

TRIBUNALS FOR USERS

The Advice Services Alliance's response to the
Lord Chancellor's Department's consultation
paper

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Introduction

i)

- The Advice Services Alliance (ASA) was established in 1980, and is the umbrella organisation for independent advice services in the UK. Its aims are to:-
- champion the development of high quality information, advice and legal services;
- ensure that people are not denied access to such services on account of lack of means, discrimination or other disadvantage;
- encourage co-operation between organisations providing such services;
- provide a forum for the discussion of issues of common interest or concern to advice organisations.

ii)

- Full membership of ASA is open to national networks of independent advice services in the UK. Current full members are:-
- Citizens Advice Scotland (CAS);
- DIAL UK (the disability information and advice line service);
- Federation of Information and Advice Centres (FIAC);
- Law Centres Federation (LCF);
- National Association of Citizens Advice Bureaux (NACAB);
- Scottish Association of Law Centres (SALC);
- Shelter;
- Shelter Cymru;
- Youth Access.

iii)

ASA welcomes this Review. As the Lord Chancellor has noted, tribunals have received little attention compared to other parts of the civil justice system. It is therefore right that there should be an investigation into whether they are working as they should, and how they can be improved.

iv)

The advice sector deals with substantial numbers of cases involving several different tribunals, principally in the field of social welfare law. These include - but are not limited to, those dealing with:

- Social Security.
- Employment;
- Immigration;
- Mental Health;

v)

ASA itself does not have the resources to comment on all the areas covered, or to provide detailed answers to many of the questions asked, in the consultation paper. Our response therefore focusses on certain issues of general principle of relevance to these and similar types of tribunals, where individuals are seeking to challenge a decision by the state or a public body, or an employer.

General Comments

We are concerned at the general approach taken by the Report and in particular the assumptions that

- the problems faced by tribunal users can be overcome by better information and advice, and that, as a result,
- representation is only necessary in exceptional cases.

In our view, this approach underestimates the difficulties faced by users, and specifically:

- the difficulties they have in understanding the paperwork they receive
- the difficulties many would have in obtaining useful information using the internet
- the difficulties they have in understanding the legal and factual issues which arise in their cases
- in many cases, their need for representation.

Literacy and the Use of IT

The first issue to consider is the extent to which tribunal users are likely to be able to absorb written information. As several respondents have already pointed out, many of the most vulnerable people have poor literacy skills. Research part-funded by the Department of Social Security found that claimants of state benefits are more likely to have low literacy skills than non-claimants (40 per cent and 17 per cent respectively).

Similarly, 46% of those with low literacy skills reported that they needed help with filling out forms from government departments.¹ In addition, many people are not computer literate and have no easy access to computers, the Internet or e-mail.

As we pointed out in our earlier response, recent data from the Family Expenditure Survey indicates that whilst access to the Internet at home, for example, is increasing rapidly, it is only in London and the South East that 1 in 4 households have such access. The figures for other regions of the UK are far lower - as are those for lower income groups, lone parent families, and pensioners.² As these groups are among those most likely to be tribunal users, scope for the use of ICT here may be limited for some time, until access via public outlets becomes widespread both in terms of location and cost.

Apart from one or two references to a video, the implication of the Report is that most of the information needed by users will be provided in writing, and/or via the Internet. There would seem to be a real danger here that the user is being seen as typically articulate, literate, and with access to the Internet. This surely exaggerates the extent to which many tribunal users read at all, are happy to receive information in writing, or use the Internet.

Moreover, the possibilities of making things easier to understand should not be overestimated. An example of the problem is given by a small-scale study of the Benefits Agency's written submissions to social security appeals tribunals, which

¹ The Law Society: Comments on the Review of Tribunals Consultation Paper, September 2000 p.10
Response of the Legal Action Group to Sir Andrew Leggatt's Review of Tribunals, September 2000, p. 8

² Internet Access 1st Quarter 2000 National Statistics, July 2000

monitored an experimental form of submission, intended to be clearer and easier for claimants to understand.³

“All the expert participants in the process thought that the new submissions would be more “user-friendly” for claimants than the old ones; but evidence from appellants themselves showed that they were just as bewildered by the new format as they had been before”.⁴

Complexity

The second main issue concerns the factual and legal complexity of many appeals.

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

The issues at stake are often considerable. As Genn and Genn commented in 1989:

“ A great deal often hangs on the success of applications before industrial tribunal: money, the possibility of future employment, qualification for unemployment benefit, withdrawal of allegations of dishonesty, and pride. The hearing may also be the first time that the applicant has seen their former employer since the dismissal, all of which contribute to feelings of pressure and a sense of intimidation.”⁵

The need for representation

The third and related issue concerns the Report’s contention that representation is unnecessary in tribunals save in a few exceptional cases. With the greatest respect to the authors of the Report, we do not consider that this contention is justified. It is not argued, as much as asserted as a fundamental principle. It does not relate to the Report’s own findings as to the level of representation in many tribunals. It is also not supported by the research on the subject, or official statistics. In our view, this contention is misguided. We accept that there are many cases where users can be expected to manage alone, provided they receive proper advice. However, in our view, the report seriously underestimates the extent to which representation is necessary in order to achieve fair results for users, and access to justice as a result.

