

LORD CHANCELLOR'S DEPARTMENT CONSULTATION

TRIBUNALS FOR USERS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

NOVEMBER 2001

The executive committee would like to acknowledge the assistance of the following people for assisting with the preparation of this response:

Frances McCarthy President, APIL

Allan Gore Executive Committee Member, APIL

Any enquiries in respect of this response should be addressed, in the first instance, to:

Annette Morris
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585

Fax: 0115 958 0885

E-mail: Annette@apil.com

TRIBUNALS FOR USERS

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents around 5000 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. The aims of the association are:
 - To promote full and prompt compensation for all types of personal injury;
 - To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
 - To promote health and safety;
 - To alert the public to dangers in society such as harmful products and dangerous drugs;
 - To provide a communication network exchanging views formally and informally.

2. APIL welcomes this opportunity to comment upon the tribunal system. With reference to the list of tribunals at annex B of the consultation paper, we should note that we are predominantly concerned with the tribunals relating to social security and criminal injuries compensation. In summary, we generally support Sir Andrew Leggatt's recommendations insofar as they relate to the restructuring of the tribunal system and the development of good practice in areas such as judicial appointments and training and IT. We are, however, concerned about the presumption that if users are given sufficient information, they will be able to represent themselves. We believe this underestimates the complexity of some tribunal hearings and procedures. Tribunal users who feel they need to be legally represented, should be given fair access to that representation.

Do you agree that reform of tribunals should focus on maintaining and improving the services that tribunals provide to their users in the areas identified in paragraphs 2-4:

- **Enabling most users to represent themselves**
- **Better information and advice**
- **Service standards and performance measures**
- **Improved training for judiciary and staff**
- **More effective procedures**
- **Incorporating active case management**
- **Review and feedback to promote better initial decision-making**
- **Modern IT providing electronic access**

3. APIL would certainly support maintaining and improving the services that tribunals provide in the areas identified in the bullet points above and as outlined in paragraphs 2-4 of the consultation paper. We believe the reasons why focussing on these areas would improve the tribunal service generally are essentially self-explanatory. We are concerned, however, about the presumption that providing tribunal users with increased information will allow them to proceed, in most cases, without legal representation. Most people only come into contact with tribunals on rare occasions in their life often at a vulnerable and difficult time. We do not think the complexities of tribunal procedures or the issues handled by them should be underestimated. Legal representation should be available to all those who need it in order to achieve access to justice. This point is expanded upon below in relation to the funding of legal representation.

Are there any other areas where improvements could be made?

4. We cannot, at this stage, identify any further areas for improvement than those identified by Sir Andrew Leggatt and reproduced in the consultation paper.

Do you think that there is a risk that users will lack confidence in a tribunal's independence where it is administered by the Government department that has responsibility for the subject area? If so, what evidence do you have to support this view?

5. We believe there is a strong risk that users will lack confidence in a tribunal's independence where it is administered by the Government department that has responsibility for the relevant subject area. The experience of APIL members is that their clients usually only have one encounter with a tribunal usually to seek to overturn a decision adverse to their interests, and are often nervous and suspicious of a system with which they are unfamiliar. If the client is already suspicious of the relevant Government department responsible for that decision, putting his case to a tribunal administered by that department may only serve to fuel that suspicion. Justice must be both done and seen to be done and we believe separating the administration of the tribunal from the Government department with which it is concerned would greatly assist in improving public confidence in the tribunal system.

Could any lack of consumer confidence be addressed in other ways, for example, by improved information?

6. Whilst improved information would certainly be beneficial for tribunal users, we do not believe that the dissemination of information would actually dispel any feelings of distrust or suspicion that a tribunal user may have.

Do you see any other real benefits for users if different Ministers are accountable for tribunal administration on the one hand, and for the relevant policies and administrative decisions on the other? Do you think that there can be benefits from having one Minister responsible for both policy and tribunal functions that would be lost if these were separated?

7. Consumer confidence, even if it is based on a perception, is vital in the administration of justice generally and we do not believe that there needs to be any additional benefit to establish the case for separating tribunal administration from policy and administrative decision making.

Do you think that improved tribunal services would be secured most effectively and efficiently by (i) a unified Tribunal Service (covering all or most of the tribunals listed in the report) or (ii) within or with limited changes to the existing administrative structure?

8. APIL supports the creation of a unified tribunal service despite our recognition that tribunals operate in very different ways. In his report, Sir Andrew Leggatt focussed on the need to improve certain aspects of the general tribunal service, in, for example, the areas of IT, judicial training and appointments and hearing locations. We believe a unified tribunal service would make it easier for those responsible to achieve an improved and consistent service in these areas. Without such unification, we fear that the improvements recognised as desirable would be introduced on a fragmented basis only and would, therefore, be less effective or less than universal.

Which of the options for change without a unified Tribunal Service, identified in paragraph 12, do you consider the most important? Are there any other options that should be considered?

9. Of the issues raised in paragraph 12 of the consultation paper, we believe the following are the most important:

- Changes to the system of judicial appointments;
- An enhanced role for the Judicial Studies Board in training tribunal judiciary;
- Joined up arrangements for spreading best practice among tribunals, including replicating the best of existing case management IT;
- Joined up arrangements to enable tribunals to share one another's hearing room accommodation and other facilities.

As noted in paragraph 8 above, however, we do not believe that these improvements would be delivered as effectively within the current fragmented tribunal service.

Do you agree that any unified Tribunal Service should be an executive agency responsible to the Lord Chancellor, or is there a better option?

