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## **WELSH LANGUAGE TRIBUNAL**

### **Evidence for the Commission on Justice in Wales**

#### **Introduction**

1. The purpose of this evidence is to provide factual information about the Tribunal and its activities which could be useful for the Commission when considering which arrangements could ensure the most effective access to justice in Wales. As a judicial body, the Tribunal has no opinion on the content of those arrangements, which is a question of policy for the Commission and for the Welsh and UK governments.

#### **The Tribunal**

2. The Welsh Language Tribunal was established under Part 7 of the Welsh Language (Wales) Measure 2011. As the Tribunal's jurisdiction is limited to questions which arise from the Welsh Language Standards order (imposed on bodies under Part 4 of the Measure), the Tribunal was not established until that order came into force. The President of the Tribunal was appointed on 1 August 2014, and the other members of the Tribunal on 1 April 2015, when the provisions of the measure relating to the Tribunal came into force fully.

3. Currently, the Tribunal has 5 members – the President, one other legally qualified member, and three lay members.

4. Under section 127 of the Measure, the Welsh Government is responsible for ensuring that the Tribunal has the staff, buildings, financial resources and other resources to enable the Tribunal to practice its functions. This is undertaken through the Welsh Tribunals Unit, which is a part of the Welsh Government. Two members of the Unit's staff, a business manager and an administrative officer, are shared between the Tribunal and another tribunal.

5. The Tribunal operates completely bilingually, and any party is welcome to use Welsh or English when communicating with the Tribunal, when presenting their arguments to the Tribunal in an Application Notice or in a case statement, and when taking part in hearings. Simultaneous translation is arranged, from Welsh to English or from English to Welsh according to demand. The Tribunal's staff are bilingual. The Tribunal's membership includes bilingual and non-Welsh speaking members.

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#### **The Unique Nature of the Tribunal**

6. The Welsh Language Tribunal is the only court or tribunal:

- (i) to be established under Welsh legislation;
- (ii) to practice functions which are unique to Wales;

(iii) to operate completely bilingually.

### **The Tribunal's Independence**

7. The Tribunal is not accountable to Welsh Ministers in relation to its judicial work, but Welsh Ministers have a number of functions in relation to the Tribunal's membership and administration. Members are appointed by Welsh Ministers, but on the basis of panel recommendations established by the Judicial Appointments Commission. Welsh Ministers set members' salary level and expenses (even though in practice these follow what is set in relation to judicial roles which are under the authority of the UK Government). Welsh Ministers can dismiss a member of the Tribunal if the member is not fit to continue as a member, or cannot, or is unwilling to practice members' duties. A protocol was agreed between the Tribunal and Welsh Ministers which ensures a fair and transparent process for complaints against members (including the President) if they could lead to dismissal. Welsh Ministers must approve the Tribunal's procedural rules, made by the President, and practice instructions given by him (except for those which only relate to judicial matters).

8. It is not possible, whilst the administration of the Tribunal is in the hands of the Welsh Government, to avoid completely the possibility of a conflict of interests. The Welsh Government itself is a body which is subject to the Standards. In addition, another situation which could also require very significant provision is one which arises from the fact that the other Welsh Tribunals have a duty, themselves, to comply with the Standards. Therefore, a case could come to Tribunal which would relate to the behaviour of members of the Welsh Tribunals Unit, and that would enforce the Tribunal to ask for special administrative arrangements to be made. As yet, no case has come before Tribunal which has raised any kind of conflict of interest.

### **The Tribunal's Jurisdiction**

9. All the Tribunal's work relates to the Welsh Language standards order and, specifically, to challenges to decisions made by the Welsh Language Commissioner in relation to those Standards. There are six types of cases which can ask for the Tribunal's intervention:

(i) an appeal by a body against the Commissioner's decision to impose a specific Standard on them, on the basis that doing so is either unreasonable or disproportionate;

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(ii) an application for a review by the Tribunal of a decision made by the Commissioner not to conduct a formal investigation into a complaint that a body has failed to comply with a Standard;

(iii) an appeal by a body against the Commissioner's determination, at the end of an investigation, that the body has failed to comply with a Standard;

(iv) an appeal by a complainant against the Commissioner's determination, at the end of an investigation, that the body in question has not failed to comply with a Standard;

(v) an appeal by a body against a penalty imposed on them by the Commissioner for failing to comply with a Standard;

(vi) an appeal by someone against an evidence notice (a notice which requires that body to provide specific evidence) given to that person by the Commissioner for the purposes of an investigation that the Commissioner is conducting.

