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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 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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# EDITORIAL



The reform of the administrative justice system continues to exercise the minds of those with an interest in the workings of our tribunals. During late 2005 and early 2006, the Nuffield Foundation held a series of six seminars on the subject, at which a range of distinguished British and international speakers shared experiences and viewpoints. On page 9 of this issue of the journal, Professor Maurice Sunkin, who organised the seminars, considers some of the themes that emerged during that series, including the general feeling that there is a need to keep up the momentum for change established by the ambitious White Paper, *Transforming Public Redress: Complaints, Redress and Tribunals*.

I am writing this editorial in the week before the Council on Tribunals' annual conference, which this year is concerned with the whole question of providing feedback to decision-making departments, with a view to developing a system in which as many disputes as possible are resolved at an early stage. On page 15 of this issue of the journal, John Seargeant describes some of the ways in which the Public Legal Education and Support Task Force (PLEAS) is taking that process one stage further, in its efforts to educate individuals in ways of resolving their day-to-day legal problems before they have even reached a stage requiring a decision to be made by another body. And on page 14, Paul Stockton outlines the work of the 'conference registrars' in Australia responsible for the early resolution of over 70 per cent of the cases received each year by the Administrative Appeals Tribunal.

Chairmen and members of tribunals work, in the meantime, to create the right conditions for a high quality of adjudication and a fair hearing. On page 2 of the journal, Professor Jeremy Cooper considers whether the use of tape recording in tribunals leads to an overall improvement in the quality of justice – and what the potential negative sides of recording a hearing might be.

Finally, on page 18, Beáta Connell describes the new rules for handling complaints about the tribunals judiciary – and points out that tribunal members may be asked for comments on complaints about others, if not themselves.

As always, comments on any aspect of the journal are most welcome.

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# GETTING *it* TAPED

JEREMY COOPER *considers the pros and cons of using tape recorders to provide definitive transcripts of tribunal proceedings.*

This article examines the use of tape recording in tribunals from a number of perspectives, asking the following questions:

- What are the broad purposes of using tape recorders in tribunal settings?
- How extensive is the current use of tape recorders across the tribunal sector?
- What is the current state of the law relating to the use of tape recorders?
- What are the effects, actual or potential, of the use of tape recorders upon the quality of justice?

## Broad purposes

There are two reasons put forward by individual courts and jurisdictions for tape recording their proceedings. The first reason is that tape recording provides a transcript of the proceedings for the tribunal judge or panel that is necessary to preserve their status as a ‘court of record’.<sup>1</sup> Even where the tribunal is not a court of record, procedural fairness in any event demands this level of objective accuracy. Tape recording generally guarantees accuracy, quality of record, and availability to allow the judge or panel to revisit the record if necessary, as part of their deliberations. The second reason is that tape recording provides applicants with a reliable and accurate record of the proceedings for the purposes of analysis, and the consideration of an appeal. Let us examine each of these reasons in turn.

There are two sets of circumstances in which these broad purposes need to be addressed – where the tribunal itself makes an official recording of the proceeding, and where the proceedings are recorded by a party.

## Recording by the tribunal

The table on page 3 summarises current practice in relation to the use of tape recordings across the tribunal sector.

## Recording by a party

Under section 9(1) of the Contempt of Court Act 1981, it is a contempt of court for anybody to make a tape recording of tribunal proceedings except with the leave of the tribunal. This provision does not, of course, apply to the official transcripts of proceedings in tribunals, where used.

There is, however, some uncertainty as to whether the Contempt of Court Act 1981 applies to *all* tribunals, and to this end the Council on Tribunals in 1982 offered the following guidance.<sup>2</sup>

- In relation to private hearings, tribunals would always be justified in refusing to allow tape recording.
- In relation to public hearings, permission should only be sparingly used, the Council being particularly concerned about an adverse impact on participants of the use of tape recording, together with the possible distraction such recording might cause to participants. The Council commented:

‘We are particularly concerned that participants [in a tribunal hearing] should not be given cause for worry or fear . . . The knowledge that what they say will be preserved and might be replayed, for whatever purpose, might well make them more nervous and flustered. We would not want proceedings to be disturbed, participants to be distracted, or informality to be inhibited.’

<b>Use of tape recordings in tribunals</b>				
<b>Tribunal</b>	<b>Is recording used?</b>	<b>Purpose of tape</b>	<b>Availability of tapes</b>	<b>Time tapes are kept after hearing</b>
Asylum and Immigration	No <sup>3</sup>	N/A	N/A	N/A
Adjudicator to HM Land Registry	Yes	See column 3	Free to parties for appeals, or for any purpose on payment	Indefinitely
Social Security and Child Support Appeals	No	N/A	N/A	N/A
Competition Appeals	No, but record of shorthand transcript kept on digital data disks			Digital data disks kept for minimum of 10 years
Care Standards	Yes, if hearing is at CST offices	Record of proceedings and to assist chairman in drafting judgement	Any party on request	c. six months
Criminal Injuries Compensation Appeals Panel	No	N/A	N/A	N/A
Driving Standards Agency	Yes	Provide transcript for any appeal	To parties	Indefinitely
Employment	Yes (oral judgement only)	To enable chairman to type up written judgement	Chairman only	90 days
Finance and Tax	No	N/A	N/A	N/A
Lands	Yes	Record of proceedings and to assist chairman in drafting decision		3–4 years
Mental Health Review	No	N/A	N/A	N/A
Office of Fair Trading	Yes, in digital format with trader's permission	To assist note-taking, and verify written note of hearing	Trader and their lawyer or appointed representative	To be determined
Parking Adjudicators	Yes, in digital format, transferred to electronic file	Adjudicators and/or reviewers can access proceedings online	Parties as transcripts and on direction of adjudicator	Indefinitely
Pension Appeals	No	N/A	N/A	N/A
SENT Wales	Yes, in digital format, stored on CDs	To free chairmen from need to take extensive notes, and provide accurate record of proceedings	To parent or LEA on application	Six months from hearing, or end of appeal process
Social Security and Child Support Commissioners	Yes	If a party requests transcript	To party, if Chief Commissioner agrees	Six months
Transport	Yes <sup>4</sup>	Record of proceedings and to assist chairmen in drafting decisions		3–4 years

**Criminal guidance**

As a matter of law, the discretion given to the tribunal to grant, withhold or withdraw leave to use tape recorders or to impose conditions as to the use of the recording is unlimited. The *Consolidated Criminal Practice Direction* (DCA 28 March 2006) does, however, offer the following guidance in the context of the criminal courts, which can be applied to the tribunal sector:

‘The following factors may be relevant to the exercise of this discretion:

- a) the existence of any reasonable need on the part of the applicant for leave, whether a litigant or a person connected with the press or broadcasting, for the recording to be made;
- b) the risk that the recording could be used for the purposes of briefing witnesses out of court;
- c) any possibility that the use of the recorder would disturb the proceedings or distract or worry any witnesses or other participants.’

