

# The Use And Value Of Oral Hearings In The Administrative Justice System

The Advice Services Alliance's response to the  
Council on Tribunal's consultation paper

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## 1 About ASA

1.1 The Advice Services Alliance (ASA) is the umbrella organisation for independent advice networks in the U.K. Full membership of ASA is open to national networks of independent advice services in the U.K. Currently, our full members are:

- adviceUK
- Age Concern England
- Citizens Advice
- Citizens Advice Scotland
- DIAL UK (the disability information and advice service)
- Law Centres Federation
- Scottish Association of Law Centres
- Shelter
- Shelter Cymru
- Youth Access

1.2 Our members represent over 2,000 organisations that provide a range of advice, legal and other services to members of the public. Most of these organisations offer services within a local area, but some of them are regional or national. They are largely funded through public sector grants and contracts, and charitable fundraising. With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people e.g. welfare benefits, debt, housing, employment, immigration, education and community care (now commonly referred to as 'social welfare law').

1.3 We have not consulted our members directly on the contents of this response. We understand that some of them may be responding to this consultation.

## 2 Introduction

2.1 We welcome the opportunity to comment on the Council on Tribunals' Consultation Paper on the use and value of oral hearings in the administrative justice system.

2.2 We understand that the Council is aiming to obtain information as to the use and value of different forms of oral exchange before considering what the relevant principles should be for deciding whether an oral hearing is needed.

2.3 We would suggest however that questions of principle should be the starting point in considering this issue.

2.4 It is our view that there are clear issues of principle in favour of oral hearings, and clear evidence to demonstrate the importance of these issues in practice in relation to the key tribunals dealing with social welfare law.

2.5 It seems to us that the key questions are:

- What issues of principle are involved here?
- Is there evidence to suggest that these issues are relevant?

2.6 Only after considering these questions would it be appropriate to consider:

- Whether it is desirable to reduce the number of oral hearings, and if so, why?

- Whether it is possible to reduce the number of oral hearings, and if so, in which tribunals, and how?

### 3 Issues of principle

- 3.1 Article 6(1) of the European Convention on Human Rights provides that, in the determination of their civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
- 3.2 This principle that has been endorsed in relation to social security appeals by several Commissioners' decisions.<sup>1</sup>
- 3.3 As a matter of democratic principle, we should start with the assumption that people are entitled to an oral hearing to resolve a dispute of any substance between themselves and the state. At the very least, appellants must have an opportunity to be heard, an opportunity to understand the process and confidence in the fairness of the process as a whole.<sup>2</sup>
- 3.4 Within the administrative justice system appellants must be able to exercise a genuine and informed choice between the dispute resolution options available to them. As the Legal Action Group have pointed out:
- “the DCA’s theoretical guarantee of the right to a hearing means little in practice if users have to fight a strong presumption against one being held.”<sup>3</sup>*
- “it is important to ensure that appellants are exercising a genuine and informed choice between the options available, and are not simply swept along in the direction of informal (or non-hearing) resolution – or even actively discouraged from opting for a formal hearing – if the latter would be in their best interests.”<sup>4</sup>*
- 3.5 In our view, it is important to consider the question of oral hearings in context rather than in the abstract. The vast majority of tribunal cases, and oral hearings, occur within the three main tribunals: Employment Tribunals, the Asylum and Immigration Tribunal and the Appeals Service.<sup>5</sup>

### 4 Employment Tribunal Cases

- 4.1 The consultation paper refers to the administrative justice system, but also to “tribunals”. We are unclear whether the paper is concerned with employment tribunals, which are of course tribunals, but are concerned with party and party disputes rather than disputes between the individual and the state.
- 4.2 It is worth noting that the number of claims to Employment Tribunals is decreasing. The latest Annual Report of the Employment Tribunals Service notes that workload during the year continued the “gradual downward trend that has existed for the last

<sup>1</sup> See for example CSDLA/606/03, and the other decisions cited there.

<sup>2</sup> See the comments by Hazel Genn at the Council’s seminar on this issue at [www.council-on-tribunals.gov.uk](http://www.council-on-tribunals.gov.uk)

<sup>3</sup> Legal Action editorial August 2004

<sup>4</sup> LAG response to the White Paper p.8

<sup>5</sup> The White Paper states, at p.22, that the three largest spending tribunals (AS, ETS and IAA) are responsible for around 85% of the total annual spend.

five years".<sup>6</sup> 2004-05 saw a large decrease in multiple cases, which fell by 39%, whereas single cases fell by 16%. Tribunals sat on 6% fewer occasions than in 2003-04. The report highlights in particular the changes in the law and procedures, which came into force in October 2004.<sup>7</sup>

- 4.3 Employment Tribunals differ from the other two main tribunal systems in the relatively low proportion of cases that are determined at a hearing. Of the jurisdictions disposed of in 2004-05:
- 30% were withdrawn
  - 37% were subject to ACAS conciliated settlements
  - 7% were disposed of otherwise
  - 26% were disposed of at a hearing, of which
  - 18% were successful at tribunal
  - 8% were dismissed.<sup>8</sup>
- 4.4 We have not heard any arguments suggesting that there is any scope for reducing the number of employment tribunal cases that go to a hearing, or for reducing the role of oral hearings. Cases that go to a hearing are, almost by definition, ones that cannot be resolved by alternative methods. They are generally contested. It is hard to see how they could be resolved, other than by way of an oral hearing, given the need of the tribunal to
- Assess the credibility of the witnesses and other evidence presented to them
  - Make clear findings as to the relevant facts
  - Consider submissions by the parties as to the facts and the law
  - Apply what are often complicated legal rules to the facts that they have found.<sup>9</sup>
- 4.5 We cannot see that it is possible or desirable to reduce the role of oral hearings in employment tribunals.

