

Council on Tribunals Annual Conference 2006

Conference Report

1 Great George Street, London

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Keynote Address

Lord Falconer of Thoroton

Lord Chancellor and Secretary of State for Constitutional Affairs

Right First Time

The Rt. Hon Lord Justice Carnwath

Senior President of Tribunals designate

Looking to the future

The Rt Hon. The Lord Newton of Braintree OBE, DL

Chairman, Council on Tribunals

Right first time: stimulating improvements in decision making through feedback

- His Honor Judge Michael Harris
President, Social Security and Child Support Appeals
- Tony Redmond: Local Government Ombudsman and Chair, British and Irish Ombudsman Association
- The Hon. Mr Justice Hodge
President, Asylum and Immigration Tribunal

Plenary Discussion:

- In jurisdictions where tribunals are hearing cases related to government or local authority decision making is there scope to improve feedback given to government/local authorities in order to improve the standard of decision making or the end-to-end process overall?
- In jurisdictions where government or local authority decision making is not involved or where feedback is not appropriate how can tribunals improve the 'end-to-end process' and 'make it work better' from the point of view of the user?

Keynote Address - Tribunals - reform across the justice system

Lord Falconer of Thoroton

Lord Chancellor and Secretary of State for Constitutional Affairs

Introduction

Thank you Tony [Lord Newton]

[Lord Falconer offered thanks to Lord Newton, Baroness Ashton, Lord Justice Carnwath and Peter Handcock.]

Good morning. It is my pleasure to be here today, I don't meet with those involved with tribunals as often as I should like, so I am very very grateful for the opportunity to talk about tribunals to so many of you today.

It is however, a pity that this conference was not a couple of days later.

Tribunals and Courts Enforcement Bill

Were it so I could stand this morning and discuss with you, in detail, the legislative content of the Queens speech.

But you will understand that Parliamentary convention means I cannot pre-judge what Her Majesty will say. And therefore I can say no more about that.

What I can say is that the Government remains very keen to introduce the Tribunals and Courts Enforcement Bill. If it is introduced it will herald the latest chapter in the biggest change the Tribunal System has undergone for over 50 years. It will enable the Tribunals Service to deliver further improvements for the public that we all seek to serve.

But within the limitations of not being able to talk about the content of the Queens speech, what I want to do this morning is:

1. first discuss the importance of Tribunals,
2. second put the reform of Tribunals system and across the justice system into context, and
3. lastly, explain the role of Tribunals in this reform.

1. Importance of Tribunals

Tribunals are, and you know better than I, a significant part of the justice system making a significant contribution. They deal with over 500,000 cases a year, more than any other branch of the justice system. Often cases which involve the most vulnerable in society. Those who have been victims of crime, victims of persecution, of discrimination, of unfair treatment. Or disputes over benefit entitlement, tax, asylum or employment. Put in these terms, Tribunals are one of the most visible aspects of the justice system - you are more likely as a member of the public to have direct experience of a Tribunal than any other part of the justice system.

As such, the public need confidence that they can obtain justice in their dealings with the state and in their workplace. They need the safeguards that tribunals provide. They need access to institutions that enable them to resolve their disputes quickly, fairly and proportionately. And in a way which makes for them, the individual, the problems manageable.

Management of dispute resolution is the strength of the tribunals. From their early formation as institutions that administered justice, both Franks and the Donovan Commission identified that they were an excellent way of delivering justice which is 'easily accessible, simple, speedy and inexpensive.'

They were designed as places that the ordinary citizen could go, present their grievance, and if there was merit to their claim, obtain justice. Accessible institutions. Often investigative not adversarial.

They are places where justice is administered by those with an expert knowledge of the area causing the grievance. Places where justice is done quickly. Places where justice is done in a way which is understood, simply.

The creation of the Tribunals Service, in April, has, I believe, reinforced these admirable qualities. It signalled the intention of Government to have a Tribunals Service, which would resolve disputes quickly, fairly and economically. Above all it has ensured that Tribunals are seen, clearly and unequivocally, as a key part of the justice system.

And it is opportune at this moment to offer my profound thanks to the Council on Tribunal for the support they have offered over the past two years. I am particularly grateful for the attitude of the Council. It has embraced change in the tribunal system with real vigour and real enthusiasm.

And having a support like that makes changes easier and much more credible.

The Council is moving ahead with its own agenda to turn itself into the Administrative Justice and Tribunals Council. And without conceding an inch of its independence or integrity, it has become a very valued critical friend to us as we transform tribunals.

I also wanted to pay tribute to the number of organisations, some of which are represented here today, who provide advice and support to many members of the public taking claims to the tribunals. Their work is invaluable. And throughout the changes and transition, the support and guidance those organisations here have offered to those in need has been vital. I am very grateful.

Through the Tribunals Service we have brought much needed coherence to the system, and with that we have brought greater transparency to the delivery of administrative justice. The public can have full confidence that justice is not only being done, but that they can see it being done. This is not a cliché. It is at the heart of what Tribunals have to do.

Further to this we have ensured that the tribunal judiciary are now under the leadership of Lord Justice Carnwath. They are demonstrably independent of the Government. It is right that this has happened and it strengthens our commitment to increasing the public confidence in that part of the justice system. It remains of enormous importance that the unique ability tribunal judiciary have to talk, enquire and to suggest resolution, in a way which is different to normal judiciary, is not lost. The value they bring through being approachable, through making hearings easy to understand and through preventing tribunals being weighed down by legalistic arguments and lawyers is something to be celebrated and something to be protected.

