



The Royal British Legion's response to Transforming Tribunals: implementing part 1 of the Tribunals, Courts and Enforcement Act 2007

18 February 2008

Thank you for the opportunity to comment on the proposals in "Transforming Tribunals" (consultation paper CP30/07).

The Royal British Legion ("the Legion") provides membership and welfare services to those serving in the Armed Forces, veterans and their dependants. The Legion currently has a membership of over 400,000 people and a beneficiary community of 10.5 million. Last year, we provided welfare services to over 60,000 people, this included advice, guidance or tribunal representation to over 20,000 veterans, widows or widowers on War Pension claims or appeals.

Our comments on relevant questions in the consultation document are set out below. We have also included some additional comments at the end of our response.

We would also like to put our response into the context of the relationship between the State and members of the Armed Forces. In particular, the duty of care the State and the Nation carries in relation to the individuals and families of those who serve in our defence forces.

Serving the country differs from all other jobs. Members of our Armed Forces sacrifice civil liberties and potentially lay down their lives when they volunteer. In return they are promised help and support when they need it most. This mutual promise is detailed in the Military Covenant.

We believe that the level of support provided by the Government has been eroded in recent years. Details of the areas where we believe that this has occurred form the basis of our recent "Honour the Covenant" campaign. A focus of this campaign was the Armed Forces Compensation Scheme (AFCS), which while delivering some benefits, also removed significant benefits afforded under the War Pension Scheme (WPS). The removal of the Pensions Appeal Tribunal (PAT) will be a further erosion of the support offered to the Armed Forces and will, we believe, further undermine the confidence of Service personnel in the lifetime support they should expect in return for their commitment. This is magnified by the fact that the AFCS was only introduced in 2005, has yet to be embedded properly and has not yet been formally reviewed (due in 2010).

We believe that there should be a less radical reform of the Pensions Appeal Tribunal until after the AFCS has been embedded and reviewed.

Questions & Responses

Q1. Do these proposals strike the correct balance between maintaining judicial expertise and encouraging judicial career development?

While the intention is for the new structure to be more than just a “federation of existing tribunals” (P.135, p.28), we need to recognise the need for a transitional phase; or as set out above, less radical reform.

The Pensions Appeal Tribunal has built a wealth of experience over many years. This must not be lost. We stress the need to ensure that “new Tribunals will be flexible enough to preserve the inevitably specialist features of some tribunals, which stem from differing issues, different law and differing users” (P.135, p.28). The concern here relates to the removal of experience and specialisation in a large and very diverse Chamber, within which cases for Armed Forces personnel, widow(er)s or veterans will form a very small part.

The need for the Senior President or Chamber President to ensure that members are “experts in the subject matter or law applied in case” (P.139, p29) cannot be overstated.

The proposal states that “Judges and members will initially be assigned to Chambers on the basis of their previous tribunal-specific appointments” (P.158, p.32). This is welcome but we are concerned at the use of the word “initially”. There is an expectation that Judges and non-legal members will eventually move to other jurisdictions within the Chamber. We feel that this will not always deliver positive outcomes; be necessary, or required in all circumstances. In the case of Healthcare Qualified Professionals (non-legal members), individuals will become less interested in attending Tribunals if they are expected to hear a wide range of appeals, but have only very specific professional interests. This will make it difficult to retain suitably qualified people, and damage the service provided to appellants.

The proposals for “ticketing” must ensure that expertise is not completely lost as experts, will, in the main, stay within the relevant Chamber. However, the diverse and large nature, particularly of the Social Entitlement Chamber, will mean that expertise will be diluted.

We believe that there is a case for an additional category “ticketing” which could be used to legislatively protect the attendance of some non-legal members at particular types of First-tier Tribunals. In the case of appeals of under the AFCS, we believe there should always be a Healthcare Qualified Professional (non-legal member) in attendance, and that this should be protected by Statute. Our reasoning here is that the AFCS introduced a new method of assessment for awards. Unlike the War Pension Scheme, the AFCS assessments at the Service Personnel and Veterans Agency (SPVA) are now carried out by trained, but non-medical personnel. The removal of a medical representative for appeals will mean the possible removal of medical expertise from both initial assessment and award, and under the proposals, the appeals process as well.

We believe that the unique nature of Service in the Armed Forces, coupled with the increasingly diverse nature of deployments and duties performed by our Armed Forces warrants the need for specific non-legal expertise in the majority of appeals currently heard by Pensions Appeal Tribunals.

