



JUDICIAL  
COLLEGE

TRIBUNALS  
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SPRING 2013  
TRIBUNALS

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# NEW BOARD MEMBERS



**Ian Anderson**

Ian is a fee-paid judge in the First-tier Tribunal (Social Entitlement Chamber) and was recently appointed a duty judge in Glasgow.

A solicitor advocate, he also sits as a part-time sheriff, has written articles for the *Journal of the Law Society of Scotland* and appeared in television and radio interviews.



**Paula Gray**

Paula is a salaried judge in the Upper Tribunal (Administrative Appeals Chamber). Formerly Social Security and Child Support

(SSCS) national training lead, she now heads AAC training and is involved in the Judicial College's generic judgecraft courses. She is a regular contributor to the SSCS website and Judicial Information Bulletin and a co-author of the Equal Treatment Bench Book.



**Judith Lea**

Judith is a judge in the First-tier Tribunal (Social Entitlement Chamber), a part-time immigration judge and Clerk to the Scottish

Solicitors' Discipline Tribunal. She is also a part-time chairman of the Private Rented Housing Panel and has extensive training experience.



**Melanie Lewis**

Melanie sat from 1995 to 2011 in what is now the Immigration and Asylum Chamber (IAC) as well as the Health, Education

and Social Care Chamber (HESC) – Special Educational Needs and Disability, Care Standards and Primary Health Lists. In 2013, she was assigned additionally to sit in HESC – Mental Health.

## EDITORIAL



I AM DELIGHTED to welcome four new members to our Editorial Board (see details left), in the knowledge that the range of experiences they collectively bring will make a significant and lasting contribution to our publication.

We have included in this edition some new perspectives from Scotland and Wales, covering the proposed reforms to the tribunal structure in Scotland contained in the Tribunals (Scotland) Bill, which was placed before the Scottish Parliament on 8 May (see page 6); the Scottish experience of the public sector equality duty following the passing of the Equality Act 2010 (see page 10); and the emerging differences between the Welsh and English approach to adjudication, through the eyeglass of special educational needs (see page 14).

Barry Clarke has written what will be the first in a series of articles on the challenges presented by the social media to the judiciary at all levels (see page 18). In the next issue he will be examining in more detail how social media may be used to produce evidence relevant to judicial decision-making. We also hope to address some of the wider security issues facing judicial office-holders.

Finally, on page 2, I review some of the current Judicial College initiatives designed to encourage cross-jurisdictional training plus other emerging issues that are common to a wide range of jurisdictions.

On 26 April, The Advocate's Gateway ([www.theadvocatesgateway.org](http://www.theadvocatesgateway.org)) was launched by the Attorney-General, and the summer edition will include an article on this new guidance on questioning people with communication needs.

**Professor Jeremy Cooper, Chairman of the Editorial Board.**

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# UNITY THROUGH A COMMON PHILOSOPHY



**Jeremy Cooper** looks at three areas where the Judicial College is finding increasingly common ground in its training of judicial office-holders – hearings involving unrepresented parties, judgecraft training and awareness of the social context of judging.

A YEAR INTO this fascinating job as Director of Training for Tribunals, I am increasingly convinced that in the training of judicial office-holders there is far more that unites than divides us. There are areas of knowledge and expertise, and experiences in sitting, that are common to us all. And we all face the same range of ethical issues both inside and outside the hearing room.<sup>1</sup> In this article I will explore three examples, although there are many others: 1) Hearings involving unrepresented parties, 2) Judgecraft training, and 3) The social context of judging.

## Hearings involving unrepresented parties

As the availability of legal aid to parties in a wide range of disputes continues to haemorrhage, the civil and criminal courts are facing increasing number of unrepresented parties appearing before them.

This is causing great concern among the courts' judiciary and a special judicial working party is shortly to report on the issue. In contrast, most tribunals already have long experience of dealing with 'unrepresented parties'<sup>2</sup> and adapting their working procedures to accommodate this reality. When training tribunal judicial office-holders we maintain a broad consensus that embedding the practice of dealing with unrepresented parties lies at the heart of any good training programme. This in turn reflects the generic overriding objective to deal with cases 'justly and fairly', which in most cases requires that a) tribunals should conduct their affairs avoiding unnecessary formality; and b) tribunals should ensure, so far as practicable,

that the parties are able to participate fully in the proceedings. Set out below are examples of tribunal training programmes actively addressing this issue.

## Social Security and Child Support (SSCS)

Represented applicants are the exception in social security and child support cases and the SSCS induction courses are therefore based upon the expectation that the tribunal will be dealing with unrepresented parties. This includes

*... embedding the practice of dealing with unrepresented parties lies at the heart of any good training programme.*

training small groups of specialist members who may have fewer skills in developing appropriate judicial questioning techniques than judges with a background in litigation. The training provides a lengthy interactive lecture/seminar in which delegates watch a DVD of a mock tribunal (using actual judicial office-holders and actors), which is stopped frequently to allow discussion of various

matters relevant to the fact of unrepresentation, including preview of facts and issues and the use of appropriate questions. The DVD also features interviews with unrepresented parties. The overall purpose of the exercise is to develop in judicial office-holders the appropriate expertise to enable an unrepresented party to put his or her own case and feel that justice has been done, regardless of the outcome.

## Criminal Injuries Compensation (CIC)

Training in the criminal injuries compensation (CIC) jurisdiction is focused strongly on the need to understand how unrepresented parties can be made to feel comfortable at a hearing.

CIC is a complex area, and by its very nature the tribunal may be dealing with a victim of crime already heavily traumatised by the events that led to the claim. CIC judicial office-holders are actively encouraged to explain to the parties the workings of the Compensation Scheme as the hearing progresses. The CIC has also produced its own Good Practice Guide whose contents address many of the issues that concern unrepresented parties. A training event in 2012 concerning sexual offences used drama therapists to provide valuable feedback about how the role-played 'Tribunal Hearings' made them feel when 'in role' as unrepresented parties.

#### **Immigration and Asylum (FtT(IAC))**

In the FtT(IAC), courses on decision-making/determination-writing and judgecraft specifically train judicial office-holders on hearing appeals from unrepresented parties. The judges are encouraged to develop techniques that create an enabling role for such appellants, which include giving guidance and direction on legal points and how to question appellants directly.

#### **Care Standards (CS)/Primary Health Lists (PHL) and Special Education Needs and Disability (SEND)**

Although all respondents in CS and PHL are represented, a significant number of appellants are not. In SEND, the majority of parties represent themselves. In hearings where there is an unrepresented party, how to ensure that there remains a clear focus on the user forms a significant part both of induction training and also of ongoing training and guidance for all judicial office-holders. Training is designed to ensure that hearings (in particular for SEND) are structured in such a way as to ensure that all unrepresented parties are enabled to present their appeals as effectively as possible, with as much informality as a fairly structured setting will allow. All training case studies assume

unrepresented parties are present, unless the contrary is stated.

