

Council on Tribunals Annual Conference 2005

Conference Report

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Parliamentary Under Secretary of State, Department for Constitutional Affairs

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Keynote Address

Baroness Ashton

Parliamentary Under Secretary of State, Department for Constitutional Affairs

- Very committed to the Courts and Tribunals Bill.
- Keen to produce a 'way forward' for individuals and businesses to secure justice, particularly those who are most vulnerable – for example children with special educational needs, disabled people, victims of crime, victims of discrimination.
- Equality Bill contains those issues and has just been sent to the House of Commons and contains a new Commission on Equality and Human Rights.
- At the moment there is a fairly incoherent system, with over 70 government tribunals in need of reform.
- Very keen to ensure we bring the best expertise together. Recognise within different tribunals there are centres of excellence, but there is a lot we can learn from each other – sharing resources more efficiently and effectively.
- The Courts and Tribunals Bill is fully prepared and we are waiting to get a slot. Inevitably we face difficulties because there is a lot of legislation waiting.
- However, this is not an 'essential' without which we can't make progress. In the meantime we want to have a community of people working around tribunals and we will achieve that, pending the legislation to cement those arrangements.
- The issue of non-legal members is important. When building the Tribunals Service we need to look closely at how we utilise our non-legal members. They are a very diverse group, often neglected and under-valued.
- Must ensure they have the relevant skills and knowledge and are used as effectively as possible, as they make the connection between the tribunal and the user.
- I am going to conduct a review of non-legal members across tribunals and I welcome any comments. What I want to achieve is a real sense of how we develop these members and how they fit into the overall picture of a tribunal service that's appropriate for the next stage in the development of civil justice.
- My commitment to you is that we get this right. It is an opportunity to learn from our tribunals and ensure that we feed back into the policies that departments follow, so that when decisions are made we can recognise how departments implement their own decisions.

Tribunal Judiciary in the New Constitution

The Rt Hon. Lord Justice Carnwath

Senior President of Tribunals designate

- A year ago I addressed this conference in my new role as Shadow President of Tribunals

Shortly before the conference, the Government had announced its legislative programme in the Queen's Speech.

- The Bill was not in the programme announced in the Queens Speech after the election. Fortunately, the launch of the new Tribunal Service is not dependent on legislation, and it will go ahead as planned next April.

Constitutional Reform

- With or without a Bill, we are faced with major change next April, as part of the wider constitutional reform programme. The Constitutional Reform Act 2005 was designed to implement the Government's proposals to revolutionise the relationship between the courts and the executive.
- It has only been in the last few months, during the preparations for the implementation of the Constitutional Reform Act next April, that its implications for the tribunal reform programme have begun to become fully apparent.
- In this paper I will concentrate on five key features of the new settlement, now embodied in the Act –
 - The statutory guarantee of independence of the judiciary, which the Lord Chancellor is obliged to uphold, and defend (s3) The "judiciary" is defined as including the judiciary of the courts of any part of the United Kingdom, and of any international court. Tribunals are not mentioned.
 - Power for the "chief justice" of any part of the United Kingdom to make written representations to Parliament on "matters of importance relating to the judiciary, or otherwise to the administration of justice" (s 5). The "judiciary" is not defined in this context. But the term "administration of justice" seems wide enough to include tribunals.
 - Statutory recognition of the role of the Lord Chief Justice as "President of the Courts of England and Wales", and as such responsible for leadership and deployment of the judiciary, and for their "welfare, training and guidance" (s 7). The "courts" for which he is made responsible by the section include magistrates courts, but not tribunals.

- A new independent Judicial Appointments Commission, responsible for judicial appointments (s 61ff). The offices for which the JAC will be responsible (s 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” (s 88(3)).

(Other tribunals, within the wider remit of the Council on 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: s 98.)

- A new statutory system for discipline of holders of judicial office, 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 (s 108ff). The definition of “judicial office” for this purpose includes all the tribunal offices listed in Schedule 14. The Lord Chief Justice is given specific power to nominate another “judicial office-holder” to exercise his disciplinary functions (s 119).
- In applying these provisions to tribunals, there is the added complication of “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 United Kingdom (s 3). The power to make written representations to Parliament, on the judiciary and the administration of justice, is extended to the Lord President and the Lord Chief Justice for Northern Ireland, as “chief justices” for their respective jurisdictions (s 5). 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. 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 (s 97). 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 (s 120-1).

Unfinished Business

- For tribunals, the constitutional reforms are unfinished business and as provisions of the new settlement were being worked out, tribunals were not at the forefront. (for example, only one tribunal member sits 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 answers – with and without the Tribunals Bill

- The Tribunals Bill, if enacted in its present form, would provide a few answers. 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 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 “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 statutory 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 statutory nominee on the panel conducting interviews for the appointment of the tribunal representative on the JAC. [But 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 am particularly grateful to Mark Rowland, Acting Chief Social Security Commissioner, for representing us on the committee under Arden LJ, concerned with issues of conduct and discipline. I have also been able, with the support of the DCA, to appoint Professor Martin Partington to act as my research adviser, and to establish jointly with the Council on Tribunals, a tribunal research advisory committee.) 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.
- 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, and to confirm a position in which, in the words of Professor Wade:

“... statutory tribunals are an integral part of the machinery of justice in the state, and not merely administrative devices for disposing of claims and arguments conveniently”.
- 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 in principle, 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.
- 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 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. What we need now is a Tribunals Concordat to finish the job.

