ANNEX 4

Courts and tribunals

Introduction

The changes made by the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 which remove from the scope of legal aid so many of the problems of everyday life are also intended to promote the resolution of such problems without recourse to the courts and tribunals. However, there is a real question about whether this is realistic or just. In many social welfare law cases, the lack of access to advice will not result in resolution outside court; it will probably result in complete failure by individuals to recognise and act on problems at an early stage which may appear as a drop in demand, but in fact will be a storing-up of problems which will then eventually surface later. So, while we look at the possibilities for appropriate dispute resolution (see para 4.4 and Annex 5), we firmly believe that the courts should be accessible and that people should have access to advice and legal support.

The President of the Supreme Court, Lord Neuberger, has warned that access to the courts is essential: 'If there is no effective access to the courts, the fundamental underpinning to all forms of dispute resolution systems, such as mediation, and even arbitration, falls away.'[1]

Dame Professor Hazel Genn in her Hamlyn lectures[2] drew attention to the importance of the courts in keeping the common law up to date and relevant and noted that the possibility of access to the courts is an essential element in encouraging people to use alternative forms of dispute resolution; it is the ultimate backstop without which mediation, negotiation and settlement cannot function effectively.

Self-represented litigants

Maintaining effective access to the courts, as an actuality rather than just a theoretical possibility, will require rethinking in the absence of civil legal aid. Otherwise, courts and tribunals are going to crumble under the eventual weight of self-represented litigants – many of whom will be defendants who are finally appearing in court at a stage where their cases will have become hopelessly complicated.

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1 'Neuberger warns against mediation and defends legal aid and Jackson', *Law Society Gazette*, 4 March 2011, available at: www.lawgazette.co.uk/news/neuberger-warns-against-mediation-and-defends-legal-aid-and-jackson.

2 See: www.ucl.ac.uk/laws/events/docs/hamlyn_poster_genn.pdf.

The Ministry of Justice (MoJ) in its written evidence to the Low Commission repeated the findings of its June 2011 literature review of research on litigants in person:[3] 'There are many reasons why people choose to represent themselves'. In some, few, cases we recognise that this will be a free choice. However, in the vast majority of cases it will be an imposed decision because of lack of money to pay a lawyer.

The Civil Justice Council (CJC) in its Working Group report on self-represented litigants drew attention to the many actions that could be taken by the courts and by the MoJ to make 'the best of a bad job' to try to alleviate the plight of those no longer eligible, or never eligible, for legal aid.[4] It drew attention to initiatives elsewhere in the common law world where courts, as with tribunals, were adopting a more proactive, more inquisitorial, role rather than the more traditional, detached role normally implicit in the adversarial model.

More recently, the President of the Supreme Court, Lord Neuberger, warned of the likely increase in self-representing litigants as a result of the legal aid changes and the detrimental impact this would have – clogging up the courts with people who had little idea of the merits, or indeed the main issues, in their case. He recognised the issues around budgets but warned that these changes might end up costing more than they would save.[5]

Experience around the world shows that helping people in this situation has many components, all of which need to be tackled. There is no silver bullet, but there are many things which can be done for comparatively modest cost which can make a difference:

- public legal education which alerts people to the fact that they have a problem which has a potential solution; public legal education also helps train volunteers in the community, in advice clinics and in courts to be more effective;
- the provision of information and advice, using the potential of new media as well as more traditional media;
- the design of forms and the guidance notes that accompany them – critical in improving access and reducing mistakes which are costly and time-consuming to put right;
- step-by-step guides for common types of proceedings, exemplified by the Royal Courts of Justice (RCJ) CAB and Advicenow guides;

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3 *Litigants in person: a literature review*, June 2011, available at: https://www.gov.uk/government/uploads/system.

4 *Access to justice for litigants in person (or self-represented litigants). A report and series of recommendations to the Lord Chancellor and to the Lord Chief Justice*, Civil Justice Council, November 2011, para 19; available at: www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FCivil+Justice+Council+-+Report+on+Access+to+Justice+for+Litigants+in+Person+(or+self-represented+lit.

5 See footnote 1.

- checklists and route maps which ensure the litigant in person has all the evidence required by the court and has taken all the necessary procedural steps;
- identifying cases suitable for mediation and providing or mandating this service as an alternative (for example, the county court telephone mediation service);
- active engagement by the court or tribunal with the litigant to ensure that all necessary steps have been taken to resolve the dispute informally or through alternative dispute resolution (ADR);
- court duty advice schemes where there is sufficient volume of cases to justify this investment;
- a more inquisitorial forum in which a Judicial Practice Direction explicitly sets out the way in which the judge must assist the litigant in person without entering into the arena (for example, the Victorian Civil and Administrative Tribunal, see para 4.11 in main report).

