for any new route of appeals, for example where it is not clear how many appeals will be generated. We ask consultees whether a First-tier Tribunal for Wales should include a general regulatory chamber, and, if so, which existing tribunals should form part of that chamber (Consultation question 12).
- 3.18 In addition we seek views on whether the Residential Property Tribunal for Wales could be combined with the Agricultural Land Tribunal for Wales into a property chamber (Consultation question 11). Finally, we ask consultees whether any of the other existing devolved tribunals should be amalgamated into a single chamber (Consultation question 13). The diagram overleaf shows how the new unified tribunal might look.

Diagram 1



CHAPTER 4: APPEALS

- 4.1 In this chapter we consider the question of onward appeals from the devolved tribunals. At present, most appeals from the devolved tribunals lie to the Upper Tribunal established by the Tribunals, Courts and Enforcement Act 2007, mirroring the route of appeal from the corresponding tribunals in England. The Welsh Language Tribunal 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. Appeals from the Adjudication Panel for Wales also lie to the High Court (whether through a statutory appeal or through judicial review). Some appeals to the High Court require permission to appeal. For school admission and exclusion appeal panels there is no conventional appeal route at all.
- 4.2 Bringing the existing devolved tribunals in Wales into one structure would make these inconsistencies starker. This chapter considers whether the existing appeal routes should be rationalised and, if so, how.

The Upper Tribunal

- 4.3 One of the key recommendations made by the report of Sir Andrew Leggatt following his review of tribunals was that there ought to be a “single route of appeals for all tribunals”. His recommendations led to the creation of the Upper Tribunal by the Tribunals, Courts and Enforcement Act 2007. Like the First-tier Tribunal it is divided into chambers. 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 can be given either by the First-tier Tribunal or the Upper Tribunal.

Appeals from devolved tribunals

- 4.4 There are not many appeals from the devolved tribunals. A table in chapter 4 of the Consultation Paper shows that in 2019/2020 23 applications for permission to appeal to the Upper Tribunal were received by the section 59 tribunals, of which 21 were refused, one was granted and one decision was pending; eight applications for permission were made to the Upper Tribunal, of which six were refused, one was granted and one decision was pending.
- 4.5 Appeals from decisions of the Valuation Tribunal for Wales do not require permission. 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.

Options for reform

- 4.6 We have identified 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.

4.7 These options are not necessarily exhaustive or mutually exclusive.

No substantive change

4.8 One possibility is simply to leave some or all current appeal routes as they are. This would preserve a system which appears to work reasonably well for the existing tribunals. In conversations with the judicial leads who head the section 59 tribunals, several were content with their routes of appeal. Where the appeal lies to the Upper Tribunal, the advantages referred to 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.

4.9 A disadvantage of leaving appeal routes unchanged is that they would continue to be inconsistent. This 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 could be even more confusing for users if our suggestion of an amalgamated tribunal at first instance is adopted.

4.10 It also offers little assistance for the development of new jurisdictions in the future. To prevent this problem 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

4.11 Another possibility might be to direct all appeals from devolved tribunals to the Administrative Court in Wales. That would involve no change for the Adjudication Panel for Wales, the Welsh Language Tribunal, or council tax appeals from the Valuation Tribunal for Wales. It would however involve changing all other appeal routes from the devolved tribunals.

4.12 While this would bring consistency, there are a number of disadvantages. It would take appeals out of the tribunal system, losing the advantages of that system: straightforward procedural rules, expert knowledge of the panel, and no (or low) fees being charged to users.

4.13 It could also be seen as going backwards. Before the Tribunals, Courts and Enforcement Act 2007, for example, there was no route of appeal from the Mental Health Review Tribunal for Wales. Applicants had to seek judicial review instead. The Leggatt Report decided that this was not satisfactory, given the complex and sensitive cases handled by the tribunals.

The Upper Tribunal

4.14 Another option for making the appeal routes consistent would be to move all appeals to the Upper Tribunal. This would preserve most existing appeal routes. It would 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.

4.15 One disadvantage is that it would run counter to the move towards greater devolution in respect of the devolved tribunals. The strength of arguments (1) and (2) may decrease in the future, as the law of Wales continues to diverge from that of England.

An Appeal Tribunal for Wales

4.16 The bolder option for reform would be the creation of a new appellate body; an Appeal Tribunal for Wales. Because its initial case load is likely to be very 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-deploy or appoint current judges of the High Court, or members of the Upper Tribunal. The President of Welsh Tribunals could also lead the Appeal Tribunal and hear appropriate cases.

4.17 The advantages of creating a new appellate body include the following.

- (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 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.
- (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.