## 5 Immigration Appeals

- 5.1 For the last few years, the immigration appeal system has been dominated by asylum cases.
- 5.2 Statistics published by the Immigration Appellate Authority show that
- In 2002, asylum appeals constituted 76% of all adjudicator appeals received and disposed of.
  - In 2003, asylum appeals constituted 70% of all such appeals received and 75% of appeals disposed of.
  - In 2004, asylum appeals constituted 41% of all such appeals received and 51% of appeals disposed of.
  - In each of the last three years over 80% of all appeals to the Immigration Appeal Tribunal have concerned asylum cases.<sup>10</sup>

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<sup>6</sup> Employment Tribunal Service Annual Report & Accounts 2004-05, p.6

<sup>7</sup> Ibid p.8

<sup>8</sup> Ibid p.29

<sup>9</sup> Employment tribunals can of course reduce the length of oral hearings, e.g. by the use of witness statements, or by asking for written submissions on particular issues.

<sup>10</sup> See the tables for Adjudicator Receipts & Disposals, Tribunal Application Receipts & Disposals and Tribunal Appeal Receipts & Disposals, at [www.iaa.gov.uk/information/information.htm](http://www.iaa.gov.uk/information/information.htm)

- 5.3 Given the importance of the issues at stake, and the crucial need to assess the credibility of the applicant's account, not to mention the Human Rights Act, no one has seriously suggested that asylum appeals can be determined other than by way of an oral hearing.
- 5.4 There are of course ways in which the number of asylum appeals could be reduced. As ICAR<sup>11</sup> have commented recently:
- "Many refugee advocacy groups point to problems with the quality of initial decision-making and attribute delays in the asylum determination system to this. It has been noted above that since 1999 the percentage of adjudicator appeals that were successful has risen dramatically and has remained between 17% and 27%. The Immigration Law Practitioners' Association (ILPA) believes that access to good legal advice and representation and better initial decisions would reduce the number of appeals lodged and thereby enable the speedier resolution of claims. Long-standing concerns about the quality of first decisions and of the country information used to make decisions have been highlighted by the Immigration Advisory Service (IAS), the Medical Foundation and Amnesty International who have argued that the poor quality of initial decisions is the reason why so many decisions are overturned on appeal."*<sup>12</sup>
- 5.5 The number of other immigration appeals has increased over the last three years, and notably so between 2003 and 2004. This has been true both of those appeals classed as "immigration" and those classed as "visit visa".<sup>13</sup>
- 5.6 In relation to family visitor appeals, we have the benefit of comprehensive research conducted on behalf of the Home Office into appellants' decisions to appeal and the disparities in success rates by appeal type as between paper and oral hearings.<sup>14</sup>
- 5.7 As far as we are aware, this is the only significant research that has been specifically conducted into the difference between paper and oral appeal hearings. We trust that the Council will give full consideration to this research in its consideration of the use and value of oral hearings.
- 5.8 The study found:
- "There is currently a considerable difference in the success rates of oral and paper appeals. Between October 2000 to September 2001 a total of 2,870 family visitor appeals were determined. Of the 1,155 appellants who elected to have an oral appeal 840 (73%) had their appeal allowed. By comparison, of the 1,715 appellants who elected to have a paper appeal, 650 (38%) had their appeal allowed."*<sup>15</sup>
- 5.9 There was some evidence of considerable misunderstanding about the differences between the two types of appeal.<sup>16</sup> Many respondents understood an oral appeal to be one where the decision was communicated orally and vice versa.<sup>17</sup>

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<sup>11</sup> Information Centre about Asylum and Refugees in the UK

<sup>12</sup> K. Ward and R. Henson ICAR Statistics Paper 2 *Decision making and appeal process*, p.15, available at [www.icar.org/uk/pdf/st009.pdf](http://www.icar.org/uk/pdf/st009.pdf)

<sup>13</sup> See the tables referred to in note 10 above

<sup>14</sup> V. Gelsthorpe et al *Family visitor appeals: an evaluation of the decision to appeal and disparities in success rates by appeal type*, available at [www.homeoffice.gov.uk/rds/pdfs2/rdsolr2603.pdf](http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr2603.pdf)

<sup>15</sup> Ibid p.48

<sup>16</sup> Ibid pp.11-12

<sup>17</sup> Ibid p.40

- 5.10 The report records that sponsors were keen to advise an oral appeal in order to be able to present the case directly to a decision-maker.<sup>18</sup>
- 5.11 The report analysed the factors that affected the outcomes of hearings, and the differential success rate between paper and oral hearings.

### **The evidence of the sponsor**

- 5.12 The ability of the appellant's sponsor to attend the appeal and present evidence in person was found to be the most influential factor.

