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Our thanks to Leueen

Welcome to the summer 2014 issue of *Tribunals*. I would like first to pay tribute to Leueen Fox for her many years' valuable work on the editorial board prior to her recent retirement.

On page 2 of this issue, Phillip Sycamore provides an insight into the work of the Judicial Appointments Commission and the significant new developments in several of its practices.

Chris Ward and Hugo Storey, on page 6, relate their experience of 'job swaps' as assigned judges on 'home and away' Chambers. Chris Ward also, on page 18, discusses with a German judge how approaches to fact-finding can differ.

On page 9, Leslie Cuthbert details the various styles and categories of interventions and relates them to his own experience.

Melanie Lewis, on page 13, explains the development of a cross-jurisdictional training course with contributions from Dr Edward Yeates and Robin Caley on dealing with vulnerable parties and witnesses.

As mentioned in the spring issue, a special international issue of *Tribunals* is to be published. To ensure as wide an audience as possible, it will be placed on the judiciary website, where past copies can also be accessed (see *www.judiciary.gov.uk/publications/tribunals-journal*).

Finally, I would encourage our readers to consider applying to become a member of our editorial board (see below).

Professor Jeremy Cooper, Chairman of the Editorial Board.
e-mail: jc*publications@judiciary.gsi.gov.uk*

Editorial Board members

Applications are invited for two additional members of the editorial board for the Judicial College's *Tribunals* journal. Three issues of the journal are published online each year, with the aim of providing interesting, lively and informative analysis of the reforms currently under way in different areas of administrative justice.

The main role of the editorial board is to agree the contents of each issue of the journal, commission articles from prospective authors and on occasion write pieces themselves.

Successful candidates will be able to demonstrate:

- **An understanding of the needs and concerns of those appearing in front of tribunal hearings.**
- **The ability to contribute their own thoughts and experiences, with the aim of benefiting others.**
- **Good communication and interpersonal skills.**

In addition, some writing experience would be desirable.

Members of the editorial board are asked to attend three meetings a year at the Judicial College's London office. The Board is keen to encourage applicants with experience or knowledge of the tribunals system whether as judicial office-holders, representatives of users or academics.

An application form is available from *jcpublications@judiciary.gsi.gov.uk*. The closing date for this post is 30 November 2014.

'An ambitious programme of change'

Phillip Sycamore **provides an insight into the work of the Judicial Appointments Commission.**

The Judicial Appointments Commission (JAC) selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland.

Tribunals make up the largest part of the work of the Commission's every year. In 2013–14, 24 of the 35 selection exercises completed were for tribunals and accounted for the vast majority of all recommendations – 676 out of 806 (84 per cent). Most of the recommendations in this case were for non-legal positions, but even among posts requiring legal qualifications, tribunals dominated, comprising 57 per cent of legal recommendations.

Posts filled covered the Employment Tribunal, Social Entitlement Chamber, Administrative Appeals in the Upper Tribunal, Property Chamber, War Pension and Armed Forces Compensation Chamber, and Health, Education and Social Care Chamber (HESC).The roles filled were diverse – judges, both salaried and fee-paid, presidents and chairmen and legally qualified tribunal members. Just over 500 of those selected for tribunals were for non-legal posts, chosen for their medical or military experience, or in dealing with the needs of people with disabilities. Some were lay people who bring non-specialist experience to the table.

Since April this year, the JAC has selected two new Chamber Presidents and is about to embark on the recruitment of judges for the First-tier and Upper Tax Chamber as well as launching a nationwide recruitment for psychiatrists to join my own Chamber – HESC.

This was one of the reasons the Crime and Courts Act 2013 amended the composition of the JAC to allow for greater tribunal representation on its Board, and I am delighted to have become the first senior Tribunal Commissioner.

I join Lucy Scott-Moncrieff, a judge on the Mental Health Tribunal, who was appointed to the JAC in February 2014 (filling the 'tribunal judge' seat). Both of us are former Presidents of the Law Society of England and Wales. We are also joined on the Commission by Usha Karu, a circuit judge and a judicial member of the Mental Health Tribunal (Restricted Patients Panel).

The JAC assigns a commissioner to every exercise to help ensure all selections continue to be made on merit . . .