#### **Asylum Support**

In this jurisdiction, judges sit alone and the vast majority of appellants are unrepresented, although a small number receive free advice and representation from a specialist agency dealing solely with asylum support. In addition, over 80 per cent of the appellants require the use of an interpreter. As a consequence, a considerable amount of training time and resource is devoted to providing judgecraft training appropriate to

making this environment work effectively for the unrepresented appellant. To this end, much creative use is made of mock hearings and discussions on judgecraft skills, including the use of individual video-recording and feedback from actors who appear as appellants in training scenarios.

#### **Judgecraft training**

The Judicial College Strategy for 2011–14 commits us to piloting various approaches to common training for all judicial office-

holders in the skills and social context of judging. The first cross-jurisdictional pilots on judgecraft skills for judges<sup>3</sup> took place in March 2013 at Scarman House and Highgate House. The pilot was called 'The Business of Judging'<sup>4</sup> and was delivered under the Chairmanship of Mrs Justice Cox. A total of 72 judges drawn from every jurisdiction within the College remit (with the exception of magistrates) attended the course along with a host of observers, including some High Court judges interested in the scope of the course for transfer to their level.

The pilot was divided into four parts: 1) Judicial conduct and ethics, 2) Assessing credibility and giving an oral decision, 3) Managing judicial life, and 4) Dealing with high-conflict and unexpected situations in the court or tribunal setting.

*... much creative use is made of mock hearings and discussions on judgecraft skills, including the use of individual video-recording and feedback ...*

Part 1 centred on a new DVD with seven scenes covering a number of ethical issues that might confront a judge both inside and outside the court or tribunal. The DVD is played to small groups of judges who then have a facilitated discussion on how to deal with each problem, by reference to the Guide to Judicial Conduct 2013. The Standing Committee on Judicial Conduct provided advice on the content of each scene prior to the event and the scenes are being further modified and developed in light of feedback from the pilots.

Part 2 is based upon a second DVD filmed on location in Birmingham using professional actors and advocates, which deals with an allegation of sexual harassment in the employment tribunal, in which the claimant is a dental nurse and the respondent is a dentist, her ex-employer. In addition to the parties there are two witnesses. The main credibility issues discussed are spotting lies, consideration of the role of demeanour and the significance (or not) of consistency in evidence, and how to approach the evidence of a potentially vulnerable witness. Having assessed the credibility of the witnesses the participants each give an oral judgment to camera. They receive feedback from their colleagues on their performance.

Part 3 concerns managing judicial stress and other welfare issues and includes a presentation and advice from the Judicial HR Team.

Part 4 consists of six live scenarios acted out by professional advocates and actors as parties, with each participant judge playing the role of judge in one scenario. They are required to deal with the several challenging incidents that unfurl as the scenarios develop. Again participants receive feedback from their colleagues. Two scenarios are set in the civil jurisdiction, two in the tribunal

jurisdiction, one in the criminal and one in the family jurisdiction.

The collegiate atmosphere on both pilots was strong and the energy and mutual support levels were impressive. There was no possibility for judges to stay for long in their comfort zones or jurisdiction specific cliques, as the blend of jurisdictions precluded this. Most of the responses to the feedback question – how effective was this course as a cross-jurisdictional training event? – were ‘very’ or ‘substantially’.

The feedback from the two pilots has been invaluable in helping us refine and fashion the future form of the course which will now run on 17–18 June 2013, 14–15 October 2013 and 3–4 March 2014. Any tribunal judge interested in attending one of these courses should discuss the matter with his or her Chamber President as soon as possible.

One of the most interesting features of the course is the detailed attention it gives to questions of judicial ethics and conduct outside the hearing room. Readers may be aware of the work of GRECO, the Group of States against Corruption, which was established in 1999 by the Council of Europe to monitor member states’ compliance with the organisation’s anti-corruption standards.<sup>5</sup> GRECO has 49 participating member states, including the US.

Following a routine visit to the UK in 2012, the GRECO team made the following observation about training in judicial ethics and conduct in this country:

‘The judiciary is ranked as the most trusted institution by the public in the United Kingdom, with an untarnished reputation of independence, impartiality and integrity of its members. Nothing that emerged from

*One of the most interesting features of the course is the detailed attention it gives to questions of judicial ethics and conduct outside the hearing room.*



the current evaluation indicated that there was any element of corruption in relation to judges nor was there any evidence of their decisions being influenced in an inappropriate manner. Measures have been taken in recent years to set in place an elaborate, but clearly workable, system for the appointment and discipline of holders of judicial office. A challenge ahead relates to the question of ensuring diversity in the judiciary. As the diversity policy is pursued, different perspectives may be brought into the system; the provision of training on shared values and ethical standards in the judiciary seems pertinent in such a context of change.’

GRECO went on to recommend that the current available guidance to judges on judicial ethics be nevertheless enhanced in order to ensure that future training programme will include a systematic component on ethics, expected conduct, conflicts of interest and so on. This pilot is a direct response to that challenge and its cross-jurisdictional nature can only enhance its impact.

### The social context of judging

The Judicial College Strategy 2011–14 states that judicial training consists of the following three elements:

- 1) Substantive law, evidence and procedure and, where appropriate, ‘subject expertise’.<sup>6</sup>
- 2) The acquisition and improvement of judicial skills including, where appropriate, leadership and management skills.
- 3) The social context within which judging occurs. ‘Social context’ includes diversity and equality.

These elements are integral to the College’s training programmes. The Judicial College’s Diversity and Development Committee has been working on developing a College-wide approach

to social context training that will ensure our programmes deal in an open, thorough and transparent way with issues of social context. It will be for course directors and training leads (together with the two Directors of Training, John Phillips and myself), to ensure that training programmes incorporate issues of social context unless there is good reason to the contrary.

To assist in the design and development of training programmes we have asked our educational development advisers to ensure that the ‘train the trainer’ programmes they will be offering across the College for course directors, training leads and course tutors include training in using a social context ‘checklist’ that will ensure the issues are fully addressed. Reference to, and training in the use of, the revised edition of the Equal Treatment Benchbook that will be published later this year will be included in this process.

We will see a lot more activity in the Judicial College on the question of social context in the course of the coming year or two.

**Jeremy Cooper is Director of Training for Tribunals and Chair of the *Tribunals* Editorial Board.**

<sup>1</sup> It is worth noting, however, that some of the more stringent rules of judicial conduct that apply to salaried judges, particularly with relation to political activity, do not automatically apply to fee-paid judges: See Guide to Judicial Conduct 2013, para 3.15, the LCJ’s Foreword.

<sup>2</sup> The term that I will be adopting throughout this article.

<sup>3</sup> The first pilots were limited to judges, but it is the College’s intention in due course to develop similar pilots for tribunal members.

<sup>4</sup> The term was taken from Bingham T (2011) *Business of Judging: Selected Essays and Speeches*, OUP.

