

ENABLING USER PARTICIPATION IN THE DECISION MAKING PROCESS

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This paper is based on empirical research on the experiences of tribunal users in Northern Ireland and the support that they can access throughout the duration of their dispute. The research was commissioned by a specialist not-for-profit organisation in Northern Ireland (Law Centre NI) and funded by the Nuffield Foundation; it was part of a joint research project with Brian Thompson, University of Liverpool, which was designed to inform a tribunal reform agenda for Northern Ireland. The research has served this purpose well with many of the findings and recommendations from the published research reports¹ featuring in government consultations on access to justice² and the structural reform of tribunals.³

The development of tribunal reform in Northern Ireland is an important objective in its own right but the research which informs this process has a broader reach than this 'local' objective and contributes to a significant body of empirical research on tribunal user experiences in Britain. The Northern Ireland research was constructed to enable a mapping of the research experiences of Northern Ireland tribunal users on to research establishing the diversity of tribunal user experiences in Britain, such as Genn et al's *Tribunals for Diverse Users*.⁴ The conclusions of the Northern Ireland research projects were that the tribunal user experiences in each jurisdiction were not significantly different: that the diversity of experiences evidenced in the British studies was mirrored in the experiences evidenced in the Northern Ireland studies.

The geographical reach of the research from Northern Ireland to Britain may, realistically, be a matter of local rather than global interest, and fails to deal with the legitimate question of what any of this evidence has to do with the experiences of tribunal users in Australia, and the interests of administrative lawyers here. Not wishing to assume that a comparative perspective is always interesting, the justification for transporting the research findings to Australia rests on three main points. First – and with the caveat that this is a simplification of a set of similarities and differences which are comprehensively explored by Cane⁵ – there are similarities between the UK tribunals conducting first tier merits review that the UK user research relates to, and the merits review conducted through the AAT, and the Social Security Appeal Tribunal (SSAT) as a first tier, specialist merits review tribunal. Secondly, new research by Gaze, Quibell and Fehlberg on the experiences of SSAT users indicates a similarity of human experiences by those interacting with this process of administrative justice in Victoria and New South Wales and those in the UK.⁶ Third, the article proposes a model to understand the user experiences as forms of participation in dispute resolution processes. This model steps back from the detail of the local and provides a conceptual understanding that is not jurisdiction specific. This article therefore aims to provide a reflective account of the experiences of tribunal users, as documented in relevant research in the UK and Australia, by developing a model of tribunal user participation in dispute resolution practices that has common points in each jurisdiction.⁷

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Why 'participation'?

Participation has an obvious, common-sense meaning that those familiar with dispute resolution processes in administrative law are unlikely to find objectionable. The idea that the user can participate in decisions affecting him/her is inherent within administrative justice mechanisms such as tribunal hearings, and forms part of our understanding of what constitutes natural justice for the tribunal user. The concept of participation was also evident in a major review of UK-wide tribunals by Sir Andrew Leggatt in 2001, and Leggatt's recommendations were premised on the vision of 'tribunals for users'. In this context, participation was about ensuring that the user voice was heard during the decision making process. Participation, therefore, would seem to be a useful mechanism to understand the tribunal users' story, and so this article takes the opportunity to reflect on what constitutes participation and what the barriers to participation might be.

Barriers to participation

The user experiences of dispute resolution processes evidence the barriers to participation that exist. These different experiences can be categorised as intellectual, practical and emotional barriers to participation.