Some of these measures are already underway or being considered. We support their introduction at the earliest opportunity. Most are relatively inexpensive but would smooth and speed up the court process, helping to get cases 'right first time' and avoiding endless calls to courts and abortive hearings, so relieving pressure on courts and tribunals as well as improving equal justice.

In 2012 the CJC commissioned Advicenow to undertake a scoping review of court forms and how they could be improved. This built on feedback from the RCJ CAB, the Personal Support Unit (PSU) at the RCJ, other advice agencies and Court Service counter and call-centre staff.[6] Advicenow has:

- undertaken a short survey aimed at people working with litigants in person to gather feedback on what they think could be done to improve forms and guidance;
- prepared a scoping report on court forms entitled *Better supporting information for court forms* (May 2012). This includes, as an example, how the notes to the allocation questionnaire could be reworked;
- undertaken a short survey aimed at Her Majesty's Courts and Tribunals Service (HMCTS) counter staff working with litigants in person to gather feedback on what they think could be done to improve forms and guidance, and produced a paper reproducing the responses from 92 people completing the survey;
- begun work on a full report on information provision for litigants in person.

We very much support this initiative, which we think will reduce the burden on MoJ counter and call-centre staff. It will also make easier the tasks of PSU

6 See: www.lawforlife.org.uk/blog/better-information-at-court/.

volunteers, now based in six county courts, in addition to the RCJ and the Principal Registry of the Family Division (see Box 25 in main report), as well as supporting the remaining advice services and pro bono efforts. It would also assist those who are capable of helping themselves to do so more effectively.

Court duty advice schemes (both criminal and civil) make an important contribution to assisting litigants and the courts themselves. They often provide the first opportunity to review the facts, the evidence and the strength of a case. We welcome the recent tender exercise by the Legal Aid Agency which resulted in housing duty solicitor schemes at 61 county courts.[7] Even though it was very late in the day, we feel it is a case of better late than never. These schemes are not provided at every county court – only at those where there is sufficient volume of work to merit it. We hope that in the remaining courts, other local arrangements can be encouraged, including access to advice by telephone for defendants in courts not covered by the scheme.

The PSU, originally based at the RCJ in the Strand in London has now, as a result of support from the CJC and financial resources from the MoJ and their own fundraising, been rolled out to six further county courts.[8] It does not provide legal advice, but lay volunteers supported by staff members, assist unrepresented litigants with everything from simple directions to more complex individual support. Volunteers also have access to pro bono legal advice, including advice through the pilot LawWorks Free Law Direct scheme.

We know also of the Community Legal Helpdesk at the University of Exeter, the winner of the Best New Student Pro Bono Activity.[9] That service is based at Exeter County Court, runs three mornings a week and its function is to inform, guide and to triage legal advice. The main work of the Helpdesk is therefore to offer assistance with the completion of forms; explain court procedures; to act as 'Mackenzie Friends' or assist with court hearings; and to signpost other forms of legal advice and help as necessary.

It is important that the impact of legally aided duty schemes and the lay volunteer advice provided by the PSU, and by others, is monitored and assessed and that active consideration is given to other areas of law or other courts or tribunals where either of these forms of assistance might have a beneficial impact on the running of the court and on the fairness of hearings. An obvious gap in provision in a complex area of law is welfare benefits, where a duty advice scheme in busy tribunals might help to assist the smooth running of hearings.

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7 See: www.justice.gov.uk/downloads/legal-aid/tenders/tender-outcome-hpcds.pdf.
8 See: http://thepsu.org/.
9 See: http://lexislegalintelligence.co.uk/intelligence/blawg/2013/04/could-a-uk-version-of-rechtwijzer-improve-the-administration-of-justice/.

At this moment, at the beginning of the introduction of universal credit, there is recognition that the transitional period will be especially demanding. We recommend that the MoJ and the Department for Work and Pensions (DWP) consider co-funding duty specialist advice schemes at the tribunal hearing centres which have the biggest caseloads of welfare benefits work for this transitional period and assess the cost benefit impact.