³ A Bryson, “A Study Evaluating Simplified Appeals Submission Papers and the Independent Tribunal Service Booklet for Appellants” (1993), Policy Studies Institute

⁴ R Berthoud and A Bryson “Social security appeals: what do the claimants want?” (1997) 4 J.S.S.L. p.19

⁵ H. Genn and Y. Genn The Effectiveness of Representation at Tribunals. Lord Chancellor’s Department , 1989, p. 234

We would point out firstly, that the Report itself found a need for and/or high levels of representation in many of the tribunals it considered. This was particularly the case in:

- immigration appeals, in which the Report records “general agreement that . . . that few appellants could realistically be expected to prepare and present their cases themselves”
- mental health review tribunals, in which legal aid (now controlled legal representation) is available
- The Criminal Injuries Compensation Appeals Panel, where around 60% of appellants are represented
- The Lands Tribunal, where legal representation is general
- The Pensions Appeal Tribunals, where over 80% of appellants are represented
- Rent Assessment Panels sitting as Leasehold Valuation Tribunals, where representation rates are relatively high
- The Social Security Commissioners, where 60% of appellants were represented
- Tax Tribunals, where parties tend to be represented in complex cases, and
- Valuation Tribunals, where about half of the appellants are represented by expert property agents ⁶

The need for representation is also clear from research on tribunals, which the Report unfortunately fails to address.

The major study of representation in tribunals is of course that carried out by Hazel and Yvette Genn. As far as we are aware, this has generally been accepted as an authoritative analysis of the issue, and its findings have never been doubted.

Since this study is hardly mentioned in the Report, it is necessary to remind ourselves of some of its key findings.

Considering the experiences of unrepresented tribunal users, the authors summarise their findings as follows:

“The experience of unrepresented appellants and applicants is overwhelmingly of feeling ill-equipped to present their case effectively at their hearing. They are intimidated, confused by the language and often surprised at the formality of the proceedings. Those who are subjected to cross-examination find the experience stressful, and feel unable to conduct cross-examination themselves. It is difficult to convey the degree of incomprehension common among appellants and applicants who appear unrepresented at tribunals, or the extent of the difficulties experienced by ordinary people trying to present their case in a legal forum”. ⁷

In their more recent study of social security appellants, Berthoud and Bryson found similar levels of incomprehension:

“In the current study, the qualitative interviews suggested that appellants were usually unable to explain the key elements of their case.” ⁸

Genn and Genn found varying rates of representation in the tribunals they studied, but

⁶ Tribunals for Users (The Leggatt Report) pp 150,140,155,170,173,184,195,204

⁷ Genn and Genn op cit, p.241

⁸ Berthoud and Bryson op cit, p.26

“In all four tribunals, the presence of a representative significantly and independently increases the probability that appellants and applicants will succeed with their case at a tribunal hearing.

The relative contribution of representation to the likelihood of success in the four tribunals is as follows:

Social Security Appeals - probability of success is increased from 30% to 48%

Immigration hearings - probability of success is increased from 20% to 38%

Mental Health Review - probability of success is increased from 20% to 35%

Industrial Tribunals - probability of success is increased from 30% to 48%
if the respondent is not represented”⁹

Moreover, the type of representation was found to be important in all four tribunals, with specialists producing significantly higher rates of success.¹⁰

The findings in relation to social security appeals have been confirmed by statistics published by the DSS which have persistently shown that an appellant’s chances of success are increased very significantly if they attend the hearing with a representative as compared to attending alone. Over the last few years the average success rates in question have been in the region of 66% as compared to 48%.

It has sometimes been suggested that the differences in these success rates are due to the fact that representation is more likely in strong cases. However, this does not explain the different success rates obtained by specialists. Nor is it supported by the research itself. Genn and Genn point out at several occasions in their research that the most important obstacle to representation is simply the inability of overstretched advice agencies to provide representation.¹¹

Genn and Genn also remind us that the question is not just one of advice. In particular, “in contrast with social security appeals, pre-hearing advice in industrial tribunals confers no advantage on unrepresented applicants.”¹²

The “enabling” role

Genn and Genn also provide considerable insight on the extent to which the lack of representation can be overcome by an “enabling” approach by the tribunal.