*Does a request to record tribunal proceedings engage an applicant’s Article 10 rights under the European Convention on Human Rights?*

**Case law**

The case of *R on the Application of Dirshe and Secretary of State for Home Department* [2005] EWCA Civ 421 provides some further tangential assistance on this issue. Although this case was looking at a very specific set of circumstances – a request by an applicant for asylum to be able to tape record his formal first interview with an immigration officer, the crucial first stage in the process of determining his application for asylum – the Court of Appeal did make a number of observations that may have relevance in other jurisdictions.

In particular, they made a distinction between circumstances where the applicant was accompanied to an adjudication by a representative, and where he or she was not. In the former case, relying upon the ruling of Pitchford J in *R on the Application of Mapah and Secretary*

*of State for Home Department* [2003] EWHC Admin 306, the Court of Appeal believed that the applicant would have a written record that was sufficiently adequate and reliable to rebut any further discretionary leave to the applicant to tape record the proceedings, by virtue of the presence of his or her representative. In the latter case, however, the court determined that ‘real procedural unfairness [results] if a tape recording is not permitted when no representative or interpreter is present on behalf of the applicant’. In this context, it is worth noting that, in the cases of *JR and AR v Hampshire CC and SENDIST* [2006] EWHC Admin 588 and *W v Leeds CC* [2004] EWHC Admin 2513, McCombe J expressed ‘surprise’ at the absence of facilities to record proceedings before the Special Educational Needs and Disability Tribunal.

**Human rights**

A further question that needs to be addressed is: Does a request to record tribunal proceedings engage an applicant’s Article 10 rights under the European Convention on Human Rights? Article 10 provides a qualified right to ‘receive and impart information and ideas without interference by a public authority’. The

freedom to receive information ‘prohibits a government from restricting a person from receiving information that others may wish or be willing to impart to him’: *Roche v United Kingdom* [2006] 42 EHRR.

Are there circumstances, therefore, where a refusal to grant leave to an applicant to tape record the tribunal proceedings may give rise to a successful Article 10 challenge? There is no specific ruling from the European Court on the question of what constitutes receiving information in a court setting, and what consequently might constitute a restriction upon that right. The limited UK case law on this issue offers little assistance, although in *R on the Application of Persey v Secretary of State for the Environment* [2003] QB 822, the Court of Appeal concluded that Article 10 was not engaged by a

decision to hold an enquiry *in private* into the outbreak of foot and mouth disease, even though the effect of this decision was to deny members of the public access to information imparted in closed sessions.

Against the above uncertainty, it must at least be open to argument that an applicant who is either unrepresented or at some other personal disadvantage that mitigates in favour of recording the proceedings (e.g. they have serious problems of understanding or communication) may seek to argue that their Article 10 rights have been breached if they are not allowed in these circumstances to tape record, or to have access to a tape recording of, the proceedings.

### Quality of justice

In conclusion, it can be argued that the use of tape recording in tribunals can lead to a number of *positive* benefits that lead to an overall improvement in the quality of justice.

- Tape recording the hearing provides a transparent recognition of the Article 10 right to impart and receive information, and a readily available means of asserting and satisfying that right.
- It encourages all witnesses to deliver oral evidence with greater precision and attention to accurate detail.
- It addresses certain equality and equal treatment issues, e.g. it provides special safeguards to those with sensory impairment or learning difficulties, so as to ensure they have every opportunity to follow and understand the proceedings.
- It assists those who have to write the final decision in checking the accuracy of their recall of evidence, and is liable to increase the accuracy of any factual analysis that is contained in the decision.
- It facilitates the processes that determine whether grounds of appeal may exist.
- Tape recording, and access to the tapes thereafter, re-enforces the principle of equality of arms.

Tape recording also has its potential *negative* sides.

- The tape recording of hearings requires equipment of appropriate quality to be available at all hearing locations, which may be impractical and has clear cost implications.
- Unless the recording is carried out to a high professional standard it may be of little value.
- Once a recording is placed in the hands of third parties, it is never entirely possible to guarantee that it will remain confidential, or that it will be protected from unlawful tampering or other interference. In the words of the Council on Tribunals, ‘it is not inconceivable that, for example through ignorance of the law or a mistaken belief that [the Contempt of Court Act 1981] is not applicable to the proceedings in question, improper use might either be made of a private hearing or be thought possible’.

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<sup>1</sup> A court of record is a court that keeps permanent records of its proceedings and is also normally a court that is subject to appellate review. It should also have a power to commit for contempt, leading to fine or imprisonment.

<sup>2</sup> Council on Tribunals Annual Report, 1981/2.

<sup>3</sup> Following *Dirshe* (see page 4), AIT does allow a party to request the proceeding be recorded.

<sup>4</sup> With exception of Traffic Commissioner cases.





# TESTING GROUND

*In her article in the Spring 2006 issue of this journal, CHERYL THOMAS looked at the statistics relating to diversity within different judicial offices. Here, she considers why it matters.*

Over the last two years, the government has pursued a concerted policy to increase diversity in the judiciary. This culminated in the establishment of the Judicial Appointments Commission (JAC), which began operating earlier this year. The commission has a statutory duty to increase diversity, at least among applicants for judicial posts. But why does diversity matter for the judiciary?

## Why it matters

The strongest case for a diverse judiciary is based on research, which shows that it not only increases public confidence in the fairness of judicial proceedings, but actually improves the quality of judicial decision-making. There is now evidence in this country that judicial diversity does affect perceptions of the fairness of judicial proceedings. However, all the evidence that diversity actually affects judicial decision-making comes from the United States. In this country, there are simply not enough women and ethnic minorities in the professional judiciary to study this issue. However, there is one judicial institution that could provide answers to this question in the UK – and that is the tribunals judiciary.

## Perceptions of fairness

The perception of the fairness of courts is vitally important in terms of access to justice, and judicial diversity can have a powerful symbolic value in promoting public confidence in judicial institutions. There is now increasing evidence that the lack of diversity in the judiciary in England and Wales has resulted in lower levels of public confidence in the fairness of the courts. This evidence comes from the

Department for Constitutional Affairs' Courts and Diversity (CAD) Research Programme, where several studies have found that the lack of diversity among those presiding over judicial proceedings affected minorities' confidence in the fairness of those proceedings<sup>1</sup>.

Hazel Genn's recent study of tribunal users found that a substantial proportion of South Asians perceived

unfairness in the course of their tribunal hearing, but that this group was less likely to perceive unfairness when the tribunal was ethnically diverse.

The CAD study of the criminal courts also found that ethnic minority defendants were particularly troubled by the lack of ethnic minority judges – 31 per cent of ethnic minority defendants in Crown Courts and 48 per cent in magistrates' courts said they would like to see more ethnic minority judges. The most common proposal by magistrates themselves to increase confidence in their courts was that more magistrates be recruited from the local ethnic minority populations.

