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**Tribunal Reform in the UK: a Quiet Revolution**

**by Lord Justice Carnwath**

***Background***

1. Tribunals constitute a substantial part of the UK justice system. They deal with a wide range of disputes including principally those between the individual and the state (such as social security benefits, tax, asylum and immigration, land compensation, mental health), but also some between private individuals (particularly employment disputes). Until now, most tribunals have been created by individual pieces of primary legislation, without any overarching framework. Many have been administered by the government departments responsible for the policy area in which that tribunal has jurisdiction. Those departments were sometimes directly responsible for the decisions which were appealable to the tribunal.
2. In the report of his Review of Tribunals, *Tribunals for Users - One System, One Service*, published in August 2001, Sir Andrew Leggatt (a former Court of Appeal judge) recommended extensive reform to the tribunals system. He recommended that tribunals should be brought together in a single system, separate from their current sponsoring departments, and that tribunal judges should be recognised as an essential part of the independent judiciary. He recommended that such a system be administered instead by a single Tribunals Service, in what was then the Lord Chancellor's Department.
3. His proposals were generally accepted by the Government in the White Paper *Transforming Public Services: Complaints, Redress and Tribunals*, published

in July 2004. The Government committed itself to secure legislation in due course to give effect to the proposals. At the same time, the then Lord Chief Justice, Lord Woolf (with the concurrence of the chief justices in Scotland and Northern Ireland) appointed Lord Justice Carnwath to act as “Senior President Designate” to provide judicial leadership in the preparation of the legislation. He participated in the appointment of the first Chief Executive of the new Tribunal Service. He sits on the Tribunal Service Management Board, and also chairs the Tribunal Presidents’ Group, which brings together the judicial heads of all the interested tribunals. The legislation was delayed until 2007, due to other Government priorities.

### ***Constitutional Reform***

4. Meanwhile, in June 2003, the Government had unexpectedly announced more wide-ranging reforms of the court system.<sup>1</sup> In due course the Constitutional Reform Act 2005 (“CRA”) was enacted, designed to give modern statutory form to the relationship between the executive and the courts. It came into effect in April 2006.
5. The CRA confers on the court judiciary a new statutory guarantee of judicial independence. The Lord Chief Justice is given a central position as Head of the Judiciary, replacing the historic role of the Lord Chancellor (who had been also a member of the Government). A new independent Judicial Appointments Commission (“JAC”) has been created. The CRA also provides for the

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<sup>1</sup> This note generally ignores variations in the different parts of the UK. The reforms of the court system under the CRA are principally directed to England and Wales, although they also affect some aspects of the separate legal systems in Scotland and Northern Ireland, respectively. Tribunals vary in their geographical extent. Some of the most important (e.g. tax, and asylum and immigration) extend to the whole of the UK); but others are more limited in scope, extending only to one or more countries within the UK.

establishment of a new Supreme Court (due to be opened in September 2009), which will take over the current jurisdiction of the House of Lords. More recently, in June 2007, a new Ministry of Justice was created, to take over the responsibilities of the former Department for Constitutional Affairs, as well as other responsibilities, including prisons. The Secretary of State for Justice, although not a member of the House of Lords, also holds the office of Lord Chancellor under the CRA.

6. Tribunals were covered by the CRA for certain purposes only (notably appointments and discipline). It was, however, recognised that further legislation would be required to complete the process started by the CRA, as well as giving effect to the Leggatt reforms. The Tribunals, Courts and Enforcement Act 2007 (“TCEA”) was passed in July 2007. As well as providing a statutory basis for the Leggatt reforms, it extends the main principles of the CRA to tribunals, including the guarantee of judicial independence. It also creates the new office of Senior President of Tribunals, the functions of which largely reflect those of the Lord Chief Justice for the ordinary courts under the CRA. The main parts of the TCEA are expected to be implemented by a series of Parliamentary orders, taking effect between October 2008 and April 2009. The Government published a policy paper in November 2007 (*Transforming Tribunals*) setting out its proposals for implementation of the TCEA.