The Tribunals Service: Facing the Future

Peter Handcock, CBE

Chief Executive designate, Tribunals Service

- The Tribunals Service will launch, on target, on 1 April 2006.
- The Leggatt Review 2001 recommended the creation of a common, unified administration for the tribunals system and more coherent structures for tribunals judiciary.
- The Government responded in 2004 with a White Paper proposing the creation of the Tribunals Service within the DCA in 2006; proposals for new statutory judicial structures (which required legislation) and a radical mission to improve the quality of decision making and to look at new ways of resolving disputes.
- The most immediate task is to launch the Tribunals Service in 2006. We will be responsible for current DCA tribunals, including Asylum and Immigration Tribunal, Tax, Social Security Commissioners. And then we will be joined by the largest of the central government tribunals; Appeals Service, Employment Tribunals Service, Special Educational Needs and Disability Tribunal, CICAP, and Mental Health Review Tribunal.
- In April 2006 we will have a budget of roughly £300 million a year and 12,000 staff/judges/panel members. This is the first significant change for tribunals in fifty years, and so the pace of change is gradual rather than overnight to maintain the quality of service. Most important and impressive is the level of knowledge, experience and commitment within the tribunal system and that is a key component in delivering successful change.
- One striking feature of the tribunals system is that the business model differs within each tribunal – both the processing of the case and the way in which the supporting administration is organised. So one of the key tasks when we undertook this work was to undertake a major piece of work to look at how we organise business processing in all jurisdictions – which processes are specialised? Which processes can be done in common?
- Second aspect of the business model that we need to change is to create a single unified organisation delivering separate services, with support from the DCA. Our systems and structures need to be designed to reflect this model. Specialist administrative staff remaining dedicated to individual jurisdictions, and integrating a regional management structure.
- One of the biggest challenges is dealing with the inherited estate. The estate is of variable quality, and the extent to which they are accessible to people varies hugely

between jurisdictions. The aim is to reduce the number of buildings and sites through rationalisation.

- We propose a national network of shared hearing centres, and the goal is where we can locate our national network, because each will need to offer good standards and facilities; including the provision onsite of advice and information; flexible usage for different needs of jurisdiction; critical to this will be the availability of networked IT. One of the striking things for me is the way that clerking is provided for hearings. In CICAP & SENDIST clerks travel from wherever the central processing is done to a casual venue, which is often unsuitable. The MHRT contracts out its clerking and is often wholly unsuitable. If you look at the AS, AIT and ETS, we have an excellent network of staff who support their jurisdictions to the highest possible standard. The goal should be to extend that quality of service across the whole jurisdiction - dedicated multi-jurisdictional hearing clerks.
- Important to strike a balance between access and quality in a new tribunal services estate. Most urban conurbations will support hearing centres, and in remoter locations we need to balance providing reasonable access with cost effectiveness. We will also need to explore using the wider DCA estate – although this may not be appropriate or practical to use courts areas.
- Next 3-5 year issue is IT. Our aim is to reduce the number of IT systems and use the best systems across the service. We want to introduce systems like ‘caseflow’ (as being developed in the Employment Tribunals Service) that allows electronic scanning and transfer of documents. I would also like to see us extend access of IT so staff in different locations can use various systems. – providing access and flexibility to support local systems.
- Judicial reform process. A critical part of the process of reform is the creation of the coherent body of tribunals judiciary, led by the Senior President with whom the administration can engage in a consistent and straightforward way. There is no coherent vision for reform unless there is a coherent vision shared with tribunal judges.
- Bringing forward the review of role of lay members in the tribunal system. We have a commitment to review a whole range of judicial issues. The responsibility for setting terms and conditions will transfer to DCA, the commitment we’ve made is that there won’t be any changes at the point of transition, but we will conduct a more detailed review during the early days of the Tribunals Services life.
- We are not aiming for a one size fits all, we need to reflect the relative weight and difference of the roles of different members of tribunals in their context, and we need to have a framework of salaries, fees and terms that support the right model for tribunal judges.

- There are a range of others with which we need to build effective partnerships with, including policy makers and decision-makers, and a wide range of stakeholders. We need to be more influential with those making policy, I want us (administration and judiciary) to find a way in to the policy making process so that we make sure it is appropriately informed by the delivery issues that later arise for tribunals. I want us to be able to provide feedback on the quality on the quality of decision making, and also support existing user/customer relationships.
- Additional dimension to the White Paper mission for the Tribunal Service is to find ways of resolving cases through early evaluation or other ways of resolving disputes. In our first year of life that will be very high on our agenda. We are already piloting new projects, e.g. early neutral evaluation, making dispute resolution more proportionate with oral hearings or paper hearings.
- Lastly we need to work out the future scope of the Tribunals Service. We know the five largest tribunals join in April 2006, the Asylum Support Adjudicators transfer in April 2007, and other tribunals are keen to join, but we need to manage this process – an enormous change agenda.
- We already have agreements in principle about the transfer of a number of small central government tribunals in 2008. Big issue to settle is whether those tribunals not currently scheduled to join should come in, and what those underpinning principles should be to enable us to decide whether a tribunal is a candidate to join the TS or not.
- Need to work hard on developing relationships with devolved Tribunals.

