



# Transforming Tribunals: Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007

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Comments of the Child Poverty Action Group

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## Introduction

1. The Child Poverty Action Group is a registered charity which campaigns for the abolition of child poverty. Our particular area of focus is on the welfare benefits and tax credits systems administered by the Department for Work and Pensions, Local Authorities and HMRC. Over the past 25 years we have built up a great deal of expertise in the area of social security law. In particular, the CPAG plays a leading role in taking legal test cases before the Social Security Commissioners, the Administrative Court, and the higher courts concerning the rules of entitlement to benefit and aspects of the administration of the welfare benefits scheme, including appeal tribunals.
2. The focus of our test-case work is to ensure that claimants' entitlement to benefits is not diminished and, where appropriate is extended, and that the systems in place to enable claimants to check the correctness of entitlement decisions are fair, accessible and independent. Other aspects of our work are to lobby for changes to social security legislation and to make submissions to bodies when consulted on proposed changes to legislation which will affect benefit claimants.
3. It is from this perspective that we welcome the opportunity of commenting on the consultation paper on 'Transforming Tribunals'. Our comments focus on our area of expertise, which is social security appeals before tribunals and before the Social Security Commissioners, who are to become part of the Upper Tribunal.
4. We welcome many of the proposed changes. We welcome the new Administrative Justice and Tribunals Council which has taken over and expanded the remit of the Council on Tribunals. We are sure it will have a valuable role to play.
5. The questions posed by the consultation do not address all the issues we believe are relevant; in particular claimants' rights to representation, the judicial review jurisdiction of the Upper Tribunal, and the long term future of tax credits appeals. We find it particularly disappointing that legal aid for representation before tribunals is not part of this consultation. Where we think it necessary we have made additional comments on these matters.

## *Background*

6. We made comments to the *Leggatt* review itself. We then commented on Sir Andrew Leggatt's report *Tribunals for Users – One System, One Service*. Broadly speaking, CPAG welcomed the *Leggatt* proposal of having a unified Tribunal system which was truly independent from any of the sponsoring government departments.

However, we had concerns about the lack of any concrete ideas about improving first instance decision-making and of *Leggatt's* view that only a limited number of cases would require representation.

7. We commented on the White Paper on *Tribunal Reform; Transforming Public Services: Complaints, Redress and Tribunals*. In summary, we supported the proposals in the White Paper for reforming tribunals by creating a unified and independent appeals service under the auspices of the then DCA. However, we were concerned about the lack of any proposals to address the poor quality of some first instance decisions. Our concern has been increased by cuts to the budget of the Department for Work and Pensions, which we believe are only likely to have a negative impact on the quality of decision making. We were also concerned about whether the proposals for alternative dispute resolution could undermine claimants' appeal rights. We questioned whether the need for claimants to be represented before tribunals was sufficiently well appreciated. We were concerned about whether research had been conducted on whether changing the name of a Tribunal Chair to "Tribunal Judge" would make users feel more or less apprehensive about coming before a tribunal.

## **Consultation Questions**

### **Chapter 7: Overview of Tribunal Structure**

#### **Representation**

We would like to make the general point here that the fact that there is no public funding for representation of claimants before tribunals as of right<sup>1</sup> is a major issue which we believe ought to have been considered in connection with these proposals. We find the fact that no mention is made of this particularly concerning in view of the cuts that have been made in civil legal aid<sup>2</sup>, and the threat that current legal aid reforms pose to legal and advice services in some areas, particularly in London. Many social security claimants rely on advice services rather than solicitors as this tends to be where the relevant expertise in this area lies.

We appreciate that tribunals and the Social Security Commissioners exercise an inquisitorial jurisdiction, that they are expert bodies who make high quality decisions, that tribunal proceedings are designed to be informal and not to be adversarial. Nevertheless, the social security claimants who go before tribunals may be some of the most vulnerable members of society. They may be appealing about entitlements to benefits for subsistence, for disability or for their children. The social security and tax credits schemes are enormously complex and the rules are often difficult for lawyers to understand, let alone

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<sup>1</sup> Discretionary legal aid may be available under s 6(8) Access to Justice Act 1999, see p 11 for more details in relation to the Upper Tribunal. We do not know whether in practise it is ever granted for "first tier" tribunals in social security.

