



President of Welsh Tribunals Third Annual Report 2020-2021

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Tribiwnlysoedd Cymru
Welsh Tribunals

Llywydd / President

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

1. Introduction

I began my Second Annual Report (published in June 2020 but substantially written in May) by explaining that the justice function in the UK was being transformed by the spread of Coronavirus. However, I did not foresee in May 2020 that what has become known as “the pandemic” would still be dominating how justice was being delivered throughout the UK one year on. Yet that is the reality and it seems clear that the delivery of the justice function will continue to be substantially affected by the pandemic over the coming months. That being so, it is inevitable that a substantial part of this report will focus upon how the Welsh Tribunals have dealt with the disruption inevitably brought about by the very serious threat posed to public health by Coronavirus and how they continue to adapt their practices and procedures to meet the needs of all users of the Tribunals, their members and the support staff.

In summary, however, the tribunal members and the staff of the Welsh Tribunals Unit have shown great resilience and flexibility throughout the last year. They all deserve a great deal of credit for their commitment, willingness to adapt to new ways of working and determination to ensure that the work of the Welsh Tribunals has run as smoothly as possible.

My first 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. I hope I can be forgiven for assuming that those who will read this Report are now fully familiar with the salient parts of the Act, the office of President of Welsh Tribunals and the processes by which members of the Welsh Tribunals are recruited and appointed. I will not repeat what I wrote in my first report.

This could have been my last annual report. My letter of appointment as President of Welsh Tribunals specifies that my term of office expires on 13 August 2021. That was always something of an anomaly since the statutory retirement age for judges in Wales and England is 70 and I reached that milestone on 31 March 2021. However, exercising the powers conferred upon him by section 26 Judicial Pensions and Retirement Act 1993, the Lord Chief Justice extended my appointment to 31 March 2022. The Lord Chief Justice took that step after first consulting the First Minister for Wales and the Lord Chancellor. I was pleased to accept the offer of an extension to my term and I am grateful for the support which I have received from the Lord Chief Justice, the First Minister and the Lord Chancellor throughout my term of office. One result of my extension is that there will be another annual report for me to write next year!

I am sure that readers of this report will be familiar with the tribunals which are known collectively as “the Welsh Tribunals”. For the avoidance of any doubt, however, I set them out as they are referred to in the Wales Act, together with the acronyms that are often used for shorthand identification of each tribunal.

Section 59 of the Wales Act 2017 defines the phrase ‘Welsh Tribunal’ to mean:

- (a) the Agricultural Land Tribunal for Wales/Tribiwnlys Tir Amaethyddol Cymru (“ALTW”);
- (b) the Mental Health Review Tribunal for Wales (“MHRTW”);
- (c) a rent assessment committee constituted in accordance with Schedule 10 to the Rent Act 1977 (including a leasehold valuation tribunal and a residential property tribunal) (“RPTW”);
- (d) the Special Educational Needs Tribunal for Wales/Tribiwnlys Anghenion Addysgol Arbennig Cymru (“SENTW”);

- (e) a tribunal constituted in accordance with Schedule 3 to the Education Act 2005 (registration of inspectors in Wales: tribunals hearing appeals under section 27);
- (f) a tribunal drawn from the Adjudication Panel for Wales/Panel Dyfarnu Cymru (“APW”);
- (g) the Welsh Language Tribunal/Tribiwnlys y Gymraeg (“WLT”).

The Welsh Tribunals are administered by the Welsh Tribunals Unit (WTU) which is part of the civil service supporting the Welsh Government but which strives to be and appear to be as independent of Government as is practicable.

The form of this report will be similar to that of last year. I will first provide factual information (an update) about numbers of cases, recruitment and appointments, cross-ticketing as between Welsh Tribunals and with English Tribunals, Practice Directions, my engagements, the working arrangements and budget of the Welsh Tribunals Unit and the use of the Welsh language within the Tribunals. I will next deal with the Commission on Justice in Wales and the Law Commission’s project on Welsh Tribunals. I will then provide my assessment of the effect of the pandemic on the work of the Welsh Tribunals before, finally, indicating my priorities for 2021/22.