“During observation of social security appeal hearings the vast majority of chairs were found to be courteous, sensitive and at pains to be helpful to appellants, reflecting, presumably, the ‘enabling’ role that has been stressed under the new regime and the belief expressed by all chairs that hearings were fundamentally ‘inquisitorial’ ”¹³

However, as they point out, the statistics show that “chairs, on the whole, appear to underestimate the advantage that representation may provide.”¹⁴ This is also borne out by their observations of social security appeal tribunal hearings.¹⁵

⁹ Genn and Genn op cit p.243

¹⁰ ibid p.243-4

¹¹ ibid. pp 52,60,222,241

¹² ibid. p.95

¹³ ibid. p.159

¹⁴ ibid p. 164

¹⁵ ibid. pp.165-6

Similar conclusions were reached by Baldwin, Wikeley and Young in their study of social security adjudication:

“It would seem to follow that, no matter how good the chairman, an appellant’s interests (and often the tribunal’s interests too) are best served by the use of expert representatives.”¹⁶

Berthoud and Bryson comment similarly in relation to social security tribunals:

“the great majority of successful appeals are presented by an expert. . . this casts strong doubts on the validity of a hearing based in theory on informal questioning of the ordinary claimant”.¹⁷

It should be noted also that the Social Security Act 1998 specifically reduced the possibility of social security appeals tribunals taking on an inquisitorial role, by allowing them to disregard any issue not raised by the appeal.¹⁸

Similarly, in relation to industrial tribunals, Genn and Genn point out that

“Applicants lose most often when they appear without representation against a legally represented opponent. This is an important finding since . . . the perception of industrial tribunal chairs is that they bend over backwards to assist unrepresented applicants who are opposed by legally-represented respondents. Table 3.17 indicates clearly that, despite their perceptions, and despite their efforts, applicants succeed very rarely in these situations.”¹⁹

Genn and Genn also question the extent to which tribunals can and should perform an “enabling” role:

“The requirement that chairs be responsible for eliciting all of the necessary information from appellants, for correctly applying the law and adjudicating the case, involves the performance [of] several different roles. This may prove difficult if the performance of these various roles is approached conscientiously.

Even if chairs succeed in obtaining the information they think they require, there may still be scope for creative argument on the application of regulations. To expect chairs to make those arguments on behalf of appellants may be asking too much, and in any case, it may not be appropriate that they should.”²⁰

Support for these views was found in particular from immigration adjudicators.²¹

Conclusion

In conclusion, it is our view, the view of our member networks, and the logical result of all the research evidence that we have seen, that there is a need for representation in tribunals that is considerably more extensive than is suggested by the Report. In our view, the lack of proper representation for many tribunal users who need it is the most significant failing of the present tribunal system. If the resources available to improve tribunals are limited, it is our view that they should be concentrated on improving advice to users and representation of users in tribunals.

¹⁶ J Baldwin, N Wikeley and R Young Judging Social Security, Clarendon Press, 1992, p.124

¹⁷ Berthoud and Bryson, op cit, p.38

¹⁸ Legal Action Group, op cit,p.17, referring to Social Security Act 1998 s.12(8)(a)

¹⁹ Genn and Genn, op cit, p.94

²⁰ ibid p. 167

²¹ ibid p.190

Although an extension of representation would obviously involve additional resources, there will also be some savings. In employment cases, in particular, it is likely that an increase in representation, and the availability of representation, is likely also to result in an increase in the number of cases which are actually settled without a tribunal hearing.²² It is likely also to lead to an increase in the amounts obtained by way of settlements. In employment and social security cases, considerable time will be saved by advisers in not having to prepare clients for having to attend a tribunal unrepresented, and in not having to appeal decisions which have gone against unrepresented clients.

The most effective means for increasing advice and representation are likely to be

- by funding organisations with the specific expertise, whether they be local advice centres, citizens advice bureaux, law centres or tribunal representation units, and
- by an extension of the system of controlled legal representation (as presently exists in immigration cases and mental health appeals) to other tribunals

As we have indicated above, our comments apply in particular to social security and employment tribunals. We agree with the Report that any extension of representation should apply in relation to all tribunals. We are unable to comment on the extent of the need for representation in other tribunals, although it would appear to us that there may be a strong case for representation in The Special Education Needs Tribunal²³ and before the Criminal Injuries Compensation Appeals Panel.²⁴

We have set out below in some detail, in our answer to question 32, our comments on the merits test which would be needed in order to implement an extension of controlled legal representation.

Our responses to the questions posed by the consultation paper are set out below.

²² *ibid* p.135

²³ Law Society, *op cit*, p. 54

²⁴ Legal Action Group, *op cit*, p.6

Questionnaire

1. Do you agree that reform of tribunals should focus on maintaining and improving the services that tribunals provide to their users in the areas identified in paragraphs 2-4 (enabling most users to represent themselves; better information and advice; service standards and performance measures; improved training for judiciary and staff; more effective procedures, incorporating active case management; review and feedback to promote better initial decision-making; and modern IT providing electronic access)?

In general terms, we agree that there is considerable scope for improvement in the services provided by tribunals to their users. We agree also that there is a need to focus on the end-to-end process.

The starting point is the need for greater clarity in original decision-making by administrative bodies. Decisions concerning people's rights and entitlements need to be properly explained. The relevant facts as found by the decision-making body need to be set out, and reasons given in ordinary English explaining how the decision has been reached based on those facts and the law as interpreted by the decision-making body. This applies in particular in social security cases. We believe that the report is over sanguine in suggesting that there have been any significant improvements in this regard by the Benefits Agency. The position is probably worse as far as the administration of housing benefit and council tax benefit by local authorities is concerned. One factor which the report does not consider is the extent to which the form and content of decision letters is driven by inappropriate computer packages, particularly those used by many local authorities.

