TRIBUNALS

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TRIBUNALS TRIBUNALS

JSB

Judicial Studies Board

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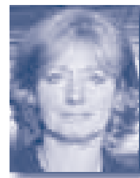
EDITORIAL



The publication in July 2004 of the White Paper, *Transforming Public Service: Complaints, Redress and Tribunals*, following on from the Leggatt review of tribunals, is probably the most important development in administrative justice since the Franks Report in 1957. The White Paper has been broadly welcomed and its publication gives this journal the opportunity to seek viewpoints on its substance from a variety of people with an interest in different aspects of administrative justice.

Indeed, it is hard for anyone whose work touches on the decision-making of public bodies not to have a view. Is the broad approach taken by the White Paper the right one? Are the methods it suggests for resolving problems at an early stage the right ones? Does it give enough thought to the way in which alternative methods of dispute resolution could be incorporated into the system? And are its views on the provision of information and advice to users realistic?

In this issue of *Tribunals* journal, we offer the views of two presidents, two academics, an adviser, a mediator, as well as those of the JSB and the Council on Tribunals, on these questions among others.

At page 2, Siobhan McGrath gives a broad overview of the White Paper's proposals for proportionate dispute resolution and expresses her concern that the expertise of staff and members should not be lost. Judge Michael Harris (page 8) goes one stage further and suggests a way in which the skills and abilities of administrators could be employed on the lower rungs of the judicial ladder.

Professor Michael Adler (page 5) believes that a 'one-door' approach is the best one from the point of view of the user but reiterates his belief that, even in such a system, the complexity of the law means that users will require support and assistance. Adam Griffith (page 11), from the Advice Services Alliance, is of the same mind and details some of the reasons why, in the real world of dispute resolution, applicants and appellants will continue to need advice and, frequently, representation.

The White Paper is keen to explore alternative methods of resolving disputes and mediation features high on its list of possibilities. At page 17, Bernard Quoroll describes the benefits of mediation, as well of some of the situations in which it is not appropriate, and considers how it could best be incorporated into the existing system.

In a tale from one of the largest public-sector decision-makers, Brian Thompson recalls the attempts by the NHS to reform its own methods of dispute resolution and why it had to reconsider the path it had taken.

Not surprisingly, the reform of our system of administrative justice was also the subject of the Council on Tribunals' annual conference this year. We are delighted to be able to include synopses of the keynote speeches given on that day, not least because they go some way towards answering the questions raised by the articles in this issue and outlined above. The speeches given by the Lord Chancellor (Lord Falconer), the Senior President Designate (Sir Robert Carnwath) and the Chief Executive Designate (Peter Handcock) are reproduced in the centre of this issue, along with a brief summary of what the other contributers had to say.

This issue also sees the publication of the first in a series of cartoons that will attempt to illustrate both the desirable and undesirable qualities in a participant at a training course. The first of these is reproduced on page 10. We have no doubt that any of you involved in organising and holding training courses will look on these with sympathy!

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December 2004

STICKING TOGETHER

SIOBHAN MCGRATH *outlines the main provisions of the White Paper, including the way in which the new amalgamated administrative justice system will operate.*

The Department for Constitutional Affairs (DCA) has now issued the long-awaited White Paper on Tribunal reform. As its title, *Transforming Public Service: Complaints, Redress and Tribunals*, indicates, the paper is not confined to the reform of the tribunal system. Instead, it places the work of administrative tribunals within the wider context of dispute resolution for those who may be dissatisfied with the decisions or decision-making process of public bodies.

The stated aim of the paper is 'to develop a range of policies and services that, so far as possible, will help people to avoid problems and legal disputes in the first place; and where they cannot, provide tailored solutions to resolve the dispute as quickly and cost-effectively as possible' (para. 2.2). This is to be known as 'proportionate dispute resolution'.

For those tribunals, like my own, that are mainly concerned with party and party adjudication, the new Tribunals Service is to provide a reformed and accessible system for the user, including access to alternative (or appropriate) dispute resolution.

The dissatisfaction that may lead a user to appeal to a tribunal at an early stage is to be tackled by various means including effective review mechanisms by the administrative bodies themselves or mediation. Additionally, a distinction is drawn between complaints relating to practice and procedure and issues that may or must be determined on appeal by independent adjudicators.

Structure

The aim is to create a 'unified and distinctive system' but with 'aspects of a federal structure' (para. 6.37). The formal divisional structure envisaged in the Leggatt report is considered to be unnecessary (para. 6.38).

Sir Andrew Leggatt had concluded that an undivided body would be impractically large and diverse. However, in the light of the limited number of jurisdictions that are to form the new service in its first phase, it is envisaged that division might obstruct flexibility and worthwhile developments.

Members will be assigned to a particular jurisdiction, yet be encouraged to sit in more than one jurisdiction.

There is, therefore, to be a single two-tiered system with a Senior President at its head, and Lord Justice Carnwath has now been appointed Senior President Designate.

In addition, individual jurisdictions are to continue to have Presidents, who will either be High Court judges or be appointed through competition among suitably qualified applicants. Where appropriate, there may also be regional tribunal judges.

Chairmen and members

Chairmen are to be appointed to a single judicial office on two levels. Those sitting in first-tier tribunals are to be known as 'Tribunal Judges' and those sitting in the appellate tribunal are to be known as 'Tribunal Appellate Judges' (para. 6.45). Chairmen already appointed to those tribunals to be brought within the new system will be transferred to the new offices,

and all new appointments will be made to the new offices. Members will be assigned to a particular jurisdiction, yet be encouraged to sit in more than one jurisdiction. It is intended that there should be the possibility of promotion to higher office within the tribunal world.

For other, non-legal members, the picture is less clear. Although non-lawyer members, including experts such as doctors, accountants and surveyors, will still be part of a unified judiciary, it is intended to consider their role further before any final plans are made in respect of their deployment within the new Tribunals Service (para. 6.66).

Training and appraisal are to play an important part in establishing and maintaining standards within the tribunal judiciary.

In addition to training on substantive law, there is to be a strong emphasis placed on training in judgecraft skills, not only in the recognised sense of adjudication but also to accommodate new forms of dispute resolution including mediation skills.

Administrative staff

Administrative support is to be provided by a separate executive agency in the DCA, led by a Chief Executive, Peter Handcock, who will be answerable to the Secretary of State for Constitutional Affairs.

The partnership between the Chief Executive and the Senior President will be 'absolutely essential to the success of the new organisation as a whole' (para. 6.87) since it is recognised that, from the user's perspective, judiciary and staff are part of the same service.

A significant body of tribunal staff will, therefore, be brigaded together in the DCA, which, it is predicated, will allow for the development of a progressive career structure with relevant specialisms within it.

Common principles will be developed with regard to precedent to enable the appellate tier to fulfil its role properly and consistently.

Practice and procedure

Simplifying rules and procedures could pave the way for the delivery of real benefits. Accordingly, a tribunals procedure committee is to be created and constituted from a core membership comprising the Senior President, a Tribunal Appellate Judge, a Tribunal Judge, a representative of the Council on Tribunals and a representative of tribunal users (para. 7.5). Its brief will be to deliver a clearer, codified system that will be able to represent the interests of many tribunals.

Case management is to be used for the effective control of process. Staff are to work in close partnership with judges and other members to ensure that applications are brought to a just and timely conclusion.

Appeals

As indicated above, the system is to have two tiers. The new appeals tribunal will bring together the jurisdictions of the Social Security and Child Support Commissioners, the Lands Tribunal, the Transport Tribunal and the new upper tier of the reformed tax tribunals. The Employment Appeal Tribunal will, however, maintain a distinctive identity (para. 7.17).

A permission requirement will be introduced to discourage unmeritorious appeals, together with the power of jurisdictional presidents to review tribunal decisions to avoid mistakes having to go to the appeals tribunal. Common principles will be developed with regard to precedent to enable the appellate tier to fulfil its role properly and consistently (para. 7.20).

Appeal from the second-tier tribunal is to be to the Court of Appeal, which will exercise the courts' traditional supervisory or appellate role. On this basis, it is suggested, there would be a limited role for judicial review in the High Court. However, the complete exclusion of the courts from their supervisory role is

a 'highly contentious constitutional proposition' and consideration is to be given to providing a statutory review on paper by a judge of the Court of Appeal (para. 7.28).

Timetable

Chapter 12 of the White Paper deals with the timing of the proposals. The timing is, of course, to some extent subject to the Government's legislative programme. Some of the proposals, however, do not require a change in the law and, within the next few months, a list of projects including a proportionate dispute project, a better information project and a shared accommodation initiative are to be launched.

In April 2005, the Tribunals Service executive agency will be launched on a shadow basis, taking over the administration of those tribunals currently within the DCA (including the Immigration Appellate Authority and the Finance and Tax Tribunals). In 2006, the Special Educational Needs and Disability Tribunal and the Employment Tribunals Service are to join the new service and, subject to legislation, the Council on Tribunals will become the Administrative Justice Council.

In 2007, the Appeals Service will be brought within the service and, again subject to legislation, the single judicial office will be implemented and the administrative appeals tribunal will become operational.

In 2008, the Criminal Injuries Compensation Appeals Panel and the Mental Health Review Tribunal are to join the new service and, in 2009, the remaining central government tribunals will become part of the system. That said, the White Paper states that the tribunal transfer dates are not set in stone and that the DCA will look to transfer tribunals at an earlier date if it is in the interests of all parties to do so.

Although the White Paper retains the focus on the needs of the user, it seeks to strike a balance between those needs and the provision of a 'balanced and systematic approach' to dispute resolution.

Housing adjudication, both in court and in tribunals, is to be the subject of a Law Commission review. It is intended that the Commission will report in May 2007, after which decisions as to the future disposal of housing disputes will be fully considered.

