



# President of Welsh Tribunals 2019-2020 Second Annual Report

30th April 2020



Tribiwnlysoedd Cymru  
Welsh Tribunals

Llywydd / President

# Contents

1.	Introduction	3
2	Updates upon the First Annual Report	4
3	Commission on Justice in Wales	6
4	The Impact of Coronavirus	10

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.  
This document is also available in Welsh.

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# 1. Introduction

1.1 I write this report at a time when the justice function in the UK has been transformed by the spread of Coronavirus. Ways of workings for most of the Welsh Tribunals which would have seemed impossible 8 weeks ago are now being explored and, when possible, adopted. All this has been achieved by the combined efforts of the tribunal members, the members of staff of the Welsh Tribunals Unit, the lawyers now dedicated to assist the Tribunals, Welsh Government civil servants, Welsh Ministers, legislators and last but not least the users of the Tribunals and their representatives. My heartfelt thanks is due to them all.

1.2 Last Year's annual report provided a good deal of explanatory material about the Wales Act 2017, the office of President of Welsh Tribunals and the processes by which members of the Tribunals are recruited and appointed. It also contained discrete sections about the number of cases handled by the individual tribunals, the use of the Welsh Language in Tribunals and the structure and budget of the Welsh Tribunals Unit (WTU).

1.3 The WTU is responsible for the administration of the tribunals which are specified in section 59 of the Wales Act 2017 and which can be conveniently summarised as:

- Agricultural Land Tribunal Wales (ALTW)
- Mental Health Review Tribunal Wales (MHRTW)
- Residential Property Tribunal Wales (RPTW)
- Special Educational Needs Tribunal Wales (SENTW)
- Adjudication Panel Wales (APW)
- Welsh Language Tribunal (WLT).

1.4 In this report, I do not repeat the explanatory material which is to be found in my first report. This second report will, essentially, fall into three sections. First, I will provide updates about the number of cases handled by the Tribunals, the use of the Welsh Language and the structure and budget of the WTU. Second, I will provide information about and offer views upon the recommendations made by the Commission for Justice in Wales so far as they relate to the President of Welsh Tribunals, the Welsh Tribunals and the WTU and how the work of the Law Commission for England and Wales might throw light upon and develop those recommendations. Third, I will consider the impact of Coronavirus and the consequent change in working practices although, inevitably, a much fuller picture will emerge as time goes by and I would expect to deal with this issue in my third annual report.

## 2. Updates upon the First Annual Report

2.1 The number of applications received by the Welsh Tribunals in the last financial year is set out in the Table below.

**Table 1: Number of applications per tribunals with percentage increase/decrease**

Tribunal	Financial Year 2017-2018	Financial Year 2018-2019	Financial Year 2019-2020	% increase/decrease	Applications processed in Welsh
ALTW	17	29	22	-24	0
MHRTW	2028	2046	1943*	-5	3
RPTW	101	176	112	-36	0
SENTW	131	139	172	+24	6
APW	3	2	2	0	0
WLT	4	3	16	+443	16

\* Historically MHRTW data for annual reports was exported from a number of sources (Manual and electronic). In 2019-20 the data for applications and referrals received have been taken from the MHRTW CRM records management system removing the risk of any human error. This change in reporting methods has created the appearance of a decrease in applications and referrals for MHRTW but the probability is that had the same methodology been adopted in previous years the applications and referrals would have been of a similar order to those for 2019-20.

2.2 Further information about the nature of the work undertaken and the membership of each tribunal is set out in each of their annual reports. All such reports are published on the website of each tribunal.

2.3 Professor Keith Bush QC retired as the President of the WLT on 31 July 2019. He was replaced by Mr Iwan Jenkins who was appointed by the First Minister following an open competition administered by the Judicial Appointments Commission of England and Wales (JAC). Mr Jenkins is a senior employee of the Crown Prosecution Service of England and Wales and he has a wealth of relevant experience relating to the operation of the justice system in Wales.