*The question these studies examined is: do judges with more diverse backgrounds actually bring something different to the process of judicial decision-making?*

## Quality of decision-making

Beyond the *perception* that diverse courts are fairer courts, American research has gone further and explored what *actual effect* a diverse judiciary has on judicial decision-making. The question these studies examined is: do judges with more diverse ethnic, gender or ideological backgrounds actually bring something different to the process of judicial decision-making? To study this, researchers focused on decision-making among judges on appeals courts, which sit as a panel and reach decisions based on the view of the majority.

There are several ways in which diversity may affect decision-making among panels of judges. Initially, researchers explored how the personal characteristics of individual judges related to their individual decisions in cases. But because panels of judges decide cases as a group, researchers recognised that they needed to look more broadly at how individual judges could be influenced by the characteristics of other judges on a panel.

Most recently, the focus has shifted away from only examining judges' personal characteristics to also exploring how the actions of judges affect panels' decisions. The main findings of these recent studies are intriguing.

The researchers examined the decisions of three-judge panels on the US Court of Appeals over many decades. First, they found that judges on diverse panels were more likely to debate a wider range of issues in reaching their judgements than were homogeneous groups of judges.

A study by Cameron and Cummings<sup>3</sup> found that adding a single non-white judge to a three-judge panel altered the deliberation process and substantially changed the voting behaviour of the two white judges on the panels. In these cases, diversity produced a 'peer effect', where the ethnic minority judge provided the two white judges with new information or unfamiliar but persuasive logic in reaching a decision.

The second main finding was that diverse judicial panels were more likely to reach decisions that followed the rules of interpretation laid down by higher courts.

A study by Cass Sunstein<sup>3</sup> found that where one judge on a panel was ideologically different from the other two, this judge acted as a whistle-blower, and stopped the other two judges from reaching a decision that was inconsistent with directives issued by the Supreme Court on how certain regulations should be interpreted.

### Uncomfortable

These findings may make uncomfortable reading for some who perform judicial functions. Most judges would accept that it is possible for others to perceive greater fairness in the judicial process if there is greater diversity in the judiciary. However, it may be more difficult to accept, for instance, that a panel of white male judges could actually be at a disadvantage in deciding cases in comparison to a mixed panel of judges.

*The second main finding was that diverse judicial panels were more likely to reach decisions that followed the rules of interpretation laid down by higher courts.*

While all the studies I have highlighted examined judicial decision-making, there have been similar findings for another group of legal decision-makers. Juries are also collegiate decision-makers, and a recent study found that the quality of jury deliberations is improved when jurors are of different ethnic backgrounds.

This research (again from America) found that, compared with all-white juries, ethnically mixed juries tended to deliberate longer, discuss more case facts and raise more questions about what important information may have been missing from the trial<sup>4</sup>.

### Testing

Even though these studies of the effect of diversity on legal decision-making have all been conducted in another jurisdiction, the conclusions are so fundamental they should not be overlooked here. If a more diverse judiciary can enhance the quality and therefore the fairness of judicial decision-making in this country, we should know this. But no comparable research on diversity and judicial decision-making has been carried out in England and Wales. The senior judiciary is the only part of the professional judiciary in this country that operates on a collegiate basis, but it is simply not diverse enough yet for such research to be carried out. However, tribunals are.

Tribunals are the only collegiate decision-making groups in this country where there are now sufficient numbers of both women and minorities to enable such research

to be conducted. They are the most ethnically diverse of all judicial offices and have twice the proportion of women in post compared to judges in Her Majesty's Court Service.

The levels of diversity vary between tribunals and among tribunal office-holders. Ethnic minority representation on tribunals is highest among lay members, but women are more equally represented across the tribunal spectrum. In all tribunals combined, 30 per cent of tribunal members are women and 9 per cent are from ethnic minorities.

Hazel Genn's recent study of tribunal users demonstrated that research could be carried out successfully with tribunals, and could make an important contribution to understanding diversity. In her study, the Appeals Service (now SSCSA) and the Criminal Injuries Compensation Appeals Panel, which both operate as three-person appellate panels, had high levels of ethnic diversity – 30 per cent on the former, and 39 per cent on CICAP. Beyond these two tribunals, both the Mental Health Review Tribunal and the Asylum and Immigration Tribunal have high percentages of women and ethnic minorities on panels and also deal with a high volume of cases.

Any research involving actual cases requires a large volume of cases in order to see which factors are most important in affecting the outcomes of cases. Hazel Genn's study examined outcomes of a large number of tribunal decisions involving minority users, and found that the type of case was more predictive of a successful outcome for the user than the user's ethnicity. However, the one issue this study did not explore was the effect of the ethnicity of the tribunal itself on the

*... if judicial diversity does have such fundamental benefits to the justice system, it draws a direct connection between diversity and merit for judicial appointment.*

decision-making process and outcomes of tribunal hearings. This was because the DCA research programme focused on understanding how the judicial system affected minority users of the system and their perception of the fairness of the system. It is now important to try to understand how diversity in the judiciary itself may affect outcomes.

### Conclusion

The need to provide strong evidence of the benefits of judicial diversity should not be underestimated. The *Daily Mail* newspaper described government initiatives to increase judicial diversity as 'giving jobs as judges to Black lawyers on

grounds of race *as well as ability*'. This of course suggests that race is not related to ability. However, if judicial diversity does have such fundamental benefits to the justice system, it draws a direct connection between diversity and merit for judicial appointment.

What is needed in this country is clear evidence of whether or not judicial diversity does improve decision-making. And only tribunals can make this contribution.

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<sup>1</sup> These studies are available at [www.dca.gov.uk/research/resrep.htm](http://www.dca.gov.uk/research/resrep.htm).

<sup>2</sup> Cameron and Cummings, *Diversity and Judicial Decision-Making* (Columbia Law Review 2003).

<sup>3</sup> Sunstein, *Why Societies Need Dissent* (Harvard University Press 2003).

<sup>4</sup> Samuel Sommers, *On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations* (Journal of Personality and Social Psychology, Volume 90, No 4, 2006).

An article on another aspect of diversity – disability – including the requirements relating to the make-up of the Disability Appeal Tribunals, how they may affect judicial decision-making, and also the impact of the Disability Discrimination Act on tribunals will be included in the journal in 2007.



# KEEP UP *the* MOMENTUM

**MAURICE SUNKIN** *brings together some of the themes covered in a series of seminars on administrative justice, held under the auspices of the Nuffield Foundation earlier this year.*

In recent years, administrative justice has emerged as the focus of a number of important policy initiatives. Against this background, the Nuffield Foundation recently organised a series of seminars on administrative justice. This had three aims:

- To stimulate a reflective examination of the area, building on experience across relevant sectors, with a view to pushing forward informed reform.
- To provide a forum in which some of the wider issues raised in current reform proposals could be discussed dispassionately.
- To help identify future research needs in this broad area, with a view to generating an intellectually interesting and practically important agenda for research to be facilitated by the Nuffield Foundation.

The series brought together those involved with administrative justice across a spectrum of activities and systems, including advisers, first-tier decision-makers, members of tribunals, judges, ombudsmen, complaints handlers and academics, as well as those concerned directly with policy.