Intellectual barriers

Intellectual barriers for users exist where the user has difficulty in understanding how the dispute resolution processes work. These users struggle to understand what is required of them and how they can progress their case within an unfamiliar system. The acknowledgement of intellectual barriers has led to different forms of assistance being developed, some of which enable the users to overcome their intellectual barriers, but some of which fail in this objective. In the Northern Ireland studies, for example, the information provided by the tribunal administrators for social security appeal tribunals could add to the users' sense of bewilderment rather than alleviate it:

Social security appellant: 'I couldn't really understand the booklet properly ... so there could have been [useful] information in that [but] a lot of things just don't register in my head'

The intellectual barriers that users face pervade all parts of the dispute resolution process, and can include the tribunal hearing. For example, in the UK social security claimants who wish to dispute entitlement decisions appeal to a tribunal which conducts an independent merits review, and although the tribunal is inquisitorial in its approach, the issue under dispute is legal as well as factual. Consequently, the relative informality of tribunal hearings must accommodate the legal arguments and findings that are raised by the appeal, and the ability of users to participate in this process of legal decision making varies widely, as does the tribunal's ability to enable the users' participation:

Social security appellant: 'some of the phrases in [the hearing] went completely over my head ...'

The greater the intellectual barrier, the less participative the dispute resolution process is for the user.

Practical barriers

In addition to intellectual barriers, tribunal users can face practical barriers to participation. This categorisation describes the difficulties that users face in trying to get practical help in resolving their disputes. Where users were able to access practical support, the effect was often to reduce or overcome intellectual barriers, as well as emotional barriers (discussed

below). This practical support was required at each of the different stages of the dispute resolution process, beginning with the initial information required by decision makers and continuing through to the tribunal hearing. In Northern Ireland, users of social security appeal tribunals and Special Educational Needs and Disability Tribunals (SENDIST) described the difficulties faced in (respectively) applying for social security benefits and disputing the decisions of the education authority on the support needs of children in school:

Social security appellant: 'all this form filling in ... it's a mountain to climb for me without help.'

SENDIST appellant: 'if you were a person who didn't have ... the understanding of procedures and ... the ability to write a good worded letter – you'd be stuck ... I didn't feel that the whole process was very user friendly.'

The absence of practical support here meant that the intellectual barriers arising from the procedural requirements for determining entitlements remained. The experiences of tribunal users in Northern Ireland are typical of the barriers faced by users in Britain and those described by Gaze et al in their research with SSAT users in Victoria and New South Wales. In the Australian research, the authors note the potential benefit SSAT users would gain from greater access to advice about how to prepare and present their appeals.⁸

Practical barriers for users can also take the form of financial barriers: in accessing specialist advice and assistance, and in securing independent evidence to corroborate their claims. On the latter point, the success or failure of an appeal can turn on the evidence that tribunal users provide to substantiate their claim but practical barriers exist in accessing such evidence:

SENDIST appellant: 'families have spent thousands and thousands of pounds, going to tribunals. I think we spent £800 on the psychology assessment ...'

The inequality of arms between legally unassisted tribunal users and legally assisted decision makers is a long-standing problem that applies to populations beyond tribunal users. The tribunal experience is intended to be informal and to avoid the need to rely on legal advice, but the reality for tribunal users is often that the process is not informal, and that they are disadvantaged by the lack of legal or specialist assistance. Perversely, practical barriers may also arise where legal assistance becomes the problem: where the user is unable to participate in the tribunal hearing because the lawyers have taken over. The evidence of this in the Northern Ireland tribunal studies came predominantly from users of employment-related tribunals, which are adversarial in their nature and where the increased judicialisation of tribunals is most apparent. For these users, the lawyers need to argue the legal issues trumped the users' need to explain how their personal experiences were part of the case:

Industrial/Fair Employment Tribunal claimant: 'briefings or preparation for the case was on the technical issues – what's detriment, has detriment been suffered – and there was no real space for me to say look, this is how it's affected me as a human being.'

Overall, and beyond the Northern Ireland findings, the user experience suggests that practical barriers can be overcome with specialist (although not necessarily legal) advice and assistance, where the user remains central to the process.

