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## Aims and scope

- 1 To provide articles to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before them.
- 2 To address common concerns and to encourage and promote a sense of cohesion among tribunal members.
- 3 To provide a link between all those who serve on tribunals.
- 4 To provide readers with material in an interesting, lively and informative style.
- 5 To encourage readers to contribute their own thoughts and experiences that may benefit others.

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Any queries concerning the journal should be addressed to:

Publications Coordinator

Judicial Studies Board

9th Floor

Millbank Tower

London

SW1P 4QU

Tel: 020 7217 4738

Fax: 020 7217 4779

E-mail: [publications@jsb.gsi.gov.uk](mailto:publications@jsb.gsi.gov.uk)

Website: [www.jsboard.co.uk](http://www.jsboard.co.uk)

# EDITORIAL



This issue of the journal marks the work that is continuing to take place as the role of tribunals is reconsidered, not only as part of the administrative justice system, but also within the civil justice system as a whole.

Of course, a number of the reforms require primary legislation, and we are still awaiting a legislative slot for the Courts and Tribunals Bill. That is not the only piece of legislation, however, that impacts on the work of tribunals and the chairmen and members who sit on them. The Constitutional Reform Act, which received Royal Assent in March 2005, also has wide-ranging ramifications for the tribunals judiciary, not least in bringing them under the umbrella of the new Office of the Lord Chief Justice, alongside all other judicial office-holders. On page 7, Robert Carnwath describes the implications of that Act's provisions for tribunal members and chairmen across the UK, and suggests the way in which it might sit alongside the Courts and Tribunals Bill and its vision of a united tribunals judiciary.

One area in which judges appear already to be considered as a single body is in the calculation of the proportion of judges who are women, or from an ethnic minority. On page 5, Cheryl Thomas considers the published statistics in the area, and suggests that the tribunals judiciary, which includes the highest proportion of those groups, would be the best arena to conduct research on what impact, if any, a more representative judiciary has on the decisions it makes.

But, however much the current emphasis is on unification, there will continue to be some intrinsic differences between the way in which an individual's case is heard in the county court and in front of a tribunal. One of these differences is the active role of the chairman of a tribunal in ensuring that clear communication is taking place between the members of the panel and the parties, and to step in when that is not happening. How far a chairman may go in 'empowering the parties' in this way continues to be a matter of energetic debate. On page 2, Andrew Bano takes a look at the role of the judge as facilitator, and of the essential part that this role plays in effective fact-finding.

This issue also includes two pieces on oral hearings. On page 18, Genevra Richardson touches on some of the themes emerging from the consultation process she undertook (on behalf of the Council on Tribunals) into the need to reassess the use and value of oral hearings. On page 21, John Raine and Eileen Dunstan consider the ways in which an oral hearing increases the confidence of an appellant in the whole process of adjudication, based on research they undertook into the National Parking Adjudication Service.

Finally, I was pleased to be asked to produce a summary of my own recently published research on *Tribunals for diverse users*, for inclusion in this issue of the journal on page 10.

As always, comments on any aspect of the journal are most welcome.

**P R O F E S S O R   H A Z E L   G E N N**

JSB, 9th Floor, Millbank Tower,

London SW1P 4QU

*tribunals@jsb.gsi.gov.uk*



# CREATING *the* RIGHT CONDITIONS

**ANDREW BANO** *describes the crucial role of the tribunal chairman in ensuring that everyone appearing in a case, and those hearing it, give their best in resolving the dispute.*

Successful fact-finding can be a daunting task for any tribunal. Tribunal members may not have worked together before. The issues that a tribunal has to decide may be complicated and will often be poorly defined before the hearing. Parties, witnesses and representatives may have little idea of what is expected of them, and time is nearly always short. This article attempts to show how chairmen can use their professional and personal skills to create the conditions in which successful fact-finding can take place.

The JSB's *Competence framework for chairmen and members of tribunals* identifies communication as one of the six key competences for tribunal members. The *Equal Treatment Bench Book* describes good communication as 'the bedrock of the legal process', and it is good communication that is the key to effective fact-finding. Although communication is a competence for all tribunal members, the *Competence framework* places on the chairman specific responsibility for ensuring effective communication between the tribunal and the parties. It is therefore the chairman who is primarily responsible for creating the conditions in which effective communication can take place.

## Understanding

In order for communication to be effective, all the participants in the hearing – tribunal members, parties and representatives – need to have the same understanding of the issues in the case. The chairman identifies and defines the issues when preparing for the

hearing and although the good chairman clears his or her mind of preconceptions at this stage, as one chairman once remarked, an open mind is not the same thing as an empty mind<sup>1</sup>. Careful preparation is one of the most important – perhaps *the* most important – requirements for the success of a tribunal hearing.

## Defining the issues

The definition of the issues in a case brings into play the chairman's professional skills and knowledge because it requires a clear understanding of the relevant statutory provisions and case law. But the chairman needs to be able to define the issues in a way that can be understood by tribunal members and parties alike.

Some legal concepts – for example, constructive dismissal in an unfair dismissal case or notional capital in a social security case – may be difficult to explain to a non-lawyer, but the ability to explain a difficult legal concept in simple, everyday terms is one of the hallmarks of the good lawyer. At the stage of preparing for the hearing, the chairman will often need to

give careful thought to the best way of explaining the legal issues in the case accurately, but at the same time in a way that is free from jargon and technical language.

*... the ability to explain a difficult legal concept in simple, everyday terms is one of the hallmarks of the good lawyer.*

## Primary facts

Having identified the legal issues, the chairman will need to formulate the factual issues which the tribunal will need to resolve in order to apply the law correctly to the case before them. For example, statutory provisions frequently require tribunals to make a determination

of what is reasonable, but such evaluations require the tribunal to make and record the findings of primary fact on which the evaluation is based. The drawing of inferences – for example, in a discrimination case – will also require clear findings to be made of the primary facts on the basis of which any inference has been made.

In some cases a number of issues may arise, but the resolution of those issues may depend on a few crucial issues of fact. Unless there is a clear understanding between members of the tribunal prior to the hearing about the key factual issues, there is a risk that tribunal members will fail to consider some vital matter.

### Specialists

The involvement of non-legally qualified members is one of the defining features of the tribunal system. Very recently, in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, Baroness

Hale of Richmond drew attention to the advantages of tribunals over courts, as in the Leggatt Report.

The second of the tests suggested by Leggatt (at paragraphs 1.11 to 1.13 of his report), of whether tribunals rather than courts should decide cases, was the need for special expertise in the subject matter of the dispute:

‘Where the civil courts require expert opinion on the facts of the case, they generally rely on the evidence produced by the parties – increasingly jointly – or on a court-appointed assessor. Tribunals offer a different opportunity, by permitting decisions to be reached by a panel of people with a range of qualifications and expertise . . . users clearly feel that the greater expertise makes for better decisions.’

### Involving all

The *Equal Treatment Bench Book* makes clear that the tribunal chairman has an active role in ensuring that everyone involved in the judicial process plays their proper part, and this point was underscored by Baroness Hale in *Gillies*:

‘It is also a fact of tribunal life that they are presided over by lawyers whose role is not only to conduct the hearing in a fair and user-friendly fashion, to understand the relevant law, and to explain it to their colleagues. It is also to assist those colleagues to address those issues in a reasonable and fair-minded way . . .’

In order to ensure that all the members of the tribunal contribute to the success of the hearing to the fullest possible extent, the chairman may need to consciously identify how the different professional disciplines and areas of expertise of each tribunal member can contribute to the overall success of the fact-finding process.

Throughout the hearing, the chairman should use his personal skills to ensure that the tribunal works as a team in bringing their different qualifications, knowledge and experience to bear in establishing the facts of the case.

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### Participation

The first of the tests suggested by Leggatt as making tribunals rather than courts suitable for resolving disputes was *participation* – that is, that users should be able to prepare and present their own cases effectively.

Effective participation obviously requires good communication, and the chairman therefore needs to understand the factors that may prevent good communication from being achieved. The *Equal Treatment Bench Book* identifies many such factors, and a thorough knowledge and understanding of fair treatment issues is obviously essential.

Sometimes a barrier to effective communication is uncertainty about matters such as what to call the tribunal members and whether to sit or stand. In most tribunals, the tribunal clerk will have explained the procedure to the parties, but the chairman should deal with any remaining concerns and put the parties at their ease in order to ensure as far as possible that they are not distracted in any way from presenting their case.

### Facilitating

The concept of the judge as a facilitator has a particular significance in the context of tribunals. Parties without legal representation frequently try to present their cases in a way that reflects their own broader concerns, rather than focusing on the issues that the tribunal has to decide. For example, in a social security case involving disability living allowance an appellant will often try to emphasise the genuineness of their disability, rather than the extent of their care needs, which is the issue with which the tribunal is concerned.

