

MBL Charity Law Review Conference , 25 September 2013

Notes for Alison McKenna's session on the First-tier Tribunal (Charity)

This session covers:

- The Tribunals framework
- Jurisdiction in charity cases - Appeals, Reviews and References
- Practice and Procedure - the Tribunal Rules; developing case law on tribunal procedure; practice directions
- Bringing a case - practical tips, time limits, inter-relationship with the Charity Commission's internal review
- What type of cases has the Tribunal heard? - an overview of decided cases in the First-tier (Charity) and Upper Tribunal (Tax and Chancery Chamber)
- Reform of the Tribunal - Lord Hodgson's proposals
- Questions and Answers

Alison McKenna began sitting as a Tribunal Judge in 2002 and took up full-time appointment as the first President of the Charity Tribunal in June 2008. Her title was changed to Principal Judge of the First-tier Tribunal (Charity) in September 2009, as a result of reforms under the Tribunal Courts and Enforcement Act 2007.

She was called to the Bar (Middle Temple) in 1988 and her subsequent legal career included practice at the independent Bar, several different roles in the Government Legal Service (including that of an in-house legal adviser to the Charity Commission 1997 - 2002), and (following her re-qualification as a solicitor in 2003) as a partner in private practice, specialising in charity law.

Alison sits as a Deputy Judge of the Upper Tribunal in both the Tax and Chancery Chamber and the Administrative Appeals Chamber. She was assigned to the Tax Chamber of the First-tier Tribunal in 2011. Alison takes an active interest in Tribunals justice, as a member of the Tribunals Judiciary Executive Board and Chair of its Communications Sub-Group. She was appointed as a Judicial Appointments Commissioner in February 2012.

MBL has kindly agreed to donate Alison's fee for speaking today to the Southampton Hospital Charity.

1. The Tribunals Framework

- 1.1 Appendix 1 is a diagrammatic representation of the Tribunals system created by the Tribunals Courts and Enforcement Act 2007 ("TCEA"). The Charity Tribunal created by the Charities Act 2006 was abolished in 2009 and its jurisdiction transferred in to the General Regulatory Chamber of the First-tier Tribunal and the Tax and Chancery Chamber of the Upper Tribunal.

- 1.2. Tribunals are a very significant part of the administrative justice framework. Some statistics: in the year 2012/13 Tribunals received around 875,000 new cases (compared with 277,000 cases received in the family courts and 130,000 cases received in the Crown Court).¹ The Number of charity cases heard in the Chancery Division before the creation of the Charity Tribunal was: 2006 – one case; 2007 – none; 2008 – three². The number of applications made to the Charity Tribunal since its creation: three applications in 2008–9; twelve applications in 2010–11; six applications in 2011–12 and five applications in 2012–13. These have resulted in approximately three to six cases a year having a full hearing. In this context it can be seen that the charity jurisdiction has a very small claim on the resources of a large judicial and administrative edifice whose process and practice is largely determined by centralised forces. This means that we are not easily able to respond to charity sector specific requests to do things differently.
- 1.3. As you can see from the diagram, tribunals are divided into “chambers” each with common subject matter, procedural rules and a shared administrative system. Each Chamber is headed by a judicial Chamber President. There is some deployment of judges between chambers. For example, I sit in the Health Education and Social Care Chamber and the Tax Chamber as well as the GRC in the First-tier and in the Upper Tribunal in two different chambers, so I have a full time job notwithstanding the low number of charity appeals. The charity jurisdiction also has a number of fee paid Judges and members. We were all appointed by the Lord Chancellor following an open competition run by the Judicial Appointments Commission. Biographical information is on the Tribunal’s website.
- 1.4. All the procedural rules for the Tribunal chambers are similar. They are made by the Tribunals Procedure Committee, a body established under s. 22 of the TCEA 2007 and supplemented by Practice Directions. The Upper Tribunal is a Superior Court of Record and so its decisions have the same authority as the High Court³ and onward appeal lies, on a point of law and with permission, to the Court of Appeal. There has been some interesting litigation about the status of the Upper Tribunal and its amenability to judicial review⁴.
- 1.5. The Constitutional Reform Act 2005 confirmed in statutory form the constitutional guarantee of independence to the judiciary and the TCEA 2007 then extended that guarantee to the tribunals judiciary. The Tribunal Service and the Courts Service have since merged (into HMCTS) and we now share administration and estates with the courts. The Crime and Courts Act 2013 gives the Lord Chief Justice power to deploy Tribunals judiciary into courts.