Training and Development in Tribunals

The Hon. Mr Justice Jeremy Sullivan

Chairman, Judicial Studies Board Tribunals Committee

- Tribunals Training Prospectus 2006 has been published. In this prospectus in addition to 'Training the Trainer', 'Effective Use of Small Groups', there is a Mentoring Skills Seminar for Tribunal Trainers.
- We have just completed the third 'Managing Judicial Leadership' seminar – and another is due in March 2006. One of the conclusions we drew from the first seminar was the value in sharing knowledge and experience within the 'uniform' and judiciary.
- It might be helpful to have judicial management seminars that are sufficiently tailored to the needs of tribunal judiciary.
- 'The Framework for Induction of New Chairmen and Members of Tribunals'. A number of tribunals had requested more detailed guidance on this crucial aspect of training. It cross refers to the competencies in the competence framework and also refers to the mentoring guidance and the training standards framework.
- 'Designing your own training'. We are finding that bespoke courses for particular tribunals involve an increasing amount of our work.
- We have been conducting a training survey to inform the Tribunal Presidents Group and of the extent of current training appraisal and mentoring in tribunals – basic information that will be needed for the unified service, in particular if there is to be greater emphasis on inter-changability.
- The results reveal how rapidly the training is moving in the tribunals world, with the widespread adoption of a competence based approach to training, usually based on the JSB's competence framework, adapted for the tribunal and the increasingly widespread use of appraisal and mentoring schemes.
- We have only surveyed tribunals due to join the Tribunals Service in April 2006. We will survey the remaining tribunals over 2006.
- Our proposals are for evaluating training that is currently offered by tribunals, so that the senior president can be assured that proper standards of training are being maintained. This is an extension of our role giving advice, guidance and being a clearing house for best training practice – working with tribunals to ensure that their training provision is to a consistent standard. It is not inspection or monitoring.

- We are in the process of piloting our proposals this autumn, and SENDIST volunteered to be involved with the pilot evaluation tribunal. Godfrey Cole will act as the JSB's Judicial Director for the Pilot. He will be supported by a team from the JSB Secretariat and will work closely with Lady Rosemary Hughes and those from SENDIST.
- We hope to conclude the pilot before the end of 2005 and intend to start a programme of evaluations in spring 2006 commencing with the 'existing and shortly to become' DCA tribunals. We expect this programme to initial evaluations to take two years.
- We will not publish the evaluation framework until after the de-briefing following the SENDIST pilot. There will then be a further process of consultation and we will report back to the Tribunal President's Group before final publication.
- Previously we have looked at training from the point of view of tribunals themselves rather than the users, and certainly the tribunals committee will be very interested to see the results of Hazel's research. It would be helpful to feed back users responses into new editions of the competencies – what sort of thing should be looked out for in appraisal etc.

Tribunals and Tribunal Users

Professor Hazel Genn CBE, FBA

Faculty of Laws, University College London

- Unable to provide results of most recent research “Tribunals for diverse users”, a comprehensive study of experience of white and minority ethnic users in tribunals and also issues relating to access for users relating to black and minority members of the general public. Publication has been delayed.
- This presentation is about ‘The User Perspective’, and draws upon previous research. There isn’t one user perspective, there are thousands of users, and for each user that brings their case to the tribunal, this is their only case.
- The starting point in considering the users perspective is this phrase from Sir Andrew Leggatts report - *‘It should never be forgotten that tribunals exist for users, and not the other way around...they do not fulfil their function unless they are accessible...and users receive the help they need to prepare and present their cases’.*
- Focusing on these three issues; accessibility; preparedness of users for hearings; perceptions of fairness on the behalf of users. What do users expect from system of redress?
- Starting with the concept of accessibility. What do we mean by access to justice in the tribunals context? It’s important we provide appropriate redress for justified grievance by procedures that are fair and perceived to be so by complainants. This basic principle applies whether we are talking about oral hearings, early form of dispute resolution or paper determination. And this issue of what it is we should be providing, or what it is people expect from systems of redress apply across the board.
- In terms of access, it is important that people should have access to redress based on merits and not resources, and that leads into the questions of how we help people get into the systems. As far as unjustified grievances are concerned, information and advice is important in diverting cases away from processes of redress where they do not have merit, but also helping to educate people as to why their case may not be one that has merit or is appropriate for the tribunal system.
- When we talk about the fundamentals of access, what are the essential elements in providing access to administrative justice? First of all users need to be aware of their rights, entitlement, obligations and responsibilities; and need to have awareness of systems for redress. They need the ability to effectively access that redress system, and then the ability to effectively participate in the redress processes to achieve a just outcome.