There should be proper internal reviews of decisions once an appeal has been made. There should also be systematic feedback from tribunals to decision-making bodies when appeals are upheld, especially where deficiencies are found in the process of establishing the relevant facts, and where errors of law are established.

However, as we have argued above, we believe that the Report has significantly underestimated the complexity of many cases which are the subject of appeals to tribunals, and consequently, the extent to which it will be necessary for users to be legally represented. We disagree with the Report's contention that there should be "few exceptions to the principle that tribunal users should be able to prepare and present their cases themselves"¹. In our opinion, a reform of tribunals which accepts this contention will lead to a significant waste of resources and an improvement in formal equality at the expense of substantial equality and access to justice.

As far as training is concerned, we believe that there is considerable scope for improvement. Given that large numbers of users will be unrepresented, we believe that tribunal Chairs need training on how to deal with unrepresented parties. Training is also necessary in order to increase sensitivity to language difficulties, and cultural issues.² Many Chairs seem to start with a predisposition in favour of the views expressed and decision reached by the original decision-maker.³ Training is necessary in the need to approach each appeal with a genuinely open mind. There is at present a danger that many Chairs have become case hardened, as a result of seeing too many appeals which are "hopeless", as the appellant has failed to

¹ Recommendation 23

² See for instance the Equal Treatment Bench Book produced by the Judicial Studies Board

³ See Genn and Genn's comments that many chairmen "had simply fallen into a pattern of not reversing DSS decisions". Genn and Genn op cit p.176

understand the relevant law, due to a lack of proper advice.⁴ Chairs need to be reminded of the findings by the monitoring authorities as to the adequacy of decision making processes and the appeal submissions prepared in social security appeals in particular. The fact that the appellant has failed to understand the key issues in a case should not blind Chairs as to the need to submit the original decision to the keenest scrutiny.

2. Are there any other areas where improvements could be made?

In our view, improvements could be made in a number of other areas.

Time limits

A number of issues arise in relation to time limits for appeals. A proper review of tribunals must consider these, and propose appropriate changes. It would be unfortunate, to say the least, if tribunal services were to be considerably improved, but remain inaccessible to users due to inappropriate time limits set from “outside” the system. It should be noted also that the general inflexibility of time limits in relation to the lodging of appeals is in marked contrast to the flexibility allowed to respondents to reply to appeals once they have been lodged.

Immigration appeals are the most obvious cases in which time limits have been set unreasonably strictly, to the detriment of users and those trying to advise and assist them. The work of many agencies and solicitors firms providing immigration advice is seriously distorted by the present time limits for appealing.

In social security cases, there has been a general reduction in time limits for appeals, from three months to one month, While this might seem sufficient in many cases, it underestimates the difficulties that claimants have in obtaining proper advice from a skilled and specialist adviser. Such problems have been highlighted by recent research.⁵

In many cases concerning capacity to work, and claims for benefits as a result of disability, it is necessary for medical evidence to be obtained, before proper advice can be given as to the prospects of success in an appeal. At present there is a danger of appeals having to be lodged in order to comply with time limits before the necessary evidence can be obtained or considered.

Different problems occur in employment tribunal cases. In many cases the user will wish to use internal procedures, such as grievance procedures, or will be the subject of internal procedures including disciplinary procedures, which often involve internal appeals. At present there is no recognition of this in terms of the three month time limit. Many users miss their right to apply to the tribunal through failing to understand this. Many applications are also lodged in order to protect the user’s position. These have to be processed and dealt with as if they were definite applications. This in turn may also lead to a hardening of attitudes, making an internal resolution of the problem more difficult.

A different problem arises in discrimination cases. When someone is complaining of events which have occurred in the past, the three month time limit applies in relation to each event, unless it can be established that they form a pattern. Since this can rarely be guaranteed, it is often necessary to lodge an application to the tribunal as soon as possible, and often before a questionnaire can be served to seek greater clarification of the issues. Again, there is a danger of rushing into applications before

⁴ *ibid* p.75

⁵ See H. Genn *Paths To Justice* p.76; R. Moorhead et al *Quality and Cost* pp141-3

the facts can be clarified, the views of the other side obtained, and the possibilities of a resolution explored. The result, again, is often a hardening of attitudes. In discrimination cases there has been some recognition in the caselaw of the advantages, and the desirability, of pursuing internal procedures before making an application to the tribunal, but this has not been consistently applied. We would suggest therefore that further consideration be given to the question of time limits in employment cases, and/or the circumstances in which they can be waived or varied.

In general terms, we see considerable merit in the suggestion made by the Legal Action Group in their previous response⁶ that there should be a minimum time limit of three months for all tribunals, and that tribunals should have the power to extend this limit if it appears just and equitable to do so (as presently exists in relation to discrimination cases in employment).

