LEGAL WALES CONFERENCE: 6 OCTOBER 2023

Tribunal Reform in Wales

The Rt Hon Sir Gary Hickinbottom

1. I am delighted to be back at the Legal Wales, this year as the recently appointed President of Welsh Tribunals.

2. I spoke at the Legal Wales Conference in 2009 – 14 years ago – when the title of my paper was, "Administrative Justice in Wales: A New Dawn". I concluded as follows:

> "We are in an exciting period for the development of justice in Wales. Of course, it is not an easy period – dealing with fundamental and novel issues, at a time of considerable and, one suspects, long-term financial restraint. But it is certainly full of challenges and opportunities for us all. In that sense, we have a new dawn. We can all appreciate the new hope and opportunities that this presents.
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> But it is for us to grasp the opportunities that these developments provide. I do not believe that the dawn is false – but we have to face towards it, not turn our backs on it. The opportunities are there for making better the justice system here in Wales: for improving the system for the benefit of those who, by compulsion or voluntary decision, engage in it….
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> The future is full of uncertainties. However, there is much that we can do further to build the foundations of Legal Wales, so that, whatever is built on top, it will be secure. We can ensure that our organisation and institutions, as well as our thoughts and ideas for the future, are in good condition, and are evolving appropriately. We can consider how justice can be administered in ways different from elsewhere in the UK, all for the benefit of the people of Wales…".

3. In that paper, I identified several challenges faced by administrative justice in Wales, as I then saw them: challenges in respect of our legal institutions and to their systemic coherence, challenges to the coherence of the jurisprudence in relation to the devolved laws of Wales, challenges to access to justice, and

challenges the independence of the judiciary including the administration of judicial functions.

4. Following the work and recommendations of the Thomas Commission and the Law Commission, in June of this year the Welsh Ministers published a White Paper, "A New Tribunal System for Wales", the formal consultation period for which ended last Monday, 2 October 2023. Today I will, of course, look forward to how the proposed reform programme may develop; but it is important to see the proposed reforms, not a single project, but as one step in the evolutionary path of the justice system of Wales. In that development, we have seen progress since 2009; and I have no doubt that we will see further, ongoing progress during the implementation of the proposed programme and after it. And by "progress", I do not simply mean "change"; as I presaged in 2009, I mean change towards a justice system more focused on and better able to provide for the needs of the people of Wales.

5. I will therefore try and set the current proposals in their proper context; and I can do so largely by reference to the challenges identified in 2009. Whilst some progress has been made, these are still our main challenges, namely ensuring (i) systemic and jurisprudential coherence, (ii) effective access to justice, and (iii) judicial independence.

Systemic and Jurisprudential Coherence

6. Let me start with systemic coherence, which is cornerstone of the White Paper proposals.

7. There are all sorts of tribunals in Wales – some of which are UK tribunals and some local authority tribunals – but, when I speak of "Welsh Tribunals", I mean the six devolved tribunals which fall under the umbrella of the President of Welsh Tribunals[1].

[1] The Adjudication Panel for Wales, the Agricultural Property Tribunal for Wales, the Educational Tribunal for Wales, the Mental Health Review Tribunal for Wales, the Residential Property Tribunal Wales and the Welsh Language Tribunal.

8. The evolutionary route taken by the Welsh Tribunals has been the usual one taken by not only other state tribunals in the UK but also by many that are non-state, such as disciplinary tribunals. Tribunals are usually established as part of the executive or administrative function of the substantive body the lawfulness of whose decisions they determined. Gradually, over time, a tribunal becomes increasingly "judicial" and increasingly independent from the executive. This is the path taken by the Welsh Tribunals. However, this development is not of course uniform: tribunals evolve over different periods, each in its own unique way.

9. The result is that the Welsh Tribunals currently operate under a variety of legislative provisions, all different. The express purpose of the White Paper proposals is to provide a system that is "clearer, simpler, more effective and coherent", and one which "will provide a solid foundation for future change and devolution of justice functions to Wales". This is at the heart of the proposals.

