

# Redressing Users' Disadvantage

Proposals for Tribunal Reform in Northern Ireland



Gráinne McKeever | Brian Thompson

Published by Law Centre (NI)

# **Redressing Users' Disadvantage**

## **Proposals for Tribunal Reform in Northern Ireland**

Gráinne McKeever and Brian Thompson

## CONTENTS

<b>ACKNOWLEDGEMENTS .....</b>	<b>6</b>
<b>EXECUTIVE SUMMARY AND RECOMMENDATIONS .....</b>	<b>7</b>
<b>Part 1: THE PROJECT, TRIBUNALS AND THEIR DEVELOPMENT .....</b>	<b>17</b>
The project .....	17
<i>Background</i> .....	17
<i>Aims and outcomes</i> .....	19
Tribunal development .....	20
<i>National Insurance</i> .....	21
<i>The rise of the welfare and regulatory state</i> .....	21
<i>The Franks report</i> .....	22
<i>Developments post-Franks</i> .....	23
<i>Northern Ireland</i> .....	24
<b>Part 2: USERS' VIEWS OF TRIBUNALS IN NORTHERN IRELAND .....</b>	<b>27</b>
Methodology .....	27
Research findings .....	28
1. <i>Why go to a tribunal?</i> .....	28
2. <i>Expectation of the tribunal hearing</i> .....	29
3. <i>Pre-hearing advice</i> .....	30
4. <i>Representation</i> .....	33
5. <i>Role of the tribunal</i> .....	37
6. <i>Experience of the hearing</i> .....	41
7. <i>Challenges faced by users</i> .....	44
8. <i>Independence</i> .....	47
9. <i>Timings and delays</i> .....	49
10. <i>Alternative methods of resolving cases</i> .....	51

11. <i>Training of tribunal members</i> .....	55
12. <i>A unified tribunal system?</i> .....	57
13. <i>Oversight and accountability</i> .....	59
Conclusion .....	59
<b>Part 3: THE SCOPING STUDY</b> .....	<b>61</b>
Introduction .....	61
<i>The Council on Tribunals</i> .....	62
<i>The Leggatt reform package</i> .....	63
An agenda for tribunal reform in Northern Ireland.....	64
<i>Users</i> .....	64
<i>Processes</i> .....	67
<i>Judicial leadership</i> .....	72
<i>Structures</i> .....	74
<i>System review</i> .....	76
<i>A proposed 'roadmap'</i> .....	80
<b>APPENDICES</b> .....	<b>84</b>

## ACKNOWLEDGEMENTS

The authors would like to thank Professor Michael Adler (University of Edinburgh), Siobhan Broderick (Northern Ireland Courts and Tribunals Service), Right Honourable Sir Patrick Coghlin (Lord Justice of Appeal), Kevin Higgins (Advice NI), Louise Kyne (Citizens Advice Northern Ireland), Conall MacLynn (President of the Appeals Tribunal for Northern Ireland), Eileen McBride (President of Industrial and Fair Employment Tribunals), Damien McCormick (President of Special Educational Needs and Disability Tribunal), Kenny Mullan (Social Security Commissioner for Northern Ireland) and Patricia Smyth (former Vice-President of Industrial and Fair Employment Tribunals) who acted as a research advisory group and offered constructive advice on the research, including an initial draft. Membership of the group does not constitute an endorsement of the research and its recommendations which are the responsibility of the authors alone.

We gratefully acknowledge the Nuffield Foundation which has funded this research.

Law Centre (NI) has not only commissioned but facilitated the research, and we are most grateful for their help with the project, particularly for the support and assistance provided by Les Allamby and Ursula O'Hare.

Finally, and most importantly, we are deeply grateful to all of the users, representatives, tribunal panel members, judiciary, officials and academics who so willingly gave up their time to assist the research by agreeing to participate in the interviews.

## THE AUTHORS

Gráinne McKeever is a Senior Lecturer in the School of Law, University of Ulster, and Vice-Chair of the Management Committee, Law Centre (NI).

Brian Thompson is a Senior Lecturer in the School of Law, University of Liverpool, and a Member of the Administrative Justice and Tribunals Council.

**Disclaimer:** Although Gráinne McKeever is a member of Law Centre (NI)'s Management Committee and Brian Thompson is a Member of the Administrative Justice and Tribunals Council, the authors have written this report in their personal capacity and their views should not be taken to be those of Law Centre (NI) or the Administrative Justice and Tribunals Council.

### **Gráinne McKeever**

School of Law, University of Ulster, Shore Road, Newtownabbey BT37 0QB

### **Brian Thompson**

School of Law, University of Liverpool, Liverpool L69 7ZS

## EXECUTIVE SUMMARY AND RECOMMENDATIONS

### The project

#### *Background*

‘...tribunals have generally had much less attention than courts, whether civil or criminal. They have... been a bit of a Cinderella in our system of justice.’ (*Lord Tony Newton, then Chair of the Council on Tribunals, 2006*)

Tribunals are bodies which have been established as an alternative to the courts for the resolution of disputes between people and public bodies, and disputes between parties arising in the work-place.

This project seeks to provide a package of reform proposals for tribunals in Northern Ireland. It was prompted by Law Centre (NI)’s perception of disadvantage faced by users of tribunals in Northern Ireland compared with users in Great Britain. Reform in Great Britain has taken place following the Leggatt Review of Tribunals published in 2001. The intermittent nature of devolution in Northern Ireland, combined with the lack of agreement on devolution of policing and justice powers, meant that tribunal reform in Northern Ireland was in a state of limbo.

The project was devised before a gathering in pace of developments in Northern Ireland which included agreement to transfer administrative support for tribunals from their sponsoring Departments to the Northern Ireland Court Service. Devolution of policing and justice occurred on 12 April 2010 and the new Department of Justice has acquired as an agency the re-titled Northern Ireland Courts and Tribunals Service. The Hillsborough Castle Agreement specifically authorises the Department of Justice to take forward the ongoing programme of tribunal reform.

There are two elements to the project. The first is a small, qualitative study of users of three different tribunals – Appeal Tribunals (social security), Industrial and Fair Employment Tribunals and the Special Educational Needs and Disability Tribunal – to understand the users’ experience of tribunals in Northern Ireland. This involved interviews with tribunal appellants, claimants and respondents and was supplemented by interviews with tribunal representatives and tribunal Chairs and members. In total, 36 interviews were conducted between August 2009 and February 2010. The research aimed to establish what issues tribunal users face in Northern Ireland. This part of the project was developed in response to the lack of research on the experiences and perceptions of tribunal users in Northern Ireland.

The second element is a scoping study, which explored in interviews – in Northern Ireland, with court and tribunal judiciary and Department officials and, in Great Britain, with an official and academics – the parameters, operational issues, possibilities and difficulties of tribunal reform, as well as the current gap in the arrangements for the oversight and accountability

of tribunals. These interviews were conducted between August and November 2009. The jurisdiction of the Council of Tribunals and its successor, the Administrative Justice and Tribunals Council, does not extend to Northern Ireland and there has been a long-standing deficit in the oversight of the work of individual tribunals. At present, only a few tribunals in Northern Ireland issue an annual report, none publish a business or development plan with strategic objectives and the gathering of data on tribunals is time consuming and difficult.

### *Tribunal development*

Tribunals have grown dramatically during the 20th century, their paradigm composition being a legally qualified Chair and two other members with specialist expertise in the matters which are dealt with by the tribunal. Their perceived advantages over the courts are their expertise in the subject matter and the procedures which they employ, which are intended to be more 'user-friendly' than those used in the courts. It is these two latter features which help promote two other perceived advantages of tribunals over courts, their speed and lower cost.

While tribunals may have been regarded by the officials who created them as machinery for administration, the view of their official reviewers is that they are machinery for adjudication, modelled on but different from courts, sharing their independence from the executive branch.

A concern about the independence of tribunals was given raised significance when the Human Rights Act 1998 was enacted as it conferred a right to proceedings before an independent and impartial tribunal in the determination of criminal charges and civil rights and obligations. This and their haphazard growth prompted the 2001 review conducted by Sir Andrew Leggatt, which did not include those tribunals within the competence of the devolved institutions in Northern Ireland, Scotland and Wales. Leggatt was concerned about this and hoped that reform in those jurisdictions would complement and not impede his proposals. His major proposals were to remove tribunals from their sponsoring Departments, so that responsibility for policy and operations would be placed in a Department under the Lord Chancellor which would not be a party in any of the disputes before the tribunals; to place all tribunal members under the judicial leadership of a Senior President; to improve the information, advice and support which users would receive enabling them to represent themselves where possible; to improve the efficiency of tribunals' administration and to use active case management so that hearings could be conducted more effectively with issues and the relevant evidence having been identified, which might also obviate the need for a hearing. The system of tribunals, and of administrative justice as a whole, was to be kept under review by the Council on Tribunals.

These proposals were mostly accepted and policy was developed in a White Paper published in 2004 which presaged the Tribunals Courts and Enforcement Act 2007. A unified Tribunals Service was established in April 2006 for UK-wide tribunals, and an Administrative Justice and Tribunals Council was created under the 2007 Act, replacing the Council on Tribunals and tasked with keeping under review the administrative justice system as a whole.

While many of the tribunals in Northern Ireland mirror their counterparts in Great Britain, reform in Northern Ireland has not followed this pattern. This project aims to provide an evidence base to shape the direction of tribunal reform in Northern Ireland, and the report uses the findings from the users' and scoping studies to create a set of recommendations for tribunal reform.

## The users' study

A number of themes emerged from the findings of the users' study:

*Why go to a tribunal?* - Users went to tribunal to address a grievance. Users did not always distinguish between their grievance and the legal basis of their claim, suggesting that there is a need for a better explanation of the decision which is contested and advice on whether a claim can be pursued.

*Expectation of the tribunal hearing* - The majority of tribunal users did not know what to expect at the tribunal hearing, and were often fearful of the experience, suffering stress, sleeplessness and nausea as a result. Users related this fear to not knowing what the physical environment of the tribunal would be like, as well as being concerned at whether they would be able to participate in the hearing and provide the tribunal with information that was required.

*Pre-hearing advice* - Users who accessed advice prior to the hearing did so from a wide range of sources – specialist, personal, lay and professional. The most effective advice was provided by experienced advisers (legal or lay) who could give advice on the legal issues. Many of the users who did not take advice before the hearing either were not aware of what advice existed, how to access advice, or regarded the cost of accessing legal advice as prohibitive. There was a general view that pre-hearing advice, while useful and potentially empowering, was not a substitute for representation.

*Representation* - The main advantage of representation was in providing an equality of arms between parties, and enabling parties to present their cases effectively. Where the quality of representation was poor, this was seen as being extremely unhelpful, and often disadvantageous for users. Poor representation could be provided by lawyers who did not understand the nature of tribunal proceedings. The quality of representation from voluntary sector organisations was also variable, but good quality specialist advice was seen as highly beneficial. Where users were represented, their view was that they could not have proceeded effectively without representation. The majority of those who were not represented stated that they would seek representation if they had to go to the tribunal again.

*Role of the tribunal* - The role of the tribunal, and particularly the Chair, was seen as being to enable individuals to present their case, to ensure that the full facts of the case were explored and that parties were not disadvantaged by lack of representation, and to remain impartial. The participation of lay panel members was seen as beneficial to the tribunal in providing a multidisciplinary perspective and avoiding an overly legalistic approach to cases. Where lay members did not appear to have an equal input into proceedings, their role was perceived as being less valuable.

*Experience of the hearing* - Users were divided between those who viewed the hearing as better than they had expected (less formal, more relaxed) and those for whom the experience was as expected, or worse (more formal, structured, intimidating). Users who were nervous or uncomfortable could be put at ease by the approach of the panel; those who had bad experiences at the hearing tended to blame the attitude and approach of the tribunal panel. The

more formal the hearing was, the more off-putting this was for users, and many users felt unprepared for the level of formality.

*Challenges faced by users* - Users faced challenges at successive points: prior to making an appeal/claim, prior to the tribunal hearing, during the hearing, and after the hearing. One of the main challenges that were identified for appellants/claimants was getting to a hearing: in recognising the right to appeal/claim and feeling able to exercise that right. Users faced challenges at the initial decision making stage, in being able to complete the necessary documentation to take an appeal/claim, and in understanding the case papers. Post-hearing, there could be difficulties with the tribunal decision, either in terms of delay in getting a decision, or in understanding the decision. There were also procedural challenges for Special Educational Needs and Disability Tribunal (SENDIST) appellants in getting the tribunal's decision implemented, and for Industrial/Fair Employment Tribunal (I/FET) users in appealing the tribunal's decisions.

*Independence* - Users wanted an independent tribunal process, which they saw as linked with (and indistinguishable from) fairness and impartiality. Views on the independence of the tribunal by users were dependent on the outcome and experience of the hearing. Where users had a positive outcome, they were more likely to view the tribunal as independent; where the outcome was negative, they were more likely to call the independence of the tribunal into question. However, where parties found the experience of the tribunal hearing to be negative, they were likely to see the tribunal as lacking independence, even where the outcome of the case was not known or was positive. The attachment to sponsoring Departments was considered to be problematic by social security appeal tribunal members and SENDIST members, but not I/FET members.

*Timings and delays* - Users identified difficulties in relation to the timings and delays within the tribunal processes with the length of time it took to get a hearing, the length of the hearing, and the length of time taken to get a decision.

*Alternative methods of resolving cases* - Overall, there was evidence of a willingness or desire to have a means of talking to 'the other side' prior to hearing, but there were mixed views on whether existing mechanisms to achieve this were appropriate. Where no formal alternative dispute resolution mechanisms existed, this was seen by some as regrettable. Users indicated a desire for an alternative to a tribunal hearing, either as an alternative means of resolving their case or to enable them to decide whether a case should be pursued.

*Training of tribunal members* - Both legal training and judge-craft training were regarded as vital by members. Legal training was regarded as a priority by most members, and this included training on the tribunal procedures. Where training was ad hoc rather than systematic, members were more likely to regard training as inadequate, and where training was not appropriately pitched to take account of differing levels of experience, it could be regarded as being of limited value. Judge-craft training was also seen as vital, particularly for new or inexperienced members. There appears to be a gap in training on diversity and equality issues.

*A unified tribunal system?* - The advantages of a unified system which were identified were the creation of a pool of members from which to draw on for different tribunals, the potential to create career paths for Chairs and an increased opportunity for members to maintain their skills by sitting more frequently. The disadvantages identified included concerns that there

would be a loss of expertise, and a loss of control by individual tribunals over their own procedures. There was a concern that the level of training required to work within a unified service would be problematic for part time and lay members. A further disadvantage was a loss of intimacy in moving from a small system to a large one, making access more problematic. There was strong agreement that proper training could facilitate cross-ticketing of members between different tribunals. There was debate over where I/FETs should sit within a unified system. There was no discussion over whether an Upper Tier should be created, but the views on the need for an Employment Appeal Tribunal which arose from discussions on challenges faced by users would be a relevant consideration here.

*Oversight and accountability* - There was strong support from tribunal members for an oversight and accountability body for NI tribunals, as a means of developing and maintaining standards for tribunals.

## The scoping study

### *Oversight and accountability*

The interviewees were of the view that there was judicial accountability, and normal financial accountability through usual departmental arrangements, but not all of the tribunals produced annual reports. There was no oversight of the development of tribunals, which was ad hoc, with disparate approaches to their running, and the viewpoint of users has not been gathered. The interviewees thought that there was a need for a Council on Tribunals such as the one which had existed from 1958 to 2007 in Great Britain, which kept the composition and working of tribunals under review, bearing in mind the users' perspective, and provided advice and constructive criticism.

### *The Leggatt reform package*

The Review of Tribunals conducted by Sir Andrew Leggatt - *Tribunals for Users: One System, One Service* - which reported in 2001, and covered 70 different bodies, had a clear focus on users. Concerns about tribunals' independence and impartiality and their incoherent proliferation led to proposals for *structures*. These changes would facilitate the provision of a better service to *users* through administrative efficiencies and *judicial leadership* to be responsible for well trained tribunal members who might be using *processes* other than oral hearings. This new tribunal framework would be kept under *system review* by the Council on Tribunals whose remit would be expanded beyond tribunals to the other component parts of the administrative justice system.

Leggatt's proposals were accepted and then elaborated on in a White Paper, *Transforming Public Services: Complaints, Redress and Tribunals*, which presented tribunal reform in the context of an improvement in public services to which it would contribute. The Leggatt reform package was accepted by the interviewees in the scoping study. The views of the interviewees, particularly those of the users, demonstrated that Leggatt's concerns for users were equally valid in Northern Ireland.

The recommendations are presented around the themes of users, processes, judicial leadership, structures, system review and a roadmap indicating tasks and a schedule for their implementation.

## Recommendations

### *Users*

The Department of Justice must adopt a user focus and ensure that tribunal policy and delivery are co-ordinated across the different areas of civil and administrative justice. There has been a lack of information for users on decisions and how they may be challenged, as well as a lack of, and lack of information about, advice and support if an appeal or challenge is sought. There is a 'hotch-potch' of appeals from, and challenges to, tribunal decisions which should be made coherent. Tribunals are different from courts and this should be reflected in their hearings being held in an appropriate user-friendly environment. Users should be surveyed about their experience of tribunals, advice and support services, and user groups should be established.

- 1. Users must be the focus of the Department of Justice and its policy and executive units in relation to tribunals and administrative justice.***
- 2. Clearly expressed information about challenges to decisions must be made available in a range of languages and formats detailing types of remedies, their possible outcomes, processes, what users can expect and what they must do to pursue a challenge.***
- 3. Tribunal users should be given access to independent, good quality advice, support and representation, and the documentation and processes for claiming such advice and support must not be complex.***
- 4. Tribunal users should have a right to an accessible and affordable appeal on a point of law.***
- 5. The tribunal environment should be user friendly and appropriate to the hearing of a dispute, and users should be consulted on what may be considered to be user friendly tribunal accommodation.***
- 6. In addition to regular customer experience surveys of tribunals and the creation of users' groups, consideration should be given to the commissioning of research into awareness and experience of tribunal appeals and the associated advice, information and support services.***

### *Processes*

While tribunals are designed to be used by people who are not represented, in some, such as Industrial and Fair Employment Tribunals, the law is so complex that while the conduct of the hearing can be facilitative, it may not erode the disadvantage of a lack of competent legal representation. Proportionate Dispute Resolution is a structured approach which seeks to prevent disputes through clear frameworks of rights, to reduce disputes by information and advice and to resolve disputes by using a variety of methods which seek to match the method to the dispute and by reserving oral hearings before tribunals or courts for those cases in which hearings are necessary or appropriate.

Tribunal rules in Great Britain have been revised so as to include an overriding objective to deal with cases fairly and justly, and sets of tribunal specific rules have been reduced to sets of generic rules. There is a duty to innovate in dispute resolution and experiments in techniques such as early neutral evaluation in disability living allowance cases and judicial mediation in employment discrimination cases have been mixed. They may achieve some cost savings but not significantly so, although there is some indication that other benefits may be gathered from experimentation.

- 7. Rules of procedure for tribunals should incorporate an overriding obligation to deal with cases fairly and justly and consideration should be given to devising generic rules.***
- 8. Consideration should be given to adopting the overall approach of Proportionate Dispute Resolution which seeks to prevent, reduce and resolve disputes.***
- 9. Policy for, and provision of, information, advice and support including legal representation should be developed across criminal, civil and administrative justice, which includes tribunals.***
- 10. There should be a duty to develop innovative techniques for the resolution of disputes by courts and tribunals.***

### *Judicial leadership*

The Lord Chief Justice of Northern Ireland is responsible for the welfare, training and guidance and deployment of judges in the courts. The Senior President of Tribunals carries out this role for the UK-wide tribunals. It is important that tribunals should have leadership which is constitutionally appropriate and they should also be guaranteed judicial independence. There is a need for tribunal training to be improved. Northern Ireland was in the vanguard in using a Judicial Appointments Commission to make tribunal appointments but not all tribunals are covered by this legislation and, of those that are covered, this does not always include all categories of tribunal members.

- 11. The guarantee of judicial independence should be extended to all tribunal members in Northern Ireland. The Lord Chief Justice should be responsible for maintaining appropriate arrangements for their welfare, training and guidance and for their deployment in the tribunals of the Northern Ireland Courts and Tribunals Service.***
- 12. Training for tribunal members should be competency based and this should be provided by the Judicial Studies Board of Northern Ireland and by other appropriate providers covering generic judge-craft and jurisdiction specific knowledge and skills. In addition to induction and continuing education and training, this should include support through mentoring, performance management and appraisal.***
- 13. The Lord Chief Justice should be responsible for arrangements for the appraisal of tribunal members.***

***14. Appointments to all Northern Ireland tribunals should be by the Northern Ireland Judicial Appointments Commission following competitions for which they are responsible.***

***15. Tribunal members should continue to be deployed in more than one tribunal jurisdiction where they have the relevant expertise and training.***

### *Structures*

The agreement for the transfer of administrative support to tribunals has gone through two of the three planned phases, however, not all tribunals were included in this programme. Responsibility for tribunal policy as well as administrative support should be transferred to the Department of Justice from the current sponsoring Departments which will provide coherence. The size of the Northern Ireland tribunal sector is rather smaller than that of Great Britain so restructuring may not be required but the utility and feasibility of a Northern Ireland Amalgamated Tribunal with first instance and appellate divisions should be the subject of a consultative study. This could also consider other aspects of the reforms relating to the granting of a right to an appeal on a point of law, such as whether this should also exclude a right to judicial review.

***16. Those tribunals for which the Department of Justice is not completely responsible should be transferred to it from their current sponsoring Departments.***

***17. Consultation should be conducted immediately to determine if it would be feasible and useful to:***

- ***restructure the tribunals into an amalgamated tribunal or a civil and administrative tribunal; and***
- ***create an appellate division for an amalgamated tribunal or a civil and administrative tribunal and whether such an appellate division should be given a judicial review jurisdiction.***

### *System review*

Leggatt had proposed that the Council on Tribunals have its remit extended to cover not only tribunal justice but administrative justice. It was recognised that in disputes between people and public bodies there were a variety of methods for redress to put things right, that they formed part of the administrative justice system which also included the arrangements for decision-making by public bodies affecting people and that the two were linked. If both were viewed together then a dynamic relationship between them could mean that lessons learned from putting things right could assist in getting things right first time. The Tribunals, Courts and Enforcement Act 2007 replaced the Council on Tribunals with the Administrative Justice and Tribunals Council which has both a Scottish and a Welsh Committee. The creation of a Northern Ireland Committee was canvassed and was the preference of most interviewees. There were, however, problems and it was thought that the balance of advantage lay in creating a Northern Ireland Administrative Justice and Tribunals Council which should have links

with the body in Great Britain. This new body should keep under review the tribunal reforms as well as relating them to the rest of the administrative justice system in Northern Ireland and doing so with an emphasis upon the users' perspective.

**18. A Northern Ireland Administrative Justice and Tribunals Council (NIAJTC) should be established with a remit to keep the administrative justice system of Northern Ireland under review, to consider ways of making the system accessible, fair and efficient, to advise Northern Ireland Ministers and the Lord Chief Justice of Northern Ireland on the development of the system, to refer to those persons proposals for changes in the system and to make proposals for research.**

**19. The NIAJTC should be appointed by the Northern Ireland Minister for Justice after public competition. The membership should not number fewer than four nor more than six persons, with the Northern Ireland Ombudsman as an ex officio member. In the consultation exercise on the reform proposals, views should be sought on whether the UK Parliamentary Ombudsman should be (a) a statutory member or (b) invited to attend as an observer, and how (a) might be done given the constitutional position.**

**20. The NIAJTC should be able to report on matters within remit causing concern at its own initiative and be asked to report on matters referred to it by Ministers. It should prepare three year strategy plans and annual action plans, consult the Civil Justice Committee, the Social Security Advisory Committee and the Northern Ireland Law Commission, and publish annual reports.**

## A proposed 'roadmap'

While some aspects of tribunal reform will not require legislation, other aspects will and so will the wider context of administrative justice. Accordingly, a schedule should be agreed which will allow some things to take place immediately or in the near future, while preparations for a Tribunals Bill should be put in train, some of which can be given to an informal but representative Administrative Justice Steering Group. This group can conduct work on possible tribunal reforms as well as paving the way for both the creation of a NIAJTC and a better understanding of the administrative justice system. This preparatory work enables the Department of Justice officials to continue with other work and then prepare a Tribunals Bill and the necessary pre-legislative consultation to which the steering group's work will have made a substantial and time-saving contribution. After enactment, there will still be some implementation to be done, which could be significant if it includes the restructuring of different tribunals into a Northern Ireland Amalgamated Tribunal.

**21. Pending the preparation and enactment of legislation on tribunal reform in Northern Ireland, action on the provision of information, advice and support to tribunal users and improving the training of tribunal members can be conducted without legislation, and the Minister of Justice should appoint an Administrative Justice Steering Committee, chaired by a judge, with members drawn from tribunal presi-**

*dents, civil servants, the advice community, academics and the Northern Ireland Ombudsman and perhaps also the Comptroller and Auditor General. This group should be responsible for conducting consultations on structural changes to tribunals - amalgamation with first instance and appellate divisions. This work should be done within six months. In addition, the Steering Group should pave the way for the work of a NIAJTC by commissioning a study to map the administrative justice system in Northern Ireland and its boundaries with UK-wide bodies as well as conducting work which will promote greater understanding of the administrative justice system, the relationships between the various remedies within the system for putting things right and the relationship between that and getting things right.*

**22. Legislation should be enacted by 2012:**

- *to provide that all new tribunals will be the responsibility of the Department of Justice;*
- *to provide judicial leadership of tribunals by the Lord Chief Justice;*
- *to extend the guarantee of judicial independence to tribunals;*
- *to provide procedural rules to include the overriding objective of dealing with a case fairly and justly;*
- *to establish a NIAJTC; and*
- *to provide for structural changes to tribunals, if supported in consultation.*

## Part 1: THE PROJECT, TRIBUNALS AND THEIR DEVELOPMENT

### The project

#### *Background*

‘...tribunals have generally had much less attention than courts, whether civil or criminal. They have... been a bit of a Cinderella in our system of justice.’

This quotation from Lord Tony Newton, then Chair of the Council on Tribunals, was made in the second reading debate in the House of Lords on the Tribunals, Courts and Enforcement Bill.<sup>1</sup> The debate was part of a tribunal reform process in Great Britain which started in 2000, with a review published in 2001, and the implementation of which was phased over the period 2006-2010. Tribunals, as Lord Newton’s likening to Cinderella suggests, may not have had as much attention as her two sisters in the legal system but that does not mean tribunals are unimportant. For some people, their first or only contact with the legal system will be with a tribunal, in particular those which deal with social security appeals and disputes arising in the workplace as the caseload statistics in Figure 1 show (overleaf).

Law Centre (NI), through its experience of advising and representing tribunal users, has been concerned that tribunal users in Northern Ireland are disadvantaged when compared with tribunal users in Great Britain. These disadvantages have arisen as a result of devolution. The terms of reference for the 2001 Review of Tribunals excluded consideration of those tribunals within the competence of the devolved institutions in Northern Ireland, Scotland and Wales, however, Sir Andrew Leggatt, the former judge who conducted it, did include a chapter on devolution. His major concern was to achieve coherence for the tribunals within his remit and also between them and those outside his remit:

“The process is complex because devolution has been achieved in different ways in each country as regards jurisdiction, powers, policy responsibilities, legislation and operational matters. There are tensions between general (devolved) administrative justice matters and the reservation of UK tribunals.”<sup>2</sup>

An example of devolutionary tensions that may affect tribunal reform is section 87 of the Northern Ireland Act 1998, which provides:

The Secretary of State and the Northern Ireland Minister having responsibility for social security (“the Northern Ireland Minister”) shall from time to time consult one another with a view to securing that, to the extent agreed between them, the legislation to which this section applies provides single systems of social security, child support and pensions for the United Kingdom.

<sup>1</sup> HL Debs., Vol. 687, cols 767-8, 29 November 2006.

<sup>2</sup> Sir A. Leggatt, *Tribunals for Users: One System, One Service*, (London: TSO, 2001), para.11.3.

