TRANSFORMING TRIBUNALS: THE REFORM OF THE CHARITY TRIBUNAL BY THE TRIBUNALS COURTS AND ENFORCEMENT ACT 2007

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Introduction

The legislation creating the Charity Tribunal[2] and making other significant reforms of charity law and regulation was enacted as the Charities Act 2006, after a rather bumpy ride through Parliament. Running alongside it for much of the Parliamentary process was an equally significant piece of legislation, albeit less well known within the charity sector. This was the Tribunals Courts and Enforcement Act 2007 ("TCEA"). This article explains how the Charity Tribunal will be reformed by TCEA, considers the opportunities that reform creates, and details the current consultation on new procedural rules for charity cases[3].

An examination of the evidence presented to Parliament during the lengthy passage of the Charities Bill reveals a two-fold policy rationale for the introduction of the Charity Tribunal. Firstly, to tackle the problem that many charities identified, whereby they felt they could not challenge the Charity Commission because it was too expensive for them to bring a case in the High Court. The second policy objective arose from the concern expressed at the paucity of charity cases being brought in the High Court. It was said that this was causing charity law to ossify at

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2 The Charity Tribunal has jurisdiction in England and Wales only as charity law and regulation is devolved in both Scotland and Northern Ireland. The Tribunal has jurisdiction in respect of decisions, orders or directions of the Charity Commission made on or after 18th March 2008.

3 See www.tribunals.gov.uk/Tribunals/PlannedChanges/grcconsultation.htm.
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a time when, more than ever, it needed to keep place with the changing role of charities in society.

During the passage of the 2006 Act, Members of both Houses of Parliament and a number of the witnesses at the Joint Committee hearings argued that public funding should be made available to charities to enable them to bring meritorious test cases in the High Court. The Government decided not to make such funding available and looked instead at other solutions to the second problem.

The 2006 Act's approach to the first area of concern was to provide charities with swift, low-cost access to justice in the form of a dedicated Charity Tribunal. This initiative, together with reform to the Charity Commission itself, was designed to ensure that the Charity Commission was seen as a truly accountable regulator. In relation to the second area of concern, the 2006 Act provides a number of scenarios in which the Attorney General, as the constitutional protector of charity, plays an enhanced role in order to assist with the clarification and development of charity law, most notably though her ability to refer general matters of charity law to the Tribunal for determination.

I am sure I was not alone in wondering how the Charity Tribunal would be able to combine the twin objectives. On the one hand it was supposed to offer charities an appeal forum characterised by procedural informality and a high degree of involvement by litigants in person. On the other, it was supposed to provide a forum for the development of the technical and legalistic area of charity law. The two objectives did not appear to be particularly comfortable bed-fellows, especially as the Charity Tribunal was not established as a superior court of record and so could not itself set legally binding precedent.

It now seems to me that the answer to the conundrum lies not with the original Tribunal created by the 2006 Act, but rather in the Tribunal as it will be re-fashioned by the reform of the whole tribunal system under TCEA. In a way not envisaged by the 2006 Act, the reforms will enable the twin policy objectives to be addressed by providing access to a two-tier judicial forum which offers the procedural informality of the First-tier Tribunal for most cases, but also access to the new Upper Tribunal, able to decide complex matters of law and set precedent for cases raising novel points of law. Both tiers will be characteristic of tribunals in that they will offer low cost, speedy access to a forum comprised of experts. However, it seems to me that the key opportunity offered by the TCEA reforms is the ability to take advantage of the flexibility provided by the two-tier system.