¹ <http://www.justice.gov.uk/downloads/publications/corporate-reports/hmcts/2013/hmcts-annual-report-2012-13.pdf?type=Finjan-Download&slot=00000104&id=00000503&location=0A64020D>

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162468/high-court-chancery-division-chp5-2011.xls.xls

³ *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC)

⁴ *R (on the application of Cart) v The Upper Tribunal* [2011] UKSC 28.

1.6. The TCEA reforms did not amend the types of cases that could be heard in the charity jurisdiction, or alter its territorial jurisdiction (England and Wales) but they did involve some other important changes. Of particular benefit in the reformed structure was the creation of the Upper Tribunal which can hear appropriate cases at first instance and also hears appeals from decisions of the First-tier Tribunal. The Upper Tribunal is constituted as a Superior Court of Record by virtue of TCEA s 3(5). The High Court therefore no longer has any appellate role in relation to the work now carried out by the First-tier Tribunal (save in cases where it might be amenable to judicial review).

1.7 One other important change is that, under the TCEA reforms, applications for judicial review of decisions of the Charity Commission may now be transferred from the Administrative Court to the Upper Tribunal (Tax and Chancery Chamber) by virtue of s 31A of the Senior Courts Act 1981. So, on the first reference made by the Attorney General and heard in the Upper Tribunal, (concerning independent schools) , a simultaneous judicial review application raising similar issues was transferred from the Administrative Court to the Upper Tribunal so that the two cases would be heard together.⁵ This reform may be seen to impact upon cases where there is no right of appeal to the Tribunal under the provisions of what is now schedule 6 to the Charities Act 2011, but where there is a basis for applying for judicial review of the Charity Commission's decision. Such an application is now likely to be heard in the Upper Tribunal.

2. Jurisdiction in Charity Cases – Appeals, Reviews and References

2.1 The architecture of the charity jurisdiction is now provided by section 315 and schedule 6 to the Charities Act 2011. In summary, there are three distinct types of application which may be made to the Tribunal: appeals, reviews and references.

2.2 Appeals involve substantive re-hearings of certain decisions, directions or orders of the Charity Commission.

“319 Appeals: general

(1) Except in the case of a reviewable matter (see section 322) an appeal may be brought to the Tribunal against any decision, direction or order mentioned in column 1 of Schedule 6.

(2) Such an appeal may be brought by—

(a) the Attorney General, or

(b) any person specified in the corresponding entry in column 2 of Schedule 6.

(3) The Commission is to be the respondent to such an appeal.

(4) In determining such an appeal the Tribunal—

(a) must consider afresh the decision, direction or order appealed against, and

⁵ *R (Independent Schools Council) v Charity Commission for England and Wales* [2011] UKUT 421 (TCC)

(b) may take into account evidence which was not available to the Commission.

(5) The Tribunal may—

(a) dismiss the appeal, or

(b) if it allows the appeal, exercise any power specified in the corresponding entry in column 3 of Schedule 6.”

2.3 Reviews are for certain decisions which are not capable of a substantive re-hearing by way of appeal, but involve a review by the Tribunal, applying the principles that the High Court would apply on an application for judicial review – so including issues of procedural fairness, human rights, proportionality and so forth. Reviewable matters are those set out in section 322(2) of the 2011 Act but they still appear in schedule 6 so you have to double-check.

“321 Reviews

(1) An application may be made to the Tribunal for the review of a reviewable matter.