**Figure 1: Tribunals and timetable for transfer to NI Courts & Tribunals Service**

<b>FIRST PHASE September 2009</b>			
<b>Tribunal name</b>	<b>NI Department</b>	<b>Staff</b>	<b>Cases received 2009-10</b>
Lands Tribunal	Department of Finance and Personnel	5	180
Care Tribunal	Department of Health, Social Services and Public Safety	1	10
Mental Health Review Tribunal	Department of Health, Social Services and Public Safety	3	319
Tribunal established under Sch 11 Health and Personal Social Services (NI) Order 1972	Department of Health, Social Services and Public Safety	-	-
Special Educational Needs & Disability Tribunal	Department of Health, Social Services and Public Safety	2.5	79
<b>SECOND PHASE April 2010</b>			
Appeals Tribunals	Department for Social Development	92	13,436
Rent Assessment Panel	Department for Social Development	2	19
<b>THIRD PHASE April 2011</b>			
Industrial & Fair Employment Tribunals	Department for Employment and Learning	62	4,762
Planning/Water Appeal Commissions	Office of the First and Deputy First Minister	20	515
Police Medical Pensions Appeal Tribunal	Northern Ireland Office	-	-
<b>NICTS tribunals</b>			
Social & Child Support Commissioners		} 7 staff working for the two tribunals	300
Pensions Appeal Tribunals			290
Traffic Penalties Tribunal		1	500
NI Valuation Tribunal		1	25
Criminal Injuries Compensation Appeals Panel Northern Ireland		8	612
<b>New tribunals established April 2010</b>			
Charity Tribunal		-	-
Health & Safety Tribunal		-	-
<b>Ministry of Justice tribunal</b>			
National Security Certificate Appeal Tribunal		-	-

**Notes on Figure 1:** the figures for the tribunals listed above have been provided by the NICTS, with the exception of figures relating to Industrial and Fair Employment Tribunals, and Planning/Water Appeal Commissions. Figures for the latter were taken from the PAC website,<sup>3</sup> and confirmed with the PAC. Figures for Industrial and Fair Employment Tribunals were provided by the Office of Industrial and Fair Employment Tribunals. In the absence of reporting requirements for tribunals, obtaining accurate figures for the tribunals is problematic. For some tribunals there is a lack of (publicly available) current data or a lack of uniformity or consistency on how tribunals report statistics, making it much more difficult to get an overall view of tribunal workloads and to make comparisons between different tribunals.

<sup>3</sup> Planning Appeals Commission, *Latest Statistical Information Relating to Planning Appeals*, available at <http://www.pacni.gov.uk/appeals>.

Section 87 recognises long-standing parity arrangements in social security between Northern Ireland and Great Britain, which may potentially affect arrangements for appealing social security decisions to the extent that, in some areas of tribunal policy, there may need to be parity with Great Britain for matters that are the responsibility of the devolved institutions in Northern Ireland. Such a process of consultation would be complex in a stable devolutionary settlement but is even more difficult when devolution is switched on and off. Even when devolution has been ‘on’, it has been incomplete, because agreement had not been reached to devolve powers for policing and justice. This led to what one of the project’s interviewees termed a ‘state of limbo’. When devolution was suspended, ‘direct rule’ ministers did not want to take action which might restrict what could be done when devolution was restored, but the restoration of devolution did not initially include policing and justice. In effect this was a ‘double whammy’. This did not mean that there was no progress on tribunal reform but rather that progress has been very slow.

Law Centre (NI), together with the Appeals Service of Northern Ireland and the (then) Department for Constitutional Affairs, organised a conference on tribunal reform in November 2005. Following the conference, the Secretary of State for Northern Ireland announced in March 2006 his intention to introduce tribunal reform in Northern Ireland. Administrative support for tribunals was to be transferred to the Northern Ireland Court Service (NICtS) as part of a new Courts and Tribunals Service (NICTS) pending devolution of policing and justice.

New tribunals for parking adjudication and land valuations have been established under the auspices of the NICtS, an inter-departmental working group co-chaired by the Office of the First Minister and Deputy First Minister (OFMDFM) and NICtS was created, and discussions with individual government Departments about personnel and other administrative issues associated with changes to the administration of tribunals have been ongoing. In early 2009, a paper was submitted to the Northern Ireland Executive setting out a path for reform in the event of devolution of policing and justice and also in the event of devolution not occurring. This paper, which is not a publicly available document, was approved by the Northern Ireland Executive in June 2009.

In November 2008 the first stage of devolution of policing and justice was announced by the First Minister and Deputy First Minister. The announcement set out the process for devolution, although without a timetable, save that the current arrangements for policing and justice would end no later than May 2012. The NICtS would thus become part of the new Department of Justice with a new title – the Northern Ireland Courts and Tribunals Service – and given the responsibility of running all of Northern Ireland’s courts and tribunals.

### *Aims and outcomes*

This was the background to the Law Centre’s application to the Nuffield Foundation which awarded funding for this project in June 2009. The objective was to produce a report on tribunal reform which would serve as a basis for the development of tribunal reform policy and its implementation, whether or not policing and justice powers had been devolved. During the period of the research, the phased implementation for the transfer of administrative support

for tribunals from their sponsoring Departments to the NICtS started<sup>4</sup> and agreement was reached on the devolution of policing and justice. The Hillsborough Castle Agreement set 12 April 2010 as the date for devolution and the creation of the new Department of Justice Northern Ireland, and in its list of suggestions for necessary action which would support the agreed policies, 'building on the ongoing Tribunal Reform programme' was the first item.<sup>5</sup>

The project has two elements. The first is a small qualitative study of users of three different tribunals to understand the users' experience of tribunals in Northern Ireland. This involved interviews with tribunal appellants, claimants and respondents, and was supplemented by interviews with tribunal representatives and tribunal Chairs and panel members. The research was conducted with users of Appeal Tribunals (social security), Industrial and Fair Employment Tribunals and the Special Educational Needs and Disability Tribunal. The research aims to establish what are the issues facing tribunal users in Northern Ireland. This part of the project was developed in response to the lack of research on the experiences and perceptions of tribunal users in Northern Ireland. The second element, the scoping study, explored in interviews – in Northern Ireland, with court and tribunal judiciary and Department officials and, in Great Britain, with an official and academics – the parameters, operational issues, possibilities and difficulties of tribunal reform, as well as the current gap in the arrangements for the oversight and accountability of tribunals. The jurisdiction of the Council of Tribunals and its successor, the Administrative Justice and Tribunals Council (AJTC), does not extend to Northern Ireland and there has been a long-standing deficit in the oversight of the work of individual tribunals. At present, only a few tribunals in Northern Ireland issue an annual report, none publish a business or development plan with strategic objectives and the gathering of data on tribunals is time consuming and difficult.<sup>6</sup> This part of the research aims to establish what measures are required to address this oversight and accountability gap, and, together with the users' study, to make recommendations for a tribunal reform programme for Northern Ireland.

While the research focuses on Northern Ireland, we present a brief context of tribunal development and reform in Great Britain which is of relevance, as these developments frequently served as models for Northern Ireland.

## Tribunal development

The degree of attention directed towards tribunals since the start of the 21<sup>st</sup> century has been unusual. In the 20<sup>th</sup> century, there were two official studies of tribunals but the normal, and indeed slightly paradoxical, situation was that when not in the spotlight the number of tribunals was steadily increasing. If 'Cinderella' can be regarded as an 'unsung heroine' then that may help explain this mixture of relative obscurity and expansion. The growth of tribunals

---

<sup>4</sup> Transfer was to be implemented in three phases, the first two carried out using section 28 agreements of the Northern Ireland Act 1998 which provides for the transfer, in either direction, of functions of UK bodies and NI Departments. Here NI Departments were transferring to the NICtS which was an executive agency of the UK's Ministry of Justice. As devolution of policing and justice occurred before the third phase, this provides a different context for transfer through a Transfer of Functions Order passed by the NI Assembly. See Figure 1. This type of secondary legislation could also be the method for transferring responsibility for policy as well as administrative functions.

<sup>5</sup> Agreement at Hillsborough Castle, para. 7.

<sup>6</sup> See notes on Figure 1, above

surely means that they were successful and this success is due to their hybrid nature which the term administrative tribunal captures. They are bodies which resolve disputes and they have developed as part of administration because most commonly they are resolving disputes which arise in the course of a governmental scheme. Their members have been appointed because of their expertise in the matters which come before them and the procedures they employ are intended to be more ‘user-friendly’ than those used in the courts. It is these two latter features which help promote two other perceived advantages of tribunals over courts, their speed and lower cost. These factors may explain why the administrative tribunal has extended beyond ‘citizen and the state’ disputes such as social security to ‘party and party’ disputes such as those arising in the workplace.

Both of these tribunals illustrate an important aspect in the rise of tribunals, which is their differences from, and perceived advantages over the ordinary courts. It is thought dissatisfaction with the county court and the excessively legalistic manner in which lawyers conducted litigation over disputes for compensation arising ‘out of and in the course of employment’ under the Workmen’s Compensation Act of 1897 played a part in the creation of specialist tribunals in the early years of the 20<sup>th</sup> century which set their paradigm design characteristics.

### *National Insurance*

The National Insurance Act 1911 established a system which included provision for the resolution of disputes over the entitlement to, and amount of, benefits. Claimants for unemployment insurance who were dissatisfied with the decision by the insurance officer could require their case to be considered by a court of referees, with a Chair appointed by the Board of Trade, and two members, one each drawn from (a) a panel of employers and (b) a panel of ‘workmen’. The Board of Trade appointed the former panel and members of the latter panel were elected by ballot by the workmen in the relevant trades. There was a final right of appeal from the court of referees to an ‘umpire’ appointed by the Crown. These structural arrangements would become increasingly prevalent after the Second World War.

### *The rise of the welfare and regulatory state*

The growth of the welfare state brought with it a growth in the number of statutory schemes to be administered, and ultimately adjudicated. Important features of the welfare state in this regard were the social security benefits for unemployment, sickness, industrial injuries and national assistance. National Insurance Local Tribunals had replaced courts of referees in the 1930s; medical appeal tribunals would hear industrial injuries appeals, which had replaced workmen’s compensation; and all of these tribunals’ memberships had a lawyer chairman and colleagues with relevant experience, including doctors where medical expertise was required. Other developments in the social security field included the creation of war pensions following the First World War. Cases could be appealed to the Pensions Appeals Tribunal on questions of entitlement and assessment.

Regulatory tribunals for transport derived from the 19<sup>th</sup> century Railways and Canals Commission and then had expanded in the 1930s to provide new commissions for road traffic

(1933) and air transport licensing (1938). Regulatory oversight ranged into new fields including the control of furnished rents and the supervision of children's voluntary homes and also into the National Health Service where there were committees and a tribunal dealing with complaints and service issues arising out of the incorporation of medical practitioners from private practice into that service.

### *The Franks report*

The Crichel Down controversy in 1954 arose over the mishandling of dealings with people who had previously owned land by officials in the Ministry of Agriculture to which the land had been transferred. An inquiry found that there had been mishandling, bias and bad faith on the part of some named officials and a later inquiry determined that some of the deficiencies were due as much to weaknesses in departmental organisation as to personal fault. The Minister resigned, taking responsibility for the actions of his Department and officials.

Another outcome of this affair was the establishment of the Committee on Administrative Tribunals and Enquiries chaired by Sir Oliver Franks. The resulting report was a thorough examination of the constitution and working of tribunals, but not in Northern Ireland. Most of the recommendations made by Franks were accepted by government and implemented in the Tribunals and Inquiries Act 1958, including recommendations on the constitution of tribunals and the appointment and removal of Chairs by the Lord Chancellor and, in Scotland, the Lord President. Candidates for these appointments were to be legally qualified for appellate tribunals and preferably so for first instance tribunals. The recommendations on procedures before, during and after hearings followed on from the general characteristics of openness, fairness and impartiality, core values which became Franks' enduring legacy. This reflected a legal/judicial approach the committee had adopted. It compared two competing views about the nature and function of tribunals. One saw tribunals as part of the machinery of administration and the other as part of the machinery for adjudication. The committee came down firmly on the side of the latter, for which courts were the model. They agreed that the reason for the rise of tribunals as court-substitutes was their perceived advantages over the courts of speed, cost, accessibility, freedom from technicality and expertise. They appreciated that the courts would not be able to cope with the work currently done by tribunals if it was returned to them. Nevertheless they were of the view that

“as a matter of general principle we are firmly of the opinion that decisions should be entrusted to a court rather than to a tribunal in the absence of considerations which make a tribunal more suitable.”<sup>7</sup>

Unfortunately they did not elaborate on those considerations which favoured tribunals over courts.

The report recommended the creation of two Councils on Tribunals, one for England and Wales and one for Scotland, although the 1958 statute created one Council, with a Scottish Committee. Its tasks included keeping under review the constitution and working of tribunals, reporting on matters referred by Ministers, being consulted on procedural rules for new tribunals and, under a code of practice, it could be consulted on the creation of new tribunals. The Council's members would conduct annual programmes of visits to tribunals and inquiries

---

<sup>7</sup> Sir O Franks (Chair) *Report of the Committee on Administrative Tribunals and Enquiries*, (London: HMSO, 1957), Cmnd. 218, para. 38.

throughout Great Britain. The annual reports would detail their work and in special reports matters of particular concern would be addressed or guidance offered.

### *Developments post-Franks*

Developments in the 1960s saw the establishment of Mental Health Review Tribunals to review the compulsory detention of patients under the mental health legislation, the expansion of the Industrial Tribunal dealing with employment disputes and the creation of arrangements to deal with immigration appeals and the Supplementary Benefit Appeals Tribunal. New tribunals continued to be created throughout the 20<sup>th</sup> century, including Fair Trading, Consumer Credit (1970s); Schools Admission and Exclusion Appeals, Special Educational Needs (1980s), Data Protection, and Meat Hygiene Appeals (1990s) and Financial Services and Markets and Gender Recognition (2000s). In the longer established areas of social security and property there was rationalisation from the 1980s onwards which merged several social security tribunals and property valuation tribunals.

Tribunals continued to be attached to government Departments whose decisions they reviewed, creating two problems. First, since tribunals were created in response to particular requirements within different government Departments, there was an absence of a systematic and coherent framework in which tribunals were developed across all Departments. Secondly, although the 1958 Act recognised the judicial character and function of tribunals, questions over their independent status came to the fore following the implementation of the Human Rights Act 1998, which incorporates the protections within the European Convention on Human Rights. Of particular concern was compliance with Article 6 of the Convention, which confers a right to a fair and public hearing by an impartial and independent tribunal when facing a criminal charge, and for the determination of civil rights and obligations. These concerns led to the Leggatt Review of Tribunals in 2001.

### *Leggatt review*

The quite prescriptive terms of reference for Leggatt's review sought proposals for a coherent framework for tribunals which would meet legal, political, and performance standards. In his report, Sir Andrew Leggatt decided that structural change was a key factor, in that the removal of tribunals from their sponsoring Departments to a Tribunals Service in the Ministry led by the Lord Chancellor would ensure their actual and perceived independence, and would also enable efficiencies in administration, the use of property, IT systems and in the deployment of administrators and tribunal members.<sup>8</sup> The model for this was the Appeals Service which had merged five different social security tribunals in which there was a President, responsible for the members, their training and deployment, and a chief executive of an executive agency who was responsible for the administrative support. The new agency would have a Senior President as well as jurisdictional presidents and a chief executive. Rationalisation would also apply to onward appeals and judicial review through an appellate tribunal which would mirror the divisions of groupings of related tribunal jurisdictions in the lower tribunal

---

<sup>8</sup> See footnote 2.

tier.<sup>9</sup> Leggatt also recommended that users should be provided with better information and advice and support, and that the Council of Tribunals should continue to keep the tribunal system under review but that its remit should be widened to encompass administrative justice.

The review also proposed three tests for deciding whether tribunals rather than courts should decide cases. In citizen and state cases, direct participation by the citizen is desirable, so

“The use of tribunals to decide disputes should be considered when the factual and legal issues raised by the majority of cases to be brought under proposed legislation are unlikely to be so complex as to prevent users from preparing their own cases and presenting them to the tribunal themselves, if properly helped.”<sup>10</sup>

Expertise is the second reason why cases should be considered for allocation to a tribunal. The mixed membership allows not only for a range of relevant expertise but a multi-member tribunal can also promote accessibility as it can facilitate users representing themselves.<sup>11</sup>

The third reason is expertise in administrative law and the ability of tribunals to deal with issues of fact and point of law arising from decisions by regulatory and administrative authorities. Accordingly when governmental schemes are being considered ministers should start with the presumption that appeal routes should be created using tribunals rather than the courts on the basis of accessibility.

“It should not be regarded as satisfactory to leave judicial review as the citizen’s only recourse, since that is expensive and difficult for the unassisted.”<sup>12</sup>

While Leggatt can be said to be confirming tribunals as machinery for adjudication with a necessary independence from Departments, he was also concerned that tribunals should work with Departments, in particular feeding back information for decision-makers so that they can learn the lessons of adverse decisions.<sup>13</sup> The Leggatt review’s proposals were mostly accepted by the government which responded with a White Paper where tribunal reform was placed in the wider context of reform of public services and then passed in the Tribunals, Courts and Enforcement Act 2007.

## *Northern Ireland*

Tribunals in Northern Ireland are, in the main, part of a separate legal system from their counterparts in Great Britain, although the tribunal landscape in Northern Ireland may appear similar to that of Great Britain, as it was prior to the Leggatt Review. There are some exceptions to this basic rule, as a result of the constitutional division between reserved and excepted mat-

---

<sup>9</sup> See Appendix A for a chart showing the new two tier tribunal structure implemented through the Tribunals Courts and Enforcement Act 2007. There are some differences between this and Leggatt’s proposals in relation to the internal divisions or chambers, in particular that Employment is not part of the two tribunals.

<sup>10</sup> See footnote 2, para. 1.11.

<sup>11</sup> See footnote 2, para 1.12.

<sup>12</sup> See footnote 2, para.1.13.

<sup>13</sup> Perhaps it could be said of Leggatt that he was moving to agreement with the view expressed by K Hendry in ‘The Tasks of Tribunals: Some Thoughts’ (1982) 1 *Civil Justice Quarterly*, 253, in which he advocated that tribunals were machinery for both administration and adjudication.

ters. Some tribunals in NI have always operated on a UK basis, namely those which deal with areas that are reserved by Westminster, such as the Asylum and Immigration Tribunal, the Banking Appeal Tribunals, the Income Tax Tribunals, the VAT Tribunals, the Information Tribunal and the Copyright Tribunal.<sup>14</sup> These tribunals are supervised by the Administrative Justice and Tribunals Council, and – previously – by the Council on Tribunals. Otherwise, the creation and working of tribunals in Northern Ireland has been a matter within the devolved competence of the Northern Ireland institutions. For most matters, therefore, Northern Ireland tribunals operate independently from their Great Britain counterparts (although procedures in each are often similar, if not identical).

The creation of tribunals in Northern Ireland has been premised on the same principles as in Great Britain – namely cost, accessibility, speed, expertise – and for the same purposes and functions – predominantly in response to regulatory or administrative schemes, many of which replicate schemes in Great Britain. In many instances, therefore, a tribunal in Great Britain will have an equivalent tribunal operating in Northern Ireland, dealing with issues such as social security entitlement, employment rights, criminal injuries, mental health or special educational needs, which will have developed broadly similar processes, composition and remedies, although under the separate control of a Northern Ireland Department.

Some tribunals have been deliberately designed to provide parallel rights to their equivalent in Great Britain, for example in social security appeals, where considerations of parity in social security provision have had some influence. The differences that exist here are on more minor procedural bases, rather than in terms of overall structure. So, for example, in 1998 Social Security Appeal Tribunals, Disability Appeal Tribunals, Medical Appeal Tribunals, Child Support Appeal Tribunals and Vaccine Damage Tribunals in Northern Ireland were amalgamated into a single unified Appeal Tribunal, mirroring the equivalent process of amalgamation of social security tribunals in Great Britain. The composition of appeal tribunals was the same in each jurisdiction and in each system a President was appointed with judicial responsibility for appointment and training of members, and a departmental agency was responsible for the administration of tribunals. In Northern Ireland this agency is The Appeals Service, an executive agency of the Department for Social Development; in Britain the Appeals Service Agency provided the administrative support for tribunals, and was the responsibility of the Department of Social Security, and then the Department for Work and Pensions. Within these arrangements, separate procedural differences existed, but none which altered the basis of entitlement to appeal or due process in the different stages of appeal.

There have, of course, been notable differences in the Northern Ireland tribunal landscape. The Fair Employment Tribunal, for example, is particular to Northern Ireland and was established to deal with disputes arising from complaints concerning religious or political discrimination in the workplace. Differences that exist tend to be constitutionally driven in the first instance, with reserved matters operating on a UK wide basis, and thereafter differences tend to be more ad hoc, with differences in local practice and procedures driven by perceived needs for a different population.

A further significant difference exists for tribunals in Northern Ireland which is that, aside from the UK-wide tribunals, they have never been subject to supervision by the Council on Tribunals. The Franks report which recommended the creation of the Council did not have a remit to examine Northern Ireland, and the legislation which established the Council did not

---

<sup>14</sup> See B. Dickson, *The Legal System of Northern Ireland* (Belfast: SLS, 2005, 5<sup>th</sup> ed) chapter 8, for general information on NI tribunals.

apply here. While Franks operated as a catalyst in Britain for tribunals to become part of the machinery of adjudication rather than administration, there was no equivalent report or legislation for Northern Ireland to provide this catalyst. Instead, this view of tribunals as judicial bodies was achieved in Northern Ireland as a by-product of the process of mirroring tribunal provision in Great Britain. However, the gap in oversight and accountability was not addressed. At the time of the Leggatt review, the tribunal landscape in Northern Ireland was as haphazard as the one found by Leggatt to exist in Britain, but Leggatt's remit was similarly restricted and so, like Franks, excluded Northern Ireland tribunals. Consequently, Leggatt's recommendations, the White Paper on tribunal reform and the Tribunals, Courts and Enforcement Act 2007 were not extended to Northern Ireland. The problems identified by the Review of Tribunals for UK-wide tribunals are still in existence in Northern Ireland, and further exacerbated by the fact there is not a complete list of tribunals or tribunal-type bodies in Northern Ireland,<sup>15</sup> and the lack of any user-focused research to identify particular problems, or any oversight of the workings of any of these tribunals.

Two main issues therefore remain for Northern Ireland. The first is that of independence; the second relates to accountability and oversight. Since the creation of the Tribunals Service, tribunals within its remit are no longer susceptible to Art. 6 ECHR challenges: tribunals are separated entirely from their sponsoring Departments. In Northern Ireland, vulnerability to an Art. 6 challenge remains since policy control of tribunals still lies with the sponsoring Department. While some tribunals have been or are otherwise agreed to be transferred to the NICTS, this relates only to a transfer of administrative responsibility, and does not apply to all tribunals in Northern Ireland. For example, School Admission and Exclusion Appeal Panels remain the responsibility of the Education and Library Boards,<sup>16</sup> and Gangmaster Appeals – a clear example of the ad hoc creation of tribunals – are the responsibility of the Department of Agriculture and Rural Development.<sup>17</sup> The continued divergence between Northern Ireland and Great Britain on the oversight of tribunals is another significant area of concern.

The movement towards tribunal reform in Northern Ireland has been slowly gathering pace, as outlined at the start of this report, and the devolution of justice provides further impetus for the reform of tribunals here. What is missing is a clear idea of how tribunals are currently functioning, as seen from the users' perspective, to establish how they might best be improved within a reformed system. In addition, there is a need to consider how best to address the issue of accountability and oversight. What this research therefore seeks to do is to map some of the issues facing users, and ascertain the views of tribunal stakeholders to inform the agenda for tribunal reform in Northern Ireland.

---

<sup>15</sup> Note that the tribunals listed for transfer of administrative support do not include every devolved tribunal. It should be noted that the Department of Finance and Personnel publication *Public Bodies 2009*, available at <http://www.dfpni.gov.uk/northern-ireland-public-bodies-2009.pdf>, does not provide a complete list of tribunals in Northern Ireland.

<sup>16</sup> Education (NI) Order 1997, art. 15 and Education (NI) Order 2006, art. 32.

<sup>17</sup> This was a UK-wide regime under The Gangmasters (Licensing) Act 2004, adapted to Northern Ireland by the Gangmasters (Appeals) Regulations (Northern Ireland) 2006, SR 2006, No. 189 as amended by the Gangmasters (Appeals) (Amendment) Regulations 2006, SR 2006 No. 235, providing for appeals to be heard by an appointed person who shall be drawn from the panel of people who may chair Industrial Tribunals.

## Part 2: USERS' VIEWS OF TRIBUNALS IN NORTHERN IRELAND

### Methodology

The users' study was a small, qualitative study designed to elicit the views of Northern Ireland tribunal users through semi-structured interviews. The numbers interviewed for this project mean that the findings are not representative of the experiences of all tribunal users but rather provide a 'snapshot' of current users' views of tribunals. The research responds to the need to identify the particular experiences of Northern Ireland tribunal users, since there is a dearth of research on this issue. It also enables us to highlight areas where further research on users' experience in Northern Ireland could most usefully focus. It should be noted that the research was based primarily in Belfast and so largely relates to the experience of tribunal users in Belfast. Only one interviewee worked exclusively with tribunals outside Belfast. The interviews took place between August 2009 and February 2010.

The objective of the project was to get a balance of views between those who took/responded to cases at tribunal, tribunal representatives and tribunal members (that is, tribunal Chairs and panel members) in Northern Ireland. The tribunals selected for participation in the project were Appeal Tribunals (social security), Industrial and Fair Employment Tribunals (I/FETs), and Special Educational Needs and Disability Tribunals (SENDISTs). Social security appeal tribunals and I/FETs were selected on the basis that they constitute the largest tribunals in Northern Ireland, and therefore deal with the largest number of tribunal users. However, it was also considered necessary to include the experience of a smaller tribunal in Northern Ireland, to identify whether the experiences here were qualitatively different and to avoid any issues facing smaller tribunals being obscured by those facing the larger tribunals.

Access to tribunal members and users was to be obtained through the Tribunal Presidents, who would identify individuals who might consent to being interviewed for the project. These individuals were provided with written information on the research and then invited to contact the researcher or consented to the researcher contacting them directly. Ten Chairs/panel members were interviewed and interviews lasted one hour, on average.

Representatives were identified through the three main voluntary sector advice agencies in Northern Ireland (Law Centre (NI), Advice NI, and CAB), through a specialist advice organisation and an employers organisation in NI. Again, written information was provided and representatives either contacted the researcher directly or consented to being contacted by the researcher. Five representatives were interviewed, and this included two representatives who were legally qualified. One representative provided a written response to interview questions; interviews with the remaining four representatives lasted one hour, on average.

The intention was to get access to users via the Secretaries to each tribunal, who would contact appellants/claimants/respondents, provide them with written information about the research and invite them to participate. This was in keeping with the ethical approval for the research, from the University of Ulster's Research Ethics Committee, which ensured that ap-

pellants/claimants/respondents were properly informed about the nature of the research and had the opportunity to consider the invitation to participate in advance of consenting to do so. For social security appellants, cases listed within a two week period in November, covering a range of benefits, were identified by the Secretary for inclusion in the research. Appellants received written information on the research project with their appeal papers, and The Appeals Service tribunal clerks then asked appellants on the day of their tribunal hearing whether they wished to participate. Over the two week period of hearings, ten appellants were interviewed. An additional appellant was contacted via one of the representatives who had been interviewed for the study. The average length of interview with these appellants was approximately 20 minutes. Six of the appellants had been informed by the tribunal of the decision in their case, with three appellants waiting for a decision to be issued, and two appellants had had their cases adjourned.

Access to OITFET claimants/respondents proved more challenging as access to interviewees was not granted until two months before the project completed. While the number of tribunal member interviewees was not affected, the delay directly impacted on the relatively low number of claimants/respondents who were interviewed. In total, only three claimants/respondents were interviewed through this process. Two of these interviewees were unaware at the time of interview what the outcome of their case was. All other interviewees were aware of the outcome of their case. The remaining four claimants/respondents were accessed through organisational and professional contacts of the researcher, in a manner consistent with the agreed research protocol. Interviews ranged from ten minutes to one hour, with the average length of interview being approximately 30 minutes.