- In all of these issues in relation to access, there are significant problems for users of the tribunal system. We know that there are personal obstacles to seeking redress – whether or not people believe or know that they have rights; difficulties obtaining advice and representation; a lack of knowledge about tribunals and other systems of redress; incorrect assumptions and expectations; a lack of knowledge of law; difficulties advocating their own case; lack of understanding of power of tribunals.
- As far as personal obstacles to seeking redress, these are very important, and there is a major job to be done in helping people to understand when they might have an entitlement to some form of redress and how they might go about accessing that. People are inhibited from seeking redress, first of all because they already fear they might make a bad situation worse. More importantly, and particularly in relation to citizen state grievances, there is a sense of powerlessness – people will often say ‘There’s nothing you can do’, or ‘You can’t win against the government’.
- Even amongst those people who think there may be something you can do in order to seek redress, they may not know what they are supposed to do – for example do I have any rights? Is there something you can do? Is there some one you can phone/write to? And also there is a general antipathy toward legal procedures among the general public.
- A quote from previous research looking at civil problems – from someone explaining why they wouldn’t take action about an employment problem:

‘The reason why I was afraid to challenge anything (employment problem), watching court cases, dramas on telly and things like that, you get a picture in your head about how law works and it doesn’t seem to work right...It doesn’t seem fair...It seems unjust. I get the impression it’s not worth bothering trying to do something about things like this because you don’t get results’.

- Real issue about the public imagination of legal proceedings, and the fact that criminal proceedings seem to dominate the public imagination of what courts/justice/the legal system is about.
- For those who believe they might have some entitlement to redress, there are barriers to those obtaining advice. People experience difficulty in accessing free advice, problems with opening times of advice agencies, queues and waiting times for appointments, unanswered phones. Improvements have been made, but it is extremely difficult for members of the public to access advice when they most need it.
- Quote made during previous bits of research – almost identical phrases used recently when I examined people’s attempts to get access to CAB’s.

‘Whenever I’ve been to the [CAB] there’s been nothing. They’re always that busy. You know they say make appointments for six month’s time. Sometimes you can’t even get them on the phone. The phone just rings out constantly’

- Where people do not have advice about seeking redress, one of the problems is that only the most determined people are likely to turn up. We know about the people who we see at tribunals, but what we don't know about is those people who are not sufficiently confident or determined that they will pursue their case to a tribunal. We only see a small proportion of the people who might be entitled to seek redress at a tribunal. Where people haven't had advice, they turn up unprepared for hearings, they may have a strong sense of injustice, but they have difficulty formulating their case in a way that will establish the necessary entitlement, and of course they don't understand the law. This lack of preparation for hearings - particularly where the hearing is significantly more formal, more complicated, more different than what they were expecting it may lead to a sense that there has been some sort of unfairness.
- Previous research on user experiences, indicates that hearings are often more formal than expected, difficulties in self-representation, tribunals cannot fully compensate for lack of representation – particularly with language difficulties, articulation etc. Represented parties may be more likely to be successful with their appeals than un-represented parties.
- How can access be improved? There is a need for more information and help, particularly for those people that know they don't know what to do. We recognise there is a huge variation in situation and capability – some need a lot of help, some don't need so much help. Need for well-publicised, easily accessible sources of free information and advice, and an important need to get the right sort of information to the right kind of people at an early stage.
- What can tribunals do before the hearing to help users prepare for the hearing and frame their expectations? The Tribunals Service should be looking at the nature and quality of information that goes to users before the hearing. We have to bear in mind language and literacy problems and the inability of individuals to grasp technicalities of legal procedure. Written material needs to go out in a way that is comprehensible and we need think about more creative ways to educate people about what to expect at tribunals. E.g. 3 or 4 mins of a video is better than 15 sheets of papers. We need to prepare people for a hearing – what will happen? What will it look like? Who will be there? What must they do? What must they bring?
- Tribunals and advice sector need to think about what they can do to answer these questions. My latest research is quite clear that when people are in tribunal waiting rooms, their understanding of what is likely to go on does not come from any sense of general knowledge, but everything they know comes from what they have received from the tribunal.
- What should we be doing to help users at tribunal hearings? The Leggatt Recommendations make it quite clear that '*members of a tribunal should do all they can to understand the point of view, as well as the case, of the citizen*', and '*The tribunal*

approach should be an enabling one, giving the parties confidence in their ability to participate, and in the tribunal's capacity to compensate for lack of skills or knowledge'.

- What should the tribunals be seeking to achieve? And this applies whether you have a full oral hearing, or a slightly truncated hearing or whether you are dealing on paper, you should seek to provide accurate, reasoned decisions, by a process which is demonstrably fair and perceived to be so by the user. The biggest challenge is providing acceptable decisions to those who lose. – *'At least I had a fair hearing'*.
- In order to allow people the sense of having a fair hearing, what do users want from the redress system? To win, but the components of fairness are opportunities for participation, evidence of being heard, arguments genuinely considered even if ultimately rejected, reasons for decisions, opportunity to influence decision, neutral forum, treatment with courtesy and respect.
- As far as the tribunal is concerned, there is a tension for tribunal chairman between this idea that they are supposed to enable and the traditional model of the neutral passive judge. The enabling process should be dynamic. What the tribunal should be seeking to do is match their strategies to the apparent competencies of the person appearing before them – you have to adjust to the needs of the user (e.g. poor language, literacy problems). Enabling is about 'goodness of fit' between tribunal's approach and user's personal bundle of competencies.
- What can the tribunal do at the hearing? – understand anxieties and difficulties, explain what is happening and what the tribunal has to do/establish, careful use of language, communicate that the language is being heard and understood – particularly body language, active listening, checking understanding of user's points. And eventually explain the decision – especially why they lost.