It is also important that lessons are learned from the problems presented and that the opportunity is taken to address some of these in a systematic way earlier in the system, for example by provision of information and advice on the Advicenow website, further training for PSU volunteers from Law for Life, the rewording of forms and guidance notes, and feedback to decision making bodies in social welfare cases to improve their processes and decision letters following the 'better information' principles developed by Advicenow.[10]

The way in which the hearing is conducted is also important. Our traditional adversarial system relies on the advocates for the parties identifying the issues, marshalling the relevant law and evidence and ensuring that the judge has all the material necessary to arrive at a just and fair decision. When parties have no access to legal advice, this approach can grind to a halt.

District judges in small claims have long adopted a more proactive approach, and this has been taken further by a number of tribunals which habitually deal with unrepresented and sometimes unassisted appellants. But it is wasteful of judicial resources for this to occur only at the oral hearing and may result in adjournment, leading to cost and delay for HMCTS and the parties, or in a decision based on less than the full facts.

For example, one way of achieving a more proactive engagement with litigants in person may be by additional standard pro forma advice on how to present their case and checklists, sent out in common types of cases. These would set out the material that the judge will require to reach a decision. These exist in some courts, but are often handed out only on the day of the hearing itself. Going beyond that is the more individual case management set out in the examples from tribunals below.

There is clearly a cost/benefit analysis to be conducted here and we hope that the MoJ will use the feedback from court staff and call-centre staff, and most importantly from the judiciary, to identify which issues and which people would benefit from this standard or more individualised case management which would result in a more effective use of judicial time and a more just outcome. This appears to be a topic suitable for the CJC and we hope that they might consider it jointly with the MoJ.

10 See: www.advicenow.org.uk/better-information/.

Innovations in tribunals

The tribunals jurisdiction, which traditionally was intended in many of its chambers for use by unrepresented appellants, is leading the way in exploring new ways of making its service more accessible and efficient as well as acknowledging areas where there is more to be done, which provide a potential blueprint for other fora.

In his valedictory 2012 report, the first Senior President of Tribunals, now Lord Carnwath, outlined possible developments for the future.[11] He said:[12]

> There is not, nor should there be, any assumption that 'one size of justice fits all'. Tribunal users vary hugely from individuals challenging their benefit entitlement to multi-national corporations arguing over tax liabilities of millions of pounds. Users vary in their ability to understand and to express themselves (whether in writing or orally). All need a fair, efficient and affordable system which is adapted to their particular needs. I hope my successor will be able to look at different ways of working. Possibilities might include –
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> - On line information and call centres (in collaboration with advice services)
> - Multiple points of access to lodge an appeal/application – by telephone, on line/in writing or in person
> - Simple 'triage' of the appeal/application – by appropriately trained (and perhaps legally qualified) staff to identify what is missing from the appeal/application and offer options for resolution
> - A range of alternative resolution options offered by judges or trained staff, including explanation, early evaluation, and mediation; and a choice of decision-making options, on the papers, using video-links or other technology, or full oral hearing.

Lord Justice Sullivan, current Senior President of Tribunals, at the 2012 Conference of the Administrative Justice and Tribunals Council, set out a similarly ambitious plan for the future, building on the successful use of registrars in the special educational needs jurisdiction for routine cases and envisaging in the future a more active case management role for them, to ensure that any outstanding issues are identified and to facilitate settlement.

The 2013 Annual Report of the Tribunals Service[13] makes for fascinating reading, illustrating as it does the way in which the separate chambers are each

11 *Senior President of Tribunals' Annual Report 2012*, available at: www.judiciary.gov.uk/Resources/JCO/Documents/Reports/spt-annual-report-2012.pdf.
12 *Senior President of Tribunals' Annual Report 2012*, p7.
13 *Senior President of Tribunals' Annual Report 2013*, available at: www.judiciary.gov.uk/Resources/JCO/Documents/Reports/SPT%20Annual%20Report_2013.pdf.

looking at the best approaches for making appeals more accessible to tribunal users, both unrepresented and represented.

The Immigration and Asylum Chamber of the Upper-tier Tribunal, under its President Mr Justice Blake, has introduced a number of innovations, including communication by email and digital transcribing of hearings. In addition, it has looked at active case management:[14]

> The Chamber continues to place emphasis on active case management, pursuant to the overriding objective in the Procedure Rules, refining its processes in the light of experience since February 2010 and in response to changing demands. Recent innovations include requiring parties to indicate in writing their case or response to the other party's case. This may frequently enable a judge to decide that the appeal can be determined fairly without a hearing or to limit the issues and/or evidence, thereby saving time at an oral hearing. Litigants who fail to comply with directions made by judges of the Chamber may find they are restricted in what is placed before the judge before a decision is made.