Jurisdiction of the Charity Tribunal

Before considering the TCEA reforms, it is important to emphasise here that the fundamental jurisdiction of the Charity Tribunal is unaffected by TCEA. That jurisdiction is established as follows:

Section 2A(4) of the Charities Act1993[4] provides that

> *"The Tribunal shall have jurisdiction to hear and determine—*
>
> *(a) such appeals and applications as may be made to the Tribunal in accordance with Schedule 1C to this Act, or any other enactment, in respect of decisions, orders or directions of the Commission, and*
>
> *(b) such matters as may be referred to the Tribunal in accordance with Schedule 1D to this Act by the Commission or the Attorney General".*

There are therefore (and will continue to be) three distinct types of application which may be made to the Tribunal[5]. These might briefly be described as:

(i) Appeals, being appeals against certain decisions, orders or directions of the Charity Commission as set out in a table in Schedule 1C to the 1993 Act. The table tells you what decisions can be appealed, who can appeal them, and what the Tribunal can do if the appeal is upheld;

(ii) Reviews, being the few decisions which are not capable of appeal, but in respect of which there is a right to review by the Tribunal, applying the principles that the High Court would apply on an application for judicial review[6];

(iii) References, which are matters referred to the Tribunal by the Attorney General (or, with her consent, the Charity Commission) to clarify matters of charity law.

In respect of the first type of case, schedule 1C to the 1993 Act provides that the Charity Tribunal must "*consider afresh the decision direction or order appealed against*", and may hear evidence which was not available to the Commission. In

4 References to the Charities Act 1993 are to that Act as amended by the Charities Act 2006.

5 The Charity Tribunal has a dedicated web site at www.charity.tribunals.gov.uk where the legislation, Rules, forms and explanatory notes can be found.

6 For reviewable matters, see Charities Act 1993 Schedule 1C paragraphs 3 and 4.

considering the nature of this jurisdiction in our first case[7], the Tribunal was assisted by Lord Justice May's comments in *E.I. Du Pont Nemours & Co v S.T. Du Pont:*[8]

> *"…the scope of a rehearing …will normally approximate to that of a rehearing "in the fullest sense of the word" such as Brooke LJ referred to in Tanfern's case [2000] 1 WLR 131, para 31. On such a rehearing the court will hear the case again. It will if necessary hear evidence again and may well admit fresh evidence. It will reach a fresh decision unconstrained by the decision of the lower court, although it will give to the decision of the lower court the weight that it deserves".*

An appeal to the Charity Tribunal is therefore by way of a substantive re-hearing rather than a procedural review of the original decision. The powers which the Tribunal may exercise if allowing such an appeal vary according to the nature of the original decision direction or order appealed against. It is therefore important to check the schedule 1C table to confirm the applicable regime in each case. In a number of instances the Charity Tribunal is given the power to quash the Commission's decision and remit the matter for a fresh determination by the Charity Commission, either generally or for determination in accordance with a finding made or direction given by the Tribunal[9].

In contrast, applications for review will involve the Tribunal in a consideration of the Charity Commission's decision-making processes, applying judicial review principles. There are only a small number of reviewable matters in the 2006 Act, however they concern some potentially contentious areas of operation, for example decisions by the Commission not to make orders under ss.26, 36 and 38 of the 1993 Act. It is important to note that reviews under the 2006 Act are not in fact judicial reviews, but rather another type of review, applying judicial review principles. This judicial-review-type power appears in the enabling legislation for a number of tribunals (for example the Competition Appeal Tribunal applies judicial review principles in proceedings under Enterprise Act 2002[10]). As the power is also exercised by the new Upper Tribunal under s.15(4) TCEA, (where it is referred to as a "judicial review" jurisdiction, complete with inverted commas[11]) it is perhaps

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7 The Tribunal's decisions are published at http://www.charity.tribunals.gov.uk/decisions.htm

8 [2006] 1 WLR 2793 at paragraph 96.

9 See Schedule 1C paragraph 5.

10 http://www.catribunal.org.uk/242/About-the-Tribunal.html

11 The Upper Tribunal's "judicial review" jurisdiction under s.15 TCEA is distinct from its jurisdiction in relation to judicial review applications transferred to the Upper Tribunal from the Administrative Court under s.19 TCEA.

likely that case law as to the exercise of that jurisdiction will emerge in the not too distant future[12].

