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EDITORIAL

A common feature of tribunals, and a way in which they contrast with the civil courts, is that users frequently prepare and present their own cases without representation, but, in the words of Sir Andrew Leggatt, ‘with expert procedural help from tribunal staff’. It is therefore important that tribunals feel comfortable with their ability to enable parties to present their case as effectively as possible before finding facts, applying the law and reaching a decision.

In this issue of the journal, we focus on the important subject of evidence and consider the skills necessary to elicit and evaluate evidence, bearing in mind the different forms it may take and the wide variety of witnesses that might appear at hearings.

In their article beginning on page 2, Kenny Mullan and Ashley Wilton take a staged approach to the eliciting of relevant evidence from witnesses, and describe the way in which tribunal members should decide on the weight to be given to it. They touch on the whole question of managing witnesses, and this topic is picked up by Philip Brown in his article on communication skills, where he describes the ways of extracting the best possible information from parties and witnesses, without appearing to favour either side.

Trevor Aldridge gives a fascinating account of the way in which thinking has developed in the Special Educational Needs and Disability Tribunal on the desirability of allowing late evidence. His article also underlines the need for tribunals to remain conscious of their purpose, and to retain some flexibility in the application of their own procedural rules.

Finally, we continue two of our series of articles in this issue with a description of the work of the new Adjudication Panel for England by its President, David Laverick, and a profile of Paul Kelly, the President of the Family Health Services Appeal Authority.

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

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WEIGHING *the* EVIDENCE



Before being able to find facts, apply the law to them and arrive at a decision, a tribunal must obtain and assess the relevant evidence. KENNY MULLAN (left) and ASHLEY WILTON describe how.

This article is intended to give some guidance in obtaining and assessing relevant evidence, a task central to the role of a tribunal. In order to find facts from the evidence, a tribunal must:

- Identify and elicit relevant evidence.
- Weigh and assess that evidence.
- Make findings of fact based on that assessment.

Nature and weight

Evidence takes a variety of different forms, many of them obvious. Others may not be so palpable, but remain forms of evidence nonetheless (e.g. videos).

The rules of most tribunals provide that a tribunal may allow evidence of any fact to be given in any manner it may think fit and must not refuse evidence only on the ground that it would be inadmissible in a court of law. The only issue for a tribunal is not the admissibility of the evidence, but whether it would be relevant or helpful in deciding the matter in issue.

One type of evidence that is often presented to a tribunal is evidence of what a party or witness has been told by someone else who is not present at the hearing to give their own evidence. Again, it may be an oral account of a document not before the tribunal. Evidence of this nature is referred to as 'hearsay evidence'. As tribunals are not bound by the strict rules of evidence, they can admit hearsay evidence.

An appellant's own direct evidence need not always be supported or corroborated by other evidence before

being accepted and a tribunal is at liberty to accept an appellant's uncorroborated testimony, but must weigh that evidence to ensure that it is consistent, not inherently improbable nor clearly absurd.

Before admitting any evidence, a tribunal must determine its probative value, and then assess its weight or value.

Burden of proof

One of the parties to the appeal will always have to assume an onus to prove their case to the satisfaction of the tribunal. It has often been said that '(s)he who asserts must prove'. In evidential terms, this is what is known as the 'burden of proof'.

It is essential that tribunals remind themselves of the relevance and significance of the burden of proof for two reasons. First, if the burden of proof is not discharged by the party on whom the burden rests, the appeal must fail. Secondly, the burden of proof does not always remain static during proceedings but may shift according to the issues raised by the appeal.

It is essential that tribunals remind themselves of the relevance and significance of the burden of proof...

Standard of proof

Tribunal members are well aware of the standard to which a party must prove his or her case, which is identical to that adopted by the ordinary civil courts, i.e. 'on the balance of probabilities'. That equates to a standard of 'more likely than not'. The standard is not that required by the criminal courts ('beyond all reasonable doubt') which is necessarily higher.

Obtaining further evidence

During proceedings, consideration may be given to adjourning to obtain more evidence. Tribunals should consider the issue critically, asking first whether the evidence is necessary (the burden of proof is an issue here), and if so whether it is likely to assist in determining the matter when the case comes back. Only if the evidence is material should an adjournment be entertained. There is a lot to be said for going by the evidence available on the day, taking account of the opportunity the parties have had to obtain the evidence, the need to avoid delays to others and the burden of proof.

A conflict of evidence between parties will not necessarily be resolved by seeking further evidence. Also, do not confuse the volume of evidence offered by each side with its value! Evaluating the available evidence to resolve the conflict by preferring the evidence of one person to another is often more appropriate.

Consider too whether there is a reasonable prospect of obtaining the evidence. It should not be assumed that because a tribunal gives a direction as to evidence, it will be supplied. Some thought should also be given to how long the delay might be in obtaining evidence. Consideration should also be given to the person who will take responsibility for obtaining and preparing the evidence. Finally, consider who will pay for the evidence.

Evidence on oath

In some tribunals, the oath (or affirmation) is always administered as a matter of course. In others, the normal procedure is not to administer the oath unless there is a crucial issue of evidence turning on credibility or, second, where there is a need to emphasise gravity. A third group of tribunals has no power to take evidence on oath, but may emphasise to the parties before them the need to tell the truth.

Summoning witnesses

A party to the proceedings may call witnesses and ask for a witness summons to be issued to compel attendance. The rules of some tribunals provide that a witness summons shall be issued on the application of a party to the appeal. The rules of other tribunals may give the tribunal a discretion whether to issue a witness summons and in these cases it will be for the chair to decide whether or not to issue a summons.

Often a party will insist that the author of a report attends where the content of that report is adverse to

them. A refusal to issue a summons in such a case is not a denial of natural justice. The correct approach is to ask whether the direct evidence of the potential witness would be relevant and of assistance in finding the facts in issue.

Expert evidence

Expert opinions need to be treated with respect rather than awe. While such opinions should be given due weight (which may well be considerable), the tribunal may, on the basis of other preferred evidence or taking account of the tribunal members' own knowledge, reject expert opinion. In recording the full statement of reasons, the reason for rejecting such evidence should be clearly stated.