It has been interesting becoming a JAC Commissioner. I have been the assigned judge sitting on the selection panel for a number of exercises but, until now, I have not had the opportunity to see the work that the JAC does 'behind the scenes'. Part of my role as a commissioner will be to act as the 'assigned commissioner' for exercises to ensure that the proper procedures are applied and the highest standards maintained. The JAC assigns a commissioner to every exercise to help ensure all selections continue to be made on merit through an independent, fair and transparent process.

I arrive as the JAC is undergoing a substantial period of change. It has put in place an ambitious programme of change which aims to support better the needs of the courts and tribunals, improve the candidate experience, reduce the total end-to-end appointments time, improve the diversity of selections and increase the certainty in the quality of selections, with a reduction in cost.

Legislative change

The 2013 Act introduced a number of changes to support the JAC's work. Some of these are already in place; others have yet to be used.

Making appointments to the judiciary

The Act transferred responsibility for making most court appointments below High Court, and in tribunals those of First-tier and Upper Tribunal, to the Lord Chief Justice (LCJ) or Senior President of Tribunals (SPT). The LCJ and SPT are now designated as 'appropriate authorities' and they decide whether to accept the recommendations made by the JAC, reject them or request a reconsideration.

Transferring from tribunals to courts

The Crime and Courts Act allows for appropriately qualified judicial office-holders to more easily move between tribunal and court roles.

Statutory consultation

Under the Judicial Appointment Regulations 2013, the JAC can now agree in advance with the appropriate authority (Lord Chancellor, Lord Chief Justice or Senior President of Tribunals) not to conduct 'statutory consultation' as part of a selection exercise. For example, it might not be used where candidates are unlikely to be known to leadership judges such as for 'entry level' fee-paid roles.

When consultation does take place, however, we are required to consult a person (other than the appropriate authority) who has held the office for which the selection is to be made or who has other relevant experience. This individual will be identified in the information pack for the selection exercise and summary reports will be sent to them for comment. The JAC may also consult another person who has held the office for which the selection is to be made or who has other relevant experience.

Where the Commission is making a selection for offices for the High Court and below, the Act removed the requirement for the JAC to consult two judges with relevant knowledge of the judicial vacancies. This statutory consultation can now be with one judge, although consultation with two judges is likely to continue for High Court exercises.

These changes have hopefully brought more flexibility into the process. Updated guidance developed by the JAC and members of the judiciary will be issued by the Judicial Office shortly.[1] Work on the guidance has included consideration of the process for seeking comments and identifying, with the Judicial Office, how to notify consultees of the dates in advance and stating clearly what consultees can expect to support the provision of comments in a timely fashion.

Equal merit

The Crime and Courts Act introduced a provision, known as the Equal Merit Provision so that, where there are two or more candidates of equal merit, a candidate may be selected by the JAC for the purpose of increasing judicial diversity. An Equal Merit Provision policy was agreed by the Commission in April this year and applies to all selection exercises launched after 1 July 2014.

The policy takes into account the response to the JAC's public consultation last year, the Ministry of Justice consultation on judicial appointments and diversity (completed in 2012) and the House of Lords' Constitution Committee report on judicial appointments, published in 2012.

The use of the Equal Merit Provision will only be considered when two or more candidates are agreed by the Commission's Selection and Character Committee (SCC) to be of equal merit when assessed against the advertised requirements for a specific post. Merit remains paramount in the selection of candidates for judicial posts.

We recognise that there are concerns about how the Equal Merit Provision will be used. Our priority is to make sure we apply it in a sound and reasoned way.

- It will be applied only at the final decision-making stage when all the evidence is available to the SCC to assess candidates as being of equal merit.
- It will be used only where there is clear under-representation on the basis of race or gender. This will be determined by reference to National Census data and data published by the Judicial Office showing the self-declared diversity of the courts and tribunals judiciary. These categories have been chosen because there are published robust datasets that provide evidence of under-representation. At this time, the judiciary does not have robust data available for other protected characteristics.
- Candidates will be told about the provision through the selection exercise materials, which will contain published data about the diversity of the relevant level of the judiciary, relevant Census data and an explanation about the potential use of the diversity data they provide.