Six seminars were held covering a range of key topics principally organised around the main phases through which administrative justice is experienced.<sup>1</sup> The topics and principal speakers were as follows:

- The landscape of administrative justice – Ann Abraham and Simon Halliday.
- Initial decision-making – Roy Sainsbury, with contributions from Adam Griffith and Jodi Berg.
- Proportionate decision-making – Paul Stockton and Andrew Le Sueur.

- The users' perspective – Hazel Genn and Michael Harris.
- ADR overseas perspectives – Trevor Buck and Erhard Blankenburg.
- Courts and councils – Richard Moorhead, with contributions from Tony Newton, Richard Tilt and Robert Thomas.

## **Ghost at the table**

This is an area in which much has happened and yet much is still promised. The government's widely admired and ambitious White Paper *Transforming Public Redress: Complaints, Redress and Tribunals* informed many of the discussions, although its presence is something akin to the ghost at the table, or at least a presence in danger of disappearing into the folk lore of administrative justice culture, having left few tangible signs of a past existence. Its protégé, the long awaited Bill, invests aspects of the reform agenda with new life. The overall impression, however, is that aside from those aspects concerned with the Tribunals Service, much of the promise contained in the government's carefully argued and persuasive agenda for more radical reform is becoming ever less likely to be delivered. Certainly a key message to emerge from the seminars is the need to retain the momentum for change established by the White Paper. Of particular importance was recognition that the achievement of administrative justice in its fullest sense requires more than improving tribunal, appellate and court systems, important as this is. The needs are broader and extend, to borrow from paragraph 1.7 of the White Paper, to:

- Designing systems to minimise errors and uncertainty.
- Improving people's ability to detect errors early.

- Providing proportionate methods for putting things right.
- Improving methods of feedback from those who discover errors so that improvements can be made in the future.

This of course is now widely accepted. The challenge is to ensure that over the medium and long term this holistic approach continues to inform government thinking and receives its practical support and encouragement.

### Early resolution

Much discussion focused on the need for early resolution of problems and for processes that are appropriate and resource-efficient, including mechanisms both within and beyond existing tribunal and ombudsmen structures, such as mediation and other ADR procedures.

The issues here are of considerable importance, concerned as they are with understanding the nature of proportionality in this context. As such they raise a whole raft of questions, only some of which we are beginning to tackle.

### Flexibility

In this context, two elemental issues attracted much attention. The first concerned the absence of a system of administrative justice. Rather than a coherent system, over time we have accumulated a variety of processes suited to handle different types of problems and offer different forms of redress. While there is clearly merit in diversity, at present there is insufficient flexibility. It is, for instance, currently impossible routinely to harness the fact-finding techniques of the ombudsmen in matters brought before tribunals or courts. While some may regard this as being inevitable and even desirable, the seminars revealed wide agreement that this is a failing that needs to be addressed. Even without radical change, it was acknowledged that more could be done to ensure

a greater exchange of experience and good practice across systems, something the Tribunals Service should be well placed to help facilitate.

### What is the problem?

The second concerned the need to gain greater understanding of the nature of problems being brought to the various systems for resolution or redress. Whether the existing procedures are fit for purpose and will leave users satisfied with outcomes much depends on their ability to address the problems that people actually experience. The current systems were established for particular reasons, often with little or any regard to

the nature of peoples' grievances. While in some contexts problems are specific and easy to identify – a child may have particular educational needs, or there may be a specific dispute over a taxpayer's liability – many issues handled by the administrative justice system are more complex, and the adequacy of the systems available for their resolution is altogether more questionable.

The case for undertaking more research seeking to understand the nature of problems and the way people experience the available systems of redress was powerfully argued by a

*There was widespread acknowledgement that we simply know too little about the potential demand for administrative justice...*

number of participants, as was the need to gain a better understanding of the way people perceive and experience the different avenues of redress. At present such comparative information is lacking and this impedes the making of well-informed policy decisions about the relative effectiveness of procedures, particularly from the users' perspective. There was widespread acknowledgement that we simply know too little about the potential demand for administrative justice or about how peoples' experience of administrative justice affects their lives. As one well-informed and well-placed participant put it: 'It is vital that we know the scale and nature of the volcano that we may be sitting on.'

### Raising awareness

Concern was also expressed over how best to improve levels of general awareness of administrative justice processes and the provision of information to parliament and the public on the performance of resolution and redress procedures.

### Assessing results

A related theme in the discussions concerned results and impacts of decisions both at the initial stages and on appeal to tribunals and courts. Two issues in particular may be picked up from among those discussed.

The first concerns the state of our knowledge about what happens *after* adjudications. For instance, in disputes involving schools, how often do applicants go elsewhere, even if a ruling has been in their favour, in order to provide a new setting for the child?

The other concerns the vexed question of how best to use lessons learnt in adjudication to help improve the quality of initial decision-making. Leaving aside the debate over the appropriateness of involving tribunals and courts in matters that might undermine their independence (on which a variety of views emerged), it is clear that attempts to provide feedback do not always result in improvements. This too was recognised as a matter warranting further consideration and research.

### Early resolution

Substantial discussion was devoted to methods of securing early resolution of disputes, including the use of mediation. While there was consensus that early resolution is desirable, the issues addressed ranged from matters of principle to questions of practicality.

In relation to principle, concerns were raised about the appropriateness of compromise in disputes between the citizen and the state. Some were firmly of the view that certain disputes, such as those involving fundamental rights, should in principle be considered inappropriate for compromise and be resolved by formal adjudication. Some, for instance, argued that short of a statutory requirement, claimants should never be

forced to compromise their claim prior to a formal adjudication. Others pointed out that in some areas, such as tax, settlements of cases are a commonplace and necessary occurrence. Likewise, it was acknowledged that compromise and agreement can help to focus disputes. There was, nonetheless, a widely held view that more experience is needed of mediation and other non-adjudicative procedures in the context of administrative justice, especially in light of experience in other areas of the justice system and in other jurisdictions.

### Oral hearings

This debate inevitably raised the question, explored by the Council on Tribunals, of the role of oral adjudication and the potential greater use of paper procedures. Not surprisingly, this too was an issue on which views differed, with some very strongly against any further shift from orality and others far less critical of the possibility, at least in certain types of case.

The challenge, in this context, is how to identify those cases where orality is necessary or desirable. Here again, experience in other parts of the justice system where a similar movement has occurred indicates that this too is an area where careful research may pay dividends, not least because evidence suggests that claimants may fare significantly less well in paper procedures than in oral hearings.

### Future research

This brief overview can only provide a glimpse of the issues discussed during these seminars, and Nuffield will want to reflect on the research questions raised. In so doing, it will need to address the part it is to play in encouraging and sponsoring research, given the keen interest of others, including the Council on Tribunals, the DCA and the Law Commission.

PROFESSOR MAURICE SUNKIN is Dean of the School of Law at the University of Essex.

