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**TRIBUNALS REFORM: FIVE YEARS ON  
ADDRESS BY THE SENIOR PRESIDENT  
SIR ROBERT CARNWATH CVO**

It is just over five years since the publication in July 2004 of the White Paper 'Transforming Public Service: Complaints; Redress and Tribunals'<sup>1</sup>, and my own appointment as "Shadow" Senior President. I was shocked to realise that this is the sixth time I have addressed this annual conference. I am of course grateful for the invitation, but I must apologise to regular attenders if the themes seem a little repetitive.

It is interesting to look back at what the White Paper itself was promising in five years time.

It concluded by announcing the launch of a number of initiatives, including

- A commitment across government to raise the standard of decision-making
- A Proportionate Dispute Resolution Project
- A Shared Accommodation initiative; and
- Research into Unmet Legal Needs in administrative and employment justice...and so on

And then it ended...

**"AND IN FIVE YEARS FROM NOW**

The public will have the benefit of

- Better decisions
- Clearer communications
- Fast, fair and easily triggered review of decisions by departments; and
- An independent, accessible, flexible and authoritative dispute resolution system tailored to the needs of the individual"

Five years seemed far away then but in retrospect the time has flown by

For us as tribunal judges and members the main focus of our attention has been simply getting the new system in place.

In this room I think that we are probably all aware of just how busy a five years this has been for the tribunals world, and how much has been achieved. We have put in place a fundamental structural reform of the system, and we have done so without serious disruption to the continuing work or the service

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<sup>1</sup> Cm 6243

to our users. More importantly, we have established a change of culture. It is now accepted that tribunals are and must be independent from government departments, that rules should be made by an independent rules committee not by the ministers whose decisions are under challenge, and above all that tribunal judges and members are fully-fledged members of the independent judiciary. That is symbolised by judicial oaths which we have all taken under the 2007 Act.

The main stages of the reform are now almost complete. A significant addition to the original plans is the planned incorporation of the Asylum and Immigration jurisdictions into the new structure next February. That decision represents a change of heart by government 2004 White Paper, and is a striking vote of confidence in the new system. It would have been unthinkable 5 years ago.

### *Tribunal champions*

We have had a many tribunal champions in getting to this point – I mention but a few:

- Lord Irvine who saw the importance of tribunals in the justice system and included them in the radical programme of reforms initiated by the new Labour government
- Andrew Leggatt whose report began this phase of tribunals reform;
- Henry Brooke who ensured that the tribunals judiciary were fully and effectively engaged in the reforms from the start;
- Lord Filkin whose broader vision was elegantly encapsulated in the White Paper by Paul Stockton (happily still a very active force leading my own office);
- Baroness Ashton who worked so hard to keep the project at the heart of legislative priorities;
- Lord Newton who led the CoT and then AJTC in its role as critical friend and who was such a strong voice for tribunals reform at crucial moments in the House of Lords debates.
- Bridget Prentice who more recently has provided the essential political backing and direction in the tricky task of implementing the Act.

Even more important to me has been the consistent help and support of the judicial leaders. I will be forgiven if I mention just one, Henry Hodge, who sadly died earlier this year after a long struggle with leukaemia. As someone I had worked with in my junior days at the Bar when he was a campaigning solicitor for bodies like CPAG and Shelter, it was a particular pleasure and privilege to have him as a wise and experienced colleague on this project. As a senior judge he was unusual in combining legal expertise with great skills in practical management and human understanding. His leadership of the AIT and the reforms he introduced have provided models for us all. I am determined that they will not be lost on transfer into the new structure. In particular, I have no doubt that the close working relationships between all levels of the judicial hierarchy, which he pioneered in the single level AIT, can and should be maintained in the two-tier structure. The chambers

arrangements have been designed to allow co-operative working, both vertically and horizontally, across the whole system.

### *The next five years*

We must now look forward to achieving some of the other White Paper objectives, particularly better decision-making at the first stage.

### *“Right first time”*

The commitment to better decision making at all levels stage was a key part of the White Paper message.

Tribunals were one part of “an end to end process” – in which “all the participants in the system have a duty to make it work better”.