The role of the Attorney General in charity cases is undisturbed by the TCEA reforms. This is one of the more unusual jurisdictional features of the Charity Tribunal and potentially a significant tool in considering how precedent-setting charity law cases might come to be decided. Although the reference procedure is most often highlighted in this regard, there are in fact a number of ways in which the Attorney General might become involved in proceedings before the Tribunal to argue a novel point:

(i) The Attorney General (or with her consent, the Charity Commission) may refer to the Tribunal any question "*involving the operation of charity law in any respect or the application of charity law to a particular state of affairs"*[13]. The Tribunal has the power to join other parties to references, for example charities operating in the jurisdictional area in question. "*Charity law*" for these purposes means the 1993 and 2006 Acts and any other enactment specified in regulations made by the Minister, and any rule of law which relates to charities. "Enactment" includes subordinate legislation[14];

(ii) The Attorney General may herself instigate appeals and reviews of decisions and may intervene (whether at her own instigation, that of the Tribunal – either of the Tribunal's own motion or on the application of one of the parties - or that of the High Court on appeal from the Tribunal[15]) in Appeals and Reviews commenced by others;

(iii) The Attorney General can also be joined as a party to any onward appeal from the Tribunal to the High Court, whether or not she was a party to the original proceedings before the Tribunal[16];

(iv) The Attorney General can also be asked to "assist" the Tribunal with any question arising in proceedings, without participating in the whole case[17].

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12 Decisions of the Upper Tribunal are reported at http://www.bailii.org/uk/cases/UKUT/AAC/2009/

13 See Charities Act 1993, Schedule 1D paragraph 2.

14 See Charities Act 1993, Schedule 1D paragraph 7.

15 N.B After the TCEA reforms take effect, onward appeals in charity cases will be heard in the Upper Tribunal rather than the High Court.

16 See Charities Act 1993, s.2C(1) and (5)(a).

17 See Charities Act 1993 s.2D (4).

Before the advent of the Charity Tribunal, when charity appeals were heard in the High Court under the Civil Procedure Rules ("CPR"), the Attorney General was a necessary party to appeals concerning s. 4 of the 1993 Act (registration), s.16 (schemes) and s. 18 (suspension and removal of trustees). The CPR provisions are not replicated in the Charity Tribunal Rules[18]; however the Attorney General has expressed an interest in being notified of any such cases before the Tribunal, via the Treasury Solicitor. I have respectfully suggested to the Attorney General's Office that it might clarify on its website the procedure for charities seeking to involve her in any other cases.[19] Whilst I am sure that charities "in the know" will feel able to petition the Attorney General to become involved in their cases or to make references to the Tribunal on general matters of importance to the sector, I am concerned that the average charity may not know how to go about involving her without more information being put into the public domain.

In the few cases that the Charity Tribunal has heard so far, the Attorney General has intervened (at the instigation of the Tribunal) in one case and offered assistance to the Tribunal in another. The involvement of the Attorney General has proved extremely useful to the Tribunal thus far, but it is, as yet, difficult to predict how frequently her powers will be exercised.

Tribunals Reform

The need to reform the tribunal system was highlighted by Sir Andrew Leggatt's 2001 Report *Tribunals for Users: One System, One Service*,[20] which found that more than 60 tribunals had grown up in an almost entirely haphazard way and were operating essentially in parallel, without either common administrative procedures or a shared jurisprudential approach. In many instances, tribunals were perceived as part of the Executive rather than part of the civil justice framework, and were not truly independent of the public authority whose decisions they reviewed.

Leggatt argued that Tribunals should be seen as providing a valuable and distinctive approach to the resolution of disputes. He suggested that certain types of dispute might in fact be better dealt with by Tribunals than by the Court system, as "tribunals *can be particularly effective in dealing with the mixture of fact and law often required to consider decisions taken by administrative or regulatory authorities*". Leggatt identified particular advantages to the tribunal user from the provision of a forum for adjudication by a panel of experts. For example: "…*where the civil courts require expert opinion on the facts of the case, they generally rely on*

18 See http://www.charity.tribunals.gov.uk/ruleslegislation.htm

19 See http://www.attorneygeneral.gov.uk/sub_our_role_work.htm

20 See http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm

the evidence produced by the parties…[but] Tribunals offer a different opportunity, by permitting decisions to be reached by a panel of people with a range of qualifications and expertise". It is easy to see how the quasi-inquisitorial approach taken by the expert tribunal can be more helpful to the unrepresented litigant than the adversarial approach of the Courts[21].

