

The Future of Tribunals

Response of the Advice Services Alliance to the
White Paper "Transforming Public Services:
Complaints, Redress and Tribunals"



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1 Introduction

About ASA

- 1.1 ASA is the umbrella organisation for independent advice networks in the U.K. Full membership of ASA is open to national networks of independent advice services in the U.K. Currently, our full members are:
- adviceUK
 - Age Concern England
 - Citizens Advice
 - Citizens Advice Scotland
 - DIAL UK (the disability information and advice service)
 - Law Centres Federation
 - Scottish Association of Law Centres
 - Shelter
 - Shelter Cymru
 - Youth Access
- 1.2 Our members represent over 2,000 organisations that provide a range of advice, legal and other services to members of the public. Most of these organisations offer services within a local area, but some of them are regional or national. They are largely funded through public sector grants and contracts, and charitable fundraising. With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people e.g. welfare benefits, debt, housing, employment, immigration, education and community care (now commonly referred to as ‘social welfare law’).

Introductory Comments

- 1.3 ASA welcomes the opportunity to comment on the Tribunals’ White Paper: “Transforming Public Services: Complaints, Redress and Tribunals”, and to take part in the debate which it has engendered.
- 1.4 We have seen the response prepared by the Legal Action Group, with which we are in broad agreement. Rather than comment on the whole of the White Paper, however, we prefer to concentrate on two main issues, which are, we believe, of most direct importance to the advice sector, namely:
- The proposed new model tribunal
 - The need for advice and representation
- 1.5 We will also comment on some other issues, and in particular on the suggestions that more can be done to get decisions ‘right first time’.
- 1.6 In general, we will limit our comments to social security appeals and employment tribunal cases.

2 The Tribunal Function

The proposed new model tribunal

- 2.1 The key aspects of the new proposals seem to be:
- Trying to achieve the benefits of a hearing without holding a hearing, particularly in relation to obtaining new evidence and reconsidering existing evidence
 - Prompting reconsideration of a case where the likely outcome can be predicted
 - Trying to achieve early resolution, where the issues are complex or where the success rate for appellants is high
 - Trying to resolve cases by assisting settlement and/or by mediation
 - Widening the role of tribunal staff under the general direction of judges
 - Enhancing the 'feedback' role of tribunals
 - Developing increased case management
- 2.2 The White Paper does not give any detail as to how these proposals might be put into effect. We appreciate that these are proposals in principle only, and that various ways of implementing them will need to be piloted.
- 2.3 We do think however that we can provide some comment on these ideas, by reference to the experience of social security and employment tribunals, and by comparing the nature of the work with that of the Financial Ombudsman Service, which seems to be the model behind many of these proposals.
- 2.4 It must always be remembered however that there is a fundamental difference in approach between a tribunal and an Ombudsman. The nature of an Ombudsman investigation is to narrow the issues down, to try to decide what a case is really about, or what the nub of the complaint is, and then make a judgment as to what is fair and reasonable based on the Ombudsman's general approach. In benefits and employment cases, the role of a tribunal is to establish all the relevant facts and then apply the relevant legal provisions to those findings.
- 2.5 Two questions seem to us to be particularly important:
- Is it desirable to have a tribunal that engages in alternative dispute resolution or "proportionate dispute resolution"?
 - Would it actually work in practice?

The Financial Ombudsman Service

- 2.6 Several of the key aspects of the new proposals appear to derive from the practice of the Financial Ombudsman Service [FOS]. The FOS is particularly important in the context of the White Paper, given its claim that "no one should need any special expertise or professional help in order to bring their complaint to us."¹ However, in order to consider the extent to which these practices can be carried over into the new Tribunals Service, it is important to appreciate the specific features of the FOS and the way in which it works.
- 2.7 In our view, these specific features include the following:²

¹ The annual review of the Financial Ombudsman Service 2003-04, p.88

² See Kempson et al 'Fair and reasonable: An assessment of the Financial Ombudsman Service', July 2004, and the annual review of the Financial Ombudsman Service for 2003-04.

- The FOS provides an informal dispute resolution service, with decisions being based on what is considered to be ‘fair and reasonable’.
- It performs an important diagnostic function of shaping or framing complaints, deciding what they are about, and making sure that all relevant matters are included.
- It tries to resolve cases by ‘guided mediation’.
- If this is unsuccessful, adjudicators make recommendations, or give a provisional view, to which the ‘losing’ side is invited to comment.
- Some complaints are rejected because they are considered to have no reasonable prospect of success.
- The FOS has developed common approaches to deal with common types of problems.
- The FOS is paid for by means of a general levy on all firms, and via individual case fees, once a case becomes chargeable. There is no charge for the first two complaints each year. There is no charge if a complaint is resolved early. This clearly gives firms a financial incentive to co-operate with the FOS and resolve cases quickly when they can.³
- FOS staff are trained in the main areas of work covered by the service.⁴ Adjudicators have detailed knowledge of the financial products with which they deal.
- FOS staff were considered by independent researchers to be very high calibre, committed and professional and the service’s greatest asset.
- The knowledge management system is vital. The FOS has a toolkit, which aims to provide all the information needed to deal with cases in different product areas.