*“Where an appellant chooses to have an oral appeal their sponsor may attend the hearing and give oral evidence before the adjudicator. The evidence gathered during interviews with stakeholders, legal representatives, entry clearance staff, HOPOs and adjudicators and from the case file analysis, suggests that there are a number of contributory factors explaining the disparity in success rates between the appeal types. However, the ability of the appellant’s sponsor to attend the appeal and present evidence in person is the most influential factor.”*

*“The presence of the sponsor at an oral hearing has an impact on the outcome for a number of reasons. Adjudicators will decide an appeal on the basis of the evidence before them. Credible evidence from a sponsor may sometimes overshadow other concerns raised by the ECO in their reasons for refusal. The sponsor can place the motivations for the visit in context, produce new evidence relating to the circumstances of the sponsor and/or applicant, or voluntarily assume responsibility for ensuring the return of the applicant at the completion of their visit.”*

*“This evidence suggests that the ability of the sponsor to attend the hearing of the appellant’s oral appeal is an essential feature of the appellate process. It ensures that the process is perceived to be fair, open and independent.”<sup>19</sup>*

*“Adjudicators viewed attendance by the sponsor as particularly helpful to ensure that the relevant matters could be fully aired, as they find ECOs tend to repeat the same formulaic reasons for refusing applicants. HOPOs also recognised the importance of oral appeals for this reason.”<sup>20</sup>*

*“The adjudicators’ finding with regard to the credibility of the sponsor will be paramount. A sponsor who is found to be credible is highly likely to see the appeal allowed. In the 54 allowed oral appeals the sponsor was found to be credible, whereas in the ten dismissed oral appeals the sponsor was either not found to be credible or the adjudicator did not otherwise accept their evidence. Adjudicators’ determinations from the case file analysis highlight the role of the credibility of the sponsor.”<sup>21</sup>*

*“[The] attendance of the sponsor may either shed new light on the original evidence or produce new evidence. The adjudicators considered that the presence of the sponsor enabled them to see the broader picture, to clarify any vague or ambiguous points and to have the arguments in the appellant’s favour brought to their attention more persuasively.”<sup>22</sup>*

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<sup>18</sup> Ibid p.42

<sup>19</sup> Ibid p.13

<sup>20</sup> Ibid p.49

<sup>21</sup> Ibid p.50

<sup>22</sup> Ibid

### **Other contributing factors**

- 5.13 The report considered the role of four other factors in contributing to the differential success rate between paper and oral hearings.
- 5.14 The evidence of the sponsor may be supplemented by additional witnesses. This appears to further support the oral evidence of the sponsor, even when there are discrepancies in their evidence.<sup>23</sup>
- 5.15 When legal representation was present in oral appeals the success rate was 83 per cent compared with 67 per cent for oral appeals without legal representation.<sup>24</sup>
- 5.16 The report considered also the impact on appeals of the attendance or non-attendance of a Home Office Presenting Officer (HOPO), and made some interesting findings:

*“Owing to staff shortages or the need for representation in more pressing categories of case, such as asylum appeals, family visitor appeals may be determined in the absence of a presenting officer. Evidence from the interviews conducted with HOPOs and the analysis of case files indicates that not all oral appeals proceed with a presenting officer in attendance: 30 per cent of cases in the case file analysis proceeded without a HOPO. Perhaps surprisingly, the case file analysis indicates that more than 80 per cent of cases with a HOPO in attendance were allowed compared with 68 per cent of cases where there was no HOPO. However, this difference was not found to be statistically significant.”<sup>25</sup>*

- 5.17 The report suggests that the willingness of presenting officers to withdraw their objections in a small number of appeals is a subsidiary factor affecting the difference in success rates.<sup>26</sup>
- 5.18 The report considered also the impact of additional documentary evidence. It found that a higher proportion of those appellants who submit additional documentation have their appeal allowed. It notes that, in practice, appellants for an oral appeal have a longer period in which to submit additional documentary evidence.<sup>27</sup>

### **The Immigration Appeal Tribunal's concerns**

- 5.19 The report also considers concerns about paper hearings expressed by the Immigration Appeal Tribunal (IAT).

*“In recent cases the Tribunal has expressed some concern with regard to the dismissal of paper appeals by adjudicators. In particular, the Tribunal has been critical of determinations where the reasons for the dismissal of the appeal are not sufficiently apparent from the determination and [where] the adjudicator has not adequately dealt with either the grounds of appeal or the additional documentary evidence supplied.”<sup>28</sup>*

- 5.20 The report comments that

*“The Tribunal is clearly concerned that paper appeals are being dismissed too peremptorily by adjudicators. At an oral appeal the adjudicator has the benefit of the*

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<sup>23</sup> Ibid p.52

<sup>24</sup> Ibid p.13

<sup>25</sup> Ibid

<sup>26</sup> Ibid p.60

<sup>27</sup> Ibid p.14

<sup>28</sup> Ibid

*sponsor's evidence. However, in a paper appeal the adjudicator must make the judgement solely on the basis of written evidence. Another issue is that adjudicators determining paper appeals are given a limited amount of time in which to examine all the evidence. Equally, some adjudicators have not been sufficiently diligent in recording their reasoning in determinations which dismiss paper appeals to indicate that proper consideration has been given. For the Tribunal to express its opinion on more than one occasion, and to refer explicitly [to] the need for adjudicators to maintain the impression of their independence, may be taken to imply that the problem is a serious one which needs to be rectified.”<sup>29</sup>*

