

THE LEGAL WALES FOUNDATION

RESPONSE TO PART 3 (“PLANNING”) OF THE MINISTRY OF JUSTICE CONSULTATION DOCUMENT - “JUDICIAL REVIEW; PROPOSALS FOR FURTHER REFORM”

1. SUMMARY

- 1.1 The Board of the Legal Wales Foundation (the Board), in response to the question *“Do you envisage advantages for the creation of a specialist Land and Planning Chamber over and above those anticipated from the Planning Fast-Track?”* submits that no meaningful response can be given to the question, insofar as the proposal affects Wales, unless it is implemented in a way that:
- i) safeguards the viability of the current arrangements for administering the Administrative Court in Wales;
 - ii) ensures that the current level of service enjoyed by those involved in statutory planning challenges and judicial review of planning decisions in Wales, through the machinery of the Administrative Court in Wales, is maintained; and
 - iii) enables the provision of specialist adjudication on planning law, which the proposal aims to provide, to be one which is genuinely specialist in relation to Wales, taking fully into account the devolution of planning law and developments in planning law and policy unique to Wales.
- 1.2 Accordingly, the Board calls upon the UK Government, if it decides to proceed with this proposal, to either:
- (i) Restrict them to England, insofar as they relate to challenges to decisions made in Wales (i.e. by retaining the present jurisdiction of the Administrative Court in Wales in relation to such matters);
or
 - (ii) Create a Welsh Division of the proposed new Upper Tribunal Land and Planning Chamber, administered by an office located in Wales (resources being shared with the office of the Administrative Court in Wales), to hear challenges to decisions made in Wales.

2 THE LEGAL WALES FOUNDATION

2.1 The Legal Wales Foundation, whose governing body is the Board, is a body whose purposes include providing a forum for discussion and the formulation of views and proposals for action on issues affecting the administration of justice, the teaching and researching of law and the provision of legal services in relation to Wales.

2.2 Membership of the Board includes representatives of:

- The judiciary;
- The Counsel General to the Welsh Government;
- The Bar;
- The Law Society;
- Individual Chambers and Solicitors' firms;
- The Crown Prosecution Service;
- HM Courts and Tribunals Service Wales;
- The National Assembly for Wales Legal Service;
- The Welsh Government Legal Service.

2.3 This Response draws on the experience and expertise of the members of the Board in the fields in which they operate. It does not necessarily represent the views of the different organisations and interests whom they represent.

2.4 HM Courts and Tribunals Service Wales do not, given the obvious conflict of interest as well as their relationship with the Ministry of Justice, wish to be associated with this submission.

2.5 Also, the Counsel General and the Welsh Government Legal Service do not feel it appropriate that they be associated with the submission in view of the need to avoid any inconsistency that might arise with views expressed by the Welsh Government in relation to the proposals.

2.6 The Board is strictly non-political and many of its members are themselves public servants. The views set out in this response should not be interpreted as calling into question the Secretary of State for Justice's prerogative to formulate and implement his policy nor as

amounting to a criticism of his policy. They are intended to inform the Minister's decision by drawing to his attention the Board's judgement, based on their wide collective experience of the operation of the legal system in Wales, of how that decision will affect Wales.

3 THE DEVOLUTION OF PLANNING LAW AND POLICY

3.1 Town and Country Planning in Wales is a subject which is within the legislative competence of the National Assembly for Wales (with the sole exception of development consent under the Planning Act 2008 and, with very few exceptions, relevant ministerial powers are vested in the Welsh Ministers. The summary of the current position in relation to statutory challenges which is set out in paragraph 35 of the consultation document, which refers exclusively to the powers of "the Secretary of State" only applies, therefore, in relation to England. In Wales the relevant functions are exercised by the Welsh Ministers and it is their decisions that are subject to statutory challenge under (primarily) Part XII of the Town and Country Planning Act 1990.