So long as such concerns remain unrecognised, parties may feel unable to concentrate on the relevant issues. The chairman can facilitate effective communication in such situations by acknowledging the party's concerns and then guiding the party to deal with the issues that concern the tribunal.

### Jargon

The *Equal Treatment Bench Book* points out that it is as important for the individuals before a court or tribunal to understand what is being said to them as it is for them to be understood. But terms in everyday use during hearings, such as 'adjournment', may be unfamiliar to many tribunal users. There is a widely held public perception that judges fail to appreciate the difficulty that ordinary people have in understanding the language of lawyers. Just as it is important to avoid jargon and technical language when defining the issues, so it is also important

to avoid as far as possible using jargon and technical language during the hearing.

The ways in which lawyers customarily use language may interfere with effective communication in other ways. Legal analysis is frequently expressed in exclusionary language – for example, by saying that a particular matter is 'not relevant'. Such language may sound unfamiliar and even hostile to non-lawyers, and it is therefore better to explain the issues with which the tribunal is concerned in simple, everyday terms.

### Indicators

The *Competence framework* identifies the following performance indicators for effective communication:

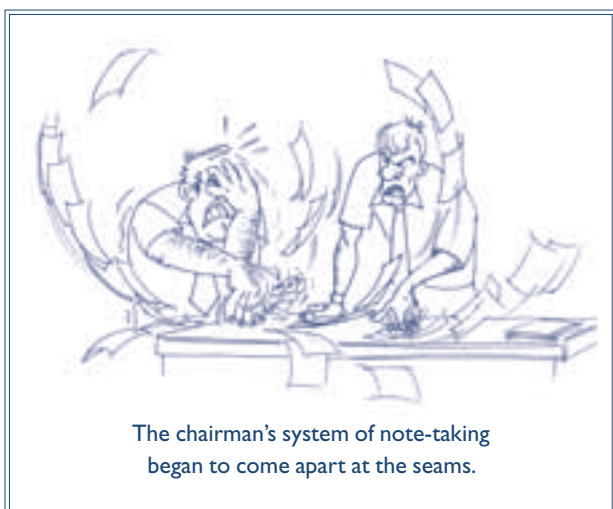
- Asks clear, concise and relevant questions that are understood by those to whom they are addressed.
- Makes appropriate comments.
- Employs active listening skills, e.g. is attentive, checks perception.
- Uses appropriate body language, e.g. uses appropriate posture, gesture, facial expression, eye contact.
- Regularly checks the understanding of all participants.

These performance indicators describe the basic techniques for maintaining effective communication during the hearing, but the skills needed by the chairman to create the right conditions for effective communication extend beyond the tribunal room.

The foundations are laid when preparing for the hearing and when bringing together the different skills and backgrounds of the other tribunal members to create an effective team. And when a decision is reached, the chairman's communication skills will again be needed to draft a decision that is clear, concise, accurate and easily understood.

ANDREW BANO is a Social Security Commissioner.

<sup>1</sup> Mr Bill Tillyard, formerly a full-time chairman in the Wales and South West Region of the Independent Tribunal Service, quoted by Edward Jacobs and Gillian Douglas, *Child Support: The Legislation*, seventh edition, page 396.



The chairman's system of note-taking began to come apart at the seams.



# DIFFERENCE *in* DIVERSITY

**C H E R Y L T H O M A S** *considers the statistics relating to diversity within different judicial offices and looks at the role of the new Judicial Appointments Commission (JAC) in this context.*

The Constitutional Reform Act 2005, which established the new JAC, largely removes the discretion the Lord Chancellor previously enjoyed over appointments. In future, broadly speaking, the Lord Chancellor will only be able to appoint a candidate recommended by the JAC, and the JAC will only recommend one person for each appointment.

Among the 15 members of the JAC, the judiciary and legal profession are in the majority, with nine judges or practising lawyers and six lay members. The lay members (including the chair, Baroness Usha Prashar) cannot be practising lawyers or have held judicial office. The tribunal member can be either a full-time, fee-paid, legal or lay tribunal member.

## Tribunal appointments

A large responsibility will rest with the one tribunal member of the JAC, given the volume and complexity of tribunal appointments, which will constitute the single largest group of appointments the JAC will initially make each year. In 2003–04, for instance, 305 appointments were made for tribunals, and only 191 appointments for other judicial posts. Unlike other judicial posts, there are numerous tribunal appointment competitions running continuously, and there has often been difficulty recruiting sufficient numbers of applicants for some vacancies, especially medically qualified members. In addition, there are now more than 100 different types of tribunal posts, and these cover a wide variety of often very specialist roles. The appointment of Judge David Pearl as the tribunal member means the JAC will include someone with many years' experience as a legal member of various tribunals. There was no guarantee that any other commissioner would have experience of tribunals,

but the appointment of Professor Hazel Genn as a lay member brings further detailed knowledge of the needs of tribunals to the JAC. In practical terms, the JAC will be responsible for all aspects of selection. However, given the part-time status of the commissioners and the volume of tribunal appointments, in the short term little may change in the way these appointments are made. Many staff from the DCA's Judicial Competitions Division have been seconded to the JAC for one to three years, and this suggests that civil servants will continue to be responsible for the overall process in the immediate future.

## Diversity

The 2005 Act also imposes a statutory duty on the JAC to have 'regard to the need to encourage diversity in the range of persons available for selection'. The under-representation of both women and ethnic minorities in the judiciary in England and Wales has long been recognised, and despite some improvement in recent years, the government itself has acknowledged that insufficient progress has been made in increasing judicial diversity.

Tribunals are the most ethnically diverse of all judicial offices and have twice the proportion of women in post compared with judges within HMCS. However, within

### Diversity in different judicial posts

	Judges	Tribunals	Magistrates
Men	84.2%	68.8%	50.6%
Women	15.8%	31.2%	49.4%
White	92.0%	77%	93.5%
Ethnic minorities	3.6%	9%	6.2%
Unknown	4.4%	14%	0.3%

*Source: DCA Judicial Appointments Annual Report 2004.*

tribunals the levels of diversity vary according to tribunal office. Ethnic minority representation on tribunals is primarily as lay members. Women are more equally represented across the tribunal spectrum, but are also best represented among lay members.

### When is a tribunal member a judge?

The judicial diversity debate has been clouded by inconsistencies in DCA statistics, as well as a lack of clarity on exactly what constitutes a ‘judge’. DCA diversity statistics of ‘judges in post’ in 2004 showed 15.8 per cent women and 3.6 per cent minorities serving. In virtually all DCA statistics, ‘judges in post’ encompass only HMCS judges, from Law Lords to deputy district judges. Yet DCA’s own Judicial Appointments Annual Report for that year reported 26 per cent women and 7 per cent ethnic minorities ‘judges in post’, almost double the number of both women and minorities. While it is not clear how these figures were arrived at, the report suggests that tribunal members were included in the percentages.

This raises the question of the extent to which tribunal members are considered judges. An insight into the government’s thinking on this has emerged from the new Tribunals Service, where legal members of tribunals will in future be known as Tribunal Judges or Tribunal Appellate Judges. Lay members will not be considered judges, although this is precisely where the greatest diversity generally exists. The new JAC will need to be clear about the extent to which tribunal members are considered judges, and this should be reflected in the presentation of all official statistics.

### Prestige

The fact that diversity levels are far higher on tribunals than in the HMCS judiciary, and are generally higher among lay members of tribunals than legal members, illustrates the ‘prestige theory’ of judicial appointments: that women and minorities are least likely to attain the most prestigious judicial offices. This is clearly the case in England and Wales. Within the senior judiciary, there

is only one judge from an ethnic minority, and ethnic minorities are only reasonably represented in relation to their representation in the legal profession (8–11 per cent) on tribunals and as deputy district judges. Women have had more success in gaining appointment to the HMCS judiciary, but have no significant representation at the senior levels of the judiciary in relation to their representation in the legal profession (32–40 per cent).

This mirrors a trend in many other judicial systems, where ethnic minorities have to push harder at the door to judicial appointments than whites, and even where women have made significant gains in appointments, their ability to progress up the judicial hierarchy has been extremely limited. Even in judiciaries such as those

in France, Italy and Spain where women judges now outnumber men, women remain excluded from almost all senior and most middle-ranking posts.

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### Why does diversity matter?