- 5.21 There may be a danger here, as suggested by the IAT's comments, that adjudicators considering paper appeals become case-hardened. It should be noted that paper appeals are conducted, in bulk, by a relatively small number of adjudicators. The report analysed 124 case files (64 oral and 60 paper), and noted that:

*“Oral appeals are heard at different hearing centres around the United Kingdom. Paper appeals by contrast are sent out to the adjudicators by courier in a group of 22 files and then collected. The result is that of the 64 oral appeals, 44 were determined by different adjudicators whereas seven adjudicators determined the 60 paper appeals.”<sup>30</sup>*

- 5.22 The legal representatives interviewed echoed this concern:

*“There was a clear preference among legal representatives for advising clients to opt for an oral rather than paper appeal. They placed little confidence in the ability of the paper appeal mechanism to provide effective consideration. One legal representative bluntly described the paper appeal option as “total waste of time and a con” and advised his clients to opt for “an oral appeal or nothing”. One lawyer was of the opinion that adjudicators assume if someone has applied for a paper appeal then it must mean that their case is a weak one.”<sup>31</sup>*

## **6 Welfare benefit appeals**

- 6.1 The findings of the research into family visit appeals mirror closely the position in relation to welfare benefit appeals.
- 6.2 The latest statistics highlight a long-standing difference between the results of oral and paper hearings conducted by the Appeals Service. They show that, in the quarter ending December 2004, of the 29,440 appeals cleared at an oral hearing, 53% were decided in favour of the appellant. By contrast, of the 10,420 paper hearings, only 22% were decided in favour of the appellant.<sup>32</sup>
- 6.3 The statistics indicate also the importance of the attendance by the appellant, and to a lesser extent the appellant's representative, in the outcome of the appeal. They show that
- Overall, the proportion of appeals decided in favour of the appellant [the success rate] was 45%
  - Where there was no attendance by the appellant or a representative, the success rate was 19%

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<sup>29</sup> Ibid pp.59-60

<sup>30</sup> Ibid p.23

<sup>31</sup> Ibid p.54

<sup>32</sup> See the Quarterly Appeal Tribunal Statistics at [www.dwp.gov.uk/asd/qat.asp](http://www.dwp.gov.uk/asd/qat.asp)

- Where the appellant attended alone, the success rate was 56%
  - Where a representative attended alone, the success rate was 58%
  - Where both attended, the success rate was 68%.<sup>33</sup>
- 6.4 The President's Report 2004-05 presents an analysis of the reasons recorded by tribunal chairmen for reaching their decisions in a sample of 747 successful appeals. These are classified in terms of eight statements. Overall the findings were as follows:
- (1) The tribunal was given additional evidence not available to the decision-maker in 63% of cases.
  - (2) The tribunal accepted evidence that the decision-maker had available but was not willing to accept in 23% of cases.
  - (3) The decision was based on insufficient facts or evidence due to the inadequate investigation of the claim or reconsideration in 12% of cases.
  - (4) The decision-maker did not give relevant facts/evidence due weight in 13% of cases.
  - (5) The tribunal formed different views of the same evidence in 37% of cases.
  - (6) The tribunal formed a different view based on the same medical evidence in 22% of cases.<sup>34</sup>
  - (7) The medical report under-estimated the severity of the disability in 25% of cases.<sup>35</sup>
  - (8) The Agency could have avoided the appeal in 7% of all cases.<sup>36</sup>
- 6.5 The report comments as follows:
- "The most common response was that the tribunal was given additional evidence not available to the decision-maker, some 474 cases (63%) of those overturned, which is consistent with the findings in last year's sample (62%). In upheld cases additional evidence was presented in 81 (10%)."*
- 6.6 The main source of additional evidence remains oral evidence. This was presented in 356 cases (47% of all overturned cases), and was provided by the appellant in 266 of these cases (36% of all overturned cases).
- 6.7 Additional written evidence was provided in 112 cases, representing 15% of overturned cases. In 59 (8%) cases it was a combination of both the written evidence and the oral evidence that enabled the decision to be overturned.<sup>37</sup>
- 6.8 Additional evidence remains the predominant reason for cases being overturned. It was noted as the reason in 50% of overturned cases in 2001, 53% in 2002, 61% in 2003 and 62% in 2004. The report comments that this

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<sup>33</sup> Ibid

<sup>34</sup> The percentage figure refers to the percentage of all cases. For the three benefits where medical evidence is particularly important (DLA/AA, IIDB and IB) the percentage is approximately 29%.

<sup>35</sup> The percentage figure refers to the percentage of all cases. For the three benefits where medical evidence is particularly important (DLA/AA, IIDB and IB) the percentage is approximately 33%.