There were also considerable difficulties in accessing SENDIST appellants, and delays here meant that no user interviews were obtained via the Secretary. The researcher contacted the three appellants who were interviewed through specialist advice organisations and charities, which facilitated the process of contacting the appellants consistent with the research protocol. These interviews lasted between fifteen minutes and 45 minutes, and all three appellants had received the tribunal decision at the time of interview.

In total, therefore, 36 interviews were conducted: ten tribunal members (includes Chairs and panel members), five representatives, eleven social security appellants, seven I/FET claimants/respondents and three SENDIST appellants.

## Research findings

### *1. Why go to a tribunal?*

Individuals who took their case to a tribunal said they did so to address a grievance that they had: that their case had been wrongly decided, that they had an entitlement that they were being denied, and that they wanted an independent adjudication of the dispute. There was also an emotional motivation, with appellants/claimants feeling angry and wanting to challenge a decision on this basis. Many articulated this as wanting to defend themselves against a perceived allegation of being untruthful, and there was a mixture of frustration at having to do this, and being glad of the opportunity to demonstrate their honesty. For some, the tribunal was simply seen as a last resort, with a stark choice between accepting a decision they viewed as wrong, or fighting it. From a respondent's perspective there was a view that cases were taken as a means to extract money, and while there was a recognition that some individuals

may feel aggrieved, nevertheless their grievances may not be perceived by respondents as justifiable or actionable.

Representatives and tribunal members were clear that appellants/claimants were not normally able to distinguish between whether they had a grievance and whether they had a legal claim arising from their grievance; this difficulty was particularly pronounced for those with no access to advice.<sup>18</sup> This aligns with the frustration expressed by respondents and their representatives that for Industrial and Fair Employment Tribunal (I/FET) cases, any grievance could result in tribunal proceedings being initiated, without any prospect of success where the grievance had no legal basis, and with a respondent not understanding why an appellant was taking a case. For social security appellants, the lack of understanding of a legal basis for a claim is illustrated by the nature of entitlement to disability benefits:

*Social security appeal tribunal member:* “I think the average person ... sees disability in its common or garden sense, not in a legalistic sense, and therefore can’t understand when they come forward to a tribunal why they’re not getting the benefit, even though they have a disability.”

For many social security appellants, tribunal Chairs and panel members saw clear evidence of appellants simply not understanding why the Department had denied their claim. For some Chairs and panel members, it had become part of the tribunal’s work to explain the Department’s decision to appellants. While this was identified as a potentially positive outcome for appellants, who left with an understanding of the reasons why their claim was denied, it suggests that more needs to be done to make claimants aware of the reasons for the Department’s decision in individual cases, to avoid the need for such claimants to lodge appeals.

## 2. Expectation of the tribunal hearing

The majority of appellants/claimants interviewed did not know what to expect at the tribunal hearing, and were fearful of the experience.<sup>19</sup> This fear ranged from slight trepidation to an absolute dread of what was to come. For social security and SENDIST appellants in particular, there was a theme of losing sleep prior to the hearing, feeling nauseous, being nervous, stressed, anxious, and rating the expectation as more nerve-racking than anything they had experienced up to that point:

*SENDIST appellant:* “I was so nervous on the day, it is one of the worst experiences of my life ... didn’t sleep the night before, felt physically sick.”

*SENDIST appellant:* “Once it started, the tribunal hearing, I realised this isn’t as bad as I thought it was going to be, but the anticipation was very difficult.”

<sup>18</sup> This reflects the findings from research in Great Britain: see Michael Adler and Jackie Gulland, *Tribunal Users’ Experiences, Perceptions and Expectations: A Literature Review*, (Council on Tribunals, 2003) p 4, available at [http://www.council-on-tribunals.gov.uk/docs/other\\_adler\(2\).pdf](http://www.council-on-tribunals.gov.uk/docs/other_adler(2).pdf).

<sup>19</sup> This finding is in common with the findings of research on tribunal users in Great Britain. For example, Adler and Gulland’s review of research highlights the general finding that appellants are often “confused by the appeal process and have little idea of what will happen at a tribunal hearing ... and they are often confused by the paperwork they are sent.”: see footnote 18, p11. The finding was also evident in Genn et al’s 2006 research: Hazel Genn, Ben Lever, Lauren Gray with Nigel Balmer and National Centre for Social Research, *Tribunals for Diverse Users*, (DCA Research Series 1/06, 2006) available at [http://www.dca.gov.uk/research/2006/01\\_2006.pdf](http://www.dca.gov.uk/research/2006/01_2006.pdf).

For most appellants/claimants, their fears stemmed from not knowing what to expect, and some specifically noted that their anxiety was considerably reduced by seeing the tribunal room in advance of the hearing itself:

*I/FET Claimant:* "I finally seen the courtroom late afternoon, for the first time ..."

*Interviewer:* "Would you have found it helpful to have seen the room beforehand?"

*I/FET Claimant:* "Yes. Without a shadow of a doubt."

*I/FET Claimant:* "the only thing I benefited from was me going down a couple of days beforehand trying to get a postponement because it ... let me know what the room was going to be like, and so on."

*Interviewer:* "It took away some of the uncertainty?"

*I/FET Claimant:* "Yeah it did, I have to admit."

While I/FET tribunal hearings are open to the public, there seemed little awareness of this among claimants and respondents. The issue of open hearings was considered problematic and potentially inappropriate for tribunals considering particularly private or intimate issues.

The expectation of hearings depended, to a limited extent, on whether individuals had prior experience of a legal hearing, although prior experience of the tribunal itself was most useful. Where appellants had been to the tribunal before, their prior experience was used as a benchmark for their current hearing. A negative prior experience was specifically identified as making appellants more nervous or upset about their current hearing. Other legal experiences were regarded as less useful or relevant. For example, those with considerable experience of court proceedings expected the tribunal to be less formal and legalistic than it was; this was particularly true for SENDIST and I/FET users. Some appellants/claimants did not relate their expectation of the tribunal hearing to prior experience of legal hearings. Several appellants/claimants/respondents used TV courtroom analogies to suggest how they imagined the tribunal hearing might be. One appellant, without prior experience of legal hearings, anticipated that the tribunal hearing would be set up like an interview, with the tribunal members seated at a table, and the appellant seated in front of them, with a space between the table and the appellant.

The majority of users were also concerned at what the tribunal members would expect from them, and worried about getting the right evidence together, understanding the case papers, and understanding the terminology.

### *3. Pre-hearing advice*

Where tribunal users took advice, the sources of advice that were utilised were wide ranging: voluntary sector advice agencies (eg CAB, Law Centre (NI), Children's Law Centre), the Labour Relations Agency, Trade Unions, particular charities or organisations such as National Autistic Society or National Deaf Children's Society, the Equality Commission, solicitors, political parties, local councillors, friends, church members, community workers, GPs or healthcare workers, and social workers. Some of these sources were regarded by tribunal members as more useful than others: effective advice on the legal issues was required, rather than personal support or misguided advice. The disparity in the quality of advice could be

problematic where advisers were inexperienced or unfamiliar with the legal issues or misunderstood the nature of what had to be established at the tribunal. Both lay and legal advice could be deficient here. Advice from experienced advisers with an expertise in the area was seen as being most effective.

Many of the appellants/claimants/respondents who did not take advice before the hearing either were not aware of what advice existed and how to access it,<sup>20</sup> or regarded the cost of accessing legal advice as prohibitive.<sup>21</sup> Cost was regarded as the determining factor by the three I/FET claimants/respondents who did not access legal advice or representation. For some social security appellants, however, advice was seen as unnecessary since the case was about them and it was simply a matter of telling the tribunal the nature of their illness/disability; as this was something they knew intimately there was no need to seek further advice on it. For this group, there was an element of making sure they weren't "caught out", suggesting that they saw the process as establishing whether they were lying or telling the truth, rather than whether they had enough evidence to substantiate their eligibility. Some, however, did acknowledge that they pursued their case with the support of healthcare workers, who either identified the possibility of an entitlement or appeal to them, or provided them with a report for the hearing. The consensus among social security appeal tribunal members was that appellants were generally not prepared for their hearing, and that key advice on the nature of the benefit, on the role and powers of the tribunal and on appellants' right to access advice and representation should be given to them in a way that "jumps out at them" from the mass of other information that is provided. SENDIST appellants tended to be well prepared, but there was a recognition that the socio-economic profile of such appellants could be seen as a contributory factor here, with such appellants better able to resource and articulate their case:

*SENDIST member:* "[the tribunal] appears to be accessible to people who are in a position to maybe appreciate the quite complex area of law; so that, for want of a better word, it has a sort of a middle-class aspect to it"<sup>22</sup>

Advice from legal advice agencies rather than private firms of solicitors was seen as being more advantageous.

The issue of whether pre-hearing advice would avoid the need for tribunal representation was also briefly explored. There was a general view that it would be better than nothing, and could provide individuals with a "fighting chance". A more positive view of this was that it could be quite empowering if advice was given early enough to allow individuals to grasp the main issues.<sup>23</sup> The main difficulties with relying only on pre-hearing advice were that cases could be more complex than they first appeared, and this complexity might not be evident at a pre-hearing stage; that advice given might not be accepted by tribunals who would errone-

<sup>20</sup> Genn et al's 2006 research identified the variability in public knowledge of advice sources and difficulties in accessing free advice services: see footnote 19.

<sup>21</sup> This finding on costs is in common with several studies in Great Britain. See for example Bruce Hayward, Mark Peters, Nicola Rousseau and Ken Seeds *Findings from the Survey of Employment Tribunal Applications 2003* (London: DTI, 2004); Genn et al, 2006: see footnote 19.

<sup>22</sup> This perception accords with the profile of parent appellants in Harris and Eden's research into School Exclusion Appeal Panels: N. Harris and K. Eden, *Challenges to School Exclusion* (London: Routledge Falmer, 2000).

<sup>23</sup> This was found to be the case in 1997 for appellants taking cases to the Special Educational Needs Tribunal, in Great Britain where 90% of appellants interviewed who had received advice said they could not have coped without it: N. Harris, *Special Educational Needs and Access to Justice* (Bristol: Jordan Publishing Ltd., 1997). Harris also notes that those who obtained advice seemed more likely to proceed with an appeal.

ously proceed with a hearing where a representative would have requested an adjournment; and that advice was not a substitute for representation:

*Representative:* "you're not, no matter how much information and advice you get, except in exceptional circumstances, going to be able to represent yourself as someone who knows the ins and outs, and who has been doing this, and who is experienced and knowledgeable. You can't gain the knowledge you need to represent yourself in a tribunal in five minutes."

This reflected findings that, for some unrepresented appellants, the tribunal's assistance in helping them set out their case could not compensate for their lack of legal knowledge:

*Social security appellant:* "you're at a loss anyway 'cause you don't know what you're talking about. You're saying a certain thing and then she's referring back to the legislation, so then you're really – well, you think what's the point?"

*Interviewer:* "Did the tribunal members help you set out your case?"

*Social security appellant:* "No, because I didn't know what I was talking about. I didn't know what I was doing."<sup>24</sup>

For some tribunal members, the complexity of the issues meant that representation could not be avoided, although there was strong agreement among members that the tribunal had a duty to assist unrepresented parties in presenting their cases.

While there is some information and advice available to tribunal users on the internet, it was clear that internet usage varied considerably among appellants, claimants, and respondents, suggesting that simply having further or better information available to users online is still unlikely to reach many users. Social security appellants did not tend to use the internet, and many did not have access either to the internet or to a computer. For those who did have internet access, most were confused about how it could be used to get information or advice on their case or the tribunal. There were two exceptions here, one a retired teacher who 'Googled' his/her medical condition from the National Institute for Clinical Excellence website to provide the tribunal with a list of symptoms of his/her condition, and an appellant who accessed the 'directgov' website to find out "what way to dress, things like that". SENDIST

---

<sup>24</sup> Genn and Genn's 1989 research found that appellants find it difficult to represent themselves, and that unrepresented appellants were disadvantaged at hearings by not being able to understand the proceedings or the issues: H. Genn and Y. Genn, *The Effectiveness of Representation* (London: Lord Chancellor's Department, 1989) p237. Baldwin et al's research in 1992 found that this disadvantage is not adequately redressed by an inquisitorial approach: J. Baldwin, N. Wikeley and R. Young, *Judging Social Security* (Oxford: Clarendon Press, 1992) p212. Genn et al's research in 2006 states: "Although, with the assistance of tribunals, most users were able to present their cases reasonably well, observation of users during hearings revealed deep and fundamental differences in language, literacy, culture, education, confidence and fluency, which traverse ethnic boundaries. These differences significantly affect users' ability to present their case. Even with the benefit of training, there are limits to the ability of tribunals to compensate for users' difficulties in presenting their case. In some circumstances, an advocate is not only helpful to the user and to the tribunal, but may be crucial to procedural and substantive fairness.": see footnote 19, p ii. However, Adler's research suggests that self-help may be possible where tribunal chairs properly take on an inquisitorial role: Michael Adler, 'From Tribunal Reform to the Reform of Administrative Justice', in Robin Creyke (ed) *Tribunals in the Common Law World* (Annandale, NSW: The Federation Press, 2008), p 171. Adler concludes, in his attempt to 'reconcile the irreconcilable', that improving administrative justice does not require a choice between a top-down approach - which emphasises the role of courts and tribunals in decision making - and a 'bottom-up' approach - which focuses on the importance of initial decision making - but that both must exist to achieve justice in administration: pp 153-174.

appellants did not automatically use the internet either, including one appellant with “a public body background” who was computer literate. Where it was used by SENDIST appellants, it was to find out information on a medical condition/disability. It was noted that SENDIST in Northern Ireland does not have a website, in contrast to England and Wales, which was considered to put Northern Ireland appellants at a disadvantage. For I/FET claimants, where the internet was accessed it was considered to be very useful, in terms of getting information on the hearing, on the legal issues, on the Labour Relations Agency and on the respondent. Some I/FET claimants did not know where to go online to get help or information, and one claimant who had accessed the internet felt that the information was not substantially different from the leaflets provided by the Office of Industrial and Fair Employment Tribunals. There was a view from the I/FET members that many parties did research their cases online, and that there was a reasonable amount of information available to assist with this.

A related issue with pre-hearing advice is that of paper hearings for social security appellants. Sainsbury’s research found that a lack of pre-hearing advice for social security appellants meant that appellants were less likely to opt for an oral hearing.<sup>25</sup> Northern Ireland social security appeal tribunal members regarded paper hearings as unlikely to be successful for appellants, because tribunals have to make a decision on the same evidence as was available to the decision maker; appellants tend not to appreciate what additional evidence may be required to raise a successful appeal. The original decision was seen as unlikely to change without “the benefit of oral evidence, or the person to put a slant on the evidence that you have”. As a result there was a consensus that “there are very few cases ... where justice can properly be done on the papers alone”. Tribunal members particularly identified this as problematic in relation to appeals dealing with mental health issues, which were felt to be more appropriately assessed through an oral hearing.

#### 4. Representation

There was a strong consensus among all interviewees that representation was beneficial to appellants/claimants/respondents with one overriding caveat: that the representation was good. Two themes emerged within this consensus: the advantages of representation, and the difficulties with the quality and nature of the representation provided.

*Advantages of representation:* The main advantage of representation was seen to be that it allowed for an equality of arms between parties,<sup>26</sup> which was particularly important where ‘the other side’ was represented:

*SENDIST appellant:* “these are two massive public bodies that have their own legal departments. And there’s wee me going in ... [H]ad I not been lucky enough to have been in touch with [the tribunal representative] I would have been going along there with just me and my husband. We would have went in, we would have been totally intimidated by the whole situation.”

<sup>25</sup> R. Sainsbury, *Consultation on ‘Improving Decision Making and Appeals in Social Security’: Analysis of responses* (London: Department of Social Security, 1997).

<sup>26</sup> A number of research reports from Great Britain have found that unrepresented tribunal appellants can be disadvantaged by their lack of representation: see Michael Adler and Jackie Gulland, footnote 18, especially para 3.3; Genn et al, 2006, footnote 19. Adler’s recent research however, suggests that the ‘representation premium’ is no longer as evident, particularly where users receive pre-hearing advice, something which may be attributable to an increasingly enabling approach adopted by Tribunals: Adler, Michael, *The Potential and Limits of Self-Representation at Tribunals: Full Research Report*, ESRC End of Award Report, RES-000-23-0853 (2008). See also footnote 24.

*SENDIST appellant* "the other side had an entourage with them ... they had somebody observe, they had two representatives, they had two witnesses, a solicitor and the barrister – I found it quite intimidating ..."

*SENDIST appellant* "I know it was supposed to be an informal hearing but I found that on the day it was actually quite excessive. They [the Education and Library Board] had a barrister, they had a solicitor. It was quite intimidating."

*I/FET claimant*: "I suppose it would have been helpful for me if they [the respondents] weren't represented! Because then I would have had more weight than them, but it seems fair to me that we were both represented."

The ability of representatives to deal with lawyers from 'the other side' applied also to pre-hearing negotiations, which could in some cases avoid the need for a tribunal hearing.

The lack of representation, in the face of a represented party, was regarded as stressful for the unrepresented party, making individuals more apprehensive and anxious about their cases. Representation was therefore seen as a means of enabling individuals to present their case regardless of whether 'the other side' was represented, and avoiding potential injustice to unrepresented individuals:<sup>27</sup>

*Social security appeal tribunal member*: "when an appellant's represented he probably comes in in a more confident way ... and he's probably less intimidated ... in the sense that his representative will have probably ... told him what to expect, ... whereas a non represented appellant may not know what to expect before coming through the door and consequently that process may be more ... likely to cause anxiety and stress ... and the appellant will be less relaxed and perhaps less able to give an account of himself."

*I/FET member*: "People who are unrepresented and who haven't really had proper advice before the hearing tend to spend a lot of time on irrelevant issues and don't address the proper issues with any degree of detail. So they miss out on proving their case in a lot of instances."

Representation was seen to provide confidence and encouragement for individuals to attend the tribunal hearing, while providing an objectivity in cases that were often highly emotional. The professional experience that representatives brought in terms of their knowledge of the justiciable issue(s), their familiarity with appeal/claim procedures, their knowledge of the role and powers of the tribunal and the nature of tribunal hearings, were regarded as invaluable by those who had access to experienced representatives. For most represented parties, there was a clear view that they could not have proceeded effectively without representation. Social security appellants were most likely to identify themselves as being unable to articulate or understand their case, and for SENDIST appellants there was a concern that individuals with little or no confidence in their literacy and oral skills would not be able to take a case from complaint to hearing without advice and representation.

The advantage of representation in being able to focus the hearing on the justiciable issue(s), clarifying and expediting the process was also regarded as a significant advantage for the tribunal:

---

<sup>27</sup> This echoes the finding of the Survey of Employment Related Tribunal Users which found that claimants supported by a third party felt more confident in pursuing what they regarded as a satisfactory outcome: Department for Employment and Learning, *The Survey of Users of Employment Related Tribunals in Northern Ireland* (Belfast, 2009), available at [http://www.delni.gov.uk/survey\\_of\\_users\\_of\\_employment-related\\_tribunals\\_in\\_northern\\_ireland\\_\\_may\\_2009\\_.pdf](http://www.delni.gov.uk/survey_of_users_of_employment-related_tribunals_in_northern_ireland__may_2009_.pdf).

*I/FET member:* “it does make hearing the cases easier when there are legal representatives on both sides. Because you don’t waste time and effort, you don’t have to be understanding of a claimant meandering through the case and dealing with irrelevancies.”

*I/FET member:* “With unrepresented people, it’s harder work for the Chair and the panel to try and get an understanding across to the unrepresented person, what they can do and what they can’t do.”

There was also a view that representation has now become necessary to cope with the complex legal issues and the legal and procedural approaches to deal with the issues:<sup>28</sup>

*I/FET member:* “the hope that you could go back to a point where the expectation was that there wouldn’t be legal representation is just pie in the sky. We’re living with what we’ve got now and I can’t see any way back.”

*Social security appeal tribunal member:* “the intention of actually having a system which is simple enough for the appellant to represent themselves hasn’t worked, because what happens is it becomes more and more complex, ... so it does become more legalistic, so the system needs to have good quality representation, freely available to the appellants.”

While this legalistic approach was noted by many tribunal members, it was also noted that experienced or well qualified representatives could make the proceedings less legalistic:

*I/FET member:* “they know the broad principles so they address you in broad principles and it’s actually less technical in many cases than somebody who is not legally qualified but has the internet and brings in 30 decisions, perhaps only one of which is relevant.”

Good quality representation was seen as simplifying and expediting the proceedings, which was regarded as beneficial for all parties.

*Difficulties with representation:* The main difficulty with representation relates to the quality of the representation that might be provided. Good representation was seen as beneficial to the individual party and to the tribunal. However, there was a consensus among tribunal members that poor quality representation leaves parties no better off than if they were unrepresented, and in some cases may do “a massive disservice” to those parties.

The experience of tribunal members was that quality of representation was hugely variable, but it was also clear that the quality of representation was not dependent on the representative being legally qualified: in some cases, the worst types of representation were seen to be provided by lawyers who did not understand the area or the nature of tribunal proceedings, and who presented cases as they would at court. The concern here – particularly for inquisitorial tribunals – with lawyers reverting to adversarial techniques was that “the whole ethos of a tribunal” could get lost.<sup>29</sup> This view was supported to some extent by views of appellants/claimants, where legal representation was seen as contributing to an increased legalisation of the hearing, and as exclusionary for the party being represented:

*I/FET claimant:* “at some points it feels like it’s not about your issue at all, it is a battle of lawyers’ minds”

<sup>28</sup> The Survey of Users of Employment Related Tribunals in Northern Ireland, also found that legal representation was seen as necessary by claimants and respondents due to the complexity and legality of employment related tribunal hearings: see footnote 27, para. 82.

<sup>29</sup> Baldwin et al note that the presence of a representative at Social Security Appeals Tribunals and Medical Appeal Tribunals tended to alter the nature of the proceedings, with tribunals focusing narrowly on the legal issues and abandoning an inquisitorial approach: see footnote 24.

*I/FET claimant:* "At times when the barristers were battling away you did kind of feel like you weren't part of it"

*I/FET claimant:* "briefings or preparation for the case was on the technical issues – what's detriment, has detriment been suffered – and there was no real space for me to say look, this is how it's affected me as a human being."

*I/FET claimant:* "There was a tendency to focus too quickly on the legal issues"

The tendency of some Chairs, and representatives from 'the other side', to by-pass the appellant/claimant/respondent and to focus on the representative was also a frustration for these parties. While this may be partly explained by the particular procedural rules governing some tribunals, for some, the formality of the tribunal could override what seemed to be sensible.

Legal representatives who had expertise in the area dealt with by the tribunal and experience in tribunal representation were seen as very valuable by tribunal panels and users:

*SENDIST appellant:* "the fact that we got free legal representation was excellent. I can't imagine having to pay for it, and I can't see any alternative either because I don't think you could do it otherwise."

*I/FET applicant:* "The flip side is that if the lawyers didn't represent my story the way I felt that it should have been represented, then the question is could people without legal experience have done a better job, and I think equally there would have been problems with people who weren't attuned to the niceties of the law trying to argue those quite fine points of law. If people had an expertise in that particular field, the fact that they don't have legal training wouldn't necessarily have been a barrier, but people coming in generically to try and support or represent, it wouldn't have touched on the level of legal detail that they needed to."

This reinforces the view that specialist and good quality representation are features that should be endorsed, rather than whether the representation should be legal or lay.

With advice organisations, the quality of representation was also variable, but for social security appeal tribunals and SENDISTs, good quality representation from advice organisations with specific knowledge and expertise was generally seen as superior to representation from private solicitors. I/FETs were more heavily reliant on legal representation, where quality could still be variable, but experienced lay representatives were also regarded positively. Some lay representatives were concerned at their ability to 'match' the legal representatives on 'the other side', and worried that tribunals might have too high an expectation of them.

There was a general concern that advice organisations were unable to meet the demand for advice and representation,<sup>30</sup> and this was reflected by representatives, tribunal members and frustrated users who had unsuccessfully sought assistance:

---

<sup>30</sup> A 2005 DCA Research Report identified users' negative experiences in getting access to advice and advisers, which were categorised as organisational aspects of the service: Jenny Johnstone & James Marston, *Advice Agencies, Advisors and their Clients: perceptions of quality* (DCA Research Series 10/05, 2005). Genn et al's 2004 research on access to advice found that the main obstacles to advice included a lack of availability of free sources of advice, unaffordable costs of professional legal advice, and a lack of knowledge of help available: H. Genn, P. Pleasance, N. J. Balmer, Al. Buck and A. O'Grady, *Understanding advice seeking behaviour* (London: Legal Services Research Centre, 2004) available at: <http://lsrc.org.uk/publications/advice.pdf>. Further research by Genn et al confirms a continued difficulty for users in accessing advice: Genn et al, 2006, see footnote 19. As Adler and Gulland's research highlights, the issue of costs is particularly important in those tribunals where legal representation is the norm: footnote 18, p 10.

*Representative:* “most, if not all, claimants ... will feel that they need representation but are simply not able to access it.”

*Social security appellant:* “I have tried to get people to come with me on my last three hearings and ... I couldn’t manage it.”

*Social security appellant:* “I rung round the Law Society, the Law Centre, got bits of information, got numbers from this one and that one. I must have rung 20 numbers.”

The majority of appellants/claimants/respondents who were not represented, when asked what, if anything, they would do differently if they had to go through the appeal/claim again, stated that they would try to get representation. One notable exception to this was an unrepresented claimant whose Industrial Tribunal case was partially successful, who had been quoted a rate of £250 for legal representation at the tribunal, and who concluded that she was glad she had not paid for any representation.

For legal representation, cost was clearly identified as an inhibiting factor.<sup>31</sup> A number of Chairs and panel members specifically identified this issue, and for I/FETs there was concern that the cost of legal representation would swallow up any award the tribunal made, or “price justice out of [reach]”. This was viewed as likely to impact most on appellants/claimants and small business respondents. A related issue was that of the costs of providing expert evidence, either through reports or as witnesses, which could be prohibitively expensive for some, but still required by the tribunal. For social security appellants, for example, GP records were often requested by the tribunal, but the cost of providing these fell to the appellant.

### 5. Role of the tribunal

There was a strong consensus among tribunal Chairs that their role was to enable individuals to present their case, regardless of whether they were (well) represented or not:

*Social security appeal tribunal member:* “even if they don’t have proper advice about process or advice about the issues we’re going to talk about, if we’re doing our job properly, we should help them to understand that in the course of the hearing ...”

*Social security appeal tribunal member:* “if the appellant is unrepresented ... you are going to have, to my mind ... you’re probably going to have to go through that learning process with the appellant as to what’s about to happen, or what is happening, or what will happen in the future ...”

*I/FET member:* “you do have the overriding objective which is to deal with cases justly and part of that is ensuring a level playing field ...”

This reflected the views of many of the users who felt that Chairs should fulfil this role:

*Social security appellant:* “[You need] a person to listen to you and be able to talk to you, and put you at ease. To me a Chair is responsible, because if they want to hear things about the person ... they’ve got to put them at ease, make them feel they’re not under pressure. They should be able to talk.”

<sup>31</sup> The issue of cost was also raised by claimants and respondents in the DEL *Survey of users of employment related tribunals in Northern Ireland*, 2009: footnote 27, para.s 79 and 81.

This enabling approach was seen by Chairs as off-setting any potential disadvantage faced by unrepresented, or poorly represented, parties.<sup>32</sup>

For social security appeal tribunal members, the role was often to help appellants understand the Department's decision, which was considered to be of value to appellants:

*Social security appeal tribunal member:* "[the appellant goes] out ... knowing why the decision that was made was made, so it doesn't always have to come down to making a 'for' or an 'against' decision."<sup>33</sup>

For SENDISTs and I/FETs, where it was more common for unrepresented appellants/claimants to face represented parties, this enabling role required a balancing of assistance to unrepresented parties with a need to remain impartial and independent, an issue that Chairs and panel members were alive to:

*SENDIST member:* "the Board come with their legal representative, and a parent, nine times out of ten ... they'll feel at a disadvantage ... I do know that we are aware of it as a panel, and that we would probably go out of our way to make sure that that perceived imbalance is rectified ..."