Where tribunal members contribute expertise in evaluating evidence to reach findings of fact, such expertise must be put to the parties during the hearing and not introduced privately during deliberations to avoid denying the parties a chance to comment on what is, effectively, expert opinion.

Managing people

Representatives, friends and family

Those accompanying the appellant into the hearing may be representatives, witnesses or friends and family simply attending to give moral support. It is very important to

It is very important to establish early in the proceedings the capacity in which persons attend and to be wary of confusion of roles

establish early in the proceedings the capacity in which persons attend and to be wary of confusion of roles. For example, the representative may well slip into the role of a witness offering hearsay evidence. The supporter may wish to speak and, again, care is needed to determine the significance of any statement by such a person who may or may not be speaking of his or her own knowledge.

The general advice is to facilitate but elucidate and control contributions from such parties. In this way, confusion of roles is avoided and the parties are more likely than not to feel that all that has been said on their behalf that needs to be said: the goal of fair hearing is more likely than not achieved.

Witnesses

Where the witness attends, the opportunity exists to obtain direct evidence on matters of dispute and interpretation. Your task is to elicit answers without leading the witness (as to which, see Phillip Brown's article in this issue).

In all cases, care should be taken to ascertain the scope of the proposed evidence before deciding whether or not to hear it. Remember that once a witness starts to give evidence, care is needed before attempting to curtail it. It is better to have agreed the scope of evidence before the witness starts.

The questioning of witnesses must be done carefully to avoid leading questions and an aggressive stance. It is crucial to avoid leading questions, which are those tending to suggest a specific answer.

For example 'Tell us of your difficulties in climbing the stairs' is a leading question which suggests the answer: that it is difficult for the appellant to climb stairs. It is better to find out whether the appellant has stairs, and needs to climb the stairs and then ask how the stairs are managed.

Aggressive and over-confrontational questioning

normally reflects more on the questioner than the witness and should be avoided, as should comments revealing judgment on the evidence during the giving of evidence. Such comments may be interpreted as prejudicial. All of these matters are traps that may hinder a fair and efficient hearing, or the appearance of such, and will be used as a source of grievance by parties, leading to appeals or complaints.

Finding facts

General

In previewing the case, the tribunal should be looking for omissions, conflicts and ambiguities in documentary evidence so that it can determine the margin of dispute and judge the relevance or materiality of evidence.

As seen earlier, the issue for the tribunal is not admissibility but the relevance (in assisting in the determination of the case) and weight of evidence. Direct evidence (that based on a person's own knowledge) may be tested and for that reason is generally afforded significant weight.

Hearsay evidence is second-hand and therefore cannot be tested by questioning. It is for this reason that hearsay should be given less weight and treated with caution.

A particular problem relates to

anonymous hearsay evidence, which raises a serious question as to reliability, and should not be relied upon as it cannot be tested.

Assertions and submissions

Assertions of fact are not items of evidence and should not be relied upon in the absence of other evidence. However, if the other party concedes or agrees matters of fact set out in the submission, proof is not necessarily needed for such matters.

Drawing inferences

Inferences of fact may legitimately be drawn from primary findings of fact in certain circumstances, e.g. the

... care should be taken to ascertain the scope of the proposed evidence before deciding whether or not to hear it

absence of a document usually available to a party to prove a contested matter.

Conflicts of evidence

Routinely, a tribunal is forced to choose between conflicting evidence. A systematic approach to this may be adopted. First ask whether the evidence offered on each side is credible or reliable. If evidence is not credible, it is not accepted as true and therefore may be rejected.

In many cases, however, the conflict is determined by applying the standard of proof. In other words, the tribunal concludes that, on the balance of probabilities, the factual account of one party is more likely than not to be the truth.

Finally, if the evidence on either side cannot be dealt with safely by the credibility or probability approach, because the evidence is such that no preference can be taken, the burden of proof will determine the matter and the tribunal will find that the party on whom the burden rests has failed to prove the necessary facts to discharge the burden.

Documentary evidence

Before any tribunal hearing commences, a number of documents will have been made available to the tribunal, and the issue will be the weight to be given to particular documentary evidence.

Often the author of a document is not present and cannot be questioned and this can make a document less reliable and only acceptable in very restricted circumstances. But the major issues are those of relevance and reliability. The tribunal should consider the age, detail and accuracy of the document.

Whether the document is an original contemporary document or is one that was created for the purpose of the appeal hearing is also relevant in assessing reliability. In addition, it is important to identify the author, the qualifications of the author and the extent of the author's

actual knowledge of the subject treated in the document. Finally, the tribunal will, of course, wish to be satisfied as to the genuineness of the document. The provenance of documents is of considerable importance in weighing the evidential value of the document. Those that are undated, unsigned, or whose authorship is otherwise unidentified should be given little weight in the absence of an explanation as to why they are in that condition.

It is misleading to assume that information in a document is more reliable or important than other kinds of evidence. The mere fact that information is reproduced on paper does not increase its reliability as evidence.

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Errors of law

In principle, no error of law arises where a tribunal prefers evidence. However, there is an error of law if:

- The decision is based on no relevant evidence, or
- The evidence is relevant but is not weighed in accordance with common sense, or
- The tribunal does not adequately explain the reason for preferring evidence.

A very common problem is the obvious but easily overlooked requirement for the tribunal to deal with all of the evidence relied on by the parties and relating to the issue in dispute. Failure to evaluate evidence relied on by either party will be an error of law. The tribunal must resist reaching sweeping conclusions that 'the tribunal was satisfied on the evidence that . . .' Instead, specific findings of primary fact must be made on the factual issues relevant to the dispute.

KENNY MULLAN is a full-time chairman of Appeal Tribunals. ASHLEY WILTON is Head of the School of Law at Newcastle University. This article is based on a paper originally written to supplement training for the Appeals Service.

HAVE *you* HEARD *the* LATEST?



TREVOR ALDRIDGE *on the genesis of the rules on late evidence at the Special Educational Needs and Disability Tribunal, which allow the submission of relevant material while preventing last-minute ambushes.*

The Special Educational Needs and Disability Tribunal (SENDIST) has had a love-hate relationship with late written evidence (and ‘written’ here includes recordings, both audio and video). After only eight years in existence, we are now on our third bite of the cherry. The puzzle is how to balance the best possible information for tribunal members with a control on its introduction which allows a fair hearing and does not interfere with case preparation.

