

# The Use and Value of Oral Hearings in the Administrative Justice System

## Introduction

In July 2004 the Department for Constitutional Affairs published a White Paper called *Transforming Public Services: Complaints, Redress and Tribunals*, in which it encouraged the adoption of proportionate dispute resolution across the whole field of administrative justice and emphasised the need to reduce reliance on formal oral hearings. The Council on Tribunals considers that the pursuit of this agenda will require careful consideration of the respective merits and demerits of all the various forms of dispute resolution currently employed within administrative justice, and that the Council and/or its successor body, the Administrative Justice Council, will need to be in a position to contribute to that debate. With that object in mind the Council would like to canvass views on the role of traditional oral hearings as currently employed and to enhance its own understanding of the alternative forms of oral exchange available in administrative justice.

This consultation paper, which seeks views on the use and value of all forms of oral exchange within the administrative justice system, represents the first stage in this inquiry. We hope it will lead to further debate.

## Responses

Please see end of document for further details.

## Closing Date

Responses should be received by [Friday, 2 September 2005](#).

## Background

In developing a debate on the use and value of oral hearings very broadly defined, this paper seeks both information on the different types of oral exchange currently employed within administrative justice and opinion about the value each form of exchange can add. Finally, with a view to developing principles which might be used to inform the decision whether or not to employ an oral component and if so in what form, the paper seeks views on the principles which might be applied to guide those choices.

While formal oral hearings play a major part within civil, criminal and administrative justice in the United Kingdom, such hearings are certainly not the only oral component currently in use. The precise nature of the oral component within a dispute resolution process will vary enormously depending on the context.

Within the tribunal context, an ‘oral hearing’ has recently been defined by the Council on Tribunals 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”, and it is in this sense that the term oral hearing, or ‘formal oral hearing’, is used here. The term ‘oral element’ is used to describe any other oral component within a dispute resolution process.

Formal oral hearings thus defined have traditionally been seen as the best way to test the evidence and to ensure that not only is justice done but is also seen to be done. The Review of Tribunals conducted by Sir Andrew Leggatt engaged in wide consultation and reported the following views on the value of oral hearings: oral hearings are more user-friendly than written procedures; are particularly suitable where cases turn on disputed facts or complex issues and where it is necessary to test the evidence rigorously; give a better opportunity to uncover information not disclosed in written evidence, offer parties the equivalent of their “day in court”; and allow “justice to be seen to be done” in a more transparent way than by use of written procedures (*Tribunals for Users: One System, One Service*, March 2001). Whatever the perceived advantages, however, there are also perceived disadvantages to formal oral hearings; in some contexts they are viewed as costly, intimidating and time consuming. And according to law a person’s right to a *fair hearing* does not always equate to the right to an *oral hearing*.

In practice the precise mix of oral and written procedures can vary widely across and within tribunals. Some tribunals are empowered to proceed on paper unless a party requests an oral hearing, while others are free to decide for themselves the circumstances in which an oral hearing will be allowed, and tribunals are increasingly being given flexible case management powers through changes to their rules and procedures. Against this complex background the Leggatt Report recommended that tribunals should assess the merits of written and oral procedure for each case, and consider whether to ask the parties their preferences.

Outside the tribunal context some dispute resolution procedures within administrative justice include no formal oral hearing, as traditionally understood, nor any other oral element. Indeed as explained above, it is now government policy to encourage greater use of alternative dispute resolution (ADR) or proportionate dispute resolution (PDR) processes within administrative justice. These processes of dispute resolution may take many different forms, not all of which will contain an oral component, and even where an oral component in some form is included it may not follow the traditional, oral hearing model adopted in more adjudicative and adversarial settings. Mediation, for example, will often involve face to face negotiation, while investigation by an ombudsman can involve fact finding interviews. Neither process seeks to emulate the formal oral hearing.

# The Value of Formal Oral Hearings

The advantages and disadvantages of formal oral hearings before tribunals, at both first instance and appeal, have been discussed in a number of different contexts including the White Paper, the Leggatt Report and in some of the Council's own publications.

Some perceived views on the value of oral hearings, with questions to assist responses to this consultation, are set out below:

They are user-friendly

1. Are oral hearings more or less user-friendly than other dispute resolution processes? Please explain.

2. Do some users find it easier or harder to express themselves through speaking, and if so can you estimate what proportion?

They are costly

3. Do oral hearings increase or decrease the cost of determining a dispute, and if so please explain why and by how much?