The user

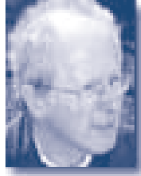
Although the White Paper retains the focus on the needs of the user, it seeks to strike a balance between those needs and the provision of a 'balanced and systematic approach' to dispute resolution (para. 10.3).

Access to appropriate advice, an explanation of the decision under challenge including a description of the role of a tribunal and any alternatives to tribunal proceedings and information about and clarity in procedures, are seen as legitimate requirements. They are not, however, regarded as absolute rights. The response to these needs, it is explained, must be proportionate and regard must be given to the relationship between costs and benefits.

Overview

The White Paper's proposals are ambitious and far-reaching. There is no doubt that reform in the field of administrative justice is needed. It is clear that tribunal resources already available, including expertise in adjudication, can be better used. It is to be hoped, however, that in managing change the established skills and experience of staff, members and tribunal heads will be taken fully into account and developed. The new system ought to provide a cohesive and cooperative vehicle for dispute resolution that will allow for the full involvement of judicial appointees and administrative officers. All it needs now is a name.

SIOBHAN MCGRATH is Senior President of the Residential Property Tribunal Service.



FILLING IN the DETAIL

MICHAEL ADLER *believes the White Paper's objectives to be laudable, but wishes it had said more about how they are to be achieved.*

The White Paper accepts the key recommendation in the Leggatt Report that tribunals administered by central government should be brought together into a unified Tribunals Service within the DCA, but it is more ambitious than Leggatt in that it aims to improve the entire system of administrative justice and justice in the workplace. To achieve this end, it argues that the mission of the new Tribunals Service and of the Administrative Justice Council (which will replace the Council on Tribunals) should be to help to improve administrative justice so that the number of disputes and the need for dispute resolution are reduced.

Although it is unfair to criticise Leggatt for focusing narrowly on tribunals, since this is what he was asked to do, this wider focus on administrative justice represents a sea change in government thinking and is very much to be welcomed. As the White Paper points out, '[administrative justice] embraces not just courts and tribunals but the millions of decisions taken by thousands of civil servants and other officials' (para. 1.6). Starting with the 'real-world problems' that people face, the White Paper argues that the aim should be to develop a range of policies and services that, so far as possible, will reduce the incidence of problems in the first place and, where problems do arise, will provide 'tailored solutions' to resolve the dispute in an appropriate way. It goes on to argue that '[w]hat we need to do is to create the unified system recommended by Sir Andrew Leggatt but transform it into a new type of organisation that will not only provide formal hearings and authoritative rulings where these are needed, but will have as well a mission to resolve disputes fairly and informally either by itself or in partnership with the decision-making department, other institutions and the advice sector' (para. 4.21). Who could disagree with that?

Improving first-instance decision-making

The White Paper argues repeatedly that government departments and agencies should get their decisions right first time. Although the new Tribunals Service will be expected to provide feedback on first-instance decision-making to government departments on the basis of the cases it has dealt with, and the Administrative Justice Council will be mandated to seek improvements in first-instance decision-making, there are no indications in the White Paper of how the government thinks this laudable aim can be achieved.

> *The White Paper argues repeatedly that government departments and agencies should get their decisions right first time.*

What if government departments and agencies continue to place greater emphasis on efficiency (i.e. on reducing the cost of decision-making) than on justice (i.e. on making the right decision and treating the citizen fairly)? This is clearly the case now with some government departments, e.g. the Department for Work and Pensions, the Home Office and their associated agencies, and there is nothing in the White Paper to indicate how the government proposes to tackle this problem.

Combining redress mechanisms

The White Paper points out that the existing mechanisms of redress do not take account of people's

problems 'as a whole'. Instead, they break them down into types and generally insist that people analyse what sort of redress they need and then choose the appropriate mechanism. People can currently complain to the decision-making department, an independent complaints handler, a Member of Parliament or the Parliamentary Commissioner for Administration, can instigate court proceedings (by raising an action of judicial review) or appeal to a tribunal. The White Paper believes that each of these redress mechanisms has its advantages and disadvantages and suggests that the main task for policy-makers is to find ways of combining the various mechanisms in order to enable people to select an appropriate one and thereby provide a genuinely responsive service. A 'one-door approach', for everyone who is dissatisfied with a decision or the way in which it was reached, is probably worth considering, although there is no mention of this in the White Paper.

At present, people often do not have much choice. If an applicant for community care, for example, wishes to challenge the decision of a community care worker at a tribunal, they cannot do so, because there is no statutory right of appeal to a tribunal against such decisions and, if they do anything at all, they will probably end up using the community care complaints procedure. On the other hand, if an applicant for Job Seeker's Allowance wishes to complain about the way in which they were treated, they will probably be told that they have a right of appeal to a tribunal and may well submit an appeal rather than use the agency's complaints procedure. In order to select an appropriate redress mechanism and provide a genuinely responsive service, the full range of redress mechanisms needs to be in place. Unfortunately, despite the references to 'complaints' and 'redress' in its title and its enthusiasm for ombudsmen techniques and alternative dispute resolution, the White Paper makes very few practical recommendations in this area and concentrates instead on the reform of tribunals.

In order to select an appropriate redress mechanism and provide a genuinely responsive service, the full range of redress mechanisms needs to be in place.

The idea of 'proportionate dispute resolution'

The White Paper is committed to the principle of 'proportionate dispute resolution', which it defines in terms of providing people with what they want – for example, a legal remedy or just an apology; a quick, cheap, simple, stress-free procedure or a rigorous, authoritative and final one; an informal procedure where the dispute is resolved consensually or a formal one where it results from adjudication.

The Tribunals Service and the Administrative Justice Council will both be enjoined to think about informal alternatives to tribunal hearings, in particular ombudsmen techniques and 'alternative dispute resolution' but, once again, there are no indications in the White Paper of how the government thinks these forms of dispute resolution should be organised.

Although there is a case for providing people with what they want, it will be important to ensure that they are exercising a genuine and informed choice between the options that are available. However, this is not the only consideration – it may be in the public interest that a case should be taken to a tribunal so that there can be a clear ruling on a point of law.

It is also debatable whether, in disputes between the citizen and the state, mediation – in which citizens might settle for less than they are entitled to – is appropriate. It is also not at all clear that this will lead to the improvements in initial decision-making to which the White Paper attaches so much importance.

The need for representation

On the need for representation, the White Paper adopts a very similar position to Leggatt. This will come as no surprise to those who have attempted to use the 'r' word in their dealings with the DCA. The White Paper concedes that 'some people will always need a lot of help, perhaps because of learning difficulties or physical

disability or language problems [a]nd others will need some degree of help until services are successfully made more responsive' (para. 10.1). However, it aims to create a situation where individuals in dispute with the state or who might be taking a case to a tribunal, or defending one, will be able to have their case resolved with little or no support or assistance (para. 10.1).

As I have argued before,[1] it is very unlikely that such a state of affairs can be achieved, while the law remains as complex as it currently is, in the short or medium term.

The White Paper notes that we already spend £200 million of legal aid on tribunal representation (on asylum and immigration, mental health and welfare benefits cases) and thinks that this is about right, although it does concede that there is also a case for looking at this issue in a more flexible way.

It argues that the extent to which individuals can and should be represented at the public expense depends on the nature, complexity and seriousness of their case, what needs to be done and the individual's own capabilities, and argues that full-scale legal representation at the taxpayer's expense in every administrative dispute or tribunal case would be 'disproportionate and unreasonable'.

. . . a strong case can be made that representation, by a lawyer or a lay expert, should be available to those who appeal to a second-tier tribunal and wish to avail themselves of it.

It is hard to take exception to this position and we clearly do need 'a balanced and systematic approach' (para. 10.3). However, having proposed the establishment of a two-tier Tribunals Service, in which appeals to the second tier require leave and are restricted to points of law, a strong case can be made that representation, by a lawyer or a lay expert, should be available to those who appeal to a second-tier tribunal and wish to avail themselves of it.

The White Paper notes that local authorities fund advice agencies and law centres, and that the Department of Trade and Industry funds Citizens Advice and the Advisory, Conciliation and Arbitration Service. It then asks whether this money is being spent in the best possible way to provide support where it is most needed and can confer the most benefit. Although this is a good question, it does not really attempt to answer it or commit itself to a procedure for doing so. However, on the grounds that many users want and would benefit from the provision of information and advice from an independent source, it announces that the DCA intends to work with the Legal Services Commission and the voluntary sector, through what will be called the 'Enhanced Advice Project', to pilot innovative schemes for providing information and advice 'within the resources available', i.e. out of existing budgets. The idea is a good one although the budgetary constraints are unfortunate.

Conclusions

There is clearly much to commend in the White Paper. For me, its most welcome features involve seeing tribunals as part of the broader landscape of administrative justice, recognising the importance of improving first-instance administrative decision-making so that fewer disputes arise and ensuring that, where disputes do arise, people have access to, and are able to make use of, appropriate forms of redress mechanism. The main weakness, as I see it, is that, with the exception of tribunal reform where government thinking is at an advanced stage, the White Paper provides too little detail about how most of its laudable objectives are to be achieved. Fortunately, there is nothing to stop the DCA from making good this deficit. Let us hope it will do so.

MICHAEL ADLER is Professor of Socio-Legal Studies in the School of Social and Political Studies at the University of Edinburgh.

[1] Adler, M (2001) 'Self-help is no substitute', *Tribunals* 8.2, pp. 18–20.

A TIME for INNOVATION

MICHAEL HARRIS *believes that the creation of a single tribunals body offers opportunities for tribunal chairmen and members to move between jurisdictions, and for the creation of a new post of registrar.*

So the White Paper is here and we have a Senior President Designate and Chief Executive Designate. The Paper is more imaginative and challenging than most of us anticipated. Although the core of our work, namely sitting in tribunals and deciding cases, will not change, much else will. It is too early for any of us to paint a picture of what it might be like in, say, five years time. But I have taken two of the changes that we know will take place – the single judicial office and a single administration – and tried to imagine just some of the issues that might flow from each of them, and suggest how we might develop them further.

