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EDITORIAL



WE ARE approaching a time when early dispute resolution skills will assume a more prominent role within the skills and service offered by the tribunals judiciary. This issue of the journal looks at dispute-resolution processes other than the traditional one of adversarial, or inquisitorial, oral hearings.

In a thorough and thoughtful article, starting on page 18, **Stuart Vernon** considers the development of dispute-resolution processes – and in particular mediation – in tribunals to date, and at their benefits and limitations.

Ann Abraham believes that the phrase ‘administrative justice’ – and therefore the area kept under review by the new Administrative Justice and Tribunals Council – should be routinely understood as extending to all those decision-making processes that affect citizens directly, or as she describes them, the ‘front-line trenches’.

In two related pieces, **Lord Newton** outlines the work programme for the AJTC on page 11, and **Tony Redmond** describes the principles of good complaint-handling developed by the British and Irish Ombudsman Association, and the purpose behind them on page 13.

Finally, in the latest of our ‘principles in practice’ series, which looks at the working of different legal principles in the tribunal hearing room, **Jeremy Cooper** on page 2 considers the development of the concepts of the burden and standard of proof in civil and tribunal cases.



New Tribunals Training Director for JSB

The JSB is delighted to announce the appointment of **Mark Hinchliffe** as its new Tribunals Training Director. A solicitor by profession, Mark sits in a number of jurisdictions, principally as an Immigration Adjudicator, chair in SENDIST, deputy Traffic Commissioner, Parking Adjudicator, and as a coroner.

He has been a regular contributor to the work of the JSB, both as a trainer and facilitator, particularly on the Tribunal Skills Development Course, and as a member of the JSB’s Tribunals Committee and Equal Treatment Advisory Committee. He has also been involved with the training programmes for numerous tribunals, including the Employment Tribunals and Immigration Tribunal, as well as his own.

Mark sees the work of the JSB in relation to tribunals training as that of a supportive friend, who removes the need for them to reinvent the wheel – particularly when training in generic ‘judgecraft’ skills – while providing advice to those seeking to develop their own training programmes.

Mark will take up the post formally on 3 April 2008, when my own term of office at the JSB comes to an end.

Godfrey Cole CBE

Any comments on the journal are, as ever, most welcome. Please send to publications@jsb.gsi.gov.uk.

THE BURDEN AND THE STANDARD OF PROOF



Jeremy Cooper considers where the burden of proof lies in establishing liability in a tribunal, and what standard of proof is required in establishing liability.

THIS ARTICLE examines the concepts of ‘burden of proof’ and ‘standard of proof’ in a tribunal setting. It is important that the examination takes place at this time of widescale unification of the tribunal system across multiple areas of work including reason writing, judgecraft training, appraisal, remuneration, cross-ticketing, and the development of a common set of procedural rules. The development of the tribunal jurisdiction as a discrete and distinct process of judicial adjudication across an increasingly diverse range of disputes challenges tribunals to acquire consistency or justify diversity in every aspect of their work. The multiple structural changes contained in the Tribunals, Courts and Enforcement Act 2007 will reinforce this change agenda, reaffirming that ‘tribunals do not exist in isolation. Each jurisdiction is part of a wider system for delivering justice.’¹

The court system has already established over several centuries a clear set of principles in relation to two questions that form the bedrock of due process in both the criminal and the civil courts. Where does the burden lie in establishing liability (civil courts) or guilt (criminal courts)? What is the standard of proof required in adjudicating the evidence to establish liability?

This article will address the same two questions in relation to the tribunal setting. What is the

burden of proof in a tribunal? What is the standard of proof in a tribunal? In addressing these questions the article will probe further into the procedural structure of a a tribunal hearing and the extent to which a tribunal’s deliberately less formal structures paradoxically render the answering of these two questions more complex.

The burden of proof

The dual concepts of burden of proof and standard of proof are most clearly understood in an adversarial system. In an adversarial system, the burden of proof rests with the party bringing the action, for example the State in the case of a criminal trial and the applicant in the case of a civil trial. In these circumstances, the court or tribunal listens to the parties who present their evidence and arguments according to strict rules of evidence and procedure. The stance of the judiciary in an adversarial hearing is not unlike that of a referee in a sporting engagement, ensuring the parties are given a fair hearing according to the rules of engagement, leading to a final adjudication as to who is the winner. It is essentially more of a reactive than a proactive role,

although this approach is beginning to change with the introduction of higher levels of judicial case management following the implementation of the Woolf Reforms and the introduction of the Civil Procedure Rules in 1997.

‘But in truth no real mischief results from an acceptance of the fact that there is some difference of approach in civil actions. Particularly is this so, if the words which are used to define that approach are the servants but not the masters of meaning.’

**Per Morris LJ in
Hornal v Neuberger
Products Ltd
[1957] 1 QB 247**

By contrast, in an inquisitorial system the judiciary are not passive recipients of information. They have key responsibility for supervising the gathering of evidence and are actively involved in determining the questions to be put to the witnesses and parties, to ascertain the facts of the case. They are given wide powers enabling them to seek and obtain any evidence they deem to be relevant to the issues to be determined. The judiciary in an inquisitorial hearing must be highly proactive, and they are explicitly tasked with positively ascertaining the truth, rather than enabling the parties to do so.

Limited meaning

Commensurate with the inquisitorial approach is a rather more relaxed attitude to any rules of evidence (the law of evidence, for example, is not a discrete subject in French law schools) and the absence of any hearsay rule. Rather, in a truly inquisitorial system, the court simply attaches to every piece of evidence such weight as it thinks fit. Some English tribunals seem already to be modelled upon just such a principle. The process of benefits adjudication is, for example, deemed to be ‘inquisitorial rather than adversarial’² leading to ‘a cooperative process of investigation in which both the claimant and the department play their part’.³ And in the words of Baroness Hale, ‘if that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as burden of proof’.⁴ The Mental Health Review Tribunal is also ‘to a significant extent inquisitorial’,⁵ and has a procedural rule permitting the tribunal ‘to receive in evidence any document or information notwithstanding that such document or information would be inadmissible in a court of law’⁶. It follows that the concept of a burden of proof has limited meaning in an inquisitorial system, as it is the court or tribunal that retains the responsibility to establish the facts and determine the outcome in whatever way it deems appropriate. This is particularly the case where a tribunal is engaged in assessing risk, for example in Parole Board cases,⁷ in cases involving

perceived threats to national security as in the Special Immigration Appeals Commission,⁸ and in cases that essentially involve the appreciation or the evaluation of economic questions, for example in the Competition Appeal Tribunal.⁹

Pragmatic approach

Another striking example of the difficulties in applying a one-size-fits-all definition of burden of proof in the complex world of tribunal hearings is to be found in the Asylum and Immigration Tribunal (AIT). The general legal principle in AIT cases, based in international law, is that the burden of proof lies on the person submitting the claim. But there may be many occasions when the person submitting an asylum claim is quite unable to support his or her claim by any personal documentary or other proof because of their age, their vulnerability or simply arising out of the circumstances in which they left their homeland. The pragmatic response of the AIT to these difficult situations has been only to require that the claimant must show ‘a reasonable degree of likelihood’ that he or she has a well-founded fear of being persecuted if obliged to return to their country of origin. And while this burden does in theory rest with the applicant, the duty to ascertain and evaluate all the relevant facts is in practice shared between the applicant and the tribunal.¹⁰

Merging the concepts

Although the civil and criminal courts are generally of an adversarial nature (the small claims court, and the Family and Childrens’ Courts being the principal exception to this norm)¹¹ tribunals range widely from the primarily adversarial (such as the Employment Tribunal), where the burden of proof clearly rests with the applicant, to the primarily inquisitorial (for example, the Criminal Injuries Compensation Adjudication Panel, the Competition Appeal Tribunal and the Social Security and Child Support Appeals Tribunal), where the tribunal takes on the role of establishing the outcome. The difficulty lies

in the case of tribunals that are hybrid, or ‘quasi-inquisitorial’, and thus neither one thing nor the other. The Special Educational Needs Tribunal (SENDIST) is one such example, with a process that begins in a highly adversarial mode, moving towards an inquisitorial phase of investigation once the core differences between the parties have emerged from beneath the adversarial umbrella. The Mental Health Review Tribunal (MHRT) is another such example, but with a different process. Mumby J in *Re oao DJ v MHRT and Mersey Care Mental Health NHS Trust and SoS for Home Department* [2005] EWHC 587¹² struggled to define the precise nature or definition of the concept of a burden of proof in the MHRT, settling in preference for the Strasbourg term ‘onus of proof’,¹³ or his own version of the term, the ‘persuasive burden’. The Court of Appeal in this case was alive to the difficulty of talking of a ‘burden of proof’ in such a setting and process, coming up with an intriguing new fusion of the concepts of burden and standards of proof embracing the entire decision-making process, in their use of the phrase ‘burden of persuasion’:

Analysis of this issue is not helped by the fact that ‘proof’ in the phrase ‘standard of proof’ and ‘probabilities’ in the phrase ‘balance of probabilities’ are words which go naturally with the concept of evidence relating to fact, but are less perfect with evaluative assessments. That is why the courts have started to speak of ‘the burden of persuasion’.