<sup>5</sup> The GRECO evaluation procedures involve the collection of information through questionnaire(s), on-site country visits enabling evaluation teams to solicit further information during high-level discussions with domestic key players, and drafting of evaluation reports. These reports, which are examined and adopted by GRECO, contain recommendations to the evaluated countries in order to improve their level of compliance with the provisions under consideration.

<sup>6</sup> In accordance with section 2(3) of the Tribunals, Courts and Enforcement Act 2007.

# INTEGRAL PART OF A MODERN JUSTICE SYSTEM

**Norman Egan** describes the reforms in Scotland that followed a critical report in 2008, the establishment in 2010 of a Scottish Tribunals Service and proposals in 2012 for a new integrated two-tier structure.

THE ROLE OF TRIBUNALS in Scotland's justice system has grown significantly in the past 30 years. Currently, there are more than 40 jurisdictions operating in the country handling in excess of 80,000 cases a year covering both reserved and devolved matters – almost equivalent to the number of cases heard in the civil courts in Scotland.

Although many individual jurisdictions have improved their practices and procedures, they have done so within a fragmented system with little if any strategic oversight or coordination. And though UK tribunals were reformed under the simplified two-tier system introduced by the Tribunals, Courts and Enforcement Act 2007, devolved tribunals remain separate from each other in terms of judicial leadership, recruitment, remuneration, training and professional development of members, and the routes of appeal on first decisions.

## Complex and disjointed

In 2008, an expert group chaired by Lord Philip published a report on the operation of tribunals in Scotland.<sup>1</sup> Lord Philip concluded that Scotland's tribunal system was extremely complex and disjointed, and that many tribunals were not sufficiently independent of the Scottish Government and were working in isolation, leading in turn to duplication of effort and variations of standards and performance, thus representing poor value for the taxpayer.

A key recommendation in the report was that a Scottish Tribunals Service be established to support all devolved Scottish tribunals and those dealing with reserved issues in Scotland. This recommendation built on the principles

promoted in Sir Andrew Leggatt's review of tribunals in England and Wales: *Tribunals for Users: One System, One Service* (2001).

In response to these recommendations the Scottish Government has been reforming the tribunals landscape in Scotland as a key part of its wider commitment to modernising the country's civil and administrative justice systems. At the heart of this reform is the aim to improve the service delivered to users and to better respond to their needs.

## First step

The first step in this programme was the establishment of the Scottish Tribunals Service (STS) in December 2010. The service brought together the administrative support for six separate tribunals in Scotland,<sup>2</sup> with a longer-term aim to integrate the administrations of other devolved tribunals incrementally.

This has already produced practical benefits for users, judiciary and administration. The creation of a unified service has enabled integrated administrative support, common financial management and budgetary controls, more effective venue realisation, and provided a single platform for developing a programme of continuous improvement.

On this basis the STS has improved and consolidated its performance since formation through a number of initiatives:

- Administrative teams providing support to each jurisdiction have 'key performance indicators' that capture common service delivery targets such as waiting time from application to first



hearing and the prompt issuing of panel decisions to parties. These targets are being achieved and in many cases exceeded. For example, the Mental Health Tribunal has achieved a significant increase in the number of hearing days when a single panel hears more than one case. This is delivering an improved service to users through more effective time management. Efficiency savings achieved have contributed to a reduction of operating costs for the STS.

- This success has been underpinned by a strong collaborative working relationship between the administration and the judiciary. STS is implementing a Continuous Improvement (CI) strategy spanning both administrative and judicial processes and procedures building around a shared objective – delivering an improved service. A ‘Lean’ approach has been adopted to support this strategy with an increasing number of business processes being the subject of value stream mapping. Significant delays and avoidable processes have been removed.
- STS has also invested in developing its people. All staff are involved in the CI activity, which fosters a strong sense of involvement in delivering a better service. Managers have been trained to lead and support staff in introducing new techniques and approaches.

It is important to note that a key purpose of the STS was to place responsibility for the administration of the tribunals in a delivery unit of the Justice Directorate of the Scottish Government, thereby separating the function from those parts of government responsible for the policy affecting the operation of the tribunals’ jurisdictions.

However successful this approach has been, supporting the development of an integrated

administrative infrastructure is only part of the story. The Scottish Government has accepted that reform of the judicial structures and leadership of devolved tribunals is equally important to achieving the aim of a better, user-focused tribunal system.

### Second phase

To this end, in March 2012 the second phase of the reform programme began with consultation on proposals for a new integrated structure for tribunals themselves. It was proposed to create a two-tiered structure – a First-tier Tribunal and an Upper Tribunal – that would accommodate existing tribunals and unify their leadership under the Lord President of the Court of Session.

*Provision will also be made to enable the transfer into the new system of the jurisdictions of existing tribunals operating within devolved competence.*

Specifically, the First-tier Tribunal will be for first decision hearings and the Upper Tribunal will decide, principally, on onward appeals. Provision will also be made to enable the transfer into the new system of the jurisdictions of existing tribunals operating within devolved competence.

Bringing a range of jurisdictions into the new system is intended to reduce complexity and provide simpler, more effective ways of resolving disputes, keeping tribunal business within the tribunal system and out of the courts as much as possible.

However, there will still be some appeals where it is more appropriate for the courts to hear and this route will continue to exist.

Currently, there is no single mechanism in Scotland for appealing against a tribunal decision and appeal routes vary, a point made by the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC) in its report of 2011: *Tribunal Reform in Scotland – a vision for the future*.<sup>3</sup>

The SCATJC promoted the idea of standardising the route of appeals to a single body, noting that this would:

- Facilitate the development of expertise among appellate judges.
- Make the appeal process more accessible to users.
- Speed up justice in comparison with appeals to the Court of Session.
- Streamline and simplify case handling, thus supporting the development of expertise among administrative support staff.
- Make it easier for support organisations to advise tribunal users who wish to appeal against a decision.

This proposal has shaped Scottish Government thinking. But it is important to stress that in developing the new structure it was necessary to view it from the user's perspective to understand how best to assist them in accessing the justice system.

Furthermore, there needs to be a thoroughgoing reconfiguration of judicial leadership, appointments, security of tenure and rule-making, as well as the need to legislate for upholding the independence of the tribunal judiciary.

### Fair, open and impartial

In 1957, the Franks Report established that tribunals should be adjudicative, fair, open and impartial. The report noted: 'Tribunals are not ordinary courts, but neither are they appendages of government departments.'

It went further, saying that impartiality would mean 'independence from the real or apparent influence of the original decision-making administration'.

In reforming the structures in Scotland, there was acute awareness that users need to be sure that decisions are taken by tribunal members who are entirely independent from those making the original decision, and that the framework for tribunal decision-making, including rules of procedure and appointment of members, is completely impartial.