A single judicial office

We will no longer be appointed to a particular jurisdiction. Instead, there will be a single tribunal office. That means that all tribunal members, though originally assigned to one jurisdiction, will at least be eligible to sit in other jurisdictions without repeating the appointment process.
Instead, their assignment to a new jurisdiction will depend on decisions made by the relevant senior judicial officers. However, assignment to a new jurisdiction will be far from automatic. The President of the new jurisdiction will need to be satisfied that the individual is at least as good as anyone applying for an appointment from outside the service.

There is a good deal of work still to do before we will know precisely how this arrangement will work in practice. It is not just a question of who will be best for the job. We will need to keep our eye on the balance of the organisation as a whole to ensure that it is appropriately invigorated with new blood.

A single appraisal scheme

Much flows from this new tribunal office. It will lead us to consider whether we need to put in place a common, all-embracing and quality-assured appraisal policy. How else will the assignment process work fairly? It must be open and transparent. A President will need to be satisfied that the reports he receives about the candidate in jurisdiction A carry as much weight as the reports about the candidate in jurisdiction B. It ought to be relatively easy to arrive at a common appraisal scheme. There are many good schemes in operation at the moment. We need to capture the best from them and build a uniform scheme based upon the excellent work that the JSB has already carried out on judicial competences. Had we remained separate, there would undoubtedly be practical problems in implementing such a scheme, not least because some jurisdictions would not have the resources to put it in place. But when we are all together, it is likely that we will be able to manage and share resources in such a way that every tribunal member can fully participate.

The appraisal scheme also needs to be all embracing, by which I mean that all tribunal members should be involved.

The appraisal scheme also needs to be all-embracing, by which I mean that all tribunal members should be involved. So far as I know, there is only one system that currently appraises salaried members. But there is no good reason why the scheme should be so restricted. Salaried (or full-time) members will also want to be

assigned to other jurisdictions and will need the evidence to support their applications. And salaried members also need to know whether they are doing a good job.

Of course, the scheme will need to differentiate between tribunal members, so that, for example, it captures the additional administrative responsibilities that many salaried members bear, but the essentials should be the same. All members, including, presumably, those in the second tier and Presidents, should be within its remit. Plenty of fun there!

Finally, the scheme needs to be 'quality-assured'. Anyone can write a monitoring report that merely says 'X seems all right to me'. Reports of value set out the evidence upon which the opinions are based. Some mechanism will need to be put in place assuring us that the scheme is being operated in the most effective way.

Training

The single tribunals office also has implications for our training programmes. Fairness will require that our members should receive similar levels of support and training. The White Paper says that the new Administrative Justice Council will, 'in collaboration with the JSB, advise the Senior President on the appropriate initial training policy and coordinated training programme'.

At the moment, the quality of training programmes varies considerably from one jurisdiction to another. This will be our opportunity to iron out those disparities. We may need to devise programmes that bring members from different jurisdictions together. That would certainly be more cost-effective. And there is considerable virtue in bringing members together. The more we do so the more we benefit from each other's experiences and the better judges we all become. Nevertheless, there are considerable logistical difficulties in separating out judgecraft (which is common to us all) and substantive law (which might only be relevant in one jurisdiction). The JSB will, I am sure, relish the chance to find a solution.

A single administration

The other change that we know will take place will be the creation of a single administrative body, the Tribunals Service, supporting all tribunals. We do not yet know how that support will work. There are a number of different models in existence. In the court system, processing is largely carried out locally. The Appeals Service has eight processing centres supporting some 140 venues. The Immigration Appellate Authority has a single back office carrying out many of the processing functions.

It should not surprise us if the new Tribunals Service were to adopt and, perhaps, take further the immigration model – namely a single, remote, back office carrying out all the processing functions.

It should not surprise us if the new Tribunals Service were to adopt and, perhaps, take further the immigration model – namely a single, remote, back office carrying out all the processing functions. Such a model would have significant implications for us, not least the issue of how best we would then be able to carry out interlocutory and case-management work. And how best would we be able to participate in alternative dispute resolution? Scanning and electronic transfer of files might be the ultimate solution but, before we get there, some solution would need to be found to prevent the endless transfer of files from the office to the tribunal and back.

Registrars

Part of the solution may lie in a suggestion that Sir Andrew Leggatt made in his report. He suggested appointing registrars. One or two jurisdictions already have a similar appointment, though they are civil service appointments rather than judicial ones. He saw such an individual dealing principally with case management, but also handling some other interlocutory issues and

playing a role in alternative dispute resolution. He thought the individual should be legally qualified, but would clearly occupy a more junior civil service grade than the current judicial Grade 7. Even without a single back office, there is much to be said for adopting this approach, but if there is a back office and if such officers are co-located with it, then such an approach would be almost irresistible. Their presence would significantly reduce the need to transfer files.

Would Sir Andrew's model go far enough? Most of us believe that case management should be carried out either by the individual who will actually hear the case, or at least by someone who is experienced in hearing such cases. To give that task to someone who will never see the inside of a tribunal room would not be a recipe for good-quality decision-making. Should we not therefore extend the registrar's role to include sitting, perhaps on the less demanding cases? Such an extension would also enable them to play a more confident role in exploring other ways for resolving disputes, as well as making their job immeasurably more interesting.

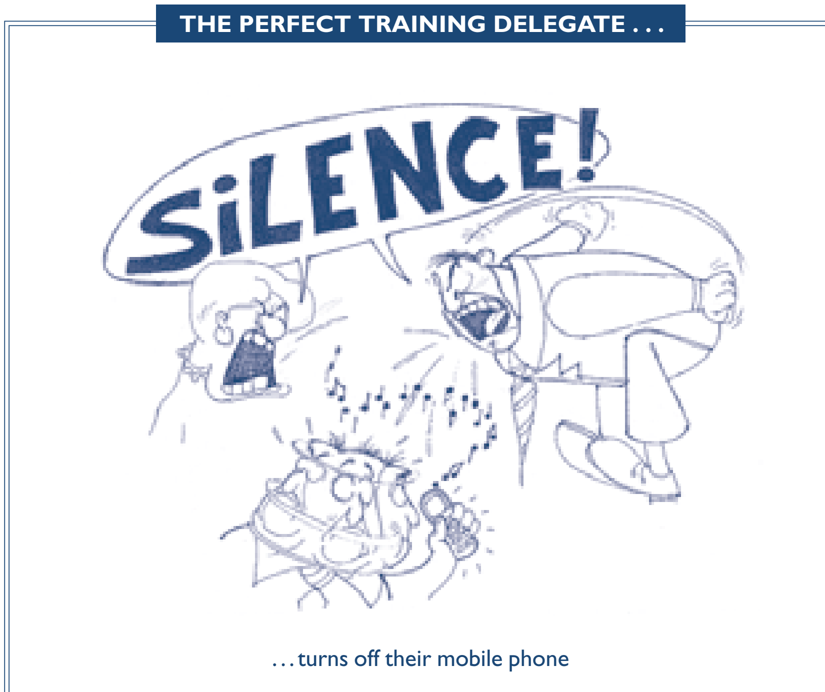
The implications are considerable. It would mean making the registrar appointment a judicial one, with the prospect of promotion up the judicial ladder. That would encourage much younger people to embark on a judicial career, rather on the Continental model. Such appointments would help us break away from the conventional, somewhat stuffy, image of judges as white, middle class and decidedly old.

We might also like to consider whether these appointments should be restricted to lawyers. There are many non-lawyers working in the employment, welfare rights, immigration and other fields who would be able to fulfil this role with distinction. There are also many civil servants of whom the same can be said.

There is at the moment too wide a gap between our administrators and ourselves. If we want to attract more able and better motivated staff then we should give them more challenging work than processing appeals. We should consider how, with perhaps a training input from us and under our overall supervision, they might tackle quasi-legal work and how, for those who wish it, they might be given the opportunity of embarking on a judicial career. Such an idea would be unthinkable so long as tribunals remained attached to their sponsoring departments, but now we have a chance to model the service in a different way. The fact is that everyone in the tribunal service, judiciary and administrators alike, are seeking to provide a public service that is judicial in nature. I am often struck by what I hear clerks saying in my own service, often expressing notions of fairness and justice that would do any judge proud.

There is no doubt that the White Paper has given us a wonderful chance to model a tribunal service that will be infinitely better than the service we can at present provide. The Paper encourages us to experiment and innovate. So let the debate begin!

THE PERFECT TRAINING DELEGATE . . .



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JUDGE MICHAEL HARRIS is the President of the Appeals Service.

The Council on Tribunals' Annual Conference, November 2004

LORD FALCONER, the ***Lord Chancellor***, describes the Government's rationale behind the reforms. 1–2

LORD JUSTICE CARNWATH, ***Senior President Designate***, considers the structure of the new service. 3–5

PETER HANDCOCK, ***Chief Executive Designate***, explains how the new administration will be created. 6–7

Additional conference views and speaker profiles. 7–8

CREATING CONFIDENCE THAT JUSTICE IS DONE

We stand on the threshold of what is arguably the biggest single change ever seen in the way in which justice is delivered in administration and in the workplace. The Tribunals Service will begin its transitional year next year, ahead of its formal launch in April 2006. It will bring tribunals together under one unified administration. And, in the Queen's Speech, we announced our intention to publish a Courts and Tribunals Bill during this session of Parliament. This is a crucial moment in the development of our Tribunals Service and I want to talk to you about why this work is so important and what the future looks like for tribunals.

