



Bar Council response to the Welsh Government's Consultation on A new tribunal system for Wales: white paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Welsh Government's Consultation on A new tribunal system for Wales: white paper.¹

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Responses to Consultation Questions

Question 1. Do you agree with the tribunals we have identified as the devolved tribunals, as set out in paragraph 22?

4. Yes. We agree with paragraph 25 of the White paper that Social Care Wales is not a tribunal.

Question 2. Do you agree with the proposed structure of the unified tribunal system for Wales?

¹ Available here: <https://www.gov.wales/new-tribunal-system-wales-white-paper-html>

5. We think that the proposed name, “First-tier Tribunal for Wales”, should be reconsidered, for a number of reasons:

- It is apt to cause confusion with the existing First-tier Tribunal. Adding the words “for Wales” is unlikely to remove that confusion, as the existing First-tier Tribunal sits and exercises its jurisdiction in Wales;
- The words “First-tier” are unnecessary. Given that the proposed appellate tribunal’s name indicates that it will have an appellate function, we see no need for the tribunal that exercises a first instance jurisdiction, to spell out that fact in its name. There is no suggestion that, for example, anyone finds the name of the Employment Tribunal confusing, because it is not named the “first-tier employment tribunal”;
- A name that is distinctive from the existing Anglo-Welsh tribunal system will indicate better the distinctly Welsh identity of the Welsh tribunal.

6. A number of options exist: Our preferred option would be the “Welsh Tribunal”. Others might be, “Devolved Tribunal for Wales”, “National Tribunal for Wales”, or “Administrative Tribunal for Wales”.

7. We are unpersuaded of the need or appropriateness of dividing either tribunal into chambers.

Question 3. Do you agree with the proposed structure for the tribunal membership in the unified tribunal system?

8. Legally-qualified members of the tribunals, appointed as such (as opposed, for example, to someone appointed as a lay member who happens to be a lawyer) should be called “judges”. This would make for consistency across the tribunals before whom Welsh people may have business, and would underline the authority of the new tribunals.

9. We think that the default position should be that each tribunal panel should be chaired by a judge. Very good reason should be required for any deviation for this. It is not satisfactory for a tribunal composed entirely of lay members to have a legal adviser. The adviser may advise, but the tribunal must be free not to follow an adviser’s advice, otherwise the adviser becomes, in effect, a member of the tribunal. It is more consistent with the tribunal having proper authority, and exercising its role of determining questions of law where required to do so, for a judge to preside.

10. The tribunal will exercise legal powers. It will determine questions of law, as well as fact. Although lay members may need to be able to vote on questions of law (not least because of the difficulty in separating them from questions of fact), they will,

no doubt, pay very close attention to the judge on questions of law. As chair, the judge will be able to assist their colleagues, whilst respecting colleagues' right to reach their own conclusions. This is more satisfactory than a legal adviser, who will not be a judicial officer, reaching a position on legal questions and then advising panels.

11. However, if a tribunal cannot be presided over by a judge, we consider it absolutely essential that it have a legal adviser. Without that, we cannot see how it could possibly reach sound conclusions on legal questions, and the public's confidence in the tribunal would, no doubt, diminish.

Question 4. Do you agree the jurisdictions of the Welsh Tribunals should be transferred to the First-tier tribunal for Wales?

12. Yes

Question 5. Do you agree that, in principle, the jurisdiction of the Valuation Tribunal for Wales should be transferred to the First-tier tribunal for Wales?

13. Yes.

Question 6. Do you agree that if the jurisdiction of the Valuation Tribunal for Wales is not transferred to the First-tier Tribunal for Wales, it should still be subject to the supervision of the President of Welsh Tribunals?

14. Yes, but it should be transferred.

Question 7. Do you agree the jurisdiction of school exclusion appeal panels should be transferred to the First-tier Tribunal for Wales?

15. Yes.

Question 8. Do you agree the jurisdiction of school admission appeal panels should continue to be administered by admission authorities for the time being?