Emotional barriers

For the majority of tribunal users, the issue under dispute is likely to be one of fundamental importance in their lives, ranging from entitlement to income-replacement social security benefits, to unlawful deductions from wages, to the determination of mental capacity and attendant detention under mental health legislation. Unsurprisingly, therefore, users are

often very emotional about their case. Notwithstanding this, the research with tribunal users reveals that this emotion extends beyond the issue under dispute and encompasses the procedures used to determine the resolution of the dispute. Dealings with decision makers and with the tribunal all contribute to the emotional barriers users face in resolving their dispute, either through the anticipation of the tribunal hearing, or the protracted battle that users feel they are engaged in. The Northern Ireland user experiences highlight this point:

SENDIST appellant: 'I was so nervous on the day, it is one of the worst experiences of my life ... didn't sleep the night before, felt physically sick.'

SENDIST appellant: 'Whenever you're in such a negative situation, I guess you don't even see anything positive in it ...'

For these users, the solution lies in providing support, so that they are able to deal with the additional demands that the dispute resolution process creates, thereby overcoming the emotional barriers they face.

Conceptual clarification of 'participation'

If participation is the concept used to understand the tribunal user's story, then some clarification is required to establish what this concept means. The value of this clarification is to tie down our understanding of how participatory (or otherwise) the user experience might be, where systemic barriers to participation exist and how solutions might be progressed. Much has been written on the concept of participation, predominantly in the area of political participation, where the seminal work remains that of Sherry Arnstein. Writing in 1969, and reflecting on a range of practices that purported to enable participation by community groups and individuals in decisions made by power holders, Arnstein conceptualised the different types of participative experiences as a ladder of participation. The ladder depicted a hierarchical progression of participative experiences, with different 'rungs' (or levels) of participation ranging from 'manipulation' as the least participatory, to tokenistic forms of participation such as 'placation' and 'consultation', through to 'citizen control' as the most participatory and empowering experience (see *Figure 1*).