Lord Falconer, the Lord Chancellor

Our aim in reforming our tribunals is the same as that which underpins our constitutional reforms and our criminal justice reforms: to improve the relationship between the individual and the State. This is not reform for its own sake, but reform to ensure that our public institutions remain connected to the people they serve.

Tribunals are an important part of this. It is critical that citizens have access to a system of redress and a means of vindicating their rights. The system must be clear and coherent for those who use it. It must give the citizen confidence that justice will be done – proportionately and swiftly.

Those aims are at the heart of what the unified Tribunals Service is all about.

The development of tribunals has a long history – the oldest 'tribunal', if I can call them that, the Special Commissioners of Income Tax – are just about to celebrate their 200th anniversary. But the process of developing tribunals as we know them today started in earnest during the First World War and led through to the 1940s, when new administrative tribunals were created as part of the welfare state.

This development continued with the Franks Report, followed by the Tribunals and Inquiries Act 1958, which established tribunals as an independent and expert part of the justice system, not an aspect of administration, carried out as part of the functions of a Whitehall department.

In the 1970s, we saw the creation of the rights not to be dismissed unfairly or to be discriminated against at work, enforceable through what are now Employment Tribunals. Such developments – coupled with the creation of and growth in ombudsmen over the past 40 years – have broadened the scope for redress and demonstrated new ways of dealing with cases.

With the publication of Sir Andrew Leggatt's highly persuasive report, *Tribunals for Users*, and our White

Paper, the pace of change is accelerating. A new executive agency will be created – bringing the administration of central government tribunals together within the DCA. But even before it has come into being we can see real improvements. Like the creation of a virtual management team of the key tribunal chief executives and secretaries to plan for the future. Or the new clearing house scheme for tribunals – making real our White Paper commitment to a shared accommodation initiative. This will mean faster and more convenient hearings for users and real savings.

The Courts and Tribunals Bill will provide the legislative framework for the new system. It will unify the judiciary and create a coherent judicial structure while maintaining expertise. It will formalise the role of the Senior President and create jurisdictional Presidents. It will create a Tribunals Procedure Committee to prepare rules. It will turn the Council on Tribunals into an Administrative Justice Council.

We intend that, in due course, all appointments to the judiciary in the new tribunal system will be made by the Judicial Appointments Commission. Unlike current tribunal Presidents, the judicial head of the new system will be appointed by the Heads of the Judiciary, not by a Minister. And the unified tribunal system will be administered by an executive agency working in partnership with the judiciary and accountable to DCA Ministers, not to the Ministers of various different Departments. Together, these measures should build public confidence in the independence of the tribunal system from government. We will lead the common law world in establishing beyond doubt the independence of tribunals from the executive.

In all this we have tried to look at the bigger picture. This means that the new and unified Tribunals Service will have a different type of task and remit to the organisations that it brings together and, indeed, to the courts. Its task is not just to operate a set of processes, important and necessary though that may be. It is to make sure that tribunals better serve people. Its task is to innovate. To develop proportionate dispute resolution. To find new and better ways of helping people when things go wrong. And, crucially, to press for change in systems and decision-making organisations to reduce the need for redress wherever possible.

So the key task for the new Tribunals Service is not just to run an efficient and effective executive operation, but also to take the initiative across Whitehall to ensure that more decisions are right first time and that disputes are resolved, so far as possible, without recourse to hearings before tribunals at all.

The DCA now has the task of co-ordinating redress policy across government. In addition to the creation of the new unified Tribunals Service, we will be tackling this new role in two ways. First, we will soon be publishing a set of principles that we hope will guide thinking inside and outside government on what the different redress mechanisms available – courts, tribunals, ombudsmen and others – should do.

Secondly, as our White Paper in July announced, we will be starting a series of pilot projects to test out new approaches to improving redress. We have already brought together the major tribunal systems to agree a common approach to improving information about redress. We are commissioning research on what our users and potential users need, and we are publishing research on how some other countries handle common issues in administrative justice. We are working with the Advice Services Alliance and others to devise schemes that improve advice and support to users. We have also agreed a joint project with the Legal Services Commission to look at ways of making tribunal-specific advice more widely and freely available – both directly to users and through advisers.

I believe this fresh and more coherent approach will be widely welcomed. It will mean new challenges both for government and for those who work in the administrative and employment justice fields as judiciary and as advisers and representatives.

I believe we can take forward reform of administrative justice and tribunals in a real spirit of partnership. And I hope and believe that by the time of next year's conference we will be in the midst of real change in the way in which we all serve the public.

A QUIET REVOLUTION PUT INTO PRACTICE

Since my appointment was announced in July, people have been asking me two rather basic questions: What is a Senior President? Which tribunals? Neither is simple to answer.

Lord Justice Carnwath, Senior President Designate of Tribunals

What is a Senior President?

The White Paper did not contain a job specification for Senior President, although it set out some general aspirations. It was envisaged that he or she would be 'strong and vigorous', and provide a 'single clear voice able to speak for the tribunals judiciary collectively'.

In the immediate future, the role would be 'strategic, co-ordinating and directing judicial input' into the development of the new service. In the longer term, the new leadership would have responsibility for developing more radical approaches to dispute resolution.

To me that lack of detailed definition is a positive advantage. I like the idea of a job for which I can write my own job specification. But I am certainly not ready yet to write it. My ideas have developed in the course of my reading and discussions since my appointment, but I have a lot more thinking to do.

What is already clear to me, and I am very grateful for it, is that all the major tribunals have their own well-established Presidents (under whatever name), who are already providing 'strong and vigorous' leadership. The last thing they need is me treading 'strongly and vigorously' on their toes. What I hope we can do together is to coordinate our efforts, and to build on the firm base that they and you all have created.

A useful forum already exists in the shape of the Tribunal Presidents' Group (TPG), originally established by Lord Justice Brooke to assist in the development of the White Paper proposals, and consisting of the Presidents of the main first-phase tribunals. I intend to work with that group both collectively and also by setting up smaller working groups to tackle particular issues.

I must emphasise that at present it is a 'shadow' post only, which is likely to continue until 2006. The intention is that, in due course under the new Courts and Tribunals Bill, the Senior President will be given a distinct constitutional role, with its own statutory functions and responsibilities. The precise details remain to be settled, not least the relationship of the Senior President with the other pillars of the legal system in the post-Concordat world. There is much thinking still to be done.

Which tribunals?

This is more difficult. Leggatt identified 70 tribunals in England and Wales. But he observed that only 20 hear more than 500 cases a year, and that many are defunct or 'moribund'. I suspect that no one knows quite how many active tribunals there are. To some extent, it depends on what you define as a tribunal and what you mean by 'active'. Appendix C of the White Paper has a list of some 50 Central Government tribunals, which are regarded as potentially within the scope of the new service, although some are on the Leggatt 'moribund' list.

The immediate focus of attention in the White Paper for the first phase (up to 2008) is sensibly on the tribunals already administered by the DCA, and the five other largest tribunals. The Appeals Service is

by far the largest in numbers, handling more than 200,000 cases a year in the field of social security. The present structure follows the merger of five separate jurisdictions under the Social Security Act 1998, a process that, like Leggatt, I regard as providing some valuable lessons for the present project.

Even within the first-phase list, it is difficult to find a single common theme, whether of subject matter or of geographical extent. Some of the DCA tribunals are concerned with highly specialised security issues (for example, the Pathogens Access Appeals Commission). Even if they are to be administered as part of the new service, I do not see them as falling naturally within the remit of the Senior President.

Of the others, the majority might be loosely described as 'administrative', in the sense that they are concerned with decisions made by government agencies of some form. But that description cannot of course be applied to one of the largest groups – the Employment Tribunals and Employment Appeal Tribunals – which are concerned with disputes mainly between private employers and employees. The Lands Tribunal has a foot in both camps. Its compensation and rating jurisdictions may perhaps be categorised as administrative. But it also has a significant share of private disputes, for example in relation to applications to modify restrictive covenants, and appeals from leasehold valuation tribunals.

Within the list, we also find every possible variety of geographical reach. Some extend to the whole of the United Kingdom, including Northern Ireland; others to the whole of Great Britain. Some cover only England and Wales; and others only England. Such apparent anomalies no doubt have to be accepted as part of the fascination of our British constitution, but I see no reason why they need complicate matters unduly. I am sure we will be able to work in cooperation with tribunals throughout the UK, whether or not they are within the new service. If it means that I am a Senior President without a definable geographical jurisdiction, so what? So long as I, and more importantly the Chief Executive, know at any one time which tribunals are within our direct responsibility, we should cope.

The second part of the Appendix C list exhibits an equally striking variety, ranging for example from the Aircraft and Shipbuilding Industries Arbitration Tribunal ('moribund', according to Leggatt) to the Sea Fish Licence Tribunal. Although the White Paper makes no immediate proposals for these tribunals (other than 'to transfer as agreed'), I would like to start preliminary work as soon as possible. If we are to construct a truly comprehensive service, we need to know which tribunals are still active, which are potential candidates for inclusion, what are their special problems, and what opportunities there are for amalgamation or joint working.

We also need to take account of the new tribunals that seem to be coming out of the Parliamentary mill with frightening regularity. Draft Bills currently before Parliament, or published in draft, include proposals for a Gambling Tribunal, a Pensions Regulator Tribunal and a Charities Tribunal.

What's in a name?

In English law and practice, we often use different names without clear distinctions – for example, courts, tribunals, panels, commissioners and so on. To me, the obvious name for the new service is 'the Tribunal Service', which will give it a clear identity distinct from the Court Service. If we want a generic name for the first-tier tribunal, my tentative suggestion is the Administrative and Civil Tribunal (ACT). In practice, I expect we shall use simple descriptive names for the different divisions, such as Employment Tribunal, Tax Tribunals and so on.