(2) Such an application may be made by—

(a) the Attorney General, or

(b) any person mentioned in the entry in column 2 of Schedule 6 which corresponds to the entry in column 1 which relates to the reviewable matter.

(3) The Commission is to be the respondent to such an application.

(4) In determining such an application the Tribunal must apply the principles which would be applied by the High Court on an application for judicial review.

(5) The Tribunal may—

(a) dismiss the application, or

(b) if it allows the application, exercise any power mentioned in the entry in column 3 of Schedule 6 which corresponds to the entry in column 1 which relates to the reviewable matter.

322 Reviewable matters

(1) In this Chapter references to reviewable matters are to—

(a) decisions to which subsection (2) applies, and

(b) orders to which subsection (3) applies.

(2) This subsection applies to decisions of the Commission—

(a) to institute an inquiry under section 46 with regard to a particular institution;

(b) to institute an inquiry under section 46 with regard to a class of institutions;

(c) not to make a common investment scheme under section 96;

(d)not to make a common deposit scheme under section 100;

(e)not to make an order under section 105 (power to authorise dealings with charity property etc.) in relation to a charity;

(f)not to make an order under section 117 (restrictions on dispositions of land) in relation to land held by or in trust for a charity;

(g)not to make an order under section 124 (restrictions on mortgages) in relation to a mortgage of land held by or in trust for a charity.

(3)This subsection applies to an order made by the Commission under section 147(2) (investigation and audit) in relation to a charitable company.”

2.4 Schedule 6 to the 2011 Act tells you in column 1 what decisions can be appealed (or reviewed), in column two, who can appeal them, and in column three, what the Tribunal can do if the appeal is upheld. There are about fifty decisions listed⁶, here is a small extract from the schedule:

“SCHEDULE 6 APPEALS AND APPLICATIONS TO TRIBUNAL

1 Decision, direction or order	2 Appellants/applicants (see sections 319(2)(b) and 321(2)(b))	3 Tribunal powers if appeal or application allowed
<i>Decision of the Commission not to give a direction under section 12(1) or (2) in relation to an institution or a charity.</i>	<i>The persons are the trustees of the institution or charity concerned.</i>	<i>Power to quash the decision and (if appropriate) remit the matter to the Commission.</i>
<i>Decision of the Commission under section 30 or 34—</i> (a) <i>to enter or not to enter an institution in the register of charities, or</i> (b) <i>to remove or not to remove an institution from the register.</i>	<i>The persons are—</i> (a) <i>the persons who are or claim to be the charity trustees of the institution,</i> (b) <i>(if a body corporate) the institution itself, and</i>	<i>Power to quash the decision and (if appropriate)—</i> (a) <i>remit the matter to the Commission;</i> (b) <i>direct the Commission to rectify the register.</i>

⁶ The schedule was amended by The Charitable Incorporated Organisations (Consequential Amendments) Order 2012 to add new appeal rights in respect of CIOs – see <http://www.legislation.gov.uk/uksi/2012/3014/article/8/made>

1 Decision, direction or order	2 Appellants/applicants (see sections 319(2)(b) and 321(2)(b))	3 Tribunal powers if appeal or application allowed
Decision of the Commission not to make a determination under section 38(3) in relation to particular information contained in the register.	<p>(c) any other person who is or may be affected by the decision.</p> <p>The persons are—</p> <p>(a) the charity trustees of the charity to which the information relates,</p> <p>(b) (if a body corporate) the charity itself, and</p> <p>(c) any other person who is or may be affected by the decision.</p>	Power to quash the decision and (if appropriate) remit the matter to the Commission.

2.5 The Tribunal may, if it upholds an appeal, exercise the powers in column three of schedule 6. Section 323 clarifies what is meant by “remit the matter to the Commission”.

323 Remission of matters to Commission

References in column 3 of Schedule 6 to the power to remit a matter to the Commission are to the power to remit the matter—

(a) generally, or

(b) for determination in accordance with a finding made or direction given by the Tribunal”.