“‘Right first time’ means a better result for the individual, less work for appeal mechanisms and lower cost for departments”.(6.32)

The unified tribunals system would be simply one part of this process. It would have -

“...a straightforward mission: to resolve disputes in the best way possible and to stimulate improved decision-making so that disputes do not happen as a result of poor decision making....” (6.1)

I used “Right first time” as the title for my 2006 talk to the AJTC. I spoke of “a play with many actors”

“It starts with individuals who need better to understand their rights and obligations. Then there are the decision-makers, not just in the public sector, but employers, landlords, and so on - anyone with power to make decisions affecting our everyday lives. And then those involved in correction and review procedures: internal reviewers, statutory adjudicators, ombudsmen, tribunals at first-tier and upper levels, and the courts all the way up to the House of Lords and (in some cases) the ECJ. No doubt each of these actors has an important role, but most of them are symbols of failure. And the higher you go, the greater the failure. (Most cases that get as far as the Court of Appeal are beyond saving.) The ideal play has only one act – the original decision.”

A somewhat purple passage you may think, but I stand by the sentiment, and I am sorry to say that this part of the White Paper agenda is very much unfinished business. I think it should now become a priority for us all, including I hope the AJTC.

In that talk I contrasted the White Paper aspiration with the other perceptions of a widening “adjudication gap” between decision-makers, as described in a paper by Nick Warren relating to decision-making in the social security field:

“The gap is unrelated to the tribunal’s constitutional independence. It is a divergence of approach which arises from long term trends within DWP to downgrade adjudication and to withdraw from participation in the ‘statutory machinery for deciding claims to benefit.’”

He traced what he saw as the gradual downgrading of the decision-makers’ role within the Department, as decision-making became “the mere processing of data compiled from a lengthy claim form”, and the Department started to withdraw from regular participation in the tribunal process, so that decisions were being made by people without the discipline of having to defend their decisions.

The White Paper saw one answer in an extension to other tribunals of the duty of the President of the Social Security Tribunals to report on decision-making. The new tribunal organisation would be given “ the duty to publish its views and analysis of decision-making and will consider how government and other decision-makers might reply to these reports” (para 6.32)

This idea was embodied in section 43 of the TCEA which provides for the Senior President to report annually “in relation to relevant tribunal cases” on matters which the Lord Chancellor has asked him to report.

By delegation under that section, I have agreed that Robert Martin, as President of the Social Entitlement, will continue the tradition he inherited from his role as President of the Appeal Tribunals in reporting on decisions in that jurisdiction. However, his comments (like those of his predecessor) do not encourage great optimism about the practical value of the exercise, unless and until decision-making departments are equipped (both organisationally and financially) to respond constructively to such reports.

Very recently Robert has given some illuminating evidence to the Work and Pensions Select Committee, which I hope will be published.

He points out that in spite of all this feedback, the percentage of the department’s decisions overturned in the tribunal has remained largely unchanged. Internal review processes only work if they bring about genuine reconsideration, and a new approach:

“The approach should be not to say, “Would I have made the same decision as before?” but rather, “Could I defend this decision in front of a tribunal?” The Compensation Recovery Unit (which deals with appeals concerning the recovery of benefits paid to accident victims) has consciously adopted the latter approach and seen the number of appeals against its decisions plummet. Other departmental agencies have yet to follow suit.”

So there is no point in tribunal presidents’ reporting on departmental decision-making unless there is effective machinery for the department to respond. I was reminded at the AJTC that the President’s duty is matched by the Secretary of State’s duty (SSA1998 s 81) to report “on the standards achieved

by the Secretary of State in the making of decisions against which appeal lies to the appeal tribunal..." But I am not aware of any recent reports under this section.

My own duty under section 43 of the 2007 was deliberately left in rather open form because we were uncertain as to the practicability or value of extending the duty more generally until we are sure that it will be useful. We need to look now again at how we can make this work. Although I hope shortly to be publishing my first "annual report" this will be in the nature of a progress report on the new system, rather than an attempt to meet the section 43 objective.

