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E-learning for fairness

EDITORIAL By **Christa Christensen**

Welcome to the Spring 2017 edition of *Tribunals* journal. I am very pleased to use my editorial to be able to announce the recent launch by the Judicial College of a suite of e-learning to help all courts and tribunals judicial office-holders who are faced with a hearing involving an individual with particular communication issues, ranging from parties or witnesses with sight or hearing impairment to those with a learning disability or particular mental disorders including autistic spectrum disorder.

The e-learning is aimed at ensuring cases are dealt with fairly and without avoidable problems with communication issues. It is available here for those readers who have access to the Learning Management System.

How lay members continue to contribute to 'a superior court of record exercising authority at the same level as the High Court'.

I would in particular like to highlight our focus piece on non-legal/specialist members in tribunals by one of my editorial board colleagues, David Bleiman, who is a lay member in the Employment Appeal Tribunal (EAT).

I do so to encourage lay, non-legal, ordinary or specialist members in other tribunals to consider contributing a piece to the journal about their own work and experience. David's piece is an insightful backward and forward look at how his role developed in the EAT and sets out how lay members continue to contribute to 'a superior court of record exercising authority at the same level as the High Court'.

The piece by Joe Morrow, President of the Mental Health Tribunal for Scotland, not only sets out the challenging work of this tribunal but also indicates how it has embraced reform and sought to influence developments in Scotland; the tribunal is 'set fair' to transfer to its new chamber in the First-tier Tribunal for Scotland in 2018.

Contents

Moving from Scotland to Wales, the article by Libby Arfon-Jones, Senior Liaison Tribunal Judge Wales, and Meleri Tudur, Deputy Chamber President (HESC), examines developments in reserved and devolved tribunals in Wales against the backdrop of the reform agenda.

The President of the Property Chamber, Judge Siobhan McGrath, has contributed an article setting out the details of an innovative scheme within her chamber that is consistent with the 'one judiciary' agenda. We enter the world of *Alice Through the Looking Glass* and consider how to end the parallel existence of courts and tribunals to ensure that litigants may resolve their disputes in one forum.

Open and transparent procedures are a fact of life for those involved in public-facing activities. An article that focuses on the importance of transparency is written by Judge Leslie Cuthbert on the police misconduct rules. Leslie introduces us to the work of the relatively new Police Misconduct Panels and the role of the legally qualified chair under a new scheme for handling matters of police misconduct introduced in January 2016 after public consultation.

How to stay safe in an online world in which it is almost impossible, if not impracticable, to avoid a presence on social media is the subject of a highly informative and very practical piece from Regional Employment Judge Barry Clarke. Barry offers 10 top tips to aid digital security.

We have our page of useful links complied by my editorial board colleague Adrian Stokes, and our regular contribution from the Senior President of Tribunals, Sir Ernest Ryder, who focuses on a number of courts and tribunals reform initiatives, the challenge of change and what this might mean for judicial office-holders.

The 'stop press' piece by David Bleiman (see panel) gives details of a seminar on online courts and provides a link to a video of the seminar which took place at UCL on 16 February.

Stop press: Watch the debate on the case for online courts

The UCL Judicial Institute has placed its recent seminar on 'The Case for Online Courts' on its YouTube channel (see here).

Leading expert Richard Susskind, IT Adviser to the Lord Chief Justice, gave a comprehensive and entertaining introduction to the topic. Susan Acland-Hood, Chief Executive of HMCTS, provided examples of developing online resources – including a divorce application form which will take just 10 minutes to complete. The application, not the divorce, she reassured the audience.

The Senior President of Tribunals, Sir Ernest Ryder, explained the proposed careful roll-out to tribunals in coming years, giving assurances that the objective was to provide improved access to justice for the users, with an 'assisted digital service' and an ability to default to telephone or paper for those who needed to.

Robert Bourns, President of the Law Society, and Andrew Langdon QC, Chairman of the Bar, expressed some reservations around the importance of face-to-face independent and professionally regulated advice, touching also on wider issues including public legal education, issue fees and costs thresholds.

The seminar is commended as an excellent update on current developments and the issues which will need to be addressed as this aspect of the reform programme progresses.

David Bleiman

This is the last *Tribunals* journal for which Jane Talbot will continue to be a member of the editorial board. I offer Jane many thanks for her contribution to the journal since 2011 and encourage readers to consider applying for the vacancy that now exists and is advertised below.

Christa Christensen is Chair of the Editorial Board *Back to contents*

Lay members: mystery or history?

FOCUS By **David Bleiman**

So why do we need lay members in the Employment Appeal Tribunal (EAT)? After all, it is 'a superior court of record exercising authority at the same level as the High Court'[1] and hearing appeals from employment tribunals (ETs) on points of law. Research suggests that views are mixed on what lay members bring to the party.[2]

Three main ingredients can be identified. The most obvious is specialist expertise. Like other non-legal members in the tribunal system, we are nowadays valued primarily as specialists. We are required 'to have special knowledge or experience of industrial relations'.[3] A second requirement, which I recall being tested at my interview in 2002, is the skillset which every tribunal member needs to participate competently and fairly in a hearing. This is now set out in the Judicial Skills and Abilities Framework 2014. But there is a third, at first sight mysterious, ingredient. Our expertise must come from a specified experience 'either as representatives of employers or as representatives of workers'.[4] This is a highly unusual qualification for tribunal members, probably unique within the system. The lay members are divided into two panels, of those having a background as worker and employer representatives. In any case in which lay members sit alongside a judge, there must be one from each panel.

The mystery is resolved by history. To understand the point and purpose of lay members in the EAT one needs to understand the history of employment law and relations, at least in its broad sweep.

The employment jurisdiction engages with the terms and conditions of individual working life and its collective regulation. This has been, remains and probably ever will be a highly contested territory.

The employment jurisdiction engages with the terms and conditions of individual working life and its collective regulation. This has been, remains and probably ever will be a highly contested territory. Unions were criminalised by the Combination Acts at the start of the 19th century and the road to both workers' and union rights was a long one. The relationship between unions and employers, still known by that old-fashioned term 'industrial relations', has swung on a pendulum between conflict and partnership. For example, during the Second World War, partnership in maintaining production was a critical feature. In contrast, in the late 1970s, the Labour government's 'social contract' broke down, the unions preferring 'free collective bargaining', culminating in the 'winter of discontent'.

'In place of strife'

The EAT was born in 1976, so we need to look more deeply into the circumstances of the time. Britain's strike record had been of great concern in the 1960s, leading to the Donovan Commission of 1965–1968. The Labour Minister, Barbara Castle, introduced a White Paper, 'In place of strife', to reform industrial relations. In the face of union opposition and a government split, the proposals were dropped. The incoming Conservative government pressed ahead with reform, the Industrial Relations Act 1971 giving statutory recognition of unfair dismissal for the first time and making the industrial tribunal (later renamed the ET) the forum for employee claims. The National Industrial Relations Court (NIRC), forerunner of the EAT, was established to hear appeals.

The NIRC rapidly came into conflict with the trade unions, culminating in 1972 in the arrest of five shop stewards, the 'Pentonville Five', for contempt of court. They had refused to comply with a NIRC injunction banning picketing at a container depot. Their jailing led to a call by the Trades Union Congress (TUC) for a national strike and the surprise intervention of the Official Solicitor who persuaded the Court of Appeal to overturn the arrest warrants.

This fraught history explains why there was great caution when the incoming Labour government of 1974, having repealed the Industrial Relations Act 1971 (including the NIRC), set up a new body to hear appeals against decisions of the industrial tribunals. Such was the anxiety that even the name had to bear no resemblance to that of its predecessor! David Hodgkins, at the time a civil servant in the Department of Employment and later a lay member of EAT, remembered:

> 'I recall puzzling with colleagues over a name. While the title eventually proposed was in part chosen because it did not include "National", "Industrial Relations" or "Court", no one had any better idea than Employment Appeal Tribunal, so that is what the new body became.'[5]

The legislative framework established by the Employment Protection Act 1975 included an extension of individual employment rights and a structure for the oversight of industrial relations characterised by a partnership approach. Employer and union representatives were placed alongside each other not only in the EAT but also in the Advisory Conciliation and Arbitration Service (ACAS) and the Central Arbitration Committee (CAC).