The Council's Evolving Role

The Rt Hon. the Lord Newton of Braintree OBE, DL
Chairman, Council on Tribunals

- Last year the Lord Chancellor spoke of the major programme of change which was underway following publication of the administrative justice White Paper in the summer of 2004. Peter Handcock and Robert Carnwath were at that time newly appointed as Chief Executive designate of the Tribunals Service and as Senior President designate of Tribunals respectively. Twelve months on, they have both firmly made their mark and have a substantial body of work behind them. I am grateful to them both for bringing us up to date this morning and for sharing their latest thinking with us.
- We were also very grateful to Cathy Ashton for joining us. We know she is doing her utmost to introduce a Bill in the current session but [as we have heard from Robert Carnwath and Peter Handcock] not everything depends on it. There is a momentum behind the reform programme now that will be relatively unaffected by whether the Bill is in this parliamentary session or the next.
- The formal transition of the Council on Tribunals does require primary legislation. It has been decided that the Administrative Justice and Tribunals Council would be a more appropriate name. There are some tribunals that the Council will continue to supervise who deal with party and party issues, and can in no sense be regarded as part of administrative justice.
- In addition to the current duties of the Council on Tribunals, the Administrative Justice and Tribunals Council would, in the words of the White Paper:
 - keep under review the performance of the administrative justice system as a whole drawing attention to matters of particular importance or concern;
 - review the relationships between the various components of the system (in particular ombudsmen, tribunals and the courts) to ensure that these are clear, comprehensible and flexible;
 - identify priorities for, and encourage the conduct of, research;
 - provide advice and make recommendations to government on changes to legislation, practice and procedure which will improve the workings of the administrative justice system.
- The White Paper envisaged that the Administrative Justice Council would be an advisory body for the whole administrative justice sector, and would for instance make suggestions for departmental review, for proportionate dispute resolution and for the

balance between the different components of the system. It would be concerned to ensure that the relationships between the courts, tribunals, ombudsmen and other ADR routes satisfactorily reflect the needs of users.

- There are 3 themes emerging strongly in our work:
 - a new approach to the way we communicate with the administrative justice sector, and an increasing emphasis on providing a forum for the sector to discuss the issues which affect us all
 - a stronger emphasis on promoting and publicising research, and working in partnership with others to produce new materials which will be of value to policy makers and others
 - a much greater emphasis on looking at tribunals and administrative justice generally from the point of view of the citizen or system user, and ensuring that users needs and priorities are reflected heavily in what we do
- We launched Adjust, the electronic newsletter, in January this year. The newsletter appears quarterly and the Autumn edition was published a short while ago. We have also just published an 'Education Special Edition' and may produce others in the future if there is sufficient interest. Being electronic, it is easier to distribute internationally and its readership extends to Canada, Australasia, continental Europe and even the Russian Federation.
- We have also increased the number of conferences, workshops and seminars that we organise and have been holding an increasing number outside London. Our Scottish Committee has had an established events programme in Scotland for some time and we were very pleased to hold our first conference in Wales back in the early summer. We have also been out to the English regions and have held "user workshops" in Manchester and Bristol. In London we have held a seminar on the use and value of oral hearings, which attracted no less than two High court judges and a Lord Justice of Appeal, and a very well attended workshop for London education appeals clerks.
- We are again very pleased this year to be able to launch a new piece of research. Trevor Buck, senior lecturer at the University of Leicester, has just finished a further report for DCA, entitled "Administrative justice and alternative dispute resolution: the Australian experience."
- The other recent research-related development is that the Council, jointly with Robert Carnwath, has established a Research Advisory Group, to be chaired by Martin Partington. Its terms of reference are;

"To provide such advice as the Senior President or the Council may seek, or as the Group may think it appropriate to offer, on all matters relating to the availability,

desirability or dissemination of research assisting with the fulfilment of their respective duties, having regard to the proposed creation of a Tribunals Service and the proposed wider remit of the Council as an Administrative Justice and Tribunals Council”

- We have now completed our programme of user workshops around the country and we greatly valued the input that attendees gave us. We are currently working on an analysis of the material we collected and we expect to publish it over the winter. Attendance by representatives of the advice sector and of pressure groups at our annual conferences has been growing each year.
- To accommodate this new work, this year in particular, members have been making far fewer visits to observe tribunal hearings than in the past and prioritising other work. However, we continue to recognise the value to the Council of staying in close touch with what is happening in the tribunal room and visits will remain an important part of our work. We think the time has come for a review of the way we approach visits and, in particular, the way we give feedback to tribunals afterwards. We plan to do that piece of work over the winter and wish to consult with tribunals about it. I will be writing to tribunal Presidents and heads about the review very shortly.
- The opinions of advice workers have been very valuable in our recent consultation exercise on the use and value of oral hearings in administrative justice. This subject has generated a great deal of interest from a wide range of perspectives, and we have received many, very carefully considered responses. I hope this consultation exercise is an example of how the Council can facilitate debate across the sector about issues that we all regard as important.