10. It is proposed that there is a single First-tier Tribunal for Wales, with chambers into which the current jurisdictions of all six Welsh Tribunals, together with school admission appeals, will be moved. There will also be an Appeal Tribunal for Wales, which will hear appeals from the First-tier Tribunal, with onward appeals going to the Court of Appeal. Although the proposals include provision for the Appeal Tribunal also to be split into chambers, in my view, at the beginning, whilst there should be the power to use chambers, they will be unnecessary in practice: the workload of the Appeal Tribunal will be small enough to be managed by the President of Welsh Tribunals without any chamber structure.

11. This "silo" model has been adopted by both the UK tribunals and the Scottish tribunals, both of which have been the subject of reform programmes; and it has worked well. It will provide, for Wales, systemic coherence and simplicity; and a system that is designed to stand the test of time, irrespective of how the devolution of justice evolves and the pace it might do so. This structure will be flexible enough to incorporate new jurisdictions as and when they are transferred in. It will enable (e.g.) common procedures to be adopted where appropriate, through a common procedural rules committee (as the White Paper

proposes). It will also enable easier and simpler cross-deployment of tribunal judges, which, in a small jurisdiction such as Wales, is vitally important. It will better enable a small and flexible judiciary to service Welsh tribunal work across Wales.

12. The proposal as to the basic, silo structure of the tribunals is likely to be uncontroversial. Some aspects of appeal routes, however, may be more contentious.

13. The White Paper proposes that the Appeal Tribunal for Wales should be the appellate body for appeals from all decisions of the First-tier Tribunal for Wales "unless there are exceptional reasons for requiring different provision to be made".

14. But I am aware that there is a body of opinion – to which I know some Welsh Tribunal judges adhere – that certain First-tier Tribunal for Wales jurisdictions should have a route of appeal elsewhere, e.g. to the Upper Tribunal or the High Court (where the route currently lies). However, I respectfully disagree. Similar arguments were used when the Upper Tribunal was established as part of the reform of UK tribunals. The provisions in the UK reformed tribunal system – in which the default position is that appeals go from the First-tier Tribunal to the Upper Tribunal – have worked well in practice. They will do so in Wales too.

15. The basis of the White Paper proposal, that the Appeal Tribunal should be the default route of challenge to be adopted other than in "exceptional circumstances", is the Law Commission's recommendation that there be a clean and cohesive appeal structure. In my view, it is an important element of that structure that users (including respondent arms of government) intuitively know how and to where an appeal against First-tier Tribunal decisions can be made.

16. It is said that, where a substantive area is devolved but the law is at present still largely the same in Wales and England, it is unnecessary and unwise to change the current, single route of challenge. The Mental Health Review Tribunal of Wales is perhaps an example. Health is a devolved function but the changes

made in the relevant mental health provisions in Wales by the Senedd to date have been very modest. It is said that having parallel tribunals interpreting the same laws will lead to conflicts and difficulties.

17. However (i) the laws are likely to diverge over time, and (ii) it is not uncommon for courts/tribunals in parallel jurisdictions to be required to interpret the same laws. Benefits and tax are examples, where there are distinct tribunals in Northern Ireland but interpreting substantially identical legislation. This does not cause problems in practice: there are ways in which parallel tribunals are able to develop the law in a consistent and coherent way (e.g. by the use of persuasive precedent, and even cross deployment in some cases). I do not foresee there being any difficulty in practice.

18. I have also heard it said that to transfer an appeal route to an Appeal Tribunal for Wales may result in less experienced or less senior judges dealing with appeals than would be appropriate; but this is simply not the case. The Appeal Tribunal will have sufficiently interesting and challenging work, at a high level, to encourage judges who are both experienced and expert to apply to sit there. Further, under the current proposals, it will have available not only its own judges but also the experienced Presidents of the First-tier Tribunal for Wales's chambers, and UK Upper Tribunal Judges who will be cross-deployable. As President of Welsh Tribunals, I propose sitting in most if not all Appeal Tribunal for Wales hearings.

