

RESPONSE BY

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TO

**THE CONSULTATION PAPER ON REGULATORY APPEALS
PUBLISHED BY THE DEPARTMENT OF THE TAOISEACH IN JULY 2006**

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INTRODUCTION

The purpose of this submission is to provide input into the consultation process based on our practical experience of providing legal advice to regulated entities and regulators.

We have noticed that recent years have seen greater transparency in public bodies' decision-making processes and an increasing preparedness on the part of private organisations and individuals to challenge these decisions. This development has been particularly noticeable in sectors which are subject to regulation and all the more so in markets subject to economic regulation. As we have significant experience representing both regulated entities and regulators in such challenges, we have drawn on this experience in responding to the consultation paper.

Decisions made by regulators can have a significant impact on the addressee(s) of the decision and on other stakeholders in the regulated market. For this reason, high quality and efficient decision making by regulators and by the arbiters of appeals, is essential.

Regulatory decisions can be challenged by way of judicial review in the High Court, statutory appeal to the Courts or in some cases by appeal to a specialist appeal body. This variety of appeal mechanisms and the fact that the various mechanisms are not necessarily mutually exclusive has given rise to a body of procedural and substantive law which applies to regulatory appeals. Left unchecked this web of law and the practices which are developing in relation to regulatory appeals could undermine the aims articulated in the Government White Paper on Better Regulation. We therefore welcome the review of regulatory appeals being conducted by the Department of The Taoiseach.

Rather than respond to all of the questions raised in the consultation paper, we only propose to make submissions on those issues in respect of which we have comments or views to offer based on our practical experience and our knowledge of the approach taken in other jurisdictions. Please also note that as we have experience of advising in a number of regulated sectors ranging from energy to aviation to telecommunications, our comments are not specific to any one sector or regulatory regime unless specifically stated.

EVALUATION OF EXISTING APPEALS MECHANISMS

Question 2 – Are there particular principles which you consider important in evaluating appeals mechanisms? If yes, please specify and comment on whether you consider current appeals provisions satisfy these principles.

The six principles set out in the White Paper, while relevant to some elements of appeal processes, appear to us to be of greater relevance to the process of regulating and introducing new regulatory requirements or regimes. Principles which we believe are of particular relevance to appeal processes are efficiency, quality decision making (which in turn requires appropriate legal and technical expertise), flexibility in procedures and cost effectiveness. In designing appeal processes we believe the legislature should also aim to avoid duplicative processes and should aim to ensure that appeal processes provide finality and certainty for the parties to the appeal.

While some of the existing appeal structures satisfy these principles others do not. For example the efficiency of certain appeals processes is compromised by the fact that when an appeal is initiated, an ad hoc panel must be convened and this can often take a number of months. It is also the case that while appeal panels may have the power to stay a regulatory decision, they are not usually equipped to grant urgent stays or injunctive relief. This can result in a duplication of processes in that parties invoke the jurisdiction of the Courts for urgent relief and subsequently seek to pursue the appeal panel route.

We recognise that the principles described above may at times place conflicting demands on policy makers and legislators and they need to be carefully balanced and tailored having regard to the particular features of each sector.

INTERNATIONAL EXPERIENCE

Question 13 - Are there appeals mechanisms in other jurisdictions which work well and which should be considered in the Irish context? Please supply details.

In this regard, we highlight the UK's proposed Tribunals, Courts and Enforcement Bill 2006. That draft Bill was published for public consultation on 26 July 2006 and, the consultation period having closed, responses received by the UK Department of Constitutional Affairs are now being considered.¹ Nonetheless, to our minds the UK draft Bill would merit close study by the Better Regulation Group, principally because it would streamline and standardise appeals procedures and powers, while ensuring that, in the case of each area that might be the subject of regulation, the appropriate balance is struck between sectoral expertise and judicial oversight (reflected in the current focus on "curial deference"). A similar theme is evident in the Irish Government's White Paper, *Regulating Better*, which considered the possibility of creating a single appeals body.