We are not talking about a purely administrative body, but one whose jurisdiction includes certain types of private-party disputes in specialised areas. My preferred name reflects the likely balance between the two elements. Whatever general names we adopt, they are not straitjackets. There is no reason to try to squeeze all the existing jurisdictions into one tier or the other.

I would suggest that the upper tier should be identified specifically as a 'court', to emphasise that its functions are more formal and concerned principally

with issues of law. Its functions in general will be for the most part indistinguishable from those of the Administrative Court from which it will take some of its work, and from which some of its judges are likely to be seconded. Appeals from it will go to the Court of Appeal with permission, just as they do from the High Court. For all practical purposes, it will be a Tribunal Appeal Court (TAC), and I think it may be clearer and simpler if we call it that. What will be new is the possibility of developing the practices and procedures of a specialist review court to provide guidance and support to the lower tribunals.

Serving the user

Service to the user was one of the basic tenets of the Leggatt report: 'No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases.'

I have been interested by a slim document published by the Council on Tribunals,[1] which seeks to test that statement by reference to available research evidence. They are sceptical about the role of unassisted parties. While their conclusions are a salutary warning against complacency, they do not surprise me over much. They are symptomatic of a fragmented tribunal system, in which there has been little opportunity for coordinated research and analysis.

Of course it worries me if appellants are confused by the appeal process. For most of them it will be a one-off experience, which they would much prefer to avoid. We can never make it easy, and we can never make it fun. What I hope we can do is to make sure that they have access to sources of information that explain, as simply as possible, what the process involves and what parties need to do to make the best of their cases. And we need to ensure that this information is available to the parties and their advisers or helpers whenever they need it, in whatever form (whether paper or electronic) is best suited to the purpose.

Similarly, we might wish that all parties had the help of professional advocates to present their cases before every type of tribunal. But in the real world it is not going to happen. Within the constraints of the system as it is, a well-informed and sympathetic tribunal, with specialised experience of similar cases, offers the best available means of arriving at a fair and principled result. One of the advantages of a combined system is that we can look at the issue in a systematic way and build on the work that has been done, for the benefit of all.

Opportunities and challenges

A key proposal of the White Paper is the creation of a single judicial office for tribunal members, with opportunities for assignment between jurisdictions. Potentially, this proposal offers great benefits: both for the system as a whole and also for tribunal members. However, as the White Paper also emphasises, it must not be at the expense of ensuring that those who sit in any jurisdiction have the necessary skills and specialist experience. So things are not going to change radically overnight. But in due course we should be able develop arrangements that will allow much greater flexibility in exchanges between different tribunals and between the tribunals and the courts.

The White Paper leaves it to us to work out together how these ideas will be put into effect. We will need a lot more information about the way the tribunal judiciary, professional and lay, work at present, and how they could best be redeployed to meet identified needs. We also need to develop suitable training programmes to enable members to prepare themselves for other specialisms.

So, there is the challenge. We have a unique opportunity to shape the delivery and development of the new system as we think it should be. Happily, we will be starting from a position of strength. For the most part, I do not expect dramatic changes for tribunal members or users. It can be a quiet revolution. But I would like to think that that this modest item in the Queen's Speech will do more for the cause of practical justice in this country than all the others put together.

[1] *Tribunal Users' Experiences, Perceptions and Expectations: a Literature Review*, by Michael Adler and Jackie Gulland, University of Edinburgh (Nov 2003).

CLEAR CRITERIA FOR MEASURING SUCCESS

I regard being asked to lead the new Tribunals Service as a huge opportunity and I am looking forward to it very much. It is a rare chance to be in at the beginning and to build something new, particularly in an area that has such an impact on the lives of so many people – perhaps more than any other part of the civil justice system. I take on my new post on 6 December when I will also become responsible for all of the existing DCA tribunals and their 1,300 or so staff.

Peter Handcock,
Chief Executive Designate
of the Tribunals Service

I want to talk about the major challenges and opportunities that lie ahead in creating the new agency and in delivering what I believe to be a truly radical mission to improve access to simple, speedy and effective redress.

I believe that there are three key elements to the vision for reform:

1 Creating a visibly independent system. The new Tribunals Service will remove any perceived association between tribunal judges and decision-making departments in government and will, I believe, of itself improve public confidence in the tribunal system.

2 Creating new partnerships with original decision-makers to increase the proportion that are right first time and developing a range of tailored dispute resolution processes so that disputes can be resolved without recourse to the formal tribunal process where appropriate. We will need to:

- Ensure that tribunal outcomes are reflected back to decision-makers systematically, so that, where necessary, the original decision-making process is improved.
- Establish our position as holding a legitimate interest in all stages of a process that might eventually lead to an appeal to a tribunal or give rise to a need for redress.
- Develop case-management systems that allow the early identification of cases for which an informal resolution process might be more appropriate.

3 Creating a new and distinctive organisation with a national infrastructure – buildings, people, IT and so on – but which preserves the character and identity of individual tribunals. This process has been under way for some time, in partnership with sponsoring departments and with the tribunals themselves.

It might be helpful if I remind you of the current timetable. In 2006, we will welcome SENDIST and the ETS; the Appeal Service will join in 2007; and CICAP and the MHRT will follow in 2008. On this timetable, by 2008, the service will have grown to employ around 3,000 staff across 180 locations with a combined budget of over £270 million a year. Something of the order of 9,000 judges and panel members will decide more than 600,000 appeals each year out of the total of around one million in all tribunals.

This is an ambitious timetable, but one I am confident we will meet or possibly advance a little as our joint planning with tribunals and their sponsor departments develops. But it is critically important that it should be delivered with no disruption at all to the day-to-day business of the tribunals.

The Chief Executives and managers of tribunals have already come together to create a virtual management team for the new organisation, with the aim of improving

service to customers by working together in advance of our formal launch. For example, there is a project under way to facilitate the sharing of venues – giving all tribunals access to each others' hearing facilities, and we are actively promoting interchanges, secondments and, where appropriate, the sharing of staff resources.

Despite the clear enthusiasm for change, there is inevitably anxiety, particularly for staff, but I expect for judges and tribunal panel members too, while the precise shape of the future is uncertain. We need to do all we can to resolve that, as quickly as we can. My commitment is to ensure that we communicate the developing picture as quickly and as widely as possible.

In a major change programme such as this, it is important to be clear about the criteria for measuring success. I suggest that the new service will:

- Have a distinctive identity, recognised by the public, who will know how to find and use it.
- Operate through a common estate, providing easy access and good facilities tailored to the needs of its users.
- Have judiciary, staff and panel members who feel valued.
- Be influential across government in spreading best practice on redress generally.
- Deploy a range of approaches to the early resolution of disputes so that cases reaching a tribunal hearing are those that genuinely need to be resolved through that formal process.

This is a radical and ambitious agenda; with your help and support I believe we can achieve it.

NOW TO FILL IN THE DETAILS

In addition to the three keynote speeches, the conference included additional views on the White Paper in which the speakers touched on the language of 'rights', devolution and matching 'the forum to the fuss'.

As President of the British and Irish Ombudsman Association, **Ann Abraham** was able to describe the way in which ombudsmen are able to offer a range of different remedies, tailored to the particular dispute in hand. It is the aim of each ombudsman to return individuals, as far as possible, to the position they were in before the facts occasioning the dispute took place. Where subsequent events have made that aim impossible, they have the power to recommend (and sometimes order) specific remedies, including the payment of damages or a method for calculating those damages, for the loss that has occurred. Unlike courts and tribunals, ombudsmen follow up cases as a means of ensuring a high level of compliance with the remedies they recommend.

The areas of public life and business in which ombudsmen exist are various and have not developed in any systematic way. There are gaps, and she believed that it could be argued that the whole area would benefit from a review, similar to the one carried out by Sir Andrew Leggatt.

While ombudsmen conduct investigations in private, a system of anonymised reporting of cases can ensure that they remain open to public scrutiny. She believed that it was essential that the new administrative justice system should facilitate the referral of cases between tribunals and ombudsmen as appropriate.

Carolyn Kirby, the Chairman of the Mental Health Review Tribunal for Wales, discussed the interrelation between the White Paper and the process of devolution in Wales. There were a number of different kinds of tribunal in Wales:

- Those where the English and Welsh tribunals operated their own, separate system.
- Those where they were part of the same whole.

She suggested that, in the interests of clarity, it might be best to create a separate Welsh jurisdiction for administrative justice, with the Welsh Tribunals Service under the aegis of the National Assembly for Wales. Such a system presented its own problems in terms of economy of scale. One example of this was training in jurisdiction-specific issues, most notably in legal developments.

She noted the duty for any public service in Wales to be capable of being conducted through the medium of the Welsh language. This included the conduct of hearings, including the early administrative stages of any case. This would continue to be part of the job for whoever was responsible for the new administrative justice system in Wales.

However that system was structured, it was paramount that English and Welsh jurisdictions worked together.

Roger Smith, the Director of JUSTICE, touched on the weaknesses that he saw in the White Paper, a document that he nevertheless described as logical. He bemoaned the fact that the discussion left behind the language of 'rights' (whether civil or human) and recalled that a great deal of good had been done since successive governments had started approaching reform from that viewpoint. He did not believe that users were primarily concerned with the characteristics of the tribunals system (whether speedy, fair, cost-effective), but with results. If the result was not in their favour, they wanted a clear reason why it had not been.

He believed that the ability to have a refusal of leave to appeal judicially reviewed should be retained. He agreed with Carolyn Kirby that additional thought needed to go into the interrelation of the new system with devolution in Wales and Scotland. The risks associated with the White Paper were that it could be described as being over-ambitious. It was also important that, in a generalist second-tier tribunal, the judges as well as the parties had the benefit of legal representatives expert in the area of law.

