EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

Ministry of Justice
A Platform for the Future
A consultation on a unified Courts and Tribunals Service

Response of the Employment Lawyers Association

24 February 2011

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Introduction

A. The Employment Lawyers Association ("ELA") is an unaffiliated group of 6,000 specialists in employment law, including those who represent both employers and employees. It is not ELA's role to comment on the political merits or otherwise of proposed legislation: rather, it is to make observations from a legal standpoint.

B. Our Legislative and Policy Committee consists of barristers and solicitors (both within private practice and in-house) who meet regularly for a number of purposes, including considering and responding to proposed new laws. This committee set up a sub-committee under the chairmanship of Stephen Levinson to consider and comment on the Ministry of Justice's consultation on the creation of a unified Courts and Tribunals Service. A list of the members of the sub-committee is set out in the Annex.

C. It is appropriate to add a note on our methodology. In order to collate a wide range of views we initially divided the questions amongst the members of the sub-committee and then carried out a joint review over several sessions. We believe as a result that our views represent opinion drawn from a wide spectrum of practitioners.

D. Our focus has to be on the operation of Employment Tribunals and our principal concern is the relative absence of consideration of their distinctive nature and ethos in this consultation. If this was to misread the paper we would be relieved but this response reflects that serious concern. We acknowledge and entirely accept the need to reduce public expenditure. We wish to ensure, however, that this is not done in a manner that damages the system of justice that applies to the workplace particularly as so many litigants in the system are unrepresented.

Question 1: Do you think the proposed vision and focus for the new organisation is correct?

1.1 The vision for the proposed HMCT Service outlined in "Platform for the Future" is, in our view, deficient in a number of respects, which we set out below.

1.2 By way of background, we contributed a detailed response to the Transforming Tribunals Consultation in 2008 (attached). Many of the points made in that response remain valid.

1.3 Our primary concern regarding the current proposals relate to the fact that there is an imbalance between the general statement in the executive summary *"We are committed to preserving and protecting the distinctive nature of tribunals and ensuring that users continue to receive the service they value"* and the thrust of the majority of the text of the paper which implies the opposite. (We return to this point in paragraph 4.3). The focus in "Platform for the Future" seems to be on administrative tribunals rather than party and party specialist tribunals such as Employment Tribunals and the fact that the interests of users is not overt are also worrying factors. Finally the proposals do not acknowledge the very complicated legal and constitutional issues, which derive from the separate Scottish legal system and judiciary. We understand that there is to be a separate consultation on this issue to which we would wish to contribute.

1.4 Taking these issues in turn:

Lack of Acknowledgement of specialist nature of Employment Tribunals.

1.5 The vision does not acknowledge specifically the specialist nature of Employment Tribunals. In its response to "Transforming Tribunals", ELA commented on their distinctive and specialist character:-

"*As the Gibbons report states, there is much that remains valuable in the original ethos of Employment Tribunals and we would add that much has since been done in recent years to improve the administration of tribunals and, in particular, the quality of the tribunal judiciary, which is generally recognised as having become a more specialised and knowledgeable body. Its specialist judges and well-informed lay-members are absolutely integral to its effectiveness. Having appropriately qualified administrative staff is also essential to the effective performance of an Employment Tribunal……. All these factors support the need for a separate pillar with dedicated judicial leadership. The new proposals must not dilute what has been achieved or impede the implementation of previously approved reforms."*

1.6 We welcomed the acknowledgement of the specialist nature of Employment Tribunals in the paper "Transforming Tribunals" (Consultation Paper CP 30/07, published on 28th November 2007) which also reiterated that Employment Tribunals would 'stand as a separate pillar' as was promised when the merger of Employment Tribunals and other tribunals was first proposed. This promise was contained in the "Protocol regarding the Transfer of ETS to a Tribunals Service in LCD" ('the Protocol") and it stated that Employment

Tribunals would retain a separate identity "in recognition of the differences of party and party tribunals from administrative tribunals which deal with disputes between party and state". We hope that the absence of similar acknowledgements in this paper does not reflect the fact that government has moved away from this commitment and we ask for confirmation this is not the case.