<sup>2</sup> Lord Falconer accepted that civil legal aid spending had been reduced by 22%

claimants. The unrepresented claimant faces a large government department, with access to its own solicitors and presenting officers who prepare its appeals. Research bears out the fact that claimants find it difficult to represent themselves<sup>3</sup>. Further, there may be no means of paying for medical evidence claimants need to support their appeals, whereas the Secretary of State can require claimants to attend medicals. We therefore believe that, in order to be able to assert their rights, to ensure equality of arms and to ensure fair access to justice, representation at tribunals should be brought within scope for legal aid<sup>4</sup>.

See below for further comments on legal aid before the Upper Tribunal.

### *Assignment*

#### **1. Do the proposals on assignment of judges and members strike the correct balance between maintaining judicial expertise and encouraging judicial career development?**

Social security is a complex and constantly changing area of law. Our main concern is that judges and members should have the expertise and the resources to apply it and to reach sound decisions, and the training to maintain their expertise.

Generally it is our understanding that decisions of Tribunal Chairs are of a good standard, although there is evidently some variability. In general we feel Chairs are well trained and resourced. This has been borne out by research<sup>5</sup>. We would, however, like to see clearer complaints procedures, particularly in relation to areas which are not the subject of appeals, such as the attitude taken to claimants and representatives.

We note the proposal for ticketing of judges by the Chamber President for suitability for each jurisdiction within a particular chamber. We submit there need to be clear criteria for suitability for each jurisdiction to ensure this is done in a fair and transparent way.

Provided the present high standards are maintained, we have no objection to the assignment of judges from different jurisdictions subject to suitable

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<sup>3</sup> *Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review*, November 2003, Professor Adler and Jackie Gulland para 3.3

<sup>4</sup> See also the *Joint Committee on Human Rights Legislative Scrutiny: First Progress Report* Second Report of Session 2006-7 HL Paper 34 HC 263 30/1/06 p 40 which says at para 6.17 "We are not persuaded that the Government's different approach to the availability of legal aid in courts as opposed to tribunals can be justified on the basis that "tribunals are not courts". Once the Government has accepted that tribunals are as important as courts to people's everyday lives, as it has in this Bill, in our view it follows that it is necessary to consider whether legal aid should be more widely available in order to make the right of access to such tribunals practical and effective." The Committee also accepts at para 6.19 that; "In many areas dealt with by tribunals the statutory framework is complex and requires legal assistance to understand."

<sup>5</sup> *Tribunals for Diverse Users* (2006) Genn, Lever and Gray, University College London

training. We note a policy document is to be published by the Senior President.

## **Proposed Chambers Structure**

### **2. Do you agree with this general approach for Chambers?**

At paragraph 302 under Tax Appeals Modernisation it is proposed that in the long term tax credits should be transferred to the Tax Chamber. It is our strong view that tax credits should remain in the Social Entitlement Chamber in the long term. In our view tax credits and tax credits claimants have a greater affinity with social security than with tax issues.

Tax credits are the main financial support for families with children, and are often claimed in combination with social security benefits. For example income support and jobseekers' allowance act as passports to full child tax credit and the disability elements in child and working tax credits are linked to receipt of disability benefits. Tax credits claimants may also be in receipt of housing benefit. Tribunal judges in the Social Entitlement Chamber will have specialist knowledge of how tax credits fit in with other benefits. We believe the informal approach developed in the social security jurisdiction is better suited to many tax credit claimants.

### **3. Is the allocation of jurisdictions to Chambers the right one?**

The Social Entitlement Chamber will clearly be a very large jurisdiction, but we agree the groupings of subject areas seem sensible. Our main concern is that this Chamber remains sufficiently well resourced to ensure there are sufficient Tribunal Judges to decide appeals expeditiously and avoid delays.

## **Chapter 8 The Upper Tribunal**

### *Structure*

#### **4. Do you agree with the proposed three-chamber structure for the Upper Tribunal?**

Please see our response to question 3 above.

### *Location*

#### **5. Do you agree with this approach to where the Upper Tribunal is located?**

We are pleased to hear that hearing facilities are to be made available throughout the UK, and we hope that the sharing of existing tribunal venues and other facilities across jurisdictions will make more local venues available, and make hearing centres more accessible to those with disabilities and with language difficulties.