### Lord President's leadership

The Scottish Ministers want a reformed system to deliver clear judicial leadership with greater consistency in practice and improved transparency. To this end, the Tribunals (Scotland) Bill, which was introduced in the

Scottish Parliament on May 8, proposes that the tribunals judiciary be brought under the leadership of the Lord President of the Court of Session. The Lord President will also be responsible for judicial deployment and for the training, welfare, guidance and performance of judges and other members of the new tribunal system along with handling complaints against tribunal members. In addition, he will be able to delegate his judicial leadership functions to any other judges of the tribunal and,

importantly, will nominate a Senator of the College of Justice (a Court of Sessions judge) as the President of Scottish Tribunals. This is a new office, responsible for the day-to-day running of tribunal business.

As much as Scottish Ministers want to bolster the independence of tribunals and their leadership they also want to ensure that tribunals retain their distinctive characteristics. Measures will protect each tribunal's unique culture and specialism. For example:

- The appointment system will ensure that members and Chamber Presidents are selected with the relevant skills, knowledge

*As much as Scottish Ministers want to bolster the independence of tribunals and their leadership they also want to ensure that tribunals retain their distinctive characteristics.*

and experience to carry out their particular assignment and nobody will be able to hear cases where they do not meet the specific appointment criteria.

- There will be separate and distinctive tribunal rules of procedure in each jurisdiction.
- Jurisdictions within a chamber will also remain separate jurisdictions whether they are in a single jurisdiction chamber or a multi-jurisdiction chamber.

Users will still be appearing before the same tribunal members with the same specialist knowledge and experience, and decisions will still be made in accordance with the law governing their jurisdiction and by applying rules and procedures that will remain largely unchanged.

Greater confidence in the tribunals' impartiality will be assured by a standardised appointments process supervised by the Judicial Appointments Board for Scotland and defined by the specialist requirements of each jurisdiction. Any tribunal rules that do require changing will be the subject of thorough scrutiny by a dedicated function of the proposed Civil Justice Council.

### More integration

The Scottish Government's programme of reform will not stop with the Bill. The programme will seek to integrate more of the devolved tribunals in Scotland into the unified structure. It will also be necessary to ensure that the administrative support for tribunals delivers a continuously improving service to an independent judicial body. This presents its own organisational challenge and a solution will be needed that distances the management of tribunals administration from the Scottish Ministers to avoid confusion over accountability

and governance. This is an ambitious agenda and will depend for its success on close working with the tribunals themselves and their users, to include not just those who raise cases but all those practitioners and professionals who are affected by tribunal practices and decisions.

### Making Justice Work

The Scottish Government wants to deliver a modern tribunal system that generates public confidence, that treats citizens fairly and with

respect, and handles their cases quickly and sensitively. It should be a system that also works as an integral part of a modernised civil and administrative justice system. That is why tribunal reform is part of the Making Justice Work programme, a set of projects brought together with the intention of providing a coordinated system-wide approach to improving how it delivers benefits to those who use it as well as identifying ways of delivering more efficient, cost-effective services. At the heart of the programme is a commitment to improve access to justice and

promote appropriate and proportionate forms of dispute resolution.

More information on the various projects, which includes tribunal reform, can be found on the Scottish Government website.<sup>4</sup>

### Norman Egan was Chief Executive of the Scottish Tribunals Service.

<sup>1</sup> [www.consumerfocus.org.uk/scotland/files/2010/10/Administrative-Justice-in-Scotland-The-Way-Forward-Full-Report.pdf](http://www.consumerfocus.org.uk/scotland/files/2010/10/Administrative-Justice-in-Scotland-The-Way-Forward-Full-Report.pdf)

<sup>2</sup> Tribunals supported by the STS: Additional Support Needs Tribunal for Scotland, Lands Tribunal for Scotland, Mental Health Tribunal for Scotland, Pension Appeals Tribunal Scotland, Private Rented Housing Panel/Homeowners Housing Panel, Scottish Charity Appeals Panel.

<sup>3</sup> <http://ajtc.justice.gov.uk/news/trib-reform-scot-vision.htm>

<sup>4</sup> [www.scotland.gov.uk/Topics/Justice/legal/mjw](http://www.scotland.gov.uk/Topics/Justice/legal/mjw)

# PUBLIC SECTOR DUTY: THE SCOTTISH EXPERIENCE



**Muriel Robison** argues that, instead of a system where discrimination is challenged after the event, public bodies need to take positive steps to promote equality of opportunity if they hope to succeed in tackling persistent inequalities.

DESPITE ALMOST 40 years of laws prohibiting discrimination because of sex and race, there are few who would argue that full equality in practice has been achieved, illustrated by a persistent pay gap between women and men and a significant employment gap for certain minority ethnic groups. Nor have subsequent laws relating to disability, sexual orientation, religion or belief and age discrimination succeeded in eliminating inequalities.<sup>1</sup>

The individual complaint-led model, where discrimination is challenged after the event, has thus shown its limitations. It is recognised that if sufficient progress is to be made, public bodies have to take positive steps to promote equality of opportunity. The race equality duty was therefore introduced in 2002, followed by the disability equality duty in 2006 and the gender equality duty in 2007. Thus the onus has shifted from the individual to public authorities to tackle what was described as ‘institutional discrimination’.<sup>2</sup>

While the Equality Act 2010 primarily consolidated a raft of discrimination laws and regulations, there were a number of important new provisions, one of the most significant being the introduction of a new, more comprehensive public sector equality duty.

## The general duty

This more expansive public sector equality duty is set out in section 149 of the Equality Act:

- ‘1) A public authority must, in the exercise of its functions, have due regard to the need to—
- a) Eliminate discrimination, harassment, victimisation and any other conduct which is prohibited under this Act.
  - b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
  - c) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.’

*... one of the most significant [new provisions of the Equality Act 2010 was] the introduction of a new, more comprehensive public sector equality duty.*

The relevant protected characteristics now include sexual orientation, religion or belief, age, gender reassignment, and pregnancy and maternity. While ‘marriage and civil partnership’ is not listed as a relevant protected characteristic, it is covered by the duty to eliminate discrimination.

This first limb of the duty is essentially a re-statement of the requirements of those parts of the Act which actually prohibit conduct because of the range of protected characteristics.

In relation to the second limb, the Act explains that advancing equality of opportunity involves the need to:

- a) Remove or minimise disadvantages suffered by protected groups.
- b) Take steps to meet the differing needs of those groups.

- c) Encourage protected groups to participate in public life where participation is disproportionately low.

The Act specifically states that compliance with the duty may involve treating some people more favourably than others. There is thus recognition that the fulfilment of the equality duty may well involve positive action, and public authorities must at least consider the need to take steps to address historical disadvantage, to remove barriers to progress and to attempt to create a level playing field.

The third limb of the duty explains that a need to foster good relations involves tackling prejudice and promoting understanding.