In essence, by this statement the Court of Appeal appears either deliberately or unwittingly to have merged into closer unity the twin concepts of burden of proof and standard of proof kept separate in traditional court jurisprudence, in recognition of the particularities of the more holistic approach to the adjudication process

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represented by the inquisitorial tribunal. So what are the current rules regarding the standard of proof in a tribunal hearing?

The standard of proof

In the two cases of *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 and *SoS for the Home Department v Rehman* [2003] 1 AC153 the House of Lords laid down a series of guiding principles on standard of proof, as follows:

- 1 Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability.
- 2 The balance of probability standard means that the court must be satisfied that the event in question is more likely than not to have occurred.
- 3 The balance of probability standard is a flexible standard. This means that when assessing this probability the court will

assume that some things are inherently more likely than others. This concept was memorably encapsulated by Lord Hoffmann, when he observed:

‘It would need more cogent evidence to satisfy one that the creature seen walking in Regent’s Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an alsatian.’

- 4 The more serious the allegation the less likely it is that the event occurred, and thus the stronger and more cogent should be the evidence before a court determines that on the balance of probabilities, the event did occur. This principle has been regularly applied in a number of different settings for the past 60 years.

These are the principles laid down to apply in non-criminal proceedings in the general civil courts, but should they also govern all tribunal proceedings? Although there is no direct authority to support this assertion, the principles are so self-evidently applicable to tribunals that, echoing Diplock LJ in *Robson v Hallett* [1967] 2 QB 939,¹⁴ ‘there is no authority because no one has thought it plausible up till now to question them’. The principles have been meticulously grafted from the raw materials of adjudications in a range of civil settings, all of which have a judicial character and have been finessed by high judicial authority. The work of tribunals is equally judicial and adjudicative. In some tribunal jurisdictions – for example the Competition Appeal Tribunal and the Mental Health Review Tribunal – the standard of proof has already been explicitly set down in case law as being the balance of probabilities.¹⁵ In others – for example schools’ appeals panels – the standard of proof is actually set down in regulations.¹⁶

A further factor that suggests the balance of probabilities to be the appropriate standard in a tribunal setting relates to the inquisitorial nature of most tribunal proceedings which is arguably best served by such a test, given the informal nature of the proceedings, and also the frequently open-textured subject matter. For example, in holding that the approach to be adopted towards the required standard of proof in cases involving children and family proceedings should be the balance of probabilities, Dame Elizabeth Butler-Sloss observed as follows:¹⁷

‘The strict rules of evidence applicable in a criminal trial which is adversarial in nature is to be contrasted with the partly inquisitorial approach of the court dealing with children cases in which the rules of evidence are considerably relaxed . . .

The standard of proof to be applied in Children Act 1989 cases is the balance of probabilities.’

But even where the applicable standard of proof has not yet been explicitly established within a specific tribunal jurisdiction there is strong indirect support for this proposition by inference from other case law, unless the jurisdiction in question exercises powers that are clearly more

commensurate with a criminal or quasi-criminal jurisdiction, than a civil adjudication.

There have been a series of important High Court decisions over the past decade that have sought to establish special standards, where the circumstances fall markedly outwith the normal range of civil actions. These cases have related in particular to:

- Sex Offender Orders under the Crime and Disorder Act 1998 (*B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340).
- Football Banning Orders under the Football Spectators Act 1989 (*Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213).
- Anti Social Behaviour Orders (ASBOs) (*R (McCann) v Crown Court at Manchester* [2003] 1 AC 787).

In all three settings the court concluded that the standard of proof to be applied was of a different, more stringent, nature than the balance of probability standard. They described the standard respectively as follows:

- ‘A civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard.’ (Sex Offender Orders)
- ‘An exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard.’ (Football Banning Orders)

‘there is no authority because no one has thought it plausible up till now to question them’.

- ‘A heightened civil standard (that is) virtually indistinguishable [from the] criminal standard.’ (ASBOs)

What is significant about these cases, however, is that they all fall into a category of case described by Lord Hope of Craighead as cases where ‘allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made’.¹⁸

While it might be argued that a number of tribunals make decisions that if adverse, have ‘serious consequences’ for the person against whom the adverse finding is made, Lord Steyn explained the concept of ‘serious consequences’ as bearing a rather more narrow meaning in this context. In Lord Steyn’s words, the ‘unifying element’ linking the three cases was ‘the use of the civil remedy as an injunction to prohibit conduct considered to be utterly unacceptable, with a remedy of criminal penalties in the event of disobedience’ and this he explains is what is meant by ‘serious consequences’. Such elements appear far outwith the jurisdictions and concerns of most if not all tribunals.¹⁹

In conclusion, where a tribunal deals with non-criminal proceedings it would seem manifestly clear that the standard of proof that should be applied in every case is that of the balance of probabilities.

Professor Jeremy Cooper is a Regional Chairman of the Mental Health Review Tribunal.

¹ *Transforming Tribunals: Implementing Part 1 of the 2007 Act*, Consultation Paper CP 30/07, p 5.

² *R v Medical Appeal Tribunal (North Midland Region) ex P Hubble* [1958] 2 QB 228.

³ *Kerr (AP) v Department for Social Development (Northern Ireland)* [2004] UKHL 27.

⁴ *Ibid* at para 63.

⁵ Per Stanley Burnton J in *R oao Ashworth Hospital Authority v MHRT* [2001] EWHC Admin 901.

⁶ Mental Health Review Tribunal Rules 1983, Rule 14 (2). The Office of Fair Trading and the Road Use Charging Adjudicator Tribunal have similar open-textured provisions in their rules of procedure.

⁷ See for example *R oao Sim v Parole Board* [2004] QB 1288 at para 42 per Keele LJ, ‘the concept of a burden of proof is inappropriate where one is involved in risk evaluation’ and *R oao Brooks v The Parole Board* [2004] EWCA Civ 80 at para 28 per Kennedy LJ, ‘ultimately the burden of proof has no real part to play’.

⁸ See for example *SoS for Home Department v Rehman* [2003] 1AC. At para 56, Lord Hoffmann extended this scepticism also to the standard of proof (see below) when he said ‘the whole concept of a standard of proof is not particularly helpful in a case such as the present’.

⁹ *JJB Sports PLC v Office of Fair Trading* [2004] CAT 17.

¹⁰ See Jarvis C (2007) *A View from the United Kingdom*, unpublished paper presented at the UNHCR and ECRE Seminar for Ukrainian Judiciary Refugee Protection, Kiev, paras 15–36.

¹¹ Children Act proceedings are ‘primarily non-adversarial and investigative as opposed to adversarial . . . (in which) the notion of a fair trial assumes far less importance’: *Re L (a Minor) (Police Investigation: Privilege)* [1997] 16 AC 17, per Lord Jauncey at 26H–27B.

¹² At para 105. See also [2005] EWCA Civ 1605.

¹³ Used in *Reid v United Kingdom* (2003) 27 EHRR 211 at para 77.

¹⁴ At p 953.