*I/FET member:* "[you] just fill in any holes that emerge in one side's case or another, not because you want to help either side but you want to decide the case justly and if there's a gap that hasn't been filled it's your job to fill it."

*SENDIST member:* "if you feel that this hasn't been dealt with properly, or enough, by the appellant, then you will take that role on and question the Board. So, because of the fact we're informal and if we do see that there's an area that hasn't been dealt with, we can then take that role on. So, I would hope that, and from my experience that's never been the case where you feel a parent hasn't had their say because of a lack of representation"

*I/FET member:* "the difficulty is, is where one side's represented and you start cross examining on behalf of the unrepresented party, then there are obviously issues of, you know, the appearance of bias and so forth kick in"

This assistance was viewed positively by unrepresented parties who felt Chairs helped them to get their points across. It was also regarded by panel members as being successful in achieving an equality of arms between parties:

*I/FET member:* "in some instances I have said that if you were unrepresented that you get as good a shot at justice – might even get a better shot at justice".<sup>34</sup>

Tribunal members felt that there was a common understanding between the panel and the representatives in relation to this role in assisting unrepresented parties:

---

<sup>32</sup> Research from Great Britain also reflects the view that the attitude of Chairs was very important in creating a perception of fairness: see for example Jane Aston, Darcy Hill and Nii Djan Tackey, *The experience of claimants in race discrimination Employment Tribunal cases*, (London: Institute for Employment Studies, 2006). In Baldwin, Wikeley and Young's research, social security appeal panel members also saw their role as interventionist in order to assist unrepresented appellants, although this intervention tended not to be evident where appellants were represented: footnote 24.

<sup>33</sup> Berthoud and Bryson's research with social security appellants in Great Britain highlighted the lack of understanding by appellants of the reason for the Department's decision and any legal basis of appeal: R. Berthoud and A. Bryson 'Social Security Appeals: What do claimants want?' (1997) *Journal of Social Security Law*, 4 (1), 17.

<sup>34</sup> This perception may reinforce Adler's findings that the absence of a representation premium is a consequence of tribunals adopting a more enabling approach: see Adler, *The Potential and Limits of Representation at Tribunals*, footnote 26

*I/FET member:* “I think the Chairs are experienced in that they know the legal representatives that come, and when they’re faced with one legal representative and one person unrepresented there is an understanding between the Chair and the legal representative that this Chair is going to provide knowledge and understanding to the unrepresented person; and that works very well”

*I/FET member:* “I have never heard that being an issue, because the Chair will say from the outset, ‘you’ll understand [to the respondent’s lawyer, usually] because Mr/Mrs X is unrepresented we’re going to have to be as flexible as possible ... And I never remember an objection being raised”

However, this ‘common understanding’ may not always exist, giving rise to frustration and misunderstanding, and a perception of bias in the panel’s actions:

*Representative:* “The whole process appears to be skewed in favour of claimants, unrepresented claimants. I believe the tribunals go far too far in assisting them ... [T]he tribunals should not have regard to the fact that one party is well represented. The other party is there, you explain the process, but you don’t give them a fool’s pardon and unfortunately I think that in a lot of cases that’s what’s happening.”

*Representative:* “in assisting unrepresented claimants you get the appearance of bias which is equally bad. There’s no real bias but there certainly is the appearance.”

*I/FET respondent:* “the perception ... would be that they’re overly helpful to unrepresented individuals ... I can understand why they have to do it; it’s frustrating, but I wouldn’t say that that indicates any impartiality.

However, this assistance appears to apply to all unrepresented parties, whether claimant or respondent; the perception of bias towards claimants may reflect the fact that claimants are more likely to be unrepresented than respondents.<sup>35</sup> Nevertheless the findings do indicate a disparity in views between panel members and representatives or their clients.

While Chairs and panel members may alter their approach to be more tolerant of the “foibles” of unrepresented parties, it was also the case that they might feel the need to be more careful in their approach with legal representatives:

*SENDIST member:* “when there are ... lawyers there ... you have to be careful of what and how you say it, because unfortunately there have been a number of judicial reviews, and judicial review is very much on what happens at the time and the decisions you make ... At the end of the day, whether it makes you make a better decision or not, I don’t think so.”

In this way, legal representation was seen to make a direct contribution to an increase in the formality and the legality of tribunal proceedings.

All tribunal members were regarded as having a vital role to play in the hearing. For Chairs, their main role was to ensure that members understood the law, but they also had a role to play in making sure that the panel appeared impartial and that proceedings were conducted in a professional manner:

*SENDIST member:* “if you’re legally trained ... you’re very aware of not appearing to be one-sided, and that’s where lay members wouldn’t be aware of ... the question they were asking.”

---

<sup>35</sup> While the numbers interviewed for this research project prevent any generalisable findings on whether claimants are more/less likely to be represented than respondents, the perception of tribunal members was that claimants were less likely to be represented than respondents. This corresponds with findings in larger surveys from Great Britain: see Hayward et al, footnote 21.

*I/FET member:* "they are very tense hearings. So you do need to be able to enforce your authority to ensure that both sides get their cases across but neither side's bullied, neither side's intimidated."

There was a strong consensus that panel members were a vital part of the tribunal, providing "a multidisciplinary approach", having a different perspective from the Chair, providing additional knowledge and expertise, being able to act as another pair of eyes and ears in assessing the facts:

*I/FET member:* "it's to do with having an input from people with experience; people who know what it's all about, who've been there, who've been in difficult situations themselves, involved in cases themselves directly or indirectly. So that's the great virtue ..."

*SENDIST member:* "I see them as really the experts in some respects ... I'm the legal expert, but ... I see their expertise as being quite specific to the tribunal."

*I/FET member:* "just as in criminal law ... you have jury concepts like reasonable force or what's obscene ... it seems to me that in the industrial tribunal context you have these concepts which really lend themselves to adjudication by a layman or laywoman such as fairness ..."

A further, and considerable, advantage noted was that panel members provided a stronger perception of fairness for appellants/claimants/respondents, although this could depend on whether individuals felt they had been treated fairly by the tribunal. For example, one appellant viewed the Chair's behaviour as unreasonable and intimidatory, but felt equally aggrieved that the panel members had not spoken out against this behaviour or sought to mitigate it in any way:

*Social security appellant:* "What bothered me about it, all this shouting and all came from him [the Chair], and the people on either side of him, they never opened their mouths, and to me if I was part of that set up and I was trying to be helpful to the person who was in front of me ... I would have had to say something to him."

For I/FETs, there was some dispute over whether the titles of 'employee' or 'employer' panel member were appropriate. On the one hand, it was recognised that this gave claimants/respondents someone who they could identify with on the panel; on the other hand, all members were clear that the label was misleading since it wrongly suggested a potential bias, and did not reflect the objective approach of members of members who "leave [their] partisanship at the door".

Some panel members felt that they had a role in reining in the behaviour of Chairs, specifically to make sure that the Chairs didn't inflate their own importance. Where Chairs had a casting vote, this could also be a source of dissatisfaction for panel members if it meant that the only way their decision could be taken on board was if the Chair agreed with it. The perception that Chairs had the dominant position on the panel was noted by one claimant:

*I/FET claimant:* "Because it was such a complex area of law the lay members were always going to be deferring to what the Chair told them the law was. I got a sense that even though they were there it was the person with the legal expertise and qualifications who was going to highly influence what the outcome was ... I don't think the lay members really understood or could grasp the kind of points that were being made ... [T]hey served to convince me that they didn't really ... understand the points that were trying to be put across, so in that sense, no, I don't think that they added value ... [I]t was more a veneer of 'this is a broader process than it actually is'."

Although this was not directly connected to whether Chairs had casting votes in decision making, it does reflect a view that the Chair's decision may be the most important. Where there are only two members on a tribunal panel, this perception may be increased.

There was a recognition by Chairs and panel members that tribunals could be more efficient with just a Chair at the hearing:

*I/FET member:* “they go slower but that’s simply because three people have to have their say instead of one person thinking internally ...”

However, there was also a consensus that the advantages of having panel members outweighed this disadvantage:

*I/FET member:* “I think it’s more than outbalanced by just a broader experience brought to the decision making process plus the perspective of the claimant and the respondent. They see three people sitting there. They see one experienced trade unionist. They see an experienced manager and they see the lawyer in the middle and it gives them the correct impression that we’re approaching it as an industrial jury in a lot of cases ...”

None of the Chairs or panel members in any of the tribunals took the view that the role of the panel members should be abolished.

## 6. Experience of the hearing

The views of appellants/claimants/respondents tended to be split between those who viewed the hearing as better than they had expected (less formal, more relaxed) and those for whom the experience was as expected, or worse (more formal, structured, intimidating). For many, the anticipation over the hearing was worse than the hearing itself, although there were some notable exceptions to this where appellants felt they had been badly treated, by Chairs in particular, and where the hearing process was perceived as very stressful.

Appellants/claimants/respondents who were nervous or uncomfortable could be put at ease by the approach of the panel. This was seen to be attributable to the manner of tribunal members rather than what they said. This included members smiling, making an appellant/claimant/respondent feel welcome and able to speak, being non-confrontational, and clearly trying to understand the evidence:

*Social security appellant:* “The Chair was a nice woman. Just the way she spoke, her manner, she didn’t talk down to you, she was pleasant.”

*Social security appellant:* “They were polite, and made you feel like you were actually welcome to sit down and have your say.”

*I/FET claimant:* “very civil and polite and would constantly be giving information on what was going on ...”

*I/FET respondent:* “I think the Chairman certainly made everyone feel at ease ... I think it was because he was actually communicating directly with you, at all levels ...”

*I/FET claimant:* “you know sometimes where you watch these things on TV like Judge John Deed, that would put the fear of God into you! But no, I felt quite at ease.”

Representatives endorsed this view and some felt strongly that where users understood and felt part of the process they were more likely to feel comfortable, more likely to feel they had been able to access their rights and could then accept the outcome. Most representatives felt that appellants/claimants/respondents do not feel very comfortable at the hearing but that this was due to the nature of what was at stake, rather than the experience of the hearing.

Where appellants had bad experiences the attitude and approach of the panel was blamed. Some appellants/claimants/respondents expressed the view that they felt they were “on trial”, and representatives felt this could often be attributed to insensitive questioning by the Chair. In one instance an appellant stated that the Chair shouted and treated him/her and his/her representative appallingly, which led the appellant to the conclusion that the tribunal was not a neutral panel, and made him/her doubtful if he/she could go back to the hearing, which had been adjourned:

*Social security appellant:* “Worse than a headmaster chastising a naughty child. I never heard anybody so arrogant and so intimidating. I thought an appeal was somewhere you could be comfortable to go to and that the people that were dealing with you could deal with you humanely, but he was, his arrogance was beyond all. And to be perfectly honest ... I’m supposed to be going back, but I wouldn’t like to face that man. I’m really toying with the idea of scrapping it because if I got him again I think I would walk out. Didn’t expect [my representative] to be ... spoken to the way she was. That wasn’t right. She was there on my behalf and my heart went out to her ...”

Some Chairs indicated that representatives were expected to be well prepared, and were clearly frustrated by the quality of some representation. Where this was the case, Chairs indicated that they would remind representatives of their obligations and hold them to this standard. It may be that Chairs need to be more aware that clients may also feel implicated in this, and in any negative view taken by the tribunal of the representative.

Representatives and panel members felt that relatively few users lodged complaints about their treatment at the tribunal, but some representatives felt there was a lack of transparency in the complaints process, and expressed concern at how a complaint might impact on future cases dealing with the same appellant/claimant/respondent or with their representative or representative organisation. One appellant interviewed had lodged a complaint, in relation to a previous tribunal hearing, and was dissatisfied with the outcome which was seen as a “brush off”.

For some I/FET users, the adversarial nature of the hearing was as problematic as the outcome:

*I/FET claimant:* “I was stripped to the bare bones by the barrister on the other side. I would advise anybody else not to go through with the tribunal. I thought it was dire.”

*I/FET claimant:* “the stress of going through the process ... I cried in the witness box ... it was very intrusive ...”

A respondent who had considerable experience in appearing before the tribunal felt this could be part and parcel of normal proceedings:

*I/FET respondent:* “there are certain Chairmen who are particularly intimidating, and by Chairmen I'm not restricting that to males. And I think their manner could be a lot better ... individuals are not used to being shouted at, basically treated as, treated sometimes like a child ... in terms of how a Chair will talk down to individuals.”

The respondent suggested that a DVD showing the robustness of the I/FET experience, particularly cross-examination, would help claimants/respondents be better prepared for this. An alternative may be to reconsider how the process could be less intimidating and traumatic for users.

The formality of the hearing was found to be off-putting for appellants/claimants/respondents. I/FETs and SENDISTs were most likely to be viewed as more formal than was anticipated,

even for those with professional experience of court proceedings and representation, but formality could be a problem for all tribunal users, and contribute to their feelings of alienation from the proceedings:

*Social security appellant:* “If it’s not informal you’re not speaking the same language, both that you can understand. When it’s formal, using big words and you don’t even know what they mean.”

*I/FET claimant:* “it felt very much like a court, very formal and under oath ...”

*I/FET claimant:* “it was very nearly like a courtroom scenario – you know you see things on TV, of a criminal nature ... It actually looks like a courtroom and feels like a courtroom ...”

*I/FET claimant:* “I was expecting it to be really daunting but it was more so than I was expecting ... I’d been told it would be formal and I kind of was expecting that but it was more formal and much more adversarial than I’d anticipated ...”

*I/FET respondent:* “I thought it was very, very formal where we were sort of thrown in right at the deep end ...”

*SENDIST appellant:* I didn’t expect it to be so, what’s the word ... I expected it to be more relaxed than what it was; it was quite full-on.”

One SENDIST appellant recommended that appellants “could be given more information on what they were going to be up against” to better reflect the nature of the proceedings. However, for one SENDIST appellant, who was represented by a charitable organisation, the tribunal Secretary’s advice that the hearing was informal and did not require legal representation was seen as inaccurate and counter-productive. The appellant’s experience of the tribunal led him/her to conclude that legal representation was necessary:

*SENDIST appellant:* “[If I was doing it again] I would have legal representation. I felt that was something which we needed on the day, but because we thought it was informal we didn’t have.”

This view was shared by an appellant who had accessed legal representation:

*SENDIST appellant:* “I know it says in the literature that the tribunal send you out beforehand that you can have a representative and that that representative doesn’t have to have a legal background. I don’t know how I would have coped without someone without a legal background, because the whole process to me was very much in and around rules and regulations and procedures, and there were lots of issues that came up about when you could submit evidence and when you couldn’t ... lots of wee things, technicalities, that without [the legal representative] I don’t think I would have been able to manage.”<sup>36</sup>

Representatives for social security appeal tribunals and SENDISTs tended to view the proceedings as being as informal or user-friendly as they could be, taking account of the legal complexities involved in the cases (although SENDIST appellants found the procedure to be more formal than anticipated). For I/FETs, the proceedings were not seen as user-friendly, due to the adversarial nature of the hearing as well as the legal complexities, but it was also clear from all tribunal representatives that the level of formality or user-friendliness would depend greatly on the approach of the tribunal panel.

<sup>36</sup> Harris’s 1997 research on Special Educational Needs Tribunals notes that most parents who used legal representation thought it was very valuable and that some parents who did not have legal representation thought it would have been helpful to have had it: footnote 23.

Overall there was a recognised tension between ensuring proceedings are formal enough to respect the authority of the process and informal enough to allow appellants to present their cases most effectively. Informality was generally seen as a strength, and as a feature that distinguished tribunals from courts. The lack of judicial trappings was also seen by representatives and panel members as helpful in making hearings seem more informal, although there was some doubt raised as to the necessity of retaining judicial features for I/FET rooms, such as the raised bench and the plastic visors over panel members' desks. Where tribunal hearings were held in court rooms, this was seen as countering efforts towards user-friendliness.

## 7. Challenges faced by users

Users faced challenges at successive points: prior to making an appeal/claim, prior to the tribunal hearing, during the hearing, and after the hearing.

One of the main challenges identified for appellants/claimants was getting to a hearing: recognising the right to appeal/claim and feeling able to exercise that right. This could relate to problems with the initial decision making process where, for example, social security appellants described difficulty in completing claim forms:

*Social security appellant:* "[Disability Living Allowance] forms are diabolical to be honest. I just looked at them and went 'wow'."

*Social security appellant:* "all this form filling in and all that there, it's a mountain to climb for me without help."

Understanding appeal papers presented similar problems and a number of social security appellants took the view that the Departmental appeal papers were "gobbledegook":

*Social security appellant:* "I have the [appeal] papers there anyway and when you read it, you can't understand it."

*Interviewer:* "So the papers didn't make sense to you?"

*Social security appellant:* "Not really, no. One thing leads back to A, B and C and the next rule leads back to chapter 8 A, B and C."

*Interviewer:* "So you just got lost?"

*Social security appellant:* "Yeah, definitely."

*Social security appellant:* "for someone who doesn't have a higher education, they would be lost ..."

These problems were particularly apparent for those who had little confidence in their own oral and literacy skills.

For SENDIST appellants, preparing their submission for the tribunal was seen to present a considerable challenge:

*SENDIST member:* "I think marshalling their evidence; you know, getting the right evidence in front of us. That's a big issue ... [Appellants] need to present expert evidence ... and this has to be up to date – they come to the hearing and nine times out of ten the evidence is old. And that's an area in which I think they need help."

*SENDIST appellant:* “I have a public body background, and I was very aware of complaints procedures and things like that, and I really feel that the whole thing, if you were a person who didn’t have the time – because it was very time consuming – and secondly, didn’t have the ability, the understanding of procedures and possibly the ... – just the ability to write a good worded letter – you’d be stuck. ... [E]ven just sorting [the evidence] out, putting that in some sort of a reasonable order for the tribunal, difficult enough task. I didn’t feel that the whole process was very user friendly.”

*SENDIST appellant:* “putting the case together for me was the most difficult. I must have done it and redone it ten times ... So it was very time consuming ...”

For I/FETs, those on the respondents’ side felt that the process of lodging a claim was too easy, resulting in cases which have no merit reaching the tribunal,<sup>37</sup> although there was some indication from tribunal panel members that the process had recently become more robust and required potential claimants to consider more fully whether they had any basis for a claim prior to lodging a claim. However, it was generally recognised by both ‘sides’ that unrepresented claimants faced a considerable challenge in dealing with respondent requests for ‘further and better particulars’, with claimants then being tied to their responses as legal pleadings, despite not having understood them properly or responded properly. These requirements were seen as a contributory factor in cases being dropped.

For social security appellants, there were particular difficulties surrounding the intimate nature of medical conditions which had to be discussed with strangers:

*Representative:* “[the biggest challenge is] having to go and justify the fact that they’re sick in front of people they don’t know in a building they don’t know ...”

SENDIST appellants felt the process of the hearing meant that there was a lack of focus on the child, from both the Tribunal and the Board, which left appellants feeling that the child gets lost in the process:

*SENDIST appellant:* “it all becomes about resources, and about the needs of the system, as opposed to the needs of the child ...”

*SENDIST appellant:* “if the tribunal members maybe if some of them could see the child in their environment because all these reports are written, and all this evidence given, but it doesn’t always give a good sense of the child.”

For I/FET users, and particularly respondents, taking time out of work could present difficulties, and there could be frustration on this issue where cases were not seen as being handled efficiently.

Post-hearing, there could be difficulties with the tribunal decision, either in terms of delay in getting a decision,<sup>38</sup> or in understanding the decision. The latter appeared to be problematic for I/FET users in particular. One claimant identified that she had ‘picked up’ something

<sup>37</sup> A 2005 Confederation of British Industry report on *Employment Tribunals and Dispute Resolution Procedures* recommends that an appropriate fee be introduced to ensure that weak claims and vexatious litigants were kept out of the system, while still ensuring that all individuals have access to justice. An additional recommendation within this report was that more cost awards be made against unsuccessful claimants, to demonstrate the adverse consequence of bringing weak claims: CBI, *A Matter of Confidence: restoring faith in employment tribunals* (2005), available at

[http://www.cbi.org.uk/ndbs/Press.nsf/0/33f9830ed75f765b8025708800523621/\\$FILE/Tribunals%20Brief%20-%20CBI.pdf](http://www.cbi.org.uk/ndbs/Press.nsf/0/33f9830ed75f765b8025708800523621/$FILE/Tribunals%20Brief%20-%20CBI.pdf). One tribunal member interviewed for the current project indicated that he was “superficially attracted” to this idea for some discrimination type cases which were weak.

<sup>38</sup> This is dealt with further under section 9, *Timings and Delays*, below.

wrong, while another did not know if the costs he was threatened with by the respondent's representative were then awarded against him when he lost the case. One claimant only partially understood the decision, and did not understand the relevance of the judgement to her:

*I/FET claimant:* "Out of the 26 page decision very little is about my case; it's all about cases that happened in England and Northern Ireland."

This presents a challenge to individuals being able to understand what the tribunal process achieved, and in considering whether they are able to appeal.

SENDIST appellants had difficulties with the lack of enforcement powers by the Tribunal to ensure that their decision is implemented, with the result that a successful outcome did not translate into any practical improvements:

*SENDIST appellant:* "There are days when I feel, what was that whole process worth? ... [H]aving paid out all that money, invested all that time, all that emotional energy, only at the end of the day to feel like I'm right back at the beginning again ... That to me is a real weakness with the tribunal, that you can get this far and ultimately be nowhere."

These were identified as significant challenges for individuals seeking a remedy through the tribunal, and requiring one appellant to have to consider judicial review proceedings.

One challenge that was frequently identified for I/FET users was the difficulty in appealing decisions and there were strong views by the majority of representatives and tribunal members that this challenge could best be dealt with by the creation of an Employment Appeal Tribunal (EAT).

*I/FET member:* "I think there should be an independent or additional appeals tier. At the minute if you want to appeal against an Industrial Tribunal or a Fair Employment Tribunal you've got to go to the Court of Appeal ... They don't know anything about employment law and they don't want to get involved. It takes a year and a half, two years before they get round to reaching a decision by which time things have moved on generally. It is hopelessly inefficient ... There needs to be an EAT. Now whether that EAT is a freestanding Employment Appeal Tribunal or whether it's part of the upper tier in a new tribunal structure doesn't really matter. So long as somebody who is dissatisfied with the decision ... can appeal on a point of law to a higher tribunal I think that would be sufficient. ... if they genuinely think the decision's wrong they should have a quick and inexpensive way of resolving it ... [I]t's a gross unfairness at the minute. Effectively there is no appeal except for a handful of cases."

*Representative:* "in NI ... effectively you have court of unlimited jurisdiction in discrimination matters which is unappealable unless you've got a very deep pocket ... [W]e need an EAT."

*Representative:* "There's no appeal at the moment. Effectively no appeal ... I can't think of any other jurisdiction where there's effectively no appeal, and there's only appeal on the point of law, not on perversity."

*Representative:* "An employment appeal tribunal would be ... very welcome ... Your only appeal is on a point of law to the Court of Appeal which is astronomically expensive and difficult, and therefore much less likely to be engaged in. That's for everybody but of course it hits particularly hard on claimants who are already at a financial probable disadvantage effectively unless they're Legally Aid-able. And anyone who's trying to mitigate their loss having been sacked would be trying to get back into work and [so] ... is not going to be Legally Aid-able and therefore the Court of Appeal is not really a realistic option at all ... And if you're in that situation you may have a decision where a mistake has been made in the law or that it is fundamentally wrong and you know that, but you simply, due to the way the system is, can't appeal ... At the minute the narrower your possibility of appeal is ... the less justice there is."

This was also identified by some claimants and respondents for whom the cost of appealing to the Court of Appeal was seen as prohibitive:

*I/FET claimant:* “I certainly couldn’t have afforded to have appealed myself in case it [the Court of Appeal] awarded costs against me. And so, I would have liked to have appealed to get some answers, to get some clarification on the points that I had problems with in the ruling. I would really have loved to have done it from that point of view but it would just have been too costly.”

Interviewees were not asked a specific question on an EAT; their views on this issue came as part of their responses to other questions on, for example, challenges faced by claimants/respondents, ability of claimants/respondents to understand tribunal decisions and weaknesses in the tribunal system. Where interviewees did not raise the issue of an EAT, their views on this were not explored.

## 8. Independence

When asked what they wanted from the tribunal process, most appellants/claimants/respondents prioritised the independence of the tribunal, which they saw as linked with (and indistinguishable from) fairness and impartiality.<sup>39</sup>

Views on the independence of the tribunal by appellants/claimants/respondents were often linked to two things: outcome and experience of hearing. Where appellants/claimants/respondents had a positive outcome, they were more likely to view the tribunal as independent; where the outcome was negative, they were more likely to call the independence of the tribunal into question.<sup>40</sup> There is little that can be done to address this outcome effect, since negative outcomes for some parties are inevitable. However, where parties found the experience of the tribunal hearing to be negative, they were likely to see the tribunal as lacking independence, even where the outcome of the case was not known or, in some cases, where there was a positive outcome.<sup>41</sup> For example, one social security appellant who felt that he/she, and his/her representative, had been very badly treated by the Chair, said: “he [Chairman] came across as if he was on their side” (outcome: case adjourned).

Most social security appellants stated that they saw the tribunal as independent, unless they had a very poor experience at the hearing. Their views on independence did not appear to be shaped by statements by Chairs at the outset of hearings, setting out the independence of the tribunal. For most appellants, this information was not taken in, with appellants saying they “went blank”, and they were unable to recall or process what was said:

*Social security appellant:* “they [the tribunal]’re not part of the Department, sure they’re not? Or they are part of the Department?”

<sup>39</sup> This reflects the findings of Cowan and Halliday who found that welfare claimants conflated independence and impartiality, and did not distinguish between them: Dave Cowan and Simon Halliday, *The Appeal of Internal Review: Law, Administrative Justice and the (non-) emergence of disputes* (Oxford: Hart, 2003) p 118.

<sup>40</sup> The outcome effect is a common finding in empirical research studies of tribunal users in Great Britain: see footnote 18, at p 23.

<sup>41</sup> This view of ‘independence’ as something that is separate from institutional independence correlates with the finding by Richardson and Genn that public confidence may not be assured simply by having access to an institutionally independent system of redress. They emphasise the need for procedural fairness, based on trust in the decision maker, to positively shape users’ perceptions of the fairness of redress systems: G Richardson and H Genn, ‘Tribunals in Transition: Resolution or Adjudication’ (2007) *Public Law*: 116.

*Appellant's representative:* "they're not part of the Department."

*Interviewer:* "Did you think they were part of the Department?"

*Social security appellant:* "I assumed they were."

For others, tribunals were seen as part of the government machine, so that general difficulties individuals experienced in dealing with government Departments were then reflected on to their perceptions of tribunal independence:

*Social security appellant:* "It's their [the Department's] rules, it's their way, so how can it be independent, if you're referring back to their rules all the time?"

*Social security appellant:* "When you deal with the government I don't know how many independent decisions [you get]."

Tribunal panel members were keenly aware of this, and felt that appellants do not view the tribunal as independent, despite specific and repeated statements by the Chair that the tribunal is independent:

*Social security appeal tribunal member:* "I'm sure some people do ... get it confused and do think that somehow we're just a ... higher up level of the Department which has made the decision, ... which is why it's so important at the outset that the Chairman really does explain to them that we are impartial ... Now ... one would like to think it would be taken onboard, but sometimes maybe people don't understand really, even in spite of those explanations."<sup>42</sup>

*Social security appeal tribunal member:* "it's their interaction with government and they're not really concerned about which branch of government."

For Chairs, the only solution was to continue to remind appellants that they were independent, and to demonstrate that independence by the nature of proceedings, so that appellants recognised "that there had been something different about this process to what they've had so far". An inquisitorial rather than adversarial approach was identified as being better able to bolster this perception, but the independence of the appeal process was seen as being hampered by the process of appealing being connected to the Department whose decision was being challenged:

*Social security appeal tribunal member:* "everything that they've had up until that point in time, all of their dealings have been with the Department."

Chairs also identified a tension between claiming independence from the Department while utilising assistance from them, and being structurally connected to them.