The Use and Value of Oral Hearings in Administrative Justice

Professor Genevra Richardson

Member, Council on Tribunals

- I want to do four things: to explain our reasons for engaging in the consultation exercise; describe the nature and number of the responses we received; give you some idea of our plans to publish the results and to take the work forward; and, to draw out the themes which we feel have emerged from the responses.
- The consultation exercise started with the White Paper of 2004 which both presented the possibility of developing proportionate dispute resolution across the whole field of administrative justice, however defined, and indicated a need to reduce reliance on formal oral hearings.
- The Council saw this as an enormous and potentially exciting agenda. To play a useful role in policy discussions we would need to inform ourselves of the views of those involved in all the various aspects of the tribunal world and beyond.
- The oral hearings consultation paper represents the first step. It was intended:
 - to canvass views on the role of the traditional oral hearing which we 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” – so the traditional tribunal hearing.
 - to find out what people thought about other methods of dispute resolution which might or might not involve some oral element – so independent complaints handling, ombudsmen, mediation.
- The Council tried to proceed from a position of neutrality. We were neither assuming the automatic superiority of the oral hearing, nor were we advocating its replacement. We genuinely wanted to gauge the range of informed opinion.
- Importantly, the consultation paper was not a research exercise. It was simply a request for information and views.
- We received 110 responses. Many were very carefully argued, and many of which were themselves the result of a consultation within the responding organisation.
- Three of the main themes, which have emerged from the responses, are represented as topics for discussion in the information packs.
- The first main theme is adjudication v other processes. Are there circumstances within administrative justice when either adjudication or another process will be the only

appropriate form of dispute resolution? Where can adjudication and other processes work together?

- Although the consultation paper was primarily about the role of traditional oral hearings, we were also interested in views on the whole question of proportionate dispute resolution within administrative justice.
- The definition of oral hearing which we adopted in the paper was taken essentially from the world of adjudication. Adjudication is, after all, the function performed by most tribunals and essentially it entails:
 - 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.
- It rapidly became clear from the responses that, before we could consider the value of oral hearings themselves, we had 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 we could usefully consider what form the adjudicatory process itself might take.
- More specifically we needed to consider whether there are some issues within administrative justice for which adjudication is the only proper mechanism. Or indeed whether there are certain disputes which should only be resolved through non adjudicatory processes
- At one level this is simply a technical legal question, is there a specific duty on the tribunal to adjudicate? But many respondents approached the question in a broader policy sense, which was very helpful.
- Some suggested that adjudication was the only appropriate way to resolve all citizen/state disputes 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 to look to the future and to the mending of relationships.
- But many, perhaps most, made the point that where citizen/state disputes are concerned alternative methods of dispute resolution could be used as a preliminary to adjudication,

even as some form of triage, but that the parties should have ultimate access to adjudication if they wished.

- These are the issues which we have tried to reflect in the first set of questions. And we would be very grateful for any further light that you can throw on them.
- The second main theme relates to styles of adjudication. Where an oral hearing is used, what factors should govern the degree of formality adopted? Do the distinctions between “adversarial”, “inquisitorial”, and “enabling” approaches retain any practical significance? How much of an adjudicative process can be dealt with on paper?
- Clearly this focuses more closely on adjudication and the forms it can take. Thinking first about oral hearings in their broadest sense: There was huge support for oral hearings and we will try to fill out the nature of this support in our published summary. But there are two issues in particular on which we would like your views.
- First, it was 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.
- Secondly, and perhaps more surprisingly, many respondents placed considerable emphasis on the old distinctions between adversarial, inquisitorial and enabling approaches. While we might have thought that the Leggatt Report had put these old debates to bed, if the nature of our responses is anything to go by, they are very much alive.
- Some respondents were quite passionately in favour of adversarial approaches while others were equally passionate about inquisitorial. To give you a flavour:
 - Inquisitorial is only appropriate if the tribunal has a first instance role
 - Article 6 demands an adversarial approach
 - Inquisitorial is to be preferred because if an adversarial process goes wrong it is the individual who is most vulnerable.
- We really would be very grateful for your views on this. Particularly whether you think the debate is still useful and what credence you attach to the view that an inquisitorial approach might compromise the adjudicator’s independence.
- It was also clear from the responses that everyone has their own understanding of what the terms mean. I have no intention of sticking my neck out right now by trying to offer a

universally acceptable set of definitions. But in an attempt to clarify terms a bit, here are the characteristics attributed by Leggatt to the three forms:

- 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/duty to call for evidence),
 - Enabling: “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 skill or knowledge”
- On the second set of questions the issue of oral v paper processes. To an extent the arguments here were similar to those I described in relation to the question of the role of adjudication, and 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:
 - A paper hearing is more likely to achieve a fair outcome in a citizen/state tribunal than in a citizen/citizen tribunal.
 - Oral hearings can be daunting because of their links with criminal trials
 - And in one topic area we received polar opposite reactions from the two relevant interest groups: one in favour of paper, one urging oral hearings.
 - The third main theme to emerge and on which we are looking for your help relates to the needs of users. In your experience what do users want from a dispute resolution process? Do some dispute resolution processes demand a greater requirement for advice, support and representation than others?
 - We received some very helpful responses from the advice sector which did suggest strong support on the part of users for oral hearings and some suspicion of alternative methods of resolving disputes. And we wonder how far this suspicion of alternatives might spring from a lack of confidence in the internal review procedures adopted by some decision-making agencies and departments.
 - But we have not found it easy to tap into the views of users directly so we are obviously very interested in what Hazel’s research will tell us. And we would greatly value any lessons you may have from your experience.
 - 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, for example:

- Advice requirements of paper hearings can be high
- Individual can be at a disadvantage in mediation if not supported
- We are very keen to know your views of the advice and support requirements of all the various processes.
- Finally the Council is committed to taking its work on these issues forward and we are asking each group to consider the questions in set four. How should we take our work on oral hearings forward and what should be our priorities in tackling our wider role?

Plenary Discussion Question 1 : Adjudication v other processes.

Are there circumstances within administrative justice when either adjudication or another process will be the only appropriate form of dispute resolution? Where can adjudication and other processes work together?

Group 1

- The group came to two conclusions. First, group was not clear what the question was asking. Second, if we did understand what the question was we thought it was the wrong question.
- Briefly, in relation to part 1(a) 'no' was overall answer save for exceptions such as where the liberty of the person was involved. As for part 1(b), would succeed most in party and party cases.

Group 2

- Where it is a question of entitlement the only appropriate form of dispute resolution is adjudication.
- There is an important distinction about dispute resolutions which are looking backward and those which are looking forward which may be more appropriate where there will be ongoing relationships more likely in party and party cases.
- Thirdly, discussed the idea of 'triage' and the possibility that this may have an important role within the range as something that may or may not lead onto adjudication, in managing expectations, in enabling someone to come face to face for the first time to explain what the problem is, and possibly as a replacement for internal review.
- Finally, came back to the point that the quality of the initial decision is crucial.

Group 4

- The question seemed to address process, and the appropriate process at the appropriate level would depend on a number of things. Most important is that the answer to the question must start with the nature of the dispute and the needs of the parties.

Group 3

- Strong view around the table that mediation is not appropriate very often, even in certain party and party jurisdictions. 'Hot-tubbing', or where mediation is informed by experts, was seen as potentially useful where mediation might be appropriate.

Group 2

- Cases such as immigration and asylum where consistency and precedent is required and of course precedence is in itself a way of preventing disputes arising in the first place. ADR does not have case law and therefore might manufacture more disputes in the long run.

Plenary Discussion Question 2 : Styles of adjudication.

Where an oral hearing is used, what factors should govern the degree of formality adopted? Do the distinctions between “adversarial”, “inquisitorial”, and “enabling approaches retain any practical significance? How much of an adjudicative process can be dealt with on paper?

Group 8

- Discussed the style of adjudication in the context of oral hearings as against the paper exercise. Noted the Appeals Service statistics that show that an appeal is more likely to succeed at an oral hearing over a paper hearing, in that jurisdiction.
- Noted that there is not always a level playing field with respect to oral hearings because, for example, some people are too far away geographically and might therefore be obliged to have a paper hearing.
- In relation to styles of adjudication, inquisitorial etc., it was felt that these definitions held less significance and that what was important was a good degree of flexibility for the tribunal to handle different circumstances. If for example, there were two well represented parties, the tribunals role might be to ‘referee’ the dispute, whereas if there was no representation, or a lack of evidence, the tribunal might be better to adopt a more inquisitorial approach.
- The group liked the term ‘enabling’ in that it helped to produce the right answer, as opposed to a purely adversarial system, which may be better at producing a ‘winner’.

Group 12

- What should govern the degree of formality adopted? The tribunal user should. It should be different if the user is inarticulate, for example.
- Expectations of the user must be taken into account. Matter which affect the formality include the rules themselves, whether you are taking evidence on oath, whether there is an interpreter.
- Some tribunals have big complex issues to decide with silks arguing the issues on either side, and this surely affects the formality.
- Informality applies to both procedure, and to atmosphere, and an informal procedure may not be helpful to a person in unfamiliar circumstances, whereas an informal atmosphere will be.

Group 7

- On factors, the group felt that the degree of formality should be dictated to by the needs of the user and not necessarily the jurisdiction. Other factors may be whether the appellant is represented, there should be an early assessment of the needs of the user by the tribunal.
- There could be a high level of uncertainty if there was a lack of clarity on procedure. Recognised that a well-structured hearing may assist nervous and inarticulate users, and that this concept is not necessarily the same as that of formality.
- Other relevant factors are the degree of skills of the tribunal, the quality of representation, and the desire of the tribunal to ensure that there is equality of arms particularly in citizen and state cases and where there are complex legal arguments involved.
- The group recognised that appellant is entitled to an oral hearing where they want to have one. In particular, oral hearing is essential where facts or credibility are in dispute.
- However, in terms of preliminary matters, a great deal of case management could be dealt with by other means, especially with the assistance of all the technology that is now available.