Social security appeals

- 2.8 As the White Paper shows,⁵ the Appeals Service receives by far the largest number of appeals of the largest tribunals administered by central government. It also deals with twice as many cases as the Employment Tribunals Service.⁶
- 2.9 Since they represent the largest single jurisdiction within the proposed new Tribunals Service, social security appeals provide arguably the most important test of the new proposals. Fortunately, we do have a significant amount of information about such appeals.
- 2.10 According to the President’s report:
- 44% of all appeals concern Disability Living Allowance [DLA] or Attendance Allowance
 - 26% concern Incapacity Benefit
 - Other benefits are each the subject of less than 10% of appeals.⁷
- 2.11 The first point to make about the benefit system is that it is extremely complex. As the House of Commons Committee of Public Accounts has commented:

³ This is recognised in the White Paper – see paragraph 4.18

⁴ FOS staff are also subject to a detailed quality assurance programme.

⁵ See the table at paragraph 3.28

⁶ The Employment Tribunals Service Annual Report 2003-04 states that they received 115,042 applications in 2003-04, of which 65,364 were single applications.

⁷ President’s Report 2003-2004: Report of the President of Appeal Tribunals on the standards of decision-making by the Secretary of State, p.11

“The complexity of the benefit system remains a major problem for staff and customers alike and is a key factor affecting the performance of the Department.”⁸

2.12 This causes difficulties for claimants, particularly for the less educated or articulate.⁹

2.13 As the National Audit Office has pointed out:

“In a number of benefits, decision-making can involve a considerable degree of judgement and needs to be clearly explained to customers to ensure that all appropriate evidence has been obtained and properly interpreted.”¹⁰

2.14 This is particularly true of DLA:

“Disability Living Allowance requires complex decisions, involving a high degree of judgement and the interpretation of detailed medical evidence. Around one in twelve decisions result in tribunal hearings, with more than half of these decided in the customer’s favour.”¹¹

2.15 The Public Accounts Committee endorses this view:

“Disability Living Allowance (and Attendance Allowance for those who become eligible after 65) is a particularly complex benefit and the Department considers it difficult to administer, as it is not based on objective criteria.”¹²

2.16 The complexity of benefit decision-making is clearly linked to the high error rate reported. Around a fifth of benefit decisions contain errors of some kind.¹³

‘Medical’ cases

2.17 The major ‘problem’ for the Appeals Service, and therefore for the new Tribunals Service, concerns cases which involve medical evidence, and specifically appeals in relation to DLA and Incapacity Benefit. Medically assessed benefits have the highest levels of successful appeals.¹⁴ Particular difficulties in decision-making using medical evidence have been highlighted.¹⁵

2.18 In relation to DLA, the National Audit Office reports that:

- 45% of decisions contained errors
- The level of error is broadly similar for both initial decisions and those that are being looked at again
- Applicants have problems with the forms
- Medical evidence is very important, but
- There are concerns about the quality of medical reports
- Clearance time targets affect the time taken at the initial decision stage
- More than half of appeals are decided in favour of the customer, with the rate on a rising curve

⁸ Committee of Public Accounts: ‘Getting it right, putting it right’, Twelfth Report of Session 2003- 04, HC 406, p.4

⁹ Ibid, p.8

¹⁰ National Audit Office: ‘Getting it right, putting it right’, Report by the Comptroller and Auditor General, p.4

¹¹ Ibid., p.5

¹² Op cit, p.9; see also the comments by Sir Richard Mottram, ibid, at Ev 3.

¹³ National Audit Office, op cit, p.2

¹⁴ Committee of Public Accounts,, op cit, p.7

¹⁵ National Audit Office, op cit, p.25, citing the President’s Report of 2002-03.

- More than 30,000 DLA decisions each year are corrected by appeals tribunals.¹⁶

Appeals

2.19 Any reconsideration of the role of tribunals in benefits cases must take account of the reasons why appeals are successful. The latest President's report gives the reasons recorded by Tribunal Chairs as follows:

- In 62% of cases, the tribunal was given additional evidence not available to the decision-maker
- In 39% of cases, the tribunal formed a different view of the same evidence
- In 24% of cases, the medical report under-estimated the severity of the disability
- In 21% of cases, the tribunal accepted evidence that the decision-maker had available but was not willing to accept
- In 20% of cases, the tribunal formed a different view based on the same medical evidence
- In 14% of cases, the decision-maker did not give relevant facts or evidence due weight

2.20 The Tribunal Chairs also suggest that, in 8% of cases, the Agency could have avoided the appeal.¹⁷

Special features

2.21 Any consideration of changing the tribunals' role needs also to take account of a number of specific features of the existing system, both within the original decision making structure and in relation to appeals.