The composition of the tribunal panel could also give rise to questions over the tribunal's independence. Some social security appellants thought that members of the tribunal panel or the clerk to the tribunal were the Department's representatives. The absence or presence of a Departmental presenting officer seemed to influence this perception. With SENDIST, there was a concern that the tribunal, including the Secretariat, had too close a relationship with the Education and Library Boards, and a question was raised over whether experience in the educational field could result in tribunal members being partial towards education authorities, although appellants were clear that no indication of partiality was displayed at hearing. This

---

<sup>42</sup> This reflects the finding in Berthoud and Bryson's research that many appellants did not realise were appealing and assumed they were continuing to the next stage of the claiming process: footnote 33.

echoes a concern raised by an I/FET claimant who felt that a panel member who withdrew over a potential conflict of interest with the claimant created a concern over independence:

*I/FET claimant:* “That gave me some doubts about [the panel’s] independence because people were dropping off for reasons that I didn’t consider were valid enough ... he dropped off and I was sorry about that because I felt ... that that perspective should be on the panel to kind of balance it, because there was people from a business interest ... I had no reason to think that they weren’t independent but equally no reason to think that they were.”

However, most I/FET claimants and respondents viewed the tribunals as independent:

*I/FET claimant:* “They ... seemed like they weren’t really going to be judgemental or have an opinion, it seemed like it was a clean slate, and I just felt that from the moment I went in and spoke. It was just their demeanour and manner ..., just came off that they were independent and that I was in with a chance of having a fair hearing.”

The attachment to sponsoring Departments was an issue for social security appeal tribunal members and SENDIST members. Sponsorship of I/FETs by the Department for Employment and Learning tended not to be perceived as an issue by interviewees. Where it was raised, tribunal members concluded that the influence of the Department was negligible. No issues were raised in relation to cases where the respondent was the Department, and none of the claimants or respondents interviewed were connected to the Department.

Independence in I/FET appears to be more closely connected to impartiality, specifically the issue of how a tribunal balances assistance to unrepresented parties with its duty to remain impartial. While it was agreed that there was no bias evident, it was the appearance of bias which was problematic. This perception of bias may result from “an imperfect understanding of what has happened” during the hearing. This could be a particular problem for unrepresented claimants: where they do not have someone to explain the process to them, that could give rise to feelings of bias, or unfairness. However, where users faced challenges bringing a case to tribunal, their sense of unfairness could be compounded and affect their perception of independence:

*Representative:* “the tribunal ... will do their best to come to an independent and fair decision, but the system itself is so unfair in its operation to get to that stage that it’s ... a problem”.

Difficulties for individuals in bringing cases to tribunals can therefore also impact on whether they view the tribunal as independent.

Overall, therefore, a good experience at the tribunal (including but not limited to outcome) tended to result in claimants having confidence in the process, but where the experience was negative (regardless of outcome) then users were less likely to have confidence in it. Where individuals had confidence in the process, they were more likely to regard it as independent.

## 9. Timings and delays

Three issues arose in relation to the timings and delays within the tribunal processes: the length of time to get a hearing; the length of the hearing; and the length of time taken to get a decision.

The length of time between appellants/claimants lodging an appeal/claim and getting a tribunal hearing varied considerably between tribunals. None of the social security appellants who

were interviewed identified any particular problems in this regard. However, social security appeal tribunal representatives did see delay as a significant problem faced by appellants:

*Representative:* "it can be anywhere from five to six months before you get a date of hearing, and then things may not run so smoothly at the hearing. Maybe somebody knows somebody on the panel, or there's no GP notes and records available on the day and that would further delay things, and that's normally what the complaints are about, the length of time it takes to get things sorted out."

*Representative:* "we do find it takes an awful long time, considering the fact that the Department should have all the information together on file already, and that really all they have to do is type up their own submission of the reasons for the decision and send that out to TAS [The Appeals Service], but then at the moment there seems to be an awful backlog in [Incapacity Benefit] appeals, that TAS will probably find they get a lot of them in all at once and then ... that backlog hits in to them fixing dates for the appeal as well. And that seems to be why it's taking so long to get everything sorted out."

*Representative:* "[appellants] think it takes a long time for the appeal to happen."

For SENDIST appellants, delay in getting a tribunal hearing was a significant issue since, in that time frame, the rights or remedies being sought were not being provided to the child. Appellants and representatives considered that the child needed immediate support, and the delay in getting a hearing on the issue was very distressing for families. During this time, relationships with the school could become strained, leading to an absence of cooperation on basic issues such as end of year meetings with parents. For one representative, the position in Northern Ireland compared unfavourably to that of England and Wales:

*Representative:* "In England and Wales the majority of appeals are lodged and heard with the decision issued within 24 weeks. My last appeal in Northern Ireland was 54 weeks and the one prior to that was over 40 weeks."

The delay in getting a hearing could also mean that evidence gathered prior to the hearing could be too old to be of use to the tribunal by the time the hearing occurred. This could put a considerable financial strain on users to get new reports which were generally very costly to obtain.

For I/FET cases, delay was not considered to be the problem, and there was a recognition that "the tribunals have moved to make themselves much more efficient in this way." The problem that was identified instead was the difficulty in getting a postponement, even where parties agreed to the postponement. This was seen to be related to cases being listed on an uninformed basis, which meant there was no account taken of how straightforward or complex the case may be, and no opportunity for input from parties to establish how long cases were likely to last. There was an acknowledgement that efforts were being made to address this, and case management was seen as positive in this regard, but limited in applying only to discrimination cases.

The length of hearing was raised as an issue in relation to I/FETs by claimants and representatives, and was something that could increase the stress or anxiety of users:

*I/FET claimant:* "It seemed to be all breaks. Start at 11 tomorrow morning, and then you'd be talking for about an hour and a half, and then it broke for lunch, ended early. I thought if it had of been more compact. Not so much 9 to 5 but near enough: 10 to 4 solid, would have been over quicker ... See things left and then coming out, it was an awful nerve wracking experience."

*Representative:* “I do accept that there’s a limit of time people can give evidence for and can concentrate and take notes but ... quite often in a hearing that lasts a week it could have been wrapped up in four days.”

The hearing was seen as being further delayed by the need to write down the evidence:

*I/FET claimant:* “If it was recorded, and they listened to the tape after something was [disputed] ... It slowed the whole thing down ... it was like me and you speaking now, everything had to be down word for word. I thought that was so, so slow, I thought it was a waste of public money, something to last that length of time.”

There was a view that the balance of convenience was for the tribunal rather than the users, and that the failure to record the hearing was indicative of this. The issue of recording proceedings was also raised in relation to social security appeal tribunals. Some panel members were in favour of recording hearings, and it was recognised that where tribunal Chairs were writing down what appellants were saying, there was often a perception by appellants that the Chair was not listening. However, there was also concern that if hearings had to be transcribed then the delay in getting the transcription might delay the issuing of decisions.

The time taken to get a decision was seen as problematic for some SENDIST appellants and for I/FET claimants and respondents, but was not raised by social security appellants. The delay in getting the tribunal’s decision could impact significantly on users:

*I/FET claimant:* “it took nearly a month for the decision to come out in the post, which I thought, if it was so clear cut, that could have been out with me in seven days, I could have been sitting here at the minute possibly awaiting the redundancy money to come in ...”

*SENDIST appellant:* “It’s awful hard, the wait between the tribunal being over and getting the results ...”

*SENDIST appellant:* “In that period it was all about my son not getting his therapy, and the longer it took to get an order put in place the longer my son wasn’t getting his therapy, so time was an issue ...”

Where the appellant also faced delay in getting to the tribunal hearing, the difficulties of delayed decisions were further exacerbated.

## 10. Alternative methods of resolving cases

There were a range of views on the need for, and quality of, alternative dispute mechanisms. The majority of views related to the potential for an Alternative Dispute Resolution (ADR) process to deal with employment disputes, but views on alternative dispute mechanisms were also explored with SENDIST and social security appeal tribunal interviewees.

For SENDIST appellants, there seemed to be little use made of the existing alternative dispute mechanism – the Dispute Avoidance and Resolution Service (DARS) – which was regarded by some with suspicion on the basis that it was in the same offices as the Education and Library Board.<sup>43</sup> Prior to the hearing, therefore, communications between the parties tended to

---

<sup>43</sup> This echoes the finding of the 2008 Education and Training Inspectorate [Survey of the Dispute Avoidance and Resolution Service](#) which stated: “This evaluation suggests that the siting of the provision within ELB headquarters does little to promote the independence of DARS. The evidence would indicate that more should be done to provide neutral settings for the service.” – para. 2.7, available at

be formal written communications, and the parties were unlikely to meet until the tribunal hearing, helping to explain why appellants saw the hearing as a “fight” between them and the Board. There was evidence that the tribunal recognised this and attempted, where possible, to provide parties with a chance to talk to each other prior to the hearing, in the knowledge that the conciliation service had not been used and that parties had not previously had any face to face meetings.<sup>44</sup>

With social security appeal tribunal users, there was a view among representatives that ADR could be extremely useful, and that while there were no formal processes for this (which some considered regrettable) informal discussions between representatives and Departmental officers often resulted in appeals being settled prior to hearing.<sup>45</sup> There was a clear view that the Department could be very receptive to these overtures and contacts were continually being built up by representatives to progress this. This informal process was dependent on those contacts, which could be adversely affected by staff changes, and appeared to be more difficult to establish with central offices than with local offices. There was evidence of representatives being able to resolve cases with Departmental Presenting Officers immediately prior to hearing but this was clearly dependent on Presenting Officers being present (and appellants having representation). Each of these informal resolution procedures was regarded as a positive process for appellants (who would not have to attend a hearing) and for the Department (who would not have to pay for a hearing). Representatives expressed a general aspiration that more meetings could take place between the Department and representatives or advisers, and a view that this type of relationship building could contribute to developing ADR processes.<sup>46</sup>

---

[http://www.etini.gov.uk/survey\\_dispute\\_avoidance\\_and\\_resolution\\_service.pdf](http://www.etini.gov.uk/survey_dispute_avoidance_and_resolution_service.pdf). The current Department for Education Northern Ireland consultation on special educational needs endorses the findings of the 2008 ETI Survey that DARS remains a viable option, and the consultation proposes leaving the current informal and formal appeal mechanisms (DARS and SENDIST, respectively) in place: DENI, *Every School a Good School: The Way Forward for Special Educational Needs and Inclusion – Consultation Document*, August 2009, para. 14.1, available at:

[http://www.deni.gov.uk/every\\_school\\_a\\_good\\_school\\_the\\_way\\_forward\\_for\\_special\\_educational\\_needs\\_sen\\_and\\_inclusion\\_8211\\_consultation\\_document\\_english\\_pdf\\_434kb.pdf](http://www.deni.gov.uk/every_school_a_good_school_the_way_forward_for_special_educational_needs_sen_and_inclusion_8211_consultation_document_english_pdf_434kb.pdf).

<sup>44</sup> At the time the interviews for this project were conducted, SENDIST had just moved into new NICTS premises in Bedford House, Belfast, and it was not clear whether it would continue to be possible to make provision for parties to talk to each other prior to the hearing within the new premises.

<sup>45</sup> Cases ‘settled’ in this way might involve getting the Department to review their decision in light of further evidence or representations from the representative.

<sup>46</sup> There has been some experience of ADR in social security appeals, which are discussed further in Part III of this report, and see C. Hay, K. McKenna and T. Buck, *Evaluation of Early Neutral Evaluation Alternative Dispute Resolution in the Social Security and Child Support Tribunal* (Ministry of Justice Research Series 2/10, 2010), available at <http://www.justice.gov.uk/publications/docs/evaluation-early-neutral-evaluation.pdf>. Questions over the appropriateness of ADR mechanisms in social security appeals, where the issue is one of entitlement rather than quantum, have been raised by a number of authors: see for example Michael Adler ‘Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice’ (2006) 69 *Modern Law Review* 6: 958; Neville Harris, Sheila Ridell, and Emily Smith, ‘Special Educational Needs (England) and Additional Support Needs (Scotland) Dispute Resolution Project Working Paper 1: Literature Review’, (2008) available at [http://www.creid.ed.ac.uk/adr/pubs/adr\\_workingpaper1.pdf](http://www.creid.ed.ac.uk/adr/pubs/adr_workingpaper1.pdf); Richardson, G and Genn, H (2007) ‘Tribunals in Transition: Resolution or Adjudication?’ *Public Law* 116; Nick Wikeley, ‘Decision Making and the New Tribunals’ (2006) *Journal of Social Security Law* 13: 67. See also Brian Thompson, ‘Current Developments in the UK: System Building – From Tribunals to Administrative Justice’, in Michael Adler, *Administrative Justice in Context* (Oxford: Hart, 2010), p 484, at pp 506-512.

I/FET interviewees were split in their views over the usefulness of ADR – either past, existing or potential procedures – between those who felt the procedures had been demonstrated to have failed and those who felt that it was still worth exploring ADR options. Most interviewees offered their experiences with the Labour Relations Agency (LRA) conciliation, mediation and arbitration services as reference points for their perspectives on ADR. A respondent with considerable experience of handling employment disputes had a very positive view of the LRA:

*I/FET respondent:* “The Labour Relations Agency perform an invaluable role. I would work with them very closely whenever it comes to unrepresented claimants, in that, while they can't give advice, they can point out and give an independent view of issues to individuals, and certainly, I find them helpful in dealing with unrepresented claimants.”

An unrepresented claimant also found the LRA to be a useful source of advice, but a first time, unrepresented respondent in the same case felt the LRA approach was inappropriate since it appeared to focus only on negotiating a paid settlement. One other claimant who had accessed the LRA felt that it was of no use in his/her case. None of the claimants were of the view that the respondents in their case had attempted to reach a settlement with them prior to the hearing, including those who had been in contact with, or been contacted by, the LRA. Indeed there was some scepticism about the attitude of employers to ADR, who were seen as using ADR as leverage against unrepresented claimants, pushing claimants towards a tribunal hearing in the expectation that this would overwhelm the claimants and force them to withdraw or settle for less.

Some representatives and tribunal members took the view that the LRA schemes were not worthwhile:

*Representative:* “The schemes are not certain; the quality of the arbitrators is unknown and they, I don't think, are ideal. The tribunals are meant to provide that service. They're meant to be a quick, simple decision making body. That hasn't happened either but I don't think that by reinventing an alternative to the tribunals you cure the problem. I think you've got to go back to the tribunals and start making them do what they're meant to do.”

There was a view from some interviewees that the LRA approach was limited to conciliation and that there might be more value in exploring other adjudicative options. One model that was proposed was a Rights Commissioner model, similar to the Republic of Ireland model:

*Representative:* “written submissions on both sides, a brief hearing which is inquisitorial in nature in which questions are asked from ... both sides and the decision is reached relatively quickly. [Y]ou may be represented but that doesn't necessarily ... give you a massive advantage ... [T]he Chair or the Commissioner can effectively dictate what way they want to run the hearing, to a large extent. And therefore being represented doesn't give you the large advantage ... that it would in an adversarial system.”

There were conflicting views over the value of this model:

*I/FET member:* “I was an arbitrator with the unfair dismissal scheme - the statutory unfair dismissal scheme - and the DEL discussion document at the minute glosses over the fact that all this was tried before and it failed totally. We had a perfect scheme where both sides come into a room like this. I sat at one end of the table, both sides sat at either end of the table in front of me and it was a shirt sleeves environment. People discussed the matter and there were no formal procedural rules. It was a meeting at which I asked the questions. Nobody else asked questions. I asked questions of both sides and reached a decision, pretty much like the system down south. Nobody wanted to use it. It died simply because of underuse. The trade unions didn't want it, the employers didn't want it, the

lawyers clearly didn't want it because they were losing out on work. Nobody wanted it. They wanted their day in court."

The current Department for Employment and Learning consultation document reflects this variance of views on particular forms of ADR but does note that the majority of consultees support a wider 'menu' of ADR services.<sup>47</sup>

Given the challenges faced by appellants/claimants in bringing a case to tribunal, there was a perspective that sole reliance on a tribunal mechanism could mean that "access to justice is much more notional than it is real", which creates an imperative to consider alternative dispute resolution procedures. Several users identified a clear need to develop alternative strategies for resolving disputes:

*I/FET claimant:* "I don't think [the tribunal hearing is] the best way of settling these things. I would prefer that there would be some more restorative process that you could consider before you get into a very adversarial situation. It's particularly made things bad in terms of [going for another job with the respondent] ... So in some ways it worked, you know, but it had a very detrimental impact on me taking it ... I felt that there was a lot of things we could have done prior to the tribunal having to happen to resolve the issue ... or just to answer the questions."

*I/FET claimant:* "I would like to have sorted it out if possible before a hearing."

*I/FET claimant:* "getting information maybe without prejudice or you know, having a meeting where, you know, where the other side could explain how they'd come up with their decision, again without prejudice ... Just something where you could get some answers and come to a decision then whether you needed to go further without it becoming quite so adversarial."

*I/FET respondent:* "[We would prefer someone] looking at all the evidence and saying 'is there a need for a tribunal?'"

*I/FET claimant:* "I think sitting down face to face across a table, without the legal ... just on a human level ... had some sort of interaction. To say what are the issues, what are your concerns, here's why we think we can't do what you want, rather than go straight into this, the impetus was all towards having a hearing and ... once that had all begun it didn't really seem as if there was a way to get off that ... But some sort of mediation to have those conversations in a different environment, in a different setting, without having to go through what turned out to be a highly formalistic process."

For an unrepresented respondent, the issue was how to make the process of adjudicating employment disputes more appropriate for small business respondents, whether within a tribunal structure or as an alternative to it:

*I/FET respondent:* "I think there is a need for dispute resolution on different levels. It's different if you're a very large employer who can afford HR managers, but something needs to be put in place for community and voluntary organisations ... Employment law needs to be the same but the resolution of

---

<sup>47</sup>Department for Employment and Learning, *Disputes in the workplace: a systems review: report on the public consultation*, (Belfast, 2009) Executive Summary, p 4, and Chapter 4, 'Alternative Dispute Resolution', available at:

[http://www.delni.gov.uk/disputes\\_in\\_the\\_workplace\\_\\_a\\_systems\\_review\\_-\\_report\\_on\\_the\\_public\\_consultation.pdf](http://www.delni.gov.uk/disputes_in_the_workplace__a_systems_review_-_report_on_the_public_consultation.pdf). For a comparative view on the value and limitations of different approaches to alternative dispute resolution see Trevor Buck, *Administrative justice and alternative dispute resolution: the Australia experience* (DCA Research Report 8/05, 2005). See also the views of the CBI Report in 2005 that further work with ACAS should be explored to provide a speedier resolution of cases: footnote 37. DEL has now published its response to the consultation on disputes in the workplace: Department for Employment and Learning, *Disputes in the workplace: a systems review – Policy response* (2010), available at [http://www.delni.gov.uk/disputes\\_in\\_the\\_workplace\\_\\_a\\_systems\\_review\\_-\\_policy\\_response.pdf](http://www.delni.gov.uk/disputes_in_the_workplace__a_systems_review_-_policy_response.pdf).

it has to be different. ... [T]he community organisations in Northern Ireland employ something like 12,000 people, so it is on a sort of level with some of our major employers but they're all individual groups and organisations. ... I think there needs to be a different band of tribunal. Maybe that's just complicating things but I think for openness, transparency all of that, I think different employers need to be treated differently. The basis of the legal system needs to be the same but there needs to be a different mechanism ..."

There were also some views expressed on the need to take account of the context in which cases are taken, and an awareness of particular issues facing Northern Ireland:

*I/FET claimant:* "I don't think it's [the tribunal process] the best way of going about things, especially in small places like Northern Ireland where you're meeting people on the street, you're coming across them, you're working in the same environment as them ... Things end up so hostile it's not a good way of resolving things."

*I/FET respondent:* "this is still Northern Ireland, there still is intimidation and there still is paramilitaries, and there still is all sorts of threats in the background, so I think a tribunal needs to be aware of that. It's the context it needs to be set in. There was witness statements but [the witnesses] wouldn't actually go and stand in front of a tribunal and say this happened ..."

This may further underline the views expressed on the need to provide alternative methods of resolving cases and to find a Northern Ireland specific solution.

### 11. Training of tribunal members

Due to the emphasis placed on the role of tribunal members, the interviews explored the training that members required to develop this role. This led to discussions on the extent to which members felt that training could facilitate cross-ticketing within a unified tribunal system, which are further explored below. The discussion on training divided into two main areas: legal training, which included training on the legal procedures for tribunal hearings, and 'judge-craft' training, although linkages between the two were also recognised.

Legal training was regarded as a priority by most members, and this included training on the tribunal procedures as well as updates to deal with changes in legislation or case law. Many Chairs were confident that they had a particular expertise in the area of law for their particular tribunal, but were not complacent about the need to update their knowledge. For panel members, legal training was regarded as vital, since they did not possess this legal knowledge. The range of legal training provided for tribunal members tended to vary, with a mixture of both active and passive training. Active training techniques which were regarded positively included case study based training where issues were explored in a participatory way. This was regarded as more useful than 'dry' lectures on legal developments. Passive training included circulation of recent and significant case law, particularly those from appeal bodies, and was regarded by several members as being a very positive means of providing current and updated information. The amount of training varied between tribunals, and a number of members felt that training was too 'light' or infrequent and could be improved. These members identified training provision as ad hoc rather than systematic, and some felt that the training provided (both active and passive) was often of limited value. Some members saw opportunities to plug into existing training programmes for other tribunals, both in Northern Ireland and in Great Britain, and felt that this could be a useful resource to avoid duplicating training sessions unnecessarily.

Judge-craft training was also seen as vital, particularly for new or inexperienced tribunal members. For Chairs there was an acknowledgement that

*I/FET member:* “when you’re on the other side of the table it’s a totally different picture and this side of the table you approach things in a different way ...”

Panel members were also aware of the difficulties faced by users and of the need for panel members to be trained to deal with these:

*Social security appeal tribunal member:* “the training is to encompass the fact that ... the appellants are ... often not hugely articulate ... they’re coming into ... an alien environment ... on the face of it, it can be quite intimidating for an appellant to come in to have his appeal heard. So ... obviously one wants to try and put the appellant at ease in order to maximise his or her opportunity to get their evidence across really ...”

This awareness of a need to put users at ease during the hearing is also important to consider in the context of the findings on users’ experience of the hearing, where a positive experience was related to the skills of panel members to put users at ease and facilitate their participation in the hearing.

Most tribunal members felt that judge-craft skills were best learned on the job. Where members sat infrequently, it was suggested that there might be a need for additional training to make up for the relative lack of on the job training. However, there was some divergence of views on the need for on-going judge-craft training. Some members felt that individuals either mastered the skills at the outset, or never at all. Some felt that the ability to put appellants/claimants/respondents at their ease was part of the competence that they brought to the job, and grew with experience:

*I/FET member:* “Once you’ve got to grips with the knack of running a case fairly and ensuring that both sides are heard and neither side thinks you’re favouring the other and managing difficult people sometimes, particularly where they get quarrelsome, the primary need for updates is the technical end and as the law shifts as it develops you need to be fully up to date with it ...”

Others felt that it could not be taken for granted that an individual’s competence would increase on the job, and competency based support was seen as advantageous in addressing skills deficits and providing some form of performance management. Chairs and panel members both saw value in being trained together on judge-craft skills “to see how other people do the job and provide ... a bit of a yardstick to measure your own performance by”, but legal training was seen by Chairs as necessarily being separate. As with legal training, judge-craft training that was developed systematically, and that linked to other training opportunities for judicial colleagues in other tribunals and courts was seen as helpful. The need to differentiate between training needs of members with different levels of experience was also regarded as important. More passive techniques identified included guidance manuals and processes of self-reflection, which were felt to be helpful training tools.

There were inevitable overlaps between issues of legal training and judge-craft skills, where, for example, training on diversity and equality issues was regarded as “the human rights side of it” by some panel members. However, there appeared to be a limited training focus on diversity and equality issues, with most training being either based on legal developments or generic judge-craft skills. Some members identified specific diversity and equality training needs, and recognised this as a gap, while others questioned whether this type of training would be useful.

## 12. A unified tribunal system?

Discussions around the possibility of a unified tribunal system for NI focused on what the potential advantages and disadvantages of a unified tribunal system might be, and what might be required for a unified tribunal system to work.

*Advantages:* Many Chairs saw a clear advantage to having a unified service that would allow access to a cohort of lawyers who could be trained in new developments as they arose, as well as having ‘fire-fighters’. A particular advantage of this was seen to be a pooling of knowledge – legal and procedural – and experience, which could also facilitate the creation of more ‘rounded’ panels. There was a view that this could create a better support network for members and provide opportunities to see how things could be done differently.

Cross-ticketing of members was seen as particularly beneficial where members sat infrequently, allowing members to maintain their skills:

*I/FET member:* “Cross ticketing I think is a serious advantage. Some tribunals don’t get a lot of work and if people are sitting on those tribunals and sitting on nothing else they very rapidly lose their skills. You need to keep up with a reasonable stream of work so you’re used to dealing with fraught hearings etc. So I think cross ticketing would enable people to keep up their expertise and ensure that they have a ... good level of training.”

Related to this was a view by Chairs that a unified structure would allow individuals to make a career out of tribunal membership, by increasing their access to other tribunals.

*Disadvantages:* The flip sides of many of the advantages were identified as potential disadvantages of a unified system. While a cohort of trained members could be an advantage, the disadvantage would be if this came at the expense of expertise. It was evident that members often felt very protective towards their particular legal area, and some Chairs were uneasy that the legal expertise, which was a significant strength of tribunals, might be lost and lead to a ‘jack of all trades’ approach. Caution was urged to ensure that ability to cross-ticket members would not be to the detriment of this expertise:

*I/FET member:* “You wouldn’t want to dilute the particular expertise, say employment or immigration or social security, but proper management of training within the joint tribunal system would deal with that.”

Related to this loss of singularity was a concern that there would be a loss of control by individual tribunals over their own procedures. More generally, some members saw a unified system as leading to a loss of intimacy that can be provided within a small system, with attendant fears that “people get swallowed up in a big machine” which is harder for the public to deal with than a smaller ‘machine’. One representative considered that bringing tribunals within what was then the NI Court Service could contribute to this problem, and expressed a concern that the connection with the Court Service – particularly where tribunals were located on Court Service properties – could create a stigma of ‘having to go to court’ that would discourage individuals from accessing tribunals.

*What is required?:* There was strong agreement that proper training could facilitate cross-ticketing of members between different tribunals. Most Chairs felt that taking on new areas of law was simply part of the lawyer’s role:

*I/FET member:* “any lawyer is used to absorbing new areas of law quickly. That’s really the skill of the job. Law always changes and even if you stayed in the same legal area you would have to update yourself on a pretty regular basis.”

*I/FET member:* "given that people are experienced lawyers, given that they have the ability to absorb vast amounts of information quickly and retain it, a couple of days [training] is more than enough."

There was a view that judge-craft skills were common across all tribunals:

*I/FET member:* "The core skills; managing the hearing, assessing the evidence, looking for inconsistencies, basically deciding whether somebody's telling the truth or not, they're completely transferable ... Assessing factual evidence and assessing truth would be completely transferrable from one [tribunal] to the other. The only training would be the technical background and that would be essential."

Training on the procedural approaches of different tribunals was considered to be vital to enable members to be cross ticketed, particularly where members were required to move between tribunals with varying levels of formality and legal procedure. It was suggested that this might require a distinct training department within a unified tribunal system, and conducted by those who specialise in training. There was also a view that there would have to be a greater degree of uniformity between tribunals than currently exists if cross-ticketing is to work, and a concern over what might be required of fee-paid members to participate, since these members were not full-time. This was regarded as more potentially problematic for lay members in particular, who had to balance their commitment to tribunal work with maintaining their expertise in their professional careers:

*Social security appeal tribunal member:* "most of the medical panellists in the appeals tribunal, they're serving GPs and they might dedicate ... one half day a week or two half days a week to doing that work ... But ... if you're going to have unified tribunals then all of those people are going to have to rule themselves out of it because ... the degree of training in order to get it set up would be such that it'd be ... impossible ... and the service would suffer as a result ... You'd end up then that ... the only medical practitioners on these panels ... would be retired doctors ... rather than doctors who are still in clinical practice."