16. No, it should also be transferred to the jurisdiction of the First-tier Tribunal for Wales.

Question 9. Do you agree appeals from school admission appeals panels should be available on a point of law to the First-tier Tribunal for Wales?

17. We commend a dedicated appeals route and process. Presently there is no dedicated appeal route. Complaint is presently made via complaint to the Public Services Ombudsman for Wales, or by way of Judicial Review. This process is

unwieldy, unclear and consumes too much time at a stage when given the nature of the decision being questioned, time is of the essence. It is vital that a regulated procedural structure is created but it must be such that it is readily accessible and understandable by the lay person as it is noted that complaints about these decisions are usually brought by carers/parents without legal representation and can be brought by young people themselves. This process must not exclude those whom it is actually designed to protect and serve.

18. We disagree that the grounds of appeal should be limited to a point of law; the grounds of appeal should be in both fact and law. The decision would be a re-decision. As most parents/carers are not legally represented it is unfair to limit an appeal to points of law which they may not be able to present. We commend that the jurisdiction of school admissions appeal panels should be transferred to the First Tier Tribunal and only then should the route of appeal be limited to a point of law to the new Appeal Tribunal.

Question 10. Do you agree with the initial chamber structure we propose for the First-tier Tribunal for Wales?

19. Yes.

Question 11. Do you agree as a guiding principle disputes deriving from Welsh law should be heard in a Welsh judicial institution?

20. We agree that, as a guiding principle, disputes deriving from Welsh law should be heard in a Welsh judicial institution.

21. However, there are areas in the paragraphs preceding question 11 with which we significantly disagree. We address these when dealing with question 15 below.

Question 12. Are there any particular types of dispute under devolved law which you believe lend themselves particularly well to being resolved by a tribunal?

22. A unified structure, if it were adopted, would encompass a wide number of tribunals, some of which are unique to Wales, such as the Welsh Language Tribunal. The need for mechanisms which address these specialist or unique jurisdictions with redress being approached on a Wales basis when determining appeals would naturally be by the proposed unified Welsh tribunal. Further, the siting of the tribunal in Wales would ensure expedition concerning appeals emanating from Wales. A streamlined and cohesive approach is therefore commended.

Question 13. Do you agree there should be an Appeal Tribunal for Wales?

23. Yes. It naturally follows that the creation of a specialist appellate court will mean legal authority on a case basis will develop with judgments being published and made available. This draws together the hitherto ad hoc approach into a more coherent and accessible form, the essence being the simplification of judicial decision making which will lead to efficiencies earlier in the system, particularly when giving early legal advice.

24. In considering this option, concern has been expressed as to the source of judicial manpower. We anticipate no such problem. There is the ability, as is recognised in the Consultation Paper, to make use of the practice of cross ticketed judiciary. This is tried and tested and recognises the breadth and depth of the judiciary. There is therefore readily available a cohort of Judges. There is a need now to take this opportunity to correct the previous deficiencies and encourage and promote good practice. A specialist Appeal tribunal would address all of these concerns.

Question 14. Do you agree the Appeal Tribunal for Wales should be the appellate body for appeals from the First-tier Tribunal for Wales unless there are exceptional reasons requiring different provision to be made?

25. Yes.

Question 15. Do you agree jurisdictions should be transferred to the Appeal Tribunal for Wales over time, and that they should be organised into chambers by subordinate legislation made by the Welsh Ministers with the concurrence of the President of Welsh Tribunals?

26. Regarding the proposal for routes of appeal to be introduced “gradually”. We recognise that appellate jurisdictions are always subject to ongoing reform and modification. However, we are concerned that the proposed staged approach could be a recipe for confusion, as different appeal routes would exist at different times. There is also a risk that, if certain appeal routes are put off to some later date, that date will be put back, and put back again, perpetuating that confusion.