19. That having been said, although not proposed in the White Paper, in my view, it would be very helpful to have a provision similar to section 6 of the Tribunals, Courts and Enforcement Act 2007 (which relates to the UK Upper Tribunal), which would enable judges to be cross deployed from the court system into the Appeal Tribunal for Wales. I envisage judges at High Court and even perhaps Court of Appeal level sitting in the Appeal Tribunal for Wales on the rare occasions they are required, as they are allowed to do in the Upper Tribunal.

20. Therefore, I would hope and expect that judges of at least the same – and, often, greater – experience and seniority will sit on cases in the Appeal Tribunal for

Wales. I have no doubt that, in respect of each case, only judges of appropriate experience and seniority will do so.

21. Finally on the subject of systemic coherence, the White Paper proposes that the President of Welsh Tribunals will preside over both the First-tier Tribunal for Wales and the Appeal Tribunal for Wales; and will be given appropriate powers to lead and manage the Welsh tribunals judiciary, e.g. in the fields of procedural rules, judicial appointments and discipline, powers which in the patchwork of provisions which govern the six tribunals are inconsistent and sometimes even difficult to find and construe.

22. As President of Welsh Tribunals, as I have said, I would propose sitting in most if not all Appeal Tribunal of Wales cases. That provision too will add to the cohesiveness of the judiciary, and the coherence of the system.

23. Furthermore, if appeals go to a single body, this will assist in the coherent development of the jurisprudence of Wales. This aspect of the proposed reforms is, in my view, underplayed. For me, as a judge, it is crucial. Most development of the laws of Wales as passed by the Senedd will in practice occur at the Appeal Tribunal level. It is right in principle and practice that the court/tribunal at that level is a single, cohesive institution established in Wales under the laws of Wales, and thus responsible to the people of Wales.

24. I will return to this general theme – but, in my view, the proposed Appeal Tribunal for Wales gives us a great opportunity to establish a high-level, effective institution for the development of the laws of Wales. We should approach the task of establishing and maintaining it with boldness, determination and confidence.

Access to Justice

25. So, I turn to access to justice in Wales. There are two relevant strands.

26. The first, which applies equally to England, is the proposition that, in some circumstances, local delivery is an essential element of proper, accountable

justice. In parts of Wales, Cardiff seems very far away. London is further. And distance is not just a geographical concept.

27. I recall that when I was a parking adjudicator in London, I dealt with a case in which it was alleged that a car registered to someone living on Anglesey had been parked on a double yellow line in Camden. The written representations from the farmer who owned the car of that registration mark - yn yr iaith nefoedd - said that he had never left Anglesey. His car had never left Anglesey. He had no intention of ever leaving Anglesey. Nor had his car. Leaving aside the rather esoteric question of whether a car can have mens rea, that seemed to me to have the ring of truth about it.

28. I was able to deal with that case on the papers – and, of course, remote hearings by telephone or with video may enable people to have proper access to justice that they would otherwise not have. We must ensure that, in Wales, we use such methods wherever they allow justice to be done: indeed, cost-effectiveness is an important element in ensuring justice is done. But, in some cases, distance has the potential for altogether denying a person the ability to use the institutions of justice that are essential for the enforcement or defence of rights.

29. In 2007, in a case called Deepdock, I heard an application in the Administrative Court concerning venue in a judicial review concerning the proposed development of a marina at Gallows Point, Beaumaris, Anglesey[2]. There were many parties, because the proposed development would substantially interfere with the long-standing mussel beds in the Menai Straits. Most parties – including Cyngor Sir Ynys Mon, the local Fisheries Committee and representative local mussel fishermen petitioned to have the substantive hearing in London, mainly on the grounds of the convenience of legal representatives. The application to have the hearing in Wales was made by – and initially only supported by – the Welsh Ministers. As I said, in determining that the hearing should be in North West Wales[3]:

[2] R (Deepdock Limited and Others) v The Welsh Ministers [2007] EWHC 3347 (Admin).
[3] It was later heard by Davis J (as he then was) in Caernarvon.