LORD JUSTICE CARNWATH

Sir Robert Carnwath was Chairman of the Law Commission for England and Wales between 1991 and 1994. He became a judge of the High Court, Chancery Division, in 1994. He has also sat regularly to hear cases in the Crown Office List, dealing with judicial review and administrative law. In September 2001, he was appointed to the Court of Appeal (commencing January 2002). In July 2004, he was appointed Senior President Designate of Tribunals by the Lord Chief Justice.

Previously, he was in practice as a barrister in the chambers of Geoffrey Rippon QC MP (now 4 Breams Buildings). His main areas of practice were local government, planning and environmental law, and administrative law. Between 1980 and 1985, he was Junior Counsel to the Inland Revenue. He took silk in 1985. He served a period as Chairman of the Administrative Law Bar Association.

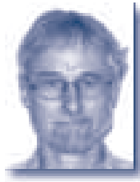
In 1989, he was the author of a report for the Department of the Environment on the enforcement of planning control, the main recommendations of which were enacted in the Planning and Compensation Act 1991. Between 1988 and 1994, he was Attorney-General to the Prince of Wales.

Outside the law, his main interest is music. He is chairman of the Britten-Pears Foundation, a former governor of the Royal Academy of Music, and a singing member of the Bach Choir.

PETER HANDCOCK

Recently appointed as Chief Executive Designate of the Tribunals Service, Peter has spent his entire career with the DCA since joining the Lord Chancellor's Department in 1971 and was appointed to the government 'fast stream' in 1985.

He has performed a variety of operational and headquarters roles, including Circuit Administrator for Midland and Oxford (1997–2001) and Director of Field Services (2001–03). Before his current appointment, he was acting Chief Executive of the Court Service and then Principal Adviser to the Secretary of State on criminal justice and DCA's Delivery Director.



QUESTIONING *the* MANTRA

In suggesting that there is no need for representation at tribunals, **ADAM GRIFFITH** *believes that the White Paper is failing to distinguish between the real world and an ideal one.*

The White Paper presents an interesting picture of how a new Tribunals Service might operate, combining a number of different forms of dispute resolution with improved case management of the more traditional roles carried out by existing tribunals.

When it comes to advice and representation, however, the White Paper seems to be somewhat contradictory. Much of what it says about the need for advice is very sensible, but it then returns to what sounds like a mantra – that there is no need for representation at tribunals, and indeed that the aim is to create a situation where individuals 'will be able to have their case resolved with little or no support or assistance'.

The problem seems to arise because the White Paper fails to distinguish between an ideal world and the real one. It suggests that the less formal and adversarial nature of tribunal hearings will, in time, reduce the need for representation, but ignores some important matters.

The first is the complexity of many of the cases that come before tribunals. The complexity of the benefit system is a clear example of this, and has been documented in many recent reports.[1] This is particularly the case with disability living allowance (DLA), which, along with attendance allowance, currently accounts for 44 per cent of all benefit appeals.[2] This complexity is evidenced by the high error rate reported by the National Audit Office. Around a fifth of benefit decisions contain errors of some kind. For DLA, the figure is 45 per cent. Second, the White Paper fails to consider developments that are likely to increase the need for advice. To take employment law as an example, the new statutory requirements for employees and employers to follow disciplinary and grievance procedures before an application is made to the employment tribunal will increase the need for advice to employees.

A further factor concerns the practice of key government departments. The President of Appeal Tribunals has complained about the falling attendance of presenting officers at Social Security Tribunals hearings, with figures showing attendance in only 24 per cent of cases.

According to the President: '[It] changes the dynamic of the tribunal and where evidence is deficient has the added risk of the tribunal appearing to be another tier of the decision-making process rather than the appropriate appellate authority.'

However: 'The Department's view is that providing presenting officers has resource implications, increasing the direct feedback from the Appeals Service has concomitant resource implications at the same time that the Department are seeking to reduce costs.'[3]

Finally, another important factor concerns the reasons why appeals are successful. According to the President's Report, in relation to successful benefit appeals:

- In 62 per cent of cases, the tribunal was given evidence not available to the decision-maker.
- In 39 per cent of cases, the tribunal formed a different view of the same evidence.
- In 24 per cent of cases, the medical report underestimated the severity of the disability.
- In 21 per cent of cases, the tribunal accepted evidence that the decision-maker was not willing to accept.
- In 20 per cent of cases, the tribunal formed a different view based on the same medical evidence.[4]

The need for advice

We believe that people contemplating or involved in tribunal cases will need advice:

- Because the law is complex, often increasingly so, and is very unlikely to become any simpler.
- Because the law changes frequently and some of these changes will increase the need for advice.
- Because employers and the state continue to make challengeable decisions in a large number of cases.

Advice is also needed in cases where a tribunal application or hearing is an option being considered. The need for advice of this kind will of course increase if some of the other proposals are implemented. Where there is a choice between different options for resolving a dispute, clients will need very specific, and often specialist, advice as to the pros and cons of different options. Where an ADR option such as mediation is chosen, clients will also need advice throughout the process.

There is no doubt that representation increases the chances of success.

The need for representation

In our view, the White Paper underestimates the difficulties for appellants and applicants, and ignores a considerable body of research on this subject. According to the review commissioned by the then Lord Chancellor's Department:

'Most of the research concludes that appellants find it difficult to represent themselves. When people have the opportunity to be represented . . . they tend to make use of it. Although some appellants choose to represent themselves, they often find that the process is more complex and legalistic than they had imagined and regret their decision afterwards. There is little research-based support for one of the central tenets of the Leggatt Report, namely that "a combination of good-quality information and advice, effective procedures and well-conducted hearings, and competent and well-trained tribunal members" would make it possible for "the vast majority of appellants to put their cases properly themselves", i.e. without representation.' [5]

There is no doubt that representation increases the chances of success.

In relation to benefits appeals, the National Audit Office report quotes Quarterly Appeals Statistics, from April to June 2002:

- Where there was a paper hearing, 23 per cent of appeals were successful.
- Where there was an oral hearing, 52 per cent succeeded.
- Where the customer was accompanied by a representative, 67 per cent of appeals were successful. [6]

We are not suggesting that publicly funded representation is necessary in all tribunal cases. We agree with the White Paper that the extent of publicly funded representation should depend on 'the nature and complexity of the task to be undertaken, the individual's own capabilities and the seriousness of the issues'.

We believe that the need for such representation can best be met by the expansion of the resources available to the advice sector, whether this comes through the legal aid scheme or from some other source. We would be happy also to see an expansion of the role played by solicitors in private practice. However, the reality is that most advice and representation in the field of social welfare law is provided by the advice sector.

We are not saying we are perfect. Far from it. However, we are there, our clients know we are there, and we are doing the job already.

ADAM GRIFFITH is a policy officer at the Advice Services Alliance.

[1] See *Getting it right, putting it right* (National Audit Office) and the Public Accounts Committee report HC 406.

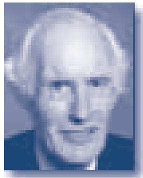
[2] See also the President's Report 2003–2004

[3] Ibid, p.7

[4] Ibid, p.14

[5] Michael Adler and Jackie Gulland *Tribunal Users: A Literature Review* (Council on Tribunals, 2003), p.27

[6] National Audit Office, op cit, p.44



The CHALLENGE *of a* WIDER REMIT

TONY NEWTON *considers the way in which the Council will employ its increased authority and the ways in which it has already begun to adapt itself for its new role.*

The Council has welcomed the attention that government has given to tribunals in recent years, which began with the appointment of Sir Andrew Leggatt in May 2000 to conduct a review of tribunals. The latest development, the publication in July 2004 of the White Paper, *Transforming Public Services: Complaints, Redress and Tribunals*, marks the most significant set of government proposals regarding tribunals since the late 1950s, when the Council on Tribunals was originally created.

The Council has strongly supported a central strand of the White Paper proposals, namely the reform and unification of the tribunal system, which carries forward the main recommendation of Sir Andrew Leggatt's report, *Tribunals for Users*, published in March 2001.

Planning for the first phase of unification is now well advanced and the Council will be supporting the process. Through my membership of the Tribunal Service Programme Board and a range of other contacts, the Council is well placed to undertake the task it has been asked to perform: to scrutinise – and if necessary to challenge – the way the new organisation is being established, particularly from the perspective of the tribunal user and the advice sector.

In the slightly longer term, the Council will be making recommendations as to which tribunals should be brought into the Tribunals Service after the first phase of unification is complete.

> *. . . the Council will be making recommendations as to which tribunals should be brought into the Tribunals Service after the first phase of unification is complete.*

The White Paper has also set tribunal reform into a wider context: that of the administrative justice 'landscape' more generally. The Government sees the proposals in the White Paper as an early step in the wider strategy it is developing to 'transform the civil and administrative justice and the way that people deal with legal problems and disputes'.

Considerable emphasis is placed on 'proportionate dispute resolution', an approach that aims to help people avoid problems in the first place and, where they cannot, provide tailored solutions to resolve the dispute. Tribunals in their present form are seen as part of a wide range of possible solutions.

All this sets a major challenge for administrative justice for the future, and the Council is to have an important part to play. The White Paper proposes that the Council on Tribunals will evolve, by April 2006 if the Government's legislative timetable permits, into a new organisation, an Administrative Justice Council (AJC), with a much wider remit and a strengthened role.

The Council is to retain its existing supervisory role over tribunals, but in addition it will keep under review the administrative justice system as a whole to ensure that the relationships between the components within it, including ombudsmen, courts and tribunals, are clear, complementary and flexible. The AJC will 'focus on improvements for the user across the whole administrative justice field'.