1.7 Sir Andrew Leggatt's seminal report on Tribunals affirmed, *"…one of the defining characteristics of the Employment Tribunal is that it has wing members who bring experience of both sides of industry. Users argue strongly that having members with that experience participating directly in the decision-making process leads to better decisions and that a panel including both lawyers and non-lawyers is more accessible. We agree and recommend that three-member panels should remain the norm for ET cases".*

1.8 In addition, paragraph 292 of the Leggatt report made positive reference to the role that Employment Tribunals had played in the "gradual improvement of the industrial climate since…Donovan and in social relationships more generally". As we observed in our response to *"Transforming Tribunals"*, Leggatt went on to say that those gains "should be risked only in the light of clear evidence that there is a substantial problem."

Focus on administrative tribunals to the exclusion of party and party tribunals.

1.9 The final bullet point of the proposed vision suggests that the primary focus of the new organisation will be administrative tribunals. Employment Tribunals involve party and party disputes rather than citizen versus state disputes.

1.10 The differences between both forms of tribunal underlay the detailed assurances provided by government when Employment Tribunals were transferred from the DTI to the Tribunals Service, which were contained in the Protocol (see paragraph 1.6).

1.11 It would be a serious concern to us if the demands of administrative tribunals rather than those of Employment Tribunals will be the only driver of any reconfiguration of tribunal services. To develop this point further, we have long been concerned that Employment Tribunals should be conducted in appropriate hearing rooms. Employment disputes are often deeply personal in nature as they can involve upsetting allegations made by one individual about the conduct and motives of another, for example in discrimination claims. In many cases, there is still a subsisting employment relationship between the parties, which adds to the tension at the hearing. In such cases, it is essential that the hearing room is of adequate space and that there are separate waiting rooms so that the parties are not

forced into each other's company before the hearing takes place. Having separate waiting rooms also allows greater scope for separate discussions on terms of settlement. Administrative tribunals do not generally have similar requirements in terms of premises. In this type of hearing, it is possible for the parties to sit at the same table as the judge and to wait in the same waiting room. If the vision assumes the adoption of a "one size fits all" approach to premises then our worry would be that Employment Tribunal hearings will be conducted in an environment that was unsuitable.

Absence of adequate acknowledgement of the interests of users

1.12 The vision appears to have been drafted without sufficient consideration of the interests of those using the tribunal system. The centrality of users to the tribunal systems was one of the dominant themes of the Leggatt report. Whilst mention is made of the interests of users, the consultation document, taken as a whole, concentrates on the needs of those administering courts and tribunals. There needs to be much greater recognition of the centrality of the interests of users in the vision.

Question 2: Are there other savings which could realistically be achieved but we have not identified?

2.1 The key savings identified in the paper are said to relate to reduced administration costs and savings in relation to the estate. These are likely to be the principal savings in relation to the proposed unification. With regard to other potential savings, we put forward the following, although we have not undertaken any feasibility studies or otherwise undertaken any costing exercises to ascertain the value of any such savings. We record elsewhere in our response our concerns in relation to the impact that the proposed savings could have on the quality of service provided.

(a) Recruitment of staff should be conducted with a view to attracting those with skills appropriate to the more flexible role anticipated by the changes. Similarly, while training will come at an immediate cost, we consider that it will produce medium to long term benefits (see also paragraph 5.3 below);

(b) Sharing of best practice between the different jurisdictions, with a view to establishing the most efficient way of dealing with various issues and situations;

(c) In a recent survey conducted among our members in relation to the running of Employment Tribunals a considerable number suggested that an electronic case-tracking system would be very useful. It is likely this would minimise the number of calls

made to tribunal staff to ascertain the progress of a case, whether it has been listed and other administrative enquiries;

(d) The introduction of fees may achieve savings although the administrative costs of collecting fees and managing this process would have to be considered. We express no view one way or the other on that issue as our members have very different views regarding the merits of such a proposal;

(e) Cases could be transferred from one particularly busy region to another that had more capacity to deal with them efficiently. At present, this is rare in Employment Tribunals;

(f) Another widely held view revealed in our recent survey is that practitioners in the Employment Tribunals would like to see more active case management from Employment Judges and a streamlining of what can be the tortuous pre-hearing procedure; for example, standard directions could indeed save time and the needless satellite litigation that can be generated over directions. Similarly a firmer steer by Judges in the direction of ADR may produce more, and earlier, settlements.