Leggatt also highlighted the fact that the relative procedural informality of tribunals enables a high degree of direct participation by tribunal users. He regarded this as particularly valuable in cases concerning disputes between the citizen and the state. Leggatt argued for resources to be allocated to the development of a discrete, unified tribunals' branch of the civil justice system. The Government accepted his recommendations and the Tribunals Service was established as an Executive Agency of the Ministry of Justice in 2006. The creation of the Tribunals Service provided a distinct administrative system for tribunals. The next phase involved the reform and integration of tribunals' judicial functions under TCEA.

One immediate constitutional change of note arises from TCEA. Tribunals' judiciary now shares the same constitutionally-protected independence as is guaranteed to the Courts judiciary under s.3 of the Constitutional Reform Act 2005[22]. This fact, together with the administrative separation of tribunals from the bodies whose decisions they review, places the tribunal system firmly within the Judicial branch of the constitution rather than within the Executive, giving tribunal users the assurance of truly independent adjudication.

TCEA is largely enabling in nature, with the details contained in subordinate legislation. The Government issued a consultation paper "*Transforming Tribunals*" in November 2007, setting out its detailed proposals for reform, and its response to the consultation was then published on 19th May 2008[23]. Both papers briefly considered the position of the Charity Tribunal. The first tranche of tribunals transferred into the new system on 3rd November 2008, with more to follow shortly.

The end-result of the TCEA reforms is that most (but not all) of the existing tribunal jurisdictions will cease to exist as stand-alone Tribunals and transfer instead into a generic two-tier Tribunal, comprising the First-tier Tribunal and the Upper Tribunal. This has the effect, as noted above, of formally severing the individual jurisdictions from the Government Department or other body which in many cases sponsors them, and whose decisions they review. Both the First-tier Tribunal and the Upper

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21 Tribunals heard nearly 600,000 cases in 2007/8. The subject-matter of these hearings involved asylum and immigration, mental health, benefits and pension entitlement, information rights, and employment claims, to name but a few. See: http://www.tribunals.gov.uk/Tribunals/publications/publications.htm#link3

22 See http://www.opsi.gov.uk/acts/acts2007/ukpga_20070015_en_1

23 Both documents are available on the Ministry of Justice web site www.justice.gov.uk

Tribunal are organised into several judicial/administrative units, known as "Chambers".[24] Each Chamber has a judicial head (the Chamber President), shares some degree of administrative support and operates under generic procedural rules, supported by jurisdiction-specific practice directions where appropriate[25]. The judicial leadership structure is pyramidical, headed by Lord Justice Carnwath as the Senior President of Tribunals. He is supported by the Chamber Presidents, who are in turn supported by Principal Judges for each jurisdiction within the Chamber. The Principal Judges will generally be the former President/Chairman of that jurisdiction when in its previous stand-alone Tribunal incarnation.[26]

The creation of the Upper Tribunal provides a number of opportunities for tribunals generally. It is established as a superior court of record[27] so that its judgements bind the First-tier and the Executive. Furthermore, it is able, like the High Court, to enforce its orders and judgements (and those of the First-tier)[28]. It enjoys the same "*powers, rights, privileges and authority as the High Court"* in respect of matters incidental to its functions[29]. It offers, for the first time in some jurisdictions, a substantive right of appeal rather than a challenge to decision-makers by way of judicial review only. In addition to these appeal rights, TCEA also provides for certain categories of judicial review application to be transferred from the Administrative Court to be heard in the Upper Tribunal[30]. The Lord Chief Justice has issued a Direction identifying the first types of case suitable for this treatment.[31] The composition of the Upper Tribunal will allow cases to be heard by High Court Judges, sitting alongside Upper Tribunal Judges, drawn from the jurisdictional specialisms. Both levels of the Tribunal may also appoint "assessors" if they require specialist expertise not otherwise available to them[32]. Last, but by no means least, the Upper Tribunal provides an important opportunity for the development of a tribunal-specific jurisprudence in respect of the approach and procedures of tribunals, as distinct from the courts[33].