The requirement is to have ‘due regard’ to the need to implement the three limbs of the duty, and while the precise scope of that obligation is disputed,<sup>3</sup> decision-makers must at least be aware of their duties and have given consideration to them in their decision-making processes.<sup>4</sup>

### Which public authorities are covered?

This so-called ‘general duty’ applies not only to public authorities but to private and voluntary sector bodies that carry out public functions. Public functions are defined as functions of a public nature for the purposes of the Human Rights Act 1998.<sup>5</sup>

The Act sets out certain exceptions including the exercise of a judicial function. While members of the tribunal judiciary are therefore not themselves subject to the public sector equality duty, it is important nevertheless for judges to be aware of the obligations placed on public bodies, including the administrative arms of Her Majesty’s Courts and Tribunal Service and the Ministry of Justice itself.

### Specific duties

Public authorities can be subject to certain additional obligations, which are referred to as ‘specific duties’ to ensure that processes are in place to meet the requirements of the general duty. The Equality Act creates a power for a Minister to impose, by regulations, specific duties on a listed public authority for the better performance of the general duty.

While the general duty is uniform throughout Britain, there are three separate sets of specific duties applying to Scottish and Welsh devolved bodies, and to English and other ‘British’ non-

devolved bodies. This allows for the Scottish Government to set specific duties deemed relevant in the Scottish context.

The previous equality duties had been heavily criticised for requiring only a ‘tick box’ approach to equality and the stated intention of the UK Government in the implementation of the new public sector equality duty, to move from process to outcomes, suited the Scottish Government’s policy objectives very well.

However, the specific duties for Scottish public authorities look very different from those to be implemented by English (and non-devolved) public authorities.

When the UK Government announced in March 2011 that it was withdrawing draft regulations issued in January, essentially on the grounds that the specific duties proposed there were too comprehensive, this came just 10 days after the Equal Opportunities Committee of the Scottish Parliament voted down draft regulations on the basis that they needed further strengthening.

The Scottish regulations were redrafted and finally brought into force on 27 May, 2012.<sup>6</sup>

... *the stated intention of the UK Government ... to move from process to outcomes suited the Scottish Government’s policy objectives very well.*



While the specific duties for English public authorities, and indeed those non-devolved public authorities operating in Scotland, now simply require public authorities to publish information to demonstrate compliance with the general duty, and to prepare and publish at least one equality objective, the specific duties which are in force in Scotland represent a comprehensive set of requirements to achieve stated equality outcomes.

### Scottish-specific duties

The duties recognise that the best way to make progress is to focus on equality outcomes, and thus there is a requirement to publish equality outcomes intended to meet the general duty. Reasonable steps must be taken to involve equality groups and to consider any relevant evidence before identifying these equality targets. This may, for example, be a target to reduce incidences of bullying and harassment reported following a staff survey. While there is no requirement to set an equality outcome for each protected characteristic, the authority would be expected to explain why it had decided to select targets for particular protected groups but not others.

At the heart of the equality duty in Scotland is the requirement to undertake ‘equality impact assessments’, and to act on their findings. This is a development from previous duties, which did not require public authorities to do anything about the results of any impact assessment. This is also in contrast to the situation in England, where the UK Government has recently stressed that there is no requirement at all to undertake such assessments.<sup>7</sup>

Whenever a public body in Scotland is proposing to revise a policy, or to introduce a new policy, consideration must be given to the impact it

will have on each of the protected groups. This duty is prescriptive in its terms and requires a listed authority to consider relevant evidence, to actually take account of the results of the impact assessment, and to publish the results within a reasonable period. Public authorities must also put in place arrangements to review and if necessary revise existing policies to ensure compliance with the equality duty.

Significantly, this regulation states that ‘any consideration by a listed authority as to whether or not it is necessary to assess the impact of applying a proposed new or revised policy or

practice . . . is not to be treated as an assessment of its impact’. This provision was included to make it clear that so-called ‘rapid’ impact assessments, often simply a declaration that a policy applied to all and therefore would not have a disparate impact, would not suffice. A policy that appears neutral on its face may of course disproportionately disadvantage a particular group. For example, a policy about dress codes may well disproportionately disadvantage

certain religious groups. The assessment process will allow that impact to be identified before the policy is implemented and for steps to be taken to minimise any disadvantage that may be suffered.

There are a number of Scottish-specific duties which relate to the gathering of information about employees, including proportions of protected groups who are recruited and retained. The duty is not just to gather this information but also to use it to better perform the equality duty – for example in initiatives that ensure more disabled people are employed if the information reveals under-representation.

Public authorities with more than 150 employees must also publish statistics about the gender pay gap as well as a statement setting out not only

*At the heart of the equality duty in Scotland is the requirement to undertake ‘equality impact assessments’, and to act on their findings.*



how it will address the pay gap between women and men but, for second and subsequent reports, also the pay gap and occupational segregation of disabled and minority racial groups.

While these duties are placed on public sector bodies, it has long been recognised that public sector bodies have an obligation, when contracting out services, to seek to ensure that equality laws are being complied with. For this reason, the Equality Act made specific provision to allow for specific duties to be imposed on contracting authorities in connection with their public procurement functions. While the UK Government chose not to act on that power, the Scottish-specific duties require Scottish public authorities that are contracting authorities to have due regard to whether any award criteria or conditions should include considerations to enable it to better perform the equality duty.

Although diluted from the previous gender and disability duties, Scottish Ministers, unlike their UK counterparts, have accepted that they do have obligations to assist Scottish public sector bodies to meet their goals. Thus Scottish Ministers will be required to publish proposals for activity to enable a listed authority to better perform the equality duty. The first reports are due in April 2013 and updated reports will be required normally after intervals of two years.

### Enforcement

While failure to perform such duties does not confer a cause of action at private law, any failure to comply with the general duty on the part of a public authority can be challenged by way of judicial review. This includes the Equality and Human Rights Commission, which can also undertake an assessment of compliance, or, where the Commission suspects that there has been a failure to comply with the specific duties, to serve a compliance notice and, if appropriate, to apply to the court for an order requiring compliance. It should be noted that in cases under

the Equality Act 2010 pursued by individuals, tribunals and courts may well be called upon to take into account any failure of a public body to comply with its obligations when considering where there is *prima facie* discrimination, sufficient to shift the burden of proof.

### Conclusion

It is interesting to speculate whether progress towards equality is achieved more quickly through the prescriptive route adopted by the Scottish Government or the more flexible route chosen by the UK Government. Whatever approach is taken to the specific duties, public authorities throughout the country are obliged to take steps to ensure that they are meeting the ultimate goal of advancing equality of opportunity and fostering good relations.

The UK Government has announced a review of the general duty which it expects to complete by June 2013. Clearly any changes to the general duty itself will be made at Westminster and will apply throughout Great Britain. So it remains to be seen what impact this may have on the comprehensive suite of specific duties currently operating in Scotland.

**Muriel Robison is an Employment Judge and former Head of Commission Enforcement at the Equality and Human Rights Commission in Scotland.**

<sup>1</sup> Freedom and Fairness: The Final Report of the Equalities Review, available at <http://webarchive.nationalarchives.gov.uk/20100807034701/http://archive.cabinetoffice.gov.uk/equalitiesreview/publications.html>.