Our comments here on the need for further detailed proposals in relation to “ticketing” are supported by our experience of existing Pensions Appeal Tribunals, in particular, appeals submitted by Gulf War veterans for Gulf War Syndrome. These are examples of where military and medical expertise has been imperative. The Pensions Appeal Tribunals and the High Court have been the only paths by which Gulf War veterans have been able to obtain State recognition and compensation for their conditions.

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

We have significant concerns relating to the constitution of the Chambers (see Q.3 response) and the name of the Social Entitlement Chamber.

The Pensions Appeal Tribunals and with it the WPS and AFCS deal with compensation payments for conditions relating to Service in the Armed Forces. The connotation of “social entitlement” is one of welfare or societal benefits. Members or former members of the Armed Forces consider claims for War Pensions (WPS & AFCS) as compensation for demonstrated damages. The name of the Chamber implies that they are seeking payments from the welfare state. We ask that the words “and Compensation” are added to the title. This might reduce the likelihood of this becoming a problem or causing offence ie the Chamber becoming the “Social Entitlement & Compensation Chamber”.

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

“The First-tier tribunal will be too large and diverse to be organised and led as a single judicial unit, without losing the expertise and jurisdictional knowledge that is at the heart of an effective tribunal” (P149, p31). We believe this statement is equally applicable to the Social Entitlement Chamber, as proposed.

The relatively small number of appeals heard each year by the Pensions Appeal Tribunals in comparison with the Social Security and Child Support Appeals will mean that expertise will be further diluted if “ticketing”, assignment and appointment of non-legal members are not carefully safeguarded.

The disappearance of the Pensions Appeal Tribunals will mean that, while there are assurances that expertise will be retained where appropriate, the risk of the dilution of expertise by too much movement toward the multi-disciplinary approach is high. The correct balance between retaining appropriate expertise with the other aims of cost savings through economies of scale and easier access to users needs to be struck, while ensuring that slippage does not occur, and above all, that the appellant does not suffer injustice at the expense of convenience.

The consultation outlines the ability for the Chamber President to appoint a Deputy Chamber President where necessary. We believe that confidence in the system would be improved if the appointment of a Deputy Chamber President, with responsibility for overseeing appeals involving the Armed Forces, was a requirement.

We also question the inclusion of the Asylum Support Tribunal into the suggested Social Entitlement Chamber. It seems the odd one out, with no substantial medical component.

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

We agree with the proposed structure for the Upper Tribunal.

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

The proposal to have the head office of the Upper Tribunal based in London is appropriate to encourage retention of salaried staff to the Upper Tribunal. The need to hold hearings throughout the UK is obvious from a user perspective and the proposal to ensure that this occurs is welcome. However, this must be balanced against the availability to the appellant and professional representation.

Jurisdictions of the Upper Tribunal – Q.6 & Q.7 see response to Q.10

Q.8 & Q.9 Not applicable.

Pensions Appeal Tribunals – Q.10 Do you agree?

Regarding the issue of appeals to the Upper Tribunal (P.133, p.38), we agree that appeals on matters of assessment and points of law under the War Pension Scheme should now be heard by the Upper Tribunal rather than by Judicial Review; particularly as the Upper Tribunal will take over many of these functions.

However, the composition of the Upper Tribunal in these appeals needs to be clarified as not only points of law will be under discussion. Proposals for membership of the Upper Tribunal when hearing appeals from the First-tier Tribunal, currently heard by the Pensions Appeal Tribunals, need to be explicit. This will be particularly important due to the proposed introduction of Chambers, and the possible loss of expertise at the First-tier. While the document states that the role of non-legal members will be less important at the Upper Tribunal, due to the fact that it will “be questions of law under discussion”, this will not always be the case for Pensions Appeal Tribunals, which under the proposals will also be dealing with Assessment Appeals.

The rights of appeal from the Upper Tribunal to the Court of Appeal and any remaining rights to Judicial Review need to be clarified. In the case of Pensions Appeal Tribunals, these remain unclear in the consultation document.

Q.11 – Q.14 Not applicable.

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

The general approach set out in P.231 does provide additional flexibility and will inevitably reduce costs. However, we would also make the following comments.

For appeals with a medical element i.e. where medical expertise has a bearing on the appeal, we believe the Chamber President should always ensure that there is a Healthcare Qualified Professional (non-legal member) involved in the appeal.