2. Updates on previous Annual Reports

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 2018-2019	Financial Year 2019-2020	Financial Year 2020-2021	% increase/decrease	Applications processed in Welsh
ALTW	29	22	13	-41	0
MHRTW	2046	*1943	1790	-8	7
RPT	176	112	106	-5	0
SENTW	139	172	116	-34	1
APW	2	2	4	+100	0
WLT	3	16	13	-35	12

*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 of recent years.

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.

There were no cross-ticketing exercises during the course of the year i.e. no member of a Welsh Tribunal were authorised to sit in a different Welsh Tribunal and no members of Welsh Tribunals were authorised to sit in the English Tribunals or vice versa. There were, however, a numbers of new appointments to the Welsh Tribunals. Three persons were appointed to ALT, namely two deputy chairs and one lay member. Five lay members were also appointed to SENTW. All of these appointments were made following competitions organised by the Judicial Appointments Commission. Competitions were also launched by the Commission to recruit legal members of RPTW and legal, medical and lay members of MHRTW. These recruitment exercises were not complete by 30 April 2021. The Presidents of both tribunals reported that substantial numbers of candidates put themselves forward for appointment.

It is worth noting 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.

During the course of the year four Practice Directions (PDs) were approved by the First Minister pursuant to section 61 Wales Act 2017. Each of the four PDs were issued jointly by the President of the Tribunal concerned and me.

In October 2020 the President of MHRTW and I jointly issued a PD which extended the operational period of a PD we had issued in April 2020 by 6 months i.e. until April 2021. The PD issued in April 2020 had been issued primarily to complement rule changes which had been made to cater for possible changes in working practices arising as a consequence of the pandemic. In October 2020 we extended its operation for a period of 6 months given that there was then a very serious increase in the number of cases of Coronavirus. The PD expired in April 2021; we decided against a further extension of its provisions for reasons which are set out below in Section 4.

In June 2020 the President of SENTW and I issued a PD which was specified to subsist for 6 months. This PD was not issued as a direct consequence of the pandemic; it was issued to facilitate the work of the Tribunal in managing evidence adduced before it. In December 2020 we reviewed the operation of the PD in the light of representations received from local education authorities. On 11 December 2020 we issued a revised PD again specifying that it would subsist for a period of 6 months and that it would be reviewed towards the end of that period.

In June 2020 the President of RPTW and I issued a PD to subsist for a period of 6 months. This PD was issued to combat the challenges faced by the Tribunal as a consequences of the pandemic. It was extended for a further six month period following a review and it will be further reviewed following the expiry of that period.

Throughout the year I have attended many meetings of bodies of which I am a member (all held remotely). By virtue of my Presidency of Welsh Tribunals, I am a member of the Tribunal Judiciary Executive Board, the Administrative Justice Council and the Welsh Committee of the Judges' Council which is chaired by the Lord Chief Justice.

The Tribunal Judiciary Executive Board has judicial representation from all the constituent parts of the United Kingdom and is made up exclusively of judges. It is a very significant forum for judicial decision making in relation to the processes to be adopted within all the tribunals of

the UK. It provided an invaluable forum for discussions about working practices which should be adopted by Tribunals so as to take account of the restrictions imposed to combat the effect of the pandemic.

The Administrative Justice Council is also a UK body. It has a wide membership consisting of judges, academic lawyers, academics in fields related to justice and administrators. The head of the Welsh Tribunals Unit, a representative of the Public Service Ombudsman for Wales and I are regular attenders at Council meetings. The Council provides a forum for detailed discussions upon topics of interest relating to the workings of tribunals as well as providing detailed insight into substantive legal issues which arise within the tribunals.

The Welsh Committee of the Judges' Council is an advisory body which informs the Lord Chief Justice upon issues which relate to Wales. Its membership comprises judges at all levels from lay magistrates to Lord Lloyd-Jones in the Supreme Court. Obviously much of its time is taken up with matters arising in the courts and tribunals of England and Wales which are administered by HMCTS but the Committee receives a report from me at every meeting about all important matters relating to Welsh Tribunals which sometimes provokes considerable debate.

Each of these bodies meet quarterly and membership of each of these bodies ensures that the President of Welsh Tribunals is very well placed to keep abreast of all important developments in the tribunals which exist in all four countries of the UK.

As and when necessary I consult with the Presiding Judges of Wales. Earlier this year, for example, I consulted with them upon succession planning for the office of President of Welsh Tribunals and whether or not I should accept the offer of an extension to my term of office.