2. Reform in context

The major reform that the Tribunals system has undergone is not reform in isolation. Reform has, and continues to happen, right across the justice system as we strive to increase public confidence in the justice system.

As Lord Denning rightly noted '*Justice is rooted in confidence*'.

We want to ensure there is public confidence in the delivery of justice.

That is why we have overhauled the Courts system and created Her Majesty's Court Service, an executive agency with total and direct accountability for the courts. That is why we have made significant constitutional changes to the role of the Lord Chancellor, changes which ensure that there is complete confidence in the integrity of Lord Chancellor, his role and in the lasting independence of the judiciary. That is why we have looked again at Legal Aid, to

ensure that the public can have confidence that public money is being used in the best and most effective way.

And that is why we continue to look for further ways to increase confidence. We have launched community justice centres, centres which are designed to work within the community and deliver justice in a way which works for the community, and perhaps most importantly, in a way which the community has trust and respects. We have instigated pilots which aim to deliver criminal justice, simply, speedily and summarily. The question of proportionate justice is not for Tribunals but also for the criminal courts. And we are pushing forward with plans to reform and improve the legal services system. Reforms for lawyers and for the system, which have at their core a desire to ensure the public are protected and have access to services.

Tribunals remain a key part of this reform agenda. Indeed much has already been achieved. But we must not think that this is the end of reform for the Tribunals. We must maintain the momentum.

Tribunals have a vital role to play, it is a unique role.

They deliver justice in a different way to other parts of the system. But this difference is their strength. This difference must be protected. This difference must be effectively utilised as we seek to deliver a change in the public's experience of justice.

3. Role of tribunals in reform

Could I turn to how I think this change can be achieved. It can, I believe, be achieved through finding new and better ways of working; through innovation; through using the flexibility the tribunals system provides; and through legislating to open up further opportunities.

As I have already said, I cannot confirm whether there will be legislation forthcoming. But if there was it would open up the possibility for greater flexibility. People in the tribunals could do more. But regardless of this, it is important to be clear, legislation can only provide the foundation for change. It cannot provide the impetus.

That will only come from a move to more fully deliver justice in a way which connects and resonates with the public. From a move to ensure the reputation of the tribunals remains one which has the confidence of the public. And which the public hear more and more about. We want the public to know particular disputes can be resolved in way which they can have confidence that they are getting the best deal.

There needs to be a move to better administrative processes. Processes which ensure the smooth delivery of justice. Processes which minimise duplication and which make the most of a move to joined up ways of working.

We must move towards a modern and effective IT system. We must move increase awareness of the services that tribunals provide. And we must make access to those services as easy and as simple as possible.

There needs to be better case management. Of those which apply to tribunals and of those which really do need resolution before a tribunal.

This will help tribunals to deal with cases quickly and effectively. It will minimise delay for those who need to bring a case before the tribunal.

There needs to be more proportionate dispute resolution. Our vision is to see much greater variety of modern and cost-effective methods to resolve disputes. Not added-on to a standard hearing process but real alternatives which people will willingly use - mediation; early neutral evaluation; conciliation, supported by good independent advice and interactive web-based information.

We need dedicated, good quality, multi-jurisdictional centres. Centres which are designed and located according to user need. Centres which provide accommodation which is of a high standard. Centres which are accessible to all.

I believe multi-disciplinary hearing centres are vital if we are going to deliver a tangible breakthrough in the public's experience of courts and of tribunals. They provide a visible symbol of the move towards putting the public first.

My vision is also for staff, judges and non-legal members to play an increasingly flexible role which best harnesses their talent and expertise.

We will not have rigid demarcation, I hope, between jurisdictions. Judgecraft skills I believe are transferable from one jurisdiction to another.

It is absolutely essential in the public interest that tribunals have a high level of expertise in complex and technical issues. But I would expect the many very able people who now work in tribunals, and who will be working there in the future, to be able to master more than one subject-area, and to be able to deal with straightforward matters across a range of jurisdictions.

I expect that as new systems and skills develop there will be less sitting in hearings, listening to oral advocacy. Judges will be leaders and managers of people as well; indeed many in tribunals already are. They will be instrumental in setting priorities, dealing with the legal issues, guiding and supporting multi-skilled teams in delivering justice.

Conclusion

This is a challenging vision. There is much to be done. But it is a vision, I firmly believe, which is achievable.

The reforms we are proposing for the Tribunal system are not in isolation. They are part of, as I say, wider reforms. Reforms that are taking place right across the justice system.

They rightly recognise that tribunals are an enormously important, indeed vital, part of the justice system. That the influence they have as for public confidence cannot and should not be underestimated.

And because of the impact tribunals can have, it is imperative that tribunals deliver that confidence.

I am confident that everyone involved with the tribunals system is more than capable of delivering reform. And that they are keen to do so. My confidence is grounded in the successful contribution you here all made to the creation of the Tribunals Service. Success that provides a solid foundation from which move forward.

A move forward to the possibility of further reforms, reforms which would be the most significant for 50 years. Reforms which will provide a tremendous opportunity for the Tribunals system to develop, to innovate and to deliver high quality service for the public.

Tribunals are not the only part of the justice system that is changing. Other parts are changing as well.