The Council's role is to be strengthened in a number of ways, by:

- **A new Government Code of Practice.** This will ensure the Council is consulted on all forms of legislation affecting tribunals. The Council will be given specific authority to publish its comments on legislation, should it think it appropriate.
- **The attention of Select Committees.** The Council's Annual or Special Reports, when published, will be drawn to the attention of the relevant Select Committees.
- **Recommending research priorities.** The AJC will make recommendations to the DCA on the priorities for future research in its field of interest and will have a role in disseminating, and lending authority to, research findings.

Although the formal creation of the AJC is currently over a year away, the Council has already begun adapting itself to a new role in the future. It particularly welcomes government plans for a stronger focus on the needs of the public and users for the new AJC, as this very much reflects the Council's own view about the priorities for the future and builds on work the Council has been doing over recent years.

The Council's most recent initiative in this area was in October 2004, when it was pleased to host a workshop for the voluntary and advice sector to consider issues concerning advice and representation arising from the White Paper and the way forward on proportionate dispute resolution. More than 50 delegates attended and the speakers included representatives of Legal Action Group, Advice Services Alliance and Citizens Advice. Other similar workshops are planned for the coming months.

These conferences are examples of a developing facilitative role for the Council, through which diverse organisations and individuals who share an interest in administrative justice are brought together to network and to exchange ideas and good practice.

The Council's annual conferences have grown from quite small beginnings a few years ago to an event for nearly 200 delegates in November 2004. Our Scottish Committee will be arranging their third conference for tribunals in Scotland in 2005 and a conference for Wales is also being planned. The Council is also planning to launch an electronic bulletin, for distribution by e-mail, early in the New Year to help it communicate with its growing audience.

. . . members will devote a greater proportion of their time in developing contacts with, and seeking the views of, individuals and organisations who share the Council's extending field of interest . . .

Members of the Council will also be working in different ways in the future in order to reflect the Council's changing role. Tribunals have always said that they found visits by members to observe hearings a valuable part of the Council's work, and they find the feedback after visits useful. These will remain a key part of the Council's work, to ensure that its views remain soundly based on experience of day-to-day business. In addition, members will devote a greater proportion of their time to developing contacts with, and seeking the views of, individuals and organisations who share the Council's extending field of interest and those able to give a public or user perspective in particular.

After nearly 50 years, the Council is about to evolve into a new organisation with greater authority and a much wider remit. It relishes the challenges ahead. Its work on the transition has begun, but one thing I hope will remain unchanged is its productive partnership with the Tribunals Committee of the JSB, which has already played an important part in strengthening the professionalism with which tribunals go about their work.

LORD NEWTON OF BRAINTREE is Chairman of the Council on Tribunals.

BASED *on* COMMON STANDARDS

Maintaining adjudicative skills within the new Tribunals Service means creating a system in which individuals feel supported. JEREMY SULLIVAN *describes the ways in which the JSB intends to help.*

Among the various training-related messages that we can extract from the White Paper, the strongest of all is that high-quality training is fundamental to the delivery of a first-class administrative justice system. This is, of course, a principle that we ourselves have always sought to uphold. As tribunal reform gathers pace over the next few years, how can we make sure that we are delivering training that continues to lay strong foundations for a just and effective tribunal service?

Fortunately, the priorities for training outlined in the White Paper make reference to existing training provision, commending the competence-based approach developed by the JSB and the move towards standards promoted by the JSB and the Council on Tribunals. We are told that 'there will be a strong emphasis placed on training in judgecraft skills for all judges'. In consequence, the White Paper contains no unpleasant surprises for the JSB, only the recognition that we will need to take on a strengthened role in order to meet the demands of a more intense and consistent programme of judicial training. To some extent, the structure is already in place to achieve this. Some changes, of course, will happen more quickly than others, but the overall direction is one of both expansion and consolidation.

Core competences

If tribunal chairmen and members are to become more flexible both in the range of jurisdictions in which they sit and in the nature of dispute resolution in which they engage, without compromising their specialist expertise, then they will need to acquire an even greater range of skills. In order to facilitate this, we intend to both increase and develop further our training provision.

Induction training is vital for every newly appointed tribunal chairman. Although we offer this on a bi-annual basis through our *Tribunal skills development course*, we aim to make sure that in future it is made available to all those who are sitting for the first time, particularly where they are appointed to tribunals that have yet to develop effective induction training programmes with a comprehensive judgecraft content.

Responsibility for judicial skills does not stop at induction. Experienced chairmen should be able to demonstrate higher levels of competence, yet still remain up to date with developments in all the jurisdictions in which they sit. In recognition of the need for continuation training, we will be offering a new training programme, the *Tribunals advanced skills course.* Training for those panel members who do not take the chair must not be overlooked. Although much of the JSB's training is currently aimed at legally qualified chairmen, we will need to consider in future how we are able to offer training in panel skills for specialist and lay members of tribunals.

Beyond the tribunal room

The *Training for tribunal trainers* programme is being adapted to reflect developments in computer-based training and distance learning. The JSB has also published a new *Tribunals' Training Handbook*. Competence in adjudicative skills needs to be supported by the environment in which adjudicators operate. This means creating an organisation in which individuals feel supported, problems can be rectified and administration runs smoothly. Achieving these ideals will depend at least partly upon furthering skills in related areas such as appraisal, mentoring and management. The year 2004

saw the publication of *Guidance on Mentoring* and we are hoping to reinforce this guidance by delivering and supporting training for tribunal mentors. Earlier this year, we also piloted a course entitled *Managing judicial leadership*, which included tribunal presidents as well as judges from other branches of the judiciary, and we expect to be able to offer further management skills training to tribunal presidents and regional chairs in the future.

Having recently published the *Guidance for Appraisal*, we are now expanding our appraisal skills training. We will continue to provide appraisal training to both single tribunals and appraisers from a range of jurisdictions, supporting the White Paper's perception of appraisal as a touchstone of quality assurance within and across jurisdictions.

The new vision

The above developments have partly progressed as a result of the Leggatt Report's contention that the Government's major objectives for unification were to 'strengthen judicial management and appraisal and to deploy legally qualified members more fully across jurisdictions'. For this to happen, tribunals will need to operate not only within a unified structure, but also upon the basis of common standards and principles, such as those outlined in the JSB's *Competence Framework*. In practice, however, the character of tribunals varies so considerably, on both a legal and operational level, that training policy and practice are rarely consistent. Nor can they be, of course, given differences in size, procedures and practices as well as culture and, of course, legal frameworks. Nevertheless, the overall transition towards unification should provide a valuable impetus for further development of standards that are recognised as benchmarks throughout the tribunals service. If national standards of performance and competence are common currency, not only in judgecraft but also in areas such as appraisal and management, then this will facilitate the cross-fertilization of expertise that unification hopes to encourage.

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Quality assurance

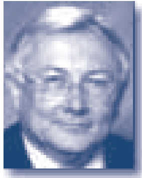
Collective, cooperative standards of best practice will need to be monitored if they are to be maintained and improved. As the Tribunals Service evolves, supervision of this audit process will fall largely within the remit of the Administrative Justice Council, which will evolve from the Council on Tribunals as a more authoritative regulatory body, with responsibility to 'scrutinise and challenge' and to collaborate with tribunals themselves on performance measurement and benchmarking.

We would envisage the JSB undergoing a similar, albeit more modest, transformation in relation to responsibility for training. In the words of the White Paper, we will provide a service of 'quality assurance' to individual tribunals, ensuring that they can deliver (or have access to) training that meets 'agreed national standards'. We are in the process of expanding our tribunals team to enable us to undertake this quality assurance or 'accreditiation' process. We would emphasise that this will not be 'inspection' in the pejorative or critical sense. On the contrary, we hope that it will be a catalyst for a greater recognition of effective training practices in tribunals and how they can be shared and perpetuated throughout the new service.

To achieve these goals, we will work closely with the Senior President, Lord Justice Carnwath, and we will continue to build on our already close ties with the Council on Tribunals. I am keen that we should also develop strong links with the DCA and the new Tribunal Service.

Above all, our partnership with the tribunals themselves is perhaps the key factor if the JSB is to take an active role in promoting the evolution of tribunals training in the new system of administrative justice.

MR JUSTICE SULLIVAN **chairs the JSB's Tribunals Committee.**



GETTING *it* RIGHT FIRST TIME

BERNARD QUOROLL *believes that the White Paper's enthusiasm for mediation and other forms of ADR has implications for government departments and local government, as well as for the new Tribunals Service.*

The first objective for Sir Andrew Leggatt's report on the review of tribunals was to ensure that there are 'fair, timely, proportionate and effective' arrangements for handling disputes. It is no surprise then that the White Paper puts so much emphasis on proportionate dispute resolution. In fact it goes further, placing dispute resolution firmly in the wider context of what is called 'the landscape of administrative justice', following the idea that we need to look not just at how disputes are handled but how to avoid them arising in the first place. Better original decision-making, more effective internal review processes, early access to ombudsmen, pre-case enquiry and learning and feedback techniques as well as more use of mediation should all play a part in reducing reliance on a time-consuming and stressful experience.

It is against this background that the White Paper places such emphasis on the use of alternative dispute resolution (ADR) in reducing or avoiding reliance on the tribunal system, and paragraph 2.11 lists some of the processes available, including mediation.

Mediation is not just one technique, however, but covers a wide variety of skills including early neutral evaluation, neutral chairing, conciliation and independent review. In the tribunals' context, I would define mediation as the use of a neutral, independent person to assist two or more parties (one of which could be the state), to reach a decision themselves about their dispute, often within procedural rules.

Conciliation, as one form of mediation, has existed in the employment tribunal system for some time and there have been increasing references to its potential in secondary legislation. But workplace mediation schemes have the potential to avoid recourse to employment tribunals at all, allowing parties to reach confidential agreements on unfair dismissal and discrimination claims (which can include non-financial settlement options such as apologies). Direct negotiation (arguably the best form of mediation) has been a feature of tax and valuation tribunals for many years.