A flavour of the thinking which led to the requirement that EAT lay members be representatives and not merely experts can be gleaned from Barbara Castle's earlier intervention during the passage of the 1971 Act, when she claimed that the Conservative government would seek to appoint its own stooges to the NIRC to do its bidding:

> '. . . can the hon. Gentleman tell us why the terms for the composition of the court in the Bill are different from those of the existing Industrial Court? Why have the words been changed from the requirement that its members shall be representatives of employers and employees to the requirement that they be people with knowledge of and experience in industrial relations, at the choice of the Lord Chancellor and the Secretary of State?'[6]

. . . employer and union bodies no longer directly nominate [EAT] members. Open recruitment and appointment on merit have resulted in a remarkably diverse composition of members.

While the statutory requirement for lay members to have experience as 'representatives' has remained intact from 1976 to date, employer and union bodies no longer directly nominate the members. Open recruitment and appointment on merit have resulted in a remarkably diverse composition of members.

Dramatic reduction

The Enterprise and Regulatory Reform Act 2013 saw a dramatic reduction in the use of lay members. EAT cases are now heard, as a default, by a judge sitting alone. Lay members only sit where a judge so directs. The government was clear that the main reason was financial, then Minister, Norman Lamb, acknowledging that the change would deliver savings of £120,000 to £130,000 a year which 'may seem a relatively small amount' but 'we should seek every level of saving'. The government insisted that there was no constraint on the discretion of judges to use lay members, Norman Lamb offering the assurance:

> '. . . any EAT judge who genuinely feels the need to sit with lay members to interpret a point of law in an appeal has the discretion to do so.'[7]

In practice, all appeals to the EAT come before a judge at the sift stage, where, based on the papers, directions are given for case management. As 'judge alone' is the default, any decision to list a case with lay members must be justified. The default position, on the other hand, does not need to be explained. It is all the more important to consider why and how lay members may 'add value' in particular cases. There is no practice direction listing criteria to be taken into account. That, EAT Presidents have concluded, might be seen as constraining the discretion of judges and might promote an unhelpful satellite litigation.

The EAT's President, Mrs Justice Simler, offers the following comment on the current role of lay members:

> 'Although the EAT's jurisdiction is limited to appeals on a point of law only, there are appeals where the presence of lay members on the appeal tribunal can and does add value, and the statutory presumption that appeals are heard by judge alone is rebutted. Often this happens where the appeal is seen as a vehicle for giving guidance on particular employment practices (for example, in dealing with reasonable adjustments or early conciliation) and the experience-based perspectives offered by lay members affords additional credibility and weight to the guidance given.'

Why and how might lay members make a real contribution of this kind?

Judgments of the EAT set binding precedents on ETs thereby requiring employers to change the ways in which they manage their people. Working life in Britain, at least among larger employers, is characterised by a high degree of formalisation of procedures, with human resources directors advising on good practice supported by specialist employment law advice. Unions and their lawyers keep tabs on case law developments, issuing advice to workplace representatives and members. Good practice is promulgated by the large representative bodies, including the Chartered Institute of Personnel and Development, Confederation of British Industry and TUC.

While some EAT cases turn on their own facts and have little wider impact, some offer significant guidance to employers and unions.

While some EAT cases turn on their own facts and have little wider impact, some offer significant guidance to employers and unions. In such cases it can enhance the credibility of the guidance if the panel issuing the judgment includes representatives drawn from the world of work, indeed usually from the same representative organisations which will circulate and apply that guidance.

As Mr Justice Browne-Wilkinson, then President of the EAT, told the Industrial Law Society in 1982:

> 'There is a tendency to regard the lay members as mere window dressing in a tribunal whose jurisdiction is limited to appeals on points of law. Nothing could be further from the truth. Their role has been, and still is, crucial because the presiding judge knows nothing of the practicalities of industrial relations. Even on a pure point of law, when it is uncertain what the law is, it is the lay members who can give guidance on the practical repercussions of any particular decision. On matters of good industrial practice . . . the contribution of the lay members is much greater and often decisive.'[8]

Is this view now dated? A new generation of EAT judges may have wider 'real world' experience than their predecessors. There is a huge 'back catalogue' of case law providing examples and parameters of good and bad employment practice. The vast majority of this historic case law derives from judgments of tribunals involving lay members, and an EAT judge can draw on this heritage of 'industrial practice' without having to have actually lived it. This may work for a while, however problems may develop over time.

Key example

The test for unfairness of a dismissal is a key example. The ET was historically seen 'as an industrial jury' whose role was 'to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted'.[9] With lay members no longer involved in unfair dismissal hearings at the ET and, as a default, no longer involved at EAT, the heritage case law will gradually become outdated. As society moves on and what is considered reasonable (or patently unreasonable) develops, will the EAT remain in touch with standards of good employment practice on the ground? Lay members can make a contribution in appropriate cases by refreshing the workplace experience underlying the case law.

Indeed this distinctive contribution of the lay members continues to gain the respect of the Court of Appeal. In a 2013 case in which the judge in the ET had sat alone, Underhill LJ set out only one passage of the EAT judgment as being 'of particular interest because it explicitly gives the views of the lay members' of the EAT, who considered that the position of the appellant employer seemed 'to defy industrial reality'.[10]

The exercise of any judicial discretion should be done with a view to enabling the EAT to deal with cases justly ('the overriding objective'). One of the component elements is 'dealing with the case in ways which are proportionate to the importance and complexity of the issues'. Importance is not defined and may include significance for employment relations, working practices and economic costs. Bearing in mind the impact of EAT precedents in the workplace and the need to maintain respect and authoritativeness, 'importance . . . of the issues' may be a reason to involve lay members. Examples might include cases involving collective rights (such as redundancy consultation), multiple claimants, trade unions or dismissals relating to union activity. Cases where an EAT judgment may result in a heavy financial burden falling on employers may carry greater respect where an employer representative has been on board the panel. These are matters for judicial discretion, 'importance' being a gateway to a proportionate approach aimed at doing justice.

There are cases, even at EAT, which are 'fact-heavy', the point of law on appeal relating to whether the ET behaved reasonably in its approach to the facts. For example, perversity cases involve an assessment of whether any reasonable tribunal could have found certain facts. As such the perspective of a single judge may be more limited than that of a full panel, engaging the lay members' experience of the workplace and employment relations. The range of reasonable responses test in unfair dismissal has already been noted. A further example is a discrimination case concerning inferences which an ET should or should not have drawn. Finally, there are cases in which a 'real world' test may apply, such as whether a contract which, on the face of it, is self-employment, corresponds to the real relationship between the parties.

With an ever greater appearance of self-represented litigants at the EAT, will the objective of 'ensuring that the parties are on an equal footing' be assisted by presenting a diverse bench and can lay members assist the judge in facilitating the participation of the litigant in person (LIP)? Sir Andrew Leggatt reported in 2001 (looking at tribunals generally) that tribunal users:

> '. . . clearly feel that the greater expertise makes for better decisions. They also say that having more members, and non-lawyers, on the panel makes it easier for at least some users to present their cases.'[11]

Is this still the case? Many judges, since 2001, have enhanced their skill and experience in supporting LIPs. And lay members, as well as judges, may require training and development to question LIPs with sensitivity and put them at ease in presenting their case.

There is a real challenge for lay members in cases where they have been listed in order to add value, that on the day they really do add value.

Some personal views

This brings me neatly on to some personal views on how to make the best use of lay members in what is a diminished role at EAT. The contribution of the lay members has declined quantitatively. But that is an argument for ensuring that their contribution is enhanced qualitatively. After all, when lay members now sit on a case, it is only because, at the sift, a judge has exercised a positive discretion to engage lay members. In my recent experience, my EAT cases, though few, have been particularly interesting and perhaps 'important'. There is a real challenge for lay members in cases where they have been listed in order to add value, that on the day they really do add value. This in turn gives the EAT a challenge to track the type of cases in which lay members are sitting and to customise the lay member training so as to address the areas and in particular the skills which may need to be enhanced or refreshed to give of their best in these cases. An emphasis on 'judgecraft' skills may be more helpful than an emphasis on case law, where the panel can usually be guided by the judge.

As for the future, who knows? History tells us that industrial relations has swung wildly between conflict and partnership, with the EAT in its present configuration a product of one chapter in that history. If the EAT moves to the court side as an 'Employment and Equality Court', would there be any role for lay members? How would such a court be viewed by the employers and by the trade unions, now and in years to come? Will the EAT in Scotland, which is due to be devolved, move in an entirely different direction?