27. Another risk, in addition to confusion, is that the Welsh appeal route will take a different approach to legislative interpretation to other routes.

28. The better approach would be to introduce the proposed appeal tribunal, with its full jurisdiction and proper designation of routes of appeal, at the same time. Even if this means that the start date is later than it might be for some parts of the jurisdiction, this would reduce the potential for confusion, for divergent approaches to interpretation, and would be constitutionally neater.

29. We are doubtful about the assertion that *“initially, the workload of the Appeal Tribunal for Wales may be such as not to need distinct chambers.”* We now question whether a chambers system is necessary at all.

30. On the one hand, the Bar Council’s March 2021 response² to the Law Commission’s *“Consultation on Devolved Tribunals in Wales”* stated on paragraph 12 that the *“division of the First-tier Tribunal for Wales into chambers would recognise the very different jurisdictions encompassed by the whole and should permit for the development of judicial expertise and distinct procedural rules, within each.”*

31. On the other hand, a chambers structure creates a risk of silos. One of the functions of the appellate tribunal should be to help ensure a consistent approach to legal questions. The risk of silos is, we now consider, too great to outweigh any benefit that a chambers structure may bring. Division into chambers would bring with it the risk that, even if the rules are the same, different practices or cultures will develop. It would bring the risk of potential confusion over which chamber had appellate jurisdiction in a particular case. It would bring a risk that chambers would decide legal questions without the broader perspective that a non-chambers structure would bring. It may also be more attractive to potential judges to sit in a wider range of cases. The (Anglo-Welsh) Court of Appeal does not sit in chambers, and experience has not shown this to have any inherent disadvantage compared to a chambers structure.

32. A proper appeal tribunal should be established, with its full jurisdiction, at the outset, with an identified start date.

Question 16. Do you agree with the proposed statutory duty to uphold judicial independence applying to all those with responsibility for the administration of justice as that applies to the reformed tribunal system in Wales?

33. Yes.

Question 17. Who do you think should be included on the list of those with responsibility for the administration of justice as it applies to the reformed tribunal system in Wales?

34. Leadership judges, and any other judge who has administrative responsibilities, should be subject to a duty to uphold independence. We consider that this is a different responsibility to those judges’ responsibilities to act fairly when they are sitting. It should be clear that they are under a duty to uphold the tribunals’

² https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2021/12/034-Bar-Council_Redacted.pdf

independence when exercising their administrative responsibilities, in addition to when sitting.

35. We see difficulty in imposing this duty on members of the Senedd.

Question 18. Is there a need for all members of the First-tier Tribunal for Wales and the Appeal Tribunal for Wales to take an oath or affirmation of their commitment to uphold judicial independence?

36. Yes.

Question 19. Do you have views on the proposed formulation of the oath or affirmation, if one is adopted?

37. Yes. A modern form of words should be adopted which is easily understandable to members of the public in Wales. We suggest something along these lines:

I, _____, do solemnly swear/affirm that I will faithfully and impartially discharge and perform all of the duties incumbent upon me as _____ so as to uphold the rule of law, support access to justice, administer justice fairly, and do equal right to all persons, according to the best of my abilities and understanding.

Question 20. Do you agree with the creation of a statutory body arms-length from Welsh Government to be responsible for the administration of the new tribunal system in Wales?

38. Yes. However, we are concerned by the reference to income from fees under the heading sources of funding. Access to justice should not be dependent upon a person's financial resources. If there are fees these should be kept to the absolute minimum, so to not impose on access to justice. For example, when in the Employment Tribunal fees were introduced, the Supreme Court struck this down for access to justice reasons in *[2017] UKSC 51, R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)*.

Question 21. Do you think the proposed statutory body should be constituted as a Welsh Government Sponsored Body, as a Non-Ministerial Department, or something else? Why?

39. We hold no firm view on this but as in relation to Q22 below, the primary consideration must be the perceived and actual independence of the judiciary working in the Welsh Tribunals and of the system of justice they administer.