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24 See s.7 TCEA 2007.

25 See s.23 TCEA 2007.

26 See the Senior President's implementation reviews, published at: http://www.tribunals.gov.uk/Tribunals/About/president.htm

27 See s.3(5) TCEA 2007.

28 See s.25 and Schedule 5 paragraph 10 (3) TCEA 2007.

29 See TCEA s.25(2)(c).

30 See s.19 TCEA 2007.

31 See http://www.hmcourts-service.gov.uk/cms/497.htm

32 See s.28 TCEA 2007.

33 For further discussion of this topic see "Tribunal Justice – a New Start" Carnwath LJ [2009] PL 48

Reform of the Charity Tribunal

I will now turn to consider the opportunities that the TCEA reforms offer to the charity jurisdiction in particular. Subject to Parliamentary approval, it is proposed that the Charity Tribunal will transfer into what is known as the General Regulatory Chamber ("GRC") of the First-tier Tribunal in September 2009. Other tribunal jurisdictions transferring into the GRC include the Information Tribunal, Gambling Appeals Tribunal, Consumer Credit Appeals Tribunal, Adjudication Panel for England and Estate Agents Appeal Panel.[34] Onward appeals from decisions of the GRC will generally be heard in the Administrative Appeals Chamber of the Upper Tribunal (with appeals from the Upper Tribunal going straight to the Court of Appeal), however it is proposed that there should now be a "Chancery"[35] Chamber of the Upper Tribunal, created to hear those Upper Tribunal cases in the finance, tax, land and charity jurisdictions. This will allow for the secondment of Chancery Division judiciary to sit in the Upper Tribunal with dedicated Upper Tribunal judges.

As mentioned above, the Charity Tribunal's current procedure is governed by the Charity Tribunal Rules 2008. These rules are due to change in favour of generic procedural rules for the GRC. The rules are currently the subject of a consultation exercise[36] being conducted by the Tribunal Procedure Committee, which has responsibility under s.22 TCEA for the making of "Tribunal Procedure Rules".[37] The consultation asks whether these new rules are appropriate for each jurisdiction, in addition to posing a number of specific questions with regard to the proposed conduct of charity cases in particular. There are also dedicated procedural rules for the Upper Tribunal and the consultation asks whether these will need to be amended for the conduct of hearings by the new "Chancery" Chamber of the Upper Tribunal in due course.

In most cases, the First-tier Tribunal will be the natural starting point for proceedings, with appeal to the Upper Tribunal on a point of law. However, in appropriate cases, it is proposed that proceedings could be transferred so as to be heard at first instance in the Upper Tribunal, with onward appeals on points of law going straight to the Court of Appeal. This flexibility of approach would allow appropriate cases to be "fast-tracked" to a level where precedent could be set for the benefit of the sector as a whole. This approach is specifically permitted by TCEA[38],

34 See the consultation document for the full list of jurisdictions – link at footnote 3 above.

35 This Chamber does not have a definite name as yet.

36 See footnote 3 above.

37 See also TCEA Schedule 5.

38 See s. 30 (1) (c) TCEA 2007.

which allows for the transfer of particular jurisdictions to the First-tier, the Upper Tribunal or both. The procedural arrangements for the transfer have yet to be finalised, being part of the current consultation.

As it would not have been possible to identify and fast-track particular precedent-setting cases to the High Court under the 2006 Act alone, this is an important aspect of the TCEA reforms which could benefit the charity sector as a whole. The current consultation on the GRC Rules asks whether Attorney General's references should always be heard by the Upper Tribunal, and also what the role of the parties should be in considering whether any other case should be fast-tracked in this way.