A tribunal position can be a stepping stone to appointment as a deputy district judge, which in turn is a stepping stone to being a district judge. In this way, greater diversity

within tribunals could encourage greater diversity within the HMCS judiciary. But research has highlighted two much wider benefits of judicial diversity: that it improves the perception of the fairness of courts, and improves the actual decision-making of courts. A recent study by Professor Hazel Genn, summarised on pages 10 to 17 of this journal, indicates that diversity on tribunals can affect minority perceptions of the fairness of tribunal decisions. In addition, research in the US clearly suggests that diversity on collegiate judicial bodies actually improves the quality of judicial decision-making.

This last conclusion is controversial, but the diversity within tribunals in England and Wales means that they may be uniquely placed to address this question here.

DR CHERYL THOMAS is Director of the Judicial Appointments Project at the University of Birmingham. Her report on judicial diversity is available at [www.cja.gov.uk](http://www.cja.gov.uk).



# UNFINISHED BUSINESS

**ROBERT CARNWATH** *details the precise position of the tribunals judiciary within the current constitutional reforms. He highlights some of the inconsistencies in the legislation and outlines a simple solution.*

With or without the long-awaited Tribunals Bill, the tribunals judiciary are faced with major change in April 2006, as part of the wider constitutional reform programme. The Constitutional Reform Act 2005 (CRA) was designed to implement the Government's proposals to revolutionise the relationship between the courts and the executive. They had been announced, unexpectedly and in rudimentary form, in June 2003. They were developed in much more detail in a concordat agreed between Lord Woolf LCJ and Lord Falconer early in 2004.

When the Leggatt report on tribunals was published in 2001, the wider reforms were probably not even a gleam in the Government's eye. Although the White Paper came later, the implications of the concordat were barely touched upon. Those responsible for the White Paper on tribunals, perhaps sensibly, did not attempt to grapple with issues which at that stage were still subject to heated Parliamentary debate. It has only been in the last few months, during the preparations for the implementation of the CRA in April 2006, that its implications for the tribunal reform programme have begun to become fully apparent. This delayed reaction is perhaps not surprising. Those who have studied the CRA will know that many of its treasures are well hidden.

## Constitutional Reform Act

The CRA has five key features. First, under section 3 of the Act, the Lord Chancellor is obliged to uphold and defend the statutory guarantee of independence of the judiciary. The 'judiciary' is defined as including the judiciary of the courts of any part of the UK, and of any international court. Tribunals are not mentioned.

Second, the 'chief justice' of any part of the UK has the power, under section 5, to make written representations to Parliament on 'matters of importance relating to the judiciary, or otherwise to the administration of justice'. The 'judiciary' is not defined in this context. But the term 'administration of justice' seems wide enough to include tribunals.

Third, section 7 recognises the role of the Lord Chief Justice as 'President of the Courts of England and Wales', responsible for leadership and deployment of the judiciary, and for their 'welfare, training and guidance'. The 'courts' for which he is made responsible by the section include magistrates' courts but not tribunals.

Fourth, a new, independent Judicial Appointments Commission (JAC), responsible for judicial appointments is established by the Act (see page 17). The offices for which the JAC will be responsible, under section 85, include not only the court judiciary, but all the tribunal appointments currently made by Crown or the Lord Chancellor, set out in a long and indigestible list in Schedule 14. As part of the selection process, the JAC is required to consult the Lord Chief Justice, and a person 'who has held the office for which a selection has to be made or has other relevant experience'. Other tribunals remain outside the Act for the time being, but there is a general power for the Lord Chancellor or Ministers seek the assistance of the JAC for other appointments.

Finally, the Act also establishes a new statutory system under which the Lord Chief Justice is given specific powers to discipline and suspend holders of judicial office, with the agreement of the Lord Chancellor. The definition of 'judicial office' for this purpose includes all

the tribunal offices listed in Schedule 14. Under section 119, the Lord Chief Justice is given specific power to nominate another ‘judicial office-holder’ to exercise his disciplinary functions.

### Cross-border issues

In applying these provisions to tribunals, there is the added complication of what I call ‘cross-border’ issues, as they affect non-devolved tribunals (such as the Scottish Employment Tribunals), or tribunals with jurisdictions extending beyond England and Wales (such as tax, immigration and social security).

Here again, the CRA eschews simple solutions. The guarantee of judicial independence (though not applied to tribunals) extends throughout the UK. The power to make representations to Parliament, on the judiciary and the administration of justice, is extended to the Lord President in Scotland and the Lord Chief Justice for Northern Ireland. The LCJ(NI) is given equivalent responsibilities to those of the LCJ for ‘welfare, training and guidance’ of the court judiciary in Northern Ireland, but again not for tribunals. There is no equivalent for Scotland (no doubt because under the Scotland Act administration of justice is a matter for the Scottish Parliament).

For judicial appointments, Scotland and Northern Ireland have separate arrangements under different statutes. The role of the Judicial Appointments Commission accordingly relates generally to England and Wales. But, in so far as the Lord Chancellor is currently making appointments for some cross-border and non-devolved tribunals, that function will come to the JAC.

Under section 97, where the appointee will be working wholly or mainly in Scotland or Northern Ireland, it is the Lord President or the LCJ(NI), rather than the Lord Chief Justice, who must be consulted by the JAC. Similarly, in relation to discipline, the functions of the Lord Chief Justice in relation to judicial office-holders who sit wholly or mainly in Scotland or Northern

Ireland, will be exercised by his counterparts in those jurisdictions.

### A bit of a muddle?

If that all sounds a bit of a muddle as far as tribunals are concerned, it is – but not irredeemably so. For tribunals, the reforms are unfinished business. In early 2004, when the new settlement was being worked out by Lord Falconer and Lord Woolf, tribunals were not at the forefront of their minds. Thus, for example, they provided for only one tribunal member to sit on the 15-person JAC, even though – as is now accepted – in terms of numbers most of its work will be on tribunal appointments.

As a result, fundamental questions have been left unanswered. The Tribunal White Paper envisaged the creation of a ‘unified tribunal judiciary’ under the

leadership of a Senior President. But where do they stand in the new constitutional world? Are tribunal judges real judges – their independence guaranteed by the statute, with the Lord Chief Justice as their leader and spokesman? Or are they some form of hybrid – judges for the purpose of appointments and discipline, but for

nothing else? And where, in the new scheme, stands the Senior President of Tribunals?

### Some possible answers

The Tribunals Bill, if enacted in its present form, would provide a few answers. Tucked away in paragraph 14 of Schedule 6 of the draft Bill, under the heading ‘Consequential and other amendments’, you will find a very important provision. It tells us that a new subsection (7A) is to be added to section 3 of the Constitutional Reform Act 2005 (the statutory guarantee of the independence of the judiciary). The new subsection will extend the definition of ‘judiciary’ to ‘include every person who holds an office listed in Schedule 14’.

That seems to point the way. But the logic is not carried through into other provisions. The Lord Chief Justice’s leadership role as President of the Courts, and his responsibility for ‘welfare, training and guidance’, are

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not in terms extended to tribunals. The Tribunals Bill would create the new statutory office of Senior President of Tribunals, who would be given responsibility for the ‘training’ of tribunal judges, and for their assignment between different tribunals. But nothing is said of their ‘welfare and guidance’. Nor is anything said of the lines of responsibility between the Senior President and the chief justices; nor of the Senior President’s functions, if any, in respect of appointments or discipline.

Under the CRA, it is possible for authority for some purposes to be conferred on a de facto ‘Senior President’, under powers delegated by the Lord Chief Justice. For example, I am already acting as his nominee on the interviewing panel for the tribunal representative on the JAC, although there appears to be no equivalent power for him to delegate his function as a statutory consultee in the actual selection process. Similarly, he could decide to delegate to me (as a judicial office-holder) his disciplinary functions in respect of tribunals in England and Wales. But this could not extend to tribunal members sitting wholly or mainly in Scotland or Northern Ireland, and the chief justices for those jurisdictions cannot delegate their powers to an English judge.

In practice, I have been able to act as a channel of communication between the Lord Chief’s office and the tribunal presidents on a number of important issues arising out of the preparations for the CRA. Other members of the Tribunal Presidents’ Group have sat on various committees concerned with the CRA. I have also had valuable meetings with the Lord President and the LCJ(NI). They have led to the establishment of tribunal groups in each country, chaired by senior judges (Lord Hamilton and Coughlin J, respectively). These will, I hope, pave the way to a unified approach to tribunal reform across the whole of the UK, regardless of the complexities of devolution.

But I have to remember (and remind others) that I have no formal status to represent tribunal judges. My

authority, if any, rests on consensus with those who have the real power and responsibility, that is, on the one hand the chief justices in each jurisdiction, and on the other the tribunal presidents.