2.22 In relation to the former, it should be noted that:

2.23 There are systems already in place that are supposed to 'get it right' first and/or second time.¹⁸

2.24 Reconsideration of decisions does happen, but it is generally ineffective. The error rate in DLA second decisions is at the same level as for first decisions. In relation to jobseekers' allowance, decisions looked at again are less accurate than initial decisions.¹⁹

2.25 The 1998 reforms were supposed to deal with these issues,²⁰ but appear to have been ineffective in many respects.

2.26 In relation to appeals:

2.27 The emphasis on the appeals function within the DWP seems to have been reduced. This appears to have had an effect on the number of cases that are reconsidered following the lodging of an appeal.

2.28 The President of Appeals Tribunals has drawn attention to the falling attendance of presenting officers at tribunal hearings, which has been a continuing trend, with the latest figures showing attendance in only 24% of cases. The President suggests that

¹⁶ Ibid, pp.21-26

¹⁷ The President's Report, op cit, p.14

¹⁸ See the overview of the decision-making and appeal process at the beginning of the National Audit Office report.

¹⁹ National Audit Office, op cit, pp.19, 23, 26, 36.

²⁰ Ibid, pp.3, 13-15

this is as important for the standard of agency decision-making as it is for the tribunals themselves. 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.”

2.29 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.”²¹

2.30 It must also be remembered that ‘paper’ hearings were introduced on the basis that many cases are ‘simple’ and can be resolved without an oral hearing. However, the success rate in paper hearings is considerably lower than at oral hearings.²²

Employment tribunals

Types of cases

2.31 The Employment Tribunals’ Service Annual Report provides details of the applications made to Employment Tribunals in 2003-04. For statistical purposes, all applications are recorded against a main jurisdiction, although most applications cover more than one complaint.

2.32 In terms of the main jurisdiction, the breakdown is:

- Unfair dismissal 33%
- Unauthorised deductions from wages 18%
- Sex, race and disability discrimination 17%
- Working Time directive 10%
- Breach of contract 7%
- Redundancy pay 4%
- Equal pay 3%
- Other 8%.²³

2.33 Most applications cover more than one complaint, the average being 1.7 complaints per application.²⁴

2.34 The report states also that “the complexity of cases has continued to increase, with average hearing times gradually lengthening.”²⁵

Case disposal

2.35 Employment tribunals differ from other tribunals by being directly linked to the conciliation service provided by ACAS, and in the proportion of cases that are disposed of without a hearing.

²¹ The President’s Report, op cit, p.7

²² The National Audit Office report cites statistics showing a 23% success rate at paper hearings, compared to a 52% success rate at oral hearings. Op cit p.44.

²³ Employment Tribunals Service Annual Report 2003-04 p.4

²⁴ Ibid. See also Table 1, at p.23 for the extent to which other jurisdictions are invoked depending on the classification of the main jurisdiction.

²⁵ Ibid, p.4

2.36 Overall, in 2003/04, cases were disposed of as follows:

- By ACAS conciliated settlements: 37%
- Withdrawn: 31%
- At a hearing: 24%
- Otherwise: 8%²⁶

2.37 There were however significant variations in the proportion of cases of different jurisdictions that were disposed of in different ways. In particular:

- Unfair dismissal cases were more likely to be settled by ACAS (44%), and less likely to be withdrawn (27%)
- Redundancy cases were much less likely to be settled by ACAS (17%) and much more likely to be disposed of at a hearing (49%)
- Sex discrimination cases were much less likely to be settled by ACAS (24%) or to be disposed of at a hearing (8%)²⁷
- Disability discrimination cases were more likely to be settled by ACAS (47%) and less likely to be disposed of at a hearing (16%)

2.38 This suggests that the 'dynamics' of employment tribunal cases vary significantly depending on the jurisdiction being invoked.

The role of ACAS

2.39 When considering the role of mediation or conciliation in employment tribunal cases, the role of ACAS deserves prime consideration. Some independent research into this role has been carried out.²⁸

2.40 The research identified a number of different elements of conciliation:

- Explaining the tribunal system and procedures
- Providing information about the legal framework
- Discussing the possibility and desirability of settlement or withdrawal
- Discussing the possibility and desirability of re-employment
- Passing information between parties or their representatives
- Encouraging consideration of the strengths and weaknesses of cases
- Commenting on the levels of offers or possible settlements or awards
- Providing more general advice and guidance on the conduct of cases
- Assisting in the finalisation and formalising of agreed settlements.