From the tribunal’s establishment in 1994, we recognised that our adjudications should be based on what the decision should be on the facts as they stood at the date of the hearing, rather than an assessment of the correctness of the decision of the local education authority – against whose decisions appeal lie to the tribunal – on the evidence available to them when they took it. In effect, we should provide a re-hearing, although there is no formal hearing at the earlier stage.

We deal with the future education of children with special educational needs. It is therefore important that their future educational requirements should be foremost, rather than the propriety of the earlier decision making process. It is certainly true that there are cases in which those requirements change quickly.

That is the case for making the latest evidence available; a decision on anything less could be flawed. But at the same time, even in an informal tribunal setting, the evidence must be reliable. The representative who arrived

at a 10 a.m. hearing announcing that on the way in he had telephoned the school in question, and the headteacher (whom one might imagine in a hurry to go to the school assembly) had said ‘...’, was hardly offering the best evidence.

The tribunal has always received a considerable amount of written evidence. As a matter of policy – decided at a political level before we were set up – the number of witnesses attending is normally limited to two for each party. This is to ensure that parents who appeal are not disadvantaged by facing an authority that finances its response to the appeal with public money.

This restriction on oral evidence generates written statements and reports from people who might have been witnesses. In addition, the child’s history, and the evidence of progress or the lack of it, is frequently relevant. This generates more paper.

Managing this mass of material to make sure that it contributes to sound decision-making is one of the tribunal’s challenges. All evidence is submitted to the tribunal secretariat, which copies it to the parties.

The case papers are sent to tribunal members in advance, who read and master them before the hearing.

When the tribunal started its work, there was no restriction on the submission of late evidence. The result was a near uncontrollable drip-feed. No sooner had we sent the bundle of papers for the hearing to members, than more evidence would arrive. Members reported that once they had received a bundle, they felt they could rely on a daily call from the postman until the hearing.

In effect, we should provide a re-hearing, although there is no formal hearing at the earlier stage

We never discovered why there was so much late evidence. Some will have related to important changes that could not have been submitted earlier. It is likely, however, that much of it was the result of inefficiency or carelessness, material that could have, and should have, been submitted at an earlier stage. Late submission was not simply untidy. It prevented members from preparing methodically, so it undermined the quality of justice that we provided.

This was the reason why, when the opportunity presented itself about a year later and new procedural regulations were brought into operation, restrictions on late written evidence were introduced. The rules provided that evidence submitted after a party's formal statement (a reply from the local education authority and a response from the parent) needed consent. For three weeks after the equivalent of the close of pleadings, the President could give permission. Otherwise the consent of the tribunal at the hearing was needed. In either case, this applied 'in exceptional cases'.

There was no intention to stop appropriate or valuable evidence being submitted. Rather, we hoped to encourage its submission at an earlier stage so that it could be rationally taken into account. This result was to be achieved in two ways.

First, to make the acceptance of late evidence a matter of discretion was intended to encourage parties to send it during the period when they were guaranteed that it would be accepted. Secondly, to limit the period during which the President's permission could be given, so that other evidence had to be left until the hearing, making acceptance even less certain, reinforced the message.

If the result had been to remove last-minute evidence that was of little importance, that would have been no loss. Enabling tribunal members to cope more

methodically with their workload and to isolate and concentrate on the real issues would be a considerable help.

After the first shock of the change, matters did not work out like that. It may be that some inconsequential evidence was never presented. But a considerable amount of late evidence did come forward. It was a rare hearing that did not spend time at the outset considering a preliminary application for the admission of late evidence, and not infrequently two applications. It was rarely a productive use of the tribunal's time. Tribunals

conscientiously considered whether it was an 'exceptional case'. But the truth of the matter was that if they suspected that the evidence would be important or even just helpful, they generally concluded that the case was indeed exceptional.

The result of the new rule was therefore positively unhelpful. Evidence that deserved careful study often only came forward at the start of the hearing. Tribunal members' preparation was undermined. The other party could justifiably feel that they had been ambushed, although not sufficiently seriously to press for an adjournment, which could be damaging to the child's educational interests because of the delay

that would be inevitable. Valuable hearing time was spent on procedural wrangling and speed-reading.

Last year, there was the chance to think yet again, when another set of procedural regulations was introduced. Evidence that a party wishes to submit after the period given for written cases is divided into two categories: items that it can submit to the tribunal and the other party at least a week before the hearing, and other items.

The presumption for items circulated in advance of the hearing is that they will be admitted. But they have to meet one basic condition. The party submitting the evidence must show that it was neither available, nor

The party submitting the evidence must show that it was neither available, nor could reasonably have been available, during the regular period for submitting evidence

could reasonably have been available, during the regular period for submitting evidence. The emphasis therefore is on restricting late evidence to material that is truly last-minute, but avoiding ambushes by having copies circulated in advance of the hearing. There is a long-stop power of exclusion if the tribunal considers that the form or extent of the evidence would impede the hearing.

If, on the other hand, the evidence is so late that it is not possible to circulate it a week before the hearing, the presumption is against admitting it. This should reduce the possibility of a last-minute ambush to the very minimum. The tribunal can accept it, but only if they consider that the case is ‘wholly exceptional’ and that, without it, there is a ‘serious risk of prejudice’ to the child concerned.

It is legitimate to ask why there is such an accumulation of late evidence. Certainly there are two factors that relate to this particular jurisdiction. More than half of parents who appeal are unrepresented at hearings, but of those with lawyers (18 per cent last year) and non-legal representatives (29 per cent), a fair number sought help at a late stage in the process. People, rightly, do not immediately reach for their lawyer if they


feel their child is not doing well at school. But the result is that conscientious representatives find that they have very little time to prepare. The second factor is the relatively small pool of independent experts from whom evidence comes. These consultants often have real difficulty in meeting tribunal deadlines.

We always bear in mind that a child's school career is irreplaceable and every delay, justified or unjustified, eats into it

These are explanations, but we do not feel that they provide reasons to abandon the basic aims of the tribunal. We seek to dispose of cases in an average time of four months from registration. That seems to be a minimum which allows parties to assemble their own cases and assess the case they have to answer and which permits the tribunal to arrange a just hearing. But, bearing in mind that we are dealing with children's education, that means there is a delay of at least a term. We always bear in mind that a child's school career is irreplaceable and every

delay, justified or unjustified, eats into it. For this reason, we have to maintain the pressure to ensure that evidence is brought forward at the earliest possible moment.