Finally, there is the question of Brexit and its uncertain impact on employment law. One of the remarkable features of employment law is that, among the underlying Directives emanating from the European Union, there are some which are the product of direct negotiation between employer and union bodies, operating at the EU level. The compendium of employment legislation which sits on the bench at EAT[12] contains a large section of 'EU Materials' which includes these 'Framework Agreements' between the 'European social partners' on, for example, parental leave and fixed-term work. When EAT is looking at a question of legal interpretation concerning employment rights deriving from EU Directives, it may therefore (admittedly infrequently) be necessary to look at what the unions and employers had negotiated, which the Directive was intended to implement.

Although the future is uncertain, the EAT, born in 1976, may take comfort from the expression 'life begins at 40'. The past 40 years have seen lay members contribute to profound developments in the case law affecting employment and equality rights in our society. Whatever the future may hold, lay members at the EAT can give of their best when they are deemed to have a contribution to make.

David Bleiman is a lay member of the Employment Appeal Tribunal. He was Chair of the Lay Members' Committee during the passage of the Enterprise and Regulatory Reform Bill, 2011–2013.

Back to contents

[1] Mrs Justice Simler, President of the EAT, discussing the current jurisdiction and future prospects for the EAT, *Tribunals*, Autumn 2016.

[2] *'Balance' that adds value to decision-making*, Susan Corby and Paul Latreille, *Tribunals*, Winter 2011.

[3] Employment Protection Act 1975, s87(3).

[4] Ibid.

[5] *A Short History of the Employment Appeal Tribunal*, 2nd Ed, 2004, Peter Dawson, p5.

[6] Hansard, HC Deb 14 December 1970 vol 808 cc961-1076.

[7] 28 June 2012, Col no 326.

[8] *The Role of the Employment Appeal Tribunal in the 1980s*, Industrial Law Journal, June 1982.

[9] Mr Justice Browne-Wilkinson in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, EAT.

[10] *CSC Computer Sciences Ltd v McAlinden & Ors* [2013] EWCA Civ 1435.

[11] *Tribunals for Users, One System, One Service*. Report of the Review of Tribunals, March 2001.

[12] *Butterworths Employment Law Handbook*, 24th Ed, 2016.

The Mental Health Tribunal for Scotland

SCOTLAND By **Joe Morrow**

The Mental Health Tribunal for Scotland (MHTS) was established by the Mental Health (Care and Treatment) (Scotland) Act 2003. The tribunal became operational in October 2005, when mental health cases were transferred to it from the public courts where they were heard by a sheriff (a type of Scottish judge) sitting alone. The tribunal is led by a president and comprises some 330 members: legal members, being legally qualified members of seven years standing; medical members, being psychiatrists or medical practitioners with psychiatric experience; and general members, being persons with experience of mental disorder and using mental health services, carers of such persons and professional persons

with experience of working with people with mental disorder such as nurses, psychologists and social workers. The tribunal also has a panel of sheriffs.

The tribunal hears cases as a three-member panel comprising a medical and a general member and convened by a legal member (or by the tribunal president or a sheriff in the case of restricted patients, i.e. certain patients who have entered the mental health system through the criminal justice system and in respect of whom the Scottish Ministers have certain obligations and responsibilities in the public interest). The tribunal hears cases in private in hospitals and at community venues throughout Scotland.

The tribunal was not the 2003 Act's only innovation. Section 1 of the 2003 Act sets out a series of principles which any person discharging a function under the Act – including the tribunal – must have regard to. These principles include taking account of the present and past wishes of the patient, the importance of the patient participating as fully as possible in the discharge of the function, the importance of providing the maximum benefit to the patient and the need to discharge the function in the manner involving the minimum restriction on the patient that is necessary. These principles are known as the Millan principles after Bruce Millan, the former Secretary of State for Scotland who chaired the committee which produced the influential 2001 report[1] reviewing mental health law in Scotland. This report resulted in the 2003 Act. The importance of the Millan principles to the work of the tribunal was recognised by the UK Supreme Court in its judgment in the case of *G v Scottish Ministers and another.*[2]

Profoundly powerful

The MHTS is a profoundly powerful jurisdiction. Not only does the tribunal have power to order a person's detention in hospital or to impose a range of restrictions on patients living in the community (such as the address at which the patient must reside), it has power to authorise a person's medical treatment against that person's will. While mental health professionals can detain a person for up to 28 days for the purpose of assessment, only the tribunal has power to order that person's detention for a longer period, on application by a Mental Health Officer. The tribunal must afford the patient's treating psychiatrist the opportunity to be heard, but the decision is the tribunal's alone. In respect of restricted patients, only the tribunal has power to conditionally discharge such patients into the community, revoke the restriction order (thus removing the Scottish Ministers from their oversight role) and absolutely discharge the patient. The tribunal must afford the Scottish Ministers the opportunity to be heard, but again the decision is the tribunal's alone.

Unusually for a decision-making body, the tribunal has the right to appear in appeals against its decisions to the superior courts . . .

The tribunal's workload has increased over the years – currently running at approximately 4,300 applications each year generating some 4,700 hearings. By taking various steps to increase efficiency while retaining the quality of the tribunal's work, the tribunal has reduced its budget. Unusually for a decision-making body, the tribunal has the right to appear in appeals against its decisions to the superior courts, whether to the Sheriff Principal (a senior Scottish judge), the Court of Session or the UK Supreme Court. This is done for the purpose of assisting in the orderly and practical development of mental health law in Scotland.

In recent years, the tribunal has engaged with the Scottish Government, the Scottish Parliament and various interested parties in a review of the operation of the 2003 Act. This review resulted in the Mental Health (Scotland) Act 2015, which the tribunal is now working with the Scottish Government to implement.

Against this backdrop – increasing case load, designing and implementing efficiency measures which ensure the maintenance of the quality of the tribunal's decision-making, reducing budget and implementing reform of mental health law – it is not difficult to conjure reasons why the tribunal might resist tribunal reform. However, that has never been the tribunal's position. While the tribunal's principal responsibility is to ensure that it does right by the patients and others appearing before it, it owes a responsibility to do all that it can to improve the efficiency and effectiveness of the delivery of justice throughout Scotland.

To that end, the tribunal has always strongly supported the concept of tribunal reform, to bring together the various tribunal jurisdictions in Scotland in one unified body under the judicial leadership of the Lord President of the Court of Session (Scotland's most senior judge). The Scottish Government proposed creating a First-tier and Upper Tribunal, such as was created in England by the Tribunals, Courts and Enforcement Act 2007. The tribunal's only red lines have been that such reform must not adversely affect its ability to deliver justice fairly and effectively for patients and others appearing before it. In practice, this meant that:

- All the tribunal's members – general and medical, not just legal – must be afforded equal status, as each casts an equal vote when they sit as a three-member panel.
- The patient must remain at the centre of the tribunal's work.
- New members must have the expertise necessary to sit on mental health cases.
- Bespoke training must continue to be provided for those sitting in the mental health jurisdiction.
- The head of the mental health jurisdiction must be committed to safeguarding the patient-centred culture and ethos of the jurisdiction.
- The jurisdiction should retain bespoke rules of procedure.
- The jurisdiction should retain access to its 80 hospital and community venues throughout Scotland, so that as far as possible the tribunal goes to the patient rather than – as was the situation when mental health cases were heard in the public courts – the patient coming to the tribunal.
- The statutory Millan principles must remain the bedrock of the 2003 Act.
- The jurisdiction must continue to be provided with its specialist, dedicated administrative support.

I am satisfied that the Scottish Government listened, reflected and grew in its understanding of the work of the tribunal . . .

Achieving those aims took many meetings with Scottish government officials, numerous briefing papers, a lot of correspondence, engagement with those interested in the work of the jurisdiction, and an appearance by me before the Justice Committee of the Scottish Parliament, which was the lead committee scrutinising the Tribunals (Scotland) Bill. In the end, I am satisfied that the Scottish Government listened, reflected and grew in its understanding of the work of the tribunal, how the tribunal carries out that work and why it carries out its work in the way that it does.