2.41 The research highlights the complexity of conciliation. It points out that:

- Parties may not wish to avoid a tribunal hearing
- Emotional considerations may be as important as practical and rational considerations
- There are significant differences in approach between larger employers and representatives on the one hand and applicants and smaller employers on the other hand.²⁹

²⁶ Ibid. p.24

²⁷ Although 23% were disposed of 'otherwise', *ibid*

²⁸ Jane Lewis and Robin Legard 'ACAS individual conciliation: a qualitative evaluation of the service provided in industrial tribunal cases', ACAS research paper 1, 1998

²⁹ *Ibid* p.115

2.42 Moreover:

“The process of individual conciliation is clearly very subtle and complex. [Industrial Relations Officers] need to achieve a balance between effective and influential intervention on the one hand and objectivity and impartiality on the other, if they are to have an impact. Parties appear to be more receptive to encouragement to assess the strengths and weaknesses of their case and the merits of settlement, where they are given more information and explanation of their legal position and how a tribunal might approach the case, and where the IRO’s comments are clearly rooted in a firm understanding and objective assessment of the case and the law.”³⁰

2.43 The report also highlights the importance of developing a relationship of trust in order for conciliation to be successful:

“It appeared to be an important precondition of the conciliation process that the parties should trust the ACAS officer to advance their interests, within their impartial remit. The key elements of this appeared to be:

- *Being perceived as impartial;*
- *Respecting confidences;*
- *Establishing rapport with individuals – the officer having the requisite personal and other skills to establish an effective working relationship;*
- *Demonstrating knowledge of industrial relations, employment law and the tribunal system;*
- *Showing interest and commitment: the officer being fully engaged with, and involved in, the case.”³¹*

2.44 The report highlights the importance of ACAS’s role where one or both parties are unrepresented. It suggests however that further consideration is needed of the difficulties involved in such situations.³²

2.45 Although the White Paper suggests that conferring the power to act as a mediator on all tribunal judges will be of particular benefit to Employment Tribunals,³³ it is difficult to see how the tribunal could match, let alone improve upon the service already provided by ACAS. There may be some technical differences between ‘mediation’ and ‘conciliation’, but it seems unlikely that tribunal members or staff would be able to match the skills and experience developed by ACAS in performing this role. It is particularly unlikely that they would be able to develop the relationship of trust with the parties that is important to this process.³⁴

Conclusions

The FOS analogy

2.46 We have highlighted above the specific features of the FOS that appear to us to be relevant in the present context. Some are fundamental, such as the fact that decisions are based on considerations of fairness and reasonableness. Some are procedural, in terms of how complaints are framed and dealt with. Some are financial, such as the way that the FOS is paid for. Some are to do with the nature of the work, the quality of the staff involved and the tools available to them.

³⁰ Ibid p.118

³¹ Ibid. p.101

³² Ibid, p. 119, 121

³³ Paragraph 8.5

³⁴ See also the comments by LAG at p.12 of their response.

- 2.47 Leaving aside, for the moment, the fundamental issues, it is worth considering the nature of the work done by the FOS.
- 2.48 The FOS looks at common situations that arise under specific types of contracts. It deals with similar situations and similar complaints about the same practice of the same or similar financial institutions and it has developed common approaches, in order to ensure consistency.
- 2.49 One question to be asked is the extent to which the FOS workload differs from that of other tribunals. In relation to benefits and employment, at least, the analogy does not seem to be promising.
- 2.50 Most benefits cases, and appeals, are individual, and depend on their individual facts. There are of course common issues that may arise, particularly as to the interpretation of the relevant rules, but these usually arise as legal issues that are decided by the Social Security Commissioners or by the courts.
- 2.51 Common problems certainly arise, perhaps particularly in the 'medical' cases, but these are more likely to be evidential issues, to do for instance with the quality of medical reports, or the lack of 'fit' between the medical and other evidence in a case. It is possible that the new Tribunals Service could take a 'line' on such issues. It might, for example, adopt a general approach of criticising the preparation or presentation of cases in which there had been a failure by the department to invite a claimant to comment on an apparently 'adverse' medical report. However, the tribunal would still have to decide each individual case on the basis of the evidence presented to it. It could not simply allow all appeals where its general approach had not been followed.
- 2.52 The situation is possibly slightly different in employment cases. It is arguable that more common situations arise in employment cases, such as a failure to follow proper procedures.³⁵ Nevertheless, the effect of this still has to be applied to the facts of the individual case. A finding that proper procedures have not been followed only gets you so far.³⁶
- 2.53 Ultimately the difference is a fundamental one of approach. As we have pointed out, the nature of an Ombudsman investigation is to narrow the issues down, to try to decide what a case is really about, or what the nub of the complaint is, and then make a judgment as to what is fair and reasonable based on the Ombudsman's general approach. In benefits and employment cases, the role of a tribunal is to establish all the relevant facts and then apply the relevant legal provisions to those findings.
- 2.54 Some more specific issues are also raised by the FOS analogy:
- The FOS rejects some complaints because they are considered to have no reasonable prospect of success. There must be a question mark over the extent, if any, to which a Tribunals Service could do this.
 - The FOS helps to shape complaints into an acceptable form and make sure that all relevant matters are included. Would this be acceptable for administrative justice or employment appeals? This is particularly relevant to employment cases, where a number of different jurisdictions may potentially arise in a case.