<sup>2</sup> The MacPherson Report, available at [www.archive.official-documents.co.uk/document/cm42/4262/4262.htm](http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm).

<sup>3</sup> *R(McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33.

<sup>4</sup> *R(Harris) v Haringey LBC* [2010] EWCA Civ 703.

<sup>5</sup> See *YL v Birmingham City Council* [2007] UKHL 27.

<sup>6</sup> The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 SSI No 2012/162. These list the Scottish public authorities which are subject to the specific duties.

<sup>7</sup> See David Cameron's recent speech to the Confederation of British Industry, available at [www.number10.gov.uk/news/speech-to-cbi](http://www.number10.gov.uk/news/speech-to-cbi).

# CHANGE OF VIEW PUSHES BACK THE BOUNDARIES



Following devolution, the government in Wales has been able to develop its own approach to the provision of special educational needs. Though many judicial skills are transferrable, the sharing of best practice and resources does not have to mean homogeny, says **Meleri Tudur**.

FOR THOSE IN ANY DOUBT, the complexity of the tribunals landscape in Wales was confirmed in the introduction to the report published in 2010 by the Welsh Committee of the Administrative Justice and Tribunals Council, which acknowledged that – within the broad range operating at that time – even the definition of the word ‘tribunal’ was not an easy one. The landscape has since changed dramatically.

When I was appointed to the Special Educational Needs Tribunal in the 1990s, it was an England and Wales jurisdiction with a mainly London-based administration, although there has always been an office in Darlington, County Durham. The administration was also London-centric, with a perception of London and ‘the rest of the country’, which included the whole of Wales, a perspective that was highlighted one day when a listings officer, noting that I was sitting on a Tuesday in Newport, South Wales, enquired whether I would be able to sit in St Austell, Cornwall, on Thursday and . . . since I was in Wales, could I sit in Colwyn Bay on the Wednesday? The only answer was: ‘Yes – if you can book me a helicopter.’

## Pioneering mindset

Pushing boundaries is not new in the special educational needs jurisdiction. From its inception when the late Trevor Aldridge QC set up the tribunal in 1993, he did so with a clear vision

of the tribunal’s subject matter, purpose and potential users and the intention that the tribunal would be fit for its purpose, rather than an expectation that users would adapt to existing judicial structures. He designed an informal tribunal process that continues, even now, to surprise seasoned court users.

This pioneering mindset was more recently exhibited in the introduction of registrars –

trained and qualified legal advisers from the magistrates’ courts service – to deal with interlocutory work within the First-tier Tribunal Special Educational Needs and Disability jurisdiction (SEND). Trialled as a pilot in June 2011, the experiment has met with such success that it has recently been confirmed as part of SEND’s ‘business as usual’, enabling standard interlocutory work to be processed consistently and without delay. For its part, the Special Educational Needs Tribunal for Wales (SENTW) was one of the first fully devolved Welsh tribunals, dealing

exclusively with special educational needs appeals and claims of disability discrimination in schools in Wales.

Not so much pushing boundaries as reinstating the geographical ones between England and Wales.

Having started from a common base of the same legislation and regulations, the two jurisdictions have branched off in divergent directions and

*Having started from a common base of the same legislation and regulations, the two jurisdictions have branched off in divergent directions and now have far less in common than they did.*

now have far less in common than they did. The process of evolution has been an interesting one and has, without doubt, benefited all concerned.

Following devolution, education was one of the areas devolved, enabling the government in Wales to explore and develop its own approach. Both the Welsh and UK governments have recently grappled with the thorny issue of changing the system of arranging and delivering special educational provision within their national boundaries, but neither intended to rush into fundamental legislative change without some assurance that it would be a success.

### **Innovative pilot**

In Wales, educationalists have been toying for several years with the idea of a single assessment process for children across the health, education and social care systems – all three being areas where power is devolved – and, in the course of trying to establish what proposals were workable, put in place trial schemes for different proposals in specific local authority areas.

Such an approach enabled small-scale change to be assessed for effectiveness without the risks associated with wholesale, untested changes to legislation.

The new Welsh Tribunal Regulations in March 2012 brought in an innovative two-year pilot in two discrete local authority areas to introduce the child's right of appeal, which is unprecedented. It is a right of appeal to SENTW against the local authority's decision, exercisable by the child. It is separate from the parents' right and is not statutorily limited to a particular age group.

In England, the Westminster government's Green Paper in 2011 also proposed a single joint assessment process but initiated a number of 'pathfinder' schemes to trial new approaches before finalisation of the legislation.

This conjured up a vision of two rows of educationalists standing either side of Offa's Dyke, binoculars trained on each other, to see what good ideas could be developed to suit needs. But it enabled a quicker evolution process as multiple experiments in different types of situations threw up different results suited to particular circumstances.

England, Scotland, Wales and Northern Ireland each have their own tribunal to deal with special educational needs and disability issues. The relationship between the four home country tribunal jurisdictions is a rather more open affair. Given its longstanding experience and expertise in the jurisdiction, SENDIST was key in the training of the new SENTW secretariat, and similarly, with the devolved tribunal in Northern Ireland. When the Additional Support Needs Tribunal for Scotland came into being in 2005, it was SENTW secretariat and judicial office-holders who were invited to deliver part of their induction training.

*This conjured up a vision of two rows of educationalists standing either side of Offa's Dyke, binoculars trained on each other . . .*

The close contact between the four jurisdictions continues on a regular basis, with an annual interjurisdictional conference enabling the sharing of ideas and information, as well as a 'round table' discussion between judicial and administrative leads to consider trends and developments and to share good practice.

### **Common skills**

Currently, sharing training facilities and resources is an obvious suggestion, since many of the skills required are common across tribunals and national borders. It is very useful to be able to access resources that are directly relevant to the tribunal's work without having to generate them from scratch. For example, the development of case management in SEND by the new tribunal procedure rules in 2008 relied on a trial-and-error system to identify when and

how best case management was undertaken, but when case management was introduced in Wales in 2012, they could avoid the pitfalls and benefit by adapting for their own use what had already been tried and tested.

Similarly, SEND piloted a tribunal panel observation system intended to supplement the current appraisal arrangements and to speed up the appraisal process, which was greatly hindered by the number of late cancelled hearings within the jurisdiction. During the pilot, it became clear that within the larger jurisdiction it was best used as a means of training individual observers and informally flagging up possible areas of weakness. In Wales, where the small jurisdiction has a similar high level of cancellations, the panel observation system proved effective in identifying good practice and general training needs, supplementing the appraisal system by highlighting potential weaknesses and encouraging self-reflection and openness among panel members.

In the other direction, the extensive work done by the SENTW secretariat to set up the pilot for the child's right of appeal, reviewing all of its paperwork and guidance documents to ensure that it is child-friendly and accessible, is likely to be very useful in informing the proposal for a child's right of appeal as identified in the recent draft Children and Families Bill in England.