<sup>1</sup> Four of the seminars were chaired by Lord Justice Sedley and the others by Stephen Oliver QC and Professor Geneva Richardson.

# A SNAPSHOT VIEW

*A recent survey by the JSB has provided a starting point for its more extensive evaluation programme.*

The Judicial Studies Board completed its survey into training, appraisal and mentoring arrangements in tribunals at the end of March 2005. In December 2005, it started a two-year rolling programme to evaluate the training provision within tribunals.

With more disputes resolved through the tribunal process than through the civil courts, tribunals are a crucial part of the justice system. April 2006 saw the coming together of 21 tribunals from across government departments into a single organisation, and this provided an opportune moment to survey and evaluate current training provision within individual jurisdictions. The new Tribunals Service will focus on delivering real benefits to tribunal users. It is important, therefore, to obtain a clear understanding of the extent and provision of tribunal training as an initial step in identifying and sharing best practice and addressing any discrepancies.

## Survey results

The results of the 2005 survey represent a significant update since the last such exercise conducted by the JSB and the Council on Tribunals, in 2002. The latest survey canvassed a total of 34 jurisdictions in two distinct phases. The first phase looked at 20 tribunals currently within or soon to transfer to the DCA, while the second phase focused on 14 non-DCA tribunals. The findings reveal the considerable progress that has been made by tribunals over the last four years in the provision of training and, particularly, in the area of appraisal.

The survey revealed that, although the amount and nature of induction training varied from jurisdiction to jurisdiction, it was in direct correlation to the size of the tribunal. This is not surprising given that the smaller jurisdictions have fewer resources. However, whatever the size of the jurisdiction, there is increased

commonality on the core topics covered during induction, such as new legislation, decision-making, conduct of hearing and equal treatment issues. The same variation from jurisdiction to jurisdiction is evident in the continuation training offered, which ranges from the comprehensive rolling programmes found in the larger tribunals to the annual training events provided in smaller jurisdictions.

It is interesting to note that much work has been done to establish appraisal within tribunals, perhaps the biggest growth area over the past four years. Nearly all tribunals have introduced schemes to appraise their membership, some relatively recently, while others have plans to do so

in the near future. It is also notable that appraisal is not just the province of the large tribunal, but its implementation does pose difficulties for the smaller and specialist jurisdictions, those that sit infrequently and those where cancellations are common. There can be little doubt, however, that the tribunals judiciary are very much closer to a widely employed system of appraisal than judges in HMCS.

*A lot of innovative work has been taking place in tribunals...*

A similar theme emerged in relation to mentoring, which poses similar difficulties for the smaller tribunal. Mentoring was found, in the main, to be a mixture of the informal and the formal. Understandably, mentoring activity is dependent on an intake of new members.

Much innovative work has been taking place in tribunals, particularly in providing training in management skills and IT, which will be of benefit to the new Tribunals Service. It is particularly encouraging to note the increase in tribunals requesting training in recent years. In addition to the more familiar courses such as Tribunal Skills Development, several jurisdictions have recently worked with the JSB to produce tailored induction training in the legal framework particular to their jurisdiction.

The JSB would like to record its thanks to all the jurisdictions that took part in the survey during a particularly busy transitional period. The survey, which will be kept up to date as more information becomes available, is, however, only the starting point.

### Evaluation

The JSB's evaluation programme goes beyond quantitative data to explore the overall consistency of approach in relation to training, appraisal and mentoring in tribunals. It will also provide more

detailed information on the resources devoted to support each activity, of which the survey could only provide a snapshot. The evaluation programme seeks to complement the work currently being undertaken by the Tribunals Service to review the levels of judicial support and the role of non-legal panel members in tribunals.

Copies of the JSB's publications for tribunals, including the *Evaluation Framework*, are available on the JSB's website at [www.jsboard.co.uk](http://www.jsboard.co.uk). The tribunals team can be contacted on [tribunals@jsb.gsi.gov.uk](mailto:tribunals@jsb.gsi.gov.uk).

## A BESPOKE SERVICE

*The JSB has been holding a number of individual training packages for different tribunals.*

Rising demand for training has prompted the JSB to think about different ways of offering established training courses. The established format of the *Tribunal skills development course* (TSD) twice a year and *Tribunals advanced skills course* (TASC) once a year would not have met the needs of jurisdictions that had recruited a number of new wing members, or new jurisdictions whose members needed skills training as part of their induction.

The Pensions Appeal Tribunal (PAT) and the Information Tribunal (IT) fall into the first category. Both recently increased their number of side members. TSD was not appropriate for this category of member as it is primarily for chairmen – a few wing members do attend and enjoy the course, but there is an assumption that all delegates are responsible for writing the decision, which is often a burden placed firmly on the chairman. In response, PAT and IT have had a one-day programme with experienced JSB TSD facilitators exploring those skills relevant to *all* members: questioning, listening, working as a member of a team, and thinking about what are the component parts of successful tribunal. As with TSD, these skills are put into the framework of the JSB's competences.

New jurisdictions in Scotland and Ireland have also drawn on JSB experience. In both countries, there

are new mental health tribunals, called the Mental Health Tribunal and the Mental Health Commission, respectively. North of the border, JSB trainers contributed to Shrieval Panel Training to assist that group in developing ways of working with other tribunal members – something new to sheriffs who invariably sit on their own. In Ireland, TSD was, in a sense, delivered en bloc but adapted to meet the needs of new members of just one jurisdiction who were taking part in a bigger induction programme. And that was what was done too for the Additional Support Needs Tribunal Scotland, whose nearest equivalent is SENDIST in England and SENTW in Wales.

Other similar initiatives in the last few months have been a *Training the trainer course* for Valuation Tribunals to assist them in their development of a more comprehensive training programme; a shortened version of the *Managing judicial leadership* course for the six Scottish Sheriffs Principal; and a day presenting an equal treatment training package to Legal Services Commission trainers, who were to cascade it down through their organisation.

In future, there are plans to offer dedicated courses for the Employment Tribunal in appraisal, mentoring and in managing judicial leadership.



# ‘STRANGE *but* CLOSE’

PAUL STOCKTON *describes two examples of ADR he witnessed during a visit to Australia.*

Alternative dispute resolution in various shapes and forms is a well-established feature of the Australian legal scene. This article deals with two examples, based on fleeting but first-hand experience in April this year.

## Conference registrars

The federal Administrative Appeals Tribunal (AAT) receives about 7,500 cases per year, over 70 per cent of which are settled by staff lawyers, known as conference registrars. I met the three conference registrars based in Sydney to discuss their work. They had chosen this career path having seen previous conference registrars in action. They were highly personable and one could easily imagine how quickly and easily they achieved empathy with their customers. Yet surprisingly, they had no specialist training in the work and said that the only real specialist knowledge necessary is an understanding of the AAT’s procedures. The AAT is, however, currently doing some work on systematising their role.

In career terms, the three conference registrars I met were very content with their lot. The key attraction to them was the variety of the work. Former conference registrars have gone on to hold tribunal and judicial appointments.