### **A tribunals concordat**

With or without a Tribunals Bill, we need an agreed framework in which this work can continue. I have no doubt what the strategy should be. The principal objective of the Leggatt reforms is to overturn decades of haphazard and piecemeal development of tribunals.

I strongly believe, therefore, that tribunal judges must be seen as an integral part of the judiciary, answerable to, and protected by, the chief justice in each jurisdiction.

With or without a Bill, there is I think a place for a ‘Senior President’, with a distinct, UK-wide role, reflecting the different territorial jurisdictions or the various tribunals. But the office should be seen, not as a separate source of power, but as deriving its authority from the chief justices as heads of the judiciary, and as providing the essential link between them and the tribunal presidents.

*... tribunal judges must be seen as an integral part of the judiciary*

The creation of the new agency will provide the starting point for the new tribunal system, to be launched in April 2006. Many of the White Paper’s objectives can be advanced by improvements in administrative and judicial practices, without legislation. But the precise position of the tribunal judiciary remains a vital issue, which must be resolved. Given the uncertainties over the progress of the Bill, I will be pressing for some other means to establish and record a clear understanding of the constitutional position of tribunals in the new settlement and their working relationships between the different agencies.

The Concordat agreed in 2004 was unfinished business as far as tribunals are concerned. We now need is a tribunals concordat to finish the job.

LORD JUSTICE CARNWATH **is the Senior President designate of tribunals.**



# DELIVERING FAIR HEARINGS

*In this extract from her recent research report for the DCA, HAZEL GENN discusses some conclusions drawn from observing more than 400 tribunal hearings in TAS, CICAP and SENDIST.*

**T***ribunals for Diverse Users* is a study of access, expectations, experiences and outcomes of tribunal hearings from the perspective of tribunal users in three tribunals: the Appeals Service, Criminal Injuries Compensation Appeals Panel, and Special Educational Needs and Disability Tribunal. It was designed to find out how white, black, and minority ethnic users perceive and are treated by tribunals and involved a waiting room survey of about 500 tribunal users, observation of 400 tribunal hearings and a post hearing survey focusing on users' reactions to the hearing and perceptions of the fairness of the process. This article discusses the purpose and some of the results of the hearing observations

## Observing hearings

'The judge or tribunal chair is manager of the hearing and should ensure that everyone who appears before the court or tribunal . . . has a fair hearing. This involves identifying the difficulties experienced by any party, whether due to lack of representation, ethnic origin, disability, gender, sexual orientation or any other cause, and finding ways to facilitate their passage through the court or tribunal process.'

*(Fairness in Courts and Tribunals: Summary of Equal Treatment Bench Book, Judicial Studies Board)*

The observation of hearings was designed to assess how minority users were dealt with by tribunal judiciary and the extent to which, within the procedures adopted during hearings, minority ethnic users were enabled to participate as effectively as white users. This was done by watching and recording evidence about tribunal and user behaviour on structured observation forms. Observers were broadly assessing:

## Introduction

The JSB is delighted to be able to include this summary by Professor Hazel Genn of parts of her report, *Tribunals for diverse users*, published in January 2006.

The research is the most significant undertaken into the needs and perceptions of tribunal users, and there can be little doubt as to the authority of the message.

Here, Hazel focuses on the purpose and some of the results of the 400 observations of hearings that were undertaken during the course of the research, in an attempt to assess the behaviour of tribunals in enabling minority users to participate in their hearings as effectively as white users.

## Significance

In these extracts, she encapsulates the main messages for the tribunals judiciary, many of which relate to the need to equip chairmen and members with the skills to enable unrepresented parties to participate effectively in hearings, and of the limits to the enabling role of tribunals.

While it is pleasing to note that within the three tribunals studied, users are on the whole treated well during hearings, the implications of the work touch more deeply on the work of the JSB. Part of its significance for us is that it has treated issues relating to fair treatment in depth, and for the first time, and serves to back up some of the beliefs on which we have been working for some time.

The implications of the work go more widely, however, and the JSB will be assessing its impact, not least on our competence framework, but also on the other guidance that we produce and the training we provide for tribunals. In the meantime, I am sure that the readers of this journal will study the findings with interest.

**Mr Justice Sullivan, JSB's Tribunals Committee**

- The extent to which tribunal judiciary were providing an appropriate and professional service to all tribunal users regardless of colour, culture or ethnic origin; and
- The extent to which there was evidence of disadvantage to minority ethnic users through processes, attitudes or behaviour on the part of tribunal judiciary.

In assessing the performance of tribunals, it was necessary to have benchmarks or standards in mind. The Leggatt Report emphasised the need for tribunal judiciary to ‘enable’ users to present their cases so that justice might be done. This included understanding the point of view as well as the case of the citizen. He argued that tribunals must be:

‘alert for factual or legal aspects of the case which appellants may not bring out, adequately or at all, but which have a bearing on the possible outcomes . . . We are convinced that the tribunal approach must be an enabling one: supporting the parties in ways which give them confidence in their own abilities to participate in the process, and in the tribunal’s capacity to compensate for the appellants’ lack of skills or knowledge.’ (Leggatt paras 7.4–7.5)

The job of enabling the user to advocate their case and to compensate for lack of representation, where necessary, is a tall order. In treating users from a diverse range of backgrounds ‘equally’ there are both positive and negative obligations on the judiciary, i.e. things that a judge should *not* do and things that he or she *should* do. What the judge should not do is employ stereotypes, and make assumptions about an individual based on presumed characteristics attributed to a group. On the other hand, there is a positive obligation on a judge, so far as possible, to meet any special needs or redress any disadvantage that a user might be experiencing, such as language, unfamiliarity with the environment, disability, lack of fluency or literacy.

*In treating users from a diverse range of backgrounds ‘equally’ there are both positive and negative obligations on the judiciary . . .*

The JSB *Competence Framework* for tribunals sets out the skills, knowledge and behaviour needed to perform the judicial function in any tribunal jurisdiction. Aside from knowledge of the law and procedure, critical competences that tribunal judiciary should demonstrate are:

- Awareness and respect for cultural and other differences
- Facilitation of participation to promote equal treatment through good communication skills such as:

- Asking clear questions which are understood.
- Using active listening skills.
- Appropriate body language.
- Checking understanding of all participants.

This competence framework provided an important starting point for the observations as did research evidence about the essential elements in users’ perceptions of fairness, which include:

- The opportunity to participate in the proceedings
- Evidence of being heard by the tribunal
- Evidence that the user’s arguments have been genuinely considered even if ultimately rejected
- That the user had an opportunity to influence the decision (i.e. that the tribunal was genuinely open-minded)
- That reasons or justification for the decision are given
- That the tribunal is neutral or even-handed
- That the user is treated with courtesy and respect

### **Tribunal Behaviour**

The aspects of tribunal behaviour that were assessed during hearings included the quality of the introduction, general disposition of the tribunal, checking the

### *Observations of features of good and poor introductions*

#### **‘Very full’ to ‘Good’**

- Names, qualifications and professions (mention appointment by Lord Chancellor).
- Introduced other participants in the room (including observer).
- Said that tribunals are not as formal as courts and you are not required to give evidence under oath.
- Explained how decision is made (write it up, call back in to explain).
- Explain the issues and the tests to satisfy.
- Stated independence from Benefits Agency.
- Will give user the chance to say everything.
- Information bundles are identical, panel has the same papers.
- Mention that they will be taking notes.
- Asked if user wished to speak before they started.
- Mention role of interpreter.
- Ensures user has a copy of the information bundle.
- Asked if user understood English.

- Makes a real point that the hearing is informal, and that they should aim for a discussion, everyone should feel willing to speak.

#### **‘Poor’ or ‘Absent’**

- Does not bother introducing the panel, just says they are impartial and ‘you can see by our name tags who we are’.
- No introductions, just dived into questioning.
- User asked panel what their job is. Chair responds that it is not relevant and ‘you can look it up on the website if you want’.
- Did not clarify why claim turned down.
- Did not state independence.
- Did not mention informality or that user would be given opportunity to make submissions.
- Did not check if user brought his bundle.
- Did not explain procedures or names.
- Scolds solicitor for being late.
- Jumped right into a discussion about missing evidence and everyone immediately began riffling through papers.

understanding of the user’s story, use of legalistic language or insensitive language, courtesy toward the user, appearance of listening, checking of the user’s story, and degree of assistance or enabling. Each of these aspects of behaviour was assessed during hearings on a five point scale from ‘very good’ to ‘very poor’ and evidence supporting the assessment was recorded.