### ***The new tribunals***

#### *First-tier and Upper Tribunals*

7. The TCEA creates two new, generic tribunals, the *First-tier Tribunal* and the *Upper Tribunal*, into which existing tribunal jurisdictions can be transferred. The First-tier will hear first instance cases, and will deal with fact and law. The Upper Tribunal is intended to be primarily, but not exclusively, an appellate tribunal from the First-tier Tribunal. The Act also provides for the establishment of “chambers” within the two tribunals so that the many jurisdictions that will be transferred into the new tribunals can be divided into groups with related interests. Each chamber will be headed by a Chamber President and overall leadership will be provided by the Senior President of Tribunals.

*The new Chambers*

8. The final form of the chambers has not yet been settled. However, following extensive discussions with the Senior President and tribunal judges, the following is the likely arrangement:
- i) First tier chambers:-
    - a) Social entitlement (e.g. social security benefits, criminal injuries compensation, asylum support)
    - b) General regulatory (e.g. regulation of gambling, charities, claims management services, estate agents, information, transport etc)
    - c) Health, education, and social care (e.g. mental health, special educational needs, care standards)

- d) Taxation (e.g. VAT and direct taxes)
  - e) Land, property and housing (e.g. leasehold valuation tribunals, land registration appeals)
- ii) Upper tribunal chambers
- a) Administrative appeals (appeals on law from first-tier chambers (a), (b) and (c))
  - b) Finance and Tax (appeals from first-tier tax chamber, and first instance jurisdiction in complex tax cases; appeals from financial regulators)
  - c) Lands (compensation for compulsory acquisition, land valuation, land registration)
9. Two other groups of tribunals will remain separate, although administered by the Tribunal Service, and under the leadership of the Senior President of Tribunals:
- i) Asylum and Immigration Tribunal (“AIT”)
  - ii) Employment Tribunals, and the Employment Appeal Tribunal.

*Membership and deployment*

10. A distinctive feature of tribunals in their current form is their specialised membership. Some tribunals consist of a lawyer or expert sitting alone. Others comprise a lawyer sitting with one or more non-lawyer members who may be experts in their field (such as doctors or accountants), or who have experience

or general skills relevant to the work of the tribunal. At present, there is no coherent system in place for deploying tribunal members. While some sit in more than one jurisdiction, this will be as a result of the member having gone through a separate appointments process for each additional jurisdiction.

11. The TCEA creates new offices for the First-tier and Upper Tribunal, “tribunal judges” and other “tribunal members,” and a new system of deployment. Judges of the First-tier Tribunal or Upper Tribunal will be allocated to one or more of the chambers of that tribunal, having regard to their knowledge and experience. It is expected that the current members of transferred tribunals will become members of the new chambers corresponding to their existing experience.<sup>2</sup> Thereafter they may be assigned to different chambers by the Senior President, subject to appropriate training.

*Reviews and appeals, and judicial review*

12. Currently there is no single mechanism for appealing against a tribunal decision. Appeal rights differ from tribunal to tribunal. In some cases there is a right of appeal to another tribunal. In other cases there is a right of appeal to the High Court. In some cases there is no right of appeal at all, but the High Court may exercise its residual judicial review jurisdiction.
13. The TCEA provides a unified appeal structure. In most cases, a decision of the First-tier Tribunal may be appealed to the Upper Tribunal, and the grounds of appeal must relate to a point of law. The rights to appeal may only be exercised with permission from either tribunal. It will also be possible for the

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<sup>2</sup> The historic jurisdiction of the General Commissioners for Income Tax (an entirely lay tribunal, responsible for most direct tax appeals) will be replaced by a new specialist chamber within the first-tier.

Upper Tribunal to deal with some judicial review cases, which would otherwise have to be dealt with by the High Court (or Court of Session in Scotland). The Upper Tribunal has this jurisdiction only where a case falls within a class specified in a direction given by the Lord Chief Justice, or in cases transferred by the High Court on an individual basis. Appeal from the Upper Tribunal will lie to the Court of Appeal, but only with permission and (for second appeals) in cases of general importance; and thereafter (in exceptional cases) with leave to the new Supreme Court.