2.4 During the course of the year one legal member was appointed to the WLT following an open competition administered by the JAC. Competitions administered by JAC have also commenced to recruit two deputy chairs of the ALTW, legal and lay members of MHRTW and education panel members for SENTW. It should be noted that all legal appointments to the Welsh Tribunals are open to legal practitioners who practise in England as well as Wales. Essentially, that is because all legal practitioners in Wales and England are qualified to practice in both countries.

2.5 The process of “cross-ticketing” has continued. 3 legal members of Welsh Tribunals have been identified as being suitable for cross ticketing to MHRTW although only two of those persons have completed the necessary training and been cross-ticketed. Two legal members of Welsh Tribunals have been cross-ticketed to the RPTW and one legal member of the First Tier Property Tribunal in England has been cross-ticketed to RPTW. Two lay members of Welsh Tribunals have been cross-ticketed to the WLT and one lay member has been cross-ticketed to APW.

2.6 During the financial year 2019-20 Practice Directions approved by the First Minister have been issued pursuant to section 61 Wales Act 2017. The President of APW issued a short Practice Direction to provide guidance to those who had been referred to APW for alleged misconduct upon the necessary content of the response form which “an accused person” is required to complete. The President of MHRTW and I jointly issued a Practice Direction dealing with various aspects of the procedure leading to hearings before the MHRTW.

2.7 During June 2019 RPTW and WLT moved from offices at Southgate House in Cardiff to premises at Cleppa Park on the outskirts of Newport which they share with the Children and Family Court Advisory and Support Service (CAFCASS CYMRU). The move has been successful. The accommodation available at Cleppa Park is sufficient to house the staff of the WTU which supports RPTW and WLT. There is also office space for the Presidents of those tribunals and a large room which can be used for tribunal hearings and meetings. Video conference and telephone conferencing facilities are also available.

2.8 WTU staff based at offices in Llandrindod Wells are due to be relocated within the town to refurbished offices within the existing Powys County Council building. The current office space occupied by WTU is used as the headquarters of SENTW, ALTW and APW and has a room of sufficient size so as to enable it to be used as a hearing room. The new accommodation will not have a dedicated hearing room but, in any event, it would not be appropriate to conduct hearings in a building which is owned and, in part, occupied by Powys County Council given that it can sometimes be involved as a party in individual cases. The new accommodation will provide meeting rooms that can be used by tribunal members for meetings and training events and it has appropriate space for the staff of WTU. Once the move is complete, cases brought before SENTW, ALTW and APW which require face to face hearings will be heard in locations which best meets the needs of the parties and tribunal members. Refurbishment of the office space available to WTU within the Powys County Council building is due to commence at the start of June 2020 with a scheduled end date towards the end of 2020. Staff moves are due to occur shortly afterwards in early 2021. It is obviously possible, however, that this timetable will be affected by restrictions imposed as a consequence of Coronavirus.

2.9 In the financial year 2019-20 the budget for WTU was set at £4,148m. The amount actually spent during the year was £4,446m (this figure included £42k which was transferred from the Welsh Language Division to cover actual running costs of the WLT). Towards the end of the year additional funding of £250,000 was made available to the WTU by the Finance Division of Welsh Government. This provision was made before the impact of Coronavirus had become apparent.

2.10 The budget for 2020-2021 has not yet been set. However, discussions have taken place between WTU and the Welsh Treasury about increasing its allocation given the significant overspend in 2019-2020.

2.11 It is too early to determine what the financial impact of Coronavirus will be on the Tribunals' budget for the financial year 2020-21. However, the head of WTU and her senior staff are closely managing the budget expenditure to determine whether additional funding will be required as a consequence of the virus.

2.12 All the Tribunals continue to offer a full Welsh language service to their users in accordance with duties imposed by the compliance notices issued by the Welsh Language Commissioner in relation to Welsh Language standards.