TREVOR ALDRIDGE QC is President of the Special Educational Needs and Disability Tribunal. For more information, visit www.sendist.gov.uk



Equality before the Courts

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ASKING *the* RIGHT QUESTION



PHILIP BROWN *considers the skills required by tribunal members to enable them to communicate effectively with parties and their representatives.*

In the last issue of this journal (Volume 9 Issue 1), Hazel Genn and Godfrey Cole described the framework of competences being developed by the Judicial Studies Board for the training of tribunal chairs and members, and the way in which the performance of those individuals might be measured. Communication will be a key component of any competence-based approach to the training of judicial office-holders, and this article outlines some of the skills and attributes required to ensure that communication in all its forms is effective during a tribunal hearing.

What do I need to be good at?

In order to demonstrate effective communication skills, chair, specialist and lay members need to be able to listen actively. Chairs and specialists will have, in addition, to ask appropriate questions and ensure that those appearing before the tribunal have understood not just what has been said but also the whole nature of the proceedings.

Active listening

Listening actively means far more than establishing that you are able to hear what is being said. Many methods of communication do not involve the spoken word at all. One inappropriate look (whether an expression of boredom, disinterest or lack of enthusiasm) can send a misleading message to those appearing in the proceedings.

What is important when listening to a case is a demonstration of attentiveness to what is being said.

Body language is an important communication tool. One colleague I worked with in training lay magistrates used to refer to a bench of three members as a 'trinity' of decision-makers, each of whom had a role in demonstrating effective verbal and non-verbal communication. The speaking part was the role of the

person chairing the proceedings, while colleagues divided their roles into analysing what was being said through effective note-taking and devising questions that could be asked of the parties, through the chair, at the appropriate times.

Translate this to a tribunal of three members where, for example:

- A legally qualified chair conducts the proceedings and makes the pronouncements.
- The specialist member assists with issues connected with that specialist's expertise.
- The lay member ensures that any questions of fact which require clarification are brought to the chair's attention to be put to the witnesses.

And it might be said that the 'trinity' of decision-makers holds good in many tribunal hearings.

Non-verbal communication

Effective non-verbal communication should demonstrate to all those appearing before a tribunal that the members of that tribunal are actively involved in the proceedings. Look interested by maintaining appropriate eye contact. Examine, read and be seen to read any

Many methods of communication do not involve the spoken word at all

documentation that is handed in. This demonstrates that you really are listening to what is going on and that you will be in a position to ask, or suggest through the chair, relevant questions at an appropriate stage in the proceedings.

Not everybody appearing before a tribunal will have the same, or even similar, communication skills to those of tribunal members. This is true of witnesses, parties, and sometimes their lay or legal representatives. It is therefore essential that the tribunal member who has a speaking role establishes that everyone is correctly identified and understands the nature of the proceedings.

The introductory process is not something to be brushed aside in the interests of 'getting on with the case'. The first issue is to ensure that everyone is clear about the names of those appearing before the tribunal. It really helps at the outset to be aware of the names of the parties, witnesses and representatives and, more importantly, the name by which they wish to be addressed during the proceedings. Get this right, and the tribunal is immediately on a wavelength. It sets the hearing off on the right track.

Asking questions

At tribunal hearings, reasons for posing a question may be many and various. Many will surround issues of clarification from parties and witnesses. Sometimes it will be necessary to ask a question in order to obtain relevant information or to confirm information already available to the tribunal. Aside from clarification, it will sometimes be necessary to obtain additional information which is supplemental to what has already gone before. The purpose behind this type of question is to enable the tribunal to make an informed decision.

While the above may state the obvious, it is important to remember that the question which you may wish to ask may take varying forms.

The open question

The open question is always a good question to begin with because it requires the subject to produce an answer that has not been suggested by the question itself. Sometimes it will be important for the tribunal to allow a party to express himself or herself freely. It also concentrates the mind of the individual concerned. Open questions are also particularly useful during the initial stages of the hearing. They can promote a good atmosphere or set the scene for subsequent questions. Sometimes it will be useful to ask an open question to introduce new topics later in the hearing or provide an

opportunity to investigate in more detail matters already raised in evidence. One such question from my jurisdiction might be: 'What would be the effect on your business if I revoked your operator's licence?' The beauty of open questions is that they do not suggest a 'yes' or 'no' answer or any other type of monosyllabic response.

The closed question

Sometimes of course it will be appropriate to ask a closed question. Many examples abound, but generally this will be for clarification or to ensure that the tribunal

understands the basis upon which evidence is being given or submissions have been made. For example: 'Do you accept that you have no reasonable excuse for your actions?' does rather suggest a 'yes' or 'no' answer, but it does put the subject on the spot. Be careful here not to put words into the subject's mouth.

There is also value in asking a closed question when a specific confirmation of fact is required ('Now Mr Jones, you are the transport manager for this operator?') The moderate use of the closed question will also be appropriate where it is necessary to obtain specific items of information or to test out hypotheses that have arisen out of a period of questioning. On occasion, it will be necessary to bring the proceedings back to the realms of relevance where a witness has 'gone off the rails'.

Closed questions should be used as sparingly as possible, however, and, wherever possible, followed up with more open questions

Closed questions should be used as sparingly as possible, however, and, wherever possible, followed up with more open questions.

Other questions

It is not unusual for evidence which has been given not to be entirely clear. Where this is the case, a *clarifying question* will be appropriate. This also assists the tribunal in gaining a fuller understanding of what has been said.

Apart from asking questions for clarification purposes, it will sometimes be necessary to further explore and prompt a full answer from the subject through an *extending question* ('Tell me more about that...') Sometimes it will be necessary to restate or paraphrase what has been said by a witness in order to ensure a better understanding of what a witness means or feels ('Tell me how you have changed your maintenance arrangements...')

Inappropriate questions

Unfortunately, it is possible that inappropriate questions may be asked of a witness or a party to the proceedings simply because that question is on the tip of the questioner's tongue and may follow naturally from what has just been said in evidence. For example: 'So you have never appeared before a public inquiry of this nature before?' That is a *leading question* and anticipates the answer. While this type of questioning has its place, it can be dangerous.