Question 3: The creation of Her Majesty's Courts and Tribunals Service provides the platform to deliver improved outcomes for users over the next 5 years. Are the outcomes that we are seeking to improve (Accessibility; Quality; Environment) those that we should focus on?

3.1 We consider that the merger should retain and encourage the specialism of Employment Tribunals, be shaped around the interests of users and pay regard to the dynamics of devolution and the separate Scottish legal system. These principles should also guide the development of desirable outcomes. The predicted outcomes currently outlined appear to us to be uncertain and concentrated on administrative issues. The advantages to those managing the systems appear paramount and the interests of users secondary.

3.2 Our specific comments on the outcomes currently proposed are set out below.

Accessibility

3.3 In our view the benefits of "accessibility" outlined on page 12 of the paper are inflated. There is an assumption that users will frequently need to have recourse to a range of courts and tribunals and that they will require uniformity in "point(s) of entry" and "administrative processes". The importance to users of these features is not apparent to us. It may be simpler to administer such a service but evidence

that users will benefit from it is required and we have other concerns about the nature of such an approach (see 3.6 below).

3.4 It is not known how many individuals frequently pursue different court and tribunal claims. We are interested to learn of the empirical evidence base that underlies this proposal, as the assumption that large numbers of individuals are involved in multiple legal fora appears to be an important reason for the merger of HMCS and the Tribunals Service. Furthermore, there is no evidence of which we are aware showing that individuals are disadvantaged, for example because the Social Entitlement Chamber, or the Lands Tribunal or the Employment Tribunal systems are accessed in different ways. We do not believe that Employment Tribunals are difficult to access and the increase in the number of claims made casts doubt on that suggestion. There may be reasons why different processes including "access points" apply to different parts of the justice system. It appears to us that "uniformity" has been elevated to a level of importance that is unwarranted. There may also be problems that might arise from overdoing uniformity. Linking the tribunals more closely to the criminal justice system for example would risk stigmatising Employment Tribunal users and deter access to justice.

3.5 Tribunals and courts have very distinctive cultures. We were therefore concerned at the suggestion that there will be a "common culture". It would be undesirable if the culture of the court prevailed and infected, more than it has done so already, that of Employment Tribunals. Indeed this would run counter to their distinctive ethos that the Protocol promised to preserve and the last fifty years of commentary on tribunals has recognised, praised and sought to foster. In this difference lays their character and purpose. Developing a common culture would be to reject entirely the findings of the Leggatt report and the Employment Tribunal System Taskforce Report as well as the 2004 White Paper, "Transforming Public Services: complaints, redress and tribunals", which supported the balance and expertise multi member panels can bring and considered that a principal reason for aligning employment tribunals with other tribunals rather than courts was that this was the best way of preserving maximum informality and accessibility. There have also been many other previous investigations by government and others to the same effect. To abandon these ideas without any explanation as to why these previous findings no longer hold sway would be an extraordinary departure from principals of good governance.

3.6 The idea of a "single corporate brand" on page 12 also gives rise to concern on our part. Courts and tribunals – whether merged or not – should be and appear to be independent of government. For this reason, we oppose any proposals that may be made to site web access to the justice system through a government web portal. We appreciate that this is a trend with powerful administrative support. We remain

firmly of the view, however, that this trend undermines the independence of the justice system. This is particularly so for any court or tribunal dealing with a dispute that is party and party. An individual wishing to bring a claim against their employer for unpaid wages is most unlikely to turn to a government website. Such difficulties of access create a vacuum easily filled by those seeking to exploit litigants. There are many rogue commercial websites, which seek to charge individuals for lodging Employment Tribunal claims and our concern is that this proposal will encourage that abuse. There are sufficient existing examples of this exploitation in the finance sector that ought to be a warning of this danger. A high proportion of litigants in employment claims are unrepresented.