Question 22. Do you think the Chair of the Board of the statutory body should be a Welsh Ministers' appointment or the President of Welsh Tribunals ex officio?

40. The President of Welsh Tribunals ex officio. We agree with the position expressed by Sir Wyn Williams in his evidence session to the Legislation, Justice and Constitution Committee, on 13 March 2023, that this will, in perception terms, ensure that independence is preserved, and give the public reassurance that the administration of Welsh Tribunals is in fact independent of the Executive which is likely to be a party to many of the disputes before those Tribunals.

Question 23. Do you have any other comments on arrangements for the administration of the new tribunal system at Table 1?

41. No comments.

Question 24. Do you agree the President of Welsh Tribunals should be the presiding judge of the First-tier Tribunal for Wales and the Appeal Tribunal for Wales, able to sit as a judge in those tribunals?

42. Yes.

Question 25. Do you agree with our proposals to enhance the office of President of Welsh Tribunals by conferring statutory duties, functions and powers on the office, as detailed in this white paper?

43. Yes.

Question 26. Do you agree with our guiding principles for the appointment of members to the First-tier Tribunal for Wales and the Appeal Tribunal for Wales?

44. The principles identified are not objectionable, but are not sufficient. We think that:

- A deep understanding of Wales;
- Evidence of a deep commitment to Wales, and;
- A deep commitment to the delivery of justice in Wales;

45. Should all be included in guiding principles.

Question 27. Do you agree with our proposals for the appointing authority for members of the new tribunals:

a. except for Chamber Presidents and Deputy Presidents, members of the First-tier Tribunal for Wales to be appointed by the President of Welsh Tribunals, and

b. Chamber Presidents and Deputy Presidents of the First-tier Tribunal for Wales and members of the Appeal Tribunal for Wales to be appointed by the Welsh Ministers with the concurrence of the President of Welsh Tribunals.

46. Yes.

Question 28. Do you agree the President of Welsh Tribunals and the Welsh Ministers when making appointments to the First-tier Tribunal for Wales and the Appeal Tribunal for Wales should be required to have regard to the need to encourage diversity in the range of persons appointed?

47. Yes. However, as stated above, persons appointed must have a commitment and deep understanding of justice in Wales. By diversity we think it should be as it is reflected in the Welsh community, recognising in addition to groups with protected characteristics under the Equality Act 2010 that Wales has implemented the socioeconomic duty, and has legislation ensuring the wellbeing of future generations, as well as legislation protecting children and young people's rights and disabled people's rights.

Question 29. Do you agree eligibility criteria for appointment to the First-tier Tribunal for Wales and the Appeal Tribunal for Wales should enable the pool of candidates eligible for appointment to be drawn as widely as possible?

48. Yes.

Question 30. Do you agree the Welsh Ministers should set terms and conditions of appointment of members of the new tribunal service?

49. Yes.

Question 31. Do you agree to there continuing to be a system of cross-deployment for judicial, legal and non-legal members in the new tribunal system?

50. Yes.

Question 32. Do you think the appointment processes for the President of Welsh Tribunals should change in any way as part of the proposed reforms set out in the white paper?

51. No.

Question 33. Do you agree with our proposals for managing complaints and making disciplinary decisions about members of the First-tier Tribunal for Wales and the Appeal Tribunal for Wales?

52. We are concerned that the proposals for dismissing members of the tribunal are insufficient to safeguard members' independence properly.