### **Quality of introduction**

The introduction to hearings given by the tribunal is important in beginning to create the conditions in which users are able to communicate and present their case. It offers the tribunal the opportunity to set the scene and establish the atmosphere of the hearing. Tribunals may introduce themselves and other people in the room, explain the independence of the tribunal, explain the role of the tribunal, the expectations of the user and the procedures to be followed. The tribunal chair’s introduction is therefore part of the enabling function since the introduction has the potential to reduce or increase anxieties depending on the way it is managed.

In the vast majority of hearings observed the introduction given by the tribunal chair was assessed as ‘very full’ or ‘full’ (80%). In a handful of observed hearings the introduction was judged to be either ‘poor’ or ‘absent’ and in a similar proportion the quality of introduction was observed as ‘neither good nor poor’. The quality of explanation of procedure provided during the introduction was also observed to be ‘very full’ or ‘full’ in the majority of cases (79%) with about 10% being observed as ‘poor’ or ‘absent’ and 11% as ‘neither good nor poor’.

Little difference was found in the quality of introductions depending on the ethnicity of the user. The proportion of cases in which the quality of introduction was judged to be ‘full’ or ‘very full’ was highest in hearings involving Black African or African Caribbean users (93% assessed to be full or very full).

### **Courtesy**

Aside from use of language and the possibility that tribunals might use insensitive words, observers also

**Observations of courtesy of tribunal**

**‘Very courteous’ to ‘Courteous’**

- Maintains eye contact with user not the interpreter.
- Spoke slowly and clearly.
- Ensured they had correct pronunciation of user’s and representative’s names.
- Apologised for asking very personal questions.
- Chair found pages in the bundle where user had trouble.
- Approached issue of self-harm with sensitivity by asking user if he preferred to sit outside.
- Explained carefully that if user felt disadvantaged through not having read papers, he was welcome to adjourn the hearing (user elected not to).
- Offered glass of water and tissue to dry eyes.
- Waiting for user to find documents without making him feel rushed.
- Assured user they would not keep her longer than necessary by going through certain issues again.
- Stopped hearing halfway to invite user’s father to sit with him for moral support, and chair even brought father up to speed on discussion.
- Appeared to be as gentle and facilitative as possible, the chair especially was unfailingly polite.
- Apologised to user for addressing his barrister.
- Assured user that if he did not understand, or if he wanted a break, just to ask and they would help.

- Clair loaned user his own reading glasses.
- Asked politely and discreetly to see scarring.
- Offered a break when user began to cry.

**‘Not courteous’ to ‘Not at all courteous’**

- Unsympathetic responses to requests for clarification . . . chair would repeat questions in a harsh, raised tone and very slowly (this came across as condescending).
- Constantly interrupting user, questions fired off rapidly in harsh tone of voice.
- Referred to user as ‘he/him’ even though user was present.
- Cuts off user rather often, not allowing him to finish answering the questions which the chair had asked.
- Chair admitted that he had not read the bundle fully but dismissed this as unimportant.
- Chair interrupts constantly.
- On a few occasions when the parents attempted to make a point, they were spoken over and their contribution was not acknowledged.
- As the chair did not invite individuals to speak, the mother resorted to putting up her hand whenever she wished to say something.
- When the mother started crying, the panel just carried on; they did not ask if she was okay or if she needed a minute, just ignored her.

recorded the level of courtesy or lack of courtesy displayed by the tribunal. Courtesy could be observed in words used, as well as consideration for the user more generally. In the majority of cases (86%), tribunals were observed to be either ‘very courteous’ or ‘courteous’ toward the user. Very few cases (9%) were observed as displaying an ‘average’ level of courtesy and even fewer (5%) observed a lack of courtesy. There were no significant differences according to tribunal or ethnicity.

Observers recorded copious examples of courteous behaviour displayed by tribunal panels. Courtesy was demonstrated through the use of polite language, sensitive language, consideration for the situation of the user, and checking whether the user might have any physical needs (breaks, drinks). Many tribunals were

seen to respect the courtesy of looking at the user while an interpreter was speaking and addressing comments and questions to the user rather than to the interpreter.

Tribunals were also, on occasion, seen to control the speed of presentation by department representatives so that interpreters could keep pace with their translation. Tribunals were seen to check the correct pronunciation of names, apologise for delays when they had occurred, and also apologise for having to ask personal and intrusive questions.

Although instances of lack of courtesy were relatively rare, a perception of lack of courtesy on the part of users was found to have an important impact on perceptions of the fairness of hearings.

### Examples of assistance or enabling

#### 'Very helpful' to 'Helpful'

- Established common definitions for things such as 'fall' versus 'losing balance'.
- Took time to repeat and rephrase questions.
- Chair had representative go through introduction again so that it could be interpreted for user... chair assured everything would be interpreted and that at each stage user would know what was happening.
- Where user appeared to struggle with a question, panel quickly followed up with paraphrased question or explanation.
- Asked questions using recognisable examples, such as how many bags of potatoes or shopping bags can you lift?
- Asking if user understood and emphasised that he should take a few moments to think it through.
- On numerous occasions, sought to clarify and consolidate the information given.
- Open-ended questions allowed user to give full explanation
- Chair always made a point of giving the user the opportunity to have the last word.
- Provided user plenty of opportunity to make his case, explaining the process clearly and checking to ensure user understood.
- Chair helps structure the questions and teases out appropriate details (when user tends to go off on tangents).
- Explained many terms in the scheme so that user could say exactly where he thinks he fits in.

- Invited user to look at the tariff scheme so that he understands fully how they make their decisions.
- When user got stuck panel offered appropriate prompts.
- Very good at trying to come to balanced decisions with party participation, almost mediating to a certain extent.
- Before moving on from point to point, the chair pauses and asks both sides if they are happy to continue.
- Gives breaks for users to gather and reflect on the evidence given by authority.

#### 'Not very helpful' to 'Unhelpful'

- Chair would repeat questions but not paraphrase or explain them very well and user had to paraphrase for himself and ask chair if he had understood it correctly, chair would affirm.
- Specialist sometimes stopped user mid-sentence and finish off his point, sometimes incorrectly! User would have to say 'no, let me re-explain'.
- Did not facilitate a discussion of his injuries which the user seemed keen to do.
- Keeps stressing for the user to be brief.
- Won't let people interrupt in the beginning but then cuts off user mid-sentence which makes her appear less confident in speaking later.
- When parents struggled to make a salient point, the panel should have used prompts to encourage them to elaborate.
- Do not invite parents to contribute or offer personal views on the education provision.

### 'Enabling'

Although many of the features of tribunal behaviour observed are aspects of the broad enabling approach, observers noted specifically the extent to which tribunals were seen actively to assist users in presenting their case.

Most tribunal judges were assessed by observers as being 'very helpful' or 'helpful' in their degree of assisting or enabling (75%). There were a number of cases (18%) where the tribunal was observed to be 'neither helpful nor unhelpful' and a handful of cases where tribunals were judged to have been positively 'unhelpful' (7%). Again there were no significant differences between the three tribunals in this respect.

Common examples noted of the type of assistance given to users involved trying to improve communication by coaxing more detailed responses through careful questioning, explaining words and definitions that might not be immediately comprehensible, repeating and paraphrasing questions, explaining the purpose of the question, and using easily recognisable examples so that the user was better able to comprehend the nature of the information being sought.

Another strategy observed was to offer the user time to think through their answer before responding on a key issue.

**Appearance of listening**

**‘Very good’ to ‘Good’**

- Very attentive throughout hearing.
- Active listening, nodding, encouraging.
- Nodding, smiling and good eye contact.
- Appeared interested in what applicant was saying. Direct eye contact.
- Very engaged, good eye contact.
- Whenever mother is speaking the panel lean forward slightly and listen attentively.
- One member asks a lot of very pertinent questions which shows she is listening carefully.

**‘Not good’ to ‘Not good at all’**

- One panel member, when not asking questions, was flipping through papers and making notes.
- Doctor seemed bored after an hour and a half.
- Doctor did not acknowledge applicant’s points.
- Chair couldn’t listen as she didn’t stop talking.
- After asking questions, doctor spent rest of time playing with her necklace and sighing loudly.

- Doctor was wearing dark glasses so it was difficult to tell if he was listening.
- Member loudly jingling the change in his pocket – it was very distracting, he didn’t seem to notice – he was slouching in his chair with his elbow on the table.
- Did not visibly show signs of listening, looked down and took notes for majority of the hearing.
- Near end of hearing, doctor appears to not be listening, as if he has already made up his mind.
- Interrupted several times, seemed uninterested in anything but the information he was looking for.
- When the representative was speaking there was no eye contact, shuffling papers, writing notes.
- For about one third of the hearing, one panel member stopped taking notes, stared out of the window and did not appear to be listening.
- Applicant is constantly interrupted by the chair.
- Many notes were taken but chair seldom looked up from writing to engage with user.
- Other panel members were not looking at the relevant pages in the bundle at times.