10. We agree that it would be logical for any unified tribunal service to become an executive agency responsible to the Lord Chancellor in view of the fact that this minister is generally responsible for the administration of justice. This is with the caveat that we do not want any increase in delay or confusion about jurisdiction. For example, the CICAP currently works well and reform must not jeopardise the efficient running of the process.

Do you agree with the Report's recommendation that the tribunals system should have a divisional structure, with each Division headed by a judicial President?

11. We support Sir Leggatt's recommendation that the tribunal system should have a divisional structure, as this is likely to benefit users by making the tribunal system easier to understand and, therefore, more accessible.

Do you agree with the roles proposed for judicial presidents?

12. APIL supports the proposed role of judicial presidents. Making one individual generally responsible for a tribunal division will, in our view, assist in ensuring that general improvements in areas such as IT and judicial training, are achieved in each tribunal division.

Do you agree that a Tribunal Service should be directed by a Tribunals Board? Do you agree with the Report's recommendation about the membership of the Tribunals Board, or would there be advantages in including more external representation. Do you agree with the Report's recommendations about the functions of the Tribunals Board?

13. We agree it would be both sensible and helpful for the tribunal service to be directed by a tribunals board and that it should be constituted by the judicial presidents of each tribunal division. Bringing together the head of each tribunal division will ensure, as far as possible, that the diversification amongst the various tribunals is taken into consideration. In addition, if the judicial presidents are to have responsibility for areas such as training and IT within their divisions, it would certainly be sensible to have the same people on a tribunals board directing the delivery of these areas within tribunal service generally.

Do you agree that the Council on Tribunals should have an enhanced role to champion the cause of users? Do you agree with the Report's detailed recommendations about the functions of the Council? Could the Council's role be expanded beyond this?

14. We agree that the Council on Tribunals should have an enhanced role to champion the cause of users and support the report's recommendations about

the functions of the Council in monitoring judicial training, the development of IT, the usefulness of the information provided to users and the adequacy of independent sources of advice. We do not believe, however, that the Council's role need be expanded beyond what is envisaged in the report.

Do you agree with the Report's recommendations about second appeals, precedent-setting powers for second tier tribunals and excluding tribunals from the scope of judicial review? Are there jurisdictions that should not have a second tier appeal, for example, because it would introduce unacceptable delay?

15. We agree that there should be a right to a further appeal to a second tier tribunal in all tribunal jurisdictions, and also that the decisions of second tier tribunals should be binding on lower tier tribunals in future cases. We do not agree, however, that tribunals should be excluded from the scope of judicial review. Judicial review provides an important safeguard for tribunal users and should remain available.

Are there jurisdictions where the grounds for a second tier appeal should be wider than a point of law?

16. We believe that the grounds for a second tier appeal should certainly be wider than a point of law in relation to criminal injuries compensation. If, for example, a compensation award is made in the wrong category on the tariff, this could make a significant difference to the amount received by the injured victim but is unlikely to concern a point of law. In a personal injury claim issued within the courts, a personal injury victim who has been awarded much less than he believes he is entitled to would be able to appeal to a higher court and we believe that the injured victims of crime should have the same opportunity.

Should only selected second tier decisions be binding; or, given that they are limited to points of law, should all second tier decisions be binding?

17. We believe that all second tier decisions should be binding, but if this is to be the case, it is imperative that those decisions are reported and widely available.

Should tribunals be excluded from judicial review, or should only second tier tribunals be excluded; or should judicial review remain available as now?

18. As noted above, the right to judicial review is an additional safeguard for the tribunal user and should be available in respect of all tribunals as it is now.

Do you agree that all appointments to departmental tribunals should be made by the Lord Chancellor?

19. We agree that it would be sensible to simplify the current procedures for appointments, as the current system is complex and diverse. As we have submitted in relation to judicial appointments, however, we believe that such appointments should be made by an independent judicial appointments commission with lay members, rather than by the Lord Chancellor. The commission, which would be wholly responsible for the recruitment, selection and promotion of tribunal members and the judiciary, in accordance with open and transparent criteria, would be independent of the Government and have its own budget and secretariat. In addition, we strongly believe that training and performance monitoring should be conducted on a continuous basis during service to ensure that standards are maintained.

Would it benefit users if different tribunals' procedural rules were made as consistent as possible with each other?

20. Whilst most, if not all, tribunals operate differently, we do believe that it would be beneficial to make tribunals' procedural rules as consistent as possible with each other insofar as this will promote best practice. Rules should not be introduced, however, for the sake of consistency where this would be inappropriate.

Should the Lord Chancellor be the Minister responsible for making all tribunals' procedural rules (even if he does not become responsible for the administration of all tribunals)?

21. We agree that it would be logical for the Lord Chancellor to have ultimate responsibility for making all tribunals' procedural rules.

Do you agree that public funding for representation should be available for exceptional cases before all tribunals, or are there tribunals for which public funding for representation should not be available in any circumstances? Are the proposed elements of the merits test appropriate?

22. We believe that funding for legal representation should be available for all those who need it. Whilst we are not opposed to the application of a merits test on the basis of the prospects of success, we are opposed to the suggestion that applicants should also have to establish exceptional circumstances, such as language or mental difficulties, in order to qualify for funding. As outlined above, tribunals can seem complex and daunting to a layperson that has not

encountered tribunal procedures before, and not just those with language or mental difficulties as the LCD suggests. By virtue of the Human Rights Act 1998, everyone has a right to a fair hearing and legal representation may play an important role in making a hearing fair, especially if the tribunal user is arguing a case against those experienced in tribunal procedures and decisions. In addition, legal representation would also, in our view, benefit the tribunal service generally as it would, in all likelihood, increase the efficiency of tribunal hearings.