It seems to us that many of the provisions of the UK draft Bill (so far as it relates to administrative justice generally, and regulatory appeals specifically) have much to recommend themselves to the Better Regulation initiative in Ireland. We have described some of the Bill's key proposals in the attached appendix; however, in synopsis, they are essentially to bring together within a single legal and procedural framework almost all of the current (and any new) administrative law tribunals in the UK, and the personnel who act in judicial or quasi-judicial roles within them. That proposed new arrangement for the organisation of administrative law tribunals would be complemented by the re-constitution of the (current) Council on Tribunals with an Administrative Justice and Tribunals Council, to supervise administrative law tribunals and keep the entire UK administrative justice system as a whole under review, so that it is as accessible, fair and efficient as possible.

¹ The draft Bill appears not to be available on the Department of Constitutional Affairs website since the consultation period ended.

We reiterate our opinion that the reforms that are proposed in the UK draft Bill have much to recommend themselves and that, with careful drafting,² many could inform closely reforms in Ireland also.

ISSUES AND CHALLENGES IN DEVELOPING APPEALS SYSTEMS

Question 16 – Is there scope for using mediation/arbitration as an alternative to formal appeals mechanisms? Are there particular sectors where such alternative approaches could have particular applicability /value?

In our view serious consideration should be given to encouraging the use of mediation to resolve disputes between regulators and regulated entities. In this context policy makers need to bear in mind that mediation is a process which can only be invoked with the agreement of both parties. It is also a process in which the parties themselves reach an agreement, rather than an outcome or decision being imposed on the parties by a third party decision maker.

The features of mediation described above make it particularly suitable for some regulatory appeals and unsuitable for others. Appeals from enforcement decisions of regulators may be amenable to resolution by mediation. For example in cases where an administrative sanction is being imposed on a regulated entity, it may be appropriate to seek to agree the terms of the sanction by way of mediation. In cases where regulators make decisions regarding the granting, revocation or suspension of licences or permits, appeals from such decisions could also be resolved by mediation. In essence where there is a bi-lateral issue to be resolved between a regulator and a regulated entity mediation may present an attractive alternative to the current appeal systems.

In other cases concerning, for example, the regulation of a limited natural resource or price cap regulation within a sector, it may be more difficult to seek to resolve appeals by mediation due to the number of different interests affected.

In our experience regulators are often restricted in their approach to dealing with challenges to their decisions given the public function they discharge and the fact that they operate within a statutory framework. In some cases the restrictions are real and in other cases they are perceived restrictions. If, therefore, a policy decision is made to encourage the use of mediation to resolve regulatory appeals we would recommend that statutory regimes are drafted to reflect this. By recommending this we do not wish to be taken as suggesting that legislative changes are required to pave the way for increased use of mediation. Rather, legislative support for and recognition of mediation as an alternative method of dealing with regulatory appeals, may dispel concerns regarding statutory restrictions on regulators in the realm of appeals.

We would not recommend arbitration as an alternative dispute resolution mechanism for regulatory appeals. In our experience, arbitration has the potential to be a very formal process with little flexibility. It is also likely to be less cost effective than current systems as the parties have to appoint and discharge the costs of an arbitrator.

22. What are the relative merits of a standing appeals body compared with an appeals panel formed for the duration of a particular appeal?

A number of possibilities (expert appeals panel, specialist court, Court advised by expert panel, general court) are raised in relation to the form which an appeal body might take. It is necessary that an appeal body would have both strong independent technical expertise and a strong element of legal expertise and experience. We generally agree with the potential advantages and disadvantages of each model identified at table 4.1 of the consultation paper, although we do not have a strong opinion on whether one model should be preferred. We are inclined to favour a single appeal body over a range of potential ad hoc appeals panels, because we think this would lead to greater consistency in appellate decisions.

² The need for careful drafting would derive primarily from the Constitutional imperative that justice be administered in courts, by judges, subject only to limited exceptions.