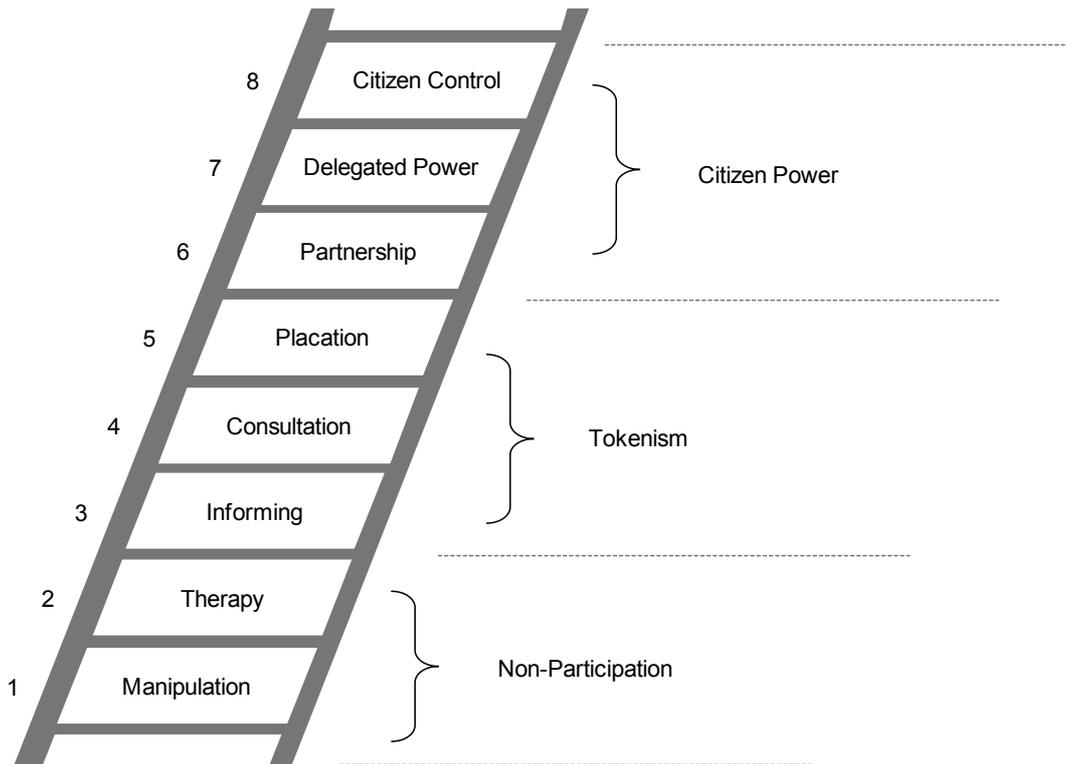


Figure 1: Arnstein's ladder of participation

This conceptualisation provides a useful starting point to develop a model of tribunal user participation: the research reveals that there are different levels of participation in this arena also, and the identification of user experiences as non-participative, tokenistic or participative provides a coherent perspective on the diversity of tribunal user experiences. Where a tribunal model departs from Arnstein's model of political participation is in its hierarchical arrangement. Tribunal user research testifies to the diversity of experiences that exist, and while some of this diversity may be attributable to good, bad or indifferent dispute resolution processes, some of the diversity is attributable to the tribunal users themselves. The ability of users to participate in legal processes is not uniform, and what constitutes a participative experience for one user may be an exclusionary experience for another. The processes of dealing with disputes must always be kept under review, and systematic problems dealt with, but the model must also take account of the inability or unwillingness of tribunal users to engage. Not all users want to participate, and a model of participation must defer to this entirely legitimate position. Consequently, the model of participation developed from Arnstein's ladder is not hierarchical.

One further, significant difference must also be noted. A ladder of legal participation for tribunal users does not aim to vest control of the dispute resolution process in the tribunal user and so differs from Arnstein's ambition for the ultimate form of participative practice. This limitation may be a reflection of the limitations of law, and the lack of participative practice in the process of rule development in particular but, for tribunal users, participation is concerned more with access than control: access to the processes through which a neutral third party determines legal entitlement, with the tribunal user having an effective voice as a necessary element of the process.

A ladder of legal participation

With the above qualifications in mind, the task becomes one of mapping the tribunal user experiences onto a ladder of legal participation, where the barriers to participation are present or absent to different degrees. The grouping of user experiences into non-participative, tokenistic and participative experiences provides the starting point for this mapping exercise, and it is within these three groups that the individual forms of participative experience emerge. Non-participative experiences can be understood as ‘isolation’ and ‘segregation’. Tokenistic experiences are those where the user faces ‘obstruction’ or ‘placation’. Participative experiences are defined as ‘engagement’, ‘collaboration’ and ‘enabling’ (see *Figure 2*). These categories are explored further, below.