Quality

3.7 Our 2010 survey of members on the service provided by Employment Tribunals, which has been provided to both the Ministry of Justice and BIS, produced worrying data on the pressures facing the system and the problems created for employers and employees alike. We have submitted the full report to the Ministry of Justice but possibly the key finding concerning the administration of Employment Tribunals was that 35% of our members were dissatisfied or very dissatisfied. In the category "very satisfied" there were only 5% and 33% were "satisfied". In addition 83% thought that the service was inadequately resourced and 56% detected deterioration in the service levels. This does not accord with the statement in the consultation paper that "performance has been driven up" or that there has been improvement in the "level and quality of service provided, putting the public at the heart of what they do" (although it is appreciated that this was a view of tribunals as a whole). We are also confident that the views of our members reflect those of their clients. We think it would be most unfortunate if the courts and tribunals merger went ahead without government reflecting on and responding to the serious concerns raised by our members on the current operation of the Employment Tribunal service. What we say is that this generalised view expressed in the consultation paper does not appear to be true for Employment Tribunals. To add the inevitable dislocations, which are likely to follow a merger, to a system already under stress is likely to lead to major problems.

3.8 It is suggested that stakeholders will now only have to "engage with one channel not two" and that this will reduce "duplicated effort" but it does not specify to whom this is supposed to apply. Again, the assumption is that there is a significant degree of overlap between users of the courts and tribunals. We are not aware of the basis of this assumption and fear that it is flawed.

Environment

3.9 We repeat the points made in response to question 1 regarding the need for Employment Tribunals to take place in suitable premises.

Question 4: Will the benefits identified here be effective in achieving these outcomes?

4.1 We are concerned that this question is circular for the following reasons. In broad outline, the consultation paper says:

a. The Government will be unifying the Courts and Tribunal Services;

b. It believes that in doing so it will produce the benefits enumerated in the consultation paper; and

c. Those benefits will make users' experiences better in terms of accessibility, quality and environment.

4.2 The question is then whether the benefits identified in the paper will be effective in delivering the improved outcomes identified. However the primary question is whether the changes proposed would produce the benefits the paper says they will produce.

4.3 As mentioned above, a particular strand of concern arises from the apparent contradiction between the paper's assurance that the "unique and distinctive nature of tribunals will continue to be promoted and protected" and the thrust of many of the proposed changes, which would appear on the face of it to diminish the differences between tribunals and courts and to overlook the nature of Employment Tribunals.

4.4 While we accept, of course, that combination of 'back office' functions between the two services may well lead to financial savings for the Treasury, it does not seem to us certain that other anticipated benefits will necessarily result from the changes proposed. A reduction in headcount will produce savings but will not of itself improve service delivery. Rent may be saved by a particular property sale but that will not improve service if a tribunal hearing moves to an inappropriate building. It may be cheaper to have more "mobile" judges flitting from jurisdiction to jurisdiction but that does not guarantee the maintenance of specialized quality. Instead it is a threat. On this point generally we are concerned to know what is intended to happen with the IT systems now that Case Mark has been abandoned as this

is likely to be a crucial element in maintaining a high level of service delivery.

Accessibility

4.5 It is not our experience that members of the public with employment-related claims are generally confused about which service to approach, such that a single point of access for both systems would improve accessibility. Rather, the relatively simple procedure for initiating claims in Employment Tribunals (it is generally easier than initiating claims in the County Courts and the High Court) seems to us to have created a system which is easily accessible – and well-accessed – by the general public. While confusion may arise at times about what legal rights and remedies are available to individuals that should not be confused with the question of access to justice in courts and tribunals.

4.6 Echoing the theme introduced above, we are concerned that the stated "benefit" of "greater consistency in administrative procedures" is at odds with the assurance of maintaining the unique and distinctive nature of tribunals.