2.6 References are matters referred to the Tribunal by the Attorney General (or, with his consent, the Charity Commission) to clarify charity law. This is a novel procedure, designed to settle questions of general importance without the need for individual charities to litigate. It is effectively a declaratory jurisdiction, perhaps most closely analogous to the availability of an “advisory opinion” in judicial review proceedings, in which the tribunal is asked to answer hypothetical questions but in which the charities affected by the proceedings can apply to be heard.

“326 References by Attorney General

(1)A question which involves—

(a)the operation of charity law in any respect, or

(b)the application of charity law to a particular state of affairs,

may be referred to the Tribunal by the Attorney General if the Attorney General considers it desirable to refer the question to the Tribunal.

(2)The Attorney General is to be a party to proceedings before the Tribunal on the reference.

(3)The following are entitled to be parties to proceedings before the Tribunal on the reference—

(a)the Commission, and

(b)with the Tribunal’s permission—

(i)the charity trustees of any charity which is likely to be affected by the Tribunal’s decision on the reference,

(ii)any such charity which is a body corporate, and

(iii)any other person who is likely to be so affected.

331 Interpretation

(1)In this Chapter—

“charity law” means—

(a)any enactment contained in, or made under, this Act or the Charities Act 2006,

(b)any other enactment specified in regulations made by the Minister, and

(c) any rule of law which relates to charities.....”

2.7 In the References so far, heard in the Upper Tribunal⁷, there has been a rather democratic and inclusive process adopted so that the reference was published on the internet and charities who might be affected by it were able to make submissions or apply to join as parties. Under the old system in the Chancery Division, the court decided the issue on the basis of the evidence and argument adduced by the parties only, but a reference allows for “public interest interventions” by a wider group of charities. We heard from about 40 charities in the benevolent funds reference. Some of them instructed lawyers, some of them

⁷ See section 5 of these notes for details.

clubbed together in groups to instruct lawyers, some of them basically wrote us letters and did not appear. All the documents and some further information about references is available on the tribunal's website.

3 Tribunal Practice and Procedure

3.1 Charity cases are managed under the *Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009* (UK) SI 2009/1976 (as amended) in the First-tier and under the *Tribunal Procedure (Upper Tribunal) Rules 2008* (UK) SI 2008/2698 in the Upper Tribunal. These rules are made and amended by the Tribunals Procedure Committee⁸ and laid before Parliament so that they are finalised as statutory instruments. They are designed to provide for generic case management across the range of jurisdictions in each of the Chambers. This means that (apart from one or two bespoke provisions) they are not charity-specific. It is not necessary to exhaust the Charity Commission's internal review process prior to applying to the tribunal: the making of an appealable or reviewable decision gives right to the statutory right of appeal.

3.2 The procedural rules for charity cases are published on the tribunal's website here: <http://www.justice.gov.uk/tribunals/charity/rules-and-legislation> and for Upper Tribunal cases here: <http://www.justice.gov.uk/tribunals/tax-and-chancery-upper-tribunal/rules-and-legislation>

3.3 There is a growing body of jurisprudence about how tribunals do their work and how the procedural rules are to be interpreted and applied. There is a digest of Upper Tribunal decisions on procedure here: <http://www.judiciary.gov.uk/media/tribunal-decisions/digest-of-procedural-decisions.htm>.

3.4 First-tier decisions turn on their own facts and have no precedent value. Upper Tribunal decisions create binding precedent for the First-tier. There is a hierarchy of decision-making within the Upper Tribunal so that the decision of a three judge panel takes precedence over the decision of a single Judge: [Dorset Healthcare NHS Foundation Trust v M H \[2009\] UKUT 4 \(AAC\)](#).