There are however some more encouraging developments. For example, as part of the reform of the tax appeal system, HMRC has introduced new internal review procedures that ensure all their decisions that are appealed can be looked at again by an officer not previously involved in the case without prejudicing the right to appeal. In the social security field there is a pilot project for "early neutral evaluation" pilot in Disability Living Allowance cases which allows judges to assess the relative strength of a case before it proceeds to hearing giving both the appellant and the department an opportunity to reconsider their evidence and their appeal or decision.

Meanwhile, the judicial mediation pilot in the Employment Tribunals has demonstrated that it is possible to save parties time, resources and personal stress as well as achieve an outcome that may preserve or mend an employer/employee relationship. This pilot has now been extended across England, Wales and Scotland. The Tribunals Service is also exploring with judges to what extent mediation and other forms of alternative dispute resolution can be used in other jurisdictions.

### *Training and appraisal*

The White Paper rightly attached great importance to effective training and appraisal. (6.71ff)

One of most important duties as Senior President (mirroring that of the LCJ for the court judiciary) is that of overseeing arrangements for training for tribunals' judges and members. One of my first steps as shadow senior president was to commission the JSB to carry out an evaluation of existing programmes. I was very encouraged by the results. They showed that we have a comprehensive training programme across all the jurisdictions within the system which goes a long way to ensuring that judges and members are fully equipped in both judgecraft skills and their specialised areas of law. Our Training Group, chaired first by Michael Harris and then Jeremy Cooper has been effective ensuring that these strengths are maintained in the new structure.

The White Paper spoke of a "partnership" with the JSB. So far our relationship has evolved on a largely adhoc and pragmatic basis. Although we have had a good working relationship with the Tribunals Committee of the JSB and its successive chairmen and training directors, their work represents only a small

part of the JSB's own training programmes, and, in budgetary terms, is very small relative to the training programmes of tribunals. We are looking at the opportunities for redefining the present arrangements, and working in the longer term to a unified judicial training system which properly represents both those needs which are common to courts and tribunals and those which are distinctive to two systems.

With this in view I have agreed with the LCJ to invite Jeremy Sullivan LJ a former Chairman of the Tribunals Committee (and formerly a regular attendee at these conferences) to review the present arrangements and look at the options for reform. In the meantime Jeremy Cooper has kindly agreed to act as my training adviser for this purpose. He is working on a preliminary report on these issues, and will also represent me on the Sullivan group.

Training and appraisal need to go hand in hand. We have also been looking at how we can develop our existing well –developed practices on appraisals. I am grateful to Libby Arfon-Jones for leading the work. Her group has made recommendations for a common system and structure for appraisal, and we are looking at implementing within available resources. Here again we have been working closely with the JSB.

The JSB framework for appraisal and appraiser standards has been substantially revised by a joint development group of the JSB and the Tribunals (with representation from non-TS tribunals and the AJTC). JSB will publish the new framework at the end of November, when it will be circulated to all TS and non TS tribunals. I hope that in due course appraisals will become sufficiently well-established across the system for them to provide essential information in cross-ticketing and assignment decisions, and eventually to support judicial advancement and recruitment.

### *Shared accommodation*

The White Paper also announced a Shared Accommodation Initiative. There has been steady progress on this front. There are far fewer daily hires of premises, and our tribunal rooms are used by a greater range of jurisdictions. Recently the TS opened a new hearing centre at Anchorage House in East London, which is absorbing work from three different buildings. This purpose built accommodation has 17 hearing rooms, principally used by the asylum support, social security and employment judges. We have also been looking at ways of developing shared use of court buildings. The new Manchester Court building is a good example, where the social entitlement and mental health jurisdictions now have a permanent base.

Sharing accommodation can save money while offering equally good or better facilities for judges and the public. But it must not be at the expense of accessibility, and it is vital that judges and user groups are involved in the planning from an early stage. The White Paper was quite clear about this

“The strategy for the common estate will be firmly based on research into user wishes and needs and consultation with user groups. The

new organisation will need to establish, not just assume, what the right location is between facilities and location.” (para 6.16)

Amen to that.