When the Scottish Government introduced the Tribunals (Scotland) Bill in the Scottish Parliament on 8 May 2013, its policy memorandum – a document which it is obliged to lodge with the Bill – reiterated the Scottish Government's commitment that:

> '. . . initially mental health will be in a chamber of its own.'

In her response to the report of the Scottish Parliament's Justice Committee after it had taken evidence on the Bill at Stage 1 of the Parliamentary process, the Minister for Community Safety and Legal Affairs noted the committee's view that retaining the tribunal in a chamber of its own would ensure that:

> '. . . the unique nature of the tribunal will be preserved within the new structure.'

The Minister wrote:

> 'I . . . stress our commitment to preserving the character and distinctiveness of the Mental Health Tribunal. That is a commitment we have stated on many occasions and I hold firm to that.'

The Minister continued:

> 'There was a commitment made in the policy memorandum to have a single chamber initially for mental health and I would reiterate that commitment. The Bill allows for chamber structure to be changed only after consultation with the Lord President and relevant stakeholders; and that any regulations are made by affirmative resolution which will allow proper Parliamentary scrutiny.' (Underlining as in the original.)

On the issue of the equal status of general, medical and legal members of the tribunal, the Tribunals (Scotland) Act 2014 distinguishes between 'ordinary' (i.e. non-legally qualified) members and 'legal' (i.e. legally qualified) members. Section 14 of the Act (capacity of members) provides that:

> 'Membership of the Scottish Tribunals as an ordinary or legal member . . . has the effect of granting such a member judicial status and capacity for the purpose for which this section makes provision.'

That purpose being:

> '. . . holding the position of and acting as such a member.'

As for the MHTS's other red lines, the Scottish Government's policy memorandum . . . set out [its] commitment to ensuring . . . safeguards in the new structure . . .

Section 3 of the Act (upholding independence) provides that the First Minister, the Lord Advocate (the Scottish Government's principal law officer and head of the systems of prosecution in Scotland), the Scottish Ministers, members of the Scottish Parliament and all other persons with responsibility for matters relating to the members of the Scottish Tribunals or the administration of justice:

> '. . . must uphold the independence of the members of the Scottish Tribunals.'

As for the MHTS's other red lines, the Scottish Government's policy memorandum which accompanied the Tribunals (Scotland) Bill when it was introduced in the Scottish Parliament set out the Scottish Government's commitment to ensuring that the safeguards in the new structure in relation to the Mental Health Tribunal for Scotland will:

- Continue to keep the patient at the centre of everything it does.
- Retain the eligibility criteria for non-legal members, which ensures that new members have the knowledge, experience and expertise to hear mental health cases.
- Retain the tailored and specific training provided to members of the Mental Health Tribunal for Scotland which recognises the patient-centred culture developed by this jurisdiction.
- Have a chamber president who recognises the patient-centric culture and ethos of the Mental Health Tribunal for Scotland and is committed to safeguarding this.
- Keep the bespoke rules currently used by the Mental Health Tribunal for Scotland (subject to appropriate modification).
- Use, so far as is possible, the same venues for hearings that have been particularly appreciated and uniquely adapted for patients.
- Retain the membership of the Mental Health Tribunal for Scotland (including the president) at the time at which its functions are transferred, who have been specifically trained to understand the sensitivities surrounding these particular cases though the provisions in the Bill providing for the transfer-in of members.
- Adhere to the Millan Principles – which the Scottish Government believes are a key strength of this jurisdiction.
- Continue to receive a specialist and dedicated administrative support.

With these commitments, given by the Scottish Government in formal documentation lodged with the Scottish Parliament and in ministerial correspondence with the Justice Committee of the Scottish Parliament, and the terms of the Tribunals (Scotland) Act 2014 on Royal Assent, I am confident that the tribunal and its members are set fair to continue the important work of this jurisdiction – having an impact, as it does, directly on the liberty of patients – once the MHTS is transferred in to its new chamber in the First-tier Tribunal for Scotland in 2018.

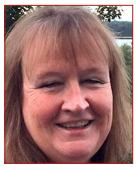
Joe Morrow is President of the Mental Health Tribunal for Scotland *Back to contents*

[1] *New Directions: Report on the Review of the Mental Health (Scotland) Act 1984* (see here).

[2] 2014 SC (UKSC) 84; 2014 SLT 247.

Surveying a changing landscape

WALES By **Libby Arfon-Jones** (left) and **Meleri Tudur**

As T.H. Parry-Williams said of Llyn y Gadair (Cadair Lake): 'Ni wel y teithiwr talog mono bron wrth edrych dros ei fasddwr ar y wlad' ('The earnest traveller barely sees it, staring over its shallow waters at the view').

The same could be said about the developing divergence and interface between devolved and reserved tribunals in Wales. With much current focus on HM Courts and Tribunals Service and the reform programme within it, there is a risk that the diverse landscape of tribunals jurisdictions post-devolution, despite the Leggatt Review of 2001, is overlooked. This is an opportunity to refocus and to look at recent developments and the way in which the administration of tribunals in Wales is evolving.

Devolved tribunals

The devolved tribunals functioning in Wales inevitably sit outside the reform programme and are not part of the HMCTS landscape: the Special Educational Needs Tribunal for Wales, the Adjudication Panel for Wales, the Mental Health Tribunal for Wales, the Welsh Language Tribunal and the Residential Property Tribunal for Wales. While classed under the general label of 'devolved tribunals', not all are administered in the same way and at present the ability to share information and issues, even between the devolved tribunals, is limited. Some share administrative resources provided by the Welsh Government in Wales. The Welsh Language Tribunal is the first devolved tribunal to be set up entirely under the auspices of the Welsh Government.

While classed under the general label of 'devolved tribunals', not all are administered in the same way . . .

A word to begin about the various devolved jurisdictions. While the remit of some will be familiar because of the similarity of the titles to their reserved counterparts, others may not be as familiar. The function of the Adjudication Panel for Wales is to determine alleged breaches by elected and co-opted members of Welsh county, county borough and community councils, fire and national park authorities, against their authority's statutory code of conduct. The Welsh Language Tribunal's function is to deal with appeals against decisions by the Welsh Language Commissioner in relation to Welsh Language Standards. The Residential Property Tribunal Wales was set up to resolve disputes relating to private rented and leasehold property. All, including the Special Educational Needs Tribunal for Wales and the Mental Health Tribunal for Wales, deal with aspects of the law where the legislative functions have been devolved to the Welsh Government.

The practical implications are that certain policies such as recruitment and appointments vary, with some tribunals making use of the Judicial Appointments Commission (JAC) processes and others appointing judicial office-holders solely through the Welsh Government. It is encouraging that the Welsh Government remains keen to engage meaningfully with HMCTS reform and with the Briggs reforms. They have established within the Welsh Government the Justice Policy team which covers, among other areas, administrative justice policy. The Welsh Tribunals Unit (WTU) has responsibility for the operational aspects of devolved tribunals as a 'Welsh Tribunals Service'.

The Welsh Government is opening up discussions with relevant teams in each of the arm's length judicial bodies in order to tap into their resources and expertise and ensure the same standards are applied across England and Wales in the devolved and non-devolved tribunals.

The WTU is leading a programme of reforms with the Justice Policy team designed to strengthen the independence of the devolved tribunals and to improve their operation through greater consistency of procedures, more independent appointment processes and improving services to the tribunal users. This programme of reform has been informed by two key reports namely the Administrative Justice and Tribunals Council Welsh Committee's 'Review of Tribunals Operating in Wales' report published in 2010[1] and the Review of Devolved Tribunals Operating in Wales in 2014 by Andrew Felton.

These two reports set out comprehensive programmes of work with many recommendations, some completed and others to be delivered. The Committee for Administrative Justice and Tribunals Wales published its Legacy Report in March 2016.[2] The Welsh Government's response to its recommendations has also been published with a statement from the First Minister.[3]

The Welsh Government is opening up discussions with relevant teams in each of the arm's length judicial bodies in order to tap into their resources and expertise . . .

One important area of progress is the arrangement under section 83 of the Government of Wales Act for the Welsh Ministers to use the JAC recruitment and selection of tribunal members for the devolved Welsh tribunals. Also encouraging are the discussions which have opened up between Welsh Government and the Judicial College to explore the options for quality training and appraisal arrangements which are cohesive, proportionate and cost-effective and take account of Welsh factors such as the increasing divergence between Welsh and English black letter law.

