

# **Traffic Commissioner for Wales**

## **Response to the call for evidence from the Commission on Justice in Wales**

### **Introduction**

1. This response is submitted in my role as the Traffic Commissioner (TC) for Wales.
2. I was appointed as a Traffic Commissioner in 2007 by the Secretary of State for Transport.
3. A Memorandum of Understanding (MoU) between the Department for Transport (DfT) and the Welsh Government facilitates the provision of a full time Traffic Commissioner for Wales. The post was previously occupied on a part time basis having been combined with the role of the Traffic Commissioner for the West Midlands.
4. I served in that dual role until 2016, when I took up the full time appointment as Traffic Commissioner for Wales.

### **Preamble**

5. At the outset, whilst I seek to provide factual objective information, I make it clear that despite historical misunderstandings between TCs and DfT (or its equivalents) the existing relationship is probably as good as it has ever been.
6. Certainly, from my personal perspective as a TC in my 12th year, I confirm that it is apparent that TCs and civil servants within the Department have a healthy mutual respect. This has resulted from concerted efforts to understand the legal principles involved in the sponsorship of a tribunal.
7. Whilst there are some concerns in relation to the administrative support provided by the agency tasked with providing this, the same does not apply to the Department.

### **Origins of TCs**

8. A publication by a specialist transport solicitor, Geoffrey Jones, in 2005 on celebrating 75 years of Traffic Commissioners describes both the rationale for the appointment of the first TCs in 1930 and changes in jurisdiction and personnel over the years. It was regarded as an authoritative history with a foreword by the then Minister of State for Transport, Stephen Ladyman. ISBN 0 9552876 0 X. The author's introduction reads as follows:

*“Over the last 75 years Traffic Commissioners have been amongst the most powerful individuals in the United Kingdom, representing prosecutor or inquisitor, judge, jury and executioner to the passenger and goods road transport industries and yet it is probably true to say that the public at large have never heard of them or, if they have, with very little concept of the history, powers and duties. Within the industry, almost without exception, they have been regarded with respect and frequently with affection. That can be said of very few regulators and it says a lot about the Commissioners themselves and the industries as a whole.”*

9. The jurisdiction is not only passenger and heavy goods road transport operator licensing, it is also one relating to licensing of those who drive PSVs (public service vehicles) and HGVs (heavy goods vehicles). TCs licensed drivers until 1971 when the Driver and Vehicle Licensing Agency (DVLA) was formed and the formal licensing body became the Secretary of State. Legislation provided that any issue of concern would be referred to a TC whose decision was binding.
10. This contrasts with the operator licensing jurisdiction where eight TCs currently appointed have eight separate legal jurisdictions as licensing bodies; this is not academic as each TC has separate legal responsibilities in respect of data, it is not pooled.
11. The above publication records how historically half the TCs were usually retired senior military officers, Major-Generals, rear admirals and so on, and the other half having some legal qualification. It refers to debates including those in Parliament with some complaining that lawyers did not necessarily follow policy.
12. Similar complaints could be made about me. I was appointed in 2007 with a background that included professional qualification as a lawyer, and additionally, an HR qualification. In previous annual reports to the Secretary of State I have explained that if there were to be a conflict, I would be obliged to follow the law rather than policy but responsibility for changing the law remains with the legislature. Whilst this may not be universally popular, it illustrates the historic independence of TCs and what is required to maintain the tribunal function in an increasing litigious age.
13. The jurisdictions have changed over the years. At the time of the 1963 Cuban missile crisis, in the event of a nuclear conflagration it was the responsibility of the local TC to requisition and run transport as thought fit, this is now a responsibility of others with specialist training and qualifications in relation to emergency planning.
14. A more recent addition to the TC jurisdiction is as an appeal body in inter parties proceedings in relation to HGVs and PSVs which have been impounded by what is now the DVSA. That has added a fresh challenge to the perception of independence
15. Appeals from TCs in respect of drivers are to different bodies in England and Wales to those in Scotland, however for all operator licensing matters the appeal body is the Upper Tribunal (equivalent of the High Court with any subsequent appeal to the Court of Appeal). The STC has produced a helpful guidance document on the TC jurisdiction roles for the Upper Tribunal.