Group 10

- Would want to reinforce the notion that formality is very dependent on the type of issue in point. Not necessarily just across tribunals, some being more formal than other, but even within a tribunal system. Tapering the process to the nature of the parties and the nature of the issues.
- The group was very impressed with the Lands Tribunal which ranges from being very formal with a ratings appeal with silks on both sides, to an alternative process if you are dealing with two people trying to decide whether a restrictive covenant should be discharged.
- On the second point, support for the idea of a video, but not necessarily a generic one.

Plenary Discussion Question 3 : User needs.

In your experience what do users want from a dispute resolution process? Do some dispute resolution processes demand a greater requirements for advice, support and representation than others?

Group 11

- To obtain closure, and to be heard, are two things that users want most out of a dispute resolution process. Users generally want a speedy resolution.
- Oral hearings clearly do have greater requirements in terms of advice and representation compared to other systems.
- There is much to be learned from the Ombudsman and mediation and other forms of ADR, in terms of what they can offer users.

Group 16

- Users want hearings to be fair and to be seen to be fair in the ways that Hazel Genn set out earlier today. They want a speedy resolution, convenient venues, assistance, equality of arms, and video beforehand to help explain the process.
- In relation to what advice and support requirements, the group felt that as the relevant legislation became more complex, the requirement for representation increased and the higher the skills of the representation needed to be.

Group 13

- Should we have paper or oral hearings? Voluntary sector people in the group were of the view that many unrepresented appellants approach oral hearings with trepidation and that they might prefer a fair paper hearing.
- Tribunal chairs in the group felt that an oral hearing was preferable and that it could help an unrepresented appellant, particularly with the evaluation of evidence.
- What support do appellants require? Group felt that web sites could help and that the Tribunals Service should have a role in developing a generic web site.
- What are the support requirements for different dispute resolution processes? You don't need less, but different advice. There was concern about the reduction in the provision of advice in general.

Group 15

- What do users want? Not to have a hearing, provided the process is fair. To be listened to. To have a speedy resolution. They want good guidance for example videos, FAQs on the web site and an indication of their prospects.
- Users want to believe that there is real independence, which users can find difficult in the absence of a hearing. What are the support requirements? Depends on the issues in question and their degree of technicality.
- More help is required for paper hearings because people are more alone in this process. It is helpful for appellants to hear in advance what the panel was focusing on.

Group 17

- What do users want? People want to put their case in a way they are comfortable with and which covers all the points. This may not necessarily be an oral hearing.
- Users want to feel they have been heard and an oral hearing is important not least because it may be the only way in which to satisfy this requirement.
- Users want a speedy resolution and there was support for the use of early directions hearings, which may enable some cases to be resolved at an earlier stage. Technology could also help in this regard for example the use of telephone conferences etc.
- What are the representation requirements? An adversarial system requires high levels of support. There is a problem with a chair offering an unrepresented party advice because they may not be seen to be fair.

Group 18

- Important point is that there are a very wide number of things that user want out of a dispute resolution process, some of which it is not possible to resolve! That people have an opportunity to be heard is very important, whether that be achieved through an oral hearing or not.
- The first contact that a person has in the process is very important. Important to bear in mind that users will come with different abilities and problems, for example the elderly or young people.
- It is important to consider that users may not necessarily require less representation in ADR processes such as mediation.

Plenary Discussion Question 4 : Next steps for the Council on Tribunals.

The Council intends to continue work on the use and value of oral hearings in the administrative justice system. What should our next steps be? The Administrative Justice and Tribunals Council will have a wider role to “ensure that relationships between the Courts, tribunals, ombudsmen and other ADR routes satisfactorily reflect the needs of users”. What should its first priorities be in tackling this task?

Group 10

- The Council should focus on the administrative staff of tribunals, the unsung heroes, because a lot is going to depend on them in terms of achieving better information and advice for users.

Group 1

- The Council needs to enable certain jurisdictions to be ring fenced where adjudication is the only proper resolution. And it needs to protect the practical lesson learned from the civil system in that mediation only works where the court remedy remains an option.

Group 8

- The group thought that if some tribunals had replied that there was scope for more paper hearings in their jurisdiction that it would be sensible for the Council to support that move.

Group 12

- The single most important point in relation to oral hearings is for the Council to get the Appeals Service to produce a DVD so that users know what an oral hearing will be like.

Group 14

- Should write to tribunals and work with them to simplify their procedures and help them integrate ADR as an option. After consultation, perhaps some system of core rules could be brought in.

Group 16

- The Council should look at the balance in an oral hearing process between oral and paper hearings, and the example of the greater use of witness statements was raised.

Group 17

- The Council must focus on easing the difficulties experienced by unrepresented appellants.

Group 18

- The Council should investigate the support that users are getting because there are clearly stresses on the budgets of advice services.