¹⁵ (CAT) *JJB Sports PLC v Office of Fair Trading* [2004] CAT 17; (MHRT) *R oao AN v MHRT and SoS for Home Dept and Mersey Care Mental Health NHS Trust* [2005] EWCA Civ 1605. In both cases, however, the court emphasised that where serious matters are in issue (e.g. in the MHRT the liberty of the individual and the protection of the public, and in the CAT the alleged dishonest conduct of a party) the quality and the weight of the evidence needs to be stronger than it would need to be if the matters under consideration were less serious.

¹⁶ *Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002*, SI 2002/3178 Reg 7A, inserted by *Education (Pupil Exclusions) (Miscellaneous Amendments) (England) Regulations 2004*, SI s 2004/402.

¹⁷ *In re U (A Child) (Department for Education and Skills intervening)* [2005] Fam 134, at 13.

¹⁸ *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 at para 82.

¹⁹ Even the fact that the Secretary of State for Justice has the power to recall to hospital a patient conditionally discharged by a tribunal, thereby taking away their liberty is not considered sufficient to alter the standard of proof required by the Secretary of State, or the tribunal reviewing the recall, which remains that of balance of probabilities.

TAKING THE BULL BY THE HORNS



In this edited version of a speech she gave at the launch of the Administrative Justice and Tribunals Council in November 2007, *Ann Abraham* describes what she sees as the real challenge for the new body.

WHEN I SPOKE at the Council on Tribunals conference in 2004, I was enthusiastic about the prospect of a new Administrative Justice and Tribunals Council (AJTC). I should say at the outset that I remain enthusiastic and even more convinced of the urgency of taking the administrative justice bull by the horns. I want briefly to explain why that is so.

Other decision-makers

Let me begin with the parts of the administrative justice system that tend to get overlooked. I want to start not with courts, or tribunals or ombudsmen or even with the users of the administrative justice system itself, but with those countless citizens who have no option but to be more or less regular recipients of the administrative decisions of the state, whether as claimants for welfare benefits, as users of the health and social care systems, or in countless other ways. And I want to start there because it is with the citizen as user of public services and decision-making that the administrative justice system must ultimately come to terms.

The simple fact of the matter is that decision-makers too often get it wrong, sometimes literally wrong (in the sense of making miscalculations or reaching perverse conclusions), but more often wrong in the more commonplace, but ultimately more troubling, sense of propping up a potentially dehumanising

system by their lack of customer focus, by failing to treat the citizen as an individual – a person entitled to respect – and instead treating them as cogs in a bureaucratic machine.

Tentacles

Now it is of course an important part of the role of the AJTC to make sure that aggrieved citizens can use the administrative justice system to have things put right, but what I am suggesting here is that the AJTC needs to ensure that its tentacles extend even further into the body of the administrative justice process – in search of the real prize of improving first-instance decision-making.

Of course, I welcome the AJTC's stated commitment to strategic oversight of the system, to infusing that system with the values of transparency, proportionality, independence, accessibility, fairness and equality. I am, however, suggesting that when we talk about the administrative justice system,

we need to have clearly in front of us a broad conception of what that expression means.

I trust we have already got beyond the stage where we might have thought it just meant courts or tribunals. We now routinely acknowledge other forms of dispute resolution as having a place at the administrative justice table. Naturally, I would regard ombudsmen as having a distinctive part to play as a system of justice in

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their own right, alternatives to the courts and tribunals, yes, but alternatives also to all those forms of alternative dispute resolution (ADR) that are essentially negotiated forms of justice: for ombudsmen the task of adjudication is a key identifying feature.

But I am suggesting that we must get beyond ombudsmen too if the AJTC is to have a strategy that can deliver meaningful change for the citizen body at large. This, I take it, is what the White Paper meant when it spoke of the AJTC retaining its supervisory role but, crucially, evolving into ‘an advisory body for the whole administrative justice sector’. It is also, I take it, what the AJTC now means when it talks about the task of keeping under review the administrative justice system as a whole.

That realisation, I want to suggest, draws us towards the central importance of administrative justice for our public discourse and so towards the central importance of the AJTC too. We hear a lot these days about ‘the democratic deficit’, about the cynical disengagement of ordinary citizens from the political process, about the unaccountability of the executive for so much of what it does. I want to suggest that the AJTC has a crucial role to play in addressing this state of stagnation.

Deliberative democracy

It has become fashionable to talk about ‘deliberative democracy’ as a viable staging post between a representative democratic process that is too remote and a participatory democratic process that is impracticable in a nation state. Deliberative democracy, I would suggest, starts with good administration, with transparent and reasoned decision-making at first instance. I

might add in passing that it is one of the places where a human rights culture begins to take root also, one of those small places that Eleanor Roosevelt famously referred to, close to home, so small and so close that they cannot be seen on any map of the world but which nevertheless simply *are the world* of the individual person.

So, what does all this mean in practice for the AJTC? What might success look like? Let me

start with a couple of examples of the challenges we face. Take the user of mental health services. To begin with, let’s not lose sight of the fact that he, or more often she, is only brought into contact with the mental health services because things have got quite bad at a very personal level. Far from the process for tackling grievances taking account of that fact, it seems instead to have been designed with the sole purpose of causing the maximum frustration for those citizens who are already more likely than most to be at the end of their tethers.

Just consider the labyrinth that awaits them after a first-instance decision that warrants review: there is the Mental Health Review Tribunal, itself subject to appeal; there is the NHS complaints system; there is the Mental Health Act Commission and

the Healthcare Commission; and then there is the Health Service Ombudsman (and the courts, of course, if anyone has the stamina).

... the AJTC needs to be alert to this sort of systemic nonsense ... [and exercise] the sort of close vigilance that will enable it to call to account the administrative process where it affects citizens most directly, at the first-instance decision-making stage.

Close vigilance

To my mind, the AJTC needs to be alert to this sort of systemic nonsense, not of course in any way as an adjudicator on particular disputes, but by way of exercising the sort of close vigilance that will enable it to call to account the administrative process where it affects citizens most directly, at the first-instance decision-

making stage. That will mean having in place the right channels of intelligence (including some serious empirical research) and communication to enable that degree of scrutiny and oversight. Of course, it is vital to take a strategic approach, but the AJTC must not succumb to the temptation of allowing the strategic approach to look too much like a retreat from the front-line trenches to a comfortable country chateau.

For my second example, let me turn to a more developed tier of the process, that of the ombudsman. The very name of the AJTC naturally gives prominence to the role of tribunals in the administrative justice system. That is not surprising. It should not, however, disguise the fact that public sector ombudsmen have an enormous part to play in that system of justice too.

Unlike tribunals, ombudsmen have not, at least not yet, been subjected to a Leggatt-type review. As a result, and despite the best and sustained efforts of the British and Irish Ombudsman Association (BIOA) over the years, the domestic ombudsman world is fragmented, and increasingly complex for the ordinary citizen to navigate.

Crowded field

I said in 2004 that the BIOA and I had hoped that the Administrative Justice White Paper would tackle this issue of unruly ombudsman proliferation, often with little guarantee that every bearer of the title meets the minimum criteria for office either in terms of independence or remedial powers, and very often with little rationale for the introduction of yet another scheme into an already often crowded field.

I have yet to fathom, for example, the rationale in the minds of the Ministry of Justice (which of all departments should know about such things) for creating a statutory Prisons Ombudsman (in the Criminal Justice and Immigration Bill), when prisons already fall ultimately within the statutory remit of the Parliamentary Ombudsman, albeit with the Ministry's own non-statutory Prisons and Probation Ombudsman occupying the intermediary ground? I hope the AJTC will be seeking an answer to that question.¹

Meanwhile, in another part of the Whitehall forest, the Department for Business, Enterprise and Regulatory Reform (where, of course, competition and choice are the order of the day) is proposing a very different sort of ombudsman arrangement for consumer redress in our gas, electricity and postal services in the Consumers, Estate Agents and Redress Bill. It makes little sense to extend the philosophy of consumerism to the process of adjudication if the offer of 'choice' threatens to undermine the credibility of all the schemes involved and to limit the ability of any of them to exert real influence and so bring about systemic change. 'Horses for courses', yes, 'Pick 'n' mix', no.