<sup>36</sup> President's Report 2004-2005, p.15, available at [www.appeals-service.gov.uk](http://www.appeals-service.gov.uk)

<sup>37</sup> Ibid p.16

*“suggests that this important primary source of information is being overlooked and not all issues are being satisfactorily investigated before the appeal hearing. There seems to be a tendency to disregard evidence received from the appellant in the process of evidence gathering prior to the decision and then in the preparation of the appeal. Some kind of contact should be made with the appellant prior to the case coming to hearing to establish whether all the facts are correct and whether further light can be shed on their circumstances that might have an impact on the final decision. This should form part of any reconsideration process, rather than it being a purely paper exercise.”<sup>38</sup>*

6.9 In relation to medical evidence, the report comments that:

*“In 187 (25%) cases the medical report underestimated the severity of the disability. In these cases the appellant attended an oral hearing in 167 (89%) and so was able to be questioned by the tribunal.”<sup>39</sup>*

*“The chairmen made a number of comments regarding medical evidence. In some cases they noted the difficulty in determining disability issues from the claim pack and the medical evidence alone, although they criticised cases where further medical evidence had not been sought at an earlier stage and the tribunal was left to pursue the matter. Where decision makers prefer to rely on one piece of medical evidence rather than another they should clearly indicate why this is so. Mental health issues again caused some concern and it was felt that mental health issues generally were not given sufficient weight. It was often only by questioning the appellant that the extent of the restrictions placed upon the appellant by their mental health came to light.”<sup>40</sup>*

*“In 168 (22%) cases the tribunal took a different view of the same medical evidence and again in the reasons given for reaching their decision chairmen highlighted the value of the appellant’s evidence and the over reliance of decision-makers on the medical reports alone, not taking into account the information available from the appellant.”<sup>41</sup>*

6.10 The report highlights the significance of these comments also in relation to appeals concerning individual benefits.

6.11 In cases concerning Disability Living Allowance or Attendance Allowance:

*“As far as further comments were concerned the chairmen greatly valued the opportunity to question the appellant. In this area it was particularly important to ascertain the impact of the person’s disability and for the tribunal to use the opportunity to question the appellant, reconcile what they were saying with the evidence, and resolve any discrepancies.”<sup>42</sup>*

6.12 In cases concerning Industrial Injuries Disablement Benefit:

*“Chairmen regarded the opportunity to question the appellant at length as crucial to the decision making process, the oral evidence of the appellant clarifying their circumstances and shedding light on the application and medical reports.”<sup>43</sup>*

6.13 In cases concerning Incapacity Benefit:

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<sup>38</sup> Ibid pp.16-17

<sup>39</sup> Ibid p.17

<sup>40</sup> Ibid p.18

<sup>41</sup> Ibid p.17

<sup>42</sup> Ibid p.28

<sup>43</sup> Ibid p.31

*“Again the most common comment on the decision-making was that the presence of the appellant at the hearing produced either new evidence or shed light on the existing evidence enabling the tribunal to overturn the original decision. Chairmen also commented that they would take the time to record a full history and go into greater depth questioning the appellant and relating the facts directly to the issues under consideration, in some cases they felt this was the only way to obtain an accurate picture of the appellant’s incapacity, particularly so in the case of mental health issues. Reflecting the findings in other benefits medical evidence was also found to have failed to give full consideration to the appellant’s mental health.”<sup>44</sup>*

6.14 The report concludes as follows:

*“In this fifth report we can see clear trends emerging year on year. For example the most notable trend is the increase in the submission of additional evidence. It seems that despite these reports the Agencies are finding it increasingly difficult to ascertain all the evidence before cases come to tribunals. At the same time there is an increasing disparity between the decision-maker’s and the tribunal’s view of the medical evidence, and the Agencies need to ask themselves why this might be so. They should also ask themselves why medical reports under-estimate the severity of the disability and how this might be remedied.”<sup>45</sup>*

## **7 Is there an alternative?**

- 7.1 In our view, for the reasons set out above, there is no alternative to oral hearings in relation to immigration appeals or employment tribunal cases. The question remains whether there are alternatives that might be relevant to welfare benefit appeals. If there are we need to consider whether they could work, and whether they could be introduced without any diminution of appellants’ rights.
- 7.2 It has been suggested, for example, that tribunals could operate in a more interventionist manner, using a better triage system, identifying cases that are capable of early resolution, gathering further information and identifying cases where an oral hearing is indicated.<sup>46</sup>
- 7.3 Even if this were desirable, we doubt whether this could work fairly in practice. How easy would it be for the tribunal to distinguish between those cases that are considered capable of early resolution and those that require an oral hearing? The findings set out above indicate the importance of proper evidence being taken from the appellant, which can then be tested by the tribunal. The emphasis placed by tribunal chairs and immigration adjudicators on hearing live evidence from the appellant, and being able to assess their credibility and compare that evidence with other evidence, such as medical evidence, confirms this. You cannot often predict whether additional credible evidence will be forthcoming at an oral hearing.
- 7.4 While there may be a few cases in which such evidence could be taken over the telephone or by other means, such as video link, it seems to us that in the vast majority of cases the tribunal needs to hear direct evidence in person from the appellant. This must surely involve an oral hearing.
- 7.5 It has been suggested that tribunals could follow the example of the Financial Ombudsman Service [FOS], by taking a more active role in obtaining evidence, and

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<sup>44</sup> Ibid pp.33-34

<sup>45</sup> Ibid p.37

<sup>46</sup> See the presentation by Hazel Genn to the Council’s seminar on this issue.

possibly by then issuing a preliminary indication as to the tribunal's thinking as to the likely result of the appeal, while preserving the appellant's right to have an oral hearing if the matter is not resolved to his or her satisfaction.