But tribunals can play a hugely influential role in making a wholesale breakthrough in public confidence.

“Right First Time”

The Rt Hon. Lord Justice Carnwath
Senior President of Tribunals Designate

Introduction

- Role of Senior President may be about to become a statutory reality with the potential inclusion of the Tribunals, Courts and Enforcement Bill in Government's legislative programme.
- Unique opportunity to take part in the process of creating the legal machinery needed to realise the bold aspirations of the Leggatt report and the White Paper.
- Tribunals are not just the means of correcting matters when things going wrong, but helping to get them right first time. As the White Paper puts it, tribunals are just one part of “...an end to end process...” – in which “...all the participants in the system have a duty to make it work better...”. “...‘Right first time’ means a better result for the individual, less work for appeal mechanisms and lower cost for departments...”
- Need to look more broadly than the relationship between tribunals and administrative decision-makers:
 - individuals who need better to understand their rights and obligations;
 - decision-makers, not just in the public sector, but employers, landlords, and so on - anyone with power to make decisions affecting our everyday lives; and
 - those involved in correction and review procedures machinery: internal reviewers, statutory adjudicators, ombudsmen, tribunals at first-tier and upper levels, and the courts all the way up to the House of Lords and (in some cases) the ECJ.
- Another important player will be the new AJTC – no longer concerned just with the tribunal stage, but with a statutory duty to oversee the whole of the administrative justice system, including decision-making within departments.
- Current Council on Tribunals offers the most comprehensive and authoritative source of information on tribunal affairs, and is an invaluable agency for monitoring of tribunals' performance.
- New AJTC will be an important partner for tribunals judiciary and Tribunals Service in transition to the new system – hopefully it will continue to act as a counterweight to the pressures for efficiency and economy and will always be ready to remind us that our primary purpose is to deliver justice.

“The Adjudication Gap”

- White Paper is one amongst a number of reviews, papers and pilot studies on the tribunals system that have been conducted over the years – these include a recent paper prepared by Professor Martin Partington of the Law Commission on ‘Feedback’ within the tribunals system.
- Another recent contribution is Sir Leonard Peach's Report on decision-making in respect of disability living allowance and incapacity benefit which was prepared in response to a 2003 National Audit Office report “*Getting it right – putting it right*”.
- One statistic illustrates the scale of the problem highlighted by the Report. A recent sample of Disability Living Allowance and Attendance Allowance cases revealed that over 70% of instances where the tribunal overturned the decision the reason was that the appellant had provided additional oral evidence at the hearing that was not available to the decision maker. If such figures are at all typical, there is great

potential for review procedures, internal or external, to pre-empt the need for a full appeal.

- A paper highlighted in the Peach Report entitled “*the Adjudication Gap*”¹ looks at the gap between decision-makers and tribunals in the field of social security. The paper traces the history of decision-making in the DWP and its predecessors over 50 years and notes the gradual downgrading of the decision-makers’ role.
- The Social Security Act 1998 abolished adjudication officers within the Department, and decision-making was transferred nominally to the Secretary of State, but in practice exercised by a new body of departmental “decision-makers”. At the same time, the Department started to withdraw from regular participation in the tribunal process: “...*It had been routine for local offices to have appeals officers who checked decisions under appeal; revised them if need be and attended the hearing to explain and, if need be, defend the decision. They were able to relay information and advice back to the decision makers thus improving the quality of decision-making generally....*”.

Case-management and Feedback

- Tribunals have a significant contribution to make in terms of improving decision-making processes within departments, both by efficient case-management of individual cases, and by effective feedback arrangements.
- An example of case management can be seen in the work of the “conference registrars” at the Australian Administrative Appeals Tribunal. Their job is to establish direct contact with the parties, usually at a personal meeting, to discuss and define the issues in dispute, identify further evidence to be gathered, and explore whether the matter can be settled. This provides an excellent opportunity for the parties to evaluate the core evidence at an early stage. Last year, 78% of the 7,500 applications handled by the Tribunal were disposed of without a formal decision on the merits.
- There are lessons for us here. Key features seem to be personal contact with someone who understands the issues, and continuity of contact. What matters is the confidence that comes from continuing contact with an identifiable person or team. Whether or not we adopt the same model, I am sure that we need to devote more of our judicial and administrative resources to active case-management.
- There have been various pilot schemes to encourage “early dispute resolution” (EDR) (current studies in the ETS and Appeal tribunals) - need to build on this experience. But EDR should be seen not just as an optional add-on, or a one-off intervention - should become an ordinary part of the process of case-management from initial decision to final disposal. There should be no adjudication gap.
- The process of feedback is also important. A tribunal’s primary mechanism to provide feedback is through judgments in individual cases. This may be particularly useful in the early days of a new jurisdiction. For example, the first important case in the Financial Services and Markets Tribunal provided an opportunity for the Tribunal to comment on the way in which the FSA had investigated facts. Following this advice, and in response to concerns from the regulated bodies, the FSA commissioned a review of its enforcement processes.

¹ *Nick Warren*, Regional Chairman of the Appeals Service (North West Region), wrote a review of changes in decision-making practices in the Department for Work and Pensions. His review was subsequently adopted as a discussion document by the President and Regional Chairmen of the Appeals Service (now the Social Security and Child Support Appeals Tribunal) and was reproduced in the May 2006 edition of *Adjust*. It has also appeared in the *Journal of Social Security Law* (2006) 13 JSSL, Issue 2.