*Social security appeal tribunal member:* "the tribunals that I've been involved in, they're all so different from each other ... that it would be ... pretty well impossible for someone who's not full time, who's not a full time tribunalist, as it were, to participate across a range of different tribunals... [T]hey're so diverse and ... there's such a lot to know about each individual one that it would be very difficult for a part time person to do that ..."

There was some concern that there might be a lack of administrative expertise within a unified system, and no comparator was noted as being able to provide evidence of what administrative capacity or skills deficit might exist.

In terms of the structure of a unified system, there was some divergence of views on where I/FETs could sit within a unified tribunal system. This was identified as a training issue initially, with a view expressed that for I/FET Chairs, it might be easier to train to sit in the ordinary courts, where complex civil law issues are at stake. In terms of structure, one member viewed I/FETs as sitting inelegantly outside the administrative tribunal structure, but still needing to remain within a tribunal system rather than being part of the court system. Another remained unconvinced that there was a need for a separate pillar for employment tribunals in the UK Tribunals Service, and so saw no need to replicate this separation in NI:

*I/FET member:* "I recognise that they are different in a sense that it's party against party as opposed to party against state but you're still dealing with (a) allegations of fact, which have to be determined, and (b) applying the law to those facts. So there's no reason really why those can't work together in one system where people can be ticketed in one jurisdiction or ticketed in two or three jurisdictions."

There was also a more general structural concern that new tribunals appeared to be established without having regard to the jurisdiction of existing tribunals, and that a better understanding of what currently exists might obviate the need to set up additional tribunals. The research did not explore the potential for an upper tier within a unified system, although discussions on the need for an Employment Appeal Tribunal under section 7, “Challenges Faced by Users”, would be a relevant consideration here.

### 13. Oversight and accountability

There was strong support for an oversight body for tribunals in NI, with several members stating that NI needed an Administrative Justice and Tribunals Council. An oversight body was seen as necessary to ensure coherence in tribunals and consistency across tribunals. For some oversight was linked to accountability: an oversight body was seen as necessary to ensure that tribunal members were performing their roles properly, creating a possibility of removing members who were not performing at the proper standard. Lack of oversight was seen as creating a system that is unregulated.

For Chairs, the importance of an oversight body was intimately linked to questions over who should lead it. There were strongly held views that the individual responsible for an oversight body should be someone who knows about the need(s) for and of this body, someone who would be committed to it and who would have the necessary leadership qualities to ensure the body was effective and visible.

## Conclusion

This research provides a snapshot of the issues facing tribunal users in Northern Ireland. To reiterate, the numbers interviewed for the research prevent the research findings being generalised to apply to all tribunals in Northern Ireland, and so the perceptions of users that are discussed here cannot be said to automatically reflect the views of all users. Indeed, views highlighted here may contrast with views established through other sources, such as customer satisfaction surveys. Further, some issues of concern that were identified at the time of the research may have been addressed in the period between the research being conducted and reported.<sup>48</sup> Nevertheless, there is value in the research in highlighting where users’ perceptions may diverge from what has been understood to be their position, and identifying where further work may need to be done. The users’ study clearly indicates that there is a considerable body of further research needed to better understand users’ experience. This includes, *inter alia*, establishing the extent to which users understand decisions under appeal, and their potential grounds of appeal; establishing what information is available to tribunal users, and ways in which this information could be made more accessible and effective; reviewing the availability of advice services to tribunal users to establish gaps in provision; reviewing the quality of tribunal representation and identifying training needs of representatives; establishing the extent to which tribunal hearings are accessible, enabling and participatory; consider-

---

<sup>48</sup> For example, as a result of the Rules of the Court of Judicature (NI) (Amendment) 2010 (SR 2010 No. 49) there can be a direct appeal from an Industrial or Fair Employment Tribunal to the Court of Appeal, rather than only by way of case stated, which may improve the position of parties wishing to appeal. The Rules were brought into effect after the interviews were completed.

ing alternative means of resolving disputes; and reviewing training provision for tribunal members.

The users' study has created the beginning of an evidence base to inform the future direction of tribunal reform and what it highlights is that tribunal reform must be considered as a matter of some urgency. In line with this need for urgency, the findings from the users' study are used to inform the third part of this research project, so that, together with the findings from the scoping study, a coherent set of recommendations can be made to help direct future reform initiatives, and a timeline for immediate and ongoing action can be produced to progress tribunal reform in Northern Ireland.

## Part 3: THE SCOPING STUDY

### Introduction

The users' study has reflected the views of tribunal users, outlining their experiences of tribunal processes in Northern Ireland. The accessibility and suitability of tribunal processes, information and procedures, and the training, management and oversight of tribunal members are key to ensuring that the tribunal experience is as positive as it can be. This fundamental issue links clearly to issues of oversight and accountability to ensure that tribunal standards reflect and maintain the core values of openness, fairness and impartiality set out by Franks in 1957. The objective of the scoping study was to ascertain the need for some mechanism of accountability and oversight for tribunals in Northern Ireland, and to consider how such a mechanism might be established.

In this section of the report, we first draw on a series of interviews conducted in the period August to November 2009 with court and tribunal judiciary and Departmental officials in Northern Ireland and with an official and academics in Great Britain, on whether there is an accountability and oversight gap in the arrangements for tribunals. There were nine interviews in Northern Ireland and three in Great Britain. We then draw on the interviews from Parts 2 and 3 to propose a reform agenda for tribunals and administrative justice in Northern Ireland which takes into account views on practicalities for an implementation plan.

#### *Accountability and oversight*

The interviewees in Northern Ireland were asked if they thought there was an accountability and oversight gap, and the prevailing view is reflected in the following comment from one of the interviewees:

“there hasn't been any effective oversight or accountability in Northern Ireland.”

This assessment needs to be broken down, not only distinguishing between accountability and oversight, but also separating out different types of accountability. As pointed out by one interviewee:

“My view is that there really is judicial accountability in many tribunals, through the appeal system, through the Court of Appeal and above ... and the High Court on Judicial Review.”

There is financial accountability through the usual arrangements for approval of planned expenditure through the estimates and supply procedures and for the audit of expenditure. The provision of annual reports by/about the different tribunals is patchy. One interviewee said:

“Well, I can only speak for my own... we are obliged to produce a report every year, and did so, until a few years ago, and we're in the process of doing one report to cover all the missing years.”

Oversight was suggested to have two strands: first coherence. As other interviewees said:

“there is a problem in Northern Ireland that there’s no independent oversight of the establishment of tribunals or the development of tribunals, and I think that’s a necessary step to take.”

“You see, I think the problem is that what has happened, what’s happened to date, really, is that, as in England, tribunals have developed in an ad hoc fashion, under the control of different government Departments, who, although they are offering an appeal system against the decisions of their own Departmental officials, they’ve developed different policy frameworks within each department, because the minister involved is responsible for his own policy and he will develop that policy with his own civil servants. And the result of all of that is that you get widely disparate approaches to how tribunals should be run. And I think there needs to be an overall coordination of the kind of service that needs to be offered, and also how independent it is of the actual government Department that’s offering the right of appeal. I think that’s actually quite important.”

The second strand concerned the users’ perspective.

*Interviewee:* “Well, part of the difficulty up to now is that, when tribunals policy has been developed, it’s been developed from the viewpoint of government and administrators within government, not from the viewpoint of appellants, and that’s because appellants have no way of voicing their concerns in a considered kind of way. The voice of appellants is generally in the hands of volunteer organisations, and volunteer organisations vary enormously in their resources and in their commitment to representing issues to government that need to be followed up.”

On these bases, there was a consensus amongst the Northern Ireland interviewees that there was a gap that needed to be addressed:

*Interviewee:* “it’s quite clear that we need to look at and develop some form of Council of Tribunals.”

Northern Ireland interviewees were familiar with the Council even though its remit covered only a few UK-wide tribunals operating in Northern Ireland, because those involved with devolved tribunals in Northern Ireland were invited to and did attend the Council’s annual conferences.

### *The Council on Tribunals*

The Council on Tribunals’ tasks included keeping under review the constitution and working of tribunals, reporting on matters and responding to consultations, and conducting visits to tribunals and inquiries. The annual reports would detail their work and in special reports matters of particular concern would be addressed or guidance offered. Examples of these reports from the last decade include those on the deficiencies in the Mental Health Review Tribunal (2000) and in School Admission and Exclusion Appeal Panels (2003) and their guidance on a framework of standards, making tribunals accessible to disabled people (both 2002) and drafting rules of procedure (2003).

The Council was a useful adviser to Ministers because tribunals were established by Departments as and when they thought their creation was appropriate. The Departments tended to respond pragmatically to issues and problems and were not always sensitive to points about legal process. The Franks Report considered the competing views of tribunals as part of the machinery of (a) administration and (b) adjudication, and came down firmly on the side of the latter, for which courts were the model. But the reason for the rise of tribunals as court-

substitutes was their perceived advantages over the courts of speed, cost, accessibility, freedom from technicality and expertise.<sup>49</sup>

The Council in its application of the Franks Report's values of openness, fairness and impartiality, sought to ensure that the speed, cost, expertise and accessibility advantages of tribunals were not offset by deficiencies in their membership and procedures. For example, in the field of social security, they had received complaints about supplementary benefit appeal tribunals around the same time that Council member Professor Kathleen Bell was commissioned by the Department of Health and Social Security to conduct research into the operation of appeal tribunals for supplementary benefit and national insurance. This work highlighted the particular difficulties in supplementary benefit which, in the period of the study, the early 1970s, contained a high degree of discretionary decision-making which the overwhelmingly lay tribunal Chairs and their wing member colleagues were unable to deal with satisfactorily. The material which they took into account was not always relevant and sometimes presenting officers were permitted to introduce material which had not previously been made available to the appellant. The tribunals' decisions did not always contain any reasons, or the reasoning was insufficient and did not clearly support the decision. By comparison, in national insurance local tribunals, the combination of legally qualified chairs, and a more structured set of entitlement regulations in a system which allowed for reported appeals on points of law, and therefore a degree of precedent, produced more consistent and appropriately reasoned decisions but still had its problems in relation to the conduct of the hearing, with appellants not turning up and variability amongst the type and success of appellants' representatives.<sup>50</sup>

This example shows improvement in terms of awareness, understanding and commitment to creating and meeting rights both substantively and procedurally. Departments pay more attention to the decision-making and appeals arrangements of the legislative schemes which they administer. The Council as an advisory body could not require that its advice be followed, but over time Departments were more likely to seek and follow their advice.

### *The Leggatt reform package*

The coming into force of the Human Rights Act 1998 was a major reason for establishing the Review of Tribunals conducted by Sir Andrew Leggatt and which reported in 2001. Another significant reason was the proliferation of tribunals and tribunal-like bodies. Leggatt determined that there were some 70 different bodies which he was dealing with and at the end of the nine month period of the review, when he produced his report, three more tribunals had been created. The title of the report *Tribunals for Users: One System, One Service*, clearly indicates the focus on users which Leggatt adopted. The concern about human rights compliance and independence from the tribunals' sponsoring Departments, plus the range and number of tribunals led to proposals about *structures*. These changes would facilitate the provision of a better service to *users* with the counterpart to administrative efficiencies being provided through *judicial leadership* and well trained tribunal members who might be using *processes* other than oral hearings. This new tribunal framework would be kept under *system review* by

<sup>49</sup> See footnote 7, para 38.

<sup>50</sup> K. Bell et al 'National Insurance Local Tribunals - A Research Study Part I and Part II' *Journal of Social Policy* (1973) 281-315, (1974) 1-25 respectively, and K. Bell, *Research study on supplementary benefit appeal tribunals: review of main findings, conclusions, recommendations* (London: HMSO, 1975), p 57.

the Council on Tribunals whose remit would be expanded beyond tribunals to the other component parts of the administrative justice system.

The great majority of the proposals made by Leggatt were accepted and then elaborated in a White Paper before enactment in the Tribunals, Courts and Enforcement Act 2007. Together they form the Leggatt reform package.

## An agenda for tribunal reform in Northern Ireland

It is striking how closely the findings of our users' study map onto the five strands of the Leggatt reform package, namely *users, processes, judicial leadership, structures, and system review*. We now propose issues for tribunal reform in Northern Ireland derived from the Leggatt reform package and the interviews from the users' and scoping studies.

### *Users*

Before considering Leggatt's views on information for users, there is the foundational matter linking two key aspects of his terms of reference, (1) independence and impartiality, and (2) the incoherence produced by the proliferation of tribunals. This resulted in Leggatt's recommendation that tribunals be removed from their sponsoring Departments to an executive agency in the Lord Chancellor's Department. Not only should those Departments relinquish administrative support but also responsibility for them, otherwise for users 'Every appeal is an away game'. As one tribunal judge remarked:

"... I've had appellants ask the question, who pays your wages, which is a really revealing one ... And, you know, it is really perception, but an important perception, you know – I couldn't say that I ever felt pressured in any way by the ... Department ... so that in reality there really was no great problem, but there was the perception."

Accordingly, the NICTS should be completely responsible for tribunal administration and policy.<sup>51</sup> As was indicated in Part 1, not all tribunals were included in the Summer 2009 plans for the transfer of administrative support from sponsoring Departments. In particular, we noted Schools Admissions and Exclusion appeals which are currently the responsibility of the Education and Library Boards. Accordingly, we suggest that not only should all existing tribunals be transferred to the NICTS but that any future tribunals would, on their creation, also become part of the new structure.

A further point on coherence relates to onward appeals from tribunals. Just as Leggatt found a 'hotch-potch'<sup>52</sup> in Great Britain, it is also true in Northern Ireland. Broadly speaking, there are four routes for onward challenge, three of which provide for an appeal on a point of law to:

---

<sup>51</sup> See also the proposals to deal with independence of tribunals in the differing devolution arrangements in Scotland and Wales by removing them from their sponsoring Departments, Administrative Justice Steering Group, *Options for the Future Administration and Supervision of Tribunals In Scotland*, (Edinburgh, 2008), and in Wales, Administrative Justice and Tribunals Council, Welsh Committee, *Review of Tribunals Operating in Wales*, (Cardiff, 2010).

<sup>52</sup> Leggatt, footnote 2, at para. 6.9, adopting the term first used by Lord Woolf: 'Hotch-Potch of appeals – the need for a blender' (1988) *Civil Justice Quarterly*, 44.

- (i) *Specialist Tribunal*: from Appeal Tribunals to Social Security and Child Support Commissioner, from Pensions Appeal Tribunal to Pensions Appeal Commissioner and from the Valuation Tribunal to the Lands Tribunal;
- (ii) *High Court*: from Special Educational Needs and Disability Tribunal, Care Tribunal;
- (iii) *Court of Appeal*: from Mental Health Review Tribunal, Lands Tribunal, Industrial and Fair Employment Tribunals.

The fourth route includes the other tribunals which do not have such an appeal on a point of law; instead, aggrieved users have the ordinary opportunity for an application for judicial review to be made to the High Court.

The reasons advanced by Leggatt for rationalising the ‘hotch-potch’ were that this provided an opportunity to retain at the appellate level the expertise found in the tribunal which could contribute to the development of a specialist body of law for that tribunal, providing precedents which would encourage consistent and high quality decision-making. There is a further reason put forward by Justice Bell in his review of the Victorian Civil and Administrative Tribunal, which is that of providing a more affordable and accessible right of appeal than going to a court.<sup>53</sup> This is something which has been raised in the context of employment cases where the Department for Employment and Learning review of the consultation on disputes in the workplace noted that there was strong support for appeals from Industrial and Fair Employment Tribunals to an Employment Appeal Tribunal and on which the review promised specific and further exploration.<sup>54</sup>

It is strongly suggested that the logic of creating tribunals to deal with some disputes about public services and in the workplace, for reasons of expertise, cost, speed and user-friendliness, should also extend to the creation of an accessible right to an appeal on a point of law to a body other than the normal courts.

Following the transfer of responsibility for policy and operation of tribunals to the NICTS, it must be borne in mind that users will not regard an initial decision and then an appeal as separate matters, but as part of a single process. Therefore, there must be liaison between the NICTS and the Departments to deal with it as an ‘end to end’ process viewed from the users’ perspective with indicators, aspects of which we now consider.<sup>55</sup>

Leggatt found that users were unclear about what they might expect at a tribunal hearing and what might be expected of them. He also found that users had a lack of information about whether or not their disappointment at an official decision amounted to a good case to challenge that decision. What was needed was, first, a clearly expressed and reasoned decision by a public body. Secondly, there should be information about how that decision might be challenged and this would not only include an appeal to a tribunal where relevant, but other possible remedies. The tribunal’s jurisdiction should be set out and the possible outcomes of the different remedies explained. In addition to this, users were also unclear about what they were expected to do to present their case and the relevant supporting materials which they would need in order to prove their arguments. The nature of the procedures should be explained and

<sup>53</sup> K. Bell, *One VACT: President’s Review of VACT* (Melbourne, 2009 not published until February 2010).

<sup>54</sup> Department for Employment and Learning, *Disputes in the Workplace: A Systems Review Policy Response*, footnote 47, paras. 6.1.-2.

<sup>55</sup> A good starting point for these considerations is the Council on Tribunals *Framework of Standards* (2002, updated 2006): see Appendix B

if there are any pre-hearing meetings then details about them must be provided. Users will also need information about the venue and its facilities and how people with impaired mobility, hearing and sight will be accommodated and if they will be able to claim travelling expenses. Leggatt was impressed by the special video on appeals which the Special Educational Needs Tribunal had commissioned to be sent out to users.

The users' study showed that all of the issues identified by Leggatt applied to users in Northern Ireland. It is important to recognise that there are two linked aspects which require co-operation amongst different bodies. Decision-making bodies and those administering appeals have to ensure that, first, the decisions are reasoned and expressed in an easily comprehensible way and that they provide comprehensive information on options for challenge, including the outcomes they produce, what is required to prove a challenge and details of the procedures, the venues and their facilities. Secondly, people require advice to help them decide if they wish to challenge a decision as well as support if it is decided to make a challenge. The appropriate degree of support will vary according to the nature of the challenge, the complexity of the issue(s) and the individual's circumstances, for example, whether they have learning difficulties or are young or old or English is not their first language. Leggatt, somewhat controversially, had recommended that the expectation should be that people would represent themselves, unless this would be inappropriate because of learning or language difficulties or their age or youth or the complexity of the issues and law. There was a pre-condition for this, that an adequate system for the provision of information and advice was in place which would put people in a position to be able to represent themselves. Another relevant factor, which will be dealt with later, is the way in which the hearing is conducted by the tribunal.

The new Department of Justice must not operate on the basis that it is only the NICTS which should provide high quality information for tribunal users. This mistake was initially made in Great Britain where the Tribunals Service, as an executive agency, was meeting the operational challenge of implementing the various structural and administrative changes in the Leggatt package as enacted in the Tribunals Courts and Enforcement Act 2007, but had no remit to oversee the framework for advice that users might receive prior to approaching a tribunal or indeed to divert them elsewhere to other remedies. For individuals, there must be recognition of the fact they need information and advice to help them decide if they are going to use a tribunal. Thus there must be integration between the policy and executive units. For UK-wide tribunals this did not happen until the Ministry of Justice was reorganised and an Access to Justice Directorate was created in 2008 which brought together policy on legal aid and public legal education with the Court Service and the Tribunals Service across the fields of civil and administrative justice.

The initial organisation of directorates within the Department of Justice includes a Policy Directorate which incorporates a Civil Justice Division which may accommodate tribunals' policy. The NICTS and the Legal Services Commission are both outside the Delivery Directorate, with the former being an executive agency and the latter a non-departmental public body, which means that it is at arms-length from the Department although funded by it. Access to justice is one of the Department's five cross-cutting themes; it covers issues such as legal aid, civil justice and the modernisation of the Courts and Tribunals Service. It is hoped that this matrix of organisational structure and policies will provide an integrated approach for the development of policy on tribunals and administrative justice.

A further consideration for the Department of Justice is the environment and accommodation used for tribunal hearings which should also be considered from the users' perspective. There

was some evidence in the users' study that the more formal the venue the more intimidating the experience could be. The use of court rooms was considered to be inappropriate, and there were negative connotations associated with going to a court venue, particularly a criminal court, for a tribunal hearing. Where the existing estate of the NICTS is to be utilised or developed for tribunal hearings, we would recommend the creation/redesignation of civil justice centres as likely to be more appropriate for tribunal hearings than combined criminal and civil court venues. However, there was evidence from the users' study that even purpose built tribunal venues could still be considered too formal by users, where judicial trappings were retained, such as a raised bench for panel members. We would therefore recommend further consultation with users to better understand the need for, and nature of, user-friendly tribunal accommodation, appropriate to the hearing of the dispute.

### **Recommendations**

- 1. Users must be the focus of the Department of Justice and its policy and executive units in relation to tribunals and administrative justice.**
- 2. Clearly expressed information about challenges to decisions must be made available in a range of languages and formats detailing types of remedies, their possible outcomes, processes, what users can expect and what they must do to pursue a challenge.**
- 3. Tribunal users should be given access to independent, good quality advice, support and representation, and the documentation and processes for claiming such advice and support must not be complex.**
- 4. Tribunal users should have a right to an accessible and affordable appeal on a point of law.**
- 5. The tribunal environment should be user friendly and appropriate to the hearing of a dispute, and users should be consulted on what may be considered to be user friendly tribunal accommodation.**
- 6. In addition to regular customer experience surveys of tribunals and the creation of users' groups, consideration should be given to the commissioning of research into awareness and experience of tribunal appeals and the associated advice, information and support services.**

### **Processes**

The Leggatt proposals on tribunal processes recommended self-representation at the hearing which would require (a) the provision of information and advice beforehand, and (b) that the tribunal members conduct the hearing in a way which enables users to represent themselves. He also advocated that active case management, by which he meant 'minding cases during their progress through the tribunal', should be used in order to improve the scheduling of hearings and to identify issues and the related evidential material. Pre-hearing reviews could also be used to direct some cases to a suitable form of alternative dispute resolution (ADR). He gave the instance that some cases are not really about entitlement to benefit but rather amount to a complaint of maladministration about the procedure. He thought that there could

be benefits in using ADR, that it could reduce the number of contested cases and issues in jurisdictions such as Special Educational Needs, and the Registered Homes Tribunal. In some topics ADR can avoid the 'starkness' of winning or losing and allow for a negotiated outcome and ADR may also be useful where the parties wish to maintain a good relationship after the conclusion of the dispute.

These active case management proposals were influenced by developments in civil justice but it was not Leggatt's starting point that they would be readily adaptable to tribunals. The aim was to devise a framework which would be as simple, proportionate and flexible as possible to accommodate party and party tribunals (for example, employment and property) as well as the different types of citizen and state tribunals.

Leggatt's proposal on self-representation was controversial, as the available research had suggested that representation produced a higher success rate before tribunals.<sup>56</sup> Accordingly, supporters of representation were concerned at the statement by the then Lord Chancellor, Lord Falconer, in the Foreword to the 2004 White Paper, "The public do not want to go to a Tribunal, they want their complaint or dispute resolved quickly and fairly." In fact, the White Paper's announcement of a new, wider approach to dispute resolution processes was a development of most of the ideas proposed by Leggatt and its name drew on one of the Leggatt's key concepts. Proportionate Dispute Resolution (PDR) is a structured, holistic approach to resolving disputes, comprising stages which would:

- minimise the risk of people experiencing legal problems by ensuring that the framework of law defining people's rights and responsibilities is as fair, simple and clear as possible, and that State agencies, administering systems like tax and benefits, make better decisions and give clearer explanations;
- improve people's understanding of their rights and responsibilities, and the information available to them about what they can do and where they can go for help when problems do arise. This will help people decide how to deal with the problem themselves if they can, and ensure they get the advice and other services they need if they cannot;
- ensure that people have ready access to early and appropriate advice and assistance when they need it, so that problems can be solved and potential disputes nipped in the bud long before they escalate into formal legal proceedings;
- promote the development of a range of tailored dispute resolution services, so that different types of dispute can be resolved fairly, quickly, efficiently and effectively, without recourse to the expense and formality of courts and tribunals where this is not necessary; but also
- deliver cost-effective court and tribunal services, that are better targeted on those cases where a hearing is the best option for resolving the dispute or enforcing the outcome.<sup>57</sup>

The White Paper proposal for a Tribunal Procedure Committee (TPC) modelled on the arrangements for the Civil Procedure Rules was enacted and this body has reduced the various tribunal specific procedural rules to generic rules for the chambers of the new two tier tribunal structure which came into operation in phases. The TPC's approach to the rules broke down tribunal procedure into stages as well as adapting from the Civil Procedure Rules the idea of

---

<sup>56</sup> See, for example, H. Genn & Y. Genn, *The Effectiveness of Representation* (London: Lord Chancellor's Department, 1989). See also footnote 24.

<sup>57</sup> *Transforming Public Service: Complaints, Redress and Tribunals* (London: HMSO, 2004) Cm 6243, para. 2.3.

an overriding objective of dealing justly with the case. A common provision, regulation 2 is to be found in the rules for all of the First-tier Tribunal chambers and the Upper Tribunal (apart from the Immigration and Asylum Chambers).

2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
- (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- (d) using any special expertise of the Tribunal effectively; and
- (e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

- (a) exercises any power under these Rules; or
- (b) interprets any rule or practice direction.

(4) Parties must—

- (a) help the Tribunal to further the overriding objective; and
- (b) co-operate with the Tribunal generally.

The common format of the rules (apart from the Immigration and Asylum Chambers) is that they are structured according to these headings:

Part 1 Introduction

Part 2 General powers and provisions

Part 3 Proceedings before the Tribunal: Before the hearing; Hearings; Decisions

Part 4 Correcting, setting aside, reviewing and appealing Tribunal decisions

In the Health, Education and Social Care Chamber, some adjustments had to be made to cover mental health cases and the different chambers may have particular practice directions and practice statements which apply only to them. The Charity Tribunal Rules (Northern Ireland) 2010 (SR2010/77) have partially adopted this format but do not include the overriding objective of dealing with cases fairly and justly, however, the Gangmaster Appeals Regulations (SR 2006/189) have an overriding objective of dealing justly with cases. Procedural rules for Northern Ireland tribunals should now include the overriding objective of dealing fairly and justly with cases and consideration should be given to producing generic procedure rules, especially if a new amalgamated structure is adopted.

The Tribunals Service has conducted two pilot studies of early resolution techniques. The first ran for a year from August 2006 until July 2007. It was a type of judicial mediation in Employment Tribunals, and was used in race, sex and disability discrimination cases. The second pilot saw Early Neutral Evaluation (ENE) being used in Disability Living Allowance and Attendance Allowance cases. A fulltime tribunal judge considered the case papers and formed a view on the likely outcome. The party that was thought likely to lose would be contacted. If it was the Department, they might re-consider their decision, and the appellant would be warned that the appeal would be likely to fail. The appellant might be given other suggestions, including submitting further evidence, seeking advice or perhaps focusing on specific issues that the tribunal could consider. If the case was complex or evenly balanced, and the judge could not form an opinion on the likely outcome, then neither party would be contacted and the case would proceed to a hearing in the normal way, although the judge could issue directions in the interests of having to avoid an adjournment. The sample of cases considered those in which the appellants had opted into ENE and 'ordinary' cases in which ENE was not used.

Both pilots were independently analysed. The conclusion in the judicial mediation study<sup>58</sup> was that this particular technique did not make a statistical difference to:

- the rates of cases settled within a set time period;
- the rate of resolution that avoided a hearing; and
- the overall levels of satisfaction of claimants or employers.

It was expensive to administer and while the parties who used it were fairly positive about it, that qualitative finding did not, as we have seen, produce a quantitatively significant positive impact. This may be because this judicial mediation was an additional process in an environment where the majority of cases (approximately 60 percent across the Employment Tribunal system) are resolved before a full hearing and where a variety of ADR techniques are already available. The evaluation concluded that, even with a larger sample size for analysis, this makes it less likely that one would see a significant value added from judicial mediation.