- (5) Responsiveness. An Appeal Tribunal for Wales would sit in Wales and be responsible to the needs of the tribunals of Wales (contingent, of course, on resourcing of a newly created tribunal, and of specialist judges being available, especially if the majority of their work is in the High Court of Upper Tribunal).
- 4.18 There are however some disadvantages. The most significant of these is that there may simply not be sufficient 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.
- 4.19 Due to the difficulty of these issues, we seek views on from consultees on whether the routes of appeal from the devolved tribunals should be uniform (Consultation question 14). We also ask for views on whether, if a uniform appeal route is adopted, that should be the Upper Tribunal, the Administrative Court in Wales, or a newly established Appeal Tribunal for Wales (Consultation question 15). If no single appeal route is adopted, we seek views on whether there should nonetheless be a default route of appeal, what that route should be, which tribunals should have their appeals heard by that default route, and whether the default appeal route could be populated gradually (Consultation question 16).

School admission and exclusion appeal panels

- 4.20 School exclusion and admission appeal panels are unusual in that they have no dedicated route of appeal. Applicants must instead complain to the Public Services Ombudsman for Wales, or the Welsh Ministers, or bring a judicial review. Our provisional view is that this is unsatisfactory. Neither the Public Services Ombudsman for Wales nor the Welsh Ministers are able to consider the merits of a particular decision, while judicial review is slow, inaccessible and expensive.
- 4.21 Our provisional proposal for school exclusion appeal panels is that they should be amalgamated with the Special Educational Needs Tribunal for Wales. In that case, applicants would use the same route of appeal as that tribunal; presently, the Upper Tribunal. But this would still leave school admissions appeals panels without a dedicated route of appeal.
- 4.22 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.
- 4.23 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 creating a right of appeal from school admission appeals panels to the Special Educational Needs Tribunal for Wales might be a solution. It has practical experience of schools and education, and is used to sitting locally. We seek views on whether appeals from school admission appeal panels should lie to the Special Educational Needs Tribunal for Wales. We also seek views on what the grounds of appeal should be (Consultation question 17) and on whether 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 (Consultation question 18).

The Valuation Tribunal for Wales

- 4.24 At present, appeals from the Valuation Tribunal for Wales lie either to the High Court (in the case of council tax appeals) or to the Upper Tribunal (Lands Chamber), for non-domestic rating appeals. We seek views on whether there should be a consistent route of appeal from the Valuation Tribunal for Wales and, if so, what that appeal route should be (Consultation question 19).

The Residential Property Tribunal for Wales

- 4.25 As explained above, the Residential Property Tribunal for Wales is in fact made up of three types of tribunal. Rent assessment committees differ from the others in that an application for permission to appeal can only be made to the Upper Tribunal. We ask consultees whether 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 (Consultation question 20).

CHAPTER 5: PROCEDURAL RULES

- 5.1 The procedural rules for the devolved tribunals in Wales are inconsistent, complex and out of date. Some date back to the 1970s and are 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, who lack modern case management powers. The lack of clarity in 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. While the detailed drafting of tribunal rules is outside the scope of this project, we do make a small number of provisional proposals concerning particular features that reformed rules might incorporate.
- 5.3 We also ask some important structural questions. Firstly, 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 reformed, the rules continue to be maintained and respond to the evolving needs of tribunal users?

How are procedural rules made?

- 5.4 With the exception of the Welsh Language Tribunal and Adjudication Panel for Wales (whose Presidents make the rules, subject to Ministerial approval), Welsh Ministers make the procedural rules for the devolved tribunals. The Welsh Ministers also have the power to issue a code of practice for school admissions and guidance for school exclusions.

Common problems across the devolved tribunals

- 5.5 The procedural rules across the devolved tribunals are inconsistent, often without any apparent reason other than historical accident and the increasingly complex devolution arrangements. These two issues are linked; inconsistency has often arisen because sets of rules have not been updated for significant periods of time. We discuss some specific examples below.

The overriding objective

- 5.6 Some, but not all, devolved tribunals include an “overriding objective” in their rules; a requirement that appeals and claims should be dealt with “fairly and justly” (the exact wording and level of detail varies from tribunal to tribunal). This is an example of more modern procedural rule making. Instead of specifically providing what is required, the rules use a statement of principle to guide the exercise of discretion. We provisionally propose that all devolved tribunals should incorporate an overriding objective in their procedural rules (Consultation question 21). We seek views on whether the overriding objective should include a non-exhaustive list of examples of compliance with it (Consultation question 22).

Duties to cooperate and assist the tribunal

- 5.7 The procedural rules of most tribunals, but not all, include a duty to cooperate with and assist the tribunal. The Mental Health Review Tribunal for Wales does not include that requirement within its rules, although a more recent practice direction does require any person providing evidence to the tribunal to assist the tribunal in achieving the overriding objective. 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 (Consultation question 23). We ask whether such a duty is appropriate in the case of the Mental Health Review Tribunal for Wales.