**Active listening**

Active listening is a structured form of listening and responding that focuses the listener’s attention on the speaker. To be listening actively, the listener must take care to attend to the speaker fully, and then repeat, in the listener’s own words, what he or she thinks the speaker has said.

There are thus two key elements: paying attention and then reflecting back to check understanding of what has been said.

This aspect of tribunal behaviour is important in enabling users to put their case. It is also crucial in influencing users’ perceptions of the fairness of hearings. Observers therefore recorded the extent to which tribunals demonstrated the appearance of listening and the extent to which they checked their understanding of what they were told by users.

**Appearance of listening**

Observers noted that the great majority of tribunals demonstrated good listening skills during hearings, with the majority being assessed as listening very well (87%) and only a small minority listening not very well (5%).

There were no significant differences between the three tribunals in this respect nor was there any significant variation in the extent to which tribunals demonstrated the appearance of listening to users of different ethnic groups.

There were many instances of good listening skills noted by observers, although the range of behaviours identified as demonstrating attention to the user was relatively narrow and limited largely to body language – such as maintaining eye contact, leaning forward when the user was speaking, nodding to indicate listening, and occasional interjections such as ‘Yes’ or ‘I see’. On the

### Checking understanding of user's story by tribunal

#### 'Very frequent' to 'Frequent'

- Reflected answers back to applicant.
- Repeating points of the response.
- Chair repeating what she had written in her notes to ensure full understanding.
- Restating answers to ensure understanding.
- Checking details and facts.
- Regular summaries made.
- Recounting what was said.
- Summarizing user's story.
- Clarifying pertinent points.
- Follow-up questions asked.
- Double checked answers with representative or companion present.
- Engaged and responsive to the story.
- Summarised answers given by user to check accurate understanding of the situation Rephrasing the answers in question form.
- Picked out relevant details from user's statement.

- Summarises points made by parents and then confirming they understand it correctly.
- Regular summaries provided.
- Repeated answers at times to confirm understanding.

#### 'Rarely' to 'Not at all'

- Did not engage with user and only asked questions, directed at the interpreter.
- At certain points they check the facts but mostly they just let the user speak.
- Checked frequently with LEA and school representatives but did not check with user often.
- Chair said that she understood where each party came from, but when she summarised the father's position, she got it wrong (father corrected).
- Did not check the user's story either by summarizing a sequence of answers or by asking 'check-up' questions.
- User did not give her story.

other hand, there appears to be an extensive repertoire of behaviours through which it is possible for tribunals to communicate that they are not listening or, worse, that they are bored – whether or not this is the case. This may include such things as not looking at the user, yawning, fiddling with papers, staring out of the window, slumping in the chair and jingling small change. Such cases were uncommon and the examples might have represented the behaviour of only one member of a panel of three. Nonetheless, from the point of view of the user, for whom this is the only case, and about which they are concerned or even agitated, it is disconcerting to sense that even one member of the panel about to decide your case is not listening. Such perceptions may well influence the user's trust that the case is being taken seriously and that the panel has an open mind.

### Checking understanding

Checking understanding or 'reflecting back' is an important way for the tribunal to satisfy itself that it has understood the information being communicated by the

user. It is also an important way for the tribunal panel to communicate to the user that they are listening, that the information being provided by the user is important, and that it is being taken seriously by the panel. The majority of tribunals (85%) appeared to be very good at checking the understanding of the user's story. In only a very few cases (5%) it was observed that tribunal judges rarely checked, if at all, their understanding of the information being given by users. As with the appearance of listening, there were again no significant differences between tribunals, or differences associated with the ethnicity of the user.

### Tribunal behaviour and ethnicity of user

Not a single analysis revealed any systematic difference in tribunals' behaviour might disadvantage minority ethnic users during hearings. This does not mean that tribunals treated each person identically. It means that most users were treated with professionalism and courtesy and that where tribunals made extra efforts to enable users to participate, this was in response to the need demonstrated by the user as a result of language or

comprehension difficulties and this was as true for white British users as for minority ethnic users.

**Conclusion**

While observation of tribunal hearings revealed the extent to which tribunals appear to have developed the competences necessary to conduct hearings that offer a fair opportunity for users to present their cases, observation of users also revealed the deep and fundamental differences between users in education, confidence, fluency and literacy – which traverse ethnic boundaries – and the importance of language, education and culture in equipping users with the bundle of competences that *they* need in order to make the best of their case. These differences inevitably mean that there are limits to the enabling role and that tribunals cannot be expected to compensate entirely for the disadvantages of some users.

The findings of the research provide a wealth of information about the needs and experiences of tribunal

users, establishing that within the three tribunals studies, users are on the whole treated well during hearings and that the majority of users, across ethnic groups, perceive this to be the case. The study also contains strong messages about the importance of preparing users for hearings, of paying attention to those features of proceedings that contribute to perceptions of fairness, of the need to equip the judiciary with the necessary skills to enable unrepresented parties to participate effectively, and of the limits to the enabling role. It also continues to confirm that in some cases representation may be crucial to substantive fairness.

The results of the research in relation to tribunals’ enabling skills and users’ perceptions of fairness contain lessons for the wider judiciary who are increasingly required to meet the challenge of delivering fair hearings for unrepresented litigants.

HAZEL GENN is Professor of Socio-Legal Studies at University College London.

# COMMISSION MEMBERS

On 23 January 2006, the Lord Chancellor announced the appointment of 13 of the 15 inaugural members of the Judicial Appointments Commission, following the appointment in October 2005 of Baroness Usha Prashar

**JUDICIAL APPOINTMENTS**

as Chairman of the Commission. Under the Constitutional Reform Act 2005, there will be 15 Commissioners, including the chairman, drawn from the judiciary, the legal professions, listed tribunals, the lay magistracy and lay public.

<b>The new members of the Judicial Appointments Commission</b>	
<b>Judicial members</b>	<b>Professional members</b>
Lord Justice Auld	Edward Nally
Lady Justice Hallett DBE	Jonathan Sumption OBE QC
Judge Frances Kirkham	<b>Lay members</b>
District Judge Charles Newman	Professor Hazel Genn CBE
<b>Tribunal member</b>	Sir Geoffrey Inkin OBE
Judge David Pearl	Sara Nathan
<b>Lay justice member</b>	Francis Plowden
Dame Lorna May Boreland-Kelly JP	Harriet Spicer

Commissioners will serve for initial terms of up to five years.

The new Commission comes into operation on 3 April 2006, from which date it will be responsible for selecting candidates for judicial office.

There will be a transitional period up to April 2007 and the Lord Chancellor will retain responsibility for a small number of appointments during that time.

# LISTENING *to* *a* RANGE *of* VIEWS

*Should the use and value of oral hearings be reassessed? A consultation exercise by the Council on Tribunals has attempted to canvass views. GENEVRA RICHARDSON draws out some of the emerging themes.*

As readers of this journal will already be aware, the 2004 White Paper, *Transforming Public Services: Complaints, Redress and Tribunals*, considered the possibility of developing proportionate dispute resolution across the whole field of administrative justice and indicated a need to reduce reliance on formal oral hearings.

The Council on Tribunals soon realised that, if it were to play a useful role in subsequent policy discussions within this enormous and potentially exciting agenda, it needed to canvass views on the function of oral hearings. Its consultation paper, *The use and value of oral hearings in the administrative justice system*, published in May 2005, represented the first step in this process.

It was intended not only to ask questions relating to the role of the traditional oral hearing, but also to find out what people thought about other methods of dispute resolution that might or might not involve some oral element, such as independent complaints handling, ombudsmen and mediation.

A tribunal hearing was defined as: 'A sitting of the tribunal for the purpose of enabling the tribunal to take a decision on an appeal, application or on any question or matter at which the parties are entitled to attend and be heard.'

The Council tried as far as possible to proceed from a position of neutrality – neither assuming the superiority of the oral hearing, nor advocating its replacement. We genuinely wanted to gauge the range of informed opinion.

The consultation paper was sent out to as many interested parties as could be identified.

## Nature and number of responses

The Council was pleased to receive 110 responses, many very carefully argued, and a number of which were themselves the result of a consultation within the responding organisation.

The breakdown of responses was as follows:

Advice sector .....	46
Tribunals .....	27
Professional bodies, practitioners, Department lawyers .....	12
Regulators, complaint-handling bodies .....	6
Ombudsmen .....	5
Academics .....	4
Other .....	9

A summary of responses will be published at the beginning of 2006. In the meantime, this article touches on some of the main themes that have emerged from the process.