Throughout the year I have chaired quarterly meetings of the judicial leads of the Welsh Tribunals. These meetings were always intended to provide the opportunity for discussing matters of concern to the judicial leads of individual tribunals and/or matters which concern all the tribunals. I have no doubt that they have succeeded in fulfilling that goal. The meetings also provide the opportunity for direct contact between the judicial leads as a group and senior members of the WTU. When invited I have also attended meetings and training days organised by individual tribunals.

On 13 July 2020 I appeared as witness before the Legislation, Justice and Constitution Committee of the Senedd. I was asked many detailed and thought provoking questions. My answers to the various questions are, of course, a matter of public record. I am grateful to the Committee for the opportunity of appearing before them and I firmly believe that the President of Welsh Tribunals should appear at appropriate intervals to expand upon and clarify the Annual Report as well as to answer other questions relevant to the work of the tribunals.

Some months after my appearance before the Committee my Second Annual Report was the subject of a debate in a plenary session of the Senedd. This inaugural event was, without doubt, something of a milestone. Not surprisingly, the contributions of members were not narrowly confined to the four corners of my report. The debate ranged far and wide over matters relating to justice in Wales.

My annual meeting with the First Minister took place on 6 October 2020. As in previous years the First Minister was accompanied by the Counsel General and his private secretary; I was accompanied by the Deputy Director – Constitution and Welsh Tribunals and the head of WTU.

Not surprisingly, much of the conversation was taken up with the effect of the pandemic on the work of the tribunals. However, we also discussed the possibility of appointing full time salaried legal members of MHRTW, the Commission for Justice in Wales, the Law Commission project on Welsh Tribunals, the role of the President of Welsh Tribunals and succession planning in respect of that office.

I am very pleased to report that following our meeting the First Minister approved, in principle, the appointment of two salaried legal members of MHRTW in addition to the President of that tribunal (who is also a salaried member) and that the Lord Chancellor, as the appointing authority, has also approved the appointment of two salaried legal members in addition to the President. The President of MHRTW and I intend that, if at all possible, the recruitment process for the appointment of those salaried members will begin in the financial year 2021/2022.

Finally, I should record that I have had frequent discussions with the head of the WTU, more occasional discussions with other civil servants and, as and when necessary, meetings with the two Welsh Government lawyers who have been given the specific role of providing legal advice to me, the WTU and, if necessary, the individual tribunals.

Since the start of the financial year the WTU staff have been working from home in line with Welsh government guidelines. Small numbers of staff were made key workers in order to access and deal with post at the offices as and when necessary. While a great deal of the work of the Tribunals can be conducted electronically hard copies of some documents are still sent to offices. I am extremely grateful to the individuals who have worked so flexibly with the aim of ensuring that all tribunal services were maintained despite the difficult circumstances prevailing. The WTU was quick off the mark to find alternative hearing methods rather than face to face hearings when the restrictions were put in place last March, as I described in my second Annual Report.

WTU staff based at offices in Llandrindod Wells were due to be relocated in refurbished offices within the existing Powys County Council building by the end of 2020. Due to the challenges posed by restrictions this has been delayed to July 2021.

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.

The budget for WTU is set by Welsh Government.

In the financial year 2020/2021 the allocation to WTU was £4,148,000.00. The budget makes provision for both tribunal and administrative running costs.

Total spend for the year was £3,565,246.00.

The underspend in this financial year is unprecedented during my tenure. Hitherto, there has been a significant overspend in each financial year. The reduced spending in 2020/21 was almost exclusively the result of the switch from face-to-face to remote hearings. There were no costs associated with hiring suitable hearing rooms; there were very little travelling expenses to be paid out to tribunal members and staff.

Strict financial management during the early months of the financial year enabled the return of significant funds to Central finance early in 2021.

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.

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. In each of my earlier reports I predicted that it was likely that APW would be made subject to the standards but that has not yet happened. Nonetheless, it is still expected that this will occur in the near future.

The uptake of the Welsh language service remains very low. Table 1 above shows that during 2020/21 the Welsh language was used in 20 cases across all Welsh Tribunals.

3. Commission on Justice in Wales and Law Commission project on Welsh Tribunals

In last year's annual report I drew attention to three recommendations of the Commission on Justice in Wales which were directly related to the Welsh Tribunals, the office of President of Welsh Tribunals and the administrative support provided to the Tribunals and the President by WTU. The reader will probably be aware that I was one of the Commissioners. For ease of reference I set out those recommendations again together with my updated comments.

