

Response by The Professional Contractors Group to the White Paper “Transforming Public Services: Complaints, Redress and Tribunals”

The PCG and its members have had extensive experience of using Tribunals, particularly the Special Commissioners of Income Tax. While some of the changes proposed in the White Paper will be of benefit to our members, the PCG has considerable reservations about some areas of ambiguity and uncertainty within the report, and also about some of the specific proposals.

We welcome the proposal that the Council on Tribunals reports to parliament and comments on legislation and also welcome the emphasis on tribunals' independence from government departments. But the suggestion of government-imposed targets and objectives suggests this independence could be limited in practice, as could agreements with decision-making departments on improving “the end to end process”. While Tribunals are not strictly judicial bodies, this proximity also sits uneasily with the principle of the separation of powers.

The PCG has serious concerns about some of the proposed new structures for tribunals and would welcome clarification of these issues.

- We would ideally like to retain the right to choose in which tier of tribunal a case is heard, rather than cases being centrally allocated.
- The paper does not state, moreover, whether the criteria for allocation will be published, nor does it address the difficulty of distinguishing between factual and legal cases for allocation purposes, which may be beyond the expertise of the non-legal staff in whose hands it is implied allocation may be placed.

The restrictions placed on the right to appeal are also a concern. There does not seem to be a right to appeal under the proposed arrangements where legal reasoning has been made incorrectly, even in a finding of fact. The statement that appeals should, “only go to the courts when issues of the weight and importance normally decided by an appeal court need to be resolved,” appears to preclude a right of appeal where a decision is simply wrong. Will the criteria for giving leave to appeal be published? We are also concerned at the potential for sanctions against appellants discussed on page 40 of the paper and would like clarification over how it will be ensured that this procedure will not be abused. Finally, we would observe that appeals often need to be taken forward to clarify important points of law, and that deciding on the progress of cases purely on the basis of “what people want” may not always be appropriate.

The PCG would also like to ask for reassurance on a range of points. We feel it to be important that Tribunals are obliged to explain the reasoning behind their decisions, and would like this to be guaranteed. We also request an assurance that a Tribunal Judge will not resolve a case on the basis of compromise or his/her discretion when it is not appropriate; such an extension of Alternative Dispute Resolution strategies into tax disputes would, we feel, almost invariably be inappropriate. We would further like to ask: will the lower tier have legally-qualified members on its panels? Could a case potentially be dismissed and denied appeal without being heard by anyone with legal or tax qualifications? On this point too we would welcome an explicit statement that this will not ever be the case.

The PCG welcomes the fact that tribunals are currently undergoing review as an opportunity for useful reform, and would offer a small number of suggestions. The White Paper acknowledges the fact of cases at the Tax Commissioners being between an individual and the state, a fact currently disguised by the presentation of cases as being between the individual and a named person, the tax inspector. Given the relative resources available to the individual and the state, the PCG suggests that the burden of proof is placed on the state rather than the taxpayer and shifted from “the balance of probabilities” to “beyond reasonable doubt”. Under current arrangements, taxpayers at risk of financial ruin in the event of losing a tribunal hearing are in a worse position in this regard than those accused of trivial offences and at risk of negligible punishment at, say, a magistrate's court.

We also suggest that cases should never be heard by even numbers of judges; the PCG is currently supporting an appeal against a Commissioners' decision made by a pair of judges in which one exercised a

casting vote, and it has highlighted the extreme complexity of applying the correct procedure. If even numbers of judges continue to sit, it is imperative that guidelines on correct procedure be issued.

It has been the case in the past that, owing to the nature of the “IR35” legislation, the Tax Commissioners have been engaged in determining a taxpayer’s employment status. We would like to suggest that as part of the current reform it should be investigated whether it would be practical for questions of determining employment status always to be referred to an Employment Tribunal. The Tax Tribunal could then determine tax based on that assessment. This would have the effect of standardising the criteria by which employment status is assessed.