2.13 Whilst APW is not subject to the standards, it operates in line with the other tribunals and treats the Welsh language no less favourably than English. It is likely that APW will be subject to the standards in the near future.

2.14 The uptake of the Welsh language service remains low. I am informed that records kept by WTU demonstrate that during 2019-20 the Welsh language was used in 9 cases across all the Tribunals except WLT.

2.15 On 10 July 2019 I met the First Minister for our annual meeting. The Counsel General was also present as were a number of Welsh Government civil servants and the head of the WTU. The discussion was wide-ranging but it included such topics as a fair fee structure for the legal members of the Welsh Tribunals, the appointment of a lawyer or lawyers with a dedicated role in respect of Welsh Tribunals and the possibilities for the structural reform of the WTU. I am very pleased to report that within weeks of the meeting the First Minister had agreed a revised fee structure for the legal members of the Tribunals and that in February this year two lawyers employed by Welsh Government were given the specific role of providing legal advice and assistance to the President of Welsh Tribunals (and through the President the other judicial leads) and to the WTU. I am satisfied that we now have in place an effective structure whereby legal advice can be sought and obtained when necessary and, already, the WTU and I have received invaluable advice during the very challenging period since the lawyers have been appointed. Despite the constructive discussions which took place about the need for structural reform of the WTU no progress has yet been made in bringing about such reform. I say more about this later in the report.

2.16 Both the First Minister and I had hoped that the Law Commission of England and Wales would have commenced its project into the reform of Welsh Tribunals some months before the end of this financial year. That did not prove to be possible (no doubt for very good reasons beyond the control of the Commission). My understanding is that the Commission has recently started work on its project or is about to begin its work. In one respect, which I discuss below, the delay in the start of this project may have a knock-on effect of some significance.

### **3. Commission on Justice in Wales**

3.1 On 24 October 2019 the Commission published its report. It was extremely wide-ranging. Its core recommendation was that "there should be legislative devolution of justice to the Senedd" and there were a total of 78 recommendations. The reader will probably be aware that I was one of the Commissioners but in this annual report I seek only to draw attention to those aspects of the Commission's report which are directly related to the Welsh Tribunals, the office of President of Welsh Tribunals and the administrative support provided to the Tribunals and President by WTU. There are 3 recommendations of the Commission to which I wish to refer specifically.

3.2 **Recommendation 22** provides that “Courts and tribunals which determine disputes in both civil and administrative law should be under one unified system in Wales”.

3.3 Although the report does not say so expressly, it is implicit in this recommendation that it can be achieved only if there is substantial devolution of the justice function to Wales. As such, substantial legislation by the UK Parliament would be necessary to implement this recommendation.

3.4 **Recommendation 25** provides that “All public bodies, ombudsmen and other tribunals which have been established under Welsh law or by the Welsh Government, which make judicial or quasi-judicial decisions, and are not currently subject to the supervision of the President of Welsh Tribunals should be brought under the supervision of the President.”

3.5 **Recommendation 27** provides that “The Welsh Tribunals Unit should have a structural independence and the Welsh Tribunals should be used for dispute resolution relating to future Welsh legislation.

3.6 These two reforms would also likely involve some legislation by the UK Parliament or, at the very least, amendment to legislation already enacted by the UK Parliament. Any such new legislation and such amendments to existing legislation as would be necessary to implement the recommendations would have as their aim the facilitation of the work of institutions already in existence and which operate exclusively in Wales. That said, I am in no position to judge whether there would be opposition to the necessary legislation within the UK Parliament or from others and it would not be appropriate for me to speculate upon such matters.