I am grateful to David Latham for agreeing to take a lead in advising me and liaising with the TS and other judicial leaders on estates issues. He also represents me on the Closer Working Group which has been formed by the Access to Justice Directorate to look at opportunities for sharing between court and tribunals.

#### *LEAN studies*

At a time when public finances are facing severe pressures, it is inevitable that the Tribunals Service will be forced to seek ways of saving money. We as judges and members must recognise the pressures that the administration faces. So far we have been reasonably fortunate in being able to maintain budget levels, but the pressures will undoubtedly intensify.

For that reason, I am keen to encourage judges to work with administrators in using what is known as LEAN methodology to cut out wasteful activity and processes that add no value for the user. The Tribunals Service’s Lean programme has up to now concentrated on administrative tasks but many of those tasks interact with the work of the judiciary. Administrative changes must be properly considered also from a judicial perspective, and judges have much to offer in promoting their own ideas. In the current edition of *Benchmark* there is a very interesting and positive account of such involvement by Jeffery Bryer and Kamlesh Chahal, who are both Mental Health judges.

The ideas can be mundane. For example, they mention the idea of a more detailed hearing request form, which would require solicitors to state the dates they are available for hearings – rather than requiring tribunal staff to make multiple phone calls and send letters in order to set dates. Simple changes can make a real difference in practical terms.

#### *Non-legal members*

The White Paper acknowledged the distinctive contribution of NLMs to the tribunal system, but saw the need to review their precise role. Baroness Ashton instigated a review, the conclusions of which were published its conclusions in November 2007 in the *Transforming Tribunals Consultation Paper*. That generally followed the Leggatt approach, and confirmed the basis principle that there should be no “purely lay” category, but that “all judges and members should have their place at the hearing table by virtue of their expertise.” It accepted that relevant expertise could come in many forms, not necessarily defined by a professional qualification.

The 2007 Act reflected the same approach by requiring the Senior President to have regard to the need for expertise in the subject matter of the disputes

before tribunals. So far my general approach, as expressed in preparing composition orders, has been to maintain existing practices unless and until there is good reason to change and then only after consultation.

However, I think we will need to keep under review the role of non-legal members in the different jurisdictions, both to make sure that they are adding value to the process and are used to the best advantage, and to ensure that we are able to recruit new members with the skills and experience we need for those tasks. That is proving to be particular problem in relation to medical members, and I have been discussing with the JAC how we can improve things.

One important factor although not the only factor is the level of pay. We have not been helped by the long period of waiting for the Government's response to the Senior Salaries Review Body's recommendations on harmonising remuneration, and by the very negative conclusion in relation to non-legal members. I have expressed my concern about the Government's rejection of the SSRBs' proposals for bringing order to the arrangements for NLM fees across the system. I do not believe this issue will go away. We are already reviewing the position in relation to medical members. We will need to watch carefully the effects on recruitment and on morale.

#### *Devolution issues*

Finally a word about cross-border issues.

I am proud as Senior President to have a jurisdiction which, unusually, extends to the whole of the United Kingdom. Leggatt was not asked to look beyond England and Wales and the 2004 White Paper had little to say on the subject. The demarcation between devolved and reserved jurisdictions in each country is messy and illogical.

As Senior President I have tried to cut across these formal divisions, and I have been supported by the chief justices in each country. The AJTC, with its committees in Scotland and more recently Wales, has also been a valuable ally.

We must accept that Scotland has a devolved judicial system, and Northern Ireland will soon follow suit. Having established that tribunal judges are full members of the judicial family, their natural link ultimately will be to the judicial systems in each country. As Senior President I see one of my duties as being to strengthen those links without losing the advantages which the 2007 Act has brought. I am not convinced that the same approach applies to Wales. We have a unified system of law and we have a single Lord Chief Justice for England and Wales. We need to have strong judicial centres in Wales for both courts and tribunals, as are now being developed, but personally I would be sorry to see anything which widens the divisions.

I believe that there is much more that unites than separates –certainly as far as most tribunals are concerned. As tribunal judges – whatever the politicians do - I hope we will take every opportunity to build on those links.

RC 12.11.09