³⁵ This is likely to be increasingly the case following the recent changes in the law in relation to the use of disciplinary and grievance procedures.

³⁶ A failure to follow procedures may for instance make a dismissal unfair. However, a tribunal may still decide that no compensation is due to the applicant.

- The FOS relies on trained and expert staff, particularly at the adjudicator level. This has important implications should the new Tribunals Service attempt to carry out any roles that are similar to those of the FOS.
- Respondents have a financial interest in co-operating with the FOS and resolving cases quickly where possible. Can this be made transferable to tribunal cases, and if so how?
- Complainants to the FOS are not representative of the general population, and are very different from appellants to social security tribunals.³⁷

Should tribunals engage in mediation?

2.55 It appears to us that there are essentially two key issues here:

- How easy would it be for tribunals to perform this role?
- How appropriate would this be?

2.56 On the first point, we agree very much with LAG that

“Expecting [judges] to develop mediation techniques in addition to conventional judgecraft skills is unrealistic – it also confuses two entirely different professional approaches, both underpinned by distinct ethical frameworks.”³⁸

“[The] skills involved in most ADR processes differ significantly from traditional judgecraft skills – and from each other. It would not be appropriate for a tribunal judge to assume the role of (say) mediator without proper training in the skills that this involves.”³⁹

2.57 The inherent weaknesses of mediation must also be recognised. In particular, there is always the danger that the results will reflect “the relative strengths and resilience of the parties involved.”⁴⁰

2.58 The fundamental issue of principle however is whether mediation is appropriate when the issue is one of entitlement. In our view the answer to this question must be no.⁴¹

2.59 This is particularly the case where the issue at stake can only be answered in one way or another, either ‘yes’ or ‘no’, as in the case of claims for benefits or for asylum. Although there may in some cases be a possible middle ground, we do not consider that it would be appropriate for a tribunal to attempt to broker a settlement in this region.

2.60 The comparison with employment cases is instructive. Although in theory employment cases are also about ‘entitlements’, there are so many variables at stake in most employment claims that a tribunal’s decision could fall anywhere along a spectrum of possible decisions in relation to liability and quantum. In such circumstances, it is appropriate for the parties to consider mediation or conciliation in many cases. However, as we have suggested above, there appears to be no reason to believe that tribunals could perform this function better or more effectively than ACAS.

³⁷ By definition, FOS complainants are the owners of specific types of financial and investment products. The FOS Annual Review 2003-04, pp.27-31, provides information as to their age, gender, disability, ethnic origin and the newspapers that they read.

³⁸ Editorial, Legal Action August 2004

³⁹ LAG response to the White Paper, pp.9-10

⁴⁰ Response by IPSEA to the White Paper p.6

⁴¹ We agree with LAG on this point also: see their response to the White Paper, pp.2, 8.

A more interventionist tribunal?

- 2.61 There is arguably a case for saying that tribunals could play a more interventionist role. It might be possible, for example, for the tribunal to try to get the more straightforward cases to an early resolution.

An interventionist tribunal?

- 2.62 It would in theory be possible to have a system in which, once a complaint and a reply had been received, the case is looked at by a specialist who could perform a role similar to that of an FOS adjudicator. At its widest, this could include a mixture of functions:

- Making sure the complaint is clear and covers all potential claims, thus framing and possibly also expanding the nature of the case
- Making a provisional assessment as to the strength of the claim and response, and notifying the parties accordingly
- Suggesting reconsideration, eg of a benefit claim
- Suggesting that mediation / conciliation might be appropriate
- Suggesting the need for additional evidence, if the case is to continue towards a tribunal hearing.

- 2.63 However:

- If such a service was to approach the standard of the FOS it would be costly
- Double handling of cases which proceed to a hearing is likely to increase costs
- Such an intervention may not prevent many hearings, though it might clarify the issues involved in many cases
- It would probably mean that cases take longer to get to a hearing
- The performance of such roles would require well trained, committed staff
- There must be a question as to how well it would work in benefits cases
- There may be a danger of duplicating ACAS' role in employment cases.

The hearing issue

- 2.64 One of the central tenets of the White Paper is the idea that the number of hearings in tribunals can and should be reduced, with better targeting on those cases where a hearing is the best option for resolving the dispute or enforcing the outcome.⁴² This raises important issues of principle.

- 2.65 As LAG have pointed out:

“the DCA’s theoretical guarantee of the right to a hearing means little in practice if users have to fight a strong presumption against one being held.”⁴³

“it is important to ensure that appellants are exercising a genuine and informed choice between the options available, and are not simply swept along in the direction of informal (or non-hearing) resolution – or even actively discouraged from opting for a formal hearing – if the latter would be in their best interests.”⁴⁴

- 2.66 There are also however practical issues.