We would like to emphasise the importance of accessibility of venues for social security claimants. The largest numbers of appeals are made in respect of DLA and incapacity benefit, benefits for claimants who are disabled or sick. Studies have shown that success rates for claimants who request an oral hearing are higher than for those whose appeals are decided on paper<sup>6</sup>. It is therefore of considerable importance in ensuring access to justice for those with disabilities that accessible venues are provided within a reasonable travelling distance.

We agree it makes sense to have a headquarters in London, and indeed to ensure that facilities for hearings are maintained in London, and not moved to cheaper but less accessible locations. We are aware that the current facilities for Commissioners' hearings leave a great deal to be desired, and that there is a shortage of suitable space where hearings can be held. We hope these reforms will offer an opportunity to address these issues.

### *Jurisdictions of the Upper Tribunal*

#### **6. Do you agree with the proposals for transferring existing appeal rights?**

#### **7. Are there other appeal rights not listed?**

We have no objection to the proposal to transfer appeal rights from the Social Security Commissioners, Pensions Appeals Commissioner and Child Support Commissioner to the Upper Tribunal. However, we are disappointed that the opportunity has not been taken to extend the scope of legal aid to the Upper Tribunal (see below).

### **Proposed Changes to and Exclusions from Appeals**

#### **Qs 8-13**

We support the introduction of a right of appeal to the Upper Tribunal in the tribunals listed in which there is no current right of further appeal. We believe this will enhance access to justice for claimants.

We regret the decision to exclude Asylum Support and Immigration Services from these enhanced rights. We accept these cases need to be resolved rapidly, but do not see why this should be a reason to exclude a further appeal right for these claimants. We fail to see why cases in this area should be any more subject to tactical appeals than any other. We understand that there is currently a large volume of asylum support decisions challenged by way of judicial review. It seems to us to be unfortunate that the opportunity has not been taken to introduce a more accessible alternative challenge mechanism for these claimants. We also question whether, if the Upper

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<sup>6</sup> *Council on Tribunals, Cited in Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review* Michael Adler and Jackie Gulland, University of Edinburgh 2003

Tribunal is exercising judicial review jurisdiction as proposed, its remit would include these appeals under that jurisdiction if not by way of direct appeal.

#### *First instance jurisdiction of the Upper Tribunal*

### **14. Which would be the appropriate option for the Information Tribunal's work?**

It is not clear whether the proposal to allow First-tier tribunals to transfer difficult cases to the Upper Tribunal, or allow Upper Tribunal judges to sit on First-tier cases would be a general power for all jurisdictions, or one confined to those jurisdictions listed below in the consultation document, that is Financial Services and Markets Appeal Tribunal, Pension Regulator Tribunal, Information Tribunal etc.

We question whether transferring cases directly to the Upper Tribunal could diminish appeal rights for claimants, as it would remove a layer of decision making. We can however see that there could be a benefit where a tribunal case contains a test case point, in being able to fast track it to the Upper Tribunal. Where appropriate, cases could be fast tracked to join others waiting to be heard on the same issue.

We also question whether having Upper Tribunal judges sitting on First-tier tribunals may compromise them if the case then reaches the Upper Tribunal by way of appeal. It would be helpful to clarify what weight a decision reached by an Upper Tribunal judge sitting at First-tier Tribunal level would carry by way of precedent. Presumably a decision taken in the Upper Tribunal without a prior decision in the First-tier Tribunal would be subject to further appeal to the Court of Appeal in the usual way.

We think the best option for the Information Tribunal's work may depend on the answers to these questions.

## **Chapter 9: Review of the Role of Non-Legal Members**

### *Appointments and Tribunal Composition*

### **15. Do you agree that this is the right approach to tribunal composition?**

### **16. Should there be different principles for certain chambers or appeal rights, and if so, why?**

We have no comments to make in response to these questions.

### *Categories of Non-Legal Member*

### **17. Do you agree that these are the appropriate categories for members?**

We agree that it could be helpful for tribunals to have access to a wider bank of health care professionals than those currently available. We believe that

qualified professionals need to be retained where their expertise is appropriate.