## The role of adjudication

It rapidly became clear from the responses that, before considering the value of oral hearings themselves, it was important first to consider the proper relationship between adjudication and other forms of dispute resolution. We had, in other words, to consider the role of adjudication before usefully considering what form the adjudicatory process itself might take.

Adjudication requires the existence of a dispute between identifiable parties, and the involvement of a third party who:

- Hears evidence, and
- Imposes a decision on the parties.

Are there some issues within administrative justice for which adjudication is the only proper mechanism? Or, alternatively, certain disputes that should only be resolved through non-adjudicatory processes?

At one level, this is simply a technical legal question – namely, is there a specific duty on the tribunal to adjudicate? But many respondents approached the question in a broader policy sense. Some suggested that adjudication was the only appropriate way to resolve all disputes between citizen and state involving entitlements. Others saw adjudication as essential only in claims involving fundamental liberties, such as immigration and asylum or mental health detention. Still others felt there were some issues where adjudication was inappropriate because it tended to look back to the past and to emphasise differences rather than look to the future and to the mending of relationships.

But many, perhaps most, made the point that where citizen vs state disputes are concerned, alternative methods of dispute resolution could be used as a preliminary to adjudication, even as some form of initial categorisation according to need, but that the parties should have ultimate access to adjudication if they wished.

### The forms of adjudication

The second point focused more closely on adjudication and the forms it can take. There was huge support for oral hearings in their broadest sense, the nature of which will be detailed in the published summary. It was, however, clear from a large number of the

responses that the degree of procedural formality was seen as particularly important. While many appreciated the ability of an informal procedure to put a nervous appellant at ease, some felt that inexperienced appellants were better served by a certain degree of formality, provided it wasn't too daunting.

Perhaps more surprisingly, many respondents placed considerable emphasis on the old distinctions between adversarial, inquisitorial and enabling approaches. Some respondents were quite passionately in favour of adversarial approaches, others of inquisitorial. While it might have been thought that the Leggatt Report had put these old debates to bed by coming out strongly in favour of an enabling approach, they appear from the responses to this consultation process to be very much alive.

*There was huge support for oral hearings in their broadest sense . . .*

Some examples of responses:

- 'Inquisitorial is only appropriate if the tribunal has a first-instance role.'
- 'Article 6 demands an adversarial approach.'
- 'Inquisitorial is to be preferred – if an adversarial process goes wrong, it is the individual who is most vulnerable.'

It is apparent that further thought needs to be given to whether this debate continues to be useful, and the credence to be attached to the view that an inquisitorial approach may compromise the adjudicator's independence.

What also became clear from the responses received, however, was that everyone has their own understanding of the meaning of different terms. While it is difficult to try to offer a universally acceptable set of definitions, it might be worth repeating the characteristics attributed by Leggatt to the three forms, reproduced below.

- *Adversarial*: 'The judge is enabled to get at the truth by holding the ring while each side presents its own case and assails that of its opponent.'

- *Inquisitorial*: ‘The judge or adjudicator takes full control of the proceedings and governs the participation of the parties.’ (In some interpretations of the term, the adjudicator has the power or duty to call for evidence.)
- *Enabling*: ‘Supporting the parties in ways that give them confidence in their own abilities to participate in the process, and in the tribunal’s capacity to compensate for the appellants’ lack of skill or knowledge.’

*There was strong support for ultimate access to an oral hearing within an adjudicatory process if all else fails.*

- ‘A paper hearing is more likely to achieve a fair outcome in a citizen vs state tribunal than in a citizen vs citizen tribunal.’
- ‘Oral hearings can be daunting because of their links with criminal trials.’

### The needs of the user

The third general theme to emerge relates to the needs of users. Responses from the advice sector suggested strong support on the part of users for oral hearings and some

suspicion of alternative methods of resolving disputes. How far does this suspicion of alternatives spring from a lack of confidence in the internal review procedures adopted by some decision-making agencies and departments?

It is difficult to tap into the views of users directly (see Professor Hazel Genn’s article on pages 10 to 17). One point that did come across very strongly in the responses was the need for advice and support, whatever the form of dispute resolution adopted.

Some examples of responses:

- ‘Advice requirements of paper hearings can be high.’
- ‘Individuals can be at a disadvantage in mediation if not supported.’

### Conclusion

The themes described above are, of course, very closely related and it is impossible to keep them entirely distinct in any discussion. But each area does have its own distinct emphasis. The Council is committed to taking forward its work on oral hearings and is also considering the themes emerging from the consultation exercise when setting its priorities within its wider role.

PROFESSOR GENEVRA RICHARDSON is a Chair of law at King’s College London and a member of the Council on Tribunals. A summary of the consultation exercise discussed in this article can be found on the Council’s website at [www.council-on-tribunals.gov.uk](http://www.council-on-tribunals.gov.uk).

### Oral vs paper

In relation to the issue of oral or paper processes, the arguments were similar to those in relation to the question of the role of adjudication.

There was strong support for ultimate access to an oral hearing within an adjudicatory process if all else fails. But there were some interesting and perhaps unexpected contributions, and in one topic area there were polar opposite reactions from the two relevant interest groups: one in favour of paper, one urging oral hearings.

Some examples of responses:





# CHOOSING *to* *get* PERSONAL



JOHN RAINE *and* EILEEN DUNSTAN *highlight how a 'personal hearing' can improve an appellant's comprehension of and confidence in the adjudication process.*

The impact of physical presence and oral contributions of appellants and defendants on the adjudicative process is an important matter for tribunals. Usually, discussion on this matter tends to focus on the impact of oral contributions on the decisions made (i.e. case *outcomes*), and on the effects that the physical presence of the parties can have on the pursuit of justice. For example, comments and responses to questions may add weight and colour to the written evidence or reveal further material facts that substantiate and support the arguments of one or other side in the case. Equally, direct questioning can sometimes expose flaws or inconsistencies not apparent in the written testimony or give rise to a sense of untrustworthiness on the part of the appellant or of other witnesses.

But besides the issue of impact on case *outcomes*, there is another important aspect to consider as well, which is not simply about satisfying those who wish to 'have their say' in proceedings but more about the effect on comprehension of, and confidence in, the *process* of adjudication. That is the subject of this article, which draws on findings from research on the National Parking Adjudication Service (NPAS). This is the tribunal that hears appeals against local authority parking enforcement decisions across England and Wales, excluding London.

As with many appellate hearings, those who appeal to this tribunal are given a choice between a 'personal hearing', usually conducted in the appellant's own local area, or a 'postal' appeal in which the adjudicators

consider only written evidence submitted in advance by the appellant and by the responding local authority. In 2004, according to NPAS statistics, some 37 per cent of a total of 10,441 appellants chose a personal hearing while the remaining 63 per cent opted to rely on written evidence only through the post.

## The National Parking Adjudication Service

The NPAS is the tribunal that citizens are perhaps most likely to encounter in their lives, being the body to which they may take their cases if they wish to challenge their local council's decisions to enforce alleged parking contraventions.

In 2004, nearly three million parking tickets were issued in England and Wales (excluding London) and while less than 0.5 per cent were taken to appeal before the parking adjudicators, this still represents a sizeable number of cases.

The tribunal's adjudicators are qualified lawyers appointed with the consent of the Lord Chancellor and normally undertake

their work on a part-time basis, alongside their other legal practice. From the outset in 1998, NPAS has shown considerable regard to principles of good customer service, and was recognised by the Leggatt Report as an exemplar in this regard. User choice and accessibility were key design criteria in establishing the *modus operandi* of the tribunal. As well as choosing a 'postal appeal' or a 'personal hearing', appellants can also choose the hearing centre, and there is also flexibility about the date and time of hearing. As indicated, about one in three appellants choose a personal hearing.

*User choice and accessibility were key design criteria in establishing the modus operandi of the tribunal.*

### Personal attendance

It is difficult to generalise about the impact of personal appearances on adjudicative decision-making in parking appeals, as it is in other tribunals. Often the direct questions of the adjudicator will elicit new information that can turn in the appellants' favour cases that had seemed (to the local authorities at least) from the paper evidence to be 'cast iron' contraventions of the traffic regulations. Unfortunately, the local authorities do not always have a parking department representative present at the personal hearings, so miss out on learning exactly what was said between the adjudicator and appellant. As a result, they are often surprised by decisions at personal appeals and grumble about what they see as perverseness and inconsistency in such adjudications.

The statistics for the proportion of appeals allowed at 'personal hearings' (65%) compared with the equivalent proportion for 'postals' (51%) do at first sight suggest some potential advantage in making a personal appearance<sup>1</sup>. However, the higher success rate of personal hearings may of course simply reflect the possibility that more people with strong cases (and with the associated determination to prove them) choose personal hearings because they really want to 'have their say' and miss no opportunity to pursue the justice they seek. Equally, it is possible that the rather lower success rate on postal appeals is indicative of a greater proportion of weaker cases being put to the adjudicators more for 'stringing it out' reasons, particularly given that postal appeals involve minimal effort and no additional cost.