Another type of question to avoid is the question that begins by addressing one issue but then goes on to address two or three others. Such a question is not designed to obtain a clear answer from a witness and will often serve to confuse the subject as to exactly what it is you are seeking an answer to. The answer will inevitably be unclear and at best will only address the last question that you have asked. Double-barrelled or *multiple questions* are not to be recommended.

Creating an understanding

A question that needs to be asked frequently at some hearings is whether everyone understands what is going on. The tribunal will, but what about the unrepresented party? An outline of the nature of the proceedings and the procedure to be adopted is always likely to be essential in the case of unrepresented parties, followed by a question to ensure an understanding of what has been said and what is about to happen in the case.

Ensuring that everybody before the tribunal understands each step in the procedure and stage in the process itself

is fundamental to the skills of effective questioning and active listening.

'Reflecting back' can be an effective method of demonstrating that the tribunal has a grasp of what is being said and that the subject can confirm, in a straightforward way, his or her evidence. For example: 'From what you say, you seem to have taken steps to rectify matters. How confident do you feel that the problems which you have encountered in the past will not be repeated?'

If adopting this approach, be careful to restate the other person's evidence in your own words. Sometimes witnesses may

express feelings in a confused or contradictory manner. Be careful to restate feelings that are actually expressed in evidence.

Similarly, the tribunal may summarise back to the witness. This is designed to encompass all key points that have been made and is not limited to what has just been said. It can also:

- Clear up ambiguities by inviting the subject to consider the summary which the tribunal has made.
- Indicate that the tribunal understands what has been said.
- Move questioning to new areas.
- Close the questioning.

'Reflecting back' can be an effective method of demonstrating that the tribunal has a grasp of what is being said

Blocks

The various blocks and bridges to effective communication in a tribunal setting are listed here for the sake of completeness. It is easy to lapse into some of the pitfalls, particularly when you do not sit as a full-time member of a tribunal. Remember that a failure to listen actively and accurately will inhibit a tribunal's ability to be effective in its decision-making.

For obvious reasons, avoid technical 'jargon'. The 'bag of bias' that every individual carries about on his or her back should be left outside the hearing room. In other words, discard the notion of stereotyping, labelling, and biased perceptions of people and situations before you even read the case papers, and demonstrate both to the parties and to colleagues that bias does not form part of your considerations.

Another block to effective communication is underdeveloped interpersonal skills. If you are not a natural communicator, training is always available.

An overall strategy

There are some very easy pointers which might be commended to all tribunal members. They are designed to assist in developing an effective communication

strategy in a tribunal hearing. They are sensible and simple to adopt.

Engage with the person appearing before the tribunal by giving that person your full attention, getting on a wavelength at an early stage through the use of simple, direct language, appropriate eye contact, and displaying open body language.

As the case proceeds, look out for non-verbal clues (but be careful about the conclusions you draw), make notes, seek clarification on what is being said and display sensitivity and respect for the party, witness or advocate. Give everyone time to think before they speak.

*Give everyone
time to think
before they
speak*

Finally, no part of this article is designed to be prescriptive, but do refer to the points outlined here on each occasion that you pause to think about your role as a communicator in a tribunal setting and to consider the question: 'What do I need to be good at?'

PHILIP BROWN is full-time Traffic Commissioner for the Western Traffic Area based in Bristol. He was formerly Director of Legal Studies at the University of Cambridge Board of Continuing Education.



Race and the Courts

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FITTING *it* ALL TOGETHER

JAMES MACMILLAN *describes the work that has been continuing during the summer at the Lord Chancellor's Department to develop the ideas relating to judicial structure contained in the Leggatt Report.*

As reported in the previous two issues of this journal, the Tribunals for Users Programme (TUP) is currently reviewing options for the modernisation of tribunals in the light of the Leggatt Report. Over the summer we have been engaging with stakeholders to develop our thinking on the way forward. This process is critical to the programme's success.

There are three main workstreams within the programme: policy, business change and stakeholder management. The policy stream is exploring how the tribunals system might increase accessibility, efficiency and effectiveness for the benefit of users.

As part of these activities, we have been working with a number of panel members and representatives of the Council on Tribunals and the Judicial Studies Board.

This is helping the programme to address a number of key strands, including the proposed judicial 'structure' across tribunals and discussions about cross-jurisdictional sitting and appeal routes.

Andrew McDonald, Head of the Tribunal for Users Programme, has said: 'The involvement of the judiciary in the modernisation process has been instrumental in helping to shape the reform proposals. Their involvement is essential in ensuring we deliver a realistic and workable solution.'

One of many interesting ideas to emerge is that there could be a role for cross-tribunal regional judicial 'managers' drawn from members of the tribunals judiciary. The programme is now considering that

proposal in more detail and is consulting stakeholders more widely.

The business change project is examining the ideal design for the proposed Tribunals Service. This includes exploring how the estate could be used most effectively for the benefit of the users as a whole. The project is also investigating what a single Tribunals Service organisation might look like and the roles for those working within such an organisation.

We are keen to ensure that a unified Tribunals Service is built upon the many examples of good practice that already exist

We have also been working with individual tribunals across government in considering some of the key policy and business issues in more depth, developing with key stakeholders a greater understanding of how the legislative framework, business processes and judicial structures currently fit together. We are keen to ensure that the proposed unified Tribunals Service is built upon the many examples of good practice that already exist within tribunals.

The programme to date has been fortunate to have received a great deal of constructive support from judicial panel members, who have helped to shape the programme in many ways. Andrew McDonald welcomes this engagement and looks forward to continuing a close relationship. We will, of course, take forward our dialogue with panel members and thank those who have assisted us thus far.

JAMES MACMILLAN is a Policy and Legislation Project Manager for the Tribunals for Users Programme at the Lord Chancellor's Department. He can be contacted on 0207 210 8595.

PAUL KELLY

ANNIE ANDERSON *interviews the President of the Family Health Services Appeal Authority.*

Paul Kelly spends an inordinate amount of time explaining the difference between the new body over which he presides, which was set up in December last year, and the already existing Family Health Services Appeal Authority (Special Health Authority). ‘As you might imagine,’ he says, ‘after a while a glazed expression, coupled with a slight swaying of the listener, usually indicates when I have said enough.’