Rationalisation

I see a key role for the AJTC here. If its oversight is to extend to the

entire administrative justice sector, it must have within its ambit the sort of rationalisation of each and every part of the system that it has already been required to exercise over the tribunals. I am conscious that the Law Commission is beginning to address some of these issues of 'overlap' in its deliberations about public law remedies. It should not be alone in that venture but should, I suggest,

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expect to find in the AJTC a well-informed and engaged partner in the quest for an integrated administrative justice system, one that means business and can deliver.

Finally, let me offer a third example of an aspect of the system that the AJTC needs to have in its sights. Over the summer, the Ministry of Justice's task force on Public Legal Education and Support, chaired by Professor Dame Hazel Genn, produced its final report entitled *Developing capable citizens: the role of public legal education*. In the course of calling for a new agency to oversee delivery of public legal education, the report identified a situation in which ordinary citizens, confronted by ever more complex and fast-changing lives, frequently have little idea how the law and the legal system affect them, and how they could be put to good use.

The report suggested that as a result of that lack of understanding, around a million civil justice problems go unresolved every year, with the burden falling as ever most heavily on the socially excluded and the vulnerable. The Ministry of Justice itself has estimated that over a three-and-a-half-year research period, unresolved legal problems cost individuals and the public purse around £13 billion.

We do not know for sure what the comparable picture is on the administrative justice scene, but I think we can be pretty confident that it is not very different, even allowing for the relative complexity of the legal process as against the alternatives to it, such as the tribunals and the ombudsman system. I would suggest that here a third challenge awaits the AJTC, the challenge of educating citizens so that they know how the system works, and of *educating the system* so that it can respond to the real needs of citizens.

This is a tremendous, long-awaited and much-needed opportunity to start to develop a system of administrative justice that is accessible, fair, effective and efficient . . .

Vision

The AJTC's vision is a clear and compelling one. It is an administrative justice system:

- Where those taking administrative decisions do so on soundly based evidence and with regard for the needs of those affected.
- Where people are helped to understand how they can best challenge decisions or seek redress at least cost and inconvenience to themselves.
- Where grievances are resolved in a way that is fair, timely, open and proportionate.
- Where there is a continuous search for improvement at every stage of the process.

All that adds up to no mean challenge. This is a tremendous, long-awaited and much-needed opportunity to start to develop a system of administrative justice that is accessible, fair, effective *and* efficient – certainly. But which is also comprehensive, coherent and co-ordinated; which learns from experience; which drives improvements in administrative practice; and which builds public confidence.

My exhortation to the new AJTC is to seize that opportunity with energy and enthusiasm: to be ambitious and bold; to be strategic and proactive; to be confident and strong – in the interests of all the users and the providers of administrative justice – but also in the interests of a much, much wider public.

Ann Abraham is the Parliamentary and Health Service Ombudsman.

¹ Since this speech was delivered, the Government has dropped the proposal for a statutory Prisons Ombudsman from the Criminal Justice and Immigration Bill, although it has restated its long-term commitment to that policy objective.

THE CHALLENGES THAT LIE AHEAD



On 1 November 2007, the Council on Tribunals was succeeded by the Administrative Justice and Tribunals Council. **Tony Newton** outlines the remit of the AJTC and how the new body proposes to go about fulfilling it.

THE TRIBUNALS, Courts and Enforcement Act 2007 charges the AJTC with keeping the overall administrative justice system under review, in addition to keeping under review the constitution and working of designated tribunals and of statutory inquiries. The legislation followed the 2004 White Paper *Transforming Public Services: Complaints, Redress and Tribunals*, which described the new remit of the AJTC as being to ‘review the relationships between the various components of the system (in particular ombudsmen, tribunals and the courts) to ensure that these are clear, complementary and flexible’.

The AJTC has been considering how to address this very wide remit and where to prioritise its efforts. We have set ourselves a set of strategic objectives (see www.ajtc.gov.uk), but we are clear that at the heart of all of our work must be a focus on the needs of users. In due course, the AJTC will publish a programme of work setting out in detail where it will be directing its efforts over the next two or three years. In the meantime, the following provides an outline of our thoughts so far.

Tribunals

Our relationship with tribunals is already changing as a result of the creation of the

The ‘administrative justice system’ is defined in the Act as ‘the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including the procedures for making such decisions, the law under which they are made, and the systems for resolving disputes and airing grievances in relation to them’.

Tribunals Service, for whom we see ourselves as a ‘critical friend’. Our members will continue to make visits to observe a small number of tribunal hearings, and to work with judges and officials in ensuring that the reform programme continues to have the needs of users at its heart. Where we see weaknesses from the user perspective, we will draw attention to these and seek to support the Tribunals Service in addressing them. For example, we have been concerned for some time about the performance of the Mental Health Review Tribunal and, with the willing cooperation of the judiciary and tribunal management, we set up an advisory group, enabling key stakeholder groups to have an input into the development and implementation of the MHRT’s programme of improvement. I have been very impressed both by the constructive approach of all members of the group and the amount of progress the tribunal has made in a relatively short time.

We will also be paying careful attention to the Tribunals Service communication strategy to support

the restructuring of tribunals in the coming months. Familiar tribunal names will be disappearing as the new chambers are formed, and it is vital that users and stakeholders are given timely and comprehensible information about these changes.

Over the longer term, the restructured tribunals will be expected to explore and promote new approaches to dispute resolution in the interests of the user. We see the AJTC as having a key role in this process, and in February 2008 published a report (see www.ajtc.gov.uk/adjust/08_02.htm) following a survey of tribunals about the techniques currently being employed. We plan to build on this work, and await with interest the results of the mediation and early neutral evaluation pilots currently under way in the Employment and Social Security and Child Support Tribunals.

We will, of course, not lose sight of those tribunals outside the Tribunals Service. For example, the operation of school admission and exclusion appeal panels is still of some concern to us. However, we have been gratified by the response of the Department for Schools, Children and Families to the concerns we raised in 2003 about the need for training for panel members and clerks. Recent amendments to the procedural rules governing the operation of admission and exclusion panels have made training mandatory before members can sit as panel members. We will monitor closely how training is being provided, which we have suggested should be on a cooperative basis, with local authorities sharing the administrative and resource burdens.

Scotland and Wales

The AJTC will continue to have a statutory Scottish Committee, whose remit includes those UK-wide tribunals that sit in Scotland and some 20 tribunals that are constituted under separate Scottish legislation. In February 2008, that Committee held a conference on administrative justice, allowing it to enhance its role as a catalyst

for sharing good practice. Moreover, in a very positive development, the Act reinforces the role of the AJTC in Wales by establishing a new Welsh Committee of the AJTC, which will be formally commenced on 1 June 2008 with Professor Sir Adrian Webb as its first chair.

First-instance decision-making

The Act makes it clear that first-instance decision-making is central to the administrative justice system for users. We have begun to build new relationships with government decision-makers, meeting with the Department for Work and

Pension, Disability and Carers

Service to discuss their initiative to improve feedback to decision-makers from tribunal decisions and to enable front-line decision-makers to develop their decision-making skills through a programme of self-coaching and mentoring. As the result of a series of initiatives, there has been a reduction in the number of cases that go to tribunals and in the number of decisions subsequently overturned on appeal, and the AJTC has a continuing role in this area.

Ombudsmen

The remit of the AJTC brings with it a new relationship with ombudsmen, different to that with tribunals. We have not sought a supervisory role as far as ombudsmen are concerned,

although their importance in the administrative justice landscape will no doubt be fully reflected in the work of the AJTC in future, not least in a joint project with the British and Irish Ombudsman Association to acquire a fuller understanding of the administrative justice world beyond tribunals.

Lord Newton of Braintree is Chair of the Administrative Justice and Tribunals Council.

'We regard the main purpose of the AJTC as helping to make administrative justice and tribunals increasingly accessible, fair and effective, first and foremost by focusing on the needs of users.'

Lord Newton, at the launch of the AJTC in November 2007

PRINCIPLES OF GOOD

COMPLAINT-HANDLING



The British and Irish Ombudsman Association has published a good-practice guide for resolving disputes. *Tony Redmond* outlines its key elements.