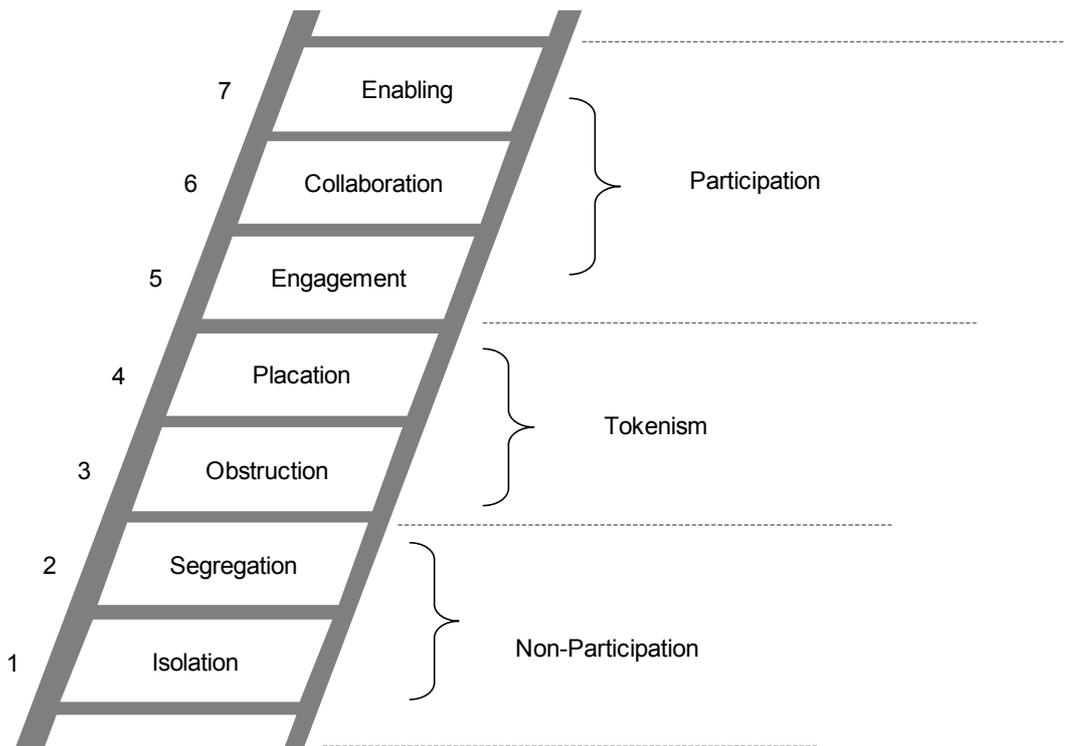


Figure 2: a ladder of legal participation for tribunal users

Isolation

Tribunal users who are isolated are those who are most excluded from the dispute resolution processes and who are unable to engage with it or negotiate their position within it, either because they are unaware of the option to engage, or unaware of how to engage. The users who experience isolation tend to see the dispute resolution processes as a ‘rubber-stamping’ of official decisions over which the individual has no control. Decision-makers can contribute to this sense of isolation where they fail to provide full or correct information to the user. Isolation can also describe the experiences of users who are geographically isolated from where decision making processes are located, and geographically isolated from the support structures that exist for users. Typically this may include users from rural locations, who are unable to access services that are predominantly located in urban areas. The support may exist but the user remains isolated from it. Language barriers may also constitute an isolating experience for tribunal users. Isolation may also be self-imposed: the user who does not want to participate in the decision making process will be isolated through personal choice, and the ladder of legal participation must recognise the validity of this choice.

Segregation

Where users are segregated they feel separate from the official process that is going on around them, or feel that their involvement in this process is of secondary importance to that of the decision maker. This segregated or inferior position exists where users experience a process that favours decision makers and power-holders, often through an apparent absence of equality of arms, where users have access to an informal, legally unassisted process that differs in its quality from the formal, legally assisted process that decision makers have access to. In the UK, this segregated process can include the use of paper-based tribunal hearings. In social security appeals, tribunal users who do not opt for an oral hearing have their case decided on the basis of the appeal papers. The research evidence is clear that users who attend their hearing are two to three times more likely to succeed in their appeal than users whose appeal is determined on the papers alone.⁹ While some tribunal literature informs users that they may be more likely to succeed if they attend their hearing, there is little evidence that tribunal users understand the impact of their decision to consent to a paper hearing, and on this basis the user experience here is categorised as segregation. Tribunal users who describe a segregated, non-participative experience regard the tribunal as independent, and so differ from the isolated user who sees the process as a rubber-stamping exercise, but the segregated user still regards the dispute resolution process, including the tribunal hearing, as inaccessible.

Obstruction

Tokenistic forms of participation include where the user continues through the administrative system but his/her progress is obstructed at different points. This can take the form of continued referrals by different decision makers from one part of the system to another, leading to the user suffering from referral fatigue. It can also encompass inaccurate or incomplete information by decision makers, where progress is inhibited or obstructed by the user's lack of knowledge. Where the user faces delay in accessing the dispute resolution process, and in obtaining the decision, this can also constitute a form of obstruction.