### Consultation

In the context of the current consultation on a separate Welsh courts' jurisdiction, and the recent establishment of a Scottish Tribunals Service, the multiplicity of different cross-border and regional tribunal arrangements would make an interesting study in what works and what does

not in different contexts. In tribunals, as in all other aspects of life, one size may not fit all.

Following the recommendations of the 2010 review, a number of tribunals in Wales are moving their administration into the office of the First Minister, so that there is a separation between the tribunals and their sponsoring departments. It seems unlikely in days of austerity and limited resources that there will be sufficient numbers of appeals to create a freestanding Welsh Tribunals Service but the experience in England suggests that such a step

*It seems unlikely... that there will be sufficient numbers of appeals to create a freestanding Welsh Tribunals Service but the experience in England suggests that such a step may not be necessary.*

may not be necessary. Joining together the administration of small tribunals has been trialled in both Wales and England in different ways and has been shown to be an effective means of saving unnecessary duplication of cost and sharing valuable experience while retaining the individual identity of each particular jurisdiction.

SEND has experience of both small- and large-scale sharing of resources: it shares its administrative team in Darlington with Care Standards (CS) and Primary Health Lists (PHL), enabling the provision of experienced administrative support across three smaller jurisdictions and flexibility in the delivery of that support when the work levels fluctuate seasonally. SEND's experience of large-scale resource sharing was as a result of its becoming part of the Tribunals Service in 2008 and then HMCTS in 2011.

### Added benefit

The sharing of resources within small jurisdictions is an obvious means of cost-cutting but has the added benefit of providing the tribunals' judiciary with an element of collegiality and an opportunity to carry out cross-jurisdictional training. SEND, CS and PHL were

the first to arrange a joint training day in 2011 focusing on the judicial skill of decision-writing, which is common to the three jurisdictions and members of the other national jurisdictions were invited, as well as cross-ticketed judges from the Mental Health jurisdiction. It provided an opportunity that would not otherwise be available to small jurisdictions to identify and address common concerns.

The price paid in joining the resources of larger organisations, however, is to lose control over certain functions. SEND's website is no longer administered from within its own offices, and while SENTW has a very user-friendly and vibrant website, the one provided for the tribunals in HMCTS has become less so. Similarly, while small jurisdictions have bespoke regulations covering every aspect of their work, the Tribunal Procedure Rules 2008 presented for the first time in the Health, Education and Social Care Chamber a generic set of rules designed for implementation in several jurisdictions. Compare that to the experience of SENTW and its new regulations, where all legally qualified chairs were given the opportunity to sit around a table to set out their proposed amendments and to redraft the regulations using their experience of what worked and what was required to improve the process of dealing with an appeal. Not all of the proposals appeared in the final legislation, but there is a satisfaction in knowing that the relevant judicial office-holders had direct input into the drafting of the regulations that they now implement.

### Why uniformity?

There is much in the work done that is common across jurisdictions, and just as the courts have different approaches and practices, uniformity may not be desirable or necessary, if the individual tribunal's current practice

achieves its purpose and suits its users. Is there any argument for uniformity? In terms of back-office support, judicial terms and conditions and high expectations of good performance and practice, there must be an unqualified 'yes', and surprisingly, despite the recent changes, that does not yet exist. However, in terms of the public interface, the tribunals' approach to enabling access to justice is one of providing (contrary to the idiom) courses for horses: the provision of an appropriate course of redress according to subject matter, nature of appeal and potential outcome for the user. In many tribunals, the appellant has not done 'wrong' and the purpose is to seek a resolution of the dispute. In others, there may be serious allegations of regulatory breaches

potentially affecting an individual's ability to work. Given the breadth of jurisdictions, it is difficult to identify how uniformity could be a better option, but that may be an issue for further consideration in the future.

### Changing demands

It cannot be disputed that many judicial skills are transferrable, and there is much to learn from the practice of others. Cherry-picking best practice and what suits the context of a particular tribunal is an excellent method of improving the quality of the experience for the users and ensuring that justice is done. Changing demands provide opportunities for exploring different ways of doing things and an opportunity to explore ideas about shared arrangements and resources. But sharing does not have to mean homogeneity: we all, in our daily lives, adapt to situations, formal and informal, as appropriate. Is part of the challenge in our professional lives not to show that same flexibility in the delivery of justice?

**Meleri Tudur** is a judge in the First-tier Tribunal (Health, Education and Social Care Chamber) and judicial lead in the Special Educational Needs and Disability Tribunal, HESC.

*The price paid in joining the resources of larger organisations, however, is to lose control over certain functions.*



# JUDGING THE CONSEQUENCES OF DIGITAL LIVES

Some see websites such as Twitter and Facebook as democratic forces for good, others see them as trivial and time-wasting. But their relevance to the work of judges is growing. In the first of two articles, **Barry Clarke** considers the challenges posed by social media.

JUDGES SHOULD BE INTERESTED in social media for one very simple reason: it has become part of the fabric of daily life. It reflects the friendships and conflicts we encounter. It provides raw material for the cases we are asked to decide. It has contributed to an evolution of the language we use. As one industry observer has put it, 'social media is about sociology and psychology more than it is about technology'.<sup>1</sup>

Social media content – that is to say, the material posted online by its users – is often criticised as banal. That is probably a fair observation; after all, the most followed person on Twitter is not philosopher Noam Chomsky but teenage pop idol Justin Bieber. For every 'tweet' from those involved in the so-called Arab Spring, there were doubtless hundreds about the latest celebrity hairstyle. As for time-wasting, one Google executive once observed pointedly: 'When you've got five minutes to kill, Twitter is a great way to kill 35 minutes.'<sup>2</sup>

## All life is there

But are our traditional methods of communication necessarily so much richer? One can no more remove platitudes, repetition and trivia from online interaction than remove them from all human conversation, where they exist in abundance. Would Tory MP Alan Clark's diaries or poet Philip Larkin's letters be as entertaining or informative if they were stripped of their gossip and polemic? Social media content incorporates expressions of egocentricity, anger,

stupidity, frustration, self-loathing, love, humour, satire and melancholy. In short, all of life is there: human introspection and human interaction captured in permanent and downloadable form.

Because all of life is there, we have a responsibility to try to understand better how it works. In my own judicial work in the Employment Tribunal, for example, barely a

week goes by without the factual narrative of a case involving a reference to Facebook. In some cases, the entire dispute has revolved around a Facebook comment perceived to have bullied a colleague or damaged the employer's brand or reputation.<sup>3</sup> In other cases, sworn testimony on a crucial point has been undermined by contemporaneous online comments or photographs posted to Facebook.

## Follow on Twitter

Judges with a Twitter account may wish to follow @JudiciaryUK (the Judicial Office, with more than 12,000 followers) or @UKSupremeCourt (with about 45,000 followers), as well as numerous legal commentators.