However, we do think that decision-making by the courts on technical issues is likely to be better if it is underpinned by availability of expert support (assessors or court-appointed experts, as are exemplified respectively by the High Court Competition List rules and by the provision for “approved persons” in section 20 of the Civil Liability and Courts Act 2004) rather than by having a judge “educated” on technical matters by the parties’ appointed experts or by some form of judicial training. The use of experts by both parties in complex litigation is commonly enough criticised where, because the expert’s instructions are “contaminated” by the party’s case, his report is either not sufficiently independent or not sufficiently addressed to the real issues as to be of great assistance to the court.

While they are significantly different in form, there might not be much difference in terms of quality of outcome between a specialist or general court with strong independent expert support and an expert panel with strong legal involvement. Certain professional disciplinary bodies for example retain a senior counsel as a standing “legal assessor” to assist in the conduct of their procedures and with their deliberations, while most appeal bodies need to have recourse to legal advice independent of the legal advice of the body responsible for the first instance decision-maker. There is an attraction to having a standing legal member (who might be a serving or, more likely, retired judge or some other very experienced lawyer) available to expert appeal panels, both in terms of producing legal consistency in procedural matters and in terms of the perceived strength of legal input to the decision on appeal, which might influence the likelihood of further legal steps following the decision on appeal.

One aspect of the questions of form about the mechanism(s) chosen about which we feel strongly is the need for consistent and effective support structures for the relevant appeal body. Even if entirely distinct appeal panels are convened to hear relevant appeals, we believe there is still a strong case for having all such panels administratively supported by the same permanent secretariat (as, for example, the Houses of the Oireachtas Commission does for different groups or configurations within the Oireachtas).

We think that a permanent support structure of this kind would assist in moving towards a consistent approach in the management of appeals processes and prevent slight and perhaps unnecessary procedural differences arising in the conduct of different forms of appeals. We think that a permanent secretariat would fairly quickly build up a useful degree of know-how which would be valuable in resource planning for appeals and in the distribution of documents and other materials relative to an appeal. Such a secretariat could even have a role in relation to identifying or maintaining details of potential experts who might be available to sit on panels or act as assessors or court-appointed experts. Another advantage of such a secretariat would be that it could reduce the (perhaps small enough) danger of claims of bias in the appeals process by reason of the involvement of administrative personnel of the first instance decision-making body in the administrative support of the appeal.

POWERS OF AN APPEALS BODY/COURT

The Consultation Paper asks for views on what powers an appellate body ought to have, relative to a decision of an administrative tribunal or decision-maker. It seems to us that:

Question 30 – Should an appeals body have the power to remit the case to the regulator for a new decision, or the power to replace the regulator’s decision with its own? Should this vary from sector to sector?

- In respect of the general supervisory jurisdiction of the High Court, the High Court should retain the power to return a matter to a decision-maker with a direction that the decision-maker reach a decision in accordance with the court’s findings, but that, where the decision-maker is a court or a tribunal and the relevant decision is quashed on the ground that there has been an error of law, the High Court should also be empowered to substitute its own decision for that quashed decision, if the High Court is satisfied that there would only have been one decision that the court or tribunal could have reached;

Question 31 - Should the regulator's decision stand during the appeals process? What would be the implications of such an approach? Should certain types of decisions stand?

Question 32 – Should there be scope for suspending parts of a decision and who should adjudicate on this?

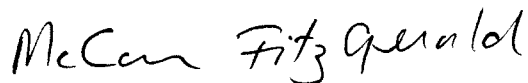
- It should be presumed that a regulator's decision stands during the appeals process, although if (by analogy with the considerations in exercising the existing jurisdiction for a court to grant an injunction) it can be established that (a) irremediable harm would then be caused by permitting the relevant decision to stand, and (b) no other, postponed remedy would adequately address any resultant harm, and (c) the balance of convenience (including factors and considerations wider than merely the narrow interests of the regulator and the appellant) favoured intervention, the court/appellate tribunal should be empowered to suspend the controversial aspect(s) of the relevant decision;

Question 33 – Where a decision has not been suspended and an appeal is upheld, what type of remedy should be available for the appellant and who should decide this?