> "20. In determining the appropriate venue for a public law hearing, regard must be had to factors wider than the convenience etc of the respective parties. These proceedings concern a decision of a Minister of the Welsh Assembly Government on behalf of the National Assembly of Wales, made in Wales under devolved powers. The devolution settlement as a matter of principle transfers political accountability to the organs of devolved government in Wales; and, where a decision of such a body is challenged, the devolved administration is directly accountable through the Courts. The location of the relevant arm of government is in any event a factor that must be taken into account in considering the appropriate venue for proceedings (CPR Rule 30.3(2)(h)). However, although the Procedural Rules only empower the Administrative Court in Wales to deal with claims 'concerning the National Assembly for Wales, the Welsh executive or any Welsh public body (including a Welsh local authority)" (CPR 54 PD3, paragraph 3.1), with the increased impetus given to devolved government by the Government of Wales Act 2006 and with increasing powers actually being devolved to the National Assembly for Wales, there is in my view a deepening imperative that challenges to any devolved decisions are (like the decisions themselves) dealt with in Wales. As a matter of administration, timely consideration is now being given to the early establishment of an Administrative Court Office in Wales, that will enable claims concerning the decisions of Welsh public bodies to be administered throughout in Wales. Equally, such cases should be heard in Wales unless there are good reasons for their being heard elsewhere.
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> 21. Just as importantly - and relatedly - the decision at the heart of these proceedings concerns the people of Wales. I have set out the background to these proceedings in some detail to emphasise that the issues raised are of considerable concern to the people of North West Wales. There are substantial local environmental issues. There are issues relating to local employment: as I understand it, the proposed marina development will create a significant number of new jobs, whilst damaging employment in (e.g.) mussel farming and fishery. I was informed by Mr Clive Lewis QC for the Welsh Ministers that, understandably, local interest in the issues raised in these proceedings is considerable: and it is likely that members of the public and local media will wish to attend the hearing in significant numbers. For this case to be heard in London (or, I would add, even Cardiff) would substantially detract from the principle of transparency in justice. Justice should not only be done but be seen to be done: and the administration of civil justice locally is an important principle that we will continue to pursue in Wales."

It remains important; and we continue to pursue it.

30. We have of course seen the closure of court estate in Wales, which makes the geographical spread of what remains worryingly thin. I will come back to this practical aspect of the access to justice issue very shortly.

31. But the second strand to the issue, which is inextricably linked to the first, is constitutional rather than practical, and it only applies to Wales: it seems to me that it is all but a constitutional imperative that challenges to the exercise of powers devolved to Wales are dealt with and heard in Wales.

32. In 2009, that was far from a given proposition. The Deepdock case itself, as I have already indicated, was a case involving consideration of the lawfulness of powers devolved to the Welsh Minsters.

33. In this regard, much progress has been made. All cases in the Welsh Tribunals are dealt with and heard in Wales. CPR rule 54.7.1A makes specific provision for claims against Welsh public bodies, which must be issued and heard in Wales unless otherwise required by any enactment, rule or practice direction. The Administrative Court in Wales is now well-established. The Administrative Appeals Chamber of the Upper Tribunal (which hears most appeals from decisions of Welsh Tribunals) and the Court of Appeal in onward appeals are willing to sit in Wales in respect of appeals involving devolved powers. I have recently been appointed a Judge of the Upper Trubunal to enable me to sit on appeals from Welsh Tribunals. There is, throughout the justice system, a much better sensitivity to the need to have challenges to the exercise of devolved powers dealt with and heard in Wales.

34. The White Paper does not directly deal with access to justice issues. However, in my view, the proposals will bring indirect benefits. For example, having a coherent system of tribunals is likely to encourage those in Wales with proper claims to come forward and make them. Further, I said I would return to estate; and do so briefly now. As part of the implementation of any reform programme, I would wish to investigate two particular matters relating to access to justice. First, the use of cost-effective IT to ensure that, where such solutions allow for better access to justice, they are available. To give but one example, experience has shown that in school admissions appeals – which, the White

Paper proposes, are brought into the reformed Welsh tribunal system – the parental parties overwhelmingly favour remote (rather than face-to-face) hearings. Second, in respect of face-to-face hearings, we must look to the better and more coherent use of real estate, so that (e.g.) appropriate civic buildings not currently used for justice purposes are made available for hearings. That degree of cooperation will be easier to coordinate once the Welsh Tribunals are rationalised as proposed.