Requiring Appellants to Confirm An Appeal

A further problem within social security appeals concerns the form which is sent by the Appeals Service to appellants once their appeal has been received, which appellants have to return within 14 days, failing which their appeal is automatically dismissed. This requirement causes unnecessary problems for appellants and their advisers, and in our view is unnecessary. If it is felt to be administratively necessary to receive confirmation from an appellant that he or she wishes to proceed, this could be achieved by simply marking cases as “inactive”, or not listing them for hearing, until such confirmation has been received, with suitable chasing letters being sent to appellants as appropriate.

Given the Report’s general endorsement of the Appeals Service as a model for the proposed new tribunal service, we would urge that this procedure be reconsidered, and hopefully abandoned, rather than extended to other tribunals.

The Form of Appeal Hearings

A further problem which occurs presently within social security appeals is the option given to appellants of a paper hearing rather than an oral hearing.

We are concerned at the Report’s suggestion that “many users of tribunals may still prefer oral hearings to written procedures”⁷ which implies that paper hearings should be seen as the norm.⁸

While we can understand that many appellants may find a paper hearing attractive as requiring less action from themselves, and saving them from the stress of an oral hearing, we are concerned that many appellants may be misled into thinking that their case will receive the same degree of scrutiny and consideration as would (or should) happen at an oral hearing. The Report notes that “there is evidence to suggest in some tribunals that today’s users still enjoy greater success when they appear in person”⁹. This is in fact clearly established by the research conducted by Hazel and Yvette Genn.¹⁰ It is also confirmed by the DSS statistics on success rates in social security appeals and by recent experiences in relation to family visitor appeals.¹¹ Appeals very often turn on the evidence given by appellants. If they are

⁶ Legal Action Group op cit p.9

⁷ Tribunals for Users para 23, p.12

⁸ See also the discussion in the Report at para 8.16

⁹ ibid para 10.16

¹⁰ Genn and Genn, op cit, pp35,79

¹¹ In the year ending 30.9.01 the success rate at oral hearings in family visitor appeals was 73%, as compared to 38% for appeals determined on the papers.

not present they cannot give that evidence, or answer questions from the tribunal which are aimed at elucidating evidence which is relevant to the appeal.

As Berthoud and Bryson have commented:

“the whole point of a tribunal is that the appellant should be able to put his or her case, and respond to the members’ questions. A hearing in the appellant’s absence is therefore of doubtful value.”¹²

While it should be possible for appeals to be heard without the appellant attending, we do not in general favour appellants being offered a paper hearing in the way in which this presently happens within the Appeals Service. Appellants should be encouraged to attend. They should be advised that the chances of success are considerably higher if they do so. In the normal course, we consider that their cases should be listed for hearing at an appropriate venue. Appellants could be asked whether they are intending to attend the hearing (as this may assist the listing of cases), but they should be encouraged to attend, and allowed to attend even if they have indicated that they are not intending to do so.

Delays

As the Report acknowledges, delays are a serious problem in many tribunals. This is particularly a problem, as far as our member networks are concerned, in relation to social security appeals, and in particular appeals to the Social Security Commissioners. While the Commissioners provide an expert service, delays of a year or more are commonplace. Serious consideration needs to be given as to the resources needed by the Commissioners in order to enable them to improve the speed of their determinations.

Significant delays also occur with employment tribunals, especially with cases lasting more than one day at the employment tribunal, and in relation to appeals to the Employment Appeal Tribunal.

Interpreters

As one of our member networks has previously argued¹³, better arrangements need to be established for deciding whether or not an interpreter is needed. There is a difference between understanding English well enough to be able to hold down a routine job and being able to present a case in a tribunal, let alone face probing questions from the tribunal, or cross examination. Steps need to be taken to establish whether an unrepresented party has sufficient fluency in English and ability to deal with the relevant paperwork to be able to follow legal proceedings and put over their case. Where there is any real doubt as to the appellant’s fluency in English, the tribunal should take all action necessary to ensure that the services of a competent interpreter are available.

The need for flexible procedures

Although we support the Report’s call for greater use of case management within tribunals, it is important that this is done with flexibility. We already have a situation in the employment tribunals where lengthy standard directions are given by tribunals, often without any consideration of what the issues are in the case, or the ability of the parties (especially if they are unrepresented) to carry them out. Users already have difficulty in understanding what is required in terms of exchanging documents.

¹² Berthoud and Bryson, op cit, p.29

¹³ Law Centres Federation: Review of Tribunals Consultation Paper: Response from the Employment Working Party p.13

Requiring unrepresented appellants to provide a schedule of losses, and requiring unrepresented parties to exchange written witness statements (and sometimes supplemental statements in reply) is expecting too much in many cases.

Enforcing tribunals' decisions

As part of considering the end-to-end process, consideration must be given to the enforcement of tribunal decisions. The nature of the problem varies as between the different tribunals.¹⁴

In social security cases, it is often very difficult and time consuming to obtain the implementation of a tribunal decision awarding benefit and/or arrears of benefit to a claimant. Consideration should be given as to whether tribunals should have powers to assist in the implementation of decisions, or at the least the power to award sanctions in terms of additional compensation and/or interest.

In employment cases, enforcement is transferred to the County Court, although this may in turn depend on actions by others, such as the service of a recoupment notice by the Benefits Agency. Here again, there is no power in the tribunal to make this happen, to impose sanctions, or to authorise a successful applicant to proceed to enforcement without it.