So let us get the difference quickly out of the way. The new authority, which has headquarters in Harrogate, provides an appeal mechanism against decisions of local health authorities or primary care trusts to refuse admission, or remove, primary health care providers (GPs, dentists, pharmacists and opticians) from local lists. Such a decision prevents the practitioner from practising within the area, or elsewhere if a national disqualification is made. Panels sit in three, and generally consist of a lawyer, a medical professional and a lay member. The FHSAA(SHA) continues to have some appeals jurisdiction, principally in relation to pharmacists, but it now also provides administrative support to the new statutory body. Although Mr Kelly’s new authority has been in existence for less than a year, the Secretary of State for Health has already used his power under the 1977 National Health Act to load yet more work on to it. From April 1, the body was made responsible for also hearing appeals on issues of law arising from applications to fill General Practice vacancies.

Mr Kelly, who has had 20 years as a high street solicitor in a small northern practice, came to the authority after sitting judicially for 10 years in Hong Kong. This included finding himself the senior sitting Coroner in



the colony in 1998 and responsible for implementing radical changes following a statutory review. That experience he found to be valuable when setting up the FHSAA.

He said: ‘Much work was needed to put new practices and procedures in place, but, unlike most new jurisdictions, I had the great good fortune to fall into the hands of the Acting Chief Executive of the SHA and

his staff whose considerable experience with appeals within the health service was invaluable.’

He added to this excellent fund of local expertise the lessons that he learned in Hong Kong: ‘Don’t change a practice for the sake of it (“If it ain’t broke . . .” etc).

Never irretrievably commit oneself to new procedures one cannot review in the light of experience. Robustly discourage bad practices as they develop (but otherwise have a light touch). And be aware of, and responsive to, the needs of users.’

Thankfully, he said, the new jurisdiction has not resulted in a flood of cases – giving the authority time to train all 70 members, who ‘have shown commendable interest and enthusiasm’. However, he expects to be busy soon. ‘Radical operational changes at health authority and primary care trust level were implemented in April and those

changes will result in an increased workload as new personnel settle into place.’

There are three possible grounds when a care worker may be refused admission to a list. The first is conduct ‘prejudicial to the efficiency of services’, such as poor clinical under-performance, repeated wasteful use of resources, inefficient practice administration or repeated breaches on contractual duties. The second ground is fraud. The third is unsuitability – for example, criminal

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convictions, decisions of regulatory bodies, or lack of a tangible quality necessary for a practitioner.

Mr Kelly believes it is right that a president should sit on appeals from time to time ‘for only if he has dealt with issues that may arise is he able to properly inform and advise’. And he adds: ‘This must be especially true in the case of a new jurisdiction where it is necessary quickly to build a central fund of knowledge based on casework.’

Of his time as a high street solicitor, he says: ‘Like many provincial firms, one could never predict what would come through the door. In our case it ranged between two ground-breaking House of Lords cases to one of my

last triumphs, the dissolution of a partnership of window cleaners, with assets of a ladder and a bucket.’

Of Hong Kong, his time there was immensely enjoyable. ‘Those who think that sitting in another jurisdiction must be quite interesting are understating the position by some distance.’ (Even if he was once accidentally introduced on a formal occasion as one ‘who dispensed with justice’.)

Now Mr Kelly is presiding over a new jurisdiction, confident of meeting whatever challenges lie ahead. But he adds: ‘I am considerably less confident of overcoming years of neglect in my garden.’

MARY HOLMES

ANDREA DOWSETT *introduces the JSB’s senior training adviser for tribunals.*

Mary Holmes joined the Judicial Studies Board at the beginning of September 2002 as the senior training adviser for tribunals. She was previously a principal lecturer at Kingston University Law School, where she taught the substantive law subjects of civil liberties and human rights, social security law, social housing law and education law.



of the Regional Training Committee for the South Eastern Region of the, then, Independent Tribunal Service, now the Appeals Service, assisting in the devising and the delivery of training to both members and chairmen. In 1995, Mary became a magistrate and sits in the adult criminal court.

Mary joins the JSB to lead the newly formed tribunal team. John Gibbons is Mary’s

deputy and the other members of the team are Marie Rafter, Anthony Massally and Yolanda Parrish.

One of Mary’s priorities will be the implementation of the JSB’s training needs analysis (the subject of an article in Volume 9 issue 1 of this journal), the first stage of which has been the development of the JSB’s Framework of Competences for Chairmen and Members of Tribunals. The framework is to be published in the autumn.

Any enquiries about the JSB’s work should be directed to anthony.massally@jsb.gsi.gov.uk

As well as developing and delivering a series of workshops for law students in interpersonal communication skills, she devised legal negotiation workshops for final-year and post-graduate diploma law students and still teaches the negotiation module on the LLM in dispute resolution. She was also responsible for quality assurance in the Law School and introduced peer observation and mentoring.

Mary was an external examiner for law subjects at several institutions, including conference skills for the General Council of the Bar’s Vocational Course. Until 1999, she was a member of both a Social Security Appeal Tribunal and a Child Support Appeal Tribunal and was a member

PROBITY *and* GOOD CONDUCT

DAVID LAVERICK *explains the workings of the Adjudication Panel for England and the Standards Board for England, two new bodies set up to monitor the actions of local authority members.*

In November 2001, I accepted an appointment to set up the Adjudication Panel for England, established by the Local Government Act 2000. At much the same time, I was attending conferences on the Leggatt Report with its proposals to consolidate the tribunal system.

The title gives little clue as to the tribunal's purpose and role. The Act also established another body which is responsible both for resourcing and servicing the Adjudication Panel and for prosecuting cases before the Panel. That body's title, 'The Standards Board for England', also gives little clue as to its purpose.

So what is this all about? The answer is probity and conduct in local government. The Act has established the Standards Board with a brief to offer guidance on matters relating to the conduct of members of local authorities. The Board must appoint employees with the splendid title of 'ethical standards officers' whose task is to investigate complaints (received from the public and referred to them by the Standards Board) that members of local authorities (and other specified bodies, including police authorities) have failed to comply with a code of conduct which each authority has been required to adopt or which is imposed on the authority in default of adoption. The Standards Board is appointing three Ethical Standards Officers who will be supported by a number of investigators.