10. It can be seen that (iii), (iv), (v) and (vi) are conventional “appeals”, whilst (ii) is an request for a review of the Commissioner's decision, based on judicial review principles under common law (see section 103(3) of the Measure). (i) is an unusual jurisdiction as on the one hand, it is described as an “appeal” but, on the other hand, it relates specifically, to the reasonableness and proportionality of the Commissioner's decision.

11. An appeal can be made to the High Court against the Tribunal's decisions, but only on a point of law.

### **The Tribunal's Powers**

12. In the case of the “appeals”, the Tribunal, if it allows the appeal, can overturn the Commissioner's decision, and insert its own decision if that is appropriate (for example by reducing the penalty imposed on a body by the Commissioner).

13. In accordance with the character of a “judicial review” case under (ii) above, the Tribunal, if it revokes the Commissioner's decision, cannot vary that decision, but rather, it must be returned to the Commissioner with directions for its legal reconsideration.

14. The Tribunal is given “supplementary powers” in relation to the attendance and examination of witnesses, the production and inspection of documents and all other matters which are “incidental to” the Tribunal's functions. Those powers are “the same powers, rights, privileges and authority as the High Court” but, of course, they are limited to the “supplementary” measures listed. Therefore, they do not allow the Tribunal to publish declaratory determinations. This was a key point in relation to a recent case (TyG/WLT/18/2) where the Commissioner decided to overturn, willingly, decisions by her which were under consideration by the Tribunal. The Tribunal considered that the impact of this was to bring the challenge to a close. The Tribunal could not continue to handle the Applicant's arguments regarding decisions by the Commissioner that were no longer in force.

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### **Methods of working**

15. Even though anyone who is party to a case can communicate with the Tribunal on paper, digital methods have been used by everyone so far. The Application Notice form can be downloaded from the Tribunal's website and sent, having been completed, to the Tribunal by e-mail. Case statements and written evidence are sent to the Tribunal in the same way. The Tribunal will communicate with the parties via e-mail. The existence and progress of cases is noted on the website and the Tribunal's decisions are posted on the website. Material relating to a case is kept in electronic files.

16. The only significant use of paper documents is that the Tribunal prepares, for members' use, hard bundles of the relevant documents for hearings.

17. When a hearing is required, the Tribunal sits in a location which is convenient for the Applicant.

### **The cases considered by the Tribunal so far**

18. The first Standards did not come into force until the end of March 2016. Since then, the Tribunal has received 15 applications. They were solved as follows:

<b>Nature of the solution</b>	<b>Number</b>
Application refused as it was received by the Tribunal outside the permitted period	1
The application was withdrawn	4
Permission to apply was refused (cases under section 103)	4
The application was annulled under rule 28	1
Determined by the Tribunal without a hearing (at the request of the parties)	1
Determined by the Tribunal following a hearing	2
As yet unsolved	2
<b>Total</b>	<b>15</b>

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19. An obvious (and possibly unexpected) feature of the Tribunal's case load is the emphasis on challenging decisions by the Commissioner not to investigate a complaint (11 out of 15). Consequently, almost all of the Tribunal's work, so far, has been "judicial review" work of the Commissioner's decisions.

### **The Tribunal's other activities**

20. As well as case work, the Tribunal, since April 2015, has achieved the following:

- Drafting procedural rules for the Tribunal's specific needs (Welsh Language Tribunal Rules 2015);
- Drafting practice directions (numbers 1, 2, 3 and 4) which relate to different aspects of the Tribunal's procedures;

- Conducting induction training sessions for members;
- Conducting regular training sessions in order to maintain and improve members' skills;
- Evolving practical methods of working in order to handle cases effectively.