### *Titles*

- 18. What should the description be?**  
**19. Would the term ‘member’ suffice?**

We have no views on these questions in relation to tribunal members. We do, however wish to comment on what we view as the more important proposal to change the name of “tribunal chairs” to “tribunal judges”.

### **“Tribunal Judges”**

One of the successes of social security appeals over the years has been the ability to blend authority with informality, and not to be seen as a “court”, with all the traditional trappings that many people expect that to entail. The use of the title “Tribunal Judge” could jeopardise this balance and make tribunals more intimidating to claimants; feedback we have received suggests this proposal is not viewed favourably amongst advisers<sup>7</sup>.

## **Chapter 10 Tribunal Procedure**

### *Improving the Service to Tribunal Users*

- 20. Do you agree that where a function of a tribunal is carried out by staff there should always be a right of access to a judge?**

We agree that there should always be access to a judge where a function of a tribunal is carried out by a member of staff.

- 21. Are there any functions of a tribunal which should never be performed by staff, whatever the safeguards?**

We would want to know more about which functions it is proposed be delegated to staff. Obviously hearings should never be carried out by staff, but subject to the right of access to a judge mentioned above, we see no reason why their functions should not be widened to include for instance, dealing with requests for adjournments.

### *Costs*

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<sup>7</sup> We note that further research is being conducted (para 48 Consultation Paper onwards), and perhaps the research conducted by Professor Adler at Edinburgh University in particular will address this. We note that in Professor Adler’s very useful review of the literature with Jackie Gulland; *Tribunal Users’ Experiences, Perceptions and Expectations: A Literature Review*, November 2003, formality is raised as an issue that concerns appellants, see para 3.2.

**22. Are these the right criteria against which a costs regime should be judged. Is there good reason for inclusion of other principles?**

We have written to the government to express our strong view that costs are not appropriate in social security appeals. Our concerns in essence were that:

1. Even the possibility of an adverse costs order would discourage claimants from appealing, which would result in injustice.
2. By their nature, social security appeals deal with challenges relating to minimum safety net benefits, so a costs regime would be unfair.

Baroness Ashton's response is footnoted to the consultation document at footnote 51. The relevant provision in the Bill was amended in order to clarify that exceptions to any costs regime could be made following our representations.

In a further letter to us dated 12/1/07, Baroness Ashton confirms that;

“The Government has no intention of inviting the Tribunal Procedure Committee, when it is established, to change the present position on costs for people bringing appeals under section 12 of the Social Security Act 1998. In our view a costs regime would not be compatible in present circumstances with the obligation in clause 22(4)(a) that the power to make rules is to be exercised with a view to securing that the system is accessible and fair.”

We are grateful for the assurances so far provided by Baroness Ashton but have two remaining concerns.

1. The same concerns outlined above apply equally to housing benefit appeals which are brought under paragraph 6 Schedule 7 Child Support, Pensions and Social Security Act 2000. These will be included in the Social Entitlement Chamber and it may be that the intention is that these should not be subject to a costs regime either.
2. The same concerns also apply to tax credits appeals brought under s 38 Tax Credits Act. We are more concerned about these. At present, tax credits appeals are included in the Social Entitlement Chamber, which is where we feel they belong. However, in the longer term, the proposal is to move them to the Tax Chamber. This is a jurisdiction that will be subject to a costs regime.

However, should tax credits be transferred into the Tax Chamber at some point in the future, we would want to see claimants protected from having costs ordered against them. The same considerations apply as for claimants of social security benefits (see q 22), with the additional reason that child tax credit is paid for claimants' children, making it particularly unfair for them to face a costs risk.

## **Chapter 11: Tax Appeals Modernisation**

Please see our response to question 22 above in relation to costs and tax credits.

## **Ch 12 – Land, Property and Housing**

We have no comments to make on these proposals, as they are outside the scope of our expertise.

### **Further points**

#### **Judicial review jurisdiction**

No questions have been asked about this in the consultation document. We note that the Upper Tribunal will have judicial review jurisdiction only where a case falls within a class specified in a direction given by the Lord Chief Justice, or in certain other cases transferred by the High Court or Court of Session.

It is not clear what the scope of this jurisdiction will be in relation to social security cases. CPAG has brought a number of test cases by way of judicial review of decisions made by the Department for Work and Pensions. We would like to know more about which jurisdiction will cover these cases in future, as well as public law challenges to decisions made by local authorities in respect of housing benefit and HMRC in respect of tax credits.