- Subject to our views on questions 31 and 32, there should be an obligation on the decision-making body to reconsider its decision in accordance with the correct principles of law. However, there should not be any entitlement to damages unless the over-turned decision was one that no reasonable regulatory body, acting in good faith, could have reached. The same approach should be taken in respect of circumstances in which the court has supplanted its decision for that of the original decision-maker (see our response to question 30 (above)); and

Question 34 – Are there any outstanding issues/challenges in improving appeals mechanisms that are not reflected in this Paper

- We have nothing further to add.



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31 October 2006

Appendix – (UK) Draft Tribunals, Courts and Enforcement Bill 2006

The draft Bill would deal with a range of matters, but merely Part 1 and Part 6 are of immediate interest (the remainder deal with matters such as judicial appointments, enforcement in debt-related matters, insolvency, etc). However, the administrative law proposals in Part 1 of the draft Bill, and the procedural matters that are addressed in Part 6 are noteworthy.

The administrative law proposals are intended in part to implement the terms of two relevant reports:

- Legatt (2001), *Review of Tribunals: Tribunals for Users – One System, One Service*³
- White Paper (2004), *Transforming Public Services: Complaints, Redress and Tribunals*⁴

Significantly, the notes to the UK draft Bill proceed from the observation that most tribunals in the UK have, to date, been created by primary legislation without any over-arching framework. The notes also observe that many administrative law tribunals in the UK have been administered by government departments that are responsible for the policy area in which the relevant tribunal has jurisdiction, and, sometimes, for the decisions that are appealable to the particular tribunal.

Principal Proposed Reforms

From the perspective of the current consultation process, the principal reforms that are proposed in the draft Bill are:

- bringing together within a single legal and procedural framework almost all⁵ of the current (and any new) administrative law tribunals that are administered by central government in the UK, and the personnel who act in judicial or quasi-judicial roles within them;⁶
- re-constitution of the (current) Council on Tribunals with an Administrative Justice and Tribunals Council, to supervise administrative law tribunals and keep the entire UK administrative justice system as a whole under review, so that it is as accessible, fair and efficient as possible;
- creation of a new, unified structure by creating two new tribunals (the First-tier Tribunal and the Upper Tribunal) and providing for the transfer of the jurisdiction of existing tribunals to them;
- establishment of chambers within the two tribunals, so that the many jurisdictions that will be transferred into the tribunals can be grouped together appropriately, each chamber to be headed by a chamber president;
- creation of judges of tribunals, drawn from legally-qualified candidates, and non-judge members;
- creation of a new judicial office (Senior President of Tribunals) to oversee the judicial members of the new tribunals;
- creation of a unified appeal structure to apply to every decision within the jurisdiction of the First-tier Tribunal. An appeal would be taken from the First-tier Tribunal to the Upper Tribunal and, on

³ <http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>

⁴ <http://www.dca.gov.uk/pubs/adminjust/adminjust.htm>

⁵ The few anticipated central government-operated exceptions are the Asylum and Immigration Tribunal (which, under UK law, is designed expressly to operate in a single-tier model) and the Employment Appeal Tribunal (which, uniquely among UK administrative law tribunals, is an adversarial forum between competing interests of citizens, rather than between a citizen and the state).

⁶ Central government-operated tribunals that it is anticipated will be brought within the new system include the Mental Health Review Tribunal, the Child Support Commissioner, the Income Tax (General Commissioner), the Income Tax (Special Commissioner), the Special Educational Needs and Disability Tribunal, the VAT and Duties Tribunal, the Financial Services and Markets Tribunal, the Land Registry Adjudicator, the Pensions Appeal Tribunal and the Consumer Credit Appeals Tribunal. See Schedule 6, Parts 1 to 4 of the draft Bill (page 115 forward).

a point of law, from the Upper Tribunal to the courts. An appeal would be possible only with permission;

- development of rules of procedure specifically for tribunals, by the Tribunals Procedure Committee (a committee with statutory rule-making powers akin to those of the Superior Courts Rules Committee in Ireland); and
- a monetary award of the First-tier Tribunal or of the Upper Tribunal should be enforceable in its own right, without having to obtain the backing of the County Court (in Ireland, the Circuit Court) or the High Court.