- More general feedback can be provided through the annual reports of the tribunals. Currently, only the President of the Appeals Service is under a statutory duty to provide feedback on departmental decision-making, through an annual report to the Secretary of State for Work and Pensions. Other presidents use their reports for more informal comments. However, reports of this kind are of little use unless the Department has effective machinery in place for responding to the points made.
- The draft Tribunals, Courts and Enforcement Bill is less prescriptive in that it only requires the Senior President to make an annual report to the Lord Chancellor covering such matters as the Senior President wishes to bring to the Lord Chancellor's attention, and matters which the Lord Chancellor asks him to cover. We need to give more thought to the contents of this report, and how to ensure that it is a basis for a constructive exchange with departments and other agencies.
- An important aspect of feedback is bringing attention to problems caused by the legislation itself, and making recommendations for change. I hope that in due course we can establish machinery for giving effect to such changes quickly and efficiently.
- There are concerns about the threat that the feedback process may pose to the perceived independence of tribunals but should be no real difficulties provided the process is transparent and even-handed.
- Can be no objection to tribunal representatives attending training events for departmental decision-makers, provided they are willing to do the same for similar events for those advising claimants. Regular user-group meetings can improve understanding between all interested parties - may be a role for the new AJTC to act as an objective and independent mediator.

The upper tribunal and beyond

- Authoritative and realistic guidance on general points of law or practice from the higher courts can make a useful contribution to the process of getting things right first time - but where should it stop?
- What is the point of multiple appeals? How much do they cost and who pays for them? Is it appropriate that relatively minor issues should be considered at up to 5 levels of appeal? Surely simple questions should be capable of a speedier and cheaper solution – and if the concern is that the law is unclear for future cases, there should be a simpler mechanism for amending it.
- The new tribunal system is designed to provide two levels of appeal from the original decision-maker: one as of right, on fact and law; and a second, with permission, on points of law only. With one qualification, that seems to me a fair and proportionate. The one qualification is that the appeal to the upper tribunal should include points of general principle, not limited to law. Provision of guidance on factual issues of general application in specialist fields is a very important part of the role of an upper tribunal.
- There will still be the possibility of appeal on points of law, with permission, to the Court of Appeal and thence to the House of Lords. But if the Upper Tier is doing its job properly onward appeals should be exceptional, and confined to points of general importance. I hope that the new Act will make clear that appeal to the Court of Appeal will be exceptional, subject to the “second appeal” criteria that currently apply to appeals from the courts – permission should be granted only on points of general importance or for other “compelling circumstances”.

Conclusion

- With the Tribunals Service now in place, and the prospect of a Tribunals Bill to provide a coherent legal structure, we have no excuse for letting the process of change drift from study to study.

Looking to the future

The Rt Hon. The Lord Newton of Braintree OBE, DL
Chairman, Council on Tribunals

- Last year spoke about the Council's evolving role as an Administrative Justice and Tribunals Council, or AJTC. Since then the Department of Constitutional Affairs has published the Tribunals, Courts and Enforcement Bill in draft - contains the intended statutory provisions in relation to the AJTC.
- In the light of the Government's declared intentions for the Council we have made a conscious effort to make plans, which fully embrace wider administrative justice issues. We are drafting a revised role and purpose statement as well as reviewing our strategic objectives for the next few years.
- Many of the themes will still be recognisable including references to the Council's long-standing values of "openness, fairness and impartiality", which rightly remain as key elements of the values of the AJTC. We will also be placing a strong emphasis on the needs of the user in the system.
- Moving into the future we will be working towards developing a coherent set of principles in relation to administrative justice as a whole, and promoting collaboration and the sharing of good practice across the sector.
- This annual conference is itself an example of the kind of collaboration we hope to promote, bringing together, as they do, members of the tribunal judiciary with ombudsmen, complaint handlers, interested academics, representatives of the advice sector and others.
- Already beginning to take forward work in a number of areas including:
 - a pilot to map the administrative justice 'landscape', working in partnership with the British and Irish Ombudsman Association;
 - a survey to establish the range of proportionate dispute resolution techniques being employed in the various jurisdictions; and
 - work to examine the use of video-linking in tribunals, with a view to identifying some good practice guidance.
- Also planning to explore use of tribunal user liaison groups, how they operate and how effective they are from the perspective of users and the organisations that represent them. Hope that the outcome of this work will enable us to identify some examples of best practice. It is important that we engage with the representatives who attend user group meetings to obtain their views on how the groups function and how effective they are.
- Council will continue to make visits to observe tribunal hearings but is keen to do more with members' visit reports, which, to date, have largely been reserved for the Council's information only. Leggatt Report suggested that the Council should seek to do more with its reports as a form of feedback to tribunals.
- Currently developing a new visit report form with a view to sending our reports of members' visits to the Presidents and Heads of the tribunal systems we have visited as well as to tribunal Chairs. We hope that these new arrangements will be introduced from April next year.
- In fulfilling its statutory function of "...keeping the administrative justice system under review..." the AJTC will also play a role as a "critical friend" of the Tribunals Service – it is in areas such as the development of key performance indicators for the tribunals within the Tribunals Service that the Council can seek to have a positive influence, particularly with a view to promoting the interests of users.