Subject to the availability of legal aid (see below), we welcome the judicial review jurisdiction for the Upper Tribunal. We believe it will be helpful for claimants to have access to a costs free jurisdiction with specialist expertise in social security on public law matters. We also believe it could be useful where the boundaries between appeal rights and public law remedies are not clear, or where an appeal raises public law issues. We wonder, however, whether this new jurisdiction may alter quite substantially the nature of the work currently undertaken by the Social Security Commissioners and their relationship to the departments whose appeals they deal with.

#### *Delays and interim payments*

Social security cases are often urgent; where a claimant has been refused benefits or tax credits s/he may have no resources to support her/himself or her/his children. It may be many months before an appeal to the Social Security Commissioners is heard and there may be a further long delay before a decision is taken. This can happen even if a case is expedited. In our experience judicial review is often used or threatened in urgent cases, because of the delays claimants are likely to face before the Commissioners. We are aware that the Administrative Court itself is currently under resourced with consequent delays; one of our own cases has taken 8 months to reach a permission hearing. We therefore submit that this issue needs to be

addressed in the Upper Tribunal, which needs to be sufficiently well resourced to avoid delays occurring.

Further, the issue of interim payments pending appeals must be addressed to mitigate unfairness to claimants, especially where it may take some time for their case to be heard. We note that the Upper Tribunal will have power to grant mandatory orders and injunctions, so could presumably order interim payments to be made. The Secretary of State's power to make interim payments pending appeals is contained in regulation 2 Social Security (Payments on Account, etc) Regulations. It is extremely unclear. It is not clear whether he has the power to make payments in these circumstances at all, and if he does, whether it is confined to cases in which he believes there is some entitlement to benefit. If so, this makes the provision virtually otiose; it could only apply in cases where the only issue at stake on appeal is the amount of benefit payable, whereas the vast majority of appeals are about whether there is any entitlement at all. We believe this power needs to be clarified.

### *Legal aid*

The Social Security Commissioners' jurisdiction is currently outside the scope of legal aid in England and Wales, and in Northern Ireland, although not in Scotland. Discretionary legal aid under s 6(8) Access to Justice Act 1999 may be available in certain cases. Whilst this can be helpful, it is limited in what it covers, is time consuming to apply for, and there are often delays in getting decisions, which must be referred to the MoJ for approval.

Proceedings before the High Court including the Administrative Court are within scope for legal aid. The consultation paper refers at footnote 36 to an assurance given by Vera Baird in the House of Commons on 27/6/07 about the availability of legal aid. However this assurance seems to relate to cases transferred from the Administrative Court. It is not clear what will happen in public law cases which start in the Upper Tribunal's jurisdiction. In our view this reinforces the case for legal aid to be made more widely available before tribunals. It would be unfair if cases which could formerly have been brought before the Administrative Court are transferred to the jurisdiction of the Upper Tribunal but no longer attract legal aid, or indeed if appeals raise public law issues, but no funding is available for the claimant's representation on these points.

### **Tribunal procedure rules**

No specific question is asked about this, but we understand it is proposed these be unified. We list below some changes we would like to see made to the procedure rules that apply to social security appeals currently.

1. We would like to see the 3 month time limit for appeal restored. We are of the view that the current one month time limit is not long enough to allow claimants who may be ill or disabled to submit appeals.

2. There are currently no time limits for HMRC, DWP and local authorities to submit papers to the Tribunals Service once they themselves have received the claimant's appeal. We would like to see these introduced, potentially with sanctions such as a strike out if they are not followed.
3. Where claimants fail to return the TAS1 enquiry form to the Tribunals Service within 14 days their appeal may be struck out. We would like to see claimants sent a reminder or warning letter before this is done.
4. We suggest consideration be given to allowing tribunals to have power to add parties to appeals – for instance in child tax credit and child benefit appeals, there may be competing claimants for benefit in respect of the same child. It would be helpful if tribunals could add the other parent as party to the appeal in these circumstances.
5. We would like to see tribunals given powers to make orders for interim payments for similar reasons to those outlined above in respect of the Upper Tribunal.

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