It must be stressed that for the vast majority of cases, the principle of informal speedy access to justice (our first policy rationale) would be preserved in the First-tier Tribunal; however it seems to me that the ability to fast track certain cases of wider significance to the sector represents a significant development in pursuit of our second objective. This approach could be applied not only to an Attorney General's reference but also to an appeal against a particular Charity Commission decision, brought by an individual charity. The determining factor would be the significance of the point of law or procedure at stake rather than the route by which it reaches the Tribunal. Furthermore, because it is proposed that the first instance jurisdiction in charity cases should be shared between the two tiers of Tribunal, it would also be possible to separate out points of law for an immediate preliminary ruling by the Upper Tribunal, with the ultimate determination of the factual issues being remitted back to the First-tier for determination in accordance with the Upper Tribunal's ruling. The draft rules provide for a high degree of procedural flexibility so that cases in the First-tier (perhaps more likely to involve litigants in person) can avoid unnecessary formality, whereas Upper Tribunal hearings can take a more legalistic form.

In terms of staffing the new system, the present members of the Charity Tribunal (Legal and Ordinary[39]) will transfer into the GRC as Judges and Other Members of the First-tier Tribunal[40]. They will be "ticketed" to sit in the charity jurisdiction. My own role will also evolve, as I shall cease to be the President of the Charity Tribunal and become instead the Principal Judge for Charity Appeals Reviews and References. I will be appointed as a Deputy Judge of the Upper Tribunal, so able to divide my time between the two tiers. There will in future be opportunities for all tribunals' judiciary (legal and lay members) to be "ticketed" to sit in more than one jurisdictional area within the First-tier, or indeed "assigned" to different Chambers, but only if they meet the statutory eligibility requirements for each jurisdiction and there is a business need. This flexible arrangement allows for intelligent deployment of tribunal members but preserves the jurisdictional specialism so important to

39 Currently specified in Schedule1B to the Charities Act 1993.

40 See s.4 TCEA 2007.

charity cases. It does not (as has been misreported elsewhere) mean that non-charity specialists will sit on charity cases. The Upper Tribunal will have a dedicated hearing centre in London but maintain the ability to sit elsewhere if needed. The First- tier Tribunal will sit in various shared tribunal hearing centres in England and Wales, as is currently the case.

In considering the ability of a more flexible tribunal system to meet the original policy objectives, one needs also to consider the inter-relationship between the Charity Commission's internal review procedure and the Tribunal. As noted above, the 2006 Act conferred statutory appeal or review rights in respect of the "decisions, orders or directions" set out in the table to Schedule 1C of the 1993 Act. The concept of a "final decision" of the Charity Commission (i.e. one that had been internally reviewed) appeared later, in the Charity Tribunal Rules. It has been a matter of some debate whether the "final decision" reference in the subordinate legislation should properly be regarded as imposing a mandatory "gateway" which charities must pass through before exercising the statutory right to apply to the Tribunal.

The Charity Commission's own recent Board Paper reviewing the work of its Final Decision Review and Tribunal Team noted that its revised internal review process has been more resource-intensive than anticipated, but that there had not been the level of applications to the Charity Tribunal originally predicted[41]. The paper does not go on to consider the nature of the connection between those two statements, however it seems to me that there may in fact be an important one. Whilst the Board Papers reported that the Charity Commission has resolved a high proportion of disputes through its non-statutory internal appeal system (which has also now been revised to include a form of oral hearing) one needs to consider whether local resolution is necessarily the best option in every case, or whether it could have the effect of containing within the Charity Commission issues which might more appropriately come to the Tribunal. There must be a risk that a lengthy internal process could sap the enthusiasm (and resources) of a charity to the extent that it chose not to go on to access the Tribunal at the end of that process. Furthermore, the settlement of cases on their individual facts could mean that, in some cases, issues of wider significance to the sector do not become more generally known-about. Local resolution may not involve a transparent process for involving other charities or the Attorney General in the resolution of wider issues, and ultimately an opportunity to set helpful new case law for the sector as a whole could thereby be missed.

I am not of course suggesting that there should be no local resolution. I am sure that charities in general appreciate the opportunity to achieve the fastest, cheapest outcome to their case. Yet, at a policy level, there is undoubtedly a balance to be struck between, on the one hand, providing that opportunity to an individual charity

41 See Board Paper No.(09) OBM 05 for meeting on 28 January 2009. Available on http://www.charity-commission.gov.uk/

and, on the other hand, ensuring that charities in general are able to take advantage of statutory appeal rights which were drafted so as to include the wider sector. It must be remembered that the appeal rights in the Schedule 1C table apply in many cases not only to the subject of the original decision but also to "*any other person who is or may be affected*". If the internal review system is an absolute requirement in all cases, it is difficult to avoid the impression that the wider statutory scheme for facilitating the development of charity law could be frustrated in many cases. In operating a mandatory internal review, is it the Charity Commission, rather than the sector, which is determining which cases are taken forward to the Tribunal, and so which cases ultimately provide the basis for a precedent to be set for the benefit of the sector as a whole?