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

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. I am not aware of anything which would suggest that at the present time such legislation is contemplated by the UK Parliament.

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."

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.

These two reforms may also 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. There is no indication that the UK Parliament is contemplating legislation relating to these matters in the near future, so far as I am aware.

However, recommendation 25 and the first part of recommendation 27 are very much within the scope of the Law Commission project on Welsh Tribunals which was commissioned by the Welsh Government and which has now been gestating over a period approaching one year.

It is clear from the Consultation paper published by the Law Commission in December 2020 that the Commission has made a detailed assessment of a number of existing bodies within Wales so as to reach a conclusion about whether they should or should not be categorised as a tribunal and, if so, whether or not they should be added to the list of Welsh Tribunals within the Wales Act 2017 and/or made subject to the supervision of President of Welsh Tribunals. The Commission recommends, provisionally, that the existing Welsh Tribunals should be consolidated into a First-Tier Tribunal and that that the Valuation Tribunal for Wales should be part of the First Tier. Additionally the Commission provisionally recommends that the jurisdiction of school exclusion appeal panels should be amalgamated into SENTW.

The Commission's consultation paper has also assessed the need for the WTU to become structurally independent from Welsh Government. Provisionally, the Commission recommends that the WTU should become a non-ministerial department. If such a recommendation is maintained in the Law Commission's final report and, thereafter, implemented, there can be no doubt that WTU would become structurally independent from Welsh Government as envisaged by the Commission on Justice in Wales. The reasoning of the Law Commission in support of this recommendation is, in my opinion, compelling and I have made no secret of my view that such development would be of substantial benefit to the operation and independence of Welsh Tribunals.

In last year's report I wrote that aspects of recommendations 25 and 27 had the potential to increase the work of some of the Welsh Tribunals very substantially. That is so, in particular, by reason of that part of recommendation 27 which is to the effect that the tribunals should become the forum for dispute resolution in relation to future Welsh legislation. I remain very much of that view. 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 there is bound to be a sharp increase in the work load of the tribunals with obvious implications for the budget and the staff structure of the Welsh Tribunals Unit.

I also expressed the view in last year's report that the implementation of recommendations 25 and 27 would transform the role of President of Welsh Tribunals. I need not dwell any further upon whether that would be the effect of the recommendations of the Commission on Justice because, in its consultation paper, the Law Commission has made a number of recommendations on a provisional basis which, if implemented, would, without doubt, increase the work load of the President very substantially. The Law Commission recommends provisionally the President becomes the appointing authority for all members of Welsh Tribunals which are currently within the Act and for the members of other public bodies which may become tribunals within the Act, that he/she becomes the disciplinary authority for those members, that he/she has a role in allocating the categories of work to the various Chambers of a newly created First Tier Tribunal structure in Wales and that he/she chairs a newly created and independent WTU and a Wales Tribunal Rule Committee.

The Law Commission also recommends, provisionally, two specific judicial roles for the President of Welsh Tribunals. First, it suggests that he/she should be entitled to sit in any of the Welsh Tribunals. While it has always been my view (and that of the Lord Chief Justice) that the President was entitled to sit in the Tribunals there is no express statutory provision to that effect. Second, the Law Commission suggests that if a separate Welsh Appeal Tribunal is created in which all the appeals from Welsh Tribunals would be heard the President should be a member of that Appeal Tribunal.

I support all the provisional recommendations made by the Law Commission in respect of the office of President of Welsh Tribunals.

The statutory basis for the office of President of Welsh Tribunals 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”. No doubt there is potential for a debate as to which legislative body (the Senedd or the UK Parliament) should bring forward any legislation relating to the office of President which may be necessary to give effect to the final recommendations made by the Law Commission. There is a degree of urgency in resolving this issue since, in my view, the scope of the office of President is a crucial component to be taken into account when planning for and recruiting my successor.

Currently there are two routes to appointment as President of Welsh Tribunals.

Route 1 envisages the President being appointed by the Lord Chief Justice from serving or retired members of the senior judiciary of England and Wales. The Lord Chief Justice is empowered to appoint the President from this potential pool following “expressions of interest” and after consulting the First Minister and the Lord Chancellor.