- Keen to see Council's views carry proper weight within government - pleased to note that the draft Bill empowers the Council to "...scrutinise and comment on legislation, existing or proposed, relating to tribunals or to any particular tribunal...".
- Will be working closely with DCA to develop a new Code for Consultation on legislation, including guidance on how government departments should seek the Council's views on legislative proposals affecting or relating to tribunals.
- Keen to ensure that moving forward Council should be aiming to demonstrate that it is fulfilling the role envisaged for it in the Leggatt Report as "the hub of the wheel of administrative justice".

Right first time: stimulating improvements in decision making through feedback

His Honor Judge Michael Harris

President, Social Security and Child Support Appeals

A statutory duty to report

- Social Security Act 1998 vests a duty to report in the President of the Appeals Tribunal. The relevant legislative provision states that ‘...*Each year the President shall make to the Secretary of State a written report, based on the cases coming before appeal tribunals, on the standards achieved by the Secretary of State in the making of decisions against which an appeal lies to an appeal tribunal: and the Secretary of State shall publish the report...*’

How did the duty come about?

- The current statutory duty resulted from a 1996 Consultation Document (I know I put white paper on the slide, but that was wrong!) entitled “*Improving decision making and appeals*”, which included a proposal to abolish the adjudication service and its Chief Adjudication officer. When the government implemented this proposal the Chief Adjudication officer’s duty to report on the quality of decision making in the Department was vested instead in the President of the Appeals Tribunal.

How is the duty met?

- We rejected the anecdotal approach and instead commissioned statisticians to devise a questionnaire and establish a statistically valid sample. The questionnaire, which has been amended and improved over the years, is completed by selected tribunals. The results, once the data has been collated and analysed, are reported to the Department quarterly on an informal basis and in a published report every July. The July report is laid before the House and retained in the Parliamentary library.

What are the key questions that reflect on the quality of decision making?

- The Appeals Service overturns a very large number of decisions – it varies from benefit to benefit but broadly speaking about 40% of decisions made by the Department are overturned and the question is: why does this occur?
- Some of the reasons that decisions are overturned include:
 - additional evidence – the tribunal is often given additional evidence which was not available to the original decision maker – 69% now, 50% in 2000 - suggests the Department should be looking at ways to ensure it receives this evidence at an earlier stage;
 - accepted evidence – the tribunal accepts evidence that was available to the original decision maker but was not accepted - 26% now, 35% in 2000;
 - incorrect weight – the original decision maker didn’t give facts or evidence sufficient weight - 18% now, 36% in 2000;
 - different view – the tribunal sometimes forms a different view of the same evidence - 36% now, 55% in 2000;
 - different view on medical evidence – the tribunal forms a different view of the same medical evidence - 21% now, 33% in 2000;
 - under-estimated disability - the medical report under-estimated the severity of the disability – 22% now, 34% in 2000;
 - avoid the appeal - there was inadequate investigation or reconsideration of the appeal by the decision makers – 23% now, 26% in 2000.

Have these reports had any effect?

- There has been an overall improvement in decision-making over the years, however, it is difficult to say whether individual reports on their own make a significant difference. However, their cumulative effect and the fact that reports are made regularly serves as a constant reminder to the Department that there is room for improvement in the decision-making process.
- This message is also reinforced by other reports that have been commissioned periodically such as the 2003 Report of the National Audit Office, reports produced by the Departments own standards committee and the recent report of Sir Leonard Peach.
- By and large the conclusions in these reports are readily accepted by Ministers and senior officials within the Department and there seems to be a genuine desire that the reporting process should continue. However, the difficulty seems to be in achieving practical change at ground level.
- Nevertheless there has been an improvement over the last few years– seeing signs in the Department and in particular parts of the Department where real efforts are being made. For example, the Disability and Carers Service have recently taken some really important measures including a system of accreditation for their decision makers, introduction of an improved and more systematic approach to the gathering of evidence and its evaluation and a more robust review mechanism.

The reporting duty as part of a package

- The statutory duty of the President to report on decision making forms part of a package of measures for feedback to decision makers. Other initiatives include:
 - administrative and judicial liaison groups set up with the department that deal with all sorts of issues and provide informal feedback, seek to improve submissions and help to smooth and speed up the process.
 - ADR or early neutral evaluation is also likely to provide a really excellent source of feedback; and
 - participation in policy initiatives.

The new statutory obligation

- The new statutory obligation in the Bill provides that: “...*Each year the Senior President must give the Lord Chancellor a report covering, in relation to the cases coming before Tribunals –*
(a) matters that the Senior President wishes to bring to the attention of the Lord Chancellor, and
(b) matters that the Lord Chancellor has asked the Senior President to cover in the report.
(2) The Lord Chancellor must publish each report given to him under subsection (1)...”

Right first time: stimulating improvements in decision making through feedback

Tony Redmond

Local Government Ombudsman and Chair, British and Irish Ombudsman Association

- Core business that Local Government ombudsmen perform under the Local Government Act 1974 is investigation of maladministration causing injustice. Other very important role relates to ombudsmen's ability to provide advice on improving administrative practices within local authorities they investigate.