3.5 The procedure rules include an overriding objective at rule 2:

“Overriding objective and parties’ obligation to co-operate with the tribunal
2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
(2) Dealing with a case fairly and justly includes—
(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

⁸. See <http://www.justice.gov.uk/about/tribunal-procedure-committee>

- (3) The Tribunal must seek to give effect to the overriding objective when it—*
(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.
(4) Parties must—
(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally”.

3.6 All of the tribunal’s case management powers are to be interpreted in a manner consistent with the overriding objective. The parties must consider the overriding objective in their dealings with each other too: [Dorset Healthcare NHS Foundation Trust v M H \[2009\] UKUT 4 \(AAC\)](#), (Three Judge Panel). The Tribunal interpreted this at paragraph 13 as:

"an express obligation upon the parties to assist in the furtherance of the objective of dealing with cases fairly and justly, which includes the avoidance of unnecessary applications and unnecessary delay. That requires parties to cooperate and liaise with each other concerning procedural matters, with a view to agreeing a procedural course promptly where they are able to do so, before making any application to the tribunal. This is particularly to be expected where parties have legal representation. Parties should endeavour to agree disclosure issues without the need for the tribunal to make a ruling. However, even where a direction from the tribunal may be requiredit will assist the tribunal to further the overriding objective if the parties can identify any directions they are able to agree, subject to the approval of the tribunal. Where they are unable to agree every aspect, this liaison will at least have the advantage of crystallising their positions, and more clearly identifying the issue(s) upon which the tribunal will have to rule".

3.7 The journey of a case through the tribunal is considered in the next section.

4 Bringing a Case

- 4.1 Each tribunal case commences with the filing of a Notice of Application. This can be downloaded from the Tribunal’s website here: http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=2800
- 4.2 In the General Regulatory Chamber Rules rule 26, an appeal in a charity case is required to be filed no later than 42 days after the Charity Commission’s decision was sent to the appellant or was published. The tribunal has power to extend the time allowed and to allow appeals made out of time to proceed.
- 4.3 The application must be accompanied by a copy of the decision the appellant seeks to appeal and a copy of the Notice and the accompanying documents must be copied to the Charity Commission when they are sent to the tribunal.
- 4.4 The Charity Commission then has 28 days to file its response to the appeal (rule 27). When responding, the Charity Commission must provide a list of the documents it relied upon when reaching its decision and *“any other documents which the respondent considers could adversely affect its case or support the appellant’s case”* (rule 27 (5)).

- 4.5 The appellant then has discretion to file a Reply to the Response within 28 days (rule 28) but need not do so. If a reply is filed then the Commission has 14 days to make any secondary disclosure (rule 29 (1)).
- 4.6 This is the standard procedural framework for the pre-hearing phase, but it can be shortened or lengthened by application to the tribunal. The requirement for the Charity Commission to make disclosure is a significant feature which is absent from the Charity Commission's internal review process and a compelling reason for commencing tribunal proceedings. There is no reason why discussions with the Charity Commission should not continue after an appeal is lodged if both sides are amenable to this. Parties often ask for the case to be "stayed" for a period to give themselves more time for fruitful discussions. If the case is settled then the appeal can be withdrawn (rule 17) or a consent order can be filed (rule 37).
- 4.7 Once the pre-hearing phase is complete there is usually a short directions hearing (often conducted by telephone conference) to iron out the details of how the case is to proceed. This might include:
- Identification of the issues in dispute;
 - Setting a timetable for the preparation of a bundle for the tribunal;
 - Deciding whether there is to be an oral hearing or determination on the papers only (if both sides agree);
 - Considering whether there is to be any live witness evidence;
 - Preparation of a bundle of legal authorities;
 - Agreeing a time estimate and hearing date.
- 4.8 A date will be set for the final hearing at a venue convenient to the parties. We use a wide range of court and tribunals buildings in England and Wales. Hearings are usually in public so anyone can come and watch. A final hearing is usually heard by a panel of three, including a Judge and lay members. Some procedural hearings may be heard by a Judge only. We often ask the Charity Commission to present its case first so that the appellant can present a focussed case in reply. Sometimes it is possible for a decision to be given on the day but more often the panel will want to think about the case further and issue a decision by e mail in a couple of weeks. We aim to take no more than 30 weeks from the date of receipt of the Notice of Application to the date on which we send out the decision to the parties.
- 4.9 What are the main differences of litigating in the Tribunal rather than in the High Court? A consistent feature of the First-tier tribunal is that it has virtually no lawyers appearing in it, apart from in mental health cases where the liberty of the subject is at stake and legal aid is available. The charity jurisdiction has proved something of an exception to this rule for debateable reasons. The Tribunal welcomes litigants in person but cannot insist on there being either representation or no representation before it – that is properly a matter for the parties.