7.6 In our response to the Tribunals' White Paper we considered these issues in some detail. Quite apart from the fundamental difference in approach between a tribunal and an Ombudsman, we suggested that there are a number of practical difficulties, notably that:

- The FOS is paid for by means of a general levy on all firms, and via individual case fees, once a case becomes chargeable. There is no charge for the first two complaints each year. There is no charge if a complaint is resolved early. This clearly gives firms a financial incentive to co-operate with the FOS and resolve cases quickly when they can.<sup>47</sup>
- FOS staff are trained in the main areas of work covered by the service.<sup>48</sup> Adjudicators have detailed knowledge of the financial products with which they deal.
- FOS staff were considered by independent researchers to be very high calibre, committed and professional and the service's greatest asset.
- The knowledge management system is vital. The FOS has a toolkit, which aims to provide all the information needed to deal with cases in different product areas.<sup>49</sup>

7.7 Our response to the White Paper considered the extent to which tribunals could take a more interventionist role. We concluded that:

*"[The] tribunal's pre-hearing role can only be limited. It could however:*

- *Identify discrepancies and omissions in the evidence and draw these to the attention of the parties*
- *Suggest particular types of evidence that might be desirable (possibly including medical reports)*
- *Identify potential shortcomings in the contentions being advanced by either party, which they might wish to consider*
- *Suggest the need for appellants to obtain advice in relation to their appeal, either in general terms or in relation to specific aspects or points*
- *Suggest reconsideration of the decision in question, in relation to benefits appeals."*<sup>50</sup>

7.8 In considering any such proposals, however, there is a fundamental question as to whether the benefit authorities would co-operate with the tribunal, and in particular with any suggestion that they should reconsider an appellant's entitlement to benefit.

7.9 The President's latest report expresses what can only be described as his exasperation with the failure of the relevant Agencies to respond to the feedback they have received:

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<sup>47</sup> This is recognised in the White Paper – see paragraph 4.18

<sup>48</sup> FOS staff are also subject to a detailed quality assurance programme.

<sup>49</sup> Advice Services Alliance *The Future of Tribunals* p.3, available at [www.asauk.org.uk](http://www.asauk.org.uk)

<sup>50</sup> Ibid pp12-13

*“In addition to the evidence available directly from the tribunal I have provided the Agencies, both the Chief Executives directly, and their nominated administrative officials with quarterly interim reports and an annual report to the Secretary of State for the last five years. The themes in the interim reports and the annual reports have remained the same and the question for both the Agencies and the Department is: What have you done with the feedback to identify areas for improvement and implement initiatives to improve the situation? . . . There seems little point in my colleagues and I providing more feedback or the Department commissioning further studies from the Appeals Service or their own Standards Committee when no discernable improvement in decision-making is the result.”<sup>51</sup>*

7.10 More specifically, he comments that

*“[There] is evidence to show that a process is now in place to review decisions once an appeal is lodged. However, there is also evidence to suggest that although this is the case the process is not having a substantial impact on preventing cases coming to tribunals. The fact that additional new evidence provides grounds for overturning decisions suggests that this evidence may be available to decision-makers if they took steps to pursue these matters early on.”<sup>52</sup>*

7.11 Similarly, the President noted in his 2003-04 report, in relation to the lack of Presenting Officers at tribunals, that:

*“The Department’s view is that providing Presenting Officers has resource implications, increasing the direct feedback from the Appeals Service has concomitant resource implications at the same time that the Department are seeking to reduce costs.”<sup>53</sup>*

7.12 One must seriously question therefore whether, in the absence of specific sanctions, the relevant agencies would be likely to respond positively to suggestions from the tribunal that they should reconsider their decisions.

## **8 Our response to the consultation questions**

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

8.1 Tribunals themselves are fairly accessible, in the sense that an appeal can be lodged fairly easily, and no fee is involved. This is arguably less true of Employment Tribunals following the changes introduced in October 2004, which require claimants to pursue internal procedures before applying to the tribunal.

8.2 Ombudsmen processes are probably more accessible in that the application process is usually simple, and in some cases, such as the FOS, office staff may help the complainant to frame a complaint.

8.3 It could be argued that Ombudsmen processes are more user-friendly in that the Ombudsman does most of the work.

8.4 User-friendliness must however also involve considerations as to the fairness and justice achieved by the processes involved. In this respect, oral hearings are clearly the most user-friendly.