1. Ombudsman Decisions and Good Practice Guidance

- Public Reports – reports which the ombudsmen issue where there is significant maladministration causing injustice - a remedy is provided. The remedy usually includes recommendations for improvements in administrative practices within the local authority.
- Local Settlements (decision letters) - the vast majority of decisions made by the ombudsmen relate to local settlements made where there is some agreement between the parties about the likely/appropriate remedy - also identify any shortcomings or weaknesses in administrative practice or service delivery, which could be improved.
- Digest of Cases - also produce a digest of cases - a sample of key cases experienced by the ombudsmen thought to be worth putting in to the public domain – these provide a sample of the different types of complaint and also allude to the fact that improvements in practice are appropriate.
- Advice and Guidance – a recent initiative has been visits by ombudsmen staff to local authorities to provide advice and guidance on effective complaints handling leading to appropriate outcomes – councils recognise the experience and expertise of the ombudsmen and their capacity to contribute to good practice.
- Annual Letters - introduced 3 years ago – annual letters analyse the complaints received and decisions made for each organisation within the jurisdiction of the ombudsmen – serve as a vehicle for suggesting improvements in the way in which councils make decisions and services.
- Special Subject Reports - special reports are utilised by many ombudsmen already – provide an opportunity to look at the evidence and trends that are emerging from different types of complaints and report to the public as a whole on general areas of concern to the ombudsmen - 6 reports have been presented over the last 3 years – each of them highlight problems with decision making processes in the relevant local authorities and identify major problems in the way that some local authorities deal with legislation, regulations or codes of practice – through these reports the ombudsmen have been able to advocate significant improvements in the administrative practices of the relevant councils so that there is no recurrence of that particular fault.

2. Special Reports

- Some areas where the special reports process has been able to identify problems and seek to rectify them are as follows:
 - school admissions - a number of weaknesses were occurring in the way in which admissions and appeals procedures were being followed in local authorities and governing bodies (which are admissions authorities) – these were identified through the special reports process;
 - benefits – found that there were no standard for dealing with appeals in respect of benefits – maximum of 28 days was advocated – a move

supported by the Council on Tribunals and subsequently by the Department for Work and Pensions;

- parking – in the context of decriminalised parking there is an opportunity for local authorities to take the appeals out of the system where they might have otherwise been dealt with in the formal legal system – this has actually helped significantly and the ombudsmen were able to put forward proposals as to how local authorities could improve the way they dealt with such cases;
 - neighbour nuisance and antisocial behaviour – the ombudsmen have looked to provide suggestions as to ways in which local authorities can handle these particularly difficult and sensitive areas of service better;
 - grave yards - there have been real health and safety issues in relation to the care and maintenance of graveyards - again the ombudsmen have been able to assist in providing feedback through the special reports process
- There are further special reports due to be released in relation to:
 - governance in partnerships;
 - telecoms masts which are major anxiety to many members of the public; and
 - handling of planning applications by local authorities.

3. *Decision making*

- Issues of concern where the ombudsmen are investigating complaints about decision making include:
 - the question of vires – there are some situations where there might be an unlawful decision being taken
 - reasonableness and proportionality
 - information being misleading or inadequate in terms of enabling a decision to be made properly
 - timing of the decision – delay is often a serious issue for those affected by a decision
 - lack of consultation - this occurs particularly in areas such as planning
 - lack of transparency
 - decisions compromised or undermined by the personal / prejudicial interests of council members
 - failure to observe the council's constitution - all local authorities now have a constitution – the question is whether they actually make sure the governance arrangements that underpin their decision making are sound?
 - the question of delegation - ombudsmen are concerned to make sure that delegation is properly practised and is in accordance with the constitution;
 - reports, background notes and preambles to decisions - ombudsmen look very carefully to see what lies behind a decision to ensure it is sound.

Where deficiencies in decision making are identified in the course of an investigation, through a process of feedback, ombudsmen advocate changes to ensure good practice is observed in the future.

4. *Conclusion*

- Ombudsmen play a very important part in the development of good administration – looking at improvements in administrative practice not only within our own organisations but in those we investigate
- The strength of the ombudsmen's position is the ability to provide an independent, detached perspective on how to achieve better decision making.
- Some questions to consider in relation to the process of feedback include:
 - when advocating good administrative practice and improvements in service delivery how far do we go?
 - is there a point at which our involvement/intervention in the way administrative practices are provided can lead us into difficulty in terms of independence?
 - what status should be attached to advice/feedback?

Right first time: stimulating improvements in decision making through feedback

The Hon. Mr Justice Hodge
President, Asylum and Immigration Tribunal

Asylum & Immigration: A Context

- We look here at feedback in the context of immigration/asylum and how the Asylum and Immigration Tribunal (AIT) manages its relationship with the DCA the Home Office and others against the background of its need to preserve independence
- The AIT's sponsoring Department is the Department of Constitutional Affairs and there is a significant level of liaison, across all levels of the AIT, with the Tribunals Service, senior departmental officials and occasionally ministers. By contrast the role of the Home Office is as a party before the AIT.
- The AIT spends a lot of time seeking to preserve its independence and impartiality:
 - the Home Office and UK Visas do recognise the independence of the AIT but nevertheless appear to wish to influence its approach;
 - the AIT also faces criticism from representatives and advisers who are regularly questioning its independence.
- The AIT operates within a context where it is subject to:
 - a greater level of legislative change than most tribunal jurisdictions
 - political pressures in relation to the views of both politicians and members of the public in general with regards to the numbers of asylum seekers and immigrants.