As we have previously suggested, at the very least, we think that successful parties ought to have the option of asking the tribunal to organise the transfer for enforcement (thus demonstrating a real interest in upholding its decisions) The court fee should also be removed.

Jurisdiction issues

It would be clearly desirable that any serious review of tribunals considers questions relating to their jurisdiction.

Such issues arise in particular in relation to employment tribunals. Various suggestions are outlined in the Report¹⁵. Of particular interest to our member networks are suggestions that employment tribunals should have jurisdiction to consider contractual matters during the period of employment, and that tribunals could have jurisdiction to deal with discrimination cases involving goods and services. One issue which also requires clarification is the overlap between personal injury and discrimination cases.¹⁶

3. Do you think that there is a risk that users will lack confidence in a tribunal's independence where it is administered by the Government Department that has responsibility for the subject area (paragraphs 8-9)?

We think that this is a genuine risk. We also consider that this is a matter of principle, and not just a question of what users think. Irrespective of whether the particular issues in a case constitute "civil rights and obligations" as therein defined, we consider that the requirements of Article 6 of the European Convention on Human Rights (entitling everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law) require the separation between the administration of tribunals and the Government Departments responsible for the relevant subject area.

¹⁴ See the comments by the Law Society in relation to Mental Health Review Tribunals and the Special Educational Needs Tribunal, Law Society, op cit paras 5.36 and 6.18

¹⁵ Tribunals For Users p.148, para 26

¹⁶ Law Centres Federation, op cit, pp.20-21

4. If so, what evidence do you have to support this view?

We have not asked our member networks for any such evidence for the reasons set out above.

5. Could any lack of user confidence be addressed in other ways, for example by improved information?

It is possible that improved information could improve user confidence, but again we feel that this is not the issue.

6. Do you see any other real benefits for users if different Ministers are accountable for tribunal administration on the one hand, and for the relevant policies and administrative decisions on the other?

It has been suggested that the administration of certain tribunals has been hampered by the fact that they have had to compete for funds with the more mainstream services funded by their sponsoring departments. The Law Society has suggested that this is the case specifically in relation to mental health review tribunals.¹⁷

7. Do you think that there can be benefits from having one Minister responsible for both policy and tribunal functions that would be lost if these were separated?

We cannot see any obvious such benefits as having flowed from the present arrangements.

8. Do you think that improved tribunal services would be secured most effectively and efficiently by (i) a unified Tribunal Service (covering all or most of the tribunals listed in the Report) or (ii) within or with limited changes to the existing administrative structure (paragraphs 11-13)?

We find this question very difficult to answer. It is not just a question of principle but also one of practice and politics and political will. There are many improvements which can be made to the ways in which tribunals function. Many of these are set out in the Report. We have set out above many of the improvements which we and our member networks would like to see. Many improvements could be carried out within the existing structures. The question is whether there would be the political will, and the necessary resources to back it up, if the report's recommendation of a unified Tribunal Service is not pursued. It may take the implementation of a unified Service to provide the necessary momentum to enable the necessary improvements to be carried out.

Besides the administrative improvements which such a unified service could achieve, another advantage of such a service could be the development of a tribunal ethos, and set of guiding principles, which could counteract some of the developments already taking place in certain tribunals, and the employment tribunals in particular, on such issues as costs, and the suggestion that fees be introduced, which developments in our view are highly detrimental to the interest of users.

9. Which of the options for change without a unified Tribunal Service, identified in paragraph 12, do you consider the most important?

Of the options outlined in paragraph 12, we consider that the most important are the service improvements outlined in paragraph 3, and in particular:

¹⁷ Law Society, op cit, para 5.30

- that users should have access to the information they need to understand their rights and the tribunal process, and to enable them wherever possible to proceed without representation; decision-makers in particular need to improve the information they provide to users
- that users should have timely access to the independent advice (and, where necessary, legal representation) they need
- improved training for tribunal judiciary and staff
- that procedures should be fair, economic, speedy and proportionate to the issues at stake, with active case management to ensure the proper progress of cases (and not just the weeding out of allegedly weak cases) and the encouragement of alternative dispute resolution where appropriate
- that there should be proper internal reviews of decisions by the decision-making body and feedback from tribunals about systemic problems

The other options outlined in paragraph 12 could all improve tribunals to some extent, although in our view they are less important than the service improvements referred to above. Of these, perhaps the most important is an enhanced role for the Council on Tribunals to monitor and report on service standards from a user perspective.

10. Are there any other options that should be considered?

We consider that the improvements outlined above are the most important.

11. Do you agree that any unified Tribunal Service should be an executive agency responsible to the Lord Chancellor, or is there a better option (paragraph 15)?

We agree that any unified Tribunal Service should be an executive agency responsible to the Lord Chancellor

12. Do you think that School Admission and Exclusion Appeal Panels should be seen as judicial tribunals, potentially within the scope of any unified Tribunal Service, or do they take administrative decisions that should continue to be subject to accountability at local level (paragraph 17)?