4.10 Tribunals are procedurally less formal than courts, there is no fancy dress and the panel are simply called “madam” or “sir”. There are no formal rules of evidence so that we can hear evidence that would not be admissible in a civil trial before the courts. There is no costs shifting, the environment is generally costs neutral, with each party bearing their own costs (if any). There are no fees to pay for using the tribunal, and the Notice of Application can simply be lodged by e mail. We do most of our pre-hearing work by e mail and telephone conference. The expectation is that the parties will co-operate with each other and with the tribunal so that there will not be an adversarial environment or tactical games employed. We can issue our decisions on the basis of written submissions only and without holding an oral hearing (if both parties agree). The format of our decisions differs from the courts too, there are no individual judgements but only the decision of the panel. We do not convene a hearing to hand a judgement down, but send it out to the parties and put it on the internet. In the Upper Tribunal cases so far we have issued a summary of the decision along with the formal decision. We don’t do that in First-tier cases as they have no precedent value. All of our decisions and the register of cases is available on our website, together with lots of useful information. See <http://www.justice.gov.uk/tribunals/charity>

5. What type of Cases has the Tribunal heard?

5.1 There follows a brief summary of some cases the tribunal has decided, highlighting some themes. All decisions are published on the website here:

<http://www.charity.tribunals.gov.uk/decisions.htm>

Statutory Inquiries:

Mr Seevaratnam appealed against the Charity Commission’s removal of him from his position as charity trustee. The case involved allegations that he had inappropriately supported an organisation which was proscribed under anti-terrorism legislation. The Tribunal restored him to his position as charity trustee.

Regulatory Issues:

Catholic Care is a Catholic voluntary adoption agency which appealed to the Tribunal against the Charity Commission’s refusal of consent for it to amend its objects. It wished to amend its objects in order to fall within an exemption for charities to the Equality Act 2010 so as not to be required to offer adoption services to same sex couples or to single people. The Tribunal refused its application (its appeal to the Upper Tribunal is pending).

Mr Ground and others were beneficiaries of a charity which comprised a disused village school. The Charity Commission had made a cy-près scheme providing alternative uses for the building. The Tribunal amended the Charity Commission’s scheme.

Registration:

Full Fact applied for registration as a charity but was refused by the Charity Commission on the basis that its objects were not exclusively charitable. The Tribunal agreed with the Charity Commission and refused the appeal.

References:

The Independent Schools Council sought judicial review of the Charity Commission's guidance in relation to the public benefit test. This was transferred from the Administrative Court to the Upper Tribunal (Tax and Chancery Chamber) and joined with the Attorney General's reference so that they would be heard together. The Upper Tribunal answered a number of questions about a hypothetical school in determining the reference. The Charity Commission withdrew parts of the guidance which the Tribunal had found to be incorrect. This decision is reported as *See R (Independent Schools Council) v Charity Commission for England and Wales* [2011] UKUT 421 (TCC).

The Attorney General referred to the Tribunal a number of questions about the charitable status of charities for the relief of poverty which require their beneficiaries to be connected by either familial relationship, profession or employment, or membership of an unincorporated association. The Tribunal answered the questions and confirmed that such charities meet the public benefit requirement for the relief of poverty. This decision is reported as *Charity Commission for England and Wales v Trustees of the Professional Footballers' Association Benevolent Fund and Others* [2012] UKUT 420 (TCC).