ALTHOUGH the institution of the ombudsman has a long history in its founding country – Sweden – of nearly 200 years, its arrival in the UK was only in 1967 with the creation of the Parliamentary Ombudsman. There was a perceived need then for a body that would deal with maladministration, and there is a much greater one now as public expectation is at a much higher level. Some of the schemes are statutory, while others are voluntary, and the constitution, articles and governance of schemes inevitably differ. We have, in large part, common goals and a common set of standards and principles that govern our work.

The ombudsman world is a changing one and, as a community, we are facing some interesting challenges in responding to the implications of a rapidly growing sphere of activity in alternative dispute resolution (ADR).

Good practice

Every organisation understands the need for an accessible, fair and cost-effective complaints-handling process as a feature of its overall approach to customer care. Equally, there is an increasing acknowledgement of the need for an ombudsman scheme for those complainants who remain dissatisfied with the outcome of their complaint.

The success of ombudsman schemes is such that most sectors and industries have sought to introduce a dispute resolution arrangement as a demonstration of good practice. Recent government legislation has introduced compulsory redress schemes for postal services, as well as for energy suppliers and estate agents.

Add to these the human rights and access to information dimensions of some complaints, and one can see that the ADR landscape is changing.

The British and Irish Ombudsman Association (BIOA), as the guardian of high standards and principles in the resolution of complaints, uses membership of the association as the means of maintaining the highest standards. Governance, particularly the independence of the ombudsman, is a critical factor in the acceptance of any scheme. Failure to observe a set of principles can undermine or compromise a scheme's decision-making and its integrity.

Good complaint-handling

In April 2007, BIOA took the important step of introducing its 'principles of good complaint-handling', which have since been widely acknowledged as an authoritative guide for ADR bodies and service-providers alike. Although the principles are set at a relatively high level, they do encourage consistency in the way ombudsmen and other similar schemes engage in ADR and the management of complaints. In this good-practice guide we point to the key elements of good complaint-handling:

- A genuinely accessible process embracing disability, minority groups and young and older people.
- A clear and transparent system, including explanations of jurisdictional limits, information about complaint expectations and the investigation itself.
- An emphasis on evidence-based conclusions and judgements.

- A rigorous review mechanism for any ‘comebacks’ on ombudsman decisions.

Any member of the public who suffers financial loss, service failure, distress or inconvenience will not want to be unsure or confused about how to register their complaint.

Landscape

Ombudsmen do not operate in a vacuum. Effective links have been forged with the courts in an effort to ensure that the public is best served, by using whichever of the bodies is the more appropriate to resolve a complaint. Redress is the subject of continuing dialogue with the courts. Ombudsmen also recognise the considerable value and benefits of the Tribunals Service, as well as other ADR mechanisms, such as mediation and conciliation services, and we are working with the Administrative Justice and Tribunals Council to map the landscape of all bodies involved in alternative dispute resolution. The outcome of that work will not only provide much-needed information about the extent and nature of all such bodies, but should also provide an opportunity to ensure there is a coherent representation of all that is available to complainants, which should help to avoid duplication, overlap and confusion.

We have recently embarked on an ambitious venture to introduce an accreditation scheme for ombudsman staff. . .

Human rights

The ombudsman is increasingly addressing aspects of human rights, equality and freedom of information when investigating complaints of maladministration and injustice. This is a subject in itself – suffice to say here that ombudsmen recognise that such matters can readily and legitimately become part of a complaint and may fall within the ombudsman’s jurisdiction.

If it is apparent that human rights are in any way engaged as part of a complaint, the investigation will seek to address any breach. The

ombudsman may find that the remedy proposed to the maladministration causing injustice also accommodates transgressions relating to human rights, although such breaches may also lead to a specific finding of maladministration.

Good heart

BIOA is in good heart and adapting to the change around it. Key to an ombudsman’s success is the recruitment and development of a high-quality workforce. The association has an opportunity to support its members in helping them maintain a complement of staff engaged in complaints-handling to a

high standard. We have recently embarked on an ambitious venture to introduce an accreditation scheme for ombudsman staff leading to a bespoke qualification. The people we employ are of a high calibre, having also acquired a considerable level of expertise and experience, and we want to formally acknowledge that, while helping set a standard for any new intake of investigative staff. The professionalism and skill of staff

could be recorded by an accreditation scheme of genuine substance. This, we hope, will provide the foundation for continuing professional development and increase the mobility of staff within the administrative justice and regulatory environments, and possibly into areas of alternative dispute resolution, customer service or services delivery, or to work for an inspectorate or auditor.

Training is crucial in any organisation, and this allows us to act effectively in an environment of continuous change. A portable qualification would open up new opportunities for ombudsman staff and enable them to carry an important message about effective complaints handling.

Tony Redmond is the Local Government Ombudsman and Chair of the British and Irish Ombudsman Association.

FRAMEWORK FOR REFORM WIDENS REVIEW REMIT



It has been through a long development period, but the eagerly anticipated Tribunals, Courts and Enforcement Act finally received Royal Assent last year. **Kenneth Mullan** explains how two new bodies – the First-Tier Tribunal and the Upper Tribunal – will work.

THE PROVISIONS of the Tribunals, Courts and Enforcement Act 2007 that have a direct relevance to the tribunal sector will now be well known. Part 1 of the Act implements the policy objective of creating a new statutory framework for tribunals, bringing existing tribunal jurisdictions together and providing a legislative structure for new jurisdictions and new appeal tribunals.

Two new tribunals are created – the First-Tier Tribunal and the Upper Tribunal – and the Lord Chancellor is given power to transfer the jurisdiction of existing tribunals to the two new bodies. A new judicial office of Senior President of Tribunals is created, with the role of providing unified leadership to the tribunals' judiciary, and the Senior President is given a range of powers and duties. There is a general duty to provide administrative support to the new tribunal structure, and provision is made for the making of tribunal procedure rules and practice directions.

Oversight and supervision of the tribunal sector is handed to a new Administrative Justice and Tribunals Council, which replaces the Council on Tribunals, and is given a wider remit to keep under review the administrative justice system as a whole. The Act also permits the Upper Tribunal to assume a limited part of the existing High Court judicial review jurisdiction.

Finally, but importantly, the Act replicates for tribunal judges, as they will become known, the Lord Chancellor's and other Ministers' general duty under the Constitutional Act 2005 to uphold the continued independence of the judiciary.

All very welcome, but the Act anticipates as much as it delivers. So, what happens next?

Frustratingly for many, the Government's response to the Act has been to embark on a detailed consultation exercise on the implementation of the legislation.

What has been achieved?

Some progress has already been made. Lord Justice Carnwath has been appointed as the first Senior President of Tribunals, formally assuming the office on 12 November 2007. The Administrative Justice and Tribunals Council (AJTC) came into existence on 1 November 2007, with the coming into force of section 44 and Schedule 7 of the Act. The AJTC, under the chair of Lord Newton of Braintree, has quickly adapted to its new role and published a key Framework

Document¹, supporting the new Council in its work and outlining the relationship, based on its wider remit, with the Ministry for Justice.

What else needs to be done?

Frustratingly for many, the Government's response to the Act has been to embark on a detailed consultation exercise on the implementation of the legislation. On 28 November 2007, the Ministry of Justice published *Transforming Tribunals*², setting out

detailed proposals on the implementation of Part 1 of the Act, and inviting comments on the plans and structures. The consultation paper gives us a clear outlook on what the tribunal sector might look like. So what is that outlook?

Employment Tribunals and the Employment Appeal Tribunal (EAT) are placed on a par with the First-Tier Tribunal and the Upper Tribunal, but will retain a separate status as a discrete 'pillar' within the Tribunals Service. A similar 'pillar' status is afforded to the Asylum and Immigration Tribunal.