3.7 It seems clear to me, however, that aspects of these two recommendations, inevitably, have the potential to increase the work of some of the Welsh Tribunals very substantially. The Senedd has legislative competence in the fields of health, education, housing and agriculture. If all disputes arising from future legislation in these areas of the law are to be determined by the Welsh Tribunals (as recommended by **Recommendation 27**) there is bound to be a sharp increase in the work load of the tribunals. By way of example, the Renting Homes (Wales) Act 2016, which has been enacted but not yet brought into force, contains provisions relating to the letting of dwelling-houses which are different from the existing law of England and Wales. Currently, the Act provides that disputes between landlords and tenants arising under the Act should be resolved in the county court. However, I understand that the Act is being reviewed prior to being brought into force. If the recommendation that disputes arising under the Act should be determined by the RPTW is accepted and incorporated into the Act the volume of work of that Tribunal would increase substantially. Similarly, there would scope for a substantial increase in the work of SENTW and ALTW if disputes arising under future legislation in the fields of education and agriculture were directed to those tribunals.

3.8 I am also of the view that important aspects of the recommendations would transform the role of President of Welsh Tribunals. Currently, the statutory basis for the office of President is to be found in section 60 of the Wales Act 2017. It should be noted that the section provides, expressly, that the President is “not a devolved Welsh authority for the purposes of the Government of Wales Act 2006”. The scope of the office is designed so that it can be undertaken by a serving High Court Judge of England and Wales as part of his/her duties as a serving judge or by a High Court Judge who has retired before the compulsory retirement age of 70. To give some guide as to the demands of the role at the moment, as a retired High Court Judge, I am obliged under the 2017 Act to devote the equivalent of 20 working days per annum to the Presidency as a minimum and, in practice to date, I have found it

necessary to devote about the equivalent of 25 to 30 days per year to the role (although the work to be performed is spread in such a way that I am engaged for some parts of days most weeks). If the President becomes responsible for supervising all the bodies operating exclusively in Wales as identified by the Commission in **Recommendation 25** the role of the President will be enlarged very significantly and this possible increase in the President's workload will be further enhanced if the President is given a role in the matters mentioned in the next paragraph.

3.9 There are no express recommendations within the Commission's report which relate to appointments to Welsh Tribunals, disciplinary processes relating to the members of the tribunals and appeals from the tribunals. Essentially, that is because it was known to the Commissioners that these matters were to be considered by the Law Commission. I have held preliminary discussions with the lawyers in the Law Commission who will take forward the project and it is clear that they will explore these matters in some detail together with the role, if any, which the President of Welsh Tribunals should play in relation to them. As I have said, however, should the Law Commission reach the view that the President of Welsh Tribunals should have a role in some or all of these matters and should such a recommendation become reality the work load of the President will grow substantially.

3.10 Currently, the main tasks performed by the President can be categorised loosely as administrative and pastoral. Although, it is generally accepted that the President is entitled to sit as a judge in the Welsh Tribunals there is no clear statutory basis which supports this conclusion and there has been no reason, in practice, (save on one occasion when it did not come to fruition) for the President to sit in a tribunal. In my view, there is at least the possibility that the absence of a formal and specific judicial role for the President will be off-putting for future potential candidates for the office. Accordingly, I would recommend that careful consideration is given to formulating a specific judicial role for the President. As readers of my first Annual Report will know (see Section 2) I have reservations about the President sitting in the Welsh Tribunals except when the Judicial Lead of a particular Tribunal and the President agree that the circumstances prevailing in a particular case make it inappropriate for the Judicial lead to sit as the chair of the Tribunal. However, if a new appellate structure was considered appropriate for Welsh Tribunals the President could be given a specific role within that structure. Further, and/or alternatively, the President could be authorised to sit in the Administrative Court in Wales. While, in practice, a serving or retired High Court Judge might from time sit in the Administrative Court in Wales that is not guaranteed. In my view, it would enhance the role of the President if he/she was nominated to sit in the Administrative Court in Wales by reason of holding the Presidency.

3.11 Until recently, it had seemed sensible to allow the Law Commission to take the lead in making suggestions and recommendations for further defining the role of President of Welsh Tribunals. Assuming, however, that the Law Commission project lasts approximately 12 months (as is anticipated) its final proposals may not be published until shortly before the expiry of my term of office.