If no person emerges from this process or if the Lord Chief Justice decides against using this process he would make an appointment following consultation with the First Minister and Lord Chancellor and a competition run by the Judicial Appointments Commission (route 2).

Paragraph 3 of Schedule 5 to the Wales Act 2017 provides that a person is eligible for selection if he/she has been qualified as a barrister or solicitor for at least 7 years. There is nothing unusual about this provision; the same minimum criteria are used for appointments to the High Court and many other judicial posts. However, these criteria are the minimum required.

In practice, I would expect that the aim of any recruitment campaign would be to identify high calibre applicants. There must be a strong argument for describing the office so as to attract candidates who would have the attributes necessary for appointment to the High Court but who have decided, for whatever reason, that they do not wish to compete for a full time salaried judicial role.

Even allowing for the increased workload should the provisional recommendations of the Law Commission come to fruition, it is very likely that the President of Welsh Tribunals will not be a salaried full time appointment for many years to come; it will very likely be fee paid for many years. Accordingly, the office of President may be attractive to those who have been appointed Deputy High Court Judges or those who aspire to that position.

Clearly, if Route 2 is used as the means for appointing my successor considerable thought will be necessary in determining appropriate additional criteria for selection if there is to be a wide and diverse pool of candidates of the required ability.

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 all the provisional recommendations of the Law Commission are adopted, the role of the President would be expanded very substantially. In my view, the work load of the President would very likely double.

4. The Impact of Coronavirus

The Welsh Tribunals have come to terms with disruption to normal working practices on an unprecedented scale. The lock down imposed by the Welsh Government on 23 March 2020 effectively ruled out traditional hearings at which the tribunal members and the parties gathered together in one room. Between 23 March 2020 and 30 April 2021 no such hearings took place; rather the work undertaken by the tribunals has been done either by reference to written evidence and written submissions alone or by “remote” hearings.

The number of cases considered by ALTW in the year 2020/21 fell markedly as is clear from Table 1 above. It is not possible to provide an unequivocal explanation for this decrease in work load but it is reasonable to infer that the pandemic has been a major factor in the diminution in work. Preliminary hearings and approval hearings have been possible by telephone conference and more recently by video conferencing. However, substantive hearings which have also necessitated site inspections have been difficult to arrange. Of the 13 applications received by ALT in 2020/21, five related to tenancy succession on death, one related to tenancy succession on retirement, five were concerned with Notices to quit and there were two land drainage cases. The ALT training day took place by video conferencing.

The work of RPTW was also disrupted in the weeks immediately after the first lock down in March 2020. 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 were necessary it was extremely difficult if not impossible to observe social distancing regulations. However, RPTW was very quick to conduct its hearings by remote means. It held its first hearing by video conferencing in May 2020 and it has developed its ability to conduct all kinds of cases by such means throughout the year. The President and I jointly issued a PD in June 2020 which had the effect of facilitating the use of remote hearings; this was needed because this tribunal operates under three sets of procedural rules and clarity was essential to make clear that each set of procedural rules permitted the use of remote hearings. RPTW has been very successful in adapting its procedure so as to facilitate remote hearings – not least by adopting rigorous case management with a view to narrowing the issues to be determined as early in the proceedings as possible.

The work load of RPTW has essentially remained constant as between 2019/20 and 2020/21. All its members, supporting staff and users are to be congratulated on dealing with such a volume of work during such challenging times. It is also worth noting that RPTW has been able to organise two online training conferences for its members (held in December 2020 and March 2021).

APW traditionally has a very small numbers of cases. As it happens it dealt with one more case during 2020/21 than in the previous year. The disruption to this tribunal was substantially minimised because the governing rules of the tribunal permits some decisions to be made after consideration of written evidence and written submissions and I am informed by the President of APW that all four cases determined by APW were dealt with on the basis of written material. That is not to say that APW was not equipped to deal with remote hearings. The members received appropriate training soon after the lock down in March 2020 had been announced and remote hearings would have taken place throughout the year had the parties requested the same.

The case load of WLT diminished to an extent during 2020/21.

It is difficult to offer a reason but it is unlikely to have been due to the effects of the pandemic.

Over the years since its coming into existence the case numbers in this tribunal have fluctuated substantially and it is more probable than not that there will continue to be a fluctuation in numbers.