### *Rules*

14. A new Tribunal Procedure Committee will take responsibility for tribunal rules, replacing the former functions of the Lord Chancellor and other government Ministers under a multiplicity of different rule-making powers, The intention is to work towards a more harmonised set of rules for the new system, except where differences are justified by the special nature of the jurisdiction..

### *The Tribunals Service*

15. In the 2004 White Paper, the Government set out its plans to create a single Tribunals Service providing common administrative support to the main central government tribunals. The new Service, an executive agency of what was then the Department for Constitutional Affairs (DCA) and is now the Ministry of Justice (MoJ), was launched in April 2006. It provides support to a range of tribunals, including the Asylum and Immigration Tribunal, the Social Security and Child Support Tribunals, the employment tribunals and the Employment Appeal Tribunal, and the Mental Health Review Tribunals in

England. Most tribunals which are the responsibility of central government are now administered by the Tribunals Service, or will join the Service over the next few years.

***The Senior President of Tribunals***

16. The office of Senior President is established by the Act as a free-standing senior judicial office, independent of both the Executive and the chief justices responsible for the courts, with powers and duties set out in the Act. The first Senior President is Lord Justice Carnwath, who was sworn in by the Lord Chief Justice on 12<sup>th</sup> November 2007. He has acted as Senior President Designate since 2004, and as such has been closely involved in the preparation of the legislation, and the setting up of the new Tribunal Service.
17. The Senior President will be the head of the tribunals' judiciary providing strategic leadership to the tribunals within the new system. The Act requires the Senior President, when carrying out his functions, to have regard to (in short): accessibility; fairness, speed and efficiency; specialist expertise; and innovation.
18. His principal functions include:
  - i) responsibility for representing the interests of tribunal judiciary to Parliament and Ministers;
  - ii) responsibility for the maintenance of appropriate arrangements for the training; guidance and welfare of tribunal judges and members;

- iii) agreeing with the Lord Chancellor the arrangements for chambers in the First-tier Tribunal and the Upper Tribunal, and the allocation of functions between chambers;
  - iv) assigning judges and members to chambers;
  - v) requesting court judges (with the agreement of the relevant chief justice) to act as a judge of the First-tier or Upper Tribunal;
  - vi) chairing the Tribunal Procedure Committee.
19. The Senior President Designate has hitherto been supported in his work by a small team within the Tribunal Service. In the future, that team will expand to create a Tribunal Judicial Office that can support the Senior President in his statutory and leadership functions. Although this will be formally part of the Tribunal Service, it will act as an independent office answerable to the Senior President. The office will work closely with the Judicial Office of the Lord Chief Justice, to ensure a common approach on issues of joint concern, and to enable support services to be shared between courts and tribunals judiciary where it is sensible and practicable to do so.

#### ***Administrative Justice and Tribunals Council***

20. Since 1958, there has been an independent “Council on Tribunals”, with a statutory duty to keep under review and report on the constitution and working of tribunals under its supervision. Sir Andrew Leggatt recommended that the Council on Tribunals should play a central role in the new tribunals system. Under the TCEA, a new Administrative Justice and Tribunals Council (“the AJTC”) has been created (as from November 2007). Its role in relation to the

supervision of tribunals will be similar to that currently exercised by the Council on Tribunals. But in addition the AJTC will be charged with keeping the administrative justice system as a whole under review, considering how to make the system more accessible, fair and efficient, and advising Ministers and the Senior President accordingly.

21. The AJTC will have between 10 and 15 members appointed by the Lord Chancellor, and by Ministers from the devolved administrations. It will have separate Scottish and Welsh Committees.

### ***Conclusion***

22. Tribunals have come to play a central part in the UK civil justice system, particularly in relation to administrative law. Their principal distinguishing features, as compared to the courts, are flexibility, specialisation, and accessibility. The present system is the result of piecemeal and incoherent development of many decades. The TCEA provides the statutory framework for a radical restructuring of the existing tribunal jurisdictions. The new Tribunals Service will provide dedicated administrative support, while the new office of Senior President of Tribunals, held by a Court of Appeal judge, should ensure effective judicial leadership.

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