Work continues on putting in place arrangements for cross-ticketing of judiciary between devolved Welsh tribunals and HMCTS courts and tribunals. This is important for providing career enhancing experience and ensuring consistency of judicial standards. The Wales Bill makes statutory provision for cross-deployment of members of Welsh tribunals.

Complaints and appraisals

Complaints handling and appraisals are other areas where work is in progress. While complaints against fee-paid judicial office-holders can be dealt with by the tribunal presidents, if a complaint is received against the president then there is no mechanism for that complaint to be dealt with by a senior judicial manager. Similarly, with tribunals appraisal schemes: while fee-paid judicial office-holders can be appraised by their tribunal president, there is currently no overarching arrangement for appraisal of tribunal presidents.

The most notable development for Welsh tribunal judiciary this year, therefore, has been the Lord Chief Justice asking Mr Justice Wyn Williams to explore the ways in which Welsh tribunals judiciary can best be supported. This development has been universally welcomed. There have been successful meetings between Mr Justice Wyn Williams and leaders of the Welsh tribunals. Of particular importance is that a statutory post of President of Welsh Tribunals has been created in the Wales Bill. The Bill has reached its final stages after the third reading in the Lords. Hitherto,

members of Welsh tribunals have felt vulnerable, without the protection of a senior judicial figure to champion their concerns and to whom to turn for support and guidance.

Welsh tribunals dialogue

The Legal Wales Conference is an established annual event in the legal calendar in Wales. It provides an opportunity for open discussion between judiciary, academics and members of the legal professions about live legal issues in Wales. It was at last year's conference in Bangor, North Wales, that the Lord Chief Justice proposed the inclusion in the Wales Bill of the creation of the post of President of Welsh Tribunals. Although a separate Welsh legal jurisdiction was not on the day's agenda, it clearly continues to be a topic of interest and debate.

One continuing concern is how to retain legal expertise in Wales. This is a real challenge, requiring a comprehensive strategy to encourage legal talent to remain in Wales. The Welsh Government, universities, the legal profession and other related organisations are aware of the challenge and rising to it.

One continuing concern is how to retain legal expertise in Wales. This is a real challenge . . .

For the reserved tribunals within HMCTS, the creation of regional leadership judges has been successful throughout England and Wales; local leadership groups enable dissemination of information about the HMCTS reform project as well as a forum for raising and discussing issues affecting the judiciary at a local level. The comparatively small size of the Welsh Tribunals Service means that such designations may not be necessary with independent devolved tribunals presidents taking the lead role in sharing and disseminating information to their own judicial office-holders within the jurisdictions. The presidents of the devolved tribunals in Wales meet on a regular basis to discuss issues within their jurisdictions and to identify whether there are common problems and a potential for shared solutions.

A relatively recent initiative is the Welsh Tribunals Contact Group (WTCG). The group is composed of representatives of both reserved and devolved tribunals in Wales and currently meets on a bi-annual basis. The WTCG met recently in Cardiff and welcomed helpful comments and insights from the Senior President of Tribunals.

The Wales Bill

The WTCG received an update on the Wales Bill and a presentation from Huw Pritchard, lecturer in devolved law and governance at the University of Cardiff, on 'Justice in Wales'. In September 2016, the Wales Governance Centre published the report 'Justice in Wales: Principles, progress and next steps'[4] written by Dr Pritchard and setting out proposals for the future administration of justice in Wales. In his presentation, he enlarged on the suggestion that there be a commission set up to oversee justice in Wales, a proposal which is supported by the First Minister. Close judicial liaison at an appropriate level with the Welsh Government is important.

Overall, the tribunals landscape in Wales continues to improve and commitment to independence in the areas of judicial appointment and training is indeed encouraging. Liaison between reserved and devolved tribunals continues and enables the strengthening of bonds through the exploration of new methods of working on a cross-jurisdictional basis, as well as the strengthening of Llais Cymru (the voice of Wales) within the tribunals system.

Libby Arfon-Jones is Senior Liaison Tribunal Judge Wales
Meleri Tudur is Deputy Chamber President (Health, Education and Social Care)

Back to contents

[1] See here.

[2] Committee for Administrative Justice in Wales: 'Administrative Justice – A Cornerstone of Social Justice in Wales Reform Priorities for the Fifth Assembly', published March 2016. See here.

[3] See here.

[4] Published by the Cardiff University Wales Governance Centre, September 2016. See here.

How to avoid dancing in a ring

ONE JUDICIARY By **Siobhan McGrath**

In September 2016, the Lord Chancellor, the Senior President of Tribunals and the Lord Chief Justice issued a joint statement explaining the plan 'to create one system and one judiciary'.[1] The plan is intended to bring about an end to the parallel existence of courts and tribunals and to create a single judiciary in a system that combines the best qualities and processes of the present courts and tribunals.

There are important differences between courts and tribunals. They deal with different types of work and have different procedures. Tribunals are often specialist and courts are only specialist sometimes. But there are no real differences between the two types of judiciary. To an outsider, the distinction may well be reminiscent of Alice in *Through the Looking Glass* and her meeting with the Tweedle twins:

> 'They were standing under a tree, each with an arm around the other's neck, and Alice knew which was which in a moment, because one of them had "Dum" embroidered on his collar, and the other "Dee".'

In fact, the courts judiciary have always been judges of the First-tier Tribunal by virtue of the Tribunals Courts and Enforcement Act 2007. Now, by virtue of amendments made to the County Courts Act 1984, First-tier Tribunal judges are also judges of the county court. How best are we to take advantage of this newly conferred office? In the Property Chamber we are conducting a pilot to test 'double-hatted sitting'[2], i.e. where we have cases that require the exercise of both county court and tribunal jurisdictions we will, with permission[3], consider both at the same time.

The idea for the project is simple: judges and tribunal members should be deployed in a way that ensures that litigants are able to resolve all issues in dispute in one forum.

The idea for the project is simple: judges and tribunal members should be deployed in a way that ensures that litigants are able to resolve all issues in dispute in one forum. The idea is not new. In a different context, section 49(2) of the Senior Courts Act 1981 requires that:

> '. . . every court shall so exercise its jurisdiction in every cause or matter before it as to secure that as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided.'

And, as the White Book note observes, this lies at the heart of the administration of civil justice in England and Wales.

Lack of a consistent principle

In property disputes, the distribution of cases between the courts and the tribunals means that in some instances litigants are required to make separate applications and obtain several determinations in more than one forum to achieve a final outcome for their dispute. The boundaries between issues considered fit for determination by the court, and those allocated to the tribunal, are not always drawn by reference to any consistent principle and are largely unrelated to complexity or value. In some cases, a party must choose whether to apply to the court or to the tribunal. In other cases, they have no choice but to apply to both.

Returning to Alice and her meeting with Tweedledum and Tweedledee:

> 'Alice did not like shaking hands with either of them first, for fear of hurting the other one's feelings; so, as the best way out of the difficulty she took hold of both hands at once; the next moment they were dancing round in a ring.'

Avoiding dancing in a ring is one of the benefits of having property disputes decided in one place rather than two. Furthermore, it is likely to reduce costs for parties and for HMCTS, it is likely to provide continuity and consistency in decision-making, and may mean that disputes are resolved more quickly.

The operation of the pilot may be best explained by an example. In a case under the Mobile Homes Act 1983, the tribunal received an application from a mobile home owner seeking a determination that her right to the peaceful and quiet enjoyment of the pitch had been breached by the site owners. The site owner took exception to her behaviour and a few weeks later issued proceedings in the county court seeking an order that they be able to terminate her occupation agreement and then obtain a mandatory injunction for her park home to be removed from the site. The same facts and statutory framework applied to both actions but the claims had to be brought in different places. The court judiciary agreed that all issues should be decided by the tribunal and that the county court claim should be allocated to the small claims track. There was one hearing, one reasoned tribunal decision and one county court order.

There are many other areas of our jurisdictions that can benefit from dual sitting. For example, in service charge cases we could decide rent arrears issues, in enfranchisement we could decide the validity of notices and in land registration cases we could decide the extent of beneficial interests and exercise TOLATA powers – the list goes on growing. The pilot is not intended to be all one way. In some instances, jurisdictions that would be exercised by the tribunal are better dealt with by the court, in which case the transfer will go the other way.