Because of the potential size of the First-Tier Tribunal³, a single judicial unit will not be possible. Rather, there will be a number of different chambers, each with its own president, and possibly additional layers of judicial management. At present, it is proposed that there will be five such chambers in the First-Tier Tribunal:

- The *General Regulatory Chamber* will hear appeals from a diverse range of sources, including some consumer credit, gambling, transport and charity.
- The *Social Entitlement Chamber* will hear those appeals presently the subject of the Social Security and Child Support Appeal Tribunal, the Pensions Appeal Tribunal, the Criminal Injuries Compensation Appeal Tribunal, and the Asylum Support Tribunal.
- The *Health, Education and Social Care Chamber* will take over the work currently undertaken by the Mental Health Review Tribunal, the Special Educational Needs and Disability Tribunal, and the Care Standards Tribunal.
- The *Taxation Chamber* will assume the jurisdiction proposed as a result of the modernisation of tax appeals.

Because of the potential size of the First-Tier Tribunal, a single judicial unit will not be possible. Rather, there will be a number of different chambers, each with its own president, and possibly additional layers of judicial management.

- The *Land, Property and Housing Chamber* will have a role over work currently undertaken by the Lands Tribunal, and other jurisdictions relevant to this chamber.

The Upper Tribunal will have three chambers – the *Administrative Appeals Chamber*, the *Finance and Tax Upper Chamber* and the *Lands Chamber*.

The consultation exercise closed on 22 February 2008, and it is envisaged that implementation of the proposals will move on quickly during the year. A response to the consultation is expected in May 2008, with affirmative commencement orders being laid in Parliament at the same time. The First-Tier and Upper Tribunals will be created in October 2008, with the establishment at first-tier level of the Social Entitlement Chamber and the Health, Education and Social Care Chamber. The Upper Tribunal will hear appeals as appropriate from the new chambers, with the creation of new appeal rights where required. There is the potential for some aspects of the judicial review jurisdiction to be transferred to the Upper Tribunal.

In April 2009, it is envisaged that the remaining three chambers of the First-Tier Tribunal will be established, and the Upper Tribunal will, at the same time, divide into its three-chamber structure.

What will be the impacts of implementation?

The most important judicial impact of implementation will be the creation of new sets of procedural rules. It is anticipated that a Tribunal Procedure Committee will be established in the spring of 2008, with the objective of devising a set of procedural rules

for the First-Tier and Upper Tribunals. An imperative exists here if the proposal is to put in place a form of the First-Tier and Upper Tribunals by October 2008. The new procedural rules will have to be ready by that date to allow the new tribunals to operate in a unified manner. It would seem, therefore, that much work will need to be carried out on the detail of such rules, and, when in place, by existing jurisdictions due to transfer in October 2008. A significant judicial training requirement would also seem to arise.

A second significant judicial impact of implementation will be the creation of new unified judicial offices. At one instant, an array of existing full-time and part-time judicial posts will disappear, to be replaced, as is hoped by those office-holders, with an office with a more diverse potential. It is envisaged that judicial deployment and assignment will be for chamber presidents to decide, and the expectation of a change of role and cross-jurisdictional allocation may be subdued by existing jurisdictional workloads, and requirements for expertise.

The Senior President has a statutory responsibility for the training, appraisal and welfare of the tribunals' judiciary. At present, those judicial function duties lie with the presidents of individual tribunals, and a diverse range of training, appraisal and welfare schemes exist across the tribunals' structure. Some consideration has been given to the future of such aspects of judicial functioning, in a unified scheme, by the establishment by the Senior President of a Tribunals Training Advisory Group, which also takes appraisal under its remit. Similar consideration will have to be given to the future of judicial information within the sector.

The statutory requirement to provide administrative support to the new tribunals

will require consideration of existing judicial administrative support arrangements. The consultation paper sets out details of the proposals for judicial administrative support, involving the implementation of a regional management structure, the development of a network of hearing and administrative support centres, and a future estates strategy.

The range of judiciary in the existing schemes is diverse, and the judicial terms and conditions,

and fee structure, associated with that range of judiciary, particularly the part-time judiciary, is equally varied. There has been recognition that existing terms and conditions will have to be looked at again in light of the unification proposals, and an appropriate review exercise is under way. Additionally, the Senior Salaries Review Body is also currently undertaking a consultation on the remuneration of the tribunals' judiciary⁴.

There has been recognition that existing terms and conditions will have to be looked at again in light of the unification proposals . . .

Will it all happen?

It would appear that significant changes are on the way, and that reform will be implemented quickly and, hopefully, efficiently. There are exciting times ahead for the tribunal sector, and the scope and pace of those changes will continue to be monitored closely by all concerned.

Dr Kenneth Mullan is an Appeal Tribunal Chairman.

A copy of the Act and its accompanying explanatory notes can be found at www.opsi.gov.uk/acts/acts2007/en/ukpgaen_20070015_en.pdf.

¹ Available at www.ajtc.gov.uk/docs/AJTCFramework.pdf. See also Ann Abraham's article on page 7.

² Available at www.justice.gov.uk/publications/cp3007.htm.

³ The consultation paper mentions an annual caseload of 300,000.

⁴ See www.ome.uk.com/review.cfm?body=4.

A FLIGHT FROM FORMALITY



Stuart Vernon looks at the development of other dispute-resolution processes in tribunals – including their benefits and limitations – and looks forward to their development by the Tribunals Service.

THOUGH MEDIATION is now well established in specific areas of the court system, its presence in the world of tribunals is more limited. This article looks at the use of mediation in tribunals, suggests some reasons for the relative absence of tribunal mediation and argues for the limited use of mediation in appropriate disputes with necessary administrative justice protections for those who choose to resolve their disputes by such a process.

Mediation is one of a number of alternative dispute-resolution procedures and can be understood as a process where a neutral person helps disputants to reach an agreed outcome to their dispute. In the court system, mediation has a long and well-established history in family law, though the House of Commons Public Accounts Committee has recently urged the Legal Services Commission to do more to encourage mediation in family law disputes. In other areas of law, the mediation and arbitration of commercial disputes is common, while the court-based mediation of a range of civil cases has only relatively recently been able to establish itself as a popular process, largely through a number of county court local initiatives. Readers who are interested in such schemes need only make a Google search to uncover a number of annual reports commenting on the relative success of mediation in court centres throughout England and Wales. Reference can also be made to a Ministry of Justice report on mediation programmes in

In other areas of law, the mediation and arbitration of commercial disputes is common . . .

the Central London County Court (Research Series No 1/07) for report and comment on the impact of quasi-compulsory mediation, user experiences and the potential for mediation to save administrative and judicial time.

Drivers

Initiatives around the use of mediation and other alternative or proportionate dispute-resolution processes (APDR) in tribunals reflect a number of drivers. Sir Andrew Leggatt’s review of the tribunal system¹ argued that oral hearings before a tribunal are the final stage in a process that should offer earlier opportunities to resolve the dispute in question. The Government’s subsequent White Paper² made it clear that in the world of administrative justice, policy and services should be directed to enabling people to resolve disputes quickly and cost-effectively. The White Paper expressed the wish to ‘promote the development of a range of tailored dispute-resolution services, so that different types of dispute can be resolved fairly, quickly, efficiently and effectively, without recourse to the expense and formality of courts and tribunals where this is not necessary’.³

These drivers span a number of concerns and consequent objectives: cost effectiveness and efficiency, fairness, the appropriateness of dispute-resolution procedures to the dispute in question and to the parties concerned, and a concern to avoid the formality of a full tribunal hearing. The use of mediation in tribunals is one

response to these concerns and objectives, but to date its development in the tribunal system has been slow and sporadic.

Early experiences

The Tribunals Service has established pilots in alternative dispute resolution in the Employment Tribunal and the Appeals Service, with the aim of testing whether such processes can be effective in dealing with a range of tribunal cases without recourse to a formal hearing. The Employment Tribunal pilot of the use of mediation in more complex disability, sex and race discrimination cases began in August 2006 in three regions – Central London, Birmingham and Newcastle. The participation of the litigating parties was voluntary and the scheme was designed to complement the conciliation work of the Advisory, Conciliation and Arbitration Service. Mediation was provided by the tribunal judiciary and it was decided that a tribunal chair involved in mediating a dispute could later be involved in the tribunal hearing if the earlier mediation had been unsuccessful. This pilot concluded in March 2007 and has been evaluated by the Centre for Employment Research at the University of Westminster. Their final report is expected early in 2008.