We consider that School Admission and Exclusion Appeal Panels are problematic, although for different reasons, and not precisely those suggested in this question.

The problem with School Admission Panels is not so much that they take administrative decisions but that they do so by explicit reference to administrative considerations, and in particular, at the first stage, with the school's capacity to admit a pupil without causing prejudice to efficient education or efficient use of resources. As the Report states, unless parents understand clearly how the appeal is structured they are likely to form unrealistic expectations of what can be expected from the hearing.¹⁸ If such panels are included in a unified Tribunal Service there is a risk that unrealistic expectations will be perpetuated or increased by the "promise" of an independent impartial hearing.

As Berthoud & Bryson have commented in relation to social security appeals:

¹⁸ Tribunals For Users p.179, para 6

“appellants may feel duped by a system which, by offering them a hearing, gives them the hope of a positive outcome. Instead, they find on attending the hearing that it will not be possible to win their case”.¹⁹

The position with Exclusion Panels is different. There is no issue here as to whether the school has the capacity to educate the child. The question is whether they should have to do so. In these cases there is an argument for a more independent appeal system than exists at present, with a hearing conducted by those further removed from the actual school itself, with expertise drawn more widely from within the educational system, and with the benefit of a legally qualified Chair (unlike at present) which will assist in the objective consideration of the evidence.

13. Does Annex B list any other bodies that should be excluded from the scope of any Tribunal Service for similar reasons?

We refer to our comments below in response to question 14.

We do not have sufficient information about the regulatory tribunals referred to in Annex B to be able to comment as to whether they should be included or excluded.

14. Should any unified Tribunal Service include:

- **local authority tribunals; and**
- **party -v- party tribunals (paragraphs 18-20)?**

We refer to our comments above concerning School Admission and Exclusion Appeal Panels.

We do not have any firm views as to whether Valuation Tribunals, the Parking Appeals Service or the National Parking Adjudication Service should be included in a unified Tribunal Service.

As far as party v party tribunals are concerned, we do not have any views in relation to the Copyright Tribunal or the Lands Tribunal.

As far as employment tribunals and the Employment Appeal Tribunal are concerned, it is the general view of our member networks that the tribunals are working well, save as to the question of representation. There appears in fact to be a general consensus that employment tribunals are working well, and would perhaps benefit least from inclusion in a Unified Appeals Service.

We refer however to our response to question 8 concerning recent developments in the employment tribunals, at the instigation of the Department of Trade and Industry, in relation to costs and fees, which we consider to be detrimental to the interest of users. If the inclusion of employment tribunals within a unified service helped to counteract such tendencies that would clearly be an argument in favour of their inclusion.

The Report proposes an incremental approach to the establishment of such a service. It might well be appropriate to defer for the moment the question of whether local authority and party v party tribunals should be included, until further progress has been made in establishing the proposed service, whereupon the question can be reconsidered in the light of progress made and the anticipated advantages and disadvantages as they appear at that stage.

¹⁹ Berthoud and Bryson, op cit, p.22

15. Do you agree with the Report's recommendation that the tribunals system should have a divisional structure, with each Division headed by a judicial President (paragraphs 22-23)?

16. Do you agree with the roles proposed for judicial presidents?

17. Do you agree that a Tribunal Service should be directed by a Tribunals Board (paragraph 24)?

We agree with these proposals

18. Do you agree with the Report's recommendation about the membership of the Tribunals Board, or would there be advantages in including more external representation.

19. Do you agree with the Report's recommendations about the functions of the Tribunals Board?

We agree in general with the proposals as to the membership and functions of the proposed Tribunals Board.

We can see that there could be advantages in including more external representation, and in particular in having input from the advice sector as to the experience of users. However, it may well be preferable for such input to be made at the level of the Council of Tribunals, i.e. explicitly from "outside" the system, rather than within it.

20. Do you agree that the Council on Tribunals should have an enhanced role to champion the cause of users (paragraph 25)?

21. Do you agree with the Report's detailed recommendations about the functions of the Council?

We agree with these proposals, and in particular the suggestion that the Council should have a role in monitoring the adequacy of independent sources of advice.

22. Could the Council's role be expanded beyond this?

We have no suggestions in this regard.

23. Do you agree with the Report's recommendations about second appeals, precedent-setting powers for second tier tribunals, and excluding tribunals from the scope of judicial review (paragraphs 27-29)?

24. Are there jurisdictions that should not have a second tier appeal, for example because it would introduce unacceptable delay?

25. Are there jurisdictions where the grounds for a second tier appeal should be wider than a point of law?

26. Should only selected second tier decisions be binding; or, given that they are limited to points of law, should all second tier decisions be binding?

27. Should tribunals be excluded from judicial review, or should only second tier tribunals be excluded; or should judicial review remain available as now?

In principle we agree with the recommendation that there should be a second tier of appellate tribunals which covers all the first instance tribunals. Mental health appeals would appear to be a particularly good example of this.²⁰

We can see the advantages of clarifying and extending the precedent-setting powers of the appellate tribunals, so that they approximate more closely the position of the Employment Appeal Tribunal. We are unclear however as to the precise status of the proposed second tier tribunals.