6. Reform of the Tribunal

- 6.1 As a serving Judge I do not endorse any particular legislative proposals. I am happy to comment on what works well and not so well in practice but I must leave the legislative solutions to others.
- 6.2 The Charities Act 2006 (which has since been consolidated with other legislation into the Charities Act 2011) included provision for a report to Parliament on its operation after five years. Lord Hodgson of Astley Abbotts was appointed to review the Act in 2011 and published his report in July 2012. The Hodgson Report can be found here: <https://www.gov.uk/government/consultations/charities-act-2006-review>. Lord Hodgson's Report was considered by the Public Administration Select Committee, which heard evidence and published its report in May 2013, available at: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/76/7602.htm>
- 6.3 Some of the recommendations in the Hodgson Report now form part of a Law Commission project on charity law, which commenced in March 2013 and is due to report in March 2014. It is envisaged that resulting legislation would be in 2016. See <http://lawcommission.justice.gov.uk/areas/charity-law.htm>
- 6.4 The Law Commission Project is to consider:

(1) whether the Tribunal should have the power (currently held by the

Charity Commission) to authorise expenditure on proceedings before it;

(2) the procedure for references by the Charity Commission to the Tribunal;

(3) whether the rules relating to references to the Tribunal should be amended to include a list of powers exercisable by the Tribunal on determining a reference, including the power to award certain remedies;

(4) whether the Tribunal should be empowered to suspend the effects of a Commission scheme or decision pending the determination of a case.

6.5 The other recommendations concerning the Tribunal in the Hodgson report are as follows:

“3. Schedule 6 to the Charities Act 2011 should be removed and the jurisdiction of the Tribunal reformulated on the face of the legislation as:

a. A right of appeal against any legal decision of the Commission

b. A right of review of any other decision of the Commission

4. Those who should have standing before the Tribunal to appeal or seek a review should be (i) the charity (if it is a body corporate); (ii) the charity trustees; (iii) any other person affected by the decision, order, direction, determination or decision not to act, as the case may be.

5. The Charity Commission and Tribunal should work together to produce and agree guidance as to the scope of the Tribunal’s jurisdiction and when a claim can be brought (including interventions by interested parties in reference cases).

6. The time limit for bringing a Tribunal case should be extended to four months.

7. Responsibility for making decisions on appropriate use of funds in specific litigation should be transferred to the Tribunal.

8. The Charity Commission should be given the power to make references to the Tribunal without the need for the Attorney General’s permission, provided they notify the Attorney of any references they make and the Attorney retains the right to become a party to the case.

9. The Tribunal should consider whether there are any further ways in which it could use its caseload management powers to simplify proceedings, make them less adversarial and dispose of cases rapidly. Parties should be encouraged to deal with cases without an oral hearing where appropriate.

10. The Tribunal should consider the value of including in each of its judgments a plain English summary of the key points and decisions, to aid understanding of the law.

11. The Government should consider ways in which the Tribunal could be empowered to take account of changing social and economic circumstances as well as case law precedents. “

- 6.6 The Government’s Response to both the Hodgson Report and the PASC report is expected soon.

Further Reading:

“The Charity Tribunal: How it Works and How You Can Use It”, NCVO 2013

“Tribunal Practice and Procedure” (2nd Edition) Edward Jacobs, Legal Action Group 2011

“Should the Charity Tribunal be Reformed?” Alison McKenna, Charity Law and Practice Review 2011

“The First-tier Tribunal (Charity): Enhanced Access to Justice for Charities or a Case of David versus Goliath?” Debra Morris Civil Justice Quarterly volume 29, number 4, 2010

“Tribunal Justice: a New Start” Robert Carnwath, Public Law 2009

“Transforming Tribunals: The Reform of the Charity Tribunal by the Tribunals Courts and Enforcement Act 2007” Alison McKenna, Charity Law and Practice Review 2009

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