The challenge now is to identify and resolve some of the practical issues: should we apply CPR or the tribunal rules? What about costs? Which appeal route should be used? Ultimately we may need special rules to make the project effective. For now we are taking the pilot very slowly. We want to make sure that we get the process right before extending it too widely. However, I am pleased to say that so far, the feedback from parties, staff and judges has been very positive. We will get there in the end.

Siobhan McGrath is President of the First-tier Tribunal (Property) *Back to contents*

[1] See here.

[2] A phrase coined by counsel in one of our cases – but not 'Mad Hatting'.

[3] Permission for the Property Chamber salaried judiciary to sit in dual jurisdictions has been given by the Flexible Deployment Group chaired by Mrs Justice Paufley.

New-look panels – a brave new world?

POLICE MISCONDUCT By **Leslie Cuthbert**

From 1 January 2016, the hearing of misconduct cases against police officers was changed by the Police (Conduct) (Amendment) Regulations 2015 which introduced legally qualified chairs (LQCs) with responsibility for chairing Police Misconduct Panels (PMPs) replacing senior police officers who previously had chaired such hearings.

This change came about as a result of a public consultation conducted by the Home Office in 2014[1] and is one of a number of measures designed to make the police disciplinary system more transparent, just and independent. Another major change was the expectation that hearings would be held in public and this was introduced in May 2015. Until this time, all misconduct hearings and meetings were held in private, unless the Independent Police Complaints Commission considered, because of the gravity of the case or some other exceptional circumstance, that

it would be in the public interest for the case to be heard in public. Police forces publish details of the outcome of cases and these are available for at least 28 days but do not include the full reasoned decisions of the panel. Prior to 1 January 2016, panels for non-senior officers (i.e. constables to chief superintendents) were composed of a senior officer as the chair, as well as a second police officer of the rank of inspector or higher, together with an independent member.

Brave new world?

Each PMP (hereafter referred to as 'panels') now consists of three people: the LQC (hereafter referred to as 'chair'), a police officer of superintendent rank or higher and an independent member. While recruitment for chairs is not conducted by the Judicial Appointments Commission, there is a page on its website providing information about the role and a link to the Association of Police and Crime Commissioners who are responsible for the recruitment of chairs for their various police areas. Chairs are appointed on a fixed-term basis and all must undergo induction training prior to sitting. As with a number of similar appointments, chairs are required to adhere to the 'Seven principles of public life' (the Nolan Principles) and must have been qualified as a solicitor or barrister for at least five years.

The competencies required for the role are akin to those that will be familiar to anyone who has applied for a judicial role, i.e. intellectual capacity, integrity, an ability to understand and deal fairly, authority and communication skills, efficiency and effective chairing.

Independent panel members are appointed in a similar way to the chairs and akin to specialist members within tribunals. They are expected to attend and participate effectively in misconduct hearings, constructively challenge facts and views in hearings, have analytical skills, as well as an ability to take a balanced, open-minded and objective approach to the issues, and come to evidence-based decisions that are robust and able to withstand challenge.

Given the sensitivity of some matters which may be discussed, while hearings are generally heard in public that does not mean that the public are allowed in to the actual hearing room.

Panels are governed by the Police (Conduct) Regulations 2012, as amended, which set out the standards of professional behaviour police officers are expected to uphold. Chairs are selected on an *ad hoc* basis as cases arise. Panels are convened to hear serious cases of alleged misconduct by police officers, usually those which are considered to amount to gross misconduct, within the meaning of the police discipline system, and which can result in the officer's dismissal without notice.

The role of the chair involves similar work to what may be expected in many other tribunal settings, namely they must prepare for the hearing, by reviewing the papers in advance, and must write up full reasons for the panel's decision within five working days of the conclusion of the proceedings. In addition, there are a number of case management decisions to make, including which witnesses are required to attend, as well as any requests that the hearing be heard in private.

Given the sensitivity of some matters which may be discussed, while hearings are generally heard in public that does not mean that the public are allowed in to the actual hearing room. At the Metropolitan Police hearing centre, the public and press sit in a separate building and receive a time-delayed video feed of proceedings. This is because if something is said, which should not be disclosed in the public interest, the chair has the power to press a button which will blank out the previous 30 seconds of footage and the proceedings then remain obscured until the button is pressed again.

The burden of proof is on the relevant appropriate authority, such as the Metropolitan Police service, to prove the matters alleged and the standard of proof is the balance of probabilities. Various allegations can be made from

bringing the police force into disrepute to more recent trends such as information leakage, i.e. the disclosure of data which should not have been disclosed, and social media misuse.

Public protection

As is the position in relation to other regulatory type bodies, such as the Nursing and Midwifery Council or the Medical Practitioners Tribunal Service, the purpose of such proceedings is not primarily punishment but rather public protection and the need to maintain the high standards and good reputation of the police service. Accordingly, if allegations are found proved, then the officer involved may receive no further action, be given management advice, receive a written or final written warning, or be dismissed (with or without notice). The work of this panel may be considered especially important since police officers are, subject to very limited exceptions, excluded altogether from the right to claim unfair dismissal. Therefore, if a panel decides that a police officer should lose his or her job for misconduct, the decision to dismiss cannot be challenged in the Employment Tribunal unless allegations are made that the dismissal was an act of unlawful discrimination or in retaliation to whistleblowing. Even then, there is a high risk that such claims may be struck out on the basis that the panel is a judicial body that should enjoy immunity from suit (confirmed most recently in *P v The Commissioner of Police for the Metropolis* [2016] EWCA Civ 2).

Appeals from Police Misconduct Panels may be made to the Police Appeals Tribunal, not as a re-hearing but on the basis that either the finding, or disciplinary action imposed, was unreasonable, that there is evidence that could not reasonably have been considered at the misconduct hearing, which could have affected the finding or disciplinary action, or that there was a breach of the procedures or some other unfairness which materially affected the finding or disciplinary decision. The only other option of challenge would be by means of judicial review on traditional public law grounds.

As with other regulatory bodies, a key function of panels is the need to maintain public confidence in, and the reputation of, the police service by setting and signalling standards to both officers and the public.

New regulations also stop police officers from resigning or retiring if they are subject to an allegation that could lead to dismissal until any case has concluded or has found that the officer will not face a dismissal hearing. Any dismissal does not prevent an individual from applying to join another police force but would obviously be a matter which he or she would be required to disclose and is likely to be a factor in deciding whether that individual is appointed.

Testing times for new system

Chairs of panels face a number of challenges. One is the police culture, which is unique, and it is unknown how it will react to non-police officers being in control of these hearings. As with other regulatory bodies, a key function of panels is the need to maintain public confidence in, and the reputation of, the police service by setting and signalling standards to both officers and the public.

Second is the precise nature of the role of the LQC itself. A recent High Court decision[2] in relation to chairs within the Medical Practitioners Tribunal Service dealt with the issue of whether a chair needed to give advice to other panel members in the presence of the parties or could alternatively simply outline his or her advice in the written determination. In the decision, Mr Justice Hickinbottom disagreed with the suggestion that the role had two functions, one of which was equivalent to that of a legal assessor who stood outside of the decision-making tribunal. Similar challenges are likely to appear in relation to police misconduct hearings where officers who are dismissed without notice are likely to contest matters to the utmost given the potential financial ramifications of losses in pensions and other rights.

Third is the fact that there are not a large number of cases meaning that chairs, as with other fee-paid judicial roles, may struggle to maintain their knowledge of the relevant guidelines, process and procedures. In the past,

approximately 100 cases of misconduct relating to the Metropolitan Police have been heard per year, and this number is expected to increase to 150 to 200 cases a year, since both the British Transport Police and Ministry of Defence Police will also fall under the remit of the London Police Misconduct Panels. These will be dealt with by approximately 25 chairs. The numbers of cases in other police forces will obviously be less.

It is undoubtedly a brave new world for the police disciplinary process but having adopted a number of principles from the world of courts and tribunals it will hopefully turn out to be a fair and just one.

Leslie Cuthbert is a judge in the First-tier Tribunal (Health, Education and Social Care) *Back to contents*

[1] See here.

[2] *R (on the application of the British Medical Association) v General Medical Council* [2016] EWHC 1015 (Admin).