### **Terms of Appointment**

16. Currently it is the Secretary of State for Transport who appoints and removes a TC, the legislative provision is in the Public Passenger Vehicles Act 1981. At the time of the Act first being promulgated the retirement age was 70, but this has subsequently been reduced. There is no statutory provision for setting the salary although the Act specifically refers to TCs being subject to the civil service pension scheme (although TCs are not civil servants).
17. Historically most, if not all, TC appointments were made for individuals at the end of their careers and on taking up a TC appointment they had an existing pension in

payment or other income. This applied in my case and I have received a pension since 2005, prior to my appointment in 2007.

18. As someone who served for over a decade on NACRO's (National Association for the Care and Resettlement of Offenders) Race Issues Advisory Committee (which included the time of the Stephen Lawrence Inquiry) it is disappointing that neither industry is reflective of the diverse society in which we live in terms of personnel. It is remarkable but when one considers the historic tendency to appoint individuals in senior positions with existing pensions, it is perhaps unsurprising that the first female TC was not appointed until 2000, which was Beverley Bell. She found an industry where nearly 99% of HGV drivers are male. The figure for PSV drivers is slightly better, but not much.
19. On more than one occasion I have described parts of the HGV industry as appearing misogynistic. Whilst the ratio of female owners and directors is far better than the lamentably low ratio of female drivers, both industries are very much male dominated.
20. Until the Local Transport Act 2008 TCs were protected from arbitrary removal as the legislation largely mirrored that applicable to the judiciary and others within the remit of (what is now) the Ministry of Justice. The 2008 Act widened the removal powers considerably with references to misbehaviour, unfortunately, despite requests, no examples have been supplied as to what could amount to misbehaviour. The assurances given to existing TCs during the progress of the Act did not in fact materialise.
21. Issues have arisen because the terms of appointment vary for each individual TC. This has often resulted from a misunderstanding, usually amongst junior civil servants, that civil service terms of appointment are not necessarily compatible with the tribunal function. This was, in part, resolved by a helpful baseline letter confirming that TCs cannot be subject to collective bargaining, thereby exempting TCs from the detailed requirements in each version of the staff handbook. This represents a pragmatic decision as no-one was in a position to confirm what the Department's staff handbook said at the time of any individual appointment (in my case I received a letter confirming my appointment on 1 March 2007 and took up my post on 1 May 2007). Whilst most would assume that the Department would seek to consider each matter on its merits and do so sympathetically, there are currently no specific provisions for matters such as maternity leave, paternity leave and so on.
22. There has been an acknowledgement of the benefits of not just a legal qualification but also practice. Prior to accepting my position as TC I asked for confirmation that I continue as a barrister as a term of my appointment, this was agreed. Later it was agreed that I continue my chartered membership of CIPD, the organisation representing HR professionals. In my specific case I enquired as to what and how I would claim expenses and was told that I should do as advised by the (then) STC.
23. TCs have agreed and adopted an appraisal scheme, which is largely based on that applying to tribunal judges. Appraisers and appraisees ensure that they receive appropriate specialist training. There is also a third party complaints protocol. Additionally, TCs have access to the Equal Treatment Bench Book and received training on it. Annually there is a professional development seminar held over two or three days.

24. I referred earlier to the fact that historically most if not all new appointments were made to individuals who were at the end of their careers and or in receipt of pensions. Whilst many would consider this a historic anomaly, it has not been addressed. There has been little consideration given to career progression so it is difficult to conceive of a 38 year old (the youngest appointment) ever being repeated. It also makes it more difficult in the event of encouraging a more diverse field of applicants. Certainly, any young female applicant who was of childbearing age and considering having a family, should take careful advice.

### **Career progression**

25. Historically when a TC retired as a TC, this was the end of *his* career (male pronoun as historically all TCs were male) and no alternative work was sought. The retirement age was 70 (the same as that applicable to most of the judiciary) but more legislation has amended this so that retirement is at 65, with a proviso that with permission of the Secretary of State a TC can continue as long as retirement is before his (or her) 66th birthday.
26. The current ages of TCs are well known, it is of interest that some, including the STC, will have to retire as a TC and then wait at least two years before receiving either a civil service pension or the state pension. In other words in the case of some existing TCs they are required to relinquish the post before their 66th birthday, but they are not able to obtain any pension before their 68th birthday.
27. In the case of the professional judiciary, new appointments are advised that there is an expectation that they do not go back into their previous legal appointment after they retire, this has been described as an unwritten rule. Its justification is on the basis that it would otherwise potentially raise issues as to independence of decision-making, especially towards the end of a judicial career. There has been no attempt to enforce this rule on recent retiree TCs, which has caused issues for the jurisdiction.