⁴² Paragraph 2.3

⁴³ Legal Action editorial August 2004

⁴⁴ LAG response to the White Paper p.8

2.67 One question is whether the evidential issues – obtaining new or further evidence and reconsidering existing evidence – can be dealt with outside a hearing.

2.68 According to the President's report:

"[Chairmen] place great value on and emphasised the importance of the appellant's detailed oral evidence. Chairmen considered that appellant's evidence was credible, convincing and crucial to the final outcome;

They place great value on the opportunity to question the appellant in detail about their circumstances;

*In cases involving medical evidence it was the combination of oral evidence and additional medical evidence that made the greatest impact."*⁴⁵

2.69 According to the National Audit Office:

*"The causal relationship between customer attendance and success has not been conclusively proven . . . Nevertheless, especially for medically assessed benefits, it is likely that the presence of the customer provides crucial evidence. For Disability Living Allowance, 61 per cent of oral hearings were decided in favour of the customer, compared with 34 per cent of paper hearings, and the President of Appeal Tribunals has indicated that the presence of the appellant has a significant impact on the outcome. Our interviews with customers also confirmed that many saw the tribunal as important."*⁴⁶

2.70 Quite apart from considerations of justice being seen to be done, this strongly suggests that oral hearings play a vital evidential role, even when additional medical evidence is provided.⁴⁷

2.71 It is not clear how many tribunal hearings could actually be avoided, although the number seems unlikely to be large. The National Audit Office has suggested that the DWP could, in five years, reduce by 25% the number of DLA appeals going to tribunal, by improving its original decision making.⁴⁸ The President's report records the views of tribunal Chairs that 8% of benefit appeals could have been avoided.⁴⁹

A more limited role

2.72 It appears to us that the tribunal's pre-hearing role can only be limited. It could however:

- Identify discrepancies and omissions in the evidence and draw these to the attention of the parties
- Suggest particular types of evidence that might be desirable (possibly including medical reports)
- Identify potential shortcomings in the contentions being advanced by either party, which they might wish to consider

⁴⁵ The President's Report, op cit, p.17

⁴⁶ National Audit Office, op cit, p.44

⁴⁷ The CICAP Annual Report 2003/04 notes that 46% of appeals were successful. It states that "The successful appeal rate reflects the fact that most of the determinations by the Appeals Panel are at an oral hearing, whilst the Authority's are all paper decisions." p.9

⁴⁸ National Audit Office, op cit pp.5, 7. The NAO suggests also that 10% of JSA appeals could be avoided.

⁴⁹ See para 2.20 above

- Suggest the need for appellants to obtain advice in relation to their appeal, either in general terms or in relation to specific aspects or points
- Suggest reconsideration of the decision in question, in relation to benefits appeals

2.73 Care must however also be taken in relation to case management issues.

2.74 The white paper suggests that tribunal staff will ensure that all the relevant material and information is available on the day and that any extraneous issues have been dealt with in advance. It also suggests that they will have sufficient sanctions and powers to carry out this role, such as the power to prevent a party who has not done what they should have done from carrying on with the case.⁵⁰

2.75 There is a danger however that the application of such sanctions may discriminate against unrepresented or unadvised appellants.⁵¹

Who will perform the tribunals' new roles?

2.76 Whatever new roles are adopted by the Tribunals Service, the question remains as to who will perform them. One of the dangers of the FOS analogy is the assumption that tribunal staff will be able to take on a number of new roles, albeit under judicial supervision. As we have argued above, it is important to bear in mind that the FOS staff are well trained and in many cases are specialists in the areas in which they work.

2.77 It appears to us that the proposed new roles could not be handled by tribunal staff, unless they were of a calibre and expertise equivalent to that of adjudicators in the FOS. In reality, it would seem that these decisions would have to be made by a tribunal chairman. This would also probably be necessary in order to deal with a second practical issue, in benefits cases, which is how to ensure that the department takes notice of what the tribunal says.

The 'feedback' issue

2.78 In relation to benefit appeals, there is a specific issue as to whether tribunals should have a role in commenting on cases and drawing the department's attention to specific or recurrent issues which arise in appeals. While this may be desirable in theory, there are serious questions as to whether it would work in practice. LAG have queried whether tribunal chairs would be consistent in their performance of this role.⁵² We have noted already the department's view, as recorded by the President, that increasing the feedback would have resource implications at a time when the department is seeking to reduce costs.⁵³ This suggests that the will to change is unlikely to be very strong within the department.

2.79 It has to be remembered that one of the results of having an appeal body is that lower level decision makers can leave cases to the tribunal to sort out. There is less need to 'get it right first time' if there is someone who can correct your decision if you get it wrong. The danger is that the department would pay insufficient attention to any recommendations made by the tribunal, on the basis that they do not need to, and the matter can be left to the tribunal to resolve, particularly when the case involves complicated issues such as the interpretation and evaluation of medical evidence.