Placation

Placation occurs where decision makers provide assistance that does not fully assist users. Typically this can include highly complex and/or voluminous information that the decision maker can point to as evidence of empowering the user and facilitating their participation. Where this information is inaccessible, the effect is to prevent effective participation by the user. Placation is also evident where decision makers have access to informal dispute resolution processes, that enable the dispute to be resolved swiftly and at any stage after the dispute arises, but where the decision maker does not utilise these informal procedures, or implements them so infrequently that they cannot be systematically relied upon by users.

The user experiences have highlighted the value of advice and, often, representation, but placation can occur where users have access to advice and/or representation that is of poor quality, and that masks the intellectual, practical and emotional barriers to participation that may remain. This type of placation can occur where users are unaware of the poor quality of support they are receiving, or where decision makers erroneously believe that the support is of sufficient quality to enable user participation.

Engagement

Engagement as a form of participation indicates that users are able to engage with the dispute resolution processes and with the people within these processes. This can include passive engagement, where users have access to good information, whether written or

audio/visual information, or as passive observers of decision making processes. Through these forms of passive participation, users can gain a realistic expectation of what is likely to apply in their own case, and this positive preparation can then allow users to engage with the processes themselves.

Collaboration

Collaborative user experiences exist where users are supported in their efforts to collaborate with decision makers in a co-operative venture to make the 'correct' decision. Collaboration results from accessible and informal tribunal hearings, where user understanding is taken as the starting point and user difficulties are dealt with as they arise. This is partnership-working, where there is a defined and necessary role for users. This role can include users identifying the best forms of support for themselves. It can also include public legal education, where those who are most likely to face problems (social security claimants, parents of children with special needs, employers and employees) are provided with information on their rights, responsibilities and means of redress. This can also apply to those who are traditionally tasked with supporting users, including medical professionals who provide corroborative evidence to substantiate a user's case.

Enabling

The means by which tribunal users are enabled range from the clarification of minor issues by administrative agency staff to the skill with which tribunal members enable users to present their case. Users describe the ability to talk to someone about their case as enabling. The ability to enable users exists at all levels of the dispute resolution process, but the experiences of tribunal users indicates that access to early and good advice is effective in dealing with the intellectual, practical and emotional barriers to participation. Good representation would also appear to have a privileged position as a form of participation, since this is not just about ensuring a successful outcome of the user's dispute, but about ensuring that the user has an effective voice within the dispute resolution process. Telling the user's story in a way that reassures the user that this has been heard is a participative experience, and the research indicates that user satisfaction derived from this type of participation can offset or reduce the 'outcome effect' whereby the user rates the experience on whether their appeal has been successful or not.

From theory to practice

The theorisation of participative experiences can bear more fruit than simply providing conceptual clarification, and offers the prospect of an on-the-ground value to the exercise. Identifying forms of participative experience lends itself to identifying participation in practice, and while this is not a simple measuring exercise it does contribute to the decision maker's ability to review where participative gaps might be plugged. The types of practice that can be observed at tribunal hearings, at informal dispute resolution proceedings, and through user contact with decision makers will all provide an indication of the level of participation that users experience at each stage of the dispute resolution process, and an indicative chart of this is provided below.