Asylum & Immigration Caseload

- The AIT has a large caseload – it has moved from a cottage industry to big business and this year alone will deal with over 130,000 immigration appeals
- The AIT works within an appeals culture, which does not exist anywhere else within the tribunals system. If there is the any chance of taking a case further, and sometimes none, the chance is taken. Adverse decisions in asylum appeals are routinely challenged as are decisions made in-country about immigration issues.

Asylum & Immigration Judiciary

- The response to the increasing caseload has been a significant increase in judicial appointments to the AIT. There are now nearly 200 salaried judiciary, over 450 fee paid judiciary and about 60 non-legal members.

Asylum & Immigration Decision-Making

- The decisions that are considered by the AIT are those made by in country officials from the Immigration and Nationality Directorate (IND) about:
 - asylum and human rights cases;
 - immigration cases
 - deportations and bail refusalsas well as decisions under the Immigration Rules made by out of country decision makers in Embassies and High Commissions all around the world in relation to:
 - family visit visas
 - refusals of entry clearance

Improving Decision-Making

- Within IND, initial decision making has improved over the years – for example, reason for refusal letters are now very much better argued than they were in the past. Improvements have come about as a result of pressures from both the AIT and appellants as well as other external pressures.
- The traditional way in which courts/tribunals seek to improve decision making is by reporting their decisions and by referring case by case determinations back to the

original decision maker – however, it is not always clear that decisions do reach original decision makers such as entry clearance officers in overseas posts.

- It is an important function of any tribunal which uses a case reporting system, that it establishes precedents to guide the judiciary. This will be an important function for the upper tier Tribunal in due course.
- In terms of informal feedback, the AIT periodically sends the Home Office examples of good and bad decisions and provides feedback, both to the Home Office and to representatives about good and bad representation.
- Formal feedback operates in the AIT system through program boards. The Tribunal is represented on at least one program board that has Home Office representatives on it where consideration is given as to how the system as a whole might be improved.
- The Tribunal also conducts regular stakeholder meetings both locally and nationally. These provide an opportunity for two-way feedback.

Risks to Independence

- The AIT is periodically asked by the Home Office to provide judges as trainers. However, there are concerns about the risks this poses to the independence of the Tribunal. It could be problematic to involve tribunal judiciary in induction training for people newly coming in to a system where they will be acting as one of the parties before the Tribunal. It is equally difficult where tribunal judiciary are asked to provide training to applicant representatives.
- However AIT judiciary do attend and speak at conferences for organisations such as the ILPA and there is a certain amount of informal liaison at local level with the presenting officers units - periodically resident senior immigration judges of the AIT visit presenting officers' units to discuss current issues within the system. But this is done on a very informal basis.
- The AIT also experiences pressure from departmental officials to make site visits – there are often requests from overseas postings to have Tribunal judiciary visit in order to find out about the difficulties experienced in these areas. However, the AIT prefers to ask parties to present any problems they are having as evidence based information before the Tribunal
- There are many risks to the independence of the Tribunal judiciary. The AIT is concerned to ensure that it is not seen as in anyway biased towards one party or another.

Improving Performance

- Finally, while improving the performance of original decision makers is desirable, it is also important to improve the performance of the Tribunal itself.
 - We have an extensive training programme well funded and resourced and led by a training judge
 - A Legal and Research Unit maintains the case law on our website, provides regular updates and library services for the judiciary
 - Regular appraisals are undertaken including of salaried judges
 - Mentoring advice and assistance is given to immigration judges by a core of designated judges with some managerial responsibilities.
 - We write judgements to tight time limits and there is a good deal of informal case discussion as a result.
 - Decisions by the higher courts in our field are made widely available
 - All our judiciary are committed to working hard to improve the overall quality of the determinations we produce

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The Tribunals Service will no doubt play an important role in the areas of training and appraisal, management and customer satisfaction surveys. It will of course control the overall budget, which we all need to keep a careful eye on. We need proper funding to do justice.

Plenary Discussion: Feedback

Some of the key themes arising out of the afternoon group discussions on improvements in feedback and 'end to end' processes included:

Ways in which feedback may be given:

- Decisions of tribunals are published and act as precedent - these decisions themselves can contain feed back.
- Mechanisms for sharing experience and knowledge built up within the tribunals system can include both statistical and anecdotal approaches – an anecdotal approach can be more accessible to decision makers in some cases – drawing attention to specific problems can be of more benefit than providing the results of generalised surveys.
- Publication of annual and statutory reports.
- Web-based case studies are a useful way of disseminating information and explaining a best practice approach.
- Incorporating reviews of case studies can form a useful part of training for initial decision makers.
- Informal feedback can also be provided through discussions, conferences, stakeholder meetings and training.

The advantages of feedback

- Feedback is vital to service and decision making improvement.
- There is an expectation that decision makers will take account of tribunal decisions - in making improvements to the general system.

The limitations of the feedback process

- While the decisions of tribunals may themselves contain reasons to feed back it is a question of how this is best communicated to those actually working at the coalface – in many instances it is questionable whether any feedback provided ever gets back to decision makers and links are necessary to ensure this happens.
- It may be unfair to be critical of a decision maker in a decision where the original decision maker is not there to answer for him/herself.
- Questions can arise about precisely who the decision maker is and the level within an organisation at which feedback should be pitched.
- Where tribunals only issue short or no statement of reasons for their decisions it means that the detail on the law and/or processes, which could act as feedback, is not evident.