## Conciliators

At the New South Wales Compensation Commission, I saw a rather different, but no less effective, model. The Commission does not regard itself as a tribunal, although from our perspective it is indistinguishable from one. It administers the Workers Compensation Scheme, which is, broadly speaking, a species of compulsory employers liability insurance, but which pays out benefits on a no-fault basis according to a strict scale. In the Commission, the central role is played by a team of conciliator-adjudicators. These people are all self-employed and fee-paid. They are required to follow a very detailed and prescriptive approach to cases, to keep the workload under control and to prevent costs spiralling.

## Stages

The conciliator is required to go through three stages, although obviously the intention is that cases should be settled at stage one or stage two if possible. Stage one is a conference over the telephone, stage two is a conciliation hearing, and stage three an adjudication. The first two stages are essentially a form of facilitated settlement negotiations. The clients and lawyers all participate and at the first stage it is usual for the claimant to take part from his or her representative’s office. There are provisions for the conciliator to drop out of the conference if the lawyers want to negotiate directly or talk to their respective clients. The conciliators I saw or heard in action were notable for two features: first, the adoption of a relatively restrained role, not intervening much or driving the case along very obviously (although one told me that her level of intervention varied with what she knew of the competence of the representatives), and second, a marked ability to relate directly and in a sympathetic way to the claimant.

## Adjudication

If conciliation does not work, the conciliators are required to move directly to an adjudication phase. This seemed to be slightly more formal than the conciliation phase and would be instantly recognisable to an English lawyer as a typical chambers hearing. The usual axiom is that any tribunal member involved in ADR should not take part in any subsequent adjudication. In the Commission, the opposite presumption applies, and this did not seem to be a controversial feature of the scheme.

Neither model could be adopted directly by the existing UK tribunal system but the underlying lesson is that justice can be achieved in more than one way. Australia is, as the art critic and historian Robert Hughes put it, ‘strange but close’.

PAUL STOCKTON is Director of Reviews and Legislation for the Tribunals Service.

# PLEAS *and* THANKS

JOHN SEARGEANT *examines the significance of how people deal with common, everyday legal disputes.*

**H**ow people deal with their day-to-day legal problems has a considerable influence on the possibility of resolving those problems before they reach a tribunal or court.

## Frequent

Such legal matters – disputes with employers or landlords, neighbour problems, the difficulties that follow relationship breakdown, financial disputes and debts, problems with social welfare benefits – are the stuff of everyday life. These are common, everyday problems that affect large numbers of citizens, and there are millions of such problems arising every year.

Indeed, in the UK we now have reliable information about the frequency and type of day-to-day legal problems that the public have to face, and recent research studies have told us a lot about how citizens grapple with these problems. The same research tells us that when faced with these sorts of problems, what people want is a solution that allows them to get on with their lives.

## Unresolved

But they face real difficulties in knowing what to do, what the possibilities are, and where they might seek information or get help. Recent estimates from research suggest that about one million problems of this kind go unresolved every year, mainly because people do little or nothing about them.

What is also clear is that difficulties in dealing with day-to-day legal problems affect all sections of society, cutting across demographic, social, ethnic, religious and cultural boundaries – although the difficulties are, of course, greatest for those most in need.

Such an inability to access ‘rights’ or to secure legitimate entitlements defeats the social justice programmes designed to reduce inequality. There is no point in creating a complex system of rights and entitlements if the public are unable to make those rights and entitlements effective.

## Early resolution

People’s inability to address disputes will, more often than not, lead to hearings before courts or tribunals. The benefits of the early resolution of disputes – before they reach a tribunal or a court of law – are nowadays widely accepted, and efforts to improve, for example, the quality of public services’ first responses to complaints, or the quality and availability of alternative dispute resolution services, are familiar features of the landscape of initiatives and policies aimed at helping to achieve this goal.

## Knowledge

Less well known, perhaps, but potentially just as important for better dispute resolution, are the growing numbers of projects and programmes that seek to provide the public themselves with the extra knowledge, skills and confidence they might need to tackle their day-to-day problems, especially the ‘legal’ aspects of those problems, to greater effect.

These ‘public legal education’ (PLE) projects have the potential to make a major contribution to the better resolution of disputes.

## Examples

Experience shows that trying to explain PLE as a general idea can make it harder to grasp than starting with some concrete examples.

The first example is about reducing evictions for rent arrears. A project in the London borough of Southwark aims to reduce evictions triggered by arrears through a mix of training for local community organisations in what to do about rent arrears, awareness-raising for local council housing staff, and negotiation with the local council on improved information to tenants in rent arrears that encourages them to get help early.

The second is about dealing more effectively with debts. In England, the Citizens Advice Bureau service has been experimenting with financial skills training for local

agencies and services that deal with young adults. By offering basic financial skills training to professionals who work with young adults, not as advisers but in other capacities, a wider network is created that increases the chances of these young adults getting early help and support with debt problems.

Thirdly, the Advice Services Alliance ([www.advicenow.org.uk](http://www.advicenow.org.uk)) has developed a campaign to highlight the myth of ‘common law marriage’, urging people to take early steps to regulate and secure their affairs in relation to their partner. The website’s guidance has a common theme – that action taken today will go a long way to helping to avoid costly disputes tomorrow, whether these are over children, property or tax.

### Confidence

These are all examples of how PLE helping the public to recognise possible courses of action in relation to day-to-day problems more easily, and to identify and take the right steps at the right time – including getting the right professional help if that is needed. Good PLE gives people the confidence and the skills to do these things, so that they are no longer helpless or at a loss but are able to decide and act in good time. Better PLE can avoid the emergence of disputes altogether, and when these have already started, can facilitate much earlier resolution. There are many types of PLE activity and there are examples of campaigns in communities, teaching, training, mentoring, the citizenship curriculum in schools, and the delivery of information through pamphlets, the internet and television.

### Connections

But there is currently no strategy for delivering PLE, no focus, no sustainability, and no connection between initiatives. And PLE providers have on the whole no awareness of what any other provider is doing, and no way of finding out. Initiatives are often limited and local, not sustained and soon forgotten. Rarely are they evaluated and lessons are not learned or disseminated. PLE remains marginal, undervalued and poorly funded. Recognising that this situation needed to change, in 2005

the Department for Constitutional Affairs agreed to support the establishment of an independent task force, which would develop a new strategy for the advancement of PLE.

The Public Legal Education and Support Task Force (PLEAS) was set up in January 2006. Chaired by Professor Dame Hazel Genn QC, it is made up of enthusiastic and experienced representatives of a wide range of organisations committed to the ambition of developing a strategy for PLE.

Since then, PLEAS has been reviewing and collating evidence about PLE and how to extend and improve PLE throughout England and Wales. The Task Force has commissioned research into the scope and character of PLE and has received submissions and presentations from a range of interested agencies.

The Task Force has paid particular attention to the work of other agencies, which are themselves seeking to promote public awareness of social issues and to enhance the public’s abilities to self-manage aspects of their daily lives. PLEAS sees, for example, a strong parallel in the preventive health initiatives of the NHS, and in the strategic approach to financial capability developed by the Financial Services Authority.