Quality

4.7 If unification does result in "greater flexibility in the deployment of resources" and a "more strategic focus on administrative processes" then that could result in an increased quality of services for users, but that depends entirely on the quality of the implementation. The paper in fact avoids dealing with this issue by stating *"there is still work to be done in fully defining how these benefits will be delivered"* and that *"this will be for the new organization to take forward, but what we have set out here are the benefits we believe unification provides the platform to develop"*. This emphasizes the need to provide detailed consultation on proposed changes in operational practices, which this paper does not provide. As and when those further consultations take place then we would be keen to be involved, and involved at an early stage. The risk is that spreading fewer resources across the two services without ensuring that staff are attuned to the unique and distinctive nature of tribunals when dealing with tribunal matters could just as easily result in a deterioration of service quality in Employment Tribunals.

4.8 As stated above, we accept that efficiencies of scale could lead to financial savings, but this in itself will not drive up service quality. (See the examples we have given in 4.4 above.) In short, the paper asks a question in relation to quality that is not possible to answer as so much depends on the manner of implementation. It is on this issue that we would be very interested and well equipped by our experience in practice and the experiences of our clients who use the system to contribute in further consultations.

Environment

4.9 Clearly a better utilization of the whole estate and a greater utilization of better quality hearing facilities are desirable. However, part of the distinctive nature of Employment Tribunals is that they tend to look and 'feel' different from other courts, and this is widely felt to make them more approachable and less intimidating for lay users. It would not, in our view, lead to an improvement of users' experience of Employment Tribunals if the surroundings in which hearings take place were to become more formal than they generally are at present. We repeat the important point that this is particularly so for unrepresented litigants given the high proportion using the employment tribunal system.

Question 5: Are there other service benefits which we have not identified that would be desirable?

5.1 There are a number of service issues relevant to Employment Tribunals that have not been directly mentioned in this consultation. Generally, we would recommend that the opportunity is taken to review the recommendations in the Employment Tribunal System Taskforce report of July 2002 as a number of these remain to be fulfilled and are of relevance to users.

5.2 There should be a review of jurisdiction, which remains unduly restricted in some instances, particularly in relation to contract claims. As has been recently illustrated by the decision in *Southern Cross Healthcare Co Ltd* v *Perkins & Others* [2010] EWCA Civ 1422 this leads to a duplication of process and confusion, even amongst judges.

5.3 As mentioned in paragraph 2.1(a) we remain concerned at the level of training that will be given to the staff of Employment Tribunals. We repeat what we have said about their specialized knowledge and wish that to be maintained and not diluted by the impact of the proposed redundancies and transfers to other jurisdictions.

5.4 We are concerned that more effective measurements of performance be developed and that they should be published regularly and designed to measure those aspects of performance most relevant to users. We are, as we mention above, concerned at the mismatch between the views of our members on performance and the views (albeit generalized) expressed in the consultation paper.

5.5 We wish the quality of communication with tribunals to be improved and enabled to work more effectively, particularly by email.

5.6 We echo the call for more uniformity of practice between regions particularly in the matter of the use of telephone hearings and interlocutory work.

Question 6: Are there any concerns over the delivery of these benefits which we should be aware of and seek to address?

6.1 We have set out our concerns about service delivery at length. Generally, whilst we fully appreciate that this consultation concerns all courts and tribunals we are left feeling that Employment Tribunals are now at risk of losing their distinctive ethos and role and that all of the investigations and research that has occured in the past and endorsed their value to the economy and working people has been ignored.

6.2 As we have explained in paragraph 3.5, the whole purpose and intention of their development was to separate Employment Tribunals from courts. The increasing complexity of law with which they have had to deal and the volume of cases has created many problems and has driven them away from the original concept. Whilst some of these changes have to be accepted that in itself is not a reason to do what we fear is envisaged and likely to result from the changes proposed in this paper (despite assurances to the contrary) which is to move towards a situation where their process and operation is indistinguishable from that of courts thus destroying what is most valuable in their operation.

24th February 2011

ANNEX

Sub-Committee Members

Stephen Levinson: (Chair): Partner, RadcliffesLeBrasseur.
Michael Burd: Partner, Lewis Silkin LLP.
Peter Frost: Partner, Herbert Smith LLP.
Bronwyn McKenna: Assistant General Secretary, Unison.
Dame Janet Gaymer: DBE, QC (Hon).
Joanne Owers: Partner, Fox Williams LLP.