The Appeals Service pilot does not involve mediation. The early neutral evaluation of appeals concerning attendance allowance and disability living allowance is being piloted with a view to identifying cases where further discussion with the parties might secure an earlier resolution of the dispute.

The Residential Property Tribunal Service, which deals with disputes between landlords and tenants, introduced its own mediation pilot in the autumn of 2004. The tribunal was concerned about the number of issues that parties sought to bring to a dispute and the failure of parties to communicate resulting from the nature of their relationship as landlord and tenant, and limitations in the processes of the tribunal. It

was thought that mediation might provide a neutral forum for parties to communicate and take that communication forward to a concluded agreement. In the event, the pilot was reported as a failure. Though a few parties expressed some interest in the availability of mediation, none actually took place. The failure was attributed to three factors:

- It appears that parties did not understand what mediation meant and were concerned that it was in some way inferior to a full tribunal hearing and decision.
- Hard-pressed staff were not given enough training and were therefore unable to fully explain it to parties.
- Tribunal members did not understand how mediation would fit with ordinary tribunal procedures and were concerned about added delays in a jurisdiction with a history of such problems.

Changes to the scheme were made to improve training and to increase support and information for those thinking of mediating their disputes. The relaunch is reported to have been successful with 10 per cent of service charge cases in one region being resolved by mediation in a three-month period.

Mediation is also often used in party v party dispute resolution outside the formal court and tribunal systems. For example, recent annual reports from the Financial Ombudsman Service (FOS)⁴ show that their adjudicators often use ‘guided mediation’ to resolve disputes. This process is described as involving the adjudicator negotiating a constructive way forward – satisfactory to both sides – without seeking to apportion any blame for what may have gone wrong in the past between the business and its customer.

The UK Intellectual Property Office, which deals with patent and trade mark issues, now

actively encourages parties to consider mediation as a way of resolving their disputes. Hearing officers will consider whether mediation would be a preferable option whenever requests to initiate litigation are received. An unreasonable refusal to mediate, or use other appropriate APDR procedures, can be taken into account by a hearing officer when considering a costs award.⁵

Questioning APDR

It is often suggested that mediation is not suited to disputes concerning the state, in its various guises, and to issues of entitlement. Judge Michael Harris, the previous President of the Appeals Service, has commented that mediation was of little use in resolving the disputes that are decided by Social Security and Child Support Tribunals because these disputes concern entitlement. He said: ‘We cannot ask applicants to accept less (or encourage them to seek more) than that to which they are legally entitled.’⁶ In his view, mediation, where the objective is to settle a dispute, has little or no value in resolving disputes concerning legally defined entitlement.

Concerns about the ‘lack of fit’ between mediation and APDR on the one hand, and specific jurisdictions and disputes on the other, have been reported to the Council on Tribunals (as it then was) by a number of tribunals in response to the Council’s 2006 survey on the use of APDR techniques (including mediation) in tribunals.⁷ The Administrative Justice and Tribunals Council has reported on the outcome of the survey and comments that the majority of respondents ‘believed that there is a lack of applicability of such techniques in cases where there is little room for negotiation in the outcomes of an appeal’.⁸ Lack of fit now appears to be a central reason for the limited use of mediation in tribunals.

‘The public do not want to go to a tribunal, they want their complaint or disputes resolved quickly and fairly.’

Avoiding formality

The Leggatt Review, the White Paper and the Tribunals Service have all seen the avoidance of the formal tribunal hearing as a virtue and this avoidance is an explicit objective of many calls for mediation and other APDR processes. Lord Falconer, in his foreword to the White Paper, went so far as to say: ‘The public do not want to go to a tribunal, they want their complaint or disputes resolved quickly and fairly.’⁹ This view has been made explicit in relation to the Employment Tribunal, at least in respect of some categories of dispute. Employment Tribunals are described as being ‘expensive for users and the Government, and offer a one-size-fits-all approach to resolving disputes, many of which could potentially be resolved more quickly and simply by other means’.¹⁰ In relation to Employment Tribunals, the Government is keen to establish a structure in which a fully contested hearing is a last resort and where mediation is seen as part of a new process for straightforward claims such as those requiring the determination of fact in monetary

disputes, and cases where the law is established and a clear remedy is needed. It should not, though, be thought that individual tribunals are being asked or encouraged to make crude choices between APDR, including mediation, on the one hand and formal hearings on the other. As we have seen, the limitations of both are widely acknowledged and many tribunals are seeking to both limit formality and increase flexibility in their processes. Initiatives include paper hearings, telephone hearings, video-conferencing, more detailed and active case management, pre-hearing reviews, and early neutral evaluation.¹¹

Questioning the flight

The wish to avoid the formality of tribunal hearings warrants comment and challenge. The Council on Tribunals (as it then was) published a consultation paper in May 2005, *The Use*

and Value of Oral Hearings in the Administrative Justice System. The consultation reflected the council's view that the encouragement of APDR systems, including mediation, across the whole field of administrative justice, requires careful consideration of the advantages and disadvantages of all the various dispute-resolution processes currently being used. The consultation revealed a high degree of support for the value of oral hearings, particularly in terms of effectiveness and the perception of fairness. In relation to mediation, the consultation identified both advantages and disadvantages.

The privacy of mediation enables frankness and better understanding between participants. It is quicker and cheaper than a formal hearing and there is virtue in parties being directly involved in the dispute resolution, not least through direct accountability for the outcome. In contrast, the privacy of mediation does not satisfy the notion of justice being done in public. Most importantly, mediation leads to compromise solutions that may be inappropriate in a number of ways.

Interestingly, the council's consultation asked respondents to identify the features of a dispute that would indicate the need for an oral hearing. Responses indicate that there is still an important role for the formal tribunal hearing where the facts are particularly complex and/or are not agreed, where credibility is an issue, where the public should have access to the resolution of the dispute, and importantly, where decisions of the state regarding rights, obligations and entitlements, are being challenged. The implications for mediation and other ADRP procedures are clear. Such procedures are thought to be more suitable for disputes where the facts are not in dispute, where credibility is not an issue and where the dispute does not involve the decisions of the state concerning rights, obligations and the entitlements of citizens.

Procedural rules

The importance of tribunal procedure as a conduit for the development and use of mediation in tribunals is reflected in the provisions of the Tribunal Courts and Enforcement Act 2007. The Act establishes the Tribunal Procedure Committee with the power to make procedural rules for both the First-Tier and the Upper Tribunal. Section 22(4) sets out a series of objectives to be secured by procedural rules – that justice is done, that the tribunal system is accessible and fair, that proceedings are handled quickly and efficiently with a responsibility on

tribunal members for ensuring that this is the case, and that the rules are both simple and simply expressed. Directions on practice and procedure may be given by the Senior President and by Chamber Presidents. These objectives are mediation-friendly, at least in the sense that they provide no obstacle to the widespread development and introduction of mediation processes. Section 24 provides a rationale for the contribution of mediation to tribunal justice, expressed in terms

of efficiency, cost-effectiveness and the reduction of pressure on users.

It appears that the Act is concerned to establish a very broad set of principles within which mediation may be developed by the Tribunals Service. Mediation may only take place with the agreement of the parties to the dispute. There is no place for compulsory or judicially directed mediation. The failure to mediate, or the failure of mediation, is to have no effect on the outcome of the proceedings. Tribunal members (tribunal judges or other tribunal members) acting as mediators may subsequently be involved in deciding the dispute, but only with the consent of the parties. Staff appointed by the Lord Chancellor under his general duty to provide staff to support the business of the Tribunals Service tribunals, may be appointed

It appears that the Act is concerned to establish a very broad set of principles within which mediation may be developed by the Tribunals Service.

to act as mediators. This final provision seems to indicate that specialists could be appointed to act as tribunal mediators.

The provisions of the Act are facilitative – they do not reflect anything like a commitment to mediation in tribunals nor to widely established tribunal mediation. Indeed, the explanatory notes to the Act recognise that mediation is not a universal objective for the Tribunals Service: ‘It is neither intended nor envisaged that mediation will take place in all jurisdictions, although the term mediation can encompass a broad spectrum of activity.’¹²

Conclusion

Mediation and other ADPR procedures are an attractive mechanism for resolving disputes before they reach a formal hearing. The resolution of any dispute by mediation or other APDR procedure is likely to be cheaper and quicker than resolution by a formal tribunal decision after a hearing. But it would be wrong to adopt such alternatives as a universal panacea. Their appropriateness is limited and the formal hearing has many important characteristics for the disputants and the state.