Work on the Task Force report has now begun and the arguments developed for a future new PLE agency – a central strategic body – that will take a lead in promoting PLE and working to improve the quality and sustainable spread of PLE across England and Wales. Such an agency would be guided by a high-level stakeholder group drawn from all of the current providers of PLE – in government and elsewhere – and those organisations that ‘represent’ the most important target groups for PLE.

Over a number of years, it is hoped that the new agency will secure PLE as an embedded part of our culture and as a key part of effective citizenship.

JOHN SEARGEANT is Task Force Manager at PLEAS. For further information, visit the organisation’s website at [www.pleas.org.uk](http://www.pleas.org.uk) or contact [info@pleas.org.uk](mailto:info@pleas.org.uk).

# UNIFIED *but* FLEXIBLE

JOHN AVERY JONES *provides an update on how the tax appeals system might be modernised.*

Throughout much of 2005, the Tax Appeals Modernisation Stakeholder Group, under the chairmanship of Stephen Oliver QC, met to determine the main features they wished to see in a reformed tax appeals system. This is a brief update on their recommendations, and the continuing work to reform the tax tribunals.

The group saw the key principle for any reform as being that all tax cases (direct or indirect tax, large cases or small) should be dealt with within the same overall unified system, but with panels flexibly constituted to meet the particular needs of individual cases. They felt that any legal input should come from within the panel, rather than from a separate legal adviser, and that more

*... less complex cases, where the issues turn on matters of fact, could be dealt with by a panel chaired by a suitably qualified non-lawyer.*

complex cases, or those where it is difficult to predict whether legal issues will arise, should be dealt with by a legal chairman sitting with one or more other members. However, they believed that less complex cases, where the issues turn on matters of fact, could be dealt with by a panel chaired by a suitably qualified non-lawyer.

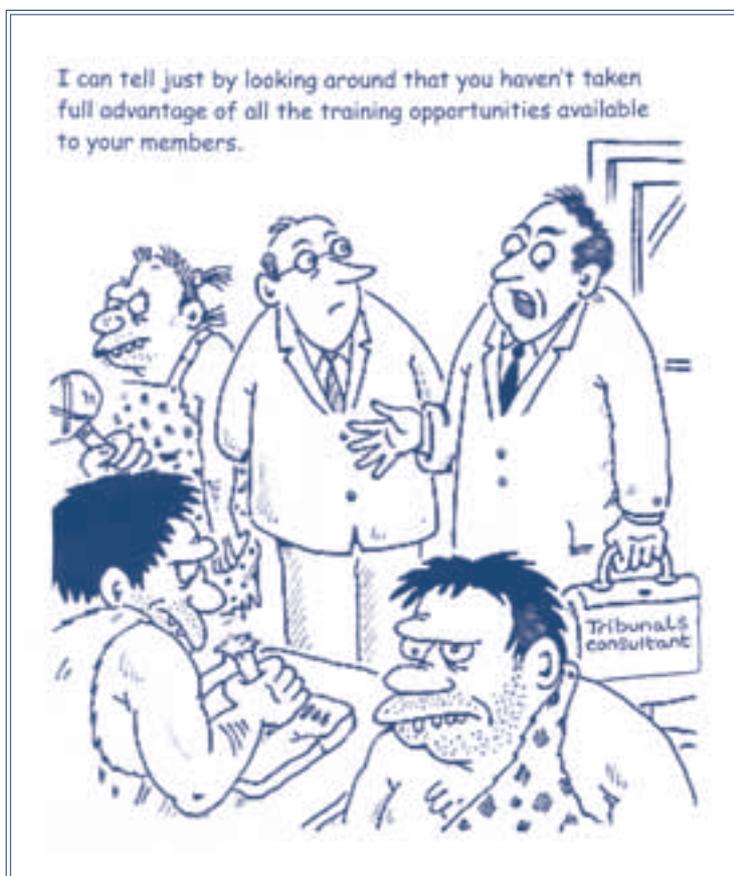
This broad approach was recommended to the Project Board in September, and consideration continues to be given to the different ways of effecting the recommendations, including which cases

are best dealt with by which type of panel and the skills and qualifications required of non-legal chairmen and members. The implementation of any reform will, however, require legislation and the draft Bill has been published.

In advance of legislation, a programme of work has been agreed with Her Majesty's Revenue and Customs (HMRC). That focuses on how HMRC and the reformed tribunal will work together and on the results of the current HMRC pilot on time limits for the transfer of cases to the tribunal, including the information necessary to allow cases to be categorised correctly.

Consideration is also being given to which judicial review functions may or may not be appropriate to transfer to a tribunal jurisdiction.

DR JOHN AVERY JONES is a Special Commissioner and a chairman of Finance and Tax Tribunals. He would welcome any views on the substance of the tax reforms via [john.averyjones@judiciary.gsi.gov.uk](mailto:john.averyjones@judiciary.gsi.gov.uk). The full set of papers considered by the Stakeholder Group can be found at [www.generalcommissioners.gov.uk/tax\\_appeal\\_mod/tax\\_appeal\\_mod.htm](http://www.generalcommissioners.gov.uk/tax_appeal_mod/tax_appeal_mod.htm).



# Be JUST, and FEAR NOT



**BEÁTA CONNELL** *outlines the new rules for handling complaints and points out that all judicial officers may be asked for comments on complaints against others, if not against themselves.*

In the Autumn 2005 issue of this journal, Lord Justice Carnwath described the new Office for Judicial Complaints, established in April 2006. Since that date, while the Lord Chancellor has retained his powers to remove judicial officers, all decisions about removals are to be taken by him and the Lord Chief Justice together, and no one can be removed unless they both agree.

In tribunals with a permanent structure, complaints about tribunal members continue to be considered within the tribunal, and they will only be referred upwards where removal or other formal disciplinary action may be required, or for other special reasons. However, the procedures will have to be approved by the Lord Chief Justice and Lord Chancellor. For those tribunals that do not already have written procedures in place, a draft protocol is in the course of preparation.

The Lord Chief Justice has new powers to impose formal disciplinary sanctions in the form of suspension or formal reprimands, warnings or advice, which he may do only with the agreement of the Lord Chancellor. The Lord Chief Justice is likely to delegate this role to another senior judge in relation to tribunal members. If the Lord Chief Justice and Lord Chancellor believe that a case referred to them requires further investigation, a judge will be appointed to investigate and report back with recommendations, as now.

A new feature is that the judge or tribunal member concerned will be able to refer the case to a review body of two judicial office-holders and two lay members, if he or she is unhappy with the outcome.