3.12 Accordingly, I have reached the conclusion that the time is fast approaching when a complete re-appraisal of the post of President of Welsh Tribunals is becoming desirable, quite independently of the work of the Law Commission if necessary, so that planning can commence in good time to find my successor. Although my period of office will not come to an end until 13 August 2021 and although there are statutory provisions which could be invoked which would allow the Lord Chief Justice to extend my term of office should he consider that to be in the public interest, it is important, in my view, that decisions about the role which the President of Welsh Tribunals is expected to fulfil in the short to medium



term are made over the coming months. Obviously it is a matter for the Law Commission to determine whether it can or should give this part of its project its immediate attention.

3.13 Under the Wales Act 2017 the Lord Chief Justice is the appointing authority for the office of President. I consider it part of my duty as President to keep him apprised of all developments which may or will impact upon the role of President as they unfold over the coming months. Additionally, of course, I will have the opportunity of dialogue with the First Minister during our annual meeting, Welsh Government officials and the members of the Law Commission.

3.14 The role of the President of Welsh Tribunals must also be examined in light of the recommendation of the Commission on Justice that the Welsh Tribunal Unit should have “structural independence” from Welsh Government. Currently, the courts and tribunals operating in each of the constituent countries of the United Kingdom are administered differently. In Northern Ireland, the Court and Tribunal Service is an agency created by the Ministry of Justice for Northern Ireland. The agency has an executive board in which judges have an important role but the chair of the board is not a judge. The courts and tribunals of England and Wales (excluding Welsh Tribunals as defined in the 2017 Act) are administered by Her Majesty’s Court and Tribunal Service (HMCTS). This is also an agency which has an executive board. Court and tribunal judges have a significant role in the board. The Scottish Courts and Tribunal Service is an independent body corporate and its executive board is chaired by the Lord President (Scotland’s most senior judge). In last year’s annual report I expressed the view that WTU should be given the same status as HMCTS. When I spoke with the First Minister in July the issue of the status to be afforded to WTU was not resolved. What seems clear, however, is that whatever structure emerges in Wales for WTU there may be a significant role for the President of Welsh Tribunals to play if the aim of “structural independence” is to be achieved. In my view, this is yet another reason why the role of the President must be given careful consideration in the near future.

3.15 Even if the decision is taken to await the final recommendations of the Law Commission prior to seeking to define, further, the role of President of Welsh Tribunals I have no doubt that the appropriate Welsh Government officials and the appropriate Welsh Ministers should begin to formulate their own proposals about the Presidency as soon as is reasonably practicable so that the Law Commission is given as much assistance on this issue as is possible.

3.16 Since the publication of the Commission on Justice Report I have met the President and Chief Executive of the Valuation Tribunal for Wales in order to discuss the possibility of the Valuation Tribunal becoming one of the tribunals listed as Welsh Tribunals under the Wales Act 2017 and, thereby, becoming subject to the supervision of the President of Welsh Tribunals. Discussions were at an early stage when they were brought to a halt by the outbreak of Coronavirus. However, the discussions were constructive and no objection in principle was raised on behalf of the Valuation Tribunal to it becoming one of the family of Welsh Tribunals. I have also met the Public Service Ombudsman for Wales to discuss with him his view of **Recommendation 25** so far as it relates to him. He expressed the clear view that no proper basis existed for making the Public Service Ombudsman subject to the supervision of the President of Welsh Tribunals. I found his views persuasive but, no doubt, they will be considered carefully both by the Law Commission and Welsh Ministers and senior civil servants within Welsh Government.

3.17 Finally, in relation to reform, the Legislation, Justice and Constitution Committee of the Senedd has launched an inquiry into “*Making Justice work in Wales*”. I have been invited to give evidence to the Committee, an invitation which I have accepted. While I look forward to the opportunity of providing evidence to the Committee I confess to a degree of trepidation given that I have spent most of my professional life asking rather than answering questions!