Judicial Independence

35. A further issue I identified in 2009 was in relation to judicial independence. There are, once more, two strands.

36. First, in 2009, the Welsh devolved tribunals operated out of the government departments which had established them and which were usually the respondent to any claim. This lack of separation of powers was a real concern.

37. Again, much progress has been made. On recently returning to the Welsh Tribunals, one of the biggest changes I noticed was the change in the Welsh Ministers' approach to justice issues - to their understanding of, sensitivity to, engagement with and support for the Welsh Tribunals and the wider rule of law. Politicians of course have a positive political agenda they are committed to pursue, and have had a particularly challenging time over the last few COVID and post-COVID years. They have had much on their plates. However, amongst all of this, the support I have had – and I know my predecessor Sir Wyn Williams had – in having the independence of the judiciary appropriately recognised and maintained, is notable. The focus of the Welsh Ministers – and, in particular, the Counsel General – on the justice system and their support for tribunal reform is greatly appreciated; and, on behalf of all the Welsh Tribunals judiciary, I thank the executive government for this support.

38. In the White Paper proposals, the commitment to the independence of the judiciary evidences itself in two particular ways. First, it is proposed to impose on all those with responsibility for the administration of justice a statutory duty to uphold judicial independence. I hope that that will apply to at least all Welsh

Ministers. Second, it is proposed to create a statutory body at arms-length from the Welsh Government to be responsible for the administration of the new tribunal system, in the form of either a Non-Ministerial Department or Welsh Government Sponsored Body. Either will work. Because of its greater overt independence, I marginally prefer the latter.

39. Second, appropriate administrative support for the Welsh Tribunals will be essential. In 2009, I expressed concern that Wales is such a small jurisdiction, that administration of justice in Wales runs the risk of (e.g.) being unable to recruit suitably senior and experienced public servants to manage it. I suggested that it would benefit from at least close cooperation if not merger of between the courts and tribunals systems present in Wales.

40. Following the subsequent merger of HM Court Service and the Tribunal Service, there is now a distinct operation in Wales for HMCTS. The Welsh Tribunals have their own, small administrative unit, which currently supports me and six devolved tribunals. That will need to be expanded; and, as part of the implementation process for the reformed programme, I would be anxious to investigate how the various limbs of the justice system in Wales can work better together, in terms of (e.g.) administration and estate. At the appropriate time, there is more work to be done here.

Closing

41. Two points in closing.

42. First, it would be wrong for me not to mention my predecessor's part in the current programme of reform. Sir Wyn Williams has done more than anyone to lay the foundations upon which we are about to build. My deep personal thanks – and the collective thanks of the Welsh tribunals as a whole – to him.

43. Finally, the title of my paper in 2009 posed a question: "Administrative Justice in Wales: A New Dawn?". The answer I gave then was that it was indeed a new dawn, which provided hope and opportunities for the evolution of justice in

Wales: but, I said, "… [W]e have to turn to face it, not turn our backs on it… [I]t is for us to grasp the opportunities that these developments provide".

44. Of course, we are impatient for improvement. Things have not progressed as quickly as we then hoped and would have liked. But, in my view, the progress has been significant – and in the right direction. Vitally, the foundations which have been laid by my predecessor – and, now, by the proposed reform of Welsh Tribunals – have been soundly prepared.

45. As I have already stressed, we must always bear in mind that the purpose of the justice system is to serve, in our case to serve the people of Wales. We should measure the proposed reforms by the extent to which they will enable us better to perform that task. In my view, the proposed reforms are a significant step towards providing the people of Wales with a robust and enduring tribunal system, which will have the flexibility to cater for whatever the future holds in respect of the devolution of justice in Wales.

46. In respect of the proposed reforms and the justice system in Wales more generally, we can approach the future with confidence; we should approach it boldly and with determination. Felly, thrown tua'r wawr. It is still there; and it beckons.

The Rt Hon Sir Gary Hickinbottom
President of Welsh Tribunals
6 October 2023