It is perhaps worth bench-marking the operation of the Charity Commission's internal review process against other such systems, for example the revised procedure operated by HMRC and its relationship to the new Tax jurisdiction in the First-tier Tribunal. HMRC has decided to provide tax payers with an optional opportunity to seek local resolution, offering them an internal review which is to be conducted within a strict timetable, unless the tax payer agrees to allow them more time. In cases where the tax payer chooses not to use the internal system or the internal review does not overturn the original decision promptly, the right of appeal to the Tribunal is engaged.[42] It seems to me that this system has much to recommend it.

It may also be the case that the operation of a mandatory "gateway" to the Charity Tribunal has other, less immediate, consequences. In the few Charity Tribunal cases to have been heard so far, observers in the public gallery may have formed the impression that everyone was operating just as if these cases were still being heard in the High Court. If it is only a few cases of a highly technical nature that make it through to a Tribunal hearing (which is then inevitably legalistic in nature), the impression might be gained that charity cases are inherently different from the average tribunal hearing. I am concerned that if we are forced by the nature of the cases we hear to operate in a manner which is as esoteric as proceedings the High Court itself, then we may not be given the opportunity to deliver on the first policy objective identified above.

It is intended that the flexibility of the Tribunal's procedures under the TCEA reforms will in future allow it to decide whether any particular case requires greater informality in the First-tier (enabling meaningful participation by those without lawyers) or alternatively to adopt a more formalistic approach to questions of law in the Upper Tribunal. Yet there must be a risk that we will not be permitted to demonstrate this approach unless there is a greater variety of cases coming through to the Tribunal for determination. If we do not get the opportunity to demonstrate

42 See Customs Information Paper ref: JCCC CIP (09) 10, available on: http://www.hmrc.gov.uk

our flexibility of approach, there is a risk that charities will feel unable to access the Tribunal without lawyers at all. Whilst the recent development of a *pro bono* legal representation scheme for the Charity Tribunal[43] will provide welcome assistance to those charities who cannot afford legal advice, it remains my view that all tribunals should be able to operate in a way which facilitates participation by unrepresented parties. This principle should apply to the charity jurisdiction as to any other.
The current consultation on the GRC rules asks the sector to consider whether the right balance has been struck in the current arrangements, or whether there should be a right for charities to access the Tribunal direct, in appropriate cases, without first using the Commission's own internal review process.

Conclusion

To recap, the policy aims underpinning the establishment of the Charity Tribunal were firstly, to enable charities to challenge the Charity Commission speedily and cheaply; secondly, to provide the sector with an opportunity to clarify and develop charity law.

Although the creation of the stand-alone Charity Tribunal went some way towards these objectives, there are a number of features of the charity jurisdiction as reformed by TCEA which represent significant opportunities for the charity sector. When viewed as a coherent whole, the combination of an appropriate internal review system within the Charity Commission, together with access to the First-tier Tribunal and the Upper Tribunal, should be seen as enhancing the ability of the Tribunal system to deliver against these objectives. In order fully to take advantage of these opportunities, it will necessary for there to be a greater flexibility of approach as between the different levels of hearing.

The current consultation on new procedural rules invites the sector to comment on the proposed mechanisms for ensuring that cases are dealt with at the most appropriate level and in the manner most suitable for each case. The system as a whole has yet to mature, but there is currently an important opportunity to engage in the process of re-shaping the Charity Tribunal to the advantage of the sector as a whole.

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Website: www.charity.tribunals.gov.uk

43 This is operated jointly by the Chancery Bar Association and the Bar Pro Bono Unit. See http://www.charity.tribunals.gov.uk/formsguidance.htm#l9