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<sup>51</sup> President’s Report, supra n36, p.8

<sup>52</sup> Ibid, pp.38-39

<sup>53</sup> President’s Report 2003-2004, p.7

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

- 8.5 The literacy issue is highlighted in the presentations by Nony Ardill and Hazel Genn to the Council's seminar on this issue. Detailed evidence about literacy levels can be found, for example, on the website of the Literacy Trust.<sup>54</sup>
- 8.6 These show, for example, that 5.2m adults (16%) have a literacy level at entry level or below. It can be assumed that the proportion of appellants to tribunals concerned with social welfare law will be considerably higher than this.
- 8.7 According to the reports cited:
- Nearly four out of 10 adults in some parts of England cannot read or write properly or do simple sums.
  - Sir Claus Moser's report described 20% of adults as being "functionally illiterate".
  - A reinterpretation of the Moser data put the national average even higher, at 24% - rising to nearly 40% in some areas. On average, 15% have low literacy, 5% have lower literacy and 4% have very low literacy.
- 8.8 Some users may find it difficult to present their case orally, but these statistics suggest that they would find it considerably more difficult to do so on paper.
- 8.9 Any move away from oral hearings to a more paper based system is therefore likely to increase appellants' inability to understand and play any meaningful part in the process of their own appeal.

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

- 8.10 We are not aware of any research on this issue. While it may be possible to put a figure on the cost of an actual oral hearing in a particular tribunal, it would then be necessary to compare this with the cost of alternative methods of achieving comparable results, such as the fact-gathering processes involved in alternative methods of dispute resolution.
- 8.11 The most effective way of decreasing the cost of determining many disputes would be to improve the quality of initial decision making. This is highlighted by the many comments made by the President of Appeal Tribunals as to the inadequacy of initial decision making and the failure to reconsider cases properly when an appeal is lodged.
- 8.12 In any event, the evidence suggests that oral hearings are far more likely to produce a fair and just result. In our view, issues of fairness and justice must be more important than issues of cost.

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

- 8.13 Matters may be complex in relation to the facts involved, the law, or both.
- 8.14 Where matters are factually complex they will require thorough investigation. Some of this investigation may involve consideration of paper and other evidence. It may involve the collection of evidence. Where there is a conflict of evidence an oral hearing is likely to be the most effective way of reaching conclusions as to the facts.

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<sup>54</sup> [www.literacytrust.org.uk](http://www.literacytrust.org.uk)

8.15 Some complex matters may largely involve questions of law. The Social Security Commissioners, for example, mostly deal with appeals by inviting written submissions from the parties, and requesting the production of such further evidence as they require. In most cases the Commissioner makes a decision without holding an oral hearing.

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

8.16 We believe very strongly that oral hearings are more effective where evidence and credibility are in question, as confirmed by the evidence set out above.

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

8.17 As we have demonstrated above, there is clear evidence that oral hearings are more effective at identifying evidence that is missing.

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

8.18 Oral hearings are more legalistic than other processes, for the simple reason that tribunals are required to establish facts and apply legal principles to those facts. That is the nature of a tribunal, as distinct from, for example, an Ombudsman, who is more concerned to decide what is fair and reasonable in the context of a particular dispute.

8.19 For the same reason, one would expect oral hearings to be more “daunting” for the parties involved, particularly if they have no previous experience of such hearings and/or are unrepresented.

8.20 We would refer however to our response to the question of “user-friendliness” above. Tribunal hearings may be more daunting, but they are more likely also to appear to be fair and to achieve a just result.

*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.*

8.21 We believe that the opportunity to have “a day in court” is important to users, and rightly so.

8.22 There appears to be a tendency to suggest that users’ desire to have a “day in court” is a problem. The phrase seems to have acquired a pejorative meaning, with the implication being that it is unreasonable to wish to have a “day in court”.

8.23 We have noted above the finding in the study of family visitor appeals that sponsors wanted an oral appeal “in order to present a case directly before a decision-maker.” The evidence summarised above indicates the importance of having a “day in court” to enable the appellant to properly counter the arguments raised against them, and to counteract the disinclination by decision-makers to accept the truth and validity of what they are saying.

8.24 There may be other ways in which users can explain their case orally to the tribunal, as we have mentioned above. It is unlikely however that this will be sufficient to enable the user to feel that they have had their “day in court”, unless they have had an opportunity to confront the case presented by the other side, argue their case against the submissions made by the other side, and question the other side’s witnesses.

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

8.25 We are not aware of any evidence on this issue.

8.26 Some forms of ADR, such as mediation may be more time consuming. Some Ombudsmen procedures take a considerable time to reach a resolution.

*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?*

8.27 We are not aware of any direct evidence on this issue.

8.28 Ombudsmen procedures can be very slow. One advantage of hearing dates is that they can concentrate minds on the issues involved and the need to be as fully prepared as possible for the actual hearing.

8.29 In their analysis of the effectiveness of representation at tribunals, Genn and Genn found that

- The period between lodging an appeal and the date of hearing tends to be longer where advice and representation has been obtained by appellants
- Delay is also caused by the need to amass evidence
- Cases that are allowed also take longer than those that are dismissed.<sup>55</sup>

8.30 We do not know if it is possible to isolate the effect of the oral component per se from other factors such as these that affect the overall length of the process.

8.31 Genn and Genn's findings suggest however that any delays due to the factors identified should be accepted and indeed welcomed. It should not be assumed that speed is more important than achieving a fair and correct result.

*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.*

8.32 We believe that oral hearings are the only way in which to ensure that justice is perceived to be done, for the reasons set out above. We refer in particular to the conclusion of the family visitor appeals study that an oral appeal "ensures that the process is perceived to be fair, open and independent."