Service of documents

- 5.8 The rules on service of documents are inconsistent and sometimes out of date. In particular, they vary on whether documents can be sent electronically. In our view the COVID-19 pandemic and the broader trend for remote hearings have underlined the importance of keeping the rules up to date and being able to serve documents electronically. We provisionally propose that devolved tribunal procedural rules should provide for electronic service of documents (Consultation question 24).

Power to review decisions

- 5.9 A number of devolved tribunals have the power to review their decisions on specified grounds, either on an application by a party or on their own initiative. This can be useful to allow a tribunal to correct obvious errors. Not all tribunals have such rules, however, and we have been informed that this can lead to unnecessary appeals in cases where the tribunal could have corrected an obvious error more quickly and efficiently than the Upper Tribunal. We provisionally propose that devolved tribunals should have the power to review their decisions (Consultation question 25).

Remote hearings

- 5.10 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 HMCTS that the section 59 tribunals could use the Cloud Video Platform used in the UK courts and tribunals.
- 5.11 The Consultation Paper does not attempt to evaluate the use of remote hearings. There are advantages and disadvantages, which are the subject of ongoing research by other bodies. Remote hearings will not be suitable for all devolved tribunals.
- 5.12 Although not suitable for all devolved tribunals, our view is that remote hearings are a useful tool in the arsenal of the devolved tribunals. It is likely that there will be an appetite to continue using the technology for some hearings even after the COVID-19 pandemic has receded. Our focus is on how the existing procedural rules accommodate (or do not accommodate) remote hearings. As with other areas in this chapter, at present the rules are inconsistent, and sometimes silent, on whether remote hearings are permitted. We provisionally propose that the rules on remote hearings should be standardised (Consultation question 26).

Standardising other tribunal procedure rules

- 5.13 Standardising the procedural rules would remove some of the inconsistencies that we have cited above. It would not be appropriate in all areas; the procedural rules must reflect the different needs of tribunal jurisdictions. But for common areas of the rules like service of documents, a standard approach could be adopted.
- 5.14 Advantages would include including making rules for accessible for users (having reviewed the rules, the clearest drafting could be adopted) and simplicity for administrative staff and cross-ticketed judges (judges would not have to familiarise themselves with a completely new set of procedural rules when moving into a new jurisdiction).
- 5.15 The main risk is over-standardisation; prioritising consistency at the expense of rules which are different for a good reason, because they reflect the needs of individual tribunals and their users. Another disadvantage is the risk of introducing divergence between devolved tribunal rules and First-tier Tribunal rules. A number of the devolved tribunals apply the same substantive law as chambers of the First-tier Tribunal. It would be particularly confusing for users of the mental health tribunals if the procedural rules differed depending on whether a patient was detained in England or in Wales.
- 5.16 We provisionally propose that devolved tribunal procedural rules should, where appropriate, be standardised (Consultation question 27). We seek views on instances of undesirable divergence of devolved tribunal rules from the equivalent First-tier Tribunal procedural rules, and how the risk of divergence might be managed (Consultation question 28).

Amalgamation into a single set of rules

- 5.17 We also consider in this chapter whether the rules for the devolved tribunals should be amalgamated; that is, contained in a single set of procedural rules. This would make it easier for the user to identify the relevant set of procedural rules. The disadvantage is that accommodating differences for each tribunal within a single set of rules leads to complex drafting, with exceptions and appendices. We provisionally propose that there should continue to be a separate set of rules for each tribunal or chamber (Consultation question 29). We do provisionally propose, however, that the three sets of rules for the Residential Property Tribunal for Wales should be amalgamated (Consultation question 30).

Making and maintaining the procedural rules

- 5.18 Within the reserved tribunals, procedural rules are made by the Tribunal Procedure Committee, established by the Tribunals, Courts and Enforcement Act 2007. We see value in establishing a similar committee for the devolved tribunals in Wales. It would enable the rules to be reviewed regularly, preventing them becoming out of date. Improvements to the rules could be made at the same time for all tribunals, preventing divergencies creeping in. A committee could also play a role in monitoring differences between procedural rules in the reserved and devolved tribunals. We provisionally propose the establishment of a Tribunal Procedure Committee for Wales (Consultation question 31).
- 5.19 In our view the natural person to chair the committee and appoint its members would be the President of Welsh Tribunals. We provisionally propose that the President of Welsh Tribunals should be responsible for chairing a Tribunal Procedure Committee for Wales and appointing its members (Consultation question 32). The President's ability to appoint members should be guided by factors set out in legislation, including the need for a committee to have access to a range of expertise (Consultation question 33).
- 5.20 Once changes to the rules have been agreed by the Tribunal Procedure Committee, how should those changes be made? In our view the options include the rules being made by a majority of the committee (as in the reserved tribunals), or by the President of Welsh Tribunals. In either case, we envisage the power being subject to approval by the Welsh Ministers (Consultation question 34).

