

Explanatory Memorandum to the Judicial Offices (Sitting in Retirement – Prescribed Offices and Descriptions) (Wales) Regulations 2023

This Explanatory Memorandum has been prepared by the Constitution and Justice Department of the Economy, Treasury and Constitution Group and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Judicial Offices (Sitting in Retirement – Prescribed Offices and Descriptions) (Wales) Regulations 2023. I am satisfied that the benefits justify the likely costs.

Mark Drakeford MS
First Minister of Wales

25 January 2023

PART 1

1. Description

- 1.1. The Judicial Offices (Sitting in Retirement – Prescribed Offices and Descriptions) (Wales) Regulations 2023 (the “Regulations”) define which holders or former holders of judicial offices in the Welsh Tribunals are eligible for appointment to the new sitting in retirement judicial offices created by section 123 of the Public Service Pensions and Judicial Offices Act 2022 (“the Act”).
- 1.2. The Regulations are required to be put in place before the President of Welsh Tribunals can exercise powers conferred by section 124 of the Act to appoint eligible persons to sitting in retirement offices by reason of such a person holding or having held a corresponding original judicial office.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

- 2.1. There are no matters of special interest to the Legislation, Justice and Constitution Committee.

3. Legislative background

- 3.1. The Public Service Pensions and Judicial Offices Act 2022 introduced changes that extend UK-wide to the mandatory retirement age for judicial office holders from 70 to 75 years of age. It also implemented a single legislative regime governing judicial office holders sitting in retirement¹, such appointments not extending beyond the mandatory retirement age of 75. A suite of new sitting in retirement judicial offices that correspond to original judicial offices is created by the Act. The Senedd agreed a Legislative Consent Motion in respect of the Act on 8 February, 2022.
- 3.2. The President of Welsh Tribunals is the appointing authority² for the new sitting in retirement offices that correspond to the original judicial offices in the Welsh Tribunals³. An “eligible person” for appointment to a sitting in retirement office is a person who holds or has held a prescribed office and is a person of such further description as may be prescribed. “Prescribed”

¹ Judicial office holders whose terms of appointments are a devolved matter for the Scottish Parliament are not in scope of this provision.

² Section 124(2)(e) of the Act

³ The original judicial offices in the Welsh Tribunals for which there are corresponding sitting in retirement offices are listed in Part 5 of Schedule 3 to the Act. Section 59(1) of the Wales Act 2017 defines the Welsh Tribunals.

means prescribed in regulations made by the Welsh Ministers with the concurrence of the President of Welsh Tribunals.⁴

3.3. These Regulations therefore prescribe the judicial offices that a person must hold or have held prior to their retirement to be eligible for appointment to a particular sitting in retirement office.

3.4. These Regulations are made under the negative resolution procedure.⁵

4. Purpose and intended effect of the legislation

4.1. Sitting in retirement was an option previously only available to salaried judges. The new sitting in retirement regime put in place by the Act is a remedy to the differential treatment between salaried and fee-paid judges and is intended to provide flexibility to meet business needs of courts and tribunals through judicial office holders being able to sit in retirement where to do so is necessary to ensure the effective administration of justice.

4.2. The Act approaches eligibility to sit in retirement with reference to offices eligible for a judicial pension. However, the list of original judicial offices⁶ for which there are now corresponding sitting in retirement offices does not of itself determine persons' eligibility to the new sitting in retirement offices. The purpose of these Regulations is therefore to implement the sitting in retirement regime for the Welsh Tribunals by prescribing the eligibility of persons who can apply to each new sitting in retirement office.

4.3. The governing principle underlying eligibility as set out in the Regulations is that appointment will normally be to the sitting in retirement office that is the direct equivalent of the original pre-retirement office. There are two exceptions to this principle:

- a) First, in relation to leadership offices. No sitting in retirement equivalents of leadership offices have been created by the Act. Leadership judges cannot, therefore, sit in retirement in a leadership capacity but in the sitting in retirement equivalent of the original statutory office which underpins their leadership appointment.
- b) Second, in relation to the Adjudication Panel for Wales, to be appointed to the office of "Member of the Adjudication Panel for Wales (sitting in retirement)" a person must satisfy the specified description, the effect of which means that a person fulfilled the role of legally qualified member of the Panel in their original appointment. This is because the Act approaches eligibility to sit in retirement by reference to offices eligible for a judicial pension, but the original statutory office of member of the Adjudication Panel for Wales does

⁴ Section 124(3) and (4)(e) of the Act.

⁵ Section 124(11) of the Act.

⁶ Part 5 of Schedule 3 to the Act lists the original judicial offices in the Welsh Tribunals for which there is a corresponding sitting in retirement office.

not separately differentiate between legal and other members of the Panel.