Additionally, at the First-tier Tribunal, there should be a minimum of two members to enable discussion and a balance of views. This should include one legal member and no less than one non-legal member with relevant expertise on the issue under discussion. In appeals against the WPS and the AFCS we stress the need to always have a legal member in the Chair, this is particularly important for issues on jurisdiction, and because the State is represented by professional staff of the Service Personnel and Veterans Agency. This will help to ensure that appellants are satisfied with the expertise and the decisions of the First-tier Tribunals.

We welcome the flexibility afforded by the inclusion of independent examination and reports and the attendance of expert witnesses. In the case of claims under the WPS and AFCS claims are made against the employer (the MOD), where the majority of evidence to support the claim is also held by the employer. This includes patient medical records. This is particularly important in appeals against decisions of the AFCS where the burden of proof rests with the claimant.

We also believe that the appellant should be permitted to make a formal request for the appointment of particular non-legal members to the First-tier Tribunal. The appellant should equally be entitled to apply for an expert to be appointed to the Upper Tribunal, and to be consulted on the venue of the hearing.

This is particularly important for appeals which require an understanding of Service life and culture. There should be a right to request a military or Other Expert (non-legal member), where the appellant believes that this understanding will play a role in the outcome of the appeal.

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

While there is a case for flexibility to be held by the Senior President or the Chamber President, there is also a strong case for principles to be held in the Statute to avoid the erosion of justice. This might be the case for certain types of tribunals rather than directly relating to the Chamber itself, which in most cases will be diverse.

As set out above, for appeals involving a medical element there should be a minimum of two members, one of whom should be a Healthcare Qualified Professional. There should also be a right to request Other Experts.

Q.17 Do you agree that these are the appropriate categories?

Limiting the number of categories is appropriate, and we welcome the note of the armed services in the Other Experts category. For cases in operational theatres this will be important, particularly on jurisdictional matters.

Q.18 What should the description be?

We support the proposal for Expert Member. Alternatively, Professional Member might be workable.

Q.19 Would the term “member” suffice?

No. The title should reflect the purpose of attendance. This will help enhance the user’s understanding.

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

Yes, if only to ensure that justice is being seen to be done for users of Tribunals.

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

No.

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

There is an argument to include principles of the “ability to pay” particularly in the case of benefits and compensation appeals. It could be argued that this is covered by the assurance given by Baroness Ashton in 2006. However, this should be explicit in the criteria for reviewing the cost regime.

Q.23 – Q.29 Not applicable

Q.30 Do you agree that the jurisdictions of the RPTS and the Agricultural Land Tribunal should be transferred to the First-tier Tribunal and their administration to the Tribunals Service?

Our interest in this area is limited to the RPTS. On the basis of cost and user access, we cannot see any reason for it not to be transferred to the First-tier Tribunal under the Lands, Property and Housing Chamber.

Additional Comments

We welcome the monitoring functions included by the Administrative Justice and Tribunals Council (AJTC). Particularly, “recognising and responding to the diverse needs and circumstances of users, by applying effective monitoring arrangements and being alert to emerging issues” and “monitoring progress and performance of tribunals against common standards and performance measures” (p.26). Our difficulty here is the lack of performance measures that currently exist for the PAT. While there are figures which detail the time taken for an appeal to be heard, little work has been completed on the experience of users of the Pensions Appeal Tribunals (PAT). This is particularly important with reference to removal of a military representative, and how users believe this will affect the outcome of the appeal.

There is currently a lack of objective evidence relating to the experiences of users. While details are collected from those who choose to use Legion support services, the details relate specifically to the service users receive from the Legion rather than the PAT itself. Equally, it goes without saying that users’ views are significantly influenced by the outcome of the appeal.

The introduction of Hearing Centres for uncomplicated cases where users can have issues resolved quickly and closer to home is welcome.

With reference to Senior President and judicial training, we believe that consideration should be given to wider access to the training provided. In particular, the voluntary sector and other private organisations that represent users at tribunal could benefit from these functions. The benefits ultimately would be passed on to the user; of course the need for the judiciary to remain independent should take precedent. However, specialist training for representatives could be delivered in this way. Of course additional costs incurred would need to be met by the users of the training services.

Any change to a regional structure for the Pensions Appeal Tribunal needs to be delivered with a clear objective of reducing the waiting and travelling times for users. Without this guarantee there will be no benefit for users of the current Pensions Appeal Tribunal.