It is suggested that the evaluation of the pilot of ENE in social security<sup>59</sup> is an important study and, while it answers some questions, it raises others. Its main conclusion is that there was not sufficient evidence to justify a national roll-out of the approach adopted in the pilot but rather there should be a limited roll-out into a wider and geographically diverse set of areas which would also be tested and monitored. This approach would also allow for changes to be made to the model of ENE used in the initial pilot. The findings of the evaluation were mixed. It was not any more cost effective than running a case in the normal manner, in that some cases still proceeded to a hearing with the attendant costs attached to this. On the other hand, interviews with appellants and the decision-making Departmental officials found that they appreciated the contact with the judge conducting the ENE. The contact was made with the party thought to be the likely loser at the hearing. Appellants welcomed the opportunity to discuss their case and the officials accepted the contact as an opportunity to improve consistency in

---

<sup>58</sup> P. Urwin, V. Karuk, P. Latreille, E. Michielsens, L. Page, B. Siara and S. Speckesser with A. Boon and P.A Chevalier, *Evaluating the Use of Judicial Mediation in Employment Tribunals*, (Ministry of Justice Research Series 7/10, 2010).

<sup>59</sup> C. Hay, K. McKenna and T. Buck, *Evaluation of Early Neutral Evaluation Alternative Dispute Resolution in the Social Security and Child Support Tribunal*, (Ministry of Justice Research Series 2/10, 2010). See footnote 46.

decision-making and as a form of quality assurance. The evaluation by the judge might lead to a direction, to require a medical assessment or to change a paper determination to a hearing. This could lead to a successful appeal.

One of the reasons for piloting ENE is that appellants with ‘hopeless’ cases might be encouraged to withdraw their appeals and thus produce savings. There was evidence that this outcome was achieved in some cases, however, it also suggests that it can promote the realisation of other policy goals such as improving the accuracy of initial decision-making and facilitating appellants to make the most of their opportunity of appearing before a tribunal by reducing the stress. It suggests that modifications to working practices should be tested. This leads into another common concern of both Leggatt and PDR, that the process of putting things right can contribute to getting things right first time. One of the ways in which this can happen is that there can be feedback on lessons learned, which will be covered later in the *system review* section.

ADR is a topic which tends to produce strong opinion both for and against it. Those who do not favour it might argue that the two pilots support their position, whereas ADR advocates might argue that they demonstrate that those particular techniques were not entirely successful in those particular contexts. It is, however, striking that in Australia, in the Commonwealth (federal) Administrative Appeals Tribunal, they dispose of the great majority of cases without a formal hearing determining the case, as the table below shows for the three years 2006-07 to 2008-09.<sup>60</sup>

**Table A3.4** Percentage of applications finalised without a hearing<sup>a</sup>

Jurisdiction	2006-07 %	2007-08 %	2008-09 %
All applications	81	79	81
Social security	72	70	76
Veterans' affairs	78	75	74
Workers' compensation	85	85	85
Taxation			
Taxation Appeals Division	92	91	89
Small Taxation Claims Tribunal	77	72	84

a Applications finalised without a hearing refers to applications that were finalised by the Tribunal without it completing the review and giving a decision on the merits under section 43 of the Administrative Appeals Tribunal Act. This includes applications finalised in accordance with terms of agreement lodged by the parties (sections 34D and 42C), applications withdrawn by the applicant (subsection 42A(1A)) and applications dismissed by the Tribunal (sections 42A and 42B).

In the next section we deal with judicial leadership, and the link between it and this section on processes is the duty to innovate methods in dispute resolution placed upon the Senior Presi-

<sup>60</sup> *Administrative Appeal Tribunal (AAT) Annual Report 2008-9*, Table A3.4. See also annual reports of the Victorian Civil and Administrative Tribunal (VCAT) and the State Administrative Tribunal in Western Australia who use ADR or facilitative dispute resolution. The President's Review of the first ten years of VCAT included recommendations to upgrade the legislation to the 'second generation level' also in ADR and to improve ADR practice by innovating in ADR. See K. Bell, footnote 53, pp 33-37, 84-89.

dent of Tribunals in section 2(3)(d) of the Tribunals, Courts and Enforcement Act 2007. We suggest that there should be a similar duty in Northern Ireland.

### **Recommendations**

- 7. Rules of procedure for tribunals should incorporate an overriding obligation to deal with cases fairly and justly and consideration should be given to devising generic rules.**
- 8. Consideration should be given to adopting the overall approach of Proportionate Dispute Resolution which seeks to prevent, reduce and resolve disputes.**
- 9. Policy for, and provision of, information, advice and support including legal representation should be developed across criminal, civil and administrative justice, which includes tribunals.**
- 10. There should be a duty to develop innovative techniques for the resolution of disputes by courts and tribunals.**

### **Judicial leadership**

In the Leggatt reform package, the proposal to create a Senior President of Tribunals was overtaken by the Constitutional Reform Act 2005 which brought about a greater degree of separation between the executive and the judiciary by redistributing the powers and duties previously held by the Lord Chancellor as the head of the judiciary. Thus the Lord Chief Justice of Northern Ireland, as President of the Courts of Northern Ireland, is responsible for maintaining appropriate arrangements for the welfare, training and guidance of the judiciary of Northern Ireland and for the deployment of the judiciary of Northern Ireland and the allocation of work within courts.<sup>61</sup> The Senior President of Tribunals has similar responsibilities for the judges and members of the First-tier and Upper Tribunals and Employment Tribunals within the Tribunals Service. This includes UK-wide tribunals operating in Northern Ireland which are in the First-tier Tribunal, Asylum Support (Social Entitlement Chamber), Consumer Credit Appeals, Estate Agents Appeals, Information Tribunal, Immigration Services (General Regulatory Chamber), the Tax Chamber and the Immigration and Asylum Chamber. In the Administrative Appeals Chamber of the Upper Tribunal, assessment appeals from the Northern Ireland Pensions Appeals Tribunal can be heard by the Northern Ireland Social Security and Child Support Commissioners who are judges in that chamber.

The appointment of new judges and members of tribunals in Great Britain and of UK-wide tribunals in Northern Ireland is carried out by the Lord Chancellor for the First-tier Tribunal and by HM the Queen for the Upper Tribunal on the recommendation of the Lord Chancellor following selection by the Judicial Appointments Commission. But in this respect this process was lagging behind the position in Northern Ireland where the Justice (Northern Ireland) Act 2002, as amended, had provided for the appointment by the Northern Ireland Judicial Appointments Commission of various members of different tribunals by including them in the

---

<sup>61</sup> S. 1(A)(B) of the Justice (Northern Ireland) act 2002, as inserted by s. 11 of the Constitutional Reform Act 2005.

list of specified judicial officers (See Appendix C for full list, although it should be noted that neither all members nor all tribunals are included in this list).

While there are reservations about changing the nomenclature in tribunals from Chair to tribunal judge, arising from a fear of ‘creeping legalism’ which is antithetical to the idea of an accessible, user-friendly tribunal, it seems sensible to make tribunal personnel in Northern Ireland part of the ‘judicial family’ under the leadership of the Lord Chief Justice and to extend to all of the tribunals the guarantee of judicial independence.

The Judicial Studies Board for Northern Ireland does not provide training for tribunal members unlike its counterpart in England and Wales. Training for Northern Ireland tribunals is a matter for the tribunal Presidents to arrange with the relevant sponsoring Department. In some cases, this means that they may be able to attend training commissioned by themselves or provided by others in England and Wales. It seems that in some tribunals training has recently been improved but that this is not the case for all:

*Interviewee:* “There are tribunals that simply don’t have any funding for any training at all ... I think that whatever system is involved the idea of training must be fundamental to all tribunals no matter what kind of tribunals.”

*Interviewee:* “but the most difficult thing in Northern Ireland is to provide the expert training in the small areas where you don’t have all that many hearings, so ... that can be quite difficult.”

As the findings in the interviews with some tribunal personnel indicated, there was a view that in some tribunal jurisdictions there was room for improvement in training. There were also differences of opinion about the level of training required for the various competencies in conducting hearings, putting people at ease and enabling them to make their arguments. The findings of the interviews with some tribunal appellants about their experience of a tribunal hearing indicated that there was a range of good to poor practice in the conduct of the hearings by tribunal Chairs. It is important that tribunal members conduct hearings appropriately and therefore they must be properly recruited, trained and appraised.

This training should not only include making a person feel at ease but also deal with hearings where one or both parties are unrepresented, or where the representation is not competent. Tribunals have been allocated work because they are supposed to be accessible to users who are not represented. Therefore the skills of conducting a hearing in an enabling but impartial way must be fostered.

It is understood that consideration is currently being given to extending the provision of training by the Judicial Studies Board for Northern Ireland to tribunals. This is an opportunity which should be taken to create arrangements for training in courts and tribunals across the whole range of judicial competencies from general ‘judge-craft’ to specialised jurisdictional knowledge and skills, and to allow this training to be commissioned and provided economically, efficiently and effectively through collaboration with counterpart bodies in Great Britain and Ireland.

Consideration should be given to the balance of full-time and fee-paid tribunal members. The employment of well trained full-time members would facilitate their deployment over more than one tribunal jurisdiction. Thus, for example, members with legal and medical expertise could not only be deployed in the Appeals Tribunals (social security) but also in the Criminal

Injuries Appeal Panel and the Pensions Appeal Tribunal. Legal and valuer/surveying expertise could be shared over the Valuation Tribunal and the Lands Tribunal. This would be subject to creating a greater uniformity of tribunal procedures.

This deployment of personnel aspect of judicial leadership suggests that the responsibility might not be exercised personally by the Lord Chief Justice but through delegation to a particular individual, a President of Tribunals, the Tribunal Presidents group and/or to a specialised committee, and indeed this is also a possibility with respect to welfare, guidance, training and appraisal.

### **Recommendations**

- 11. The guarantee of judicial independence should be extended to all tribunal members in Northern Ireland. The Lord Chief Justice should be responsible for maintaining appropriate arrangements for their welfare, training and guidance and for their deployment in the tribunals of the Northern Ireland Courts and Tribunals Service.***
- 12. Training for tribunal members should be competency based and this should be provided by the Judicial Studies Board of Northern Ireland and by other appropriate providers covering generic judge-craft and jurisdiction specific knowledge and skills. In addition to induction and continuing education and training, this should include support through mentoring, performance management and appraisal.***
- 13. The Lord Chief Justice should be responsible for arrangements for the appraisal of tribunal members.***
- 14. Appointments to all Northern Ireland tribunals should be by the Northern Ireland Judicial Appointments Commission following competitions for which they are responsible.***
- 15. Tribunal members should continue to be deployed in more than one tribunal jurisdiction where they have the relevant expertise and training.***

### **Structures**

The striking feature of the Leggatt package was the streamlining of over 70 different tribunal jurisdictions into a two tier structure comprising six chambers in the First-tier Tribunal and four chambers in the Upper Tribunal. The Upper Tribunal allowed for the expansion of an appellate structure on a point of law across the whole range of tribunals included in the structure. Leggatt's recommendations proposed to include more tribunals than are currently included. Two examples are the Schools Admission and Exclusion Appeals and the Residential Property Tribunal Service, both of which are administered by local authorities. Leggatt also recommended that Employment Tribunals be 'full members' of his proposed structure whereas what happened was that their administrative staff became part of the Tribunals Service and the judges and members were placed under the overall leadership of the Senior President of Tribunals but the tribunals were not incorporated into the First-tier Tribunal.

The constitutionally innovative aspect of the Upper Tribunal is that not only has it jurisdiction to hear appeals on a point of law but it may also hear claims for judicial review, previously a jurisdiction only given to the High Court. The logic behind this was that the new tribunal would be able to develop a coherent body of law in relation to these tribunal jurisdictions and that because of the specialist expertise of these judges it would also be appropriate for them to hear judicial reviews in related matters.

The number of Northern Ireland tribunals is relatively small and it is not clear that it is necessary to create an amalgamated Northern Ireland tribunal equivalent to the First-tier Tribunal. One interviewee said:

“If you’re going to have chambers here, you could combine them into maybe two or three and then have a fairly small appeal level with cases going from there to the Court of Appeal.”

It is suggested that, alongside work being done on the transfer of tribunals, short studies should be conducted immediately into the utility and feasibility of establishing a Northern Ireland Amalgamated Tribunal. Three possible chambers or divisions of such a new structure, on which views could be sought, are, first, Welfare and Education covering social security benefits, pensions and criminal injuries compensation, mental health review, care, special educational needs and disability and, eventually, schools admissions and exclusions; and, secondly, Property and Regulatory covering valuation, the Lands Tribunal, rent assessment, planning, charities, traffic penalties and health and safety. It is suggested that, as the third division or chamber, Industrial and Fair Employment Tribunals could become an Employment division. Consultation should also focus on how an Employment Appeal Tribunal might be accommodated in appellate arrangements. A further possibility is exploration of a subsequent stage of reform, drawing on an Australian development: a combined Civil and Administrative Tribunal. There are now four such tribunals<sup>62</sup> and their civil jurisdictions include consumer and credit disputes, residential and retail property. Some of them have been given vocational regulation in professions such as the law, healthcare practitioners, and architects and some also deal with guardianship and anti-discrimination. Their administrative jurisdictions include planning and environment, land valuation, taxation. All of them use a variety of ADR techniques as well as adjudication to ‘finalise’ cases.

In addition, there should be consultation on whether the right to an accessible appeal on a point of law from a tribunal should exclude the possibility of judicial review, and whether an appellate jurisdiction should also have the possibility of hearing judicial reviews transferred from the High Court.

### **Recommendations**

**16. Those tribunals for which the Department of Justice is not completely responsible should be transferred to it from their current sponsoring bodies.**

**17. Consultation should be conducted immediately to determine if it would be feasible and useful to:**

<sup>62</sup> The Victorian Civil and Administrative Tribunal (VCAT) in Victoria (1998), the State Administrative Tribunal (SAT) in Western Australia (2003), the ACT Civil and Administrative Tribunal (ACAT) in the Australian Capital Territory (2008) and the Queensland Civil and Administrative Tribunal (QCAT) in Queensland (2009).

- *restructure the tribunals into an amalgamated tribunal or a civil and administrative tribunal; and*
- *create an appellate division for an amalgamated tribunal or a civil and administrative tribunal and whether such an appellate division should be given a judicial review jurisdiction.*

### *System review*

Leggatt had recommended that the Council on Tribunals, which had been established in 1958 to keep under review the composition and working of tribunals and inquiries, should become the hub of the wheel of administrative justice and not just tribunal justice. This was because Leggatt recognised that people who had problems with state bodies and public services could seek redress using a variety of methods and it made more sense for those grievances and the possible remedies to be considered in the round rather than in isolation. The 2004 White Paper elaborated on this by placing tribunal reform within the wider context of transforming public services. This not only allowed for consideration of the idea that people might have a choice of remedies; complaints processes, ombudsmen, tribunals, inquiries and the courts, but also that these methods for putting things right could also play a part in getting things right. In other words, that curative medicine could contribute to preventive medicine. Its proposals led to the establishment of an Administrative Justice and Tribunals Council by the Tribunals, Courts and Enforcement Act 2007 which conferred the roles of keeping the administrative justice system under review, to consider ways of making the system accessible, fair and efficient, to advise Ministers and the Senior President of Tribunals on the development of the system, to refer to those persons proposals for changes in the system and to make proposals for research. The administrative justice system was defined as

the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including—(a) the procedures for making such decisions, (b) the law under which such decisions are made, and (c) the systems for resolving disputes and airing grievances in relation to such decisions.<sup>63</sup>

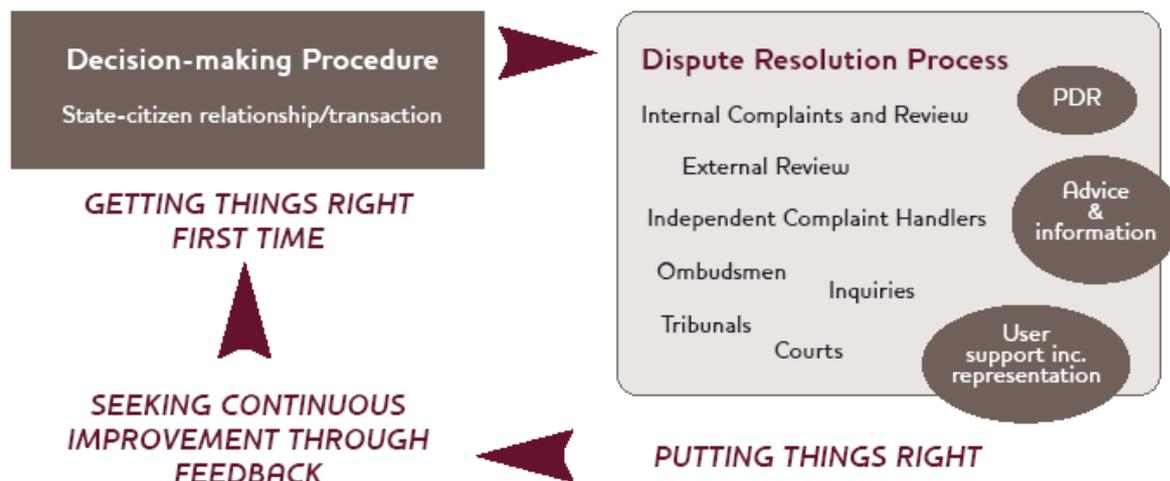
Tribunal judiciary in Northern Ireland were familiar with the AJTC's predecessor, the Council on Tribunals, having attended its conferences. They were less familiar with the widened remit of the AJTC, although the President of Appeals Tribunals, in making his annual reports on decision-making standards, is making a contribution to getting things right by seeking to draw out lessons from his tribunal's work in putting things right in initial decision-making on social security benefits claims.

The following diagram shows a dynamic relationship between putting things right and getting things right.<sup>64</sup>

---

<sup>63</sup> Sched. 7, para. 13(4), Tribunals Courts and Enforcement Act 20087. See Appendix D for material on the AJTC.

<sup>64</sup> See 'The Developing Administrative Justice Landscape' in *Adjust*, September 2009 at [http://www.ajtc.gov.uk/adjust/articles/landscape\\_paper.pdf](http://www.ajtc.gov.uk/adjust/articles/landscape_paper.pdf).



This identification and dissemination of lessons is also part of the work carried out by the Northern Ireland Ombudsman who, writing in the publication marking his institution's 40<sup>th</sup> anniversary, noted that his ombudsman colleagues in Great Britain were members of the AJTC and its Scottish and Welsh committees and that they contributed to the work of 'ensuring that relationships between courts, tribunals, ombudsmen and alternative dispute resolution satisfactorily reflect the needs of the user.'<sup>65</sup> He therefore felt that the Northern Ireland citizen is at a disadvantage due to the absence of an equivalent body and role. In that publication, the Lord Chief Justice of Northern Ireland commented on the complementary relationship between the courts (and by implication tribunals) and the ombudsman, likening them to the emergency services: "Each is absolutely vital – but not necessarily in the same situation."<sup>66</sup>

It is strongly recommended that a body is needed to keep under review the administrative justice system in Northern Ireland. First, the original role of the Council on Tribunals is needed to keep under review the composition and working of tribunals, using visits to observe the operation of tribunals, and this oversight would add to both the material collected directly from users through surveys and meetings of users' groups, and also appraisal of tribunal personnel, helping to monitor standards. Secondly, the reasoning that underpins this part of the Leggatt package also applies in Northern Ireland. Not only should the range of methods for resolving disputes about public services be kept under review but so should their relationship between each other, as well as the relationship between putting things right and getting things right. Such a body would have a major part to play in helping to ensure that the administrative justice system in Northern Ireland is accessible, fair and efficient.

The interviewees supported such a body and role, and agreed that there were two possible ways to establish it. One would be to follow the devolutionary structure of the AJTC and add to its Scottish and Welsh Committees one for Northern Ireland:

*Interviewee:* "a direct link to the UK body is desirable, even if primary legislation is required for this. I think that there's no point us trying to replicate something – when the wheel has been invented, why

<sup>65</sup> T. Frawley 'Concluding Thoughts' in *Reflections in Time: 40 Years of the Office of the Northern Ireland Ombudsman* (Belfast: Northern Ireland Ombudsman, 2010) 64, at 67.

<sup>66</sup> Sir D Morgan 'The Ombudsman and the Judge: Redressing Grievance and Holding to Account': footnote 65, p 13.

try to invent something better? There's already a connection, as I've said before, between the UK and Northern Ireland tribunals, because the AJTC, as I see it, has a remit over the UK tribunals operating in Northern Ireland, and any body involved in such a role in Northern Ireland ought to have some link in with the body that has jurisdiction over the UK tribunals, otherwise we're going to have two entirely separate bodies operating in Northern Ireland, and that appears to me to be not only unsatisfactory but really absurd."

The other possibility would be to establish a Northern Ireland Administrative Justice and Tribunals Council which could be linked to the AJTC. Implementing the former option would seem to be the easier way forward but it would require primary legislation at Westminster and whilst the legislation itself would not be difficult, finding a legislative slot would be. As one interviewee said:

"We sometimes see a lot of value in some things that are done in the UK way. Whether or not that applies to this, I'm not sure. My opening gambit is I agree, it would be better to have that UK wide link, however if there is a need to create this at a certain time, this is a low priority issue. Perhaps second best would be to have our own stand alone issue and build the links."

It is suggested that it is preferable for this to be part of the total programme for tribunal reform in Northern Ireland which may start from the Leggatt package but is adapted to local circumstances.

The interviewees' opinions on the size of and composition of a Council varied only slightly:

"a three-member body would be appropriate, .. it must consist of people who are experts in the tribunal system, but also – this is the difficulty – who are presently not working directly within that system,"

"I think the important thing is to get the range of expertise that you need and that will probably require... I would have thought it would have to be more than four, I mean, there are actually... There's still a kind of broad range of the tribunal activities in Northern Ireland and they're all quite disparate. .. and I think a research funding is probably important as well, to find out what is happening in the system, how the system is operating and whether or not it's delivering to the public what it's supposed to be delivering to the public. So if you have a system where the body is funded to do an annual report on the actual functioning of tribunals, and has the staffing and the expertise to be able to do that, added to a research funding, so that they can look into matters that need to be explored further, I think those two things taken together would actually make quite a difference, too; it should operate quite well, I think so."

"Whether you do that by the user directly or whether you go to the Law Centre to get people... It might be the latter would help you to focus it. You should probably have representations from Department or Departments, but you've got to be careful about that, that you don't represent a Department, a particular Department too strongly. You have a representative from them because they are, this is administrative justice. It's quite often it's individual against government Department as opposed to individual against individual. You also probably should have a representative of the advocates who appear before tribunals and possibly a representative of tribunal Chairmen on... I would be cautious about making it unwieldy. Oh and again this is personal preference, I would like to see someone with academic experience on it."

The view that the committee should not be too "unwieldy" is one that we endorse. While a large committee has the advantage of including a greater degree of representation from interested bodies and individuals, the logistical, practical and financial problems of setting up and running such a committee and ensuring that it would have an effective decision making capacity tend to work against developing this option. Our recommendation is therefore for a smaller, expert body. The consensus among the scoping study interviewees was a member-

ship of four to six which would be an appropriate range to ensure that members' background and competences would include experience of (a) tribunals, (b) government Departments, (c) the advisory sector which would provide knowledge of the issues facing people as users of tribunals and other dispute resolution mechanisms, and (d) academic research. In addition to those members, the Northern Ireland Ombudsman should also be an ex officio member. Both the Scottish and Welsh committees of the AJTC also have, in addition to their respective Public Services Ombudsman, as another ex officio member the UK's Parliamentary Ombudsman. It is suggested that the UK Parliamentary Ombudsman should not be an ex officio member of the proposed NIAJTC. In part, this reflects the constitutional position that as an officer of the Westminster Parliament, it is a matter for that body to decide what tasks the Parliamentary Ombudsman undertakes. It could be that the Parliamentary Ombudsman might be invited to attend meetings. It is suggested that this particular issue should be included in the consultation exercise which would be conducted before the proposed legislative reform package goes to the Northern Ireland Assembly.

The AJTC appointments are part-time. In Wales, the members are contracted for 22 days each year and in Scotland for 35 days. The secretariat to support this part-time advisory body would also work part-time on NIAJTC matters, providing policy and administrative support. It might be possible for such personnel to provide the same functions for the Civil Justice Committee, indeed that body could be renamed the Civil Justice Council, with a wider membership including advice sector and consumer representatives, and a similar body might also be established for Family Justice. All three bodies would have a shared interest in public legal education, legal advice and support including the provision of legal representation, as well as ADR.

It is to be hoped that there could be links between the NIAJTC and the AJTC and its Scottish and Welsh committees. One suggestion is that the Chair of the NIAJTC could be a member of, or an observer at, the AJTC. Another possible link would be at secretariat level. Perhaps a Department of Justice official could be identified as a person who would support the work of the NIAJTC and its members and could be seconded to the AJTC to gain experience. Certainly, it can be expected that there would be a sharing of research and knowledge amongst the various AJTC bodies and personnel.

There is a difficulty in trying to capture the views of users. As one interviewee noted:

"The other thing we find, when we get groups of customers together to talk about issues, they're only talking about their little, local issue as it applies to them, and they find it very hard to extrapolate that out to an area or strategy, and that's just a fact."

A possible way around this is to convene a forum, as suggested by one of the interviewees:

"...a stakeholder forum that, you know, comes together regularly, perhaps only once a year, but a recognisably stakeholder forum in which a broader range of people go to get together and exchange ideas. That would raise the profile of the body. It would also possibly give the body ideas that they might not otherwise get."

### **Recommendations**

**18. A Northern Ireland Administrative Justice and Tribunals Council (NIAJTC) should be established with a remit to keep the administrative justice system of Northern Ireland under review, to consider ways of making the system accessible, fair and effi-**

*cient, to advise Northern Ireland Ministers and the Lord Chief Justice of Northern Ireland on the development of the system, to refer to those persons proposals for changes in the system and to make proposals for research.*

*19. The NIAJTC should be appointed by the Northern Ireland Minister for Justice after public competition. The membership should not number fewer than four nor more than six persons, with the Northern Ireland Ombudsman as an ex officio member. In the consultation exercise on the reform proposals, views should be sought on whether the UK Parliamentary Ombudsman should be (a) a statutory member or (b) invited to attend as an observer, and on how (a) might be done given the constitutional position.*

*20. The NIATJC should be able to report on matters within remit causing concern at its own initiative and be asked to report on matters referred to it by Ministers. It should prepare three year strategy plans and annual action plans and consult the Civil Justice Committee, the Social Security Advisory Committee and the Northern Ireland Law Commission, and publish annual reports.*

### *A proposed 'roadmap'*

It took six years from the publication of the Leggatt Review of Tribunals to the passing of the Tribunals, Courts and Enforcement Act 2007 and a further fifteen months to the first phase of implementation with the first three chambers of the First-tier Tribunal. Tribunal reform in Northern Ireland is needed, some of it has begun and there is a model in the form of the Leggatt package which can be picked up, some parts can be adopted while others will have to be adapted. Tribunals and Administrative Justice reform will be competing with other initiatives from the Department of Justice and other Departments in the queue for a slot in the legislative programme. Matters are further complicated because elections to the Northern Ireland Assembly are due in 2011. Legislation will not therefore be introduced in the Assembly until 2011-12 but the aim should be to have a consultation exercise begun soon after the election.

A work programme should be devised which moves forward those matters which do not require legislation whilst making preparations for topics which will require legislation and as a consequence will have to undergo a consultation process. The aim must be to organise matters so that there is an appropriate allocation of tasks to phases thus minimising the gaps between them and reducing the overall time needed to complete the programme.

Progress can be made by the NICTS without legislative authority in the preparation of information for users, about tribunals, their processes and outcomes, the commissioning of surveys of users' experiences and the creation of jurisdictional users' groups. In co-operation with Department of Justice policy colleagues and the Northern Ireland Legal Services Commission, service providers, and users, work can be conducted on policy for, information about, provision and review of, advice and support services including legal representation.

It may not be necessary for legislation to expand the work of the Judicial Studies Board for Northern Ireland into tribunals by creating a Tribunals committee. Arrangements can be made for the efficient and effective use of existing funds for training and this may include taking

advantage of existing provision in Great Britain and Ireland, and adapting it to local circumstances.