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

8.33 It may be that some potential users may be inhibited, for the same reasons that some users may find oral hearings daunting. However, there is no requirement for users to attend oral hearings, and some users do win their appeals even though they do not attend. See the Appeals Service statistics cited above, where the success rate where there was no attendance was 19%.

8.34 What is important is that potential users are able to receive proper advice about the nature of tribunal hearings and are able to exercise an informed choice as to whether they wish to appeal, whether they wish to opt for a paper hearing where this is available, and whether they wish to attend any oral hearing. In some cases users may prefer to submit additional evidence and not attend the hearing. That is their

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<sup>55</sup> H. Genn and Y. Genn *The Effectiveness of Representation at Tribunals* pp.148-49

right and their choice, although in the vast majority of cases they would be better advised to attend the hearing.

*13. Are these valid concerns? Please explain.*

- 8.35 The holding of oral hearings will inevitably have practical and resource implications. However, such considerations must be secondary to the importance of having a system that is perceived to be fair, open and independent.

*14. In your experience, what are the particular advantages of adversarial procedures? Please explain.*

*15. What are their disadvantages?*

- 8.36 We are not convinced that the adversarial/inquisitorial distinction is as important as has been suggested.

- 8.37 Although an adversarial style of adjudication is common in tribunals, we do not think that this is always or necessarily the case. It is probably truest of employment tribunal cases, where two parties are clearly opposed to each other and present their case in an adversarial manner, particularly when they are represented. It may also be true, although perhaps to a lesser extent, in immigration appeals, when the Home Office is represented by a presenting officer. It is probably least true in social security appeals, where the department is less likely to be represented. This situation has been a matter of regular comment by the President, whose latest report notes the presence of a presenting officer in only 27% of the sampled cases. The President notes, as he had done in previous reports, that

*“The routine absence of one of the parties to the proceedings at oral hearings changes the dynamic of the tribunal and where evidence is deficient has the added risk of the tribunal appearing to be another tier of the decision-making process rather than the appropriate appellate authority.”<sup>56</sup>*

- 8.38 The emphasis placed by Appeals Service chairmen and immigration adjudicators on the importance of hearing from the appellant (or sponsor), and being able to test other evidence in the light of that evidence, suggests that many appeals are less an adversarial process than a dialogue between the tribunal and the appellant (or sponsor), which aims to establish the relevant facts and apply the relevant legal principles to those facts.

- 8.39 It should be noted also that the role of a presenting officer is not just to present or defend the decision which is subject to appeal. Presenting Officers are expected to take an independent view and act as an *amicus curiae*.<sup>57</sup>

- 8.40 It is particularly noteworthy that the study of family visitor appeals found that a higher proportion of cases with a HOPO in attendance were allowed, and that the willingness of presenting officers to withdraw their objections in a small number of appeals is a subsidiary factor affecting the difference in success rates.

- 8.41 Although the study states that the difference in success rates was not found to be statistically significant, it is surely relevant that they did not find that the presence of a HOPO was related to a lower success rate. This would appear to suggest that the tribunals in question were proceeding on a basis that was more inquisitorial than adversarial.

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<sup>56</sup> President's Report, supra n36, p.7

<sup>57</sup> See J. Baldwin et al *Judging Social Security* [1992] Chapter 7.

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

- 8.42 We do not share the fear of some people that tribunals will appear to be less independent if they become more inquisitorial or enabling.
- 8.43 What is essential to a proper oral hearing is a thorough investigation as to the relevant facts, and an appropriate application of the relevant legal principles.
- 8.44 In tribunals dealing with disputes between the individual and the state, what is important is that the tribunal appears to be, and is, independent of the department or government agency concerned. In these appeals we do not see a more inquisitorial or enabling role as a threat to the tribunal's real or perceived independence.

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

- 8.45 A more inquisitorial approach should make the proceedings easier and less daunting for the parties, since there would be less onus on them to make their case as best they can.

*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?*

- 8.46 We find these questions difficult to answer. It is not clear to us whether the questions are concerned with the use of the 'oral element' in other dispute resolution processes, or whether they are concerned with other elements involved in such processes.
- 8.47 In general, we think that there is only a limited extent to which Ombudsman type processes, for example, could be carried over into the tribunal system. See our comments above under the heading "Is there an alternative?"

*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?*

- 8.48 For the reasons we have set out above, we do not see any significant scope for distinguishing between the need for an oral component in general and an oral hearing in particular. In our view an oral hearing should be assumed to be the best form of oral component.
- 8.49 A number of features should indicate the need for an oral hearing
- The importance of the issues at stake to the appellant (as in asylum appeals, or cases where the appellant has been detained under the provisions of the Mental Health Act)
  - Where the appellant is challenging a decision by the state as to the appellant's rights, entitlements or obligations (as in immigration cases generally, claims for benefit, disputes as to the nature of a child's special educational needs and how they should be met, or disputes as to the amount of tax owed by the appellant)
  - Where a private dispute involves any significant dispute as to the facts or the interpretation of the law (as in employment tribunal cases – although it could be argued that this should be subject to a de minimis rule of some kind, e.g. in relation to disputes as to small amounts of unpaid pay).

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

8.50 In our view, when these features exist, there should be a right to an oral hearing.