The Government has produced four model codes of conduct for the various kinds of local authority: principal authorities, parish councils, police authorities, national parks and broads authorities. The authorities concerned

were able to add to, but not detract from, the mandatory provisions in those codes of conduct, which include requirements to treat others, including council employees, with respect, to promote equality, to avoid disclosing confidential information and a wide-ranging duty to avoid bringing the authority concerned into disrepute.

Although employees of the Standards Board, the ethical standards officers are personally responsible for investigating the complaints referred to them by the Board and for determining what action to take following that investigation. Their options are to:

- Report that there is no evidence of any breach of the code of conduct.
- Report that no action needs to be taken.
- Refer matters to the monitoring officer of the authority concerned.
- Refer the matter to the President of the Adjudication Panel.

... the Case Tribunal may suspend or partially suspend the respondent

Cases are then referred to the Adjudication Panel whose Case Tribunals decide whether or not the respondent has failed to comply with the relevant code of conduct. Where such non-compliance is determined then the Case Tribunal may suspend or partially suspend the respondent or may disqualify the respondent from being a member of that or any other relevant authority for up to five years. The full Adjudication Panel consists of eight legal members and 16 lay members together of course with myself. All are part-time. Case Tribunals will comprise any three members of the Panel.

This sanction replaces the former arrangements under which members could be disqualified as a result of being surcharged by the district auditor. However, the range of actions that can lead to a reference to the Adjudication Panel is very much wider than the circumstances which could result in surcharge.

The model codes of conduct require the declaration of personal interests and preclude a member's participation in matters where that interest is judged to be prejudicial. In addition, members are required to promote equality, to treat others with respect, and not to disclose confidential information. There is also a wide-ranging provision that members should not conduct himself or herself in a manner which could reasonably be regarded as bringing his office or authority into disrepute.

I am hopeful that by the time matters come to be referred to a case tribunal, the facts will not usually be in dispute. But I anticipate some contest as to whether particular facts do constitute a failure to abide by the code. The Adjudication Panel starts from a clean sheet in working out what the appropriate sanction should be in cases where there has been a breach of the appropriate code of conduct.

Starting from a clean sheet presented some difficulty in arranging training for Panel Members. It was obviously not possible for the induction programme to include any observation of the Case Tribunals at work. Most, but not all, members of the Panel already held appointments as members of other tribunals so had a general understanding of tribunal procedures and the underlying principles.

There was a dilemma as to when to provide such training: on the one hand the Adjudication Panel wished to avoid receiving referrals before the training had been provided; on the other we wanted to avoid a gap between the training taking place and the first hearings of the Case Tribunals. An induction training programme was drawn up with help from the Judicial Studies Board and the

Appeal Service and delivered at a residential course in June 2002. A further day's programme for chairmen is being planned for November and the first Case Tribunals are likely to follow shortly thereafter. The November programme will be looking particularly at the use of laptop computers by chairmen in the course of the hearings as well as how to achieve consistency in the use of sanctions.

Starting from a clean sheet has also meant that the Panel has been able to devise its own procedures although it is expected that rules will in due course be set out by statutory instrument. The provisions in the primary legislation mean that the Case Tribunals have something of

a hybrid character combining characteristics of party and party tribunals with those more usually found in citizen-state tribunals. There is a right of appeal to the High Court against decisions of case tribunals and interim case tribunals (which have power to suspend respondents before the completion of an investigation). That right of appeal is available only to the respondent: there is no similar right for the ethical standards officer or for the original complainant to

the Standards Board, although that complainant is to be given notice of the tribunal's decision, which must also be published in a newspaper local to the area concerned.

While that notice will no doubt appear tucked away among the classified pages, the expectation is that the tribunal hearings will be given rather more prominence in the news sections of the local, and at times the national, press. Whether the Adjudication Panel will become a big player on the tribunal scene in terms of number of cases is doubtful; but because of the newsworthy nature of its casework it is likely to have a high public profile once sittings commence.

DAVID LAVERICK is the President of the Adjudication Panel for England. More information about the Panel can be found at www.local-regions.odpm.gov.uk/ethical/panel or www.adjudicationpanel.co.uk

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The **INSOLENT** *and* *the* **INCOMPETENT**

STUART VERNON *considers the difficulties a tribunal may have in deciding whether an advocate is incompetent and asks what it should do when it reaches such a conclusion.*

Two recent decisions have highlighted the difficulties encountered by tribunals when faced with advocates who are either insolent or incompetent. In *Bennett v London Borough of Southwark* [2002] IRLR 407, the Court of Appeal giving judgment on February 21, 2002, had to deal with the consequences of the ‘inexcusable petulance and insolence’ of a lay representative. A lengthy Employment Tribunal hearing had been adjourned and the applicant was not able to attend the adjourned hearing because of illness. Her representative’s application for a further adjournment was refused on the basis that the applicant had already given her evidence, that her representative could cross-examine in her absence and that it would cause a waste of time and resources, further expense to the respondent and result in likely delays of months. The applicant made it clear to her representative that she was unhappy for the case to proceed in her absence and further applications to adjourn were made.

During the final application the representative accused the tribunal of racism by suggesting that: ‘If I were a white barrister, I would not be treated in this way’, and ‘If I were an Oxford-educated white barrister with a plummy voice, I would not be put in this position.’

The tribunal responded to these remarks by retiring to consider their position. They concluded that they could no longer hear a case on race discrimination when they themselves had been accused of racism. They returned and announced that they were consequently discharging themselves from the case. They left any newly convened

tribunal to deal with any application from the London Borough of Southwark that the case should be struck out on the grounds that the manner in which the proceedings had been conducted was scandalous, frivolous or vexatious (rule 13(2)(e) of the Employment Tribunal Rules of Procedure 1993 under which the Tribunal has no power to punish a party or representative for contempt). After appeals against the decision of a newly convened tribunal to the EAT, the matter finally came before the Court of Appeal.