Each case of course has its own distinct evidence and circumstances on which decisions turn and, without a controlled experiment in which the same cases are put before one set of adjudicators as postal appeals and before another set as personal hearings, it is difficult to conclude upon the impact on appeal decisions, if any, of the choice of attendance in person over a postal appeal.

It is, however, evident that oral evidence can play a significant part in tipping the 'balance of probabilities' scale – an adjudicative principle not always appreciated by the council officers. While, as indicated, local

authority parking managers are often quite critical of adjudicator decision-making, their perspective is, of course, hardly neutral and, particularly if absent from the adjudication room, their assessments tend to be based largely on their own evidence.

### Comprehension and confidence

Besides the impact on the decisions themselves, there is quite another aspect to personal hearings to consider – that is, the impact of attendance on the appellants' comprehension of and confidence in the adjudication process.

This issue was examined as part of a research project conducted in 2004/05 for NPAS, which, among other objectives, sought to identify how the parking adjudication process was perceived by its users – both personal and postal appellants<sup>2</sup>. A total of some 150 appellants were interviewed by telephone, and responses were gathered to a series of questions about perceptions, understandings and expectations of the process, including its independence and the status and powers of the adjudicators.

Perhaps unsurprisingly, the research confirmed that appellants in general appreciate being able to choose between a postal appeal and a personal hearing. The study also identified few surprises as to the reasons underlying the exercise of such choice. But the study also highlighted significant variance in awareness and comprehension of the adjudication process between those who chose personal and postal appeals respectively and also in the respect for, and confidence in, the process shown by the two sets of appellants.

It was particularly notable, for example, that almost all of those who chose a personal hearing were aware of the *lawyer status* of the adjudicators (something adjudicators always make clear in their introductory remarks). In contrast, only 38 per cent of postal appellants were aware that their cases had been dealt with by lawyers. Similarly, while a high proportion of personal appellants regarded the adjudicators to be 'completely impartial' and 'wholly independent of the council', only about two-thirds of postal appellants shared those perceptions.

Interestingly, relatively few of either postal or personal appellants regarded parking adjudicators as having the same judicial authority as judges in court (although the proportion of personal appellants was again found to be significantly higher in this regard than for postal appellants). And it was also noteworthy that more than half of the postal appellants felt the adjudicators ‘will mostly believe council arguments’ (compared with just one in five who attended for a personal hearing).

Inevitably, to some extent at least, perceptions in this context are coloured by the outcomes of appeals. And in this regard the research also found statistically significant differences in perceptions about ‘adjudicator impartiality’ and ‘independence from the council’ between those whose appeals were refused and those allowed.

However, a significant proportion of those whose appeals were refused still held quite positive (and accurate) perceptions about the adjudicators’ impartiality (50%), independence (64%) and tendency to support the citizen if the council’s evidence is at all inconclusive (42%). Indeed, on closer examination, 96 per cent of such cases (i.e. those citing positive perceptions about the adjudicators, despite their appeals being refused), proved to be appellants who had chosen a personal hearing.

### Broadening the alternatives

A key issue of concern then is that those who exercise the right to appeal through the post, while benefiting in terms of avoidance of both the inconvenience of attendance and the anxiety and stress of cross-examination by an adjudicator, could be losing out in terms of the opportunity to learn first hand about the independence of the process and so to derive respect for and confidence in the integrity of the process.

What might be done about this? Clearly it would seem a retrograde step to deny people a choice they appreciate and instead standardise the arrangements either in favour of personal hearings or postal appeals for all. But then

comprehension of, and confidence in, the integrity and independence of adjudicative processes needs also to be regarded as a vital objective alongside consumer choice in the contemporary judicial context. Accordingly, variance in awareness between postal and personal appellants does deserve to be addressed one way or another, and, indeed, the research concluded that this could most easily be done by adding a telephone interaction (or possibly a video-conference interaction) to the postal appeal option. In this way the postal appellant (like those attending in person) would have the opportunity to hear directly by telephone from the adjudicator an explanation of the process by which their appeal would be decided and have the opportunity to ask any questions or, indeed, to make

any points, that they particularly wished to be considered in the adjudication. Furthermore, the process might well be developed into a telephone-based ‘personal hearing’ in cases where the appellant so wished, and the NPAS has recently embarked on a pilot study. In such ways, the awareness and confidence gap between postal and personal hearings could surely

be narrowed with the benefit that justice would not just be done but would more clearly be understood to have been done, irrespective of the choice of hearing type.

JOHN RAINE is a Professor of Management in Criminal Justice at the School of Public Policy, University of Birmingham.

EILEEN DUNSTAN is a Research Fellow at the Institute of Local Government Studies, University of Birmingham.

This article is based on research undertaken by the authors in 2005 on *User Perspectives on the National Parking Adjudication Service and Local Authority Parking Enforcement: Defining Quality – Raising Standards*. More details are available at [www.publicpolicy.bham.ac.uk/publications](http://www.publicpolicy.bham.ac.uk/publications).

<sup>1</sup> These statistics were derived from the sample of responses to the user survey conducted for NPAS, *User Perspectives on the National Parking Adjudication Service*, NPAS 2005.

<sup>2</sup> Raine J W and E Dunstan (2005), *User Perspectives on the National Parking Adjudication Service: Report of a Research Project*, University of Birmingham, School of Public Policy.

*Clearly it would seem a retrograde step to deny people a choice they appreciate . . .*

# ANNUAL CONFERENCE

The Council on Tribunals' Annual Conference was held on 15 November 2005, and included participants from more than 40 different jurisdictions, as well as representatives from the advice sector, user groups, academia and the wider administrative justice world.

Three of the speakers at the conference are featured separately in articles elsewhere in this issue of *Tribunals*: Lord Justice Carnwath's assessment of the impact of the Constitutional Reforms Act on the tribunals judiciary is on page 5; Professor Genevra Richardson's assessment of the Council's consultation exercise on oral hearings is on page 18; and Professor Hazel Genn summarises some of the findings of her research into the experience of tribunal users on page 10.

A theme running throughout this year's conference was those elements of the White Paper on which work could be (and indeed had been) continuing in the absence of a Courts and Tribunals Bill.

One of these projects was the review of non-legal members across tribunals, announced by Baroness Ashton, the Parliamentary Under Secretary of State at the DCA. Describing non-legal members as 'often neglected and under-valued', she touched on the importance of ensuring that those individuals have the skills and knowledge necessary to carry out their role effectively.

Peter Handcock, Chief Executive designate of the Tribunals Service, described the work that had been taking place to ensure that the new Service launched on target on 1 April 2006. On that date, the tribunals for which the DCA already provides central administrative support (including the Asylum and Immigration Tribunals and the Tax Tribunals) will be joined by the five largest from other government departments, namely the Employment Tribunals Service, SENDIST, the Appeals Service, MHRT and CICAP. Much consideration had been given to how tribunals process

their case loads and how the supporting administration is organised, with a view to seeing which processes are specialised and which held in common. The aim is to have a single unified organisation (in a national network of shared hearing centres) delivering separate, specialised services. Dedicated multi-jurisdictional hearing clerks will be responsible for the different centres, with specialist administrative staff remaining dedicated to individual jurisdictions. Critical to the success of this will be the availability of networked IT (with a reduction in the number of current IT systems), allowing facilities such as the electronic scanning and transfer of documents.

The responsibility for setting terms and conditions will transfer to the DCA, without any change at the point of transition. A detailed review would aim to produce a framework of salaries, fees and terms reflecting the different roles of different tribunal members. In the meantime, pilots on areas such as early neutral evaluation are already being held as part of the mission envisaged for the new Service by the White Paper of finding other ways of resolving disputes.

Finally, the chairman of the Council on Tribunals, Lord Newton, reminded the conference that the formal transition of the Council on Tribunals to the Administrative Justice and Tribunals Council was one of the changes that would require primary legislation. He mentioned three themes emerging in the Council's work to establish the remit of its new role.

The first of these was the necessity of finding a new approach to the way in which the Council communicates with the administrative justice sector, with an increasing emphasis on providing a forum for the sector to discuss the issues that affect all. Second, it was felt that there should be a stronger emphasis on promoting and publicising research to produce materials of value to policy-makers and others. Third was a continuing emphasis on the needs and priorities of the citizen or system user in the work of the tribunal.

*Much consideration had been given to how tribunals process their case loads . . .*





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