There may also be lessons from the history of administrative justice to suggest that today’s informality can become tomorrow’s formality. Behind the recommendations of the Franks Report,¹³ which led to the establishment of the post-Second World War tribunal system, was the view that tribunals could provide a level of informality in resolving disputes that the courts were unable to. That belief led to the piece-by-piece construction of the tribunals system that we know today. Some 50 or more years later we have widespread calls for the adoption of dispute-resolution procedures, including mediation, that avoid the relative formality of the tribunal hearing. This formality has itself developed through the growing legalism and judicialisation of the tribunal system. Related influences have come from the European Convention on

Human Rights – Article 6 in particular – and the Human Rights Act. A disproportionate flight from formal tribunal procedures could challenge these important developments and the rights and protections they provide.

The benefits of informality, efficiency, and the cost-effectiveness of mediation and other APDR procedures are well established. But their pursuit should not be allowed to undermine the important guarantees provided for the citizen by the formal tribunal system. Contemporary administrative law, of which the formal tribunal system is a central element, provides equality of arms, the right to a fair hearing and to an outcome that reflects the relative merits of the case rather than the relative power of the parties. The challenge for mediation and other APDR procedures is to be able to sustain these standards within their more informal processes.

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¹ *Tribunals for Users: One System, One Service*, Department for Constitutional Affairs, 2001.

² *Transforming Public Services: Complaints, Redress and Tribunals* CM 6243 (2004).

³ Para 2.3.

⁴ See annual reports for 2005–06 and 2006–07.

⁵ See *Mediation of Intellectual Property Disputes*, UK Intellectual Property Office, April 2007.

⁶ *Innovate to Evaluate*. Harris, M. *Tribunals* Summer 2006 issue.

⁷ Tribunals that considered use of ADPR techniques to be inappropriate included the National Parking Adjudication Service and the Mental Health Review Tribunals of England and Wales.

⁸ *The Use of Proportionate Dispute Resolution in Tribunals*. Adjust, February 2008.

⁹ *Transforming Public Services: Complaints, Redress and Tribunals*. CM 6243. Department for Constitutional Affairs. July 2004.

¹⁰ *Resolving disputes in the workplace: a consultation*. March 2007. Department for Trade and Industry. Para 1.6.

¹¹ For further information see *The Use of Proportionate Dispute Resolution in Tribunals*, Adjust February 2008.

¹² Para 151.

¹³ Cmnd 218 (1957).

A PROBLEM AND A PRIVILEGE

Brian Langstaff is keen to keep the importance of training, particularly in judgecraft, uppermost in people's minds during his tenure as the chairman of the JSB's Tribunals Committee.

I CONFESS to being in two minds. Taking over the chairmanship of the Tribunals Committee of the JSB when it is working so well is a privilege. But following the footsteps of Mr Justice Sullivan is no easy matter – and it is a problem to try to live up to the standards of easy, effective success that he created both by hard work and a clear vision of how training for the tribunals judiciary could grow ‘from a respectable cottage industry’ to the credible force it is today.

That I do so at a time of change and development, both within the JSB and within the Tribunals Service, adds to the challenge. Change in and at the JSB comes on two fronts.

First, the JSB's recent proposals to create a ‘judicial college’ for the uniformed branch of the judiciary recognise the force of that which the Tribunals Committee and Sullivan J have preached for some years – the importance of hands-on training in judgecraft and orientation of a judge within his particular setting. The idea is that training needs in black-letter law will be largely self-determined, and met more by distance learning than residential coursework. It seems likely that the training of the tribunals judiciary will develop in tandem.

Second, several key personnel who were instrumental in the success of the last eight years have retired from their roles. Not just Sullivan J, but Keene LJ as Chair of the JSB itself, and Mary Holmes as Tribunals Training Adviser. Our Training Director Godfrey Cole, whose unflagging energy and enthusiasm has sustained many a course to the delegates' great advantage,

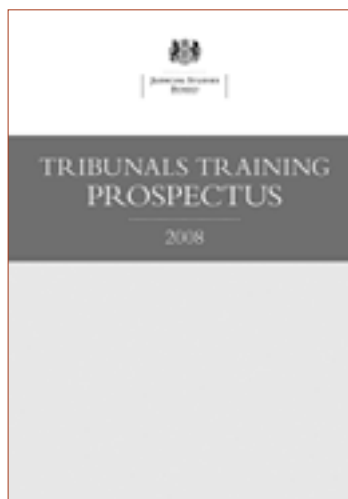
is soon to go: his swansong will be a Highgate House course ending, coincidentally with his departure, on 1 April this year. All deserve our thanks, and appreciation. We will have a new Tribunals Director, Mark Hinchliffe, in place before Godfrey finally goes – but he, like me, will find the old shoes hard to fill.

The changes in the Tribunals Service are too well known for me to need mention them, as are the new faces with whom I am now to liaise. It may be less obvious, though, in the early months of the Tribunals Service that minds may be concentrated elsewhere than on training. It will thus be a central part of our, and my, role over the coming months to ensure that its importance is re-emphasised whenever appropriate. To this end, the Tribunals Committee has broken its own unwritten rule not to respond to Government consultations – adopted for the very good reason that it occupies a unique position as an advisory body already – to

remind the Department that, since the success of the proposed reforms in achieving flexibility of judicial resource by cross-ticketing depends on those who sit in initially unfamiliar jurisdictions being given induction and orientation training to assist them, sufficient resources must be found for this. The costs are likely to exceed today's baseline.

Problems? More like challenges: the principal one of which is to grasp the present opportunity to shape tribunals training for the future.

Mr Justice Langstaff succeeded Mr Justice Sullivan as chairman of the JSB's Tribunals Committee in November 2007.



The JSB has updated its prospectus of courses for tribunals.

MENTORING SKILLS SEMINAR

The JSB is currently taking nominations for a seminar on mentoring skills, described in more detail below. Further information about the course, or about how to apply for it can be found in the full Tribunals Training Prospectus (www.jsboard.co.uk), or from tribunals@jsb.gsi.gov.uk.

Who should attend?

This seminar is aimed at those who have been or who are likely to be designated mentors within their tribunal, and provides mentors with an opportunity to explore the skills necessary for effective mentoring.

What happens at the seminar?

Participants will have the chance to focus on the purposes of mentoring, the key tasks and responsibilities of a mentor, identifying the skills that a mentor needs and will practise mentoring in small groups. Much of the seminar focuses on the training DVD *Supporting the Judiciary – the Mentoring Process*, which illustrates the mentoring process from ‘the initial meeting’ to what happens ‘in the future’.

What are the aims and learning outcomes?

The aim of the seminar is to assist participants to identify and develop the necessary skills as a mentor and involves:

- Being able to define mentoring in general terms and distinguish between different types of mentoring.
- Appreciating the benefits of mentoring to mentor and mentee.



adrian_sayles@easy.com

“It’s your mentee again . . . she wants to know if this is a convenient time.”

- Identifying responsibilities of mentor and mentee.
- Identifying and practising the skills necessary for effective mentoring.

All participants receive a copy of the DVD *Supporting the Judiciary – the Mentoring Process* after completing the training. The DVD is also available on request from the JSB for new mentees.

Next scheduled seminar	Frequency	Telephone
Arranged in accordance with demand	According to demand	020 7217 2410
Duration	Training director	E-mail
One day, non-residential	Mr Godfrey Cole CBE	tribunals@jsb.gsi.gov.uk
Venue	Further information	Cost
JSB Boardroom, 9th Floor, Millbank Tower, London SW1P 4QU	Tribunals Team, JSB, 9th Floor, Millbank Tower, London SW1P 4QU	No cost at present
		Places available
		20

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AIMS AND SCOPE

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

Tribunals is published three times a year by the Tribunals Committee of the Judicial Studies Board, although the views expressed are not necessarily those of the Board.

Any queries concerning the journal should be addressed to:

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