⁵⁰ Paragraph 7.9

⁵¹ See also the LAG response p.12

⁵² *ibid*, p.8

⁵³ See para 2.29 above

2.80 The danger for the tribunals however, as the President has pointed out, is that they then appear to be “another tier of the decision-making process rather than the appropriate appellate authority.”⁵⁴

Do tribunals need more powers?

2.81 One possible way to strengthen the ‘feedback’ role would be to increase the powers and sanctions available to tribunals.

2.82 Following on from the suggestions made in this regard by IPSEA,⁵⁵ we would suggest that consideration should be given as to whether tribunals should have the powers to

- Require government departments to reconsider or retake decisions concerning a claimant’s entitlement to benefit
- Order government departments to pay costs where cases have resulted in a hearing that the tribunal considers to have been unnecessary
- Make recommendations that government departments improve their decision-making processes in specific ways.⁵⁶

2.83 If such powers were to be introduced, the frequency of their subsequent use could become the subject of performance indicators, or PSA targets, for the department concerned.

Is this the right answer to the right problem?

2.84 As far as benefits cases are concerned, the question must be asked as to whether the government is addressing the right problem. This issue is obviously complex, and we can only outline what appear to us to be the key issues.

2.85 The various reports on benefits decision making suggest to us that many successful appeals could have been avoided, if DWP staff had:

- seriously looked at the evidence
- checked any discrepancies or omissions with the claimant
- been more inclined to accept the claimant’s word
- not accepted medical evidence at its face value
- checked with the claimant what the effect of their disability on them actually was.

2.86 There is clearly a need for greater communication and contact between claimants and decision-makers.⁵⁷

2.87 In our view, a mechanism is needed that allows a meeting between a claimant and the department to discuss a claim before an adverse decision is made. Provision could also be made for a decision to be properly reconsidered following the intervention of an advice agency.

2.88 There is also a case for slower decision making, since it appears that clearance time targets effect the time taken at the initial decision stage, at least in relation to DLA claims.⁵⁸

⁵⁴ See para 2.28 above

⁵⁵ See IPSEA’s response to the White Paper, pp.4-5

⁵⁶ Although such recommendations could not be enforceable as such, they could be relevant as to any future costs awards

⁵⁷ See in particular the National Audit Office report, op cit, p.5

⁵⁸ See para 2.18 above

2.89 Finally, there is a strong argument that the department should be encouraged, or indeed required, to improve its appeal function, and provide presenting officers at appeal hearings.

3 Advice and representation

The White Paper

- 3.1 On the question of advice and representation, the White Paper seems to us 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, no case for extending legal aid to tribunals, and 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."⁵⁹
- 3.2 In general, we agree with what the White Paper has to say about user needs, the need for realistic advice about options and the prospects of success, and the need for advice to be given from a source independent of government.⁶⁰
- 3.3 We agree that a balanced and systematic approach is needed as to the extent to which representation should be publicly funded,⁶¹ but it seems to us that the White Paper fails to present such an approach. Its argument that full-scale representation should not be available at public expense comes close to setting up a straw man to demolish, rather than forming part of a coherent argument as to the circumstances in which representation may be necessary. In this respect the White Paper arguably represents a step back from the position adopted by the Leggatt Report, which did at least consult on the contents of a merits test for representation in tribunals.⁶²
- 3.4 We are concerned at the suggestion in the White Paper that funding is available for exceptional cases where an individual cannot represent his or her own case in resolving a matter of great importance.⁶³ The latest annual report of the Legal Services Commission states that, during 2003-04, only 13 applications for representation at enquiries or tribunals were granted.⁶⁴
- 3.5 The White Paper also fails to consider a number of trends suggesting that the need for advice is in fact being increased as a result of changes in the law.
- 3.6 Employment law is an example of this. The increasing complexity of employment legislation, and the greater need for advice at the application stage has been noted by the Employment Tribunal Taskforce.⁶⁵
- 3.7 In particular, 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 about
- The procedures themselves

⁵⁹ White Paper para 10.1

⁶⁰ Ibid, paras 10.2, 10.7, 10.9.

⁶¹ Ibid para 10.3

⁶² Question 32 in 'Tribunals for Users'

⁶³ White Paper, para 10.14

⁶⁴ Legal Services Commission: Annual report 2003/04, p.44. The figures given do not distinguish between enquiries and tribunals.

⁶⁵ See Adler and Gulland 'Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review', November 2003, pp.5-6.