But mediation has yet to establish itself firmly within the tribunal world. The White Paper heralds a determined attempt to change that. To do that, mediation will need to be 'built in' as an integral part of the processes of departments of state and local government, based on clear understandings about when it can help to aid resolution of disputes.

There is no 'one size fits all' scheme that enables the state simply to pass a matter back to the parties. In many cases, such as where benefits entitlement or penalties are involved, the process may not be a negotiation. However, there will be cases where both state and individual can revise their positions on hearing from the other side in a legally safe environment, or where, with better understanding of the issues, discretions can be applied in different ways.

Leasehold Valuation Tribunals could, for example, encourage mediation between a leaseholder, tenants and an appointed manager or even between tenants, rather than just respond to applications from parties in conflict. Mediation may work best, however, in support of evaluative approaches, for example in helping an unrepresented appellant to understand the strengths and weaknesses of his or her case. It may also have greater potential closer to the time of the original decision, before a complaint has even reached the tribunal system.

Among the benefits traditionally ascribed to mediation are that it:

- Enables the parties themselves to reach an agreement.
- Reduces cost and formality.
- Gives complainants an opportunity to have their say.
- Can be quick.
- Encourages creative solutions.
- Enables continuing relationships.

Each benefit promoted by mediation does, however, raise its own issues. First, there may be little room for manoeuvre in the application of rules relating to statutory entitlements, although outcomes can often depend on the establishment of facts or explanations that mediation can facilitate.

Each benefit promoted by mediation does, however, raise its own issues.

Second, mediation does not exclude the use of advocates or representatives – indeed they can be just as necessary to a successful outcome as in court or tribunal hearings, particularly where complex issues are at stake. In reality, advocates and the cost of them are sometimes a necessity, notwithstanding a well-intentioned desire to use them less or substitute advice centres. The White Paper offers few new prescriptions for responding to this dilemma.

Third, mediations can be as stressful for the parties as a tribunal hearing, even though great care is taken to create the most informal setting possible. They also need to be managed carefully to avoid adding to the overall timescale, although nothing prevents mediation in parallel or as an integral part of other proceedings.

Finally, continuing relationships may be more apparent than real – how far do you expect to have a relationship with your planning or tax inspector?

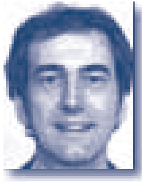
It is not usually part of the mediator's role to ensure that justice is done in quite the same way as judges or chairmen, who have to maintain their independence, while making sure that an unrepresented party is helped sufficiently to ensure that the issues are given a fair hearing. The mediator's role is to act impartially while brokering an agreement between parties. What appears to be a more inquisitorial role may be adopted with each party in private, to help them assess the strengths and weaknesses of their cases. Time may also be spent in advance working with individuals, to make sure they understand what they need to do. A party to a mediation can still of course arrive unrepresented, unprepared or unable to present his or her case effectively.

Notwithstanding such ambiguities, mediation does have enough potential to make it a serious contender for application in tribunal situations. The Australian Administrative Appeals Tribunal (AAT) procedure now provides for a combination of methods: conferences at which an outcome may be negotiated, directions hearings, and private voluntary mediations, all en route to a hearing if that becomes necessary. Anyone involved as a mediator will not preside at a subsequent hearing. The AAT website reports an 80 per cent success rate. So why have we not experimented more here? Lack of a single system may be one reason.

In summary, mediation is one of a range of potentially useful tools, capable of reducing recourse to tribunals within a proportionate approach. It may, with imagination, be incorporated within tribunal rules to speed the process of reaching fair and defendable outcomes. It is, however, only part of a much wider approach sought by the White Paper, to get decisions right first time, to improve intermediate processes and to create learning systems that, in time, will prevent some matters coming to tribunals at all.

That is a wholly worthy ambition for the new Tribunals Service and other government departments and local government. Perhaps the overall approach should become less judicial in outlook and more about good administration.

BERNARD QUOROLL is a member of the Council on Tribunals, a solicitor and a Centre for Effective Dispute Resolution accredited mediator.



NOT *the* FINISHED ARTICLE

BRIAN THOMPSON *flags some points in the White Paper that require further deliberation and refers for comparison to the comprehensive complaints scheme in the National Health Service.*

The DCA's policy for civil and administrative justice states that formal adjudication, whether in the courts or in tribunals, is to be avoided whenever possible. The White Paper runs through some forms of alternative dispute resolution, which all have their plus and minus points. The White Paper states that research is needed to identify and classify the types of disputes and the users' desired outcomes so that the form of dispute resolution can be matched to the type and outcome. But there needs to be a mechanism to help the user learn whether or not something has gone wrong – education, information and advice must accompany proportionate dispute resolution.

Any new arrangements should ensure that all relevant information is unearthed at an early stage. Early access to advice may lead to a correct outcome and forestall an unnecessary challenge. The research clearly shows that success rates are improved if there is representation [1] and I would suggest that, even with a facilitative procedure, an unrepresented, albeit advised, user would not be as successful as one who is represented.

There is a lack of clarity about who will decide on the best form of dispute resolution and whether the users have a say.

The new institution

There is a lack of clarity about who will decide on the best form of dispute resolution and whether the users have a say. New thinking is to be encouraged, however, in devising forums of users and their advisers to meet, and report to, the governing board of the new institution. One of the most important functions of that institution will be the contribution it can make to improving decision-making, and the White Paper notes that this will be a cooperative venture. A recent initiative by the Parliamentary and Local Government Ombudsmen is the writing of an annual letter to government departments and local councils, pointing out the key themes or lessons learned from their work.

The NHS

The NHS complaints procedure combines a variety of forms of dispute resolution, including hearings over three tiers, and it is somewhat surprising that the White Paper makes no mention of it. The procedure was introduced in 1996, an evaluation conducted and published in 2001 [2], and a reform programme for England published by the Department of Health in 2003 [3]. Implementation of reform across the three jurisdictions of England, Scotland and Wales has differed slightly, but broadly conforms to the analysis and recommendations in the 2001 evaluation. Wales implemented its reforms in April 2003, England in July 2004 and Scotland's are expected for December 2004.

As originally introduced, the procedure included a first stage, termed 'local resolution', in which speedy informal resolution of a complaint might occur but investigation and/or conciliation could be used. If the complainant was not satisfied with the outcome at the first stage, it was possible to seek to enter the second stage of 'independent review'. Progress to the second stage was not automatic. If the convenor was satisfied that it was appropriate, a panel of three lay people was

established, assisted where necessary by a clinical assessor, to hear the complaint. If a panel was not convened or the complainant was dissatisfied with its decision, a complaint could be made to the Health Service Commissioner or Ombudsman.

The 2001 evaluation found that complainants at both stages were not always taken seriously and dealt with appropriately and that they needed support in making their complaints. The second stage, like the first, was organised at the trust against whose staff the complaint was made. The convenor was a non-executive member of the trust board and was not perceived to be independent. In addition, the number of cases they dealt with was not sufficient to allow for expertise and consistency to develop. The lessons from complaints were not properly learnt and acted upon to improve services.

The NHS scheme provides one model as to how different forms of dispute resolution can be inter-related and structured . . .

In the reforms, the biggest changes were made at the second stage, which was made completely independent of the trusts. An Independent Review Secretariat was created in Wales, and in England the Healthcare Commission was given the task of operating independent reviews. Clearer criteria have been developed to determine what actions should take place, panels of three lay people completely independent of the NHS hear the complaints, and their reports seek the resolution of the individual complaint and to improve service generally. In England and Wales, the dissatisfied complainant may still seek to refer the complaint to that jurisdiction's Health Service Ombudsman. In Scotland, the independent review stage will be conducted by the Scottish Public Service Ombudsman, thus collapsing the three stages into two in that jurisdiction.

The conduct of the hearing by the panel is left to the discretion of the panel members. The guidance emphasises that it should not be adversarial. In England, the practice of allowing a complainant to be accompanied by a legally qualified friend, but not allowing that person to act as such, is now part of the legislation.[4] The Healthcare Commission guidance states that normally the complainant and the complained against will be in the same room to hear evidence given by others. It is suggested that the panel could be conducted as a series of interviews if the complainant is unwell.

The Welsh guidance retains the ban on legal representation and suggests that the panel may decide to hold separate meetings with the complainant and complained against and, if new evidence is produced, then the panel chair should find out why it was not produced earlier and then decide if it is relevant and if it should be circulated. So there is a choice between (a) having an adjournment to allow the other party and the assessor to examine the new material and to decide if it should be admitted at this stage, and (b) refusing to accept it and proceeding as planned.

In England, each trust has its own Patient Advice and Liaison Service, which may assist with queries and complaints, but there is also the Independent Complaints Advocacy Service that can support a patient through the complaints procedure. Support mechanisms are in place in Wales through the community health councils and are being planned for the local health councils in Scotland.

The NHS scheme provides one model as to how different forms of dispute resolution can be inter-related and structured as well as provision of a gateway and support for the user.

BRIAN THOMPSON is a Senior Lecturer at Liverpool Law School.

[1] H. Genn and Y. Genn, *The Effectiveness of Representation at Tribunals*, (LCD, 1989) and R. Thomas [2004] *Public Law* 612.

[2] J. Posnett et al., *NHS Complaints Procedure National Evaluation*, (Department of Health, 2001).

[3] *NHS Complaints Reform: Making Things Right,* (Department of Health, 2003).

[4] SI 2004, No 1768, reg 18(6).

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Aims and scope

1. To provide articles to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before them.
2. To address common concerns and to encourage and promote a sense of cohesion among tribunal members.
3. To provide a much-needed link between all those who serve on tribunals.
4. To provide readers with material in an interesting, lively and informative style.
5. To encourage readers to contribute their own thoughts and experiences that may benefit others.

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