The JAC will report the number of instances where an individual has been selected following application of the policy. We expect to make the first report on the use of the provision when we publish our six-monthly Official Statistics Bulletin in June 2015. We will review the policy annually.

The Equal Merit Provision on its own will not resolve the issue of increasing judicial diversity, but it could make a positive contribution alongside the other efforts of the JAC, legal profession, government and the judiciary.

Improving judicial diversity

The Equal Merit Provision is just one of the tools the JAC can now use. The work of ensuring there is greater diversity across the whole of the judiciary is a shared responsibility. The Chairman of the JAC, Christopher Stephens, chairs a Diversity Forum, which brings together the Bar Council, the Law Society, the Chartered Institute of Legal Executives (CILEx), the Ministry of Justice, the judiciary and the Judicial Office to identify areas for collective action on achieving greater judicial diversity.

The Crime and Courts Act also placed a statutory duty in relation to encouraging judicial diversity for the Lord Chancellor and the Lord Chief Justice. The Lord Chief Justice has established a Judicial Diversity Committee to focus the judiciary's work in achieving greater diversity.

They, along with the JAC and the three main legal professions, are working together to implement a joint action plan based on the findings of the 2013 research project *Barriers to making a judicial appointment 2013*. The results, available on the JAC website,[2] suggest that we are raising awareness and understanding among all groups but that barriers remain that impede decisions to apply for judicial posts.

For its part the JAC is creating an easier-to-use website with self-assessment tools to allow prospective candidates to identify whether they have the right level of skills and experience to apply. The JAC attracts a strong field of high-quality candidates and I know from my own experience that only the very best and best prepared will be successful. Realistic self-assessment is crucial and the JAC's planned online tools will help candidates do this. In addition it has instigated a 'candidate attraction project' to better target high-quality candidates from under-represented groups, again through joint working with professional bodies.

Tribunals are leading the way in terms of achieving greater diversity. In tribunals, the proportion of women and Black, Asian and Minority Ethnic (BAME) judges in post is the same as their level in the eligible pool.

Recommendations of women for tribunal judge positions have increased over the years and are higher than their proportion of the eligible pool. Recommendations of BAME candidates for tribunal judge positions remain steady and are in line with the eligible pool.

Women in particular are changing the face of the judiciary, especially in mid-range salaried court and tribunal posts. In some selections they are outperforming men. However, in some exercises BAME candidates have been recommended at rates below their rate of application.

When considering salaried versus fee-paid positions, women secured more than half the tribunal posts available in 2013–14 under both types of roles. However, almost all the successful BAME tribunal candidates had applied for fee-paid roles.

While it should be noted that most of the salaried selection exercises in 2013–14 were for single posts, there remains a challenge for the JAC, its government partners, the judiciary and the legal professions to understand why BAME applicants are not more successful. We are working on this jointly.

As of June 2014, the JAC has begun to publish information about sexual orientation and religious belief in its half-yearly official statistics, also available online.[3] These new categories broaden the JAC's knowledge of the diversity of those seeking judicial office and help it to establish a baseline for future comparison. The JAC also hopes that others will begin to collect and publish similar data.

Selection process review

Part of the JAC change programme involves transforming the selection processes to be faster, more candidate-focused and less costly.

One of the more obvious elements to this is the introduction of an online application process that will be more interactive for candidates, enabling them to create a personalised profile page to help their preparation in applying for judicial roles. The online application process and accompanying new records management system – known as the Judicial Appointments Recruitment System (JARS) – will allow more efficient processing of applications, references and selection day reports. We expect that it will make a considerable contribution to future efficiencies and financial savings and improve the candidate experience. The project is expected to be ready by the end of 2014.

The time it takes to make an appointment has already been significantly reduced since 2012 from 30 weeks to 21.

The time it takes to make an appointment has already been significantly reduced since 2012 from 30 weeks to 21. It is hoped that JARS, with its greater automation and less reliance on manual processing, will allow further time savings to be made. Alongside this the JAC has also agreed to consider using a two-week application period for those exercises advertised with a long lead time.

The JAC's selection process was externally reviewed at the end of 2013. The work of selection panels, and the consistency and transparency of the process were recognised as strong aspects, but there were a number of areas where further improvements could be made.