They provide an opportunity to draw out salient points. They are useful for exposing errors, misconceptions or injustices, especially where disputed facts, complex issues or questions of credibility are involved

4. Are oral hearings more or less effective than other processes in dealing with complex matters? Please explain.

5. Are oral hearings more or less effective than other processes where evidence and credibility are in question, and if so in what way?

6. Are oral hearings more or less effective at uncovering evidence not otherwise disclosed, and if so how?

They are legalistic and daunting

7. Are oral hearings more or less legalistic and daunting than other dispute resolution processes? Please explain.

They offer parties the equivalent of their “day in court”

They are time consuming

They allow “justice to be seen to be done” in a more transparent way than by use of written procedures

They inhibit direct and easy access to the full range of potential users

They create difficulties in securing attendance and appropriate venue, have resource implications and increase potential for delay/ adjournment

8. Is the opportunity to have a “day in court” important to users and can it be satisfied only through an oral hearing? Please explain.

9. Are oral hearings more or less time consuming for participants than other dispute resolution processes? Please explain.

10. From the date a dispute resolution process is started to the date an agreement, recommendation, or decision is made, what impact does the oral component of the process have on the overall length of the process? For example, do traditional oral hearings lengthen a dispute resolution, and if so why?

By “started” we mean the date a complaint is made, an appeal is lodged with a department, an appeal is lodged with or referred to a tribunal, or anything similar. “Decision”, in relation to tribunals, means the decision of the first tier tribunal.

11. Are oral hearings the best or only way in which to ensure that justice is perceived to be done both by the participants themselves and the public at large? Please explain.

12. Do oral hearings inhibit some potential users? Please explain.

13. Are these valid concerns? Please explain.

# The Style of Oral Hearings and Range of Other Oral Elements

As emphasised above, the oral component within a dispute resolution process will vary enormously depending on the context. Most tribunals perform an essentially adjudicative function; on the evidence before them they have to reach a binding determination of the matter in dispute. And traditionally they have adopted an adversarial style of procedure at an oral hearing. Each party is allowed to advance their own case and question the other party's case and the tribunal acts as the independent decision maker.

However, even within tribunals a more "inquisitorial" style is sometimes adopted where there is a greater flexibility over style and procedure, and the tribunal plays a more active role in questioning participants and calling for evidence. This tendency has been encouraged in some tribunals by the introduction of comprehensive case management powers.

The Leggatt Report advocated an "enabling" approach to tribunal hearings. Such an approach would combine aspects of both adversarial and inquisitorial styles and enable hearings to proceed in a flexible and more effective manner. It was suggested that this might have particular value in those tribunals where participants are less likely to be represented.

Outside the tribunal context the oral element might be less central and designed to perform a different task; face to face negotiations in mediation, for example, or fact finding interviews conducted by an ombudsman, whether face to face or over the telephone.

Some points, with questions to assist responses, are listed below:

In tribunals an adversarial style of adjudication is common

14. In your experience, what are the particular advantages of adversarial procedures? Please explain.
15. What are their disadvantages?

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Some people fear that tribunals will appear to be less independent if they become more inquisitorial or even enabling

In other dispute resolution processes the oral element may be less central and designed to perform a different task; face to face negotiations in mediation, for example, or fact finding interviews conducted by an ombudsman

16. How can a tribunal maintain its independence in an inquisitorial situation?

17. What effect would an increasingly inquisitorial style have on the participants?

18. In your experience what form do these other elements take and what tasks do they perform?

19. What are their particular advantages and disadvantages?

20. Do they offer examples of good practice that could be adopted elsewhere?

## Relevant Principles

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Principles could be devised in order to help guide the choice of procedure in general and the use of oral hearings in particular

21. In your view what features of a dispute should indicate the need for an oral component in general and an oral hearing in particular?

22. What features of the dispute should influence the form any oral component might take?

## How to Respond

The questions are designed to help you respond. We will welcome any further comments that you feel are relevant.

Please give an explanation of your responses where possible, and provide details of any statistics or other evidence that has guided your response.

When responding please state whether you are responding as an individual or representing the views of an organisation. The Council intends to publish a summary of your responses later this year. If you wish to remain anonymous, please clearly indicate this in your response.

Please respond by Friday, 2 September 2005

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This consultation paper is also available on-line at [www.council-on-tribunals.gov.uk](http://www.council-on-tribunals.gov.uk).

## Enquiries to

Simon Catherall on 020 7855 5210 or in writing to either of the above addresses.

Thank you for participating in this consultation exercise