The common set of rules came into force on 7 April 2006, and also apply to the tribunals judiciary in Scotland and Northern Ireland.<sup>1</sup>

## What is covered?

Under Rule 5(1), any complaint with substance to it that:

- a) follows a significant number of similar or related complaints; or
- b) is an allegation of improper discrimination on grounds such as race, gender, sexual orientation, religion or disability; or
- c) is otherwise of such significance that removal from office or a formal penalty might be considered; or
- d) has been received from an MP; or
- e) concerns a tribunal member who also sits as a judge or sheriff; or
- f) is about a former tribunal member, must be referred to the Office for Judicial Complaints.

‘Complaint’ is defined by regulation 2(1) of the Judicial Discipline (Prescribed Procedures) Regulations 2006

(SI 2006/676) as ‘an allegation of misconduct by a judicial officer-holder’.

The *Guidance for Handling Complaints Against Judicial Office-Holders within Tribunals*<sup>2</sup> states that the aim of the procedures under the Rules is, inter alia, to ‘maintain the confidence of the public that individual judicial office-holders within tribunals . . . live up to the very high standards expected of them in discharging their judicial duties’. Any pending prosecution or conviction,

*. . . [complaints] will only be referred upwards where removal or other formal disciplinary action may be required, or for other special reasons.*

including drinking and driving, and any professional disciplinary proceedings should be reported to the President or regional chairman of your tribunal.

**What is not covered?**

Rule 7(1) specifies that, unless there are reasons to investigate it, a complaint must be rejected if it is about either the private life or the professional conduct in a non-judicial capacity of a tribunal member and could not reasonably be considered to affect his or her suitability to hold judicial office.

Any complaint about a judicial decision or judicial case management that raises no question of misconduct must also be rejected under rule 7(1). The procedures are, however, intended to cover matters such as:

- Personal conduct whether in or out of the tribunal room.
- Excessive delay, e.g. in the delivery of a judgement (or statement of reasons).
- Comments made in the course of proceedings that are not directly integral to the judicial decision or underlying reasoning and that might lower public confidence in the judiciary.

*Anybody can make a complaint: appellant; friend, relative or representative of the appellant; interpreter; witness; and any MP...*

**Who handles the complaints?**

While the Lord Chancellor and Lord Chief Justice are, under the Constitutional Reform Act 2005, ultimately responsible jointly for the handling of complaints against the judiciary and for judicial discipline, they have agreed that the President or other senior judicial office-holders of tribunals designated by the President<sup>3</sup> – referred to as the ‘investigating judicial officer-holder’ – should usually be responsible for dealing with complaints in the first instance.

Those individuals are assisted by tribunal staff who work under their close direction – the job descriptions for members of staff stress the need for strict confidentiality in dealing with complaints against judicial office-holders.

In practice, complaints are initially referred to a customer services manager, or staff fulfilling that function, who is then responsible for gathering preliminary information and referring the complaint to the investigating judicial officer-holder. Staff do not make decisions on the substance of complaints against judicial office-holders – this role is retained by the nominated investigating judicial officer-holder.

The President of a tribunal may decide to deal with a specific complaint personally or may reserve the determination of the complaint to him or herself.<sup>4</sup>

**Who can make a complaint?**

Anybody can make a complaint: appellant; friend, relative or representative of the appellant; interpreter; witness; and any MP who decides to take up the matter on behalf of a constituent. Complaints would normally be in writing.

Regulations 4 and 5 provide that a complaint must be made within 12 months – subject to a discretion to extend the time limit for good reason. If an extension of time is refused, there is a right to make representations (within 10 working days of notification of the refusal)

to the Office for Judicial Complaints, asking the Lord Chancellor or Lord Chief Justice to grant the extension.

**Seeing the complaint**

A tribunal member will not normally see a complaint that is rejected as not adequately particularised; not raising a question of misconduct; being untrue, mistaken, misconceived or otherwise without substance; or vexatious.<sup>5</sup> If, however, the tribunal member is aware of such a complaint, then they will be informed of the rejection.

A tribunal member will see the complaints (against them or another member of a tribunal in which they participated) that require investigation and will be expected to co-operate with the complaints handling

process and to reply to requests for comments on complaints in a timely manner. Rule 6(3) allows 20 working days to respond, although a quicker response will often be possible.

### Anticipating a complaint

It may become apparent, during a hearing or otherwise (whether due to comments made or due to the escalation of events) that a complaint is threatened or likely. A tribunal member should then make a record of events at the earliest opportunity, while the events are fresh in the mind. It is good practice for each tribunal member, and the clerk if present during the events, to make such a record. If the incident or situation appears serious enough, you may wish to send a written report to the President in anticipation of a formal complaint being received.

### Further investigation of a complaint

In rare and exceptional circumstances, consideration may be given to interviewing some or all of the parties concerned in person. Such interviews will be conducted by at least two people; any person being interviewed will be entitled to be accompanied by a person of their choice.

### The timing of a response

The investigating judicial officer-holder will first establish whether the appeal proceedings have come to an end. If not – for example, because an appeal is pending – then a response will not normally be sent until the appeal has been determined. This is in order that any relevant findings or comments by the appellate tribunal or court are taken into account.

### If a complaint is upheld

Under Rule 9(3), a tribunal member must be given a reasonable opportunity to comment on the proposed response, and will be sent a copy of the response. The investigating judicial officer-holder or President will decide whether they should then issue guidance, advice or a rebuke. Advice given may be, and a rebuke will be, recorded on an individual's personal file.

### Right of appeal by the judicial office-holder

Regulation 10(6) of the Judicial Discipline (Prescribed Procedures) Regulations 2006 provides that where the President decides to record advice or rebuke on a personal file, the tribunal member may make representations to the Lord Chancellor and Lord Chief Justice within 10 working days. They may deal with the case themselves or may – if the case is considered sufficiently serious or complex – appoint an investigating judge.

An investigating judge may also be appointed to look into serious or complex complaints referred by the President under Rule 5(1).

### Conclusion

These procedures exist to address grievances that arise from the rare instances where tribunal members exceed the limits of appropriate behaviour or where they are, or appear to be, biased or prejudiced. They aim to allow tribunal members to learn from genuine errors in the personal conduct of hearings.

They should not discourage any judicial office-holder 'where appropriate, from asking probing questions during hearings on issues of fact, credibility and so on, even where this has the potential to be uncomfortable and may at times be intrusive to appellants, legal representatives and other parties'.

It seems that Cardinal Wolsey's advice in Shakespeare's *Henry VIII* – 'Be just, and fear not' – still holds good.

BEÁTA CONNELL is a District Chairman of Social Security and Child Support Appeal Tribunals in the North East Region.

<sup>1</sup> See [www.judicialcomplaints.gov.uk/publications/tribs\\_rules.htm](http://www.judicialcomplaints.gov.uk/publications/tribs_rules.htm).

<sup>2</sup> See [www.judicialcomplaints.gov.uk/docs/Complaints\\_Guidance\\_7.4.06.doc](http://www.judicialcomplaints.gov.uk/docs/Complaints_Guidance_7.4.06.doc).

<sup>3</sup> Rule 4(1).

<sup>4</sup> Rule 4(4).

<sup>5</sup> See Rule 7(1) and note the additional grounds on which a complaint will be rejected.





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