

## **RESEARCH UPDATE: POLLUTER PAYS MECHANISM IN FIRST-TIER ADMINISTRATIVE TRIBUNALS**

Polluter pays is one of the two research areas which the pro bono panel has been prioritising. Our view is that the introduction of a polluter pays mechanism in the tribunal system is one of the many tools which could help improve first-time decision making by public bodies.

### **Background**

There are two widely accepted aspects of public body decision making which create knock-on costs to HMCTS.

1. The quality of first time decision making could often be improved.<sup>1</sup> A faulty first instance decision often results in a costly appeal for which the initial decision maker does not have to pay. Several tribunals are overturning a high proportion of first-instance decisions. For example, the SEN tribunal is currently overturning around 90% of appeals. While it is true that not all successful appeals result from a faulty first-instance decision, there is widespread concern that some first-instance decision makers have come to see the first-tier tribunal as an extension of first-instance decision making: refusing applications in the knowledge that the tribunal can reverse the decision, rather than genuinely attempting to apply the law in the given case.
2. The government departments whose decisions are being appealed do not always comply with the procedural rules and/or directions of the tribunal.<sup>2</sup> This causes delay and increases the cost to HMCTS of administering the appeal.

### **Polluter pays as part of the solution**

In the current system, first time decision makers are often financially incentivised to refuse applications - e.g. where DWP refuses an application for welfare benefits, it does not have to pay those benefits. If this refusal is made unlawfully and the applicant appeals (in addition to the delay and potential hardship caused to the applicant) the financial cost of rectifying the error is borne by HMCTS and not the first time decision maker.

Introducing a “polluter pays” mechanism would make the current funding model fairer because it would place more of the financial burden on the department in control of the relevant costs. It would also help to incentivise a “right first time” culture.

We do not consider a polluter pays mechanism to be a silver bullet solution to the problem. It is clear that broad cultural change (e.g. by establishing a feedback culture between the tribunals and public bodies and prioritising the quality rather than volume of decisions made) within the relevant government departments and local authorities is

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<sup>1</sup> Administrative Justice & Tribunals Council, *Right First Time*, 2010. (pp.10-14); Robert Thomas, *Administrative justice, better decisions and organisational learning*, Public Law, 2015. (pp3-10); Low Commission, *Tackling the advice deficit: A Strategy for access to advice and legal support on social welfare law in England and Wales*, 2014 (pp28-31).

<sup>2</sup> Robert Thomas, *Administrative Justice and Asylum Appeals*, 2011 (pp[X]).

ultimately key to improving the situation. However, a polluter pays mechanism could play a small but important role in incentivising the adoption of such cultural change.

## Research

We are grateful to the academic panel for guiding us in our research so far, which has focussed on (i) the way in which financial incentives affect organisational behaviour and (ii) financial incentives within the justice system (for example, costs rules). Little empirical research has been carried out with regards the latter, but we have learned from looking at financial incentives in other contexts, such as regulatory fines and sin taxes.

## What has been proposed previously?

There have been a number of previous proposals to introduce a polluter pays mechanism into the tribunal system to redress the misaligned incentives described above. In 2011, the Administrative Justice and Tribunals Council's *Right First Time* report recommended that 'original decision makers should contribute to the costs of running tribunals by direct reference to the actual volumes of appeals. We further believe that the contributions should normally be increased where their decisions are overturned on appeal'.<sup>3</sup> In 2010, the Law Society recommended that 'public authorities, such as UKBA, local authorities and others whose decisions are overturned by courts and tribunals should be required to pay the costs of the claimant to the legal aid fund, together with a surcharge'.<sup>4</sup> This was supported by the Justice Select Committee<sup>5</sup> and by the Low Commission.<sup>6</sup>

## What were the objections?

These proposals have been met with several criticisms. In its response to the LASPO consultation responses, the Ministry of Justice noted that "it would be difficult to apply the principle in cases involving legal advice about a decision of a public body, for example on benefits. It would not necessarily be the case that the initial decision was wrong (it may have been correct, or based on insufficient evidence). Determining who should pay in these cases would be problematic and carry an administrative cost."<sup>7</sup> Another objection to polluter pays raised by the Ministry of Justice was that it constitutes "robbing Peter to Pay Paul" – i.e. no overall costs savings would be made by the public purse as a result of the measure. The ministry also expressed concern that the threat of paying for incorrect decisions would result in public bodies taking a more "risk-averse approach, especially in relation to borderline cases, and have unintended consequences which could drive additional costs".<sup>8</sup>

## Towards a proposal

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<sup>3</sup> Administrative Justice and Tribunals Council, *Right First Time* (2011), pp29-29.

<sup>4</sup> Law Society, *Incentivising better decision making by public bodies* (2015), p.6.

<sup>5</sup> Justice Committee, *The Government's proposed reform of legal aid* (2011), pp26-27.

<sup>6</sup> The Low Commission, *Tackling the advice deficit: A strategy for access to advice and legal support on social welfare law in England and Wales* (2014), pp28-29.

<sup>7</sup> Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government Response* (2011), p.71.

<sup>8</sup> *Ibid*, p.258.

We are currently working on a practical proposal for a polluter pays mechanism which would address some of the concerns outlined above. We consider that any proposed mechanism should depart from the previous proposals in the following key ways.

1. It is not linked to appeal outcome. To incentivise better decision making, we consider that a polluter pays mechanism should only apply to a first-instance decision maker where it (i) makes a decision which is prima facie unlawful (e.g. applied the wrong legal test or failed to take into account relevant available evidence) or (ii) materially breaches the tribunal procedural rules (e.g. fails to comply with tribunal directions).
2. It is formulated as a fee payable to HMCTS rather than a costs order. This would allow HMCTS to recoup unnecessary costs it incurred in running the appeal.

In terms of practical implementation of any proposed mechanism, we think that the following measures would help to achieve the intended effect.

1. The mechanism is trial and evaluated of by way of a pilot carried out in a single tribunal or defined subset of cases within a single tribunal. The pilot could include an initial pre-pilot period during which the tribunal judges would record the cases in which they would impose the new fee were it in force. The rule would then come into force and the number of fees ordered would be recorded and measured against the base line data recorded during the pre-pilot period.
2. The total annual sum payable under the proposed rule is presented by way of letter to the permanent secretary of the relevant department or the CEO of the relevant local authority, and that such letter point out that this sum is on top of the costs already born by that department in being party to the appeal.

### **Other considerations**

We disagree with the argument that a polluter pays mechanism would simply be “Robbing Peter to pay Paul”. Paul has already being robbed; the idea is both to compensate Paul for his loss, and to create a financial incentive to encourage Peter to mend his ways.

It can be argued that appellants also generate unnecessary costs to HMCTS by bringing frivolous / groundless appeals or failing to comply with tribunal directions. However, given the relative resourcing of the parties, and the fact that the administrative tribunal system exists as a check on administrative decisions taken by the executive, we are strongly of the view that it would be inappropriate for the mechanism to apply to appellants - this would risk creating a practical impediment to the statutory right of appeal and undermining access to justice.