## 4. The Impact of Coronavirus

4.1 The Welsh Tribunals are having to come to terms with disruption to normal working practices on an unprecedented scale. The lock down imposed by the Welsh Government has, effectively, ruled out traditional hearings at which the tribunal members and the parties gather together in one room. Since 23 March 2020 no such hearings have taken place; rather such work as the tribunals have been able to undertake has been done either by reference to written evidence and written submissions alone or by “remote” hearings.

4.2 The work of ALTW is severely disrupted with the Tribunal not able to list any cases that require site inspections (and most do) until July 2020 at the earliest, when the situation will be reviewed. Directions hearings and hearings in which approval is sought of consent orders take place by telephone conference.

4.3 The work of RPTW is also disrupted. Site visits have a part to play in some of the decisions made by this Tribunal and in many of the cases in which site visits are necessary it would be extremely difficult if not impossible to observe social distancing regulations. That said, RPTW is exploring the possibility of remote and telephone hearings where that is consistent with the procedural rules governing the work of this Tribunal.

4.4 WLT and APW have small numbers of cases. The disruption in these tribunals can be substantially minimised because (a) some decisions can be made after consideration of written evidence and written submissions and (b) when a hearing is necessary it can be convened remotely without undue difficulty.

4.5 SENTW deals with cases which are primarily focussed upon the educational needs of vulnerable children. As soon as traditional hearings ceased it began exploring the best ways of dealing with cases remotely. As at the date of this report SENTW is about to begin trialling the use of virtual hearing rooms (acquired by WTU with the assistance of HMCTS) with a view to holding virtual hearings of cases during the period of lockdown (and beyond, if necessary).

4.6 MHRTW has, by far, the largest numbers of cases of any Welsh Tribunal. The cases before the tribunal which require a hearing have traditionally taken place at hospital. Since the lockdown was imposed the Tribunal has functioned by using telephone hearings and I understand that it will explore the possibility of other forms of remote hearings.

4.7 Although MHRTW is a Welsh Tribunal under the Wales Act 2017 it was created by legislation enacted by the UK Parliament. Over the years the rules applicable in England which govern the equivalent body to MHRTW have diverged from the rules which govern MHRTW. In summary, the rules in England have provided for much greater flexibility in the process of decision making. So, for example, for some years in England it has been possible to constitute a tribunal by one or two members (as opposed to the full complement of three) in order to make decisions in certain types of cases whereas in Wales that has not been possible. Further, the tribunal in England has had the ability to decide cases by reference to written

material alone if certain criteria are met whereas that has not been the case in Wales. Once it became known that the UK Parliament intended to enact the Coronavirus Act 2020 strenuous efforts were made to ensure that the legislation included provisions specific to MHRTW to ensure that it could work as flexibly as its English counterpart. No doubt through a great deal of hard work on the part of many people and, further, through co-operative working between civil servants in Wales and England suitable provisions were drafted specific to MHRTW and incorporated into the Act. Accordingly, MHRTW can now work as flexibly as its English counterpart for as long as the relevant provisions of the Coronavirus Act are in force. It is also worth noting that with the First Minister's approval the President of MHRTW and I were able to issue, jointly, a Practice Direction relating to the work of MHRTW, so as to supplement the rule changes in Wales, within days of the Act receiving Royal Assent.

4.8 Obviously, it is too soon even to offer a prediction about the true impact of the outbreak of Coronavirus upon the work of the Welsh Tribunals. No doubt its impact will be considered in some detail in my Third Annual Report next year. However, I should record my gratitude to the members of Welsh Tribunals and the WTU for being ready able and willing to embrace necessary change to the working practices of the Tribunals where that has been possible and for being prepared to be flexible and innovative in dealing with the challenges which the Tribunals now face and are likely to continue to face for many months yet.



**Sir Wyn Williams**  
**President of Welsh Tribunals**