Take care of your digital footprint

ONLINE SECURITY By **Barry Clarke**

The pace of judicial reform will accelerate during 2017. We will hear more about online dispute resolution, virtual hearings and the adoption of digital processes as part of a common platform. Similar technologies have been changing the world in which we live for several years. We have, by and large, become used to them. But have we properly understood their transformative nature? These technologies have an impact on us not just as judges, but as citizens, parents, voters, workers and consumers.

Cast your minds back a decade. Perhaps 2007 does not seem so very long ago. In technological terms, however, 2007 was a lifetime ago. As that year began, no one in the UK had a Facebook account (Facebook launched in the UK in July 2007) and no one in the UK owned an iPhone (Apple launched the first iPhone in the UK in November 2007). Giant auction site eBay had only just started. Online banking and shopping were in their infancy. If you wanted to watch television, well, you turned on your TV set.

What do these developments mean to us as holders of judicial office? The short answer is that they place us at risk.

Ten years later, we are living what social scientists Anabel Quan-Haase and Barry Wellman call 'hyperconnected' lives.[1] Technology suffuses every aspect of our existence and continues to transform it.[2] We hear phrases like 'Web 2.0'[3] and the 'Internet of things'.[4] The smartphones in our pockets operate as digital Swiss Army knives. These devices are simultaneously our window to the wider world and our main means of escaping it: cameras, e-mail devices, GPS navigation systems, messaging services and the main platforms for accessing social media sites, for gaming, for Internet browsing and, increasingly, for paying for goods and services. Once in a while we even use them to make phone calls.

These devices, and the way we use them, leave online a lasting digital footprint for each of us. Our footprint is analysed by advanced algorithms[5] and repackaged and sold for profit.[6] Yet, if we lose these devices, the resulting 'fear of missing out'[7] can, for some, negatively influence psychological health.[8]

Privacy concerns

What do these developments mean to us as holders of judicial office? The short answer is that they place us at risk. By way of example, albeit involving an element of self-promotion, I can offer a personal insight. Despite being an early

adopter and technology enthusiast since the early 1980s, I have become increasingly concerned about the impact technology has on our privacy and our security.

In 2012, I began training employment judges about this new world, focusing especially on the way in which social media triggered workplace disputes or generated evidence relevant to the determination of disputes. Throughout 2013 and 2014, I trained all the non-legal members of the Employment Tribunal too. In 2015, with the blessing of the ET President and the Judicial College, I began training immigration judges, who witness how social media has transformed migration patterns. In 2016, it was district judges in the magistrates' court who see the sharp end of online malicious communications. In 2017, it will be the turn of the salaried judiciary of the Social Security and Child Support Tribunal.

The part of the session with the most impact is where I demonstrate the ready availability online of sensitive personal data about particular judges. Using publicly available information from data aggregation websites,[9] which facilitate 'jigsaw research', I can often locate a judge's home address and year (or precise date) of birth. In one case, I obtained the maiden name of a judge's mother, the names of his wife and daughter and pictures of his extended family; this was a judge who did not use social media at all. In another case, I located the school attended by a judge's children and, in yet another, the park in which a judge ran for 5km every Saturday morning. This was all done fairly quickly from the comfort of a desk; 20 years ago a private detective would have been required. Such are the risks we now face.

Given the sensitive, confidential and sometimes life-changing nature of the work we do as judges and members, we need to learn how to protect ourselves. We need to develop wisdom about the way we interact with new technology. We need to educate our friends and family members too, since their use of technology and social media also creates a digital footprint for us.

It will not be long, if we have not arrived there already, when most candidates for judicial office will bring with them a social media history.

When I started these training sessions in 2012, it was typically the case that about a quarter of those attending owned a smartphone and an even smaller number used social media. Moreover, those who did use social media could be described as 'light users'. For example, they had only set up a Facebook account to stay in touch with travelling adult children and had a limited network of 'friends'. In 2016, the situation has markedly shifted. Now, I find that a large majority owns a smartphone (and often a tablet as well) and somewhere around two-thirds actively use social media. It will not be long, if we have not arrived there already, when most candidates for judicial office will bring with them a social media history. In addition, the range of social media services being used by judges and members has increased. The use of Twitter, a popular platform for spreading legal news, is widespread. I am especially interested in the numbers now using Instagram and WhatsApp, since few judges realise that both of these services are owned by, and share data with, Facebook.

Below are some 'top tips' to assist judges and members in using technology and social media more wisely. They serve, I hope, three purposes. First, they will minimise the chances that, deliberately or inadvertently, you post something online that is inconsistent with the Judicial Code of Conduct (such as the expression of a viewpoint on a political issue of the day or reference to your judicial office). There have been a few examples in recent years of judges or members being reprimanded for inappropriate social media content; the disciplinary statements are publicly available.[10]

Secondly, they will enhance your security, by minimising the chances that a disaffected party can trace you to your home address.

Thirdly, they will reduce the extent to which data about your lives as citizens, parents, voters, workers and consumers becomes a tradeable commodity. For when it comes to social media, Facebook and their kin are not the product. *You* are the product.

Be secure – some top tips

- Find out what information about you is public and remove/amend it where you can. Make every effort to ensure that your home address and telephone number are not online (for example, as a result of holding a directorship or on *www.192.com*).
- When signing up for online services, enter the minimum amount of authentic information possible. Consider providing a bizarre rather than truthful answer to a security question (for example, that your first pet was called 'The Statue of Liberty').
- If you don't use social media, protect yourself by speaking to and educating those who do. If you do use social media, use common sense.
- Take care of your privacy. Check who can see what you post: friends, friends of friends, everyone? Don't announce online your holiday plans or your house move, except perhaps to a limited circle of trusted contacts. Be careful of the photographs you share. Ask friends not to 'tag' you in photographs.
- Do not post anything that would damage public confidence in the impartiality of the judiciary, e.g. political views, matters of public debate.
- Do not identify yourself on social media as a judge or member. Do not discuss your cases on social media. Be very wary about accepting 'friend requests' from lawyers or representatives who may appear before you.
- Consider using a pseudonym as your social media handle.
- Check the default settings of websites and browsers you use. Can you increase the privacy settings? Be wary of signing up to websites using your social media profiles. Turn on two-step verification where you can (eJudiciary is a good example of how this is done).
- Change your passwords regularly. Don't use the same password for everything. Make sure they are good passwords (a password manager app, like mSecure, will help you remember your passwords and even suggest secure and random new ones).
- Maximise privacy settings on your smartphones. Turn off location services. Don't allow apps to access all your contacts. Back up your data. Use encryption services. Use anti-virus and anti-spyware software. Keep software up to date, since that is how weaknesses are identified and repaired.
- Be wary of using free public Wifi, which is usually not encrypted, for work use.
- Buy (and use) a shredder.
- Consider using more than one e-mail address. For personal use, consider an e-mail address that does not contain your name.
- Treat unsolicited texts and e-mails warily. Do not reply. Do not open attachments if you are not confident that the source is safe.

Barry Clarke is the Regional Employment Judge for Wales *Back to contents*

Useful links:

Tracking my digital footprint from CPNI (Centre for the Protection of National Infrastructure).

Me and my shadow

Get safe online

BBC Webwise

The Guide to Judicial Conduct (July 2016 amended version), especially Section 8.11 and Appendix 4.

The Responsibilities of the Judiciary (September 2015), especially Section 8.

[1] See here.

[2] The Government Office for Science produced an excellent and very readable report on the topic in January 2013.

[3] See here.

[4] See here.

[5] The algorithm behind the Facebook news feed is accessibly described in this *Time* magazine article from July 2015.

[6] This news article from 2012 explains what data mining is, how it works and why it is important.

[7] See here.

[8] See here, 'The relationship between fear of missing out, alcohol use, and alcohol-related consequences in college students', *Annals of Neuroscience and Psychology* (2015) 2: 1-7.

[9] Some examples: Open Charities, 192.com, Company Check, Genes Reunited, Rightmove.

[10] See here.

Recent publications

EXTERNAL LINKS By **Adrian Stokes**

This section lists recent publications of interest to readers of the *Tribunals* journal with a very short description of each (where this is not obvious from the title) and a link to the actual document. It is not intended to be a comprehensive list but is intended to bring to the attention of readers some publications of interest but which they might have missed. It also gives a number of useful links.

The Historian as Judge

Lord Sumption's address to Administrative Appeals Chamber/Immigration and Asylum Chamber judges at the Rolls Building, London (6 October 2016).