### **Deputy TCs**

28. There are a number of fee paid deputy TCs (DTCs) across Great Britain, they undertake a valuable role as it is rare that a TC will be the position to cover all the work without impacting on annual leave, sickness and so on. Most if not all of the DTCs also sit in other jurisdictions including as deputy district judges, deputy coroners and other judicial jurisdictions.
29. Fee paid deputy judges within the remit of the Ministry of Justice litigated in respect of pension arrangements, this culminated in a legal determination that they were entitled to a pension (a pro rata judicial pension). DTCs sought a similar arrangement in respect of their roles deputising for TCs, although there was always an acceptance that any pension would be related to the civil service pension scheme, as full-time TCs were subject to the civil service scheme as set out by statute.
30. Eventually, a Consent Order between the Department and individual DTCs confirmed an acceptance that DTCs were equivalent to deputy tribunal judges. As a result civil service pension equivalents have been or are being addressed.

## **Salary**

31. There is no statutory provision setting out the salary of a TC, the only legislative reference is to the civil service pension scheme being applicable. Historically the actual salary paid to a TC was as agreed by TCs and a relevant senior civil servant. In more recent years in an endeavour to avoid annual haggling over the issue, TCs were advised that they would be paid at the rate applicable to first tier tribunal judges, minus 10%. It is not clear where the minus 10% comes from.

## **Specific issues relating to Wales**

32. A considerable amount of the working time of the TC for Wales will be related to training and education with view to improving road safety, fair competition and enhancing Welsh business generally, however there is always the potential for conflict. This is very much in line with the Regulators' Code. I envisage that the person specification for the appointment of my successor will include a reference to the individual having a deep understanding and appreciation of devolution in Wales.
33. Successive references in annual reports have been made to the lack of arrangements to support compliance with Welsh language legislation. On my appointment in 2007 I was told that I would not receive any training or assistance in relation to speaking Welsh. Whilst I suspect that any new appointment would be given different advice, I am aware that there is a strong body of opinion within Wales that my successor as TC for Wales should be fluent in both English and Welsh.
34. I strongly support the suggestion that it be an essential criterion for appointment that my successor be bilingual, indeed I have referred to the considerable disadvantage in my not speaking Welsh. Those in the parts of Wales which are primarily Welsh speaking as a first language have also been at a particular disadvantage. The last recruitment round for DTCs for GB did not include a Welsh speaker in Wales, this was on the assumption that my successor would be a Welsh speaker.
35. The MoU between the Welsh Government and the DfT, which enabled me to be full time TC for Wales, confirms that the Welsh Government is to be consulted on criteria for recruiting my successor. It also ensures that there must be prior consultation with the equivalent Welsh Minister before removing a TC for Wales.

## **Recruitment of my successor as TC for Wales**

36. It is possible that all the issues identified, which might be regarded as impediments to an objective selection process could be addressed. However I point out that the appointment of the TC for Wales is not the same as the appointment of a TC in other parts of GB. In the case of Wales the Welsh Government effectively provides funding for Wales having its own full-time TC with safeguards set out to ensure that the incumbent is free to undertake his or her work within Wales.
37. An option that might be considered is whether, noting that the Welsh Government reimburses the totality of the salary of the TC for Wales, perhaps my successor could be appointed subject to the salary and terms and conditions applicable to 1st tier tribunal judges within the Welsh Tribunal Service with the Welsh Government providing any additional funding if appropriate.

38. I have referred to the regrettably low number of females TCs. As an individual that has championed equality issues throughout my career, I would be delighted if my successor was someone who was in a good place to address the substantial gender inequality within the commercial vehicle industries.
39. If it is intended to appoint the best possible candidate I suggest that at the very least it may be time re-examine what separates the tribunal function of a TC from that of a first tier tribunal judge and how, given the Consent Order referred to above, that can be justified. If my successor was within the remit of the Welsh Tribunal Service, it would allow for the judicial appointments process to be utilised and it would be exponentially more likely that suitably qualified people would feel confident to be able to apply knowing that there are existing provisions to deal with basic HR matters including maternity leave, paternity leave and so on.
40. I appreciate that the appointment will be made on the basis that the best candidate will be appointed and I do not question this, nevertheless I do suggest that addressing the issues that I have raised is more likely to ensure competent candidates apply from a more diverse section of society than that reflected by more historic appointments.



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