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.

Appointments in the devolved Welsh tribunals

- 6.2 Appointment functions within the section 59 tribunals are generally split between the Lord Chancellor on the one hand, and the Welsh Ministers on the other. The Lord Chancellor tends 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, with the Lord Chancellor more likely to be responsible for appointing the former.
- 6.3 The Welsh Language Tribunal is the most recently created tribunal. 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 independence of the tribunal and the rule of law.
- 6.4 Other tribunals have different processes. The President of the Valuation Tribunal for Wales is elected by its members, as are three national representatives. Other members of the tribunal and chairpersons are appointed by a panel of members and national representatives.
- 6.5 School admission and exclusion appeal panels follow a different pattern. For admission appeals, the admission authority makes appointments. This is usually the local authority, but for foundation and voluntary aided schools the governing body is responsible. It is possible for joint arrangements to be made between governing bodies and the local authority. Local authorities also appoint members to exclusion appeal panels. In practice many local authorities appoint an “independent appeals panel” which hears both admission and exclusion appeals.
- 6.6 Because administration of these panels is not centralised, it is difficult to find accurate information about the operation of the panels. We seek evidence from consultees about how these panels work in practice, and the extent to which local authorities work together.

The Judicial Appointments Commission

- 6.7 The Judicial Appointments Commission (the “JAC”) is an independent statutory body, created by the Constitutional Reform Act 2005. It selects candidates for appointment to courts and tribunals in England and Wales, and to some tribunals with a UK-wide jurisdiction. The candidates it selects are usually appointed. It runs selection processes for the section 59 tribunals.

Reform of appointments in Wales

- 6.8 Our provisional view is that the appointing authorities for the devolved tribunals should be the same. The current mixed position is the result of historical development, rather than any policy choice reflecting differences between the tribunals. We provisionally propose that the same appointing authority (or authorities) should make appointments for devolved tribunals (Consultation question 35).
- 6.9 It appears to us there are a number of possible appointing authorities. These are:
- (1) the Lord Chancellor;
 - (2) the Welsh Ministers; and
 - (3) the President of Welsh Tribunals.
- 6.10 A number of guiding principles are relevant to deciding who should make appointments. These include the following.
- (1) Independence. It has long been recognised that the departments responsible for taking appealable decisions should not be involved in the appointment process for tribunals that review those decisions. One way of increasing independence is to transfer responsibility for appointments from the executive to the judiciary.
 - (2) Seniority. Another relevant principle is the seniority of the appointing authority. Involving an important figure with government appointments underlines the importance of the office itself. This helps to explain why the Welsh Ministers and Lord Chancellor share these responsibilities at present.
 - (3) Ability to assess candidates. A further principle is that the appointing authority should be in a good position to assess the merits of the recommendation made by the selection authority. This is why the Senior President of Tribunals now makes appointments to the First-tier and Upper Tribunals.
- 6.11 We provisionally propose that members of the section 59 tribunals should be appointed by the President of Welsh Tribunals (Consultation question 36). The President is more likely than the Welsh Ministers to be familiar with the needs of individual tribunals, and is already consulted in relation to appointments of legal members of the restricted patient panel of the Mental Health Review Tribunal for Wales. The President is also demonstrably independent of the Welsh Government.
- 6.12 We provisionally propose that judicial leads of the section 59 tribunals should be appointed by the Welsh Ministers, with the agreement of the President of Welsh Tribunals (Consultation question 37). That satisfies the “seniority” criterion outlined above, but balances it with the judicial expertise and independence inherent in the office of President of Welsh Tribunals.

The Valuation Tribunal for Wales

- 6.13 We seek views on how the President of the Valuation Tribunal for Wales and members and chairpersons should be appointed (Consultation questions 38 and 39).

School admission and exclusion appeal panels

- 6.14 We propose in Chapter 3 that functions of school exclusion appeal panels should be transferred to the Special Educational Needs Tribunal for Wales. In that event, appointments would be governed by the appointment procedures for SENTW.
- 6.15 That would, however, leave appointments to school admission appeal panels in the hands of the appointing authority. In most cases this is the local authority, but for some types of school it is the governing body of the school in question. Moving this responsibility elsewhere would increase the perceived independence of these panels, but it is unclear how easy this would be to do in practice. We seek views on whether members of school admission (and, if retained, school exclusion) appeal panels should be appointed by the President of Welsh Tribunals (Consultation question 40).