3.2 As footnote 24 to the document makes clear, "moving statutory challenges under the Town and Country Planning Act 1990 to the new chamber would require primary legislation". Since the subject is within the legislative competence of the National Assembly for Wales this would involve either an Act of the Assembly or, if the amendment to the Town and Country Planning Act 1990 were made by Act of Parliament, a Legislative Consent Motion passed by the Assembly.

4. THE ADMINISTRATIVE COURT IN WALES

4.1 Although it has been possible, since 1999, for Administrative Court cases, including challenges to decisions by Welsh Ministers, to be heard in Wales, the administration of the Court continued, until 2008, to be located in London. It was generally accepted that this was an obstacle to the natural development of the work of the Court in Wales in that it made effective local case management, and in particular the efficient listing of hearings, difficult to achieve and acted as a

disincentive to the hearing of cases in Wales. The opening of the Cardiff office of the Court was seen as being a major enhancement to the effectiveness of the decentralisation of Administrative Court work to Wales, a move which was, itself, seen as a necessary and desirable response of the courts to the devolution of government.

4.2 A considerable part of the work of the Administrative Court in Wales is done by judges who have a close knowledge of Wales and, in particular, of the legal and policy frameworks that apply to Wales. Welsh planning law has now begun to diverge significantly from that of England whilst Welsh planning policy had already begun to develop differently even before devolution and that process is accelerating.

4.3 The speed at which Welsh planning law is likely to diverge from that of England will inevitably increase. On 16 July 2013 the First Minister announced the Welsh Government's Legislative Programme for the coming year including a Planning Reform Bill which he said would deliver a step change in his Government's planning reform agenda.

5. RESPONSE TO QUESTION 1:

"Do you envisage advantages for the creation of a specialist Land and Planning Chamber over and above those anticipated from the Planning Fast-Track?"

5.1 Whilst the Board accepts that there may, in principle, be benefits in statutory and common law challenges in planning cases being heard by judges who specialise in the planning field, they are unable to conclude that the proposal to create a specialist Land and Planning Chamber would be of advantage to Wales unless the proposal incorporated safeguards to protect the interests of litigants (including public authorities) involved in challenges arising in Wales.

5.2 To a large degree, the difficulty which the Board has in evaluating the proposal is that it does not explain how the proposed Chamber will respond to specifically Welsh needs. Given the need to ensure that any proposal has the support of the Assembly, and hence of the Welsh Government, it is unfortunate that the consultation does not make

clear to what extent its proposals reflect a common approach by the two administrations.

- 5.3 However, in the absence of any explanation as to how Welsh interests would be protected, the Board regards it as essential that if challenges to planning decisions arising in Wales are to be transferred to a Chamber of the Upper Tribunal than not only should they be heard in Wales but they should also be administered in Wales and the specialist planning judiciary which would hear such cases should be at least as equally specialist in Welsh planning law as in English planning law.
- 5.4 The Board believes that, in practice, this would require the work of the new Chamber to be sub-divided, by creating distinct English and Welsh divisions, the latter administered by an office located in Wales. In practice, this would be an office shared with the Administrative Court in Wales, thereby ensuring, on the one hand, that no additional administrative costs were incurred and, on the other, that the viability of the current office of the Administrative Court in Wales was not undermined by the removal of a substantial part of its current work.
- 5.5 The proposal is for a new Land and Planning Chamber which would therefore retain the functions of the current Lands Chamber. Decentralising the Lands side of the work of the Chamber, with hearings in Wales of all Land cases arising in Wales, and administration of those cases by the Wales office, would be a logical and desirable consequence of the establishment of a Welsh division. Naturally, the ability to allocate judges to hear cases in Wales would not be subject to the same kind of constraint as would be the case for planning cases, where there is already a growing need for specialisation in Welsh law and understanding of Welsh policy.

6. THE ALTERNATIVE

- 6.1 If the necessary safeguards for the interests of Welsh litigants (including Welsh public authorities) cannot be provided through the provision of a Welsh division of the proposed Planning and Land

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Chamber then the Board feels that, whatever solution is adopted for England, the right to appeal to the High Court (i.e. to judges sitting in the Administrative Court) should be retained in relation to Wales.

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Legal Wales Foundation.