The rules governing WLT permit remote hearings and determinations on the basis of written material. Of the seven appeals considered in 2020/21 three appeals were rejected, two were allowed and two were not resolved in that year. All the appeals were determined by reference to written submissions.

SENTW deals with cases which are primarily focussed upon the educational needs of vulnerable children. As soon as traditional face-to-face hearings ceased it began exploring the best ways of dealing with cases remotely. Its members received appropriate training and espoused remote hearings with enthusiasm. The President has consistently reported that hearings by video conferencing have proved to be a great success. A constant theme has been that the parents of children with special educational needs positively prefer hearings by remote means since they are, in the main, able to participate from their own homes and, in consequence, feel more relaxed and better able to participate. All the members of the tribunal and the staff which support them are to be congratulated for the flexibility and commitment shown in developing alternative methods of working.

Table 1 shows that there was a substantial decrease in the number of cases dealt with in 2020/21 compared to 2019/20 although the number of cases dealt with in 2020/21 was much closer to the numbers dealt with in 2017/18 and 2018/19 (albeit lower than both those years). I do not have the evidential base to determine whether the pandemic has caused or contributed to the fall in numbers of cases in 2020/21 but, in my view, some research in relation to this issue is justified given the clear need to ensure that the education of vulnerable children is not compromised. I will be asking the President of SENTW and the Head of WTU to organise the necessary work.

MHRTW has, by far, the largest numbers of cases of any Welsh Tribunal. Most of the cases before the tribunal which require a hearing have traditionally taken place at hospital. Since the lockdown was imposed in March 2020 no face-to-face hearings at hospitals have been possible with the consequence that the Tribunal has had to adapt to remote hearings. Over the course of the year all cases requiring a hearing have been conducted over the telephone. In the early days of the spread of Coronavirus and, in particular, as the first lockdown approached there was a genuine concern that MHRTW would be unable to deal with a case load approaching 2000 cases per annum. In consequence there was a need for urgent decisions about whether the procedural rules governing MHRTW were in need of amendment.

Although MHRTW is a Welsh Tribunal under the Wales Act 2017 it was created many years ago by legislation enacted by the UK Parliament. Over the years the procedural 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 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.

As a consequence MHRTW was enabled to work as flexibly as its English counterpart for so long as it was thought appropriate by legislators.

I wholeheartedly supported the rule changes in Wales (as did the President of MHRTW) and 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.

As time went by, however, the rule changes and the PD were the subject of criticism from some of the lawyers who practise in the field of mental health. Further, the rule changes were the subject of criticism by the Equality, Local Government and Communities Committee of the Senedd in its report entitled "Into sharp relief: inequality and the pandemic". There were concerns that the protections afforded to patients by decisions being taken by three members (as opposed to a lesser number) and following oral hearings were being eroded.

I understand why these concerns were expressed. Nevertheless, in the early days of the pandemic and when social distancing rules were at their most restrictive as cases of Coronavirus reached their peaks there was a real risk that assembling three members for every hearing (albeit conducted remotely) would prove impossible to achieve for lack of the necessary numbers of members who were ready, willing and able to work throughout the pandemic.

The whole point of the rule changes was to prevent a situation developing in which some cases were simply not heard at all as might have been the case if members of MHRTW themselves became ill either with Coronavirus or other ailments. A significant number of the most experienced members of MHRTW are aged over 60 and prior to vaccination were themselves at risk of significant illness should they contract Coronavirus.

As it happens it has never been necessary to reduce the number of members hearing a case from the full complement of three. Further, it has never been necessary to determine a case by reference only to written material. The Tribunal has delivered a full programme of hearings in every category of case with a fully constituted panel and without any undue delay or backlog of hearings. That this has been possible is to the great credit of the members of MHRTW and the staff that has provided unstinting support.

Upon the expiry of the PD which had been extended for a period of six months from October 2020 the President of MHRTW and I decided that it would not be further extended. That was possible because of the falling numbers of persons suffering from Coronavirus and, as I have said, the commitment of the members of the Tribunal and the support staff. At the time of writing I do not expect that the PD will be revived although it should be noted that the provisions within the Coronavirus Act 2020 referred to above have not been repealed and so could be invoked if the need arose.

As Table 1 demonstrates the Tribunal has received a large number of cases during the year (albeit the numbers are reduced in comparison with previous years). MHRTW has sought to understand why the number of cases received in 2020/21 has reduced by about 8%.