The Social Entitlement Chamber, under its President, His Honour Judge Martin, commented in the same report on the challenge of dealing with appeals from new universal credit and on the importance of feedback to DWP for systemic reasons on appeal failure:[15]

> In the face of the continuing unwillingness of DWP to be represented at SSCS Tribunal hearings, the Tribunal examined alternative methods of providing feedback that might assist in improving the standard of Departmental decisions. Following joint discussions, the Tribunal introduced in July 2012 a scheme whereby DWP would receive from the Tribunal, in cases where the Tribunal overturned the Department's decision, summary reasons in a standardised format. The advantage of the formatted arrangement is that it allows the Department both to reflect upon overturned decisions in individual cases and to aggregate data across thousands of appealed decisions to identify any systemic shortcomings.
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> While there is interest across courts and tribunals in mediation as an alternative to dispute resolution through contested hearings, the scope for mediation in social security is limited by DWP's lack of power to compromise claims. The Tribunal has also observed a reduction in the proportion of appeals that resolve prior to the hearing. The percentage of appeals withdrawn by appellants or conceded by DWP has halved over the past year. The result is that 81% of the appeals received by the Tribunal proceed to a full hearing.

14 *Senior President of Tribunals' Annual Report 2013*, p22.
15 *Senior President of Tribunals' Annual Report 2013*, p30.

The tribunal has simple information about how to appeal on its website,[16] but does not appear to have links through to any independent advice websites, which might be able to provide more emotional and practical support, building capability to respond.

In asylum support hearings, the chamber has introduced electronic lodgement of bundles and video hearings which came into their own during the 2012 London Olympic travel shutdown, as well as cross-ticketing which enables the chamber to cope with fluctuations of work.

In the Health, Education and Social Care Chamber, the President, His Honour Judge Sycamore, reports on a number of innovations, many reflecting the need for speed, including:[17]

> In the Mental Health jurisdiction, it is intended to build on the pilot scheme in SEND to use the skills of legal advisors from local magistrates' courts to deal with standard box work requests in the mental health jurisdiction at the Leicester office. The title 'Registrar' is likely to be adopted and the aim is to achieve consistency in orders and directions and to respond quickly to routine requests and queries. In addition the duty judge scheme, whereby salaried tribunal judges work in situ with the staff in Leicester, will continue – given the substantial efficiencies and case-management benefits that have been realised.
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> This year, a further seven mental health salaried tribunal judges have been authorised to sit on the Restricted Patients Panel, taking the complement to 20. This allows our judges to take some of the burden from the Circuit Judges and Recorders already authorised to hear restricted cases, which should ensure speedier listing.
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> As mentioned above and in last year's report, the use of Registrars to deal with routine applications in SEND has been so successful that their numbers have been increased to ensure that there is permanent coverage throughout the year, and on a trial basis the Registrars will undertake active case management of cases close to hearing to ensure that any outstanding issues are identified. It is anticipated that will also have an effect on the very late settlement of cases.
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> A joint LEAN (organisational efficiency review) has been undertaken with Stockton and Essex Local Authorities with the aim of improving the end to end structure, timetable and user satisfaction of appeals to SEND. Steps will be taken to disseminate the lessons learned as far as possible in the next year, indications from all were that a shorter timetable for appeals was preferred and the jurisdiction is considering reducing the timetable for appeals from 22 to 12 weeks to accommodate this. A pilot scheme to

16 See: www.justice.gov.uk/tribunals/sscs/appeals.

17 *Senior President of Tribunals' Annual Report 2013*, pp38–39.

> increase the take up of mediation by requiring parents to receive information from independent mediators appointed in their case has led to the take up of mediation increasing from 3%, where no information is given, to 6% when the Tribunal encourages contact, and as high as 25% when an information session is directed. The Tribunal is considering how best to extend the reach of this pilot.

We have covered these innovations in tribunals in considerable detail as they provide encouraging evidence of what is happening, of a desire in the Tribunal Judiciary, led by successive Senior Presidents, to build on this and to do more to meet the needs of their users, and they also provide exemplary material to be copied in the civil courts.

Innovations in the courts

One factor which is clearly helpful to the tribunals is the division by subject matter which enables each chamber to concentrate on its particular users and their needs. This is much more of a challenge in the county courts, where apart from 'possession days', the list is likely to contain a mixture of cases. However, we consider that this 'typology' may well be the clue to the way forward, certainly in developing online materials to assist people and potentially in considering further innovations.