## Lack of advice

In my experience, many seasoned practitioners are behind the curve

on the relevance of social media content, neglecting to mine the rich seam of evidential material that it can provide. Indeed, I suspect that many practitioners fail to advise their clients to preserve such material in the same way that all relevant evidence should be preserved. It seems likely that many parties fail to make a reasonable search for such material as part of the disclosure exercise; nothing else satisfactorily explains the very high number of late applications to rely on Facebook material made by advocates at the outset of a hearing. The explanation often provided is that one party or witness happens to



be friends on Facebook with another party or witness and, having checked their online entries the day before, has turned up at the hearing with print-outs. This is just the material that is shown to the tribunal; it seems likely that much more goes undiscovered and undisclosed.

As judges, we should seek to avoid easy reliance on lazy stereotypes. We should avoid similar traps surrounding social media. The average age of Facebook users is not 14, but over 40. It is not the pursuit of a small minority: Facebook has 32 million active users in the UK<sup>4</sup> and more than one billion globally.<sup>5</sup> The average Facebook user in Britain spends almost 15 and a half hours a month using the site.<sup>6</sup> Each day across the world, some 2.5 billion items of content are shared on Facebook.<sup>7</sup> The social media platform most often used by businesses in the UK is Facebook, not LinkedIn. When Facebook floated on the New York Stock Exchange in May 2012, it was the third biggest public offering in US corporate history after General Motors and Visa.

### Here to stay

I am not plugging Facebook in particular. It is a sobering thought that it only launched in the UK in 2006, the same year Daniel Craig first appeared on our cinema screens as James Bond. In another six years, it may go the way of Friends Reunited or Bebo and we may ask ourselves what all the fuss was about. But the concept of social media is itself here to stay, and I offer two reasons for this.

- The first is the ease of accessing the Internet. Eighty per cent of British households and 90 per cent of British businesses now have Internet access and these percentages continue to increase. More and more shops and public places offer free or discounted WiFi access

in the battle for the attention and loyalty of consumers.

- The second is in most of our pockets: the increasingly ubiquitous smartphone. Over half of Internet access is now from the gadgets that many of us use as digital Swiss Army knives. Such devices are used to access social media 'apps', listen to music, watch online content and play games far more frequently than they are used to make telephone calls.

*Employers took years to develop policies for keeping an eye on the private use . . . of Internet access provided through work, but will have a harder time keeping tab on the use [their employees] make of their own smartphones.*

Employers took years to develop policies for keeping an eye on the private use that their employees made of Internet access provided through work, but will have a harder time keeping tab on the use they make of their own smartphones. On the other side of the coin, employees previously saw home as offering sanctuary from workplace bullying, but will now find that the bullying follows them simply because their smartphones and the social media apps uploaded to them remain with them 24 hours a day.

### Personal privacy

A prominent concern about widespread social media activity is what it means for personal privacy.

The less sophisticated users of social media – and I would hazard a guess that this includes a lot of teenage participants – rarely take adequate steps to protect their privacy. Many of them 'overshare',<sup>8</sup> broadcasting facts and opinions to the online world with scarcely a thought about their permanence and capacity to damage their reputation. It is relatively easy to harvest from public social media profiles the sort of data, such as a person's date of birth and mother's maiden name, used as security gateways for personal banking services. Recent research has demonstrated the uncanny accuracy with which

marketing analysts can predict a person's gender, ethnicity, sexual orientation, political beliefs and even history of drug use from their Facebook activities.<sup>9</sup>

The loss of privacy concerns not just what is revealed online but by how many people see it. Facebook users will 'tag' friends in photographs without pausing to reflect on who might see that image<sup>10</sup> or how it might become viral. Very few appreciate that much of the online data processed by the likes of Facebook, Apple and Google is stored in huge centres in North Carolina, raising problems about the application of domestic principles of data protection. In the words of one industry leader: 'Privacy is dead, and social media holds the smoking gun.'<sup>11</sup>

### Public confidence

I am certainly not suggesting that judges should become prolific tweeters or bloggers or avid users of Facebook. Indeed, any judge who engages with social media should reflect on the relevant section in the IT and Information Security Guidance for the judiciary issued in September 2012. The current edition of the Guide to Judicial Conduct, released in March 2013, also includes a section on social networking; furthermore, Appendix 4 of the guide incorporates guidance on blogging by judicial office-holders. The collective thrust of these materials is that, while judges are not precluded from participating in social media in a personal capacity, they should take care to protect their own privacy and must not engage in conduct or express opinions that could damage public confidence in the judiciary.

I am instead suggesting that judges recognise the role that social media now plays in human interaction. Before too long, many of the people appearing before us will have grown up in a world where they access more video content from file-sharing websites than television, where they rarely use mobile devices for making telephone calls and where they never meet

many of their so-called friends. These trends are influencing the nature of the evidence before us as well as the types of dispute we are tasked with deciding.

In his collection 'The Salmon of Doubt', the late Douglas Adams formulated a set of rules to describe our reaction to new things:

'Anything that is in the world when you're born is normal and ordinary and is just a natural part of the way the world works. Anything that's invented between when you're 15 and 35 is new and exciting and revolutionary and you can probably get a career in it. Anything invented after you're 35 is against the natural order of things.'

We judges are, by and large, over the age of 35. Even though many of us may not want a digital life, we must not be oblivious to the fact that so many people do.

**Barry Clarke is an Employment Judge. In his second article, he will examine in more detail how social media sites such as Facebook produce evidence relevant to judicial decision-making.**

<sup>1</sup> Brian Solis, the principal of FutureWorks.

<sup>2</sup> Matt Cutts, head of web filtering at Google Inc.

<sup>3</sup> As an example of alleged reputational damage, see *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).

<sup>4</sup> [www.socialbakers.com/facebook-statistics](http://www.socialbakers.com/facebook-statistics)

<sup>5</sup> [www.bbc.co.uk/news/technology-19816709](http://www.bbc.co.uk/news/technology-19816709)

<sup>6</sup> <http://socialmediatoday.com/kenburbary/276356/facebook-demographics-revisited-2011-statistics>

<sup>7</sup> [http://allfacebook.com/jay-parikh-big-data-project-prism\\_b98128](http://allfacebook.com/jay-parikh-big-data-project-prism_b98128)

<sup>8</sup> Selected by the publishers of Webster's New World Dictionary as their 'word of the year' in 2008.

<sup>9</sup> See Kosinski, Stillwell and Graepel, 'Private traits and attributes are predictable from digital records of human behaviour', in *Proceedings of the National Academy of Sciences*, February 2013.

<sup>10</sup> Indeed, while Facebook users who upload photographs own the IP inherent in such photographs, they grant Facebook a 'transferable, sub-licensable, royalty-free, worldwide licence' to use them.

<sup>11</sup> Pete Cashmore, CEO of news website Mashable.



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## AIMS AND SCOPE

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

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