4.4. The ad hoc development of the Welsh Tribunals and the pre and post devolution statutory frameworks⁷ that provide their respective schemes of governance, has created a lack of coherence across them in relation to the way in which the membership of each tribunal is categorised and described. The older legislation sometimes describes different categories of tribunal member using terminology we now consider to be outdated in terms of legislative drafting. This is the case in respect of original judicial offices for two of the Welsh Tribunals which are defined using language that is not gender neutral:

- a) Schedule 9 to the Agriculture Act 1947 refers to “chairman” and “deputy-chairmen” to define judicial offices in the Agricultural Land Tribunal for Wales. This terminology is carried through in the Regulations to prescribe the original offices that correspond to the office of “Deputy Chair of the Agricultural Land Tribunal for Wales (sitting in retirement)”.
- b) Schedule 10 to the Rent Act 1977 refers to a panel of persons to act as “chairmen” of the Rent Assessment Committee in Wales. This terminology is carried through in the Regulations to prescribe the original offices that correspond to the office of “Legal member of the Rent Assessment Committee Wales (sitting in retirement)”.⁸

4.5. Because the statutory framework for each Welsh Tribunal defines the original judicial offices in respect of which the Act creates corresponding sitting in retirement offices, the extant terminology defining those original offices has been carried through into the Regulations. This approach has been followed including where the terminology of older legislation is considered outdated. The rationale for doing so is to maintain clarity in terms of the prescribed original judicial office a person must hold or have held to be eligible for appointment to the corresponding sitting in retirement office.

5. Consultation

5.1. A consultation on raising the mandatory retirement age for devolved judicial office holders was published on 7 September 2020 and closed on 30 November 2020.⁹ It partly aligned with a Ministry of Justice consultation on

⁷ In date range, from the Agriculture Act 1947 to the Additional Learning Needs and Education Tribunal (Wales) Act 2018.

⁸ Section 173 of the Commonhold and Leasehold Reform Act 2002 and section 229 of the Housing Act 2004 respectively provide that the jurisdiction of a leasehold valuation tribunal and of a residential property tribunal is exercisable by a rent assessment committee constituted under Schedule 10 to the Rent Act 1977. The reference to “Rent Assessment Committee Wales” in the Regulations therefore also captures the Leasehold Valuation Tribunal Wales and the Residential Property Tribunal Wales.

⁹ See [Judicial mandatory retirement age: Welsh judicial offices 2020 \[HTML\] | GOV.WALES](#)

raising the mandatory retirement age for all other judicial office holders in England and Wales. The Act implemented a mandatory retirement age of 75, and a regime for sitting in retirement with appointments not extending beyond the mandatory retirement age.

5.2. The Regulations are made with the concurrence of the President of Welsh Tribunals and the President was consulted during their preparation. No further public consultation has been undertaken in relation to these Regulations which are administrative and technical in nature.

PART 2 – Regulatory Impact Assessment (RIA)

An RIA has been undertaken for the Regulations.

6. Options

6.1. The Act introduced a new sitting in retirement regime to remedy the differential treatment that previously existed between salaried and fee-paid judges, namely where salaried but not fee-paid judges could sit in retirement. The sitting in retirement regime under the Act creates a new category of judicial office that enables judicial office holders (whether salaried or fee-paid) to retire from their original judicial office, draw their judicial pensions, and be appointed to a fee-paid sitting in retirement office.

6.2. The Act approaches the eligibility of judicial office holders to sit in retirement with reference to offices eligible for a judicial pension. However, the list of original judicial offices in the Welsh Tribunals for which there are corresponding sitting in retirement offices¹⁰, does not of itself determine persons' eligibility to be appointed to corresponding sitting in retirement offices.

6.3. The eligibility criteria for appointment to a Welsh Tribunals' sitting in retirement office are set out in the Regulations. The Regulations prescribe the original judicial office a person must hold or have held to be eligible for appointment to a corresponding sitting in retirement office.

6.4. Regulations specifying eligibility criteria for appointment must therefore be made for the sitting in retirement regime to be operable, enabling appointments to be made to sitting in retirement offices in the Welsh Tribunals. Two options have been considered in the development of the RIA:

- a) Option 1: maintain business as usual in terms of meeting the business needs of the Welsh Tribunals by not making the Regulations; and
- b) Option 2: make the Regulations specifying the eligibility criteria for appointment to sitting in retirement offices.

¹⁰ Part 5 of Schedule 3 to the Act lists the original judicial offices in the Welsh Tribunals for which there is a corresponding sitting in retirement office.

6.5. Option 1 means the Welsh Tribunals would continue to be resourced by existing judicial resource alone. This is because without the Regulations in place the sitting in retirement regime is inoperable.