Role of the Judicial Appointments Commission

- 6.16 The advantage of having one body using standard selection processes across the devolved tribunals is clear. 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 ensures that all appointees are assessed to the same standard and by the same body.
- 6.17 It was suggested to us that Wales might benefit from its own appointments body, following the examples of Northern Ireland and Scotland. We have provisionally concluded however that, given the relatively low volume of appointments to the devolved tribunals, the level of investment and administrative effort required to set up a separate appointments body for Wales is not justified at present. We provisionally propose that arrangements for selection of appointments to the section 59 tribunals by the Judicial Appointments Commission should not be altered as part of our reforms (Consultation question 41).
- 6.18 There is a question about whether the JAC's role could or should be extended to the Valuation Tribunal for Wales and school exclusion and admission appeal panels. This would ensure that there was a rigorous and consistent process in place for appointment to those tribunals. But it is possible that the JAC's rigorous process may be too elaborate for appointments to these tribunals, which rely on the willingness of unpaid volunteers. We seek views on who should be responsible for selecting the President of the Valuation Tribunal for Wales (Consultation question 42) and members and chairpersons of that tribunal (Consultation question 43). We also seek views on whether the selection of members of school admission and (if retained) exclusion appeal panels (Consultation question 44).

CHAPTER 7: COMPLAINTS AND DISCIPLINE

- 7.1 The statutory framework governing complaints about conduct of members of the devolved tribunals is complex, inconsistent and not accessible for tribunal users. This appears to be the result of a number of related factors: the *ad hoc* development of tribunals, the changes brought about by the Tribunals, Courts and Enforcement Act 2007 and constitutional reforms under the Constitutional Reform Act 2005. These developments occurred as the devolution settlement expanded, adding an additional layer of complexity.
- 7.2 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).
- 7.3 We start this chapter by outlining the UK-wide statutory framework governing complaints. That framework also applies to a number of the devolved tribunals. After outlining the position of the devolved tribunals, we move on to our proposals for reform.

Complaints and disciplinary powers in the UK tribunal system

- 7.4 Schedule 14 to the Constitutional Reform Act 2005 contains a list of judicial office holders appointed by the Lord Chancellor. Complaints about those office holders must be made to the Judicial Conduct Investigations Office (the “JCIO”), the body which supports the Lord Chancellor and the Lord Chief Justice in their joint responsibility for judicial discipline. There is however an exception to this rule.
- 7.5 Complaints about a “tribunal member” (listed in the Judicial Conduct (Tribunals) Rules 2014) have to be made to the “relevant President”. A schedule to the 2014 Rules gives a list of tribunal members and relevant Presidents. The 2014 Rules set out the process the relevant president must follow. Similar procedures are followed by the JCIO.

Disciplinary and dismissal powers

- 7.6 The Lord Chancellor and (in England and Wales) the Lord Chief Justice are jointly responsible for the dismissal and discipline of judicial office holders listed in Schedule 14 to the Constitutional Reform Act 2005. The Lord Chancellor can remove a person from office, so long as prescribed procedures are followed. The Lord Chief Justice may, with the agreement of the Lord Chancellor, offer formal advice, or a formal written warning or reprimand. The Lord Chief Justice may also suspend a person, if they are subject to criminal proceedings or have been convicted of a criminal offence.

Complaints processes within the devolved tribunals in Wales

- 7.7 A point to note is that the devolved tribunals in Wales receive very few complaints. For 2017/18 (the most recent year for which complete data is available), the Mental Health Review Tribunal for Wales saw five complaints, and the Special Educational Needs Tribunal for Wales and Valuation Tribunal for Wales saw one each.

- 7.8 The UK framework outlined above applies to some of the devolved tribunals. Some members of the devolved tribunals are listed as “tribunal members” in the 2014 Rules. Complaints regarding the conduct of the chairperson’s panel of the Special Education Needs Tribunal for Wales, and panels of deputy chairpersons, farmers and owners of agricultural land in the Agricultural Land Tribunal for Wales must be made to the relevant President. Complaints about members of the Mental Health Review Tribunal for Wales are to be made to the “liaison judge”; however, we understand no liaison judge has been appointed.
- 7.9 Some other members of the devolved tribunals in Wales are not listed as “tribunal members” in the 2014 Rules, but are listed in Schedule 14 to the Constitutional Reform Act 2005 as “office holders”. These include, for example, members of rent assessment committees in Wales and some judicial leads. Complaints about these office holders must therefore be made to the JCIO.
- 7.10 This leaves a number of members of the devolved tribunals who are not listed as either “tribunal members” or “office holders”. These include judicial leads and members of the Valuation Tribunal for Wales and Adjudication Panel for Wales, as well as members of school admission and exclusion appeal panels.
- 7.11 Not all of these tribunals have complaints processes. For example, there is currently no procedure for complaints against the conduct of members of the Valuation Tribunal for Wales (as opposed to administrative complaints). We provisionally propose that individuals should be able to make a complaint regarding the conduct of members of the Valuation Tribunal for Wales (Consultation question 48).
- 7.12 The position of complaints against members of school admission appeal panels and school exclusion appeal panels is complicated. There is no single procedure for complaints, but users can complain to the Public Services Ombudsman for Wales or to the Welsh Ministers. 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 47).
- 7.13 Where there are complaints policies, these are not always readily accessible. We provisionally propose that there should be a standardised complaints policy that applies to all devolved tribunals (Consultation question 45). That policy should be available both online and in hard copy form upon request (Consultation question 46).