We do not agree that tribunals should be excluded from the scope of judicial review. It is to be hoped that an improved appellate tier would reduce the need for judicial review applications. However, we can see no justification for removing tribunals from the scope of judicial review. Judicial review is available in relation to Magistrates Courts and we can see no reason why the position should be different in relation to tribunals.

In immigration cases, in particular, the Court of Appeal's jurisdiction is narrower than that of the High Court. The Administrative Court is the natural forum for questions of natural justice arising from judicial proceedings. There is a range of decisions which are presently potentially subject to judicial review, and we can see no justification for removing immigration tribunals from the scope of judicial review.²¹

We cannot think of any jurisdictions which should not have a second tier appeal

28. Do you agree that all appointments to departmental tribunals should be made by the Lord Chancellor (paragraph 31)?

We agree with this suggestion.

29. Would it benefit users if different tribunals' procedural rules were made as consistent as possible with each other (paragraph 32)?

We are not convinced of this. The vast majority of users are unlikely to be "repeat-players". It could of course benefit advisers who are dealing with a range of tribunals.

²⁰ Law Society, *op cit*, p.48

²¹ Macdonald's Immigration Law and Practice, 5th Ed, pp. 918-921

30. Should the Lord Chancellor be the Minister responsible for making all tribunals' procedural rules (even if he does not become responsible for the administration of all tribunals)?

This seems to us to be logical.

31. Do you agree that public funding for representation should be available for exceptional cases before all tribunals, or are there tribunals for which public funding for representation should not be available in any circumstances (paragraph 33)?

We agree that public funding should be available in principle in all tribunals.

32. Are the proposed elements of the merits test appropriate?

We do not consider that the proposed merits test is wide enough.

We have compared the proposed test with other tests currently in operation in relation to tribunal representation, specifically the present test for controlled legal representation (CLR) in immigration cases, and the test which exists in employment tribunals in Scotland, as well as with the test which was proposed by the Royal Commission on Legal Services (RCLS) in 1979.

In our opinion, the test proposed by the report fails to take account of three important issues which can arise in tribunal cases.

The first issue concerns strong cases. There is no suggestion in the proposed test that cases with a good chance of success should warrant representation. Such a principle however is clearly set out in the CLR provisions, which assume that representation should be provided if the prospects of success are clearly over 50%.

The second issue concerns the importance of the case to the user.

The Report recognises the need for representation as exemplified in existing CLS provision in Mental Health Review Tribunals, the Employment Appeal Tribunal, and before immigration adjudicators and the Immigration Appeal Tribunal and seems to accept the criterion that cases with “particularly serious outcomes” warrant representation.²² This reflects the existing CLR provision, which recognises cases of “overwhelming importance to the client” as justifying representation when the prospects of success are unclear or borderline. This suggestion also appears in the test proposed by the RCLS.

The third issue concerns cases which involve wider issues which go beyond the case itself, either because they raise significant points of law and/or are “test cases” or because they raise significant issues of human rights or have a significant wider public interest. Such issues are recognised within the CLR provisions, as justifying representation when the prospects of success are unclear or borderline.

In our view therefore, a merits test should cover four different types of cases, and should authorise representation along the following lines:

1. *Strong cases*

Representation should be available where

- The prospects of success are moderate or better, i.e. clearly over 50%, and

²² Tribunals For Users para 4.22

- the likely benefits to be gained from the proceedings justify the likely costs, such that a reasonable privately paying client would be prepared to take the proceedings having regard to the prospects of success and all the other circumstances.²³

2. *Cases in which it would be unreasonable to expect the user to proceed unrepresented*

Representation should be available where

- there is a reasonable prospect of success, and
- it would be unreasonable to expect the user to present his/her case because of
 - his/her personal circumstances – e.g. inadequate knowledge of English or mental or physical disability, or
 - the complexity of the case in fact or law²⁴

3. *Cases of overwhelming importance to the client*

Representation should be available where

- the case has a particularly serious potential outcome for the user

This might arise, for instance where

- the case concerns the life, liberty or physical safety of the user or his/her family
- it concerns the roof over their heads
- the ability of an individual to follow his occupation is at stake
- the amount at stake is of considerable importance to the quality of life of the user and/or his/her immediate family
- the user is likely to suffer considerable hardship if the case is unsuccessful

and

- the likely benefits to be gained from the proceedings justify the likely costs, such that a reasonable privately paying client would be prepared to take the proceedings having regard to the prospects of success and all the other circumstances²⁵

4. *Cases where there is an important principle at stake*

Representation should be available where

- the case involves a significant new point of law and/or is a “test case”, or
- the case raises significant issues of human rights; or
- the case has significant wider public interest

We appreciate that the details would have to be set out in the Funding Code, with clearer guidance as to the bases on which the tests should be applied, and the relevant factors which should be taken into account.

²³ This is the first category of cases for which CLR may be granted

²⁴ This is of course the test proposed by the Report

²⁵ This is based on the CLR test, with additional examples suggested by the RCLS