Hindrances and difficulties with the feedback process

- The issue of independence and impartiality of tribunals impacts upon the feedback process. However, where feedback is provided on a more informal basis such as through conferences/ discussions / stakeholder meetings it is not generally regarded as a threat to perceived impartiality.
- Transparency in the feedback process is vital as any perceptions that a tribunal is getting too close to the decision maker may erode independence.
- The actual culture of a recipient Department can serve as a hindrance to an effective process of feedback – it depends on the cultural mindset of the Department that the Tribunal is dealing with.
- Engagement with user groups can be problematic given the clear vested interests that are involved.

Ways of making improvements to feedback

- It might be a helpful first step to ask the agency responsible for the decisions under appeal about the kind of feedback, which would be most helpful to them.
- Research should be conducted into the mechanisms that are currently in place to offer general/case specific feedback.

- There should be a review mechanism within Departments to look at feedback received from tribunals/complaints handlers and improvement made as necessary.
- Individual decision makers require simplified information and there needs to be transparent systems of exchange of information to help them learn from tribunal decisions.
- There should be monitoring to ensure that Department's respond appropriately to feedback and tribunals are kept abreast of the responses to their feedback.
- Feedback might be better received if there were also opportunities to feedback views to the tribunal i.e. two way feedback.
- Feedback should be about cases, systems, resources and processes i.e. it should be both strategic and detailed - strategic feedback should go to policy makers/managers and detailed feedback should go to original decision makers
- Tribunals can play an important part in feeding back concerns and pointing out anomalies, which will assist when the legislation/policy/ procedural rules are reviewed - however, query the extent to which tribunals should be involved in advocating/lobbying for policy change?
- The feedback system should be set up in such a way as to encourage learning - there should be incentives operating within Departments to encourage them to take feedback on board.
- Whilst different solutions have been developed by various tribunals, it would be useful to develop a common model of what is expected, from the point of view of tribunals, in terms of responses to feedback.
- There may be a role for the AJTC in usefully drawing together all existing feedback mechanisms to assist in establishing a standard framework for feedback mechanisms and/or developing a best practice model/framework.
- The President of the new Tribunals system under the Bill will have an important role to play in encouraging a consistent approach to feedback.
- Any feedback protocol that is developed will need to be sufficiently flexible to accommodate the varying needs of the different jurisdictions within the tribunals sector.
- Lessons can be learned from the approach to feedback that is taken by ombudsmen and complaint handlers - to this end it would be helpful to have a co-operative approach to working with ombudsmen etc. to provide feedback common to decision making bodies.
- The Tribunals Service's role in reporting on systemic performance should reduce anxieties about the propriety of informal feedback – furthermore the weight of feedback through annual reporting may be increased now that it will be channelled through the Service

Improvements to the end to end process

- Early identification of new or emerging issues with a view to the creation of appropriate precedents on novel or contentious points.
- Greater use of legal and lay advisory services at a pre-hearing stage could assist in improving the end to end process – however, these services would need to be adequately funded.
- Greater use of alternative dispute resolution mechanisms, where appropriate, including mediation and early neutral evaluation and the adoption of a more inquisitorial approach by tribunals.
- The implementation of modern IT systems could allow for the more rapid dissemination of best practice, but could also impact on the flexibility to deal with needs at a local level.
- Feedback to stakeholder groups is still important even where there is no relevant sponsoring government Department – in a party to party context it is important for tribunals to obtain feedback from users about how the system is working.
- User surveys can be a useful way of obtaining feedback and the results can, if appropriate, be shared amongst a range of jurisdictions.

- Adequate funding and maintenance of resources such as handbooks, guidance and case law reports remains important – it is also important to ensure these resources are accessible to users and users are aware of their availability.
- Retention of skilled human resources, continual staff training and staff involvement in intensive case management are key in targeting the needs of users
- Visibility is important in improving accessibility of tribunal services to users – options can include press, comprehensive websites, open days and DVDs.
- Streamlining administrative processes to allow for options such as online filing can achieve improvements in the end to end process
- Flexibility as to location and venue for tribunal hearing can improve accessibility for tribunal users.
- User friendliness, impartial assistance for unrepresented applicants, reduced formality and involvement of lay members.
- Greater use of empirical research to inform improvements/reform.
- Simplification of the underlying law and legal processes would allow users greater clarity in understanding their position without the need to resort to extensive specialist advice.
- The process for reform of procedural rules should be streamlined and multiple sets of analogous rules rationalised.
- Improved mechanisms for enforcing decisions.

External factors which may contribute to bad decision making/impact of the end to end process

- The politics surrounding some jurisdictions, such as immigration, can have a significant impact on the efficacy of the decision making process.
- Legal aid reform and cut backs in funding to advice services such as ACAS - as the availability of legal aid and other advice services decline, there is likely to impact on issues such as the number of successful appeals – it will not always be possible to simply rely on statistics as a measure of good decision making.
- The wider context in which decisions are made – for example the cultural mindset of the Departments tribunals are dealing with, can complicate/impact upon the process of feedback - sometimes it is not appropriate to provide feedback to certain kinds of agencies/Departments as their culture is not conducive to getting feedback through.
- Poor quality legal representation can mean that applicants are not able to present their cases as clearly and as thoroughly as they otherwise might.
- Provision of feedback may not, in itself, cure administrative problems. Analysis of the cause of problems is also required. There may be a role for the new AJTC in making a broad-brush assessment of wider issues and providing general feedback to stakeholders in the tribunals system as necessary.