Disciplinary process

- 7.14 As well as having a uniform complaints policy, we also provisionally propose that the process of investigating a complaint should be uniform across the devolved tribunals, including in relation to complaints about administration of the tribunals (Consultation question 49) and complaints about the conduct of members (Consultation question 50).
- 7.15 We provisionally consider that there should be consistency in relation to (a) the disciplinary processes that apply to members of the devolved tribunals and (b) who exercises the power to discipline and, ultimately, to dismiss members and judicial leads. In relation to disciplinary processes, our preliminary view is that the 2014 Rules

provide a useful model which could be adopted as uniform practice across the devolved tribunals.

- 7.16 We provisionally propose that complaints regarding members of the devolved tribunals should be investigated by the relevant judicial lead (Consultation question 51). Complaints regarding judicial leads should be investigated by the JCIO or an equivalent body (Consultation question 52). We make similar proposals in relation to the Valuation Tribunal for Wales (Consultation questions 54 and 55). We seek views on who might investigate complaints made regarding the conduct of members of school admission and exclusion appeal panels (Consultation question 53).

Disciplinary powers

- 7.17 The Lord Chief Justice and Lord Chancellor exercise disciplinary powers over members of the devolved tribunals listed in Schedule 14 to the Constitutional Reform Act 2005. However, as outlined above, that list is not exhaustive. Disciplinary powers in respect of the Valuation Tribunal for Wales and the Welsh Language Tribunal are conferred on the Welsh Ministers in the legislation which governs those tribunals. For other tribunals, however, the position is less clear. In particular, we have been unable to identify powers explicitly permitting the dismissal of members or Presidents of the Adjudication Panel for Wales or members of school admission and exclusion appeal panels.
- 7.18 We provisionally propose that the President of Welsh Tribunals should have the power to discipline and dismiss members of the section 59 tribunals (Consultation question 56) and members of the Valuation Tribunal for Wales (Consultation question 57). 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 (Consultation question 58).
- 7.19 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 provided for by the 2014 Rules), 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. Instead we provisionally propose that judicial leads should only be dismissed by the President of Welsh Tribunals with the agreement of the Welsh Ministers (Consultation question 59). We make a similar provisional proposal in respect of the Valuation Tribunal for Wales (Consultation question 60).
- 7.20 It is a fundamental aspect of the rule of law that judges cannot be disciplined on political grounds. Any involvement of the Welsh Ministers raises concerns about protecting the independence of the judiciary. Our provisional view is that these concerns can be alleviated by restricting the power to one of concurrence in a decision of the President of Welsh Tribunals. They would also be addressed by imposing on the Welsh Ministers a statutory duty to respect judicial independence (discussed further in Chapter 10). We seek views on whether there should be any further safeguards attaching to the exercise of disciplinary powers to protect the independence of the judiciary (Consultation question 61).

CHAPTER 8: THE PRESIDENT OF WELSH TRIBUNALS

- 8.1 The office of President of Welsh Tribunals was created by the Wales Act 2017. Sir Wyn Williams (formerly Mr Justice Wyn Williams, a High Court judge) is the first person to be appointed to the role. This leadership has had a considerable impact on devolved tribunals in Wales; it has given them a figurehead and a common identity.
- 8.2 The provisional proposals we make in the Consultation Paper would create a unified tribunal to replace the existing individual tribunals. The President of Welsh Tribunals would have an important role in steering tribunals through this period of reform. Our provisional proposals on appointments and discipline (Chapters 6 and 7) and the structure of the Welsh Tribunals Unit (Chapter 9) would also give a greater role to the President. This chapter takes a more comprehensive look at the role.

Existing responsibilities of the President of Welsh Tribunals

- 8.3 The President of Welsh Tribunals has two responsibilities. The first is “inward-looking”. Section 60(5)(a) of the Wales Act 2017 makes the President responsible for:

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.

- 8.4 The second responsibility is outward-looking: to represent the views of members of the devolved tribunals to the Welsh Ministers and other members of the Senedd. This is usually done through annual meetings with the First Minister and an annual report, 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.
- 8.5 The Wales Act 2017 does not explicitly envisage a judicial role for the President of Welsh Tribunals. However, the President has in the past expressed the view that “as a senior judge, the President is entitled to sit as the legal chair of each of the Welsh Tribunals”, though should only do so if the President and judicial lead of the tribunal agreed it would be inappropriate for the judicial lead to sit on a particular case.