- How they affect the right to bring a claim
- How they affect the relevant time limits
- How they affect what needs to be included in the claim form [the ET1]
- The tribunal's new procedures, including the 'pre-acceptance' procedure

3.8 There is also a new ET1 form, which is optional now, but will be compulsory from next April. This has baffled advisers already, and will also increase the need for advice.⁶⁶

The need for advice

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

- Because the law is complex, in many cases is increasingly complex, and is very unlikely to become any simpler
- Because of a general lack of awareness of important legal provisions⁶⁷
- Because the law changes all the time and some of these changes will increase the need for advice
- Because employers and the State make challengeable decisions in a large number of cases, and will continue to do so
- Because of the power imbalance between the vulnerable individual and the State⁶⁸
- Because most appellants do not really understand the appeals process or the powers of tribunals⁶⁹
- Because many appellants are confused by the appeal process and have little idea of what will happen at a tribunal hearing.⁷⁰

3.10 In our response to the Leggatt report, we commented that:

“As far as benefits appeals are concerned, the issues in many if not most appeals involve considerations of fact, evidence and law. This is particularly the case where the appeal concerns issues such as entitlement to disability benefits, the personal capability assessment, habitual residence, overpayments, or notional capital or income. In our view, it would be unrealistic and inappropriate to expect users to argue their case alone at tribunal in many such cases.

The complexities of cases before Employment Tribunals are well known. Some cases do concern relatively straightforward issues of fact, such as cases concerned solely with unpaid wages. Some other cases, including some unfair dismissal cases, are also relatively straightforward, such as where the facts are not significantly in dispute, and the only question is whether the employer has acted reasonably and/or followed a fair procedure. However there are many cases which are extremely complex both factually and legally, including in particular cases in which the applicant is claiming discrimination on the grounds of race, sex or disability, or where the case

⁶⁶ See Jo Chimes 'Claims and responses', Adviser 103, p.12

⁶⁷ Adler and Gulland refer specifically to research indicating a general lack of awareness of the provisions of the Disability Discrimination Act, op cit p.6

⁶⁸ See the discussion of 'powerlessness' in H. Genn and Y. Genn 'The Effectiveness of Representation at Tribunals', 1989, pp.130-131

⁶⁹ Adler and Gulland op cit p.4

⁷⁰ Ibid p.11

includes consideration as to whether the applicant is (or was) an employee, or whether there has been a transfer of an undertaking.”⁷¹

- 3.11 In many cases, there is clearly a need for expert advice. In employment cases, for example, where the likely outcome of a case in financial terms is hard to predict, expert advice would generally be necessary if an applicant is involved in negotiations for settlement of a claim. In discrimination cases expert help is also needed in the preparation of a claim, especially when it comes to preparing questionnaires. The preparation of witness statements and bundles of documents is also generally likely to require expert help.
- 3.12 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 White Paper 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.⁷²

The need for representation

- 3.13 In our view, the White Paper, like the Leggatt report, underestimates the difficulties for appellants and applicants, and ignores a considerable body of research on this subject.
- 3.14 Hazel and Yvette Genn summarise their findings in the following terms:

“In general, unrepresented [appellants and applicants] are disadvantaged in hearings by not being able to understand what is going on, by not knowing what they have to do, and by not understanding what the tribunal is there to do. Unrepresented appellants and applicants rarely feel that they have the necessary verbal skills to present a genuine challenge to the other side. They do not feel that they are able to ask the right questions, or express their case in the right sort of terms.”⁷³

- 3.15 The literature review of “Tribunal Users’ Experiences, Perceptions and Expectations”, commissioned by the then Lord Chancellor’s Department, concluded as follows:

“Most of the research concludes that appellants find it difficult to represent themselves. When people have the opportunity to be represented (because they are able to afford legal representation, because they are able to obtain legal aid, or because free lay representation is available) 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.”⁷⁴

⁷¹ ‘Tribunals for Users: Response of the Advice Services Alliance’, available at http://www.asauk.org.uk/fileLibrary/pdf/Tribunals_for_Users.pdf, p.3

⁷² See the LAG response to the White Paper, pp.3, 4

⁷³ Genn and Genn, op cit, p.237

⁷⁴ Adler and Gulland, op cit, p.27. See also the discussion of representation in the CICAP Annual Report 2003/04, p.10

3.16 There is no doubt that representation increases the chances of success.⁷⁵ Recent evidence confirms this. In relation to social security appeals:

*“Quarterly Appeals Statistics, published by the Department, confirm that customers choosing an oral hearing have a greater rate of success. Of 34,000 appeals cleared at oral hearing between April and June 2002, 52 per cent were decided in favour of the customer, compared with 23 per cent of the 11,000 paper hearings. Customers also fare best when accompanied by a representative - 67 per cent of these hearings were decided in the customer's favour.”*⁷⁶

3.17 We are not suggesting that publicly funded representation is necessary in all benefits or employment 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.”⁷⁷ There will have to be a merits test of some kind.⁷⁸

3.18 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.

⁷⁵ For a consideration of some of the evidence, see Advice Services Alliance, op cit, pp.5-6

⁷⁶ National Audit Office, op cit, p.44

⁷⁷ White Paper, para 10.3

⁷⁸ See for instance the test we proposed in response to Question 32 of the Leggatt Report: Advice Services Alliance, op cit