53. The proposal that members of the first-tier tribunal be dismissable by the President, and members of the appellate tribunal by the President and the First Minister jointly (or the First Minister alone in the event of disagreement) are unsatisfactory for the following reasons:

- In principle, members of the first-tier tribunal, who will be the primary fact-finders, should enjoy the same protection for their independence, as members of the appellate tribunal;
- The decision to dismiss a member of the judiciary is very serious. It should therefore be taken after a process that both underlines the seriousness of the decision, and minimises the risk of it being taken for other than wholly proper reasons. The question that should be asked is, would the system provide satisfactory protection of judicial independence in the (hopefully hypothetical) case of the First Minister being unsympathetic to the very notion of judicial independence?;
- In principle, the decision to dismiss should not be in the hands of one person, be that person the President or the First Minister;
- In principle, in the event of a disagreement between the First Minister and the President, to allow the former's view to prevail would increase the risk of dismissals being politically motivated;
- In the event that a properly-investigated complaint leads to a conclusion that dismissal would be appropriate, that decision should be subject to confirmation by a qualified majority of the Senedd. By way of comparison, dismissal of the senior judiciary in England & Wales is by a motion in both houses of the UK Parliament. The Senedd being a unicameral body, to allow dismissal by a simple majority would allow the governing party to approve a dismissal. We consider that a decision to dismiss is likely to be justified only where it commands a significant, cross-party majority in the Senedd. A qualified majority, such as that required by the US Senate to convict on impeachment (2/3 majority), would be an appropriate safeguard;

54. We therefore consider that the proposals would provide inadequate protection for judicial independence, and should be strengthened.

Question 34. Do you agree with the proposed investigatory role for an independent body or person? Who do you think that body or person should be?

55. It should be the Judicial Conduct Investigations Office.

Question 35. Do you agree with our proposals for the management of complaints about the administration of the new tribunal system?

56. Yes.

Question 36. Do you agree with the creation of a statutory committee with responsibility for developing Tribunal Procedure Rules, as detailed in paragraphs 173-177 and in chapter 9?

57. Yes.

Question 37. Do you agree with the proposed exercise of the power to make the tribunal procedural rules?

58. Yes.

Question 38. Do you agree with the Tribunal Procedure Rules Committee developing common procedural rules across the new tribunal system whilst recognising and accommodating the unique characteristics of each jurisdiction?

59. Yes.

Question 39. Do you agree with our proposal that the Tribunal Procedure Rules of the First-tier Tribunal for Wales and the Appeal Tribunal for Wales should include the following matters:

- a. an overriding objective
- b. a duty of the parties to cooperate with each other and the tribunal
- c. provision for service of documents by electronic means
- d. a power for the First-tier Tribunal for Wales to review its own decisions, and
- e. rules on remote hearings.

60. Yes.

Question 40. Do you agree the operation of civil and administrative justice in Wales should be kept under review? And if so, how should this be done?

61. Yes, we agree that it should be kept under review. The Thomas Commission included a detailed consideration of all available evidence and came to rational evidence-based recommendations, a similar Welsh based process should be adopted.

Question 41. We would like to know your views on the effects that our proposed reforms to devolved tribunals in Wales to create a unified, coherent tribunal system comprising of the First-tier Tribunal for Wales and the Appeal Tribunal for Wales would have on the Welsh language, specifically:

i. on opportunities for people to use Welsh and

ii. on treating the Welsh language no less favourably than English.

What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

62. The Bar Council defers to the Welsh Language Commissioner who will have more evidence and expertise in this area. The provisions of the Welsh Language Act 1993 regarding the equal status of Welsh and English in the courts and tribunals of Wales will apply.

Question 42. Please also explain how you believe the proposed reforms could be formulated or changed so as to have:

i. positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language, and

ii. no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.

63. The Bar Council defers to the Welsh Language Commissioner who will have more evidence and expertise in this area. The provisions of the Welsh Language Act 1993 regarding the equal status of Welsh and English in the courts and tribunals of Wales will apply.

Question 43. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them:

When you reply, please confirm whether you are replying as an individual or submitting an official response on behalf of an organisation and include:

- **your name**
- **your position (if applicable)**
- **the name of organisation (if applicable)**
- **an address (including post code)**
- **an email address, and**
- **a contact telephone number**

64. Please see the pre-amble to our response, and contact details of a representative of the organisation below.

Bar Council

2 October 2023

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