Potential reforms

- 8.6 While the creation of the office of President of Welsh Tribunals is relatively recent, there have been calls for its reform, from both the Commission on Justice in Wales (the “Thomas Commission”) and the President of Welsh Tribunals himself.
- 8.7 The President has argued that a “specific judicial role” be formulated for the office. Our provisional view is that this would be a valuable development, which would assist in ensuring the President continues to have a day-to-day understanding of the work of the tribunals. We therefore provisionally propose that the President of Welsh Tribunals should be a judge of the tribunal or tribunals over which the President resides (Consultation question 62).

- 8.8 We also consider whether President's remit should be extended beyond the section 59 tribunals. The Thomas Commission has suggested that the role should be extended to other bodies established under Welsh law or by the Welsh Government.

School admission and exclusion appeal panels and the Valuation Tribunal for Wales

- 8.9 We consider whether the remit of the President should be extended in relation to school admission appeal panels, and to exclusion appeal panels if they are retained.
- 8.10 There are difficulties in seeing how the role of President of Welsh Tribunals would fit into the existing system of school admission appeal panels. Because the panels are not run centrally, there is no obvious person within the current structure who could represent the interests of the panels to the President, in the way that existing judicial leads do. In order for the President to communicate effectively with the panels it might be necessary to agree on regional representatives to liaise with the President.
- 8.11 If those difficulties could be overcome, there might be a number of advantages to extending the President's role. The President's existing responsibility for training of tribunal members could be extended to the panels, ensuring consistency. The more outward-facing elements of the role (representing the tribunals' interests to the Senedd and Welsh Ministers) could also give the panels a collective voice.
- 8.12 Finally, the involvement of the President of Welsh Tribunals could help bolster the independence of the panels. At present, appointments and administration are the responsibility of the appointing authority (in some cases the governing board of a particular school), meaning that the panels lack the structural independence of other tribunals. The President's supervision of appeal panels would protect them from the perception of being susceptible to pressure from local authorities. We therefore seek views on whether school admission and (if retained) exclusion panels should be subject to the supervision of the President of Welsh Tribunals (Consultation question 63).
- 8.13 We also make a provisional proposal that the Valuation Tribunal for Wales should come under the supervision of the President of Welsh Tribunals (Consultation question 64).

CHAPTER 9: THE WELSH TRIBUNALS UNIT

- 9.1 The Welsh Tribunals Unit is the part of the Welsh Government that administers the section 59 tribunals. Unlike other bodies which administer tribunals in the UK, it is not structurally independent from Welsh Government. This has led some to question whether it is sufficiently independent. This chapter considers other models that have been adopted in the UK for the administration of tribunals, and makes a provisional proposal.

The executive agency model: Her Majesty's Courts and Tribunals Service and the Northern Ireland Courts and Tribunals Service

- 9.2 Executive agencies are units of a central government department which are administratively separate, but which legally remain part of the department. A Guide issued by the Cabinet Office explains that they are usually set up

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-focussed department.

- 9.3 Executive agencies are usually led by a Chief Executive, who is accountable to the relevant departmental Minister for delivery and day-to-day activities. Staff of executive agencies are civil servants. The executive agency model is one which has been adopted by both Her Majesty's Courts and Tribunals Service and the Northern Ireland Courts and Tribunals Service.

The non-ministerial department model: the Scottish Courts and Tribunals Service

- 9.4 SCTS was created in 2015, with the merger of the Scottish Courts Service and Scottish Tribunals Service. It is a non-ministerial department, established by statute, making it legally separate from the Scottish Government. It has a Board and a Chief Executive.
- 9.5 The SCTS Board includes both judicial and non-judicial members. The judicial members drawn from the tribunals system are the President of Scottish Tribunals, and a Chamber President from the First-tier Tribunal for Scotland. The members of the Board are responsible for the leadership and direction of the organisation, and ensuring it meets the aims and objectives agreed between the SCTS and the Scottish Ministers.

Reforming the Welsh Tribunals Unit

- 9.6 We are of the preliminary view that the Welsh Tribunals Unit should have greater structural independence from the Welsh Government. Whether it were reformed as an executive agency or a non-ministerial department, such reform would provide the following benefits.
- (1) It would embed the principle of judicial independence into the system, and provide reassurance to tribunal users that the running of the tribunals takes place at a distance from the decisions against which they are appealing.
 - (2) It would increase the public profile of the Welsh Tribunals Unit, and make its activities more transparent to the general public. Currently the Welsh Tribunals Unit's budget is reported in the President of Welsh Tribunals' annual report, but it has a very limited public presence (for example, it does not have its own website).
 - (3) It would allow the judiciary a role in the running of the Welsh Tribunals Unit. In particular either model would give a role to the President of Welsh Tribunals.
- 9.7 While we think either model could provide these benefits, we are drawn to the non-ministerial department model, because of the greater independence it gives from the Welsh Government. We therefore provisionally propose that the Welsh Tribunals Unit should be restructured into a non-ministerial department (Consultation question 65).