Lord Chief Justice's Annual Press Conference 2016

Transcript of the LCJ's Press Conference (30 November 2016). The video is available here on YouTube. (Both published 7 February 2017.)

Raising the Bar: Innovation and global opportunity for a forward thinking profession

Keynote speech by Sir Ernest Ryder, Senior President of Tribunals, at the Annual Bar and Young Bar Conference 2016 (17 October 2016).

Delegation of functions to tribunal caseworkers

Practice statement in respect of the First-tier (Immigration and Asylum Chamber) extending the scheme for an additional six months (published 17 November 2016).

Access to Justice

This is a report prepared as background for a debate in Westminster Hall on the initiative of Rob Marris MP. Although the report is largely concerned with courts rather than tribunals, it may be of some interest to readers. It also has a comprehensive bibliography (all hyperlinked) (published 9 January 2017).

Useful links:

International Organization for Judicial Training

This is an organisation consisting (August 2015) of 123 members, all concerned with judicial training from 75 countries. The Judicial College is a member.

The Advocate's Gateway

Provides 'free access to practical, evidence-based guidance on vulnerable witnesses and defendants'.

Unconscious bias

Website on unconscious bias including various tests.

Tribunal decisions

Rightsnet

Child Poverty Action Group

Adrian Stokes is a Disability Qualified Member in the First-tier Tribunal (Social Entitlement)

Back to contents

Editorial board member

Applications are invited for one additional member of the editorial board for the Judicial College's *Tribunals* journal. Three issues of the journal are published online each year, with the aim of providing interesting, lively and informative analysis of the reforms currently under way in different areas of administrative justice.

The main role of editorial board members is to agree the contents of each issue of the journal, commission articles from prospective authors and on occasion write pieces themselves.

The successful candidate will be able to demonstrate:

- **An understanding of the needs and concerns of those appearing in front of tribunal hearings.**
- **The ability to contribute their own thoughts and experiences, with the aim of benefiting others.**
- **Good communication and interpersonal skills.**

In addition, some writing experience would be desirable.

Members of the editorial board are asked to attend three meetings a year at the Judicial College's London office. The board is keen to encourage applicants with experience or knowledge of the tribunals system whether as judicial office-holders, representatives of users or academics.

Any candidate wishing to discuss the work of the editorial board should e-mail *JCPublications@judicary.gsi.gov.uk* and will be put in touch with a board member who is available to provide further information about the position. An application form is available from this e-mail address. The closing date is 3 April 2017 at 5pm.

Masterclasses for reform leaders

By **Ernest Ryder**

On 18 and 19 January, we began a series of what are known as Reform Leadership Masterclasses run by the Judicial College. The Lord Chief Justice and I invited every leadership judge: Presiding Judge, Family Division Liaison Judge, Chancery Supervising Judge, the resident and designated judges from the courts alongside the Chamber Presidents and regional judges from the tribunals, to attend a leadership course where questions were put and where reform was discussed.

There will inevitably be some who do not think such training is necessary. They would miss an opportunity to understand what a change programme involves. The fact that it never stops, it is continuous, and develops with our knowledge of what works and what the system and our users need. This understanding is key to the successful reform of our justice system.

There will inevitably be some who do not think such training is necessary.

There is a detailed briefing pack describing what we hope to achieve. It sets out what has already been discussed with the judges on each of the jurisdictional judicial engagement groups and reform boards. For example, there are those who have been beavering away on crime for two years and those in civil, family and tribunals who have been going for about a year. There are also those dealing with estates and property, whether it be sales, the renewal of leases or the court of the future design programme. In IT, we have common process development, digital case management, and the development of user-facing components and presentational facilities for use in courts and hearing rooms. We

are using judges, some of whom are experts, others are representative of all of our judges across different jurisdictions to inform, advise and cross-check each innovative idea.

All of the judges who have been involved in the planning so far, who were people nominated from your jurisdictions, will have the briefing material to which I have referred which will be made available to all judicial office-holders on the intranet very soon. The intention is that at a local level and at a regional level the leadership judges will use the material and go and talk to the judicial office-holders in every lunch room in every court and tribunal building and ask them for their comments, engage with them for their bright ideas and, most particularly, their concerns and their fears about what might happen. They will hopefully be able to answer your questions, because the material is available for discussion; and if not, they should know where to go to get answers or to continue the conversation.

There will be no 'big bang' but rather a gradual learning curve. There will be no 'one size fits all'.

Let me put some of this into context for you, the judge. What does the future look like for you? I have to start by saying we are not at a stage where we can give you what the consultants would call the end state or future operating model. We will have it fairly soon, but not yet. In any event it would not be wise to fix it before the judiciary and users alike have been consulted, to find out what the system's needs will be and what advice you would like us to take into account.

The published material will set out some of the detail of proposals that are being considered. There will be no 'big bang' but rather a gradual learning curve. There will be no 'one size fits all'. What is needed for a party-state benefits appeal is not the same as that needed for a party-party jurisdiction such as employment or property. But each will use some of the same IT components: for example, a digital portal with intuitive questions that replaces the formal application form, a system to track, notify and manage all stages of a hearing, a system to upload documents on to the cloud and that permits digital case management, virtual hearing facilities and a system that permits continuous online hearings (i.e. an inquisitorial investigation into jurisdictional facts) by sequential messaging.

We will start with Social Security and Child Support and then move on to other jurisdictions. We will learn from the experience of the developments over the last two years in crime – so, for example, crime has the common platform which is available to the CPS and police forces and which has both a document case management component and a facility to create bundles, display documents and allow mark-up on those documents. That technology allows documents to be displayed in court or only on laptops where the judge or the parties are working on them.

Everything is advised upon by the judiciary, the litigants in person engagement group and the professional engagement groups.

Electronic document case management systems will allow registrars and case officers to undertake tasks in support of the judiciary. They have a check-list of functions authorised under the rules. They are not allowed to exceed their authorisation. What they do is immediately reviewable by a judge if necessary. We get case officers to undertake triage and they produce standard and bespoke direction orders, either to be sent out under their own authority or after approval by the judge. They could divert cases, for example to judicial conciliation, early neutral evaluation or mediation or to an external arbitrator – access to and benefits derived from alternative dispute resolution are very much issues I would now like to focus on. In this way, technology and case officer support could be used to signpost and facilitate proportionate and fair settlement.

Does any of this work for litigants? Everything is being tested with users and judicial office-holders before it is piloted and then introduced. Everything is advised upon by the judiciary, the litigants in person engagement group (the LiPEg) and the professional engagement groups. It won't work for a percentage of litigants who we know

already cannot access anything online. For their needs, there will be an assisted digital programme. It will involve reputable third-party providers. They will provide those excluded litigants with services even to the extent of using paper applications if necessary. The principle must always be that we are improving on the access to justice that already exists.

Alongside all of this, there will be more jurisdictions of different kinds in fewer buildings. Those buildings will be either hub courts and hearing centres in regional city or town centres or national jurisdiction centres with local hearing facilities. Our buildings will need to be of a lot higher quality than some of the ones we presently use. There is a sum of over £230 million to be spent on refurbishment of the remaining estate to make it fit for the purposes we envisage. And that is in addition to the wifi, the screens which you will need, the presentation equipment and so on. We need good facilities for judges, staff and public alike.

HMCTS staff will fundamentally change the way they do things because at the moment everything is in a paper file. They are going to service jurisdictional centres and back offices that produce documents on clouds, customer centres that track claims and answer people's queries and specialist staff who support our courts and hearing centres. The days of having a concierge and an IT expert may be around the corner.

We will need some new training and support and we are going to use the opportunity that reform presents to integrate the courts and tribunals judiciary and maximise the sharing of skills and expertise between the two. That will allow far greater cross-deployment between jurisdictions and, I believe, better career prospects. We need to engage with each other. We need to help and support each other. We need to listen to each other.

I hope that the consequence of what we are doing will be an institution that is improved rather than devalued; where the rule of law is reinforced; and the independent judiciary is fortified. These are worthwhile objectives, very much within reach. I hope you will want to take part to help us make the justice system of the 21st century something you feel valued by and proud of.

Sir Ernest Ryder is Senior President of Tribunals *Back to contents*

Tribunals is published three times a year by the Judicial College, although the views expressed are not necessarily those of the College. Queries to: *jcpublications@judiciary.gsi.gov.uk* tel: 0113 2005 128