### **The Tribunal's Spending**

21. These are the sums spent by the Tribunal since it was established:

<b>Financial Year</b>	<b>Spending</b>
2015/16	£19,500
2016/17	£21,600
2017/18	£32,315

NB The sums noted here are those which are under the control of the Tribunal, namely members' salaries and costs and other costs from conducting hearings and training sessions. The cost of administering the Tribunal falls on the Welsh Government as part of the cost of maintaining the Welsh Tribunals Unit, which is shared between all the Welsh tribunals.

### **Other judicial functions under the Welsh Language (Wales) Measure 2011**

22. The limited nature of the Tribunal's functions has already been mentioned (paragraphs 9-14). Although the Measure gives the Tribunal extensive powers in relation to some specific kinds of decisions on behalf of the Commissioner, including the ability to practice "judicial review" jurisdiction in relation to a decision made by the Commissioner not to investigate a complaint made by a member of the public, the Tribunal does not have the right to intervene in other kinds of decisions made by the Commissioner in relation to investigations.

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23. For example, complainants, and those who are subject to a complaint, are given a number of specific rights in relation to an investigation. The procedure for conducting an investigation is determined by Schedule 10 of the Measure. Responsibility is given to the Commissioner to consult with the complainant, and the person about whom the complaint was made, in relation to the proposed terms of reference of the investigation (Schedule 10 paragraph 2). The Commissioner must give persons an opportunity to make representations in relation to the topic of the investigation (Schedule 10 paragraphs 3 and 4). When the Commissioner has completed an investigation, she must consult with interested persons in relation to the complaint before completing her report and deciding on which actions should be taken (section 58 of the Measure). Neither the complainant nor the person about whom the complaint was made have the ability to challenge, by applying to the Tribunal, a failure by the Commissioner to operate according to these duties. They can, of course, wait until the end of the investigation and appeal against the Commissioner's determination. However this would not always ensure justice. For

example, what if the Commissioner refused, unreasonably, to give effect to the complainant's representations in relation to the terms of reference and, as a result, conducted a defective investigation which led to an unreliable determination that a body had not complied with a standard? Would that justify a determination by the Tribunal that the body *had* failed to comply with the standard? Under section 96 of the Measure, the only power that the Tribunal has, on appeal, is either to affirm or annul the Commissioner's determination. The Tribunal does not therefore, in relation to an appeal, have the right to return the determination to the Commissioner with directions to conduct an investigation on the basis of revised terms of reference.

24. Therefore, the only reliable way of questioning the Commissioner's compliance with the Measures' requirements when conducting an investigation is by asking the High Court for a judicial review, with the financial implications that could entail. It is not obvious why the Tribunal was given the ability to review the lawfulness of a decision by the Commissioner not to investigate a complaint, but not to review the lawfulness of the Commissioner's methods of conducting an investigation.

25. Under section 88 of the Measure, the Commissioner can ask the County Court for an order requiring a body to take specific steps to comply with the requirements of the Commissioner's determination at the end of an investigation. As the Tribunal has all the High Court's powers in relation to ancillary matters arising from a case before the Tribunal (including an order for a person to appear before the Tribunal to give evidence or produce documents), it is not clear why the Tribunal is not an appropriate forum for enforcing compliance with the Commissioner's determinations.

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## **Conclusions**

26. It is suggested that the following conclusions can be made on the basis of the evidence above:

- (i) that the history of the Welsh Language Tribunal proves that it is completely practical to establish effective Welsh specialised judicial bodies;
- (ii) that a body can therefore provide free and accessible justice;
- (iii) that the Tribunal's dependence on Governmental administrative maintenance can, in some circumstances, lead to a conflict of interest (although that situation has not arisen, as yet, in the Tribunal's history);
- (iv) that there is a way to extend the scope of the Tribunal's jurisdiction, making its powers more inclusive within its general terms of reference – the Welsh Language Standards in this case - without changing the character of the Tribunal's jurisdiction fundamentally.

Keith Bush QC

**President of the Welsh Language Tribunal**

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