The fall in numbers is explained in the main by a fall in the number of applications made by or in relation to patients in the community.

Given the social distancing restrictions in operation over much of the year it seems to me that there is likely to be a direct link between the reduced number of “community cases” and the pandemic. I have seen no evidence which suggests that the fall in the number of cases has been substantially caused or contributed to by the fact that hearings have, of necessity, been conducted remotely.

That is not to say that there has been no expressions of disquiet about remote hearings. As I explained above, MHRTW has conducted hearings throughout the year by telephone.

There has always been some pressure from some patients and their lawyers to conduct hearings by video conferencing. The President of MHRTW and her team of deputies has kept this possibility under review for some months and I understand that trialling of video conferencing hearings will begin shortly, if they have not already begun by the date of publication of this report.

The logistical difficulties of conducting hearings by video conferencing should not, however, be underestimated. Not all hospitals in which patients are detained are equipped for such hearings. Not all patients would welcome video conference hearings. There is a need, so far as is reasonable and proportionate, for consistency of treatment of patients in the way that hearings are conducted.

No doubt, once some hearings have taken place by video conferencing, MHRTW will undertake a detailed assessment of the circumstances in which different forms of remote hearings can be deployed. I will give MHRTW my full support in reaching appropriate conclusions.

I do not pretend that the challenges posed by the pandemic have been overcome in all instances without disruption. I am quite prepared to accept that there will have been instances in which cases may not have run as smoothly as they would have done had traditional face-to-face hearings been available.

Nonetheless I can say with a good deal of confidence that the flexibility which all the tribunals have shown in adapting their ways of working during this most difficult of times has been crucial in ensuring that the tribunals have operated efficiently and expeditiously and in accordance with the overarching aim of delivering justice to all participants.

5. Priorities for 2021/22

First and foremost there will be the need to assess and evaluate how the tribunals should operate from the time that the pandemic comes to an end. I have a statutory duty under the Wales Act 2017 to devise innovative methods of resolving disputes which are brought before the tribunals and, without doubt, the pandemic has forced the judicial leads of the tribunals and me to think about ways of working which were unimaginable to most tribunal users prior to March 2020.

A crucial issue for detailed consideration is the extent to which remote hearings are retained once traditional face-to-face hearings become possible. There can be no doubt that remote hearings are likely to prove less costly to organise. There can be no doubt, too, that some users of the tribunals feel far more comfortable participating from their own home or other familiar surroundings than is the case when they are in a more formal setting.

However, the overarching object of each tribunal is to deliver justice and there can be no doubt, in my opinion, that traditional face-to-face hearings are a better model for achieving justice when there are contentious and crucial factual issues in dispute which are dependent for their resolution upon oral sworn evidence from witnesses. There may also be circumstances which are particular to individual tribunals which make face-to-face hearings either necessary or, at least, very desirable.

Over the course of the coming months the judicial leads and I will be making an In-depth assessment of the current procedural rules governing each tribunal and what should be done to develop criteria by which decisions are made as to whether remote or face-to-face hearings are held. In this respect we will be very much assisted by emerging detailed research which has been undertaken upon the use of remote hearings during the pandemic. Just as I was completing this report the Legal Education Foundation published the results of its research into remote hearings during the early months of the pandemic. I could not do justice to an erudite, detailed and lengthy report by attempting a summary in an annual report. This research, and other similar reports, however, will be the foundation stones for the work of tribunals in the years to come.

I have three other important priorities. First, to respond appropriately to the final recommendations about Welsh Tribunals which are likely to be published by the Law Commission in the autumn, in particular those relating to the office of President of Welsh Tribunals and the status of the WTU. Second, to provide assistance, if required, in relation to the transition from SENTW to “the Education Tribunal” which will happen later this year by virtue of legislation made in Wales entitled the Additional Learning Needs and Education Tribunal (Wales) Act 2018. Third, if required, to assist in devising criteria for appointment of salaried legal members of MHRTW.

The office of President of Welsh Tribunals has proved to be more demanding than I envisaged when I took office in the autumn of 2017. I believe that would have been so even without the intervention of the pandemic. However, it has been an honour to have been involved in the very early stages of a project to develop Welsh Tribunals as bodies for dispute resolution which are truly fit for purpose in the second decade of the Twenty First Century.



Sir Wyn Williams
President of Welsh Tribunals