CHAPTER 10: JUDICIAL INDEPENDENCE

- 10.1 In order to perform their role, judges need to be independent, both from government and from other influences. This enables judges to make impartial decisions, which in turn allows users of tribunals to put their faith in the judicial system.
- 10.2 Judicial independence is explicitly included within the terms of reference for this project. It is particularly relevant to a number of topics which are considered in other chapters; appointments and discipline (Chapters 6 and 7) and the structure of the Welsh Tribunals Unit (Chapter 9).

A statutory guarantee of independence

- 10.3 The Constitutional Reform Act 2005 made significant changes to the legal system in the UK. One of the principles underpinning these changes was that the judiciary should be independent. Section 3(1) of the Act 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.
- 10.4 Section 3(5) also prevents the Chancellor and Ministers of the Crown from seeking to “influence particular judicial decisions through any special access to the judiciary”.
- 10.5 When the Tribunals, Courts and Enforcement Act 2007 was passed, the guarantee was extended to chamber presidents and vice-presidents and members of the First-tier and Upper Tribunals. It also applies to the President, Vice-President and members of the Valuation Tribunal for England.
- 10.6 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. As explained in Chapters 6 and 7, this list is incomplete in respect of the devolved tribunals. We provisionally propose that 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 (Consultation question 66).

The judicial oath

- 10.7 Judges in the UK are required to take the “judicial oath”. This is in fact two separate oaths or affirmations: the oath of allegiance and the judicial oath. Taking the oath represents an individual commitment to the principle of impartial decision-making.
- 10.8 Following the enactment of the Tribunals, Courts and Enforcement Act 2007, members, judges and judicial leads of the First-tier Tribunal and Upper Tribunal must take the judicial oath. In Scotland, all members and judicial leads of tribunals are considered part of the judiciary and are also required to take the oath.
- 10.9 In Wales, the President of Welsh Tribunals is also required to take the judicial oath before the Lord Chief Justice. But there is no statutory requirement for either judicial leads or members of devolved tribunals to take the oath (though in practice, some may have taken it as part of their appointment to other judicial offices). 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).

Consultation Questions

CHAPTER 2: TRIBUNALS IN WALES: DEVOLVED COMPETENCE AND DEVOLVED TRIBUNALS

Consultation Question 1.

- 1.10 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.

- 1.11 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.

1.12 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.

1.13 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.

- 1.14 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.

- 1.15 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.

- 1.16 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.

- 1.17 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.

1.18 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.

1.19 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.

1.20 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.

1.21 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.

- 1.22 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.**

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

Paragraph 4.54

Consultation Question 15.

- 1.24 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.

- 1.25 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.

1.26 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.

- 1.27 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.

- 1.28 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.

- 1.29 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.

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

Do you agree?

Paragraph 5.19

Consultation Question 22.

- 1.31 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.

- 1.32 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.

- 1.33 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.

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

Do you agree?

Paragraph 5.36

Consultation Question 26.

1.35 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.

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

Do you agree?

Paragraph 5.68

Consultation Question 28.

1.37 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.

1.38 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.

1.39 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.

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

Do you agree?

Paragraph 5.107

Consultation Question 32.

1.41 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.

- 1.42 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.

- 1.43 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.**

- 1.44 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.

- 1.45 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.

- 1.46 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.

- 1.47 We seek views on how the President of the Valuation Tribunal for Wales should be appointed.

Paragraph 6.74

Consultation Question 39.

- 1.48 We seek views on how members and chairpersons of the Valuation Tribunal for Wales should be appointed.

Paragraph 6.75

Consultation Question 40.

- 1.49 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.

- 1.50 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.

- 1.51 We seek views on how the President of the Valuation Tribunal for Wales should be selected.

Paragraph 6.92

Consultation Question 43.

- 1.52 We seek views on how members of the Valuation Tribunal for Wales, including chairpersons, should be selected.

Paragraph 6.93

Consultation Question 44.

- 1.53 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.**

- 1.54 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.

- 1.55 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.

- 1.56 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.

- 1.57 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.

- 1.58 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.

- 1.59 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.

- 1.60 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.

- 1.61 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.

- 1.62 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.

- 1.63 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.

- 1.64 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.

- 1.65 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.

- 1.66 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.

- 1.67 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.

- 1.68 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.

- 1.69 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.

- 1.70 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.**

- 1.71 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.

- 1.72 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.

- 1.73 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.**

- 1.74 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.**

- 1.75 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.

1.76 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