Participation	
Enabling	<ul style="list-style-type: none"> • tribunal staff clarifying user queries; • users knowing where to go for advice; • tribunal members enabling users in setting out their case; • users being put at ease; • access to early and good advice; • access to good representation; • users able to talk to someone about their case; • decision makers resolving disputes at earliest stage (including working with other agencies)
Engagement	<ul style="list-style-type: none"> • users able to witness other tribunal hearings (including video tribunals); • users getting clear, concise and understandable information which takes account of low levels of knowledge
Collaboration	<ul style="list-style-type: none"> • decision makers working with users to identify useful forms of, and access to, support; • public legal education for users and support workers; • informal hearings without judicial trappings
Tokenism	
Placation	<ul style="list-style-type: none"> • written information that is not in 'Plain English'; • high volumes of information, with absence of summary information; • policy, but not practice, of informal dispute resolution
Obstruction	<ul style="list-style-type: none"> • referral fatigue; • delays in getting tribunal hearings and decisions; • users intimidated by tribunal members (attitude, language, approach); • misinformation from decision makers
Non-participation	
Segregation	<ul style="list-style-type: none"> • users' right to appeal reliant on economic support, particularly where decision makers have access to additional support; • lack of awareness that legal issue is under dispute; • lack of awareness of procedural aspects of lodging claim/appeal, including basis of initial decision, time limits, supporting evidence, legal tests and language; • lack of awareness of implications of paper hearing; • lack of awareness of right to challenge decisions

Isolation	<ul style="list-style-type: none"> • users unable to engage/negotiate with decision makers; • misinformation from decision-makers; • geographical barriers to accessing support; • users unable to talk to someone about their case; • users feeling anxious, agitated, unsure, unprepared; • users unable to speak out; • tribunal seen as lacking independence
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Conclusion

The research is clear both that tribunal user experiences are diverse and that this diversity of experience exists in different jurisdictions, including those in the UK and Australia. Trying to find a way to use the knowledge of these experiences to improve the ability of users to participate remains a challenge, and this article proposes a modelling of this experience as a way to understand how the administrative justice system accommodates or excludes tribunal users. The model proposed is a ladder of legal participation that acknowledges the different types of participative experience that exist, and highlights where participative gaps emerge for users. The intention is to be able to recognise, respect and respond to the individual user's willingness or desire to participate in the dispute resolution process, from the initial decision through to a tribunal hearing, with a view to improving the quality of administrative justice for tribunal users.

Endnotes

- 1 G McKeever and B Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast, Law Centre NI, 2010); G McKeever, *Supporting Tribunal Users: Access to Pre-hearing Information, Advice and Support in Northern Ireland* (Belfast, Law Centre NI, 2011); B Thompson, *Structural Tribunal Reform in Northern Ireland* (Belfast, Law Centre NI, 2011). The reports are available from Law Centre NI's website: www.lawcentreni.org.
- 2 Department of Justice Northern Ireland, *The Access to Justice Review Report*, 2011.
- 3 Department of Justice Northern Ireland, *The Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document*, 2013.
- 4 H Genn, B Lever, and L Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs, 2006). See also M Adler and J Gulland, *Tribunal Users' Experiences, Perceptions and Limitations: a Literature Review* (Council on Tribunals, 2003); D Cowan and S Halliday, *The Appeal of Internal Review: Administrative Justice and the (Non-)emergence of Disputes* (Oxford University Press, 2003); J Aston, D Hill, and N D Tackey, *The Experience of Claimants in Race Discrimination Employment Tribunal Cases* (Department of Enterprise, Trade and Industry, 2006); M Adler, *The Potential and Limits of Self-Representation at Tribunals: Full Research Report* ESRC End of Award Report (2008); N Harris and S Riddell, *Resolving Disputes about Educational Provision* (Ashgate, 2011).
- 5 P Cane, *Administrative Tribunals and Adjudication* (Hart, 2010).
- 6 Beth Gaze, Ruth Quibell and Belinda Fehlberg, 'The Experiences of Users of the Social Security Appeals Tribunal: Diverse Individuals, Issues and Experiences' (forthcoming, 2013) *Federal Law Review*.
- 7 This model of legal participation was first published in *Public Law*: see G McKeever, "A Ladder of Legal Participation" [2013] *Public Law* 575-598.
- 8 Op cit, fn 6.
- 9 Hazel Genn and Cheryl Thomas, *Tribunal Decision-making: an Empirical Study*, UCL Judicial Institute Discussion Paper (2013), available at <http://www.nuffieldfoundation.org/tribunal-decision-making>.