Lord Justice Ward was critical of the way in which the original tribunal dealt with the problem

Lord Justice Ward was critical of the way in which the original tribunal dealt with the problem. He suggested that they should have listened to the diatribe with ‘phlegmatic fortitude, retiring, if necessary, to compose themselves and to cool the advocate’s ardour’, and then calmly continue. Resort to familiar tribunal skills might have saved the situation: ‘One cannot help but wonder whether a few soothing words . . . would not have defused

this explosive moment in a way which would have allowed (the representative) to pull himself together, and behave with sufficient decorum to allow the hearing to continue.’ In this way the tribunal would not have ‘abdicated its responsibility’. ‘Where its authority is challenged it must deal with that challenge itself.’

In a colourful phrase, Lord Justice Ward declared: ‘In getting on their high horse they fell off the judgment seat.’

The Court of Appeal’s decision emphasises the responsibility of tribunals to rise above such challenges so that they can discharge their responsibility to judge

impartially. Lord Justice Ward went on to discuss what should be done in the circumstance that the tribunal concluded that they were incapable of hearing the case impartially. In such cases, the tribunal would have been wrong to continue. To do so would 'deny justice being done'.

In *Parmar and Others (t/a Ace Knitwear) v Woods (Inspector of Taxes)* (2002) *The Times*, June 5, Mr Justice Lightman held that incompetence by a chartered accountant conducting a tax appeal before a special commissioner did not render the proceedings unfair and did not entitle the advocate's clients to a fresh hearing. Chartered accountants have statutory rights of audience as advocates before commissioners. By acting as such, the advocate in this case warranted his fitness, legal knowledge and expertise to assume that role.

In this case, the advocate had been the appellants' accountant and had taken an active role in formulating insurance claims after a fire at their premises. However, at the hearing none of the appellant taxpayers or the accountant advocate had given evidence on the numerous issues of fact.

The commissioner rejected the taxpayers' appeal on the grounds that their case was not supported by evidence.

It was said that the accountant advocate thought that his submissions, so far as they covered areas within his own

knowledge, constituted evidence. Lightman J held that the commissioner was obliged to treat the submissions as such; they could not therefore constitute evidence in favour of the taxpayers. The conduct of the advocate was consistent with a decision taken by him that he had little evidence to give or had not wished to expose himself to cross-examination.

This decision confirms the principle set out by the House of Lords in *Al-Mehdawi v Secretary of State for the Home Department* [1989] 3 All ER 843 that a party to a dispute, who had lost the opportunity to have their case heard through the fault of their legal advisers, could not complain that they had been the victim of procedural impropriety or been denied natural justice.

However, the decision of Lightman J suggests that assumptions of competence in those who have rights of audience, may end when their incompetence becomes apparent. Such a suggestion raises interesting questions: when, and on what evidence, is a tribunal to conclude that an advocate is incompetent; and what is a tribunal to do when it reaches such a conclusion? Answers on a postcard!

STUART VERNON is Adjudicator, Office of Fair Trading. Readers may find Michael Johnson's article on the under-represented party helpful (published in Volume 7, Issue 1 of this journal).



The JSB's Competence Framework for Chairmen and Members of Tribunals 'sets out the skills, knowledge and behavioural attributes needed to perform the judicial function in any tribunal jurisdiction'.

The document will be published in November 2002. Copies will be made available on the JSB's website at www.jsboard.co.uk

Enquiries to John Gibbons on 020 7217 4772 or e-mail tribunals@jsb.gsi.gov.uk

NEWS UPDATE

Council on Tribunals moves

The Council on Tribunals moved to new premises on July 1, 2002, and is now based at: 1st Floor, 81 Chancery Lane, London WC2A 1BQ. The general enquiries telephone number is 020 7855 5200. The e-mail address is *enquiries@cot.gsi.gov.uk*.

Council on Tribunals Conference 2002

The Council's 2002 Conference is to take place on Wednesday, November 20, at Millbank Tower. Its annual report will be published that day.

Making tribunals accessible to disabled people – guidance on applying the Disability Discrimination Act

Consultation on a draft guidance document for tribunals has taken place and the responses are now being considered. It is intended that the final version of the guidance will be published in time for the Council's Conference in November.

The Council on Tribunals Model Rules

The Council is working on the modernisation of its Model Rules of Procedure for Tribunals with a view to consulting on a revised version of the rules in due course.

Children's Hearings in Scotland

The Scottish Committee of the Council on Tribunals presented its Special Report on Children's Hearings to the Scottish Ministers in June 2002.

Appointment

Ms Ann Abraham has been appointed as new Parliamentary Commissioner for Administration and will take up her post later this year in succession to Sir Michael Buckley.

The post-holder is an ex officio member of the Council and its Scottish Committee. Ms Abraham is currently the Legal Services Ombudsman for England and Wales, is a member of the executive committee of the British and Irish Ombudsman Association and has been a member of the Committee on Standards in Public Life since January 2000.

She previously held positions as chief executive of the National Association of Citizens Advice Bureaux from 1991 to 1997, various senior posts in the Housing Corporation from 1980 to 1990, and was non-executive director of the Benefits Agency from November 1997 to June 2001.

Appointments to the Council on Tribunals

Mrs Ros Hepplewhite and Ms Penny Letts were appointed as members of the Council on Tribunals at the beginning of September.

Mrs Hepplewhite chairs the Leicestershire and Rutland Area Probation Board. She was chief executive and registrar of the General Dental Council from 1996 to 2000. Between 1992 and 1994 she was chief executive of the Child Support Agency.

Ms Letts is a commissioner member and visit team leader with the Mental Health Act Commission. She also undertakes consultancy work for MIND and the British Medical Journal. From 1987 to 2001 she worked for the Law Society as policy adviser with particular responsibilities for mental health and disability.

Mrs Elizabeth Cameron was appointed as a member of the Council on Tribunals and its Scottish Committee in September. She is deputy manager of the Edinburgh Central Citizens Advice Bureau. She co-ordinates the mediation service at the Edinburgh Sheriff's Court and manages the In Court Advisor project.

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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 much-needed 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.

Tribunals is published twice a year by the Tribunals Committee of the Judicial Studies Board, although the views expressed are not necessarily those of the Board.

Any queries concerning the journal should be addressed to:

Andrea Dowsett

Judicial Studies Board

9th Floor

Millbank Tower

London

SW1P 4QU

Tel: 020 7217 4767

Fax: 020 7217 4779

E-mail: publications@jsb.gsi.gov.uk