Legislation will be needed to:

1. transfer tribunals' policy and operations to the NICTS from their current sponsoring Departments;
2. extend the guarantee of judicial independence to tribunals;
3. provide for judicial leadership of tribunal members by the Lord Chief Justice;
4. appoint all tribunal members by the Northern Ireland Judicial Appointments Commission after selection exercises;
5. provide for an Amalgamated Tribunal with jurisdictional and appellate divisions;
6. provide for changes to processes, a duty to innovate and, in relation to procedural rules, insert an overriding objective and create generic rules; and
7. create a NIAJTC.

Primary legislation would not be required for all aspects of the reform package. For example, it is planned to use secondary legislation, that is Transfer of Functions Orders, to transfer tribunals from their sponsoring Departments to the NICTS and secondary legislation could also be used to include all tribunal appointments in the schedule of judicial offices, appointment to which is made by the NI JAC. Primary legislation would be needed to establish a NIAJTC and an amalgamated tribunal structure and such a Tribunals Act could usefully consolidate the various elements in the package as well as underscoring the importance of the extension of judicial independence to tribunals as well as their membership of the judicial family and imposing a duty to innovate in dispute resolution.

Thus work can be carried out on determining what structural changes might be made to tribunals after they had been transferred to the NICTS simultaneously with the work on that transfer. Scheduling the work in that order does not delay the transfer of tribunals necessary for compliance with the independence requirements of Article 6 of the European Convention on Human Rights.

The proposal in our suggested agenda which needs more preparation, because it is less familiar, is the extension of reform beyond tribunals to the wider administrative justice system. It is therefore suggested that an Administrative Justice Steering Group be established which can pave the way for a NIAJTC and also be responsible for collecting views on the tribunal structural changes. So as not to lose momentum, this preparatory work should be timetabled with the work on structural changes, to be completed in no more than six months. The next priority should be given to mapping the administrative justice system in Northern Ireland and its boundaries with UK-wide bodies, and then a start made on the type of work which the NIAJTC will be given: considering the relationship between methods for putting things right and the possibility of new ones such as legislation which permits apologies to be made without the admission of liability, and considering how putting it right can contribute to getting it right first time in public services.

The idea for such a group is drawn from Scotland<sup>67</sup> and its composition also follows that model with its Chair to be a judge and members to include the Ombudsman, some (two) Tribunal Presidents officials from the Department of Justice and also the Office of the First Minister and Deputy First Minister, the advisory sector, including the Consumer Council for Northern Ireland, academics and perhaps the addition of a senior member of the Northern Ireland Audit Office, if not the Comptroller and Auditor General.

A timetable might look like this:

**June 2010 – April 2011** NICTS negotiates and prepares legislation for transfer of responsibility for tribunal policy and operations, as well as providing information for users, conducting surveys of their experience and creating users' groups

**June 2010 – April 2011** NIJSB devise and implements new training programme for courts and tribunals

**September 2010 – March 2011** Administrative Justice Steering Group conducts studies and reports on tribunal structural changes, and the mapping of the administrative justice system; and from

**September 2010 – December 2011** devises and conducts work on relations between remedies in the administrative justice system, such as apology legislation and early resolution; and between remedies and getting things right, such as feedback

**September – December 2011** consultation on Tribunals Bill (includes amalgamated tribunal if sufficient support)

**July 2012** enactment of Tribunals Bill. LCJ has judicial leadership, guarantee of judicial independence extended to tribunals, overriding objective inserted in procedural rules

**September 2012** establishment of NI AJTC

**September 2013** implementation of amalgamated tribunal if included in the Bill

Northern Ireland has lagged behind other countries in developing tribunals and administrative justice. Not only must there be catching-up to the point which others have currently reached but also further progress towards the next stage of continuous improvement. The establishment of the Department of Justice has ended a state of limbo in which progress on tribunal reform was suspended. At this point it therefore makes sense to look around for models but it is to be hoped that research will enable a change from copying others' reforms to exercising self-initiative: an evolutionary process moving from *adopting* through *adapting* to *innovating*.

It is our hope that this report contributes to improved services for users.

---

<sup>67</sup> Administrative Justice Steering Group (Tom Mullen), *Administrative Justice in Scotland – the Way Forward* (Edinburgh: Scottish Consumer Council, 2009).

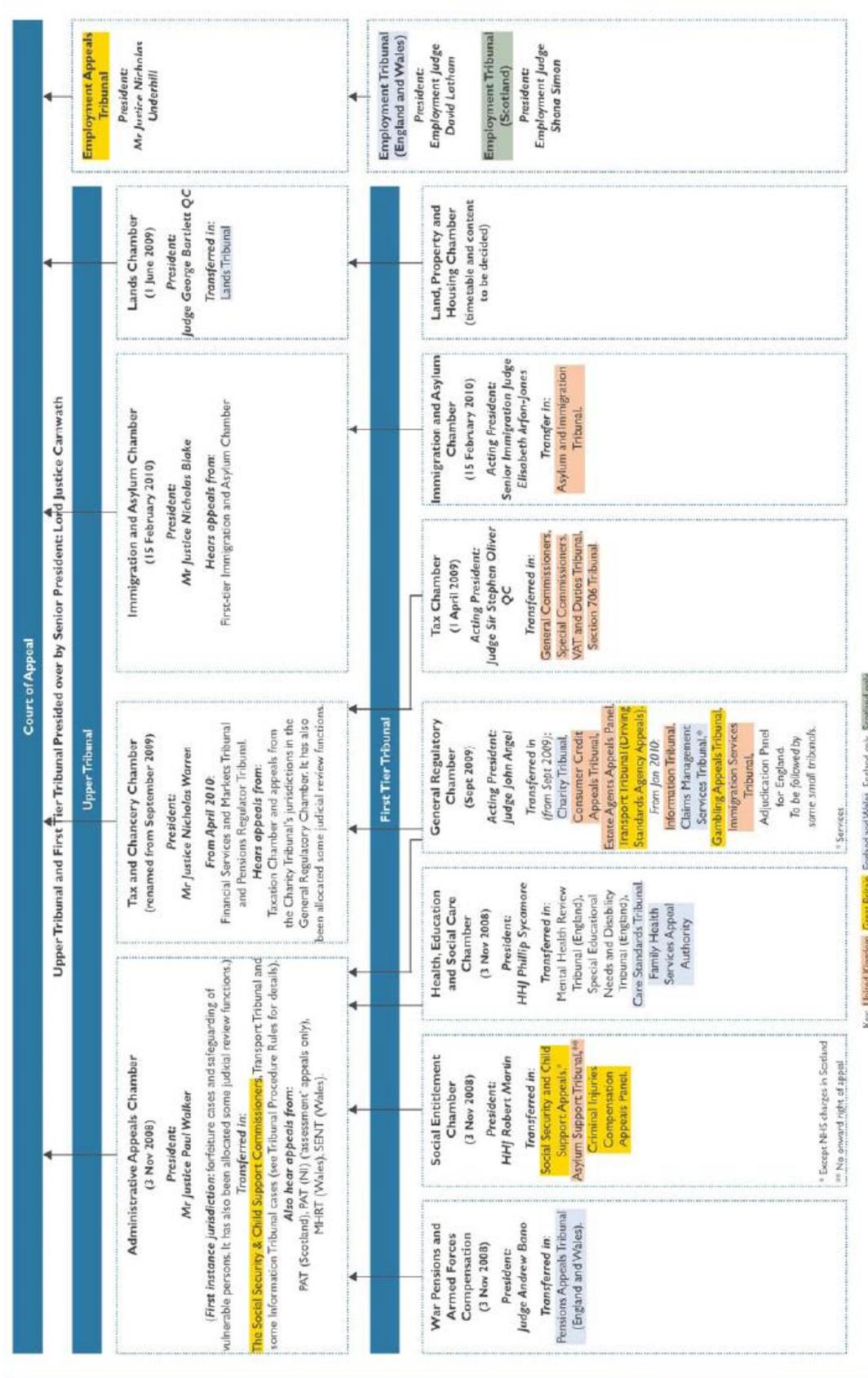
## **Recommendations**

**21. Pending the preparation and enactment of legislation on tribunal reform in Northern Ireland, action on the provision of information, advice and support to tribunal users and improving the training of tribunal members can be conducted without legislation, and the Minister of Justice should appoint an Administrative Justice Steering Committee, chaired by a judge, with members drawn from tribunal presidents, civil servants, the advice community, academics and the Northern Ireland Ombudsman and perhaps also the Comptroller and Auditor General. This group should be responsible for conducting consultations on structural changes to tribunals - amalgamation with first instance and appellate divisions. This work should be done within six months. In addition, the Steering Group should pave the way for the work of a NIAJTC by commissioning a study to map the administrative justice system in Northern Ireland and its boundaries with UK-wide bodies as well as conducting work which will promote greater understanding of the administrative justice system and the relationships between the various remedies within the system for putting things right and the relationship between that and getting things right.**

**22. Legislation should be enacted by 2012:**

- **to provide that all new tribunals will be the responsibility of the Department of Justice;**
- **to provide judicial leadership of tribunals by the Lord Chief Justice;**
- **to extend the guarantee of judicial independence to tribunals;**
- **to provide procedural rules to include the overriding objective of dealing with a case fairly and justly;**
- **to establish a NIAJTC; and**
- **to provide for structural changes to tribunals, if supported in consultation.**

# APPENDIX A Tribunal Service Organisation Chart



## APPENDIX B

### Council on Tribunals, Framework of Standards

(material taken from [http://www.council-on-tribunals.gov.uk/docs/guid\\_framstan.pdf](http://www.council-on-tribunals.gov.uk/docs/guid_framstan.pdf))

#### 1 Tribunals should:

- **Be independent**
  - **Provide open, fair and impartial hearings**
- a Tribunals should be free to reach decisions according to law without influence (actual or perceived) from the body or person whose decision is being challenged or appealed, or from anyone else.**
- b Judicial officers should be independent.**
- i. Procedures for the selection and appointment of Tribunal members should be fair and independent of related departments of government and other interested parties.
  - ii. Appointees must have appropriate security of tenure, subject to procedures for re-training or removal from office in case of poor performance, misbehaviour, incapacity or persistent failure to comply with sitting requirements.
  - iii. Procedures should be in place to ensure conflicts of interest are identified and avoided.
- c Appointments to judicial office should take account of the diversity of our society, and the composition of tribunals should be monitored to inform those making appointments.**
- d Tribunal hearings should be open and fair.**
- i. Hearings should normally take place in public, although a private hearing should be provided in appropriate circumstances.
  - ii. At the hearing, the identity of the tribunal membership should be communicated to the parties.
  - iii. Hearings should be conducted with an appropriate degree of informality, and the necessary steps taken to ensure all relevant issues are explored.
  - iv. Appropriate guidance about evidence and procedures should be given at hearings especially where individuals have no legal representation.
  - v. Special procedures should be provided for hearings involving children or other vulnerable groups e.g. those with severe mental health problems.

- vi. The parties should be accorded equal status (e.g. presenting officers should not be present with tribunal members in the absence of an appellant).
- vii. If the hearing proceeds in the absence of a party, or his or her representative, the tribunal should nevertheless seek to ensure that that party's case is fully considered.
- viii. Where an interpreter is required by one of the parties, the interpreter should be used throughout the hearing to ensure the proceedings are understood.
- ix. Decisions should be soundly based on the evidence and relevant law.
- x. Decisions should wherever reasonably possible be given on the day of the hearing, and if not, as soon as possible thereafter. They must be supported by reasons, explained clearly to the parties, and if given orally confirmed in writing. Reasons should identify findings of fact, apply the relevant law and explain the decision.

## 2 Tribunals should:

- Be accessible to users
- Focus on the needs of users

### a **Potential users of the tribunal should be given access to information about its services.**

i. Information in plain language about the tribunal, translated where appropriate into other languages, should be disseminated to interested organisations, and made available in places where it is likely to be seen by potential users. It should inform users about:

- the range of issues that can be referred to the tribunal;
- how to contact the tribunal;
- what information the tribunal will require;
- where to get help and advice;
- where previous decisions of the tribunal are recorded.

ii. Makers of decisions from which there is a right of appeal to a tribunal should be obliged to inform those affected by decisions of the right of appeal and how a guide to such rights and procedures can be obtained.

### b **Procedural Rules should be short, clear, simple, and up to date.**

i. The same procedures and prescribed forms (if any) should be used without local variations except where necessary for the greater convenience of local users.

ii. Full written copies of all the tribunal's rules, procedures and prescribed forms relevant to a party's case should be made available, free of charge, to all parties and their advisers on request.

iii. Requirements imposed on parties under procedural rules should be appropriately modified where a party is not legally represented.

iv. An up to date plain language guide to the procedures should be available for users. This should be translated where appropriate into other languages.

v. Rules should be regularly reviewed in consultation with users and with the Council on Tribunals. The object of such review should be to improve accessibility to users, simplicity, fairness, effectiveness and speed.

vi. Whenever amendments are necessary they should be made promptly and brought to the attention of users.

**c      Forms should be short and simple.**

i. Where there are timetables, e.g. for the submission of documents, they should be made clear.

**d      The papers required by the tribunal should be proportionate and appropriate to the issues at stake.**

i. Users should be able to understand:

- what papers they have to provide
- what papers the other party will provide
- what additional papers the other party can be required to provide

ii. Provision should be made for users with special needs, e.g. braille, audio tape, large print, translation into languages other than English.

iii. There should be a clear time limit for lodging of all papers.

**e      Tribunals should provide users with clear information about how their case will be handled.**

i. Users should be clearly informed about what is expected of them, what they have to provide, what will happen at a hearing, the circumstances in which travelling expenses are payable and how to make a claim.

ii. Users should be provided with clear and timely information about the date and venue of any hearing.

iii. Users should be clearly informed where a tribunal has the power to order one party to pay the costs or expenses of another. Wherever practical that information should include an indication of the scope and extent of a likely award.

iv. Users should be able to find out about the progress of their case and how long they are likely to have to wait for a hearing or decision.

v. Where it is possible to do so, users should be given a specific time for their hearing.

vi. Users should be informed whether they have to attend or not, and advised whether it will usually be in their interest to do so.

vii. Information about the venue should include parking facilities and public transport routes, refreshment and other facilities, access for people with disabilities, and a map.

viii. The tribunal's decision should be accompanied by information about appeal rights and where independent advice may be obtained.

**f A complaints policy and procedure should be in place in relation to the performance of both judiciary and administration, and should be publicised to users.**

**g Tribunals should establish and publish a clear policy on the payment of travelling expenses.**

**h Tribunals should establish and publish a clear policy on equal treatment and continuously monitor compliance.**

### 3 Tribunals should:

- Offer cost effective procedures
- Be properly resourced and organised

**a Judicial resources should be managed to provide a good service, and to ensure that individuals sit often enough to maintain knowledge and skills.**

**b Standards for judicial behaviour and performance should be set and monitored.**

i. The results of monitoring should be regularly assessed and used to raise standards.

ii. All chairs and members should participate in a review of their performance at appropriate intervals to identify areas of good performance and areas for improvement. Suitably experienced colleagues, specially selected and appropriately trained to be able to give constructive feedback on performance, should undertake annual reviews.

**c Cases should be heard, and a final decision given, within a reasonable period.**

i. Judicial practice should take account of the need for expedition and reasonable economy.

ii. Management information about the age and type of outstanding cases should be collected and monitored.

iii. Waiting time targets for cases should be set and monitored.

**d Programmes of induction and refresher training should be provided for tribunal chairs, members and administrative staff.**

i. Induction and training should take place before tribunal members begin sitting.

ii. Regular refresher training should be provided to all members, including the opportunity to discuss matters of concern with other members.

iii. The lead members of tribunals should be trained in the skills of chairing.

iv. Guidance should be provided regularly to all members upon matters of law and practice.

v. Chairs, members and administrators should have participated in training in diversity and equal treatment issues.

**e Appropriate levels of administrative and clerical support should be provided for the proper conduct of tribunal hearings.**

i. Tribunals should provide appropriately trained and skilled staff and administrative facilities sufficient to ensure that tribunals are properly administered and hearings are properly supported, with advice and assistance from clerks, ushers and other administrative staff.

ii. Roles and responsibilities of tribunal clerks and other administrative staff should be clearly determined and communicated to those concerned.

**f Standards for hearing venues and for service and performance should be set and monitored in consultation with users.**

**g Appropriate planning, budgeting and monitoring procedures should be in place.**

i. Data about patterns in the caseload of the system (errors in first tier decision making, cost of cases going to judicial review etc.) should be collected and monitored.

ii. Administrative processes should be responsive to the needs of those who wish to use them.

iii. Targets should be reviewed regularly and improved where possible.

iv. Information about the performance of the tribunal should be published at least once a year.

v. Information about performance should include, where relevant:

- key performance statistics (waiting times, outstanding caseload, age of caseload, intake and clearance);
- performance against quality standards;
- expenditure and investment figures;
- details of training for judiciary and administrative staff;
- information about complaints.

**h Where relevant, tribunals should work with first tier decision makers and/or second tier tribunals continuously to improve the “end to end” experience for the user (e.g. to ensure the whole appeals process is completed in a reasonable time).**

## APPENDIX C

### List of Judicial Offices

Tribunal offices included in List of Judicial Offices for which appointment is made by the Northern Ireland Judicial Appointments Commission Justice (Northern Ireland) Act 2002, Schedule 1 (as amended)

President of Appeal Tribunals (within the meaning of Chapter 1 of Part 2 of the Social Security (Northern Ireland) Order 1998

Member of the panel of persons to act as members of such appeal tribunals

[Member of the panel of persons who may serve as chairmen of the Care Tribunal established by Article 44 of the Health and Personal Social Services (Quality, Improvements and Regulation) (Northern Ireland) Order 2003

President of the Industrial Tribunals and the Fair Employment Tribunal

Acting President of the Industrial Tribunals and the Fair Employment Tribunal under Article 82(6) of the Fair Employment and Treatment (Northern Ireland) Order 1998

Vice-President of the Industrial Tribunals and the Fair Employment Tribunal

Acting Vice-President of the Industrial Tribunals and the Fair Employment Tribunal under Article 82(6) of the Fair Employment and Treatment (Northern Ireland) Order 1998

Member of the panel of chairmen of the Industrial Tribunals

Member of the panel of chairmen of the Fair Employment Tribunal

President of the Lands Tribunal for Northern Ireland

Deputy President of the Lands Tribunal for Northern Ireland under section 3(1) of the Lands Tribunal and Compensation Act (Northern Ireland) 1964

Other member of the Lands Tribunal for Northern Ireland

Temporary member of the Lands Tribunal for Northern Ireland under section 3(2) of the Lands Tribunal and Compensation Act (Northern Ireland) 1964

President of the Special Educational Needs and Disability Tribunal for Northern Ireland

Member of the panel of persons who may serve as chairman of that Tribunal

Member of the tribunal established under section 91 of the Northern Ireland Act 1998

Member of the Mental Health Review Tribunal for Northern Ireland

Member of the panel of persons who may serve as chairmen of a tribunal established for the purposes of the Deregulation (Model Appeal Provisions) Order (Northern Ireland) 1997

Chairman of a Tribunal appointed under paragraph 1(1)(a) of Schedule 3 to the Misuse of Drugs Act 1971 in its application to Northern Ireland

Member of a Tribunal appointed under paragraph 2(1) of the Schedule to the Pensions Appeal Tribunals Act 1943 in its application to Northern Ireland

President or Deputy President of Pensions Appeal Tribunals appointed under paragraph 2B of the Schedule to the Pensions Appeal Tribunals Act 1943 in its application to Northern Ireland

Chairman of the Plant Varieties and Seeds Tribunal for the purpose of proceedings brought before it in Northern Ireland

Deputy appointed under paragraph 6(1) of [Schedule 3](#) to the Plant Varieties Act 1997 for the purpose of proceedings brought before the Plant Varieties and Seeds Tribunal in Northern Ireland

Member of the panel of persons to act as chairmen of Reinstatement Committees sitting in Northern Ireland (appointed under paragraph 2(1)(a) of [Schedule 2](#) to the Reserve Forces (Safeguard of Employment) Act 1985)

President of the Northern Ireland Valuation Tribunal

Member of the Northern Ireland Valuation Tribunal

President or other member of the Charity Tribunal for Northern Ireland

Adjudicator appointed under Article 7(1)(b) of the Criminal Injuries Compensation (Northern Ireland) Order 2002

Chairman appointed under Article 7(2)(b) of the Criminal Injuries Compensation (Northern Ireland) Order 2002

Adjudicator appointed under Article 29 of the Traffic Management (Northern Ireland) Order 2005

Chairman of an Appeal Tribunal for the purposes of the Adoption (Northern Ireland) Order 1987

## APPENDIX D

### The Administrative Justice and Tribunals Council

(material taken from website <http://www.ajtc.gov.uk/about/about-us.htm>)

#### Purpose, vision and values

##### *Purpose*

The AJTC's purpose is to help make administrative justice and tribunals increasingly accessible, fair and effective by:

- playing a pivotal role in the development of coherent principles and good practice
- promoting understanding, learning and continuous improvement
- ensuring that the needs of users are central.

##### *Vision*

The AJTC's vision for administrative justice and tribunals is a system where:

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

##### *Values*

The values the AJTC seeks to promote in administrative justice and tribunals are:

- Openness and transparency
- Fairness and proportionality
- Impartiality and independence
- Equality of access to justice

The AJTC will also work collaboratively with others, basing its views on evidence and principle so as to encourage measurable improvement.

## Strategic objectives

The AJTC will focus first and foremost on the needs of users.

The AJTC will keep under review and influence the development of administrative justice and tribunals through:

- giving authoritative and principled advice and guidance to government, the Tribunals Service and others within the administrative justice system on changes to legislation, practices and procedures to improve the working of administrative justice, tribunals and inquiries, including a framework of generally applicable principles;
- exploring and promoting the scope for new approaches to dispute resolution;
- seeking to build up influence over forthcoming legislation, in particular in advance of publication;
- recognising and responding to the diverse needs and circumstances of users, by applying effective monitoring arrangements and being alert to emerging issues;
- raising awareness of the different approaches within the UK legal systems.

The AJTC will keep under review the work of the Tribunals Service, the tribunals within it and other tribunals:

- offering advice and assistance on wider policy issues that complement the Tribunals Service's own work programme or otherwise affect tribunals;
- commenting from time to time on Tribunals Service priorities, standards and performance measures;
- monitoring progress and performance of tribunals against common standards and performance measures.

The AJTC will respond authoritatively to emerging issues and proposals that affect or involve administrative justice, tribunals and inquiries more generally:

- identifying and responding to perceived needs and current/prospective concerns in relation to all aspects of administrative justice;
- identifying priorities for, and encouraging the conduct of, relevant research;
- monitoring the relationships between first instance decision makers, ombudsmen, tribunals and the courts to ensure they are clear, complementary and flexible;
- promoting the accessibility of administrative justice and tribunals to users through open, fair and impartial procedures and high quality, user friendly information and advice;
- employing a range of communication methods to give an account of its work and disseminate its views.

## How we work

### *How does the AJTC work?*

The members of the AJTC meet on a monthly basis.

- We provide advice and make recommendations on changes to legislation, practice and procedure which will improve the workings of the administrative justice system;
- We attend proceedings of tribunals (including deliberations) as an observer;
- We make recommendations on the priorities for Ministry of Justice and other research projects, as well as playing a major role in disseminating, and lending authority to, any research findings;
- We review the relationships between the various components of the administrative justice system (such as ombudsmen, tribunals and the courts);
- We may be called to give evidence before Parliamentary Select Committees;
- We publish a statutory Annual Report to the Lord Chancellor, the Welsh Ministers and the Scottish Ministers, and Special Reports and other guidance on relevant matters;
- We hold an annual conference for Presidents and Heads of tribunals, academics, the advice sector and others with an interest in administrative justice, and topical workshop events when the need arises;
- We produce a quarterly electronic newsletter which contains news and views of the wider administrative justice world.

## Constitution and functions

1. The Administrative Justice and Tribunals Council (AJTC) was set up by the Tribunals, Courts and Enforcement Act 2007 to replace the Council on Tribunals.

2. The AJTC consists of not more than 15 nor less than 10 appointed members. Of these, either two or three are appointed by the Scottish Ministers with the concurrence of the Lord Chancellor and the Welsh Ministers; and either one or two are appointed by the Welsh Ministers with the concurrence of the Lord Chancellor and the Scottish Ministers. The remainder are appointed by the Lord Chancellor with the concurrence of the Scottish Ministers and the Welsh Ministers.

3. The Lord Chancellor, after consultation with the Scottish Ministers and the Welsh Ministers, nominates one of the appointed members to be Chair of the AJTC. The Parliamentary Commissioner for Administration (the Parliamentary Ombudsman) is a member of the AJTC by virtue of his or her office.

4. The Scottish Committee of the AJTC consists of the two or three members of the AJTC appointed by the Scottish Ministers (one being nominated by the Scottish Ministers as Chair) and three or four other members, not being members of the AJTC, appointed by the Scottish Ministers. The Parliamentary Ombudsman and the Scottish Public Services Ombudsman are members of the Scottish Committee by virtue of their office.

5. The Welsh Committee of the AJTC consists of the one or two members of the AJTC appointed by the Welsh Ministers (one being nominated by the Welsh Ministers as Chair) and two or three other members, not being members of the AJTC, appointed by the Welsh Ministers. The Parliamentary Ombudsman and the Public Services Ombudsman for Wales are members of the Welsh Committee by virtue of their office.

6. The principal functions of the AJTC as laid down in the Tribunals, Courts and Enforcement Act 2007 are:

- a) to keep the administrative justice system under review;
- b) to keep under review and report on the constitution and working of listed tribunals; and
- c) to keep under review and report on the constitution and working of statutory inquiries.

7. The AJTC's functions with respect to the administrative justice system include considering ways to make it accessible, fair and efficient, advising the Lord Chancellor, the Scottish Ministers, the Welsh Ministers and the Senior President of Tribunals on its development and referring to them proposals for change, and making proposals for research.

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

9. The AJTC's functions with respect to tribunals include considering and reporting on any matter relating to listed tribunals that the AJTC determines to be of special importance, considering and reporting on any particular matter relating to tribunals that is referred to the AJTC by the Lord Chancellor, the Scottish Ministers and the Welsh Ministers, and scrutinising and commenting on legislation, existing or proposed, relating to tribunals.

10. "Listed tribunals" are the First-tier Tribunal and Upper Tribunal established by the 2007 Act and tribunals listed by orders made by the Lord Chancellor, the Scottish Ministers and the Welsh Ministers. The AJTC must be consulted before procedural rules are made for any listed tribunal except the First-tier Tribunal and Upper Tribunal. The AJTC is represented on the Tribunal Procedure Committee that makes procedural rules for the First-tier Tribunal and Upper Tribunal.

11. The AJTC's functions with respect to statutory inquiries include considering and reporting on any matter relating to statutory inquiries that the AJTC determines to be of special importance, and considering and reporting on any particular matter relating to statutory inquiries that is referred to the AJTC by the Lord Chancellor, the Scottish Ministers and the Welsh Ministers.

12. "Statutory inquiry" means an inquiry or hearing held by or on behalf of a Minister of the Crown, the Scottish Ministers or the Welsh Ministers in pursuance of a statutory duty, or a discretionary inquiry or hearing held by or on behalf of those Ministers which has been designated by an order under the Tribunals and Inquiries Act 1992. The AJTC must be consulted

on procedural rules made by the Lord Chancellor or the Scottish Ministers in connection with statutory inquiries.

13. Members of the AJTC and the Scottish and Welsh Committees have the right to attend (as observer) proceedings of a listed tribunal or a statutory inquiry, including hearings held in private and proceedings not taking the form of a hearing.

14. The AJTC has no authority to deal with matters within the legislative competence of the Northern Ireland Assembly.

15. The AJTC must formulate, in general terms, a programme of the work that it plans to undertake in carrying out its functions. It must keep the programme under review and revise it when appropriate. It must send a copy of the programme, and any significant revision to it, to the Lord Chancellor, the Scottish Ministers and the Welsh Ministers.

16. The AJTC must make an annual report to the Lord Chancellor, the Scottish Ministers and the Welsh Ministers, which must be laid before Parliament, the Scottish Parliament and the National Assembly for Wales. The Scottish Committee must make an annual report to the Scottish Ministers, who must lay the report before the Scottish Parliament. The Welsh Committee must make an annual report to the Welsh Ministers, who must lay the report before the National Assembly for Wales.