6.6. The Act makes clear there is no entitlement for judicial office holders to be appointed to a sitting in retirement office. Appointment can be made only where there is a business case that such an appointment facilitates the disposal of business in the court or tribunal to which a person is appointed.¹¹ The regime is therefore intended to be subsidiary to appointment to, and deployment of, original judicial offices for the purpose of meeting the business needs of the Welsh Tribunals. Sitting in retirement offices are therefore a means by which existing judicial resource can be complemented to deliver the business needs of the Welsh Tribunals by meeting any immediate, short term needs that may arise for which there is a resourcing demand which cannot be met by deployment from the cohort of non-retired judicial office holders.

6.7. The flexible resourcing offered by the new statutory sitting in retirement regime would only be available to the Welsh Tribunals under Option 2. This is because the Regulations specify the eligibility criteria for appointment to sitting in retirement offices.

7. Costs and benefits

7.1. As noted in paragraph 6.6, the sitting in retirement regime is intended to provide flexible resourcing to meet the business needs of the Welsh Tribunals where that cannot be met by deployment from the cohort of non-retired judicial office holders. The business needs of the Welsh Tribunals are demand led and based on the number of applications made to each individual tribunal. The number of applications received by the Welsh Tribunals in financial years 2018-2019 to 2021-2022 are set out in the table below.

Number of applications to the Welsh Tribunals

Welsh Tribunal	Financial Years			
	2018-2019	2019-2020	2020-2021	2021-2022
Agricultural Land Tribunal	29	22	13	20
Mental Health Review Tribunal	2,046	1,943	1,790	1,840
Residential Property Tribunal	176	112	106	113
Education Tribunal ¹²	139	172	116	151
Adjudication Tribunal	2	2	4	10
Welsh Language Tribunal	3	16	13	3

¹¹ Section 124(1)(a) of the Act.

¹² The Special Educational Needs Tribunal for Wales formally changed name to the Education Tribunal for Wales on 1 September 2021 pursuant to section 91 of the Additional Learning Needs and Education (Wales) Act 2018.

- 7.2. The total expenditure in administering the Welsh Tribunals in the most recent financial years of 2020-2021 and 2021-22 was £3,565,246 and £4,092,047 respectively and the business of each tribunal was delivered utilising the existing cohort of tribunal members.
- 7.3. Under Option 1 the flexible resourcing of the sitting in retirement regime would not be utilised and there would be no additional cost to meeting the business needs of the Welsh Tribunals.
- 7.4. Under Option 2 the flexible resourcing offered by the sitting in retirement regime would only be utilised to meet the business needs of the Welsh Tribunals that cannot be met by deployment from the cohort of non-retired judicial office holders. Save for minimal additional costs relating to training (paragraph 7.5 refers), we assess the cost implications of Option 2 as being largely neutral on the overall expenditure for administering the Welsh Tribunals, for the following reasons:
- a) the work of the Welsh Tribunals and the costs of administering them are demand led based on the number of applications made to the tribunals;
 - b) sitting in retirement resource is intended to be deployed to meet demand that cannot be met by deployment from the cohort of non-retired judicial office holders;
 - c) sitting in retirement office holders are fee-paid and the cost of deploying them to meet demand would therefore equate to the cost that would be incurred if non-retired judicial office holders were available to be deployed to sit; and
 - d) appointment to a sitting in retirement office carries no guarantee to the incumbent of sitting days, sitting being dependent on meeting the business needs of the Welsh Tribunals.
- 7.5. Whilst persons appointed to sitting in retirement offices will be experienced tribunal members, they will have training requirements. We anticipate they will access update training arranged generally annually for the cohort of tribunal members and they will be remunerated at their fee-paid rate for attending such training. We anticipate additional costs will be minimal. Because sitting in retirement appointments are based on business need in circumstances where non-retired judicial office holders are unable to meet demand, we anticipate very few persons will be appointed to sit in retirement. We therefore estimate an additional annual cost of approximately £2K based on 4 or 5 members sitting in retirement attending an annual day of training and receiving remuneration based on applicable fee rates.
- 7.6. The benefits of flexible resourcing to meet business needs of the Welsh Tribunals that is offered by the sitting in retirement regime can only be

realised if the Regulations are made. The benefits do not accrue under Option 1 but do accrue under Option 2.

8. Competition Assessment

8.1. The Regulations have no impact on the competitiveness of businesses, charities or the voluntary sector.

9. Post implementation review

9.1. No specific monitoring or review of the Regulations is proposed. Sitting days of sitting in retirement office holders will be monitored from an operational perspective in the same way as sitting days for other members of the Welsh Tribunals.