An encouraging start in the direction of changing the judicial approach to better reflect the needs of those using the courts is demonstrated in the civil courts. In February 2013 the Chancellor of the High Court announced a review of the practice and procedure of the Chancery Division, both in and outside London, with a brief to make recommendations for change.[18] It included among its five terms of reference:[19]

> To consider the implications for business in the Chancery Division of the imminent reduction in the availability of Legal Aid, and to make recommendations designed to secure the best access to justice for self represented litigants.

Other jurisdictions have led the way in identifying changes in judicial approach which enable the court to adopt a more proactive approach to eliciting the necessary facts and evidence from litigants when one or both are representing themselves. A leader in this field is the Victorian Civil and Administrative Tribunal in Australia. A review by the former President of the Tribunal[20] proposed a self-represented persons strategy that would include the following elements:

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18 *Chancery Modernisation Review: Provisional report*, July 2013, available at: www.judiciary.gov.uk/Resources/JCO/Documents/Reports/CMR%20Provisional%20Report.pdf.

19 *Chancery Modernisation Review: Provisional report*, para 1.1.4.

20 *'One VCAT': President's Review of VCAT*, 2009, available at: www.vcat.vic.gov.au/sites/default/files/president%27s_review_of_vcat_report%5B1%5D.pdf.

- a positive duty on the tribunal to assist all parties;
- a litigants in person co-ordinator;
- enhanced powers and duties of the principal registrar (including to assist parties);
- expanded pro bono services;
- the establishment of a self- representation civil law service;
- a Judicial Direction on how judges can and should deal with unrepresented litigants.

In this country, we were enormously heartened by the recent report of the Judicial Working Group on Litigants in Person commissioned by Lord Dyson, the Master of the Rolls in December 2012, chaired by Mr Justice Hickinbottom, and published in July 2013.[21] Its recommendations follow, and in some cases lead, international best practice and include recommendations on:

- the development of web-based materials and audio-visual guides to assist litigants in person;
- recommendation on judicial training; and
- most cogent of all, recommendations which look at the difficult question of how far our adversarial system may need to change to cope justly with the needs of unassisted and unrepresented litigants.

The report recommends that the Judicial Office should undertake, urgently, further work to assess the merits of three proposals:

- provision of a dedicated rule that makes specific modifications to other rules where one or more of the parties to proceedings is a litigant in person;
- introduction of a specific power into Civil Procedure Rules (CPR) 3.1 that would allow the court to direct that, where at least one party is a litigant in person, the proceedings should be conducted by way of a more inquisitorial form of process;
- introduction of a specific general Practice Direction or new CPR rule that would, without creating a fully inquisitorial form of procedure, address the needs of litigants in person to obtain access to justice while enabling courts to manage cases consistently with the overriding objective.

We can only applaud these suggestions and look forward to seeing the implementation of all their recommendations which have the potential to make a significant contribution to equal justice.

Professor Richard Moorhead, who has done research on litigants in person, drew attention to this as a fruitful approach in his thoughtful blog, Lawyer Watch, in October 2010.[22] He argued that:

21 Available at: www.judiciary.gov.uk/Resources/JCO/Documents/Reports/lip_2013.pdf.

22 *Legal aid – system failure or broken law?*, 14 October 2010, available at: http://lawyerwatch.wordpress.com/2010/10/14/legal-aid-%E2%80%93-system-failure-or-broken-law/.

> ... those interested in access to justice have to move beyond seeing legal aid as the problem and look more fundamentally at the nature of law and legal institutions. We need to consider radical redesign of dispute resolution processes, not simply the tacking on of ADR and we should to consider radical simplification and codification of substantive law.

We agree with this approach, as will be apparent from the sections of this report and the annexes on good law and on ADR (Annexes 3 and 5 respectively), where we set out the essential components of an ideal dispute resolution process. We repeat them here as they have as much validity within the jurisdiction of courts and tribunals as they do outside it. We see the essential components as:

- an assessor or forum which has all the legal expertise required (to overcome the individual's lack of knowledge of the law);
- an inquisitorial function to ensure that all the necessary facts and evidence are discovered;
- flexible and personal engagement using telephone or email in preference to writing or oral hearings so that the assessor does all the paperwork and is responsible for its being comprehensive and accurate;
- built-in mediation where appropriate for issues where there may be no 'right' answer or where an agreed solution is desirable;
- a final binding decision on both parties;
- no cost or low cost, and, where ADR is paid for, predictable pricing with the possibility of costs-shifting and/or means-weighting.

The examination of typologies of disputes which we have already recommended should include examination of types of disputes which might be dealt with in this fashion.