Work on the key requirements for each judicial office is one such area and, as a first step, the JAC is talking to judges in the HESC Chamber to develop a detailed understanding of their judicial roles. If this proves effective, the process may be expanded to cover other tribunals and courts roles. This work is being supported by an occupational psychologist who joined the JAC in May. I am pleased my own Chamber is involved

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Home and away: courts in a new LIGHT

The advantages of temporary secondment to a different Chamber could lead to its more extended use, suggest *Christopher Ward*, left, and *Hugo Storey*.

The assignment of judges between Chambers in both the First-tier Tribunal and Upper Tribunal is an area still in its relative infancy. It presently takes place under the Senior President's June 2009 policy statement on assignment.

We write as Upper Tribunal judges, based respectively in the Administrative Appeals Chamber (AAC) and the Immigration and Asylum Chamber (IAC), who have been assigned to the 'other' Chamber for a small number of individual cases and seek here to explore the value of that process. These arrangements have typically come about as the result of one Chamber President or other, sometimes acting at the suggestion of the judge of his Chamber with the conduct of the case, considering that it might benefit from the inclusion of a visiting judge on the panel. The 'other' Chamber President has then nominated a visiting judge to be put forward by the 'home' Chamber to the office of the Senior President of Tribunals for the necessary temporary assignment.

What might grandiloquently be termed the 'culture' of each Chamber is conditioned by many factors, including the powers vested in it, the nature of its jurisdiction and, up to a point, the history of the Chamber and its predecessor bodies. There are as a result some differences. Further, each Chamber is concerned with particular, often very specialist, areas of law.

Yet despite all of this, and as the President's policy statement acknowledges, there are areas that are very much common to both our jurisdictions, and it has been these areas that have initially been the driver for case-by-case secondment between our Chambers. In some instances, they are to be found in the common core of procedural provisions that exists under the 2007 Act and Tribunal Procedure Rules. More frequently, the driver has been EU law, itself increasing in profile with the advent of the Charter of Fundamental Rights of the European Union to the status of primary law. But, as the cases below demonstrate, points of overlap can be wide-ranging. Consider, for example the following case studies.

Case study 1

A young woman on income support wants to bring her non-EU husband to live with her in the United Kingdom. Her mother has made money available for that purpose. An immigration case turns on how capital sums and ongoing payments fall to be treated for social security purposes. Will they be available to finance the bringing in of the husband or will they merely result in a reduction of the income support payable to the wife?

Case study 2

The duties of states to those seeking or granted asylum are the subject of both international treaties and EU directives. A few years ago, the UK changed domestic law about what it would pay to such people. In a social security appeal, it is argued that the changes conflict with the treaties and/or directives.

Case study 3

Whether an appellant in an immigration case is entitled to the relevant residence permit turns on whether she can rely on a right as carer of a European Economic Area national child in 'education' other than 'nursery education'. The latter expression is no longer in use in England, though it remains in legislation

applying only in Wales. The AAC, which has an education jurisdiction, was able to provide input concerning how the provisions applied to a child in reception class.

In each case (and there have been a small number of others), two judges from the 'home' Chamber where the case arose were joined by a judge from the other Chamber, who was able to contribute an informed response on technical issues to which the 'home' judges would not necessarily have had cause to have regular exposure. This contribution to the specialism of the tribunal has considerable value, not only where a party is unrepresented and not in a position on their own to present legal issues which may be either detailed and obscure or complex and wide-ranging, but also in helping the Upper Tribunal evaluate submissions made by expert counsel.

There are other advantages too. Each Chamber deals predominantly with the actions of one very large government department, Work and Pensions (DWP) in the case of the AAC and the Home Office in the case of the IAC. It is entirely possible, notably in relation to rights of freedom of movement under EU law, for the same issue to present itself in litigation between an individual and either of those departments. This gives rise to a number of challenges. Firstly, it cannot be assumed in the ordinary course that those appearing for the state are instructed on behalf of anyone other than the government department which has sent them. While efforts are sometimes made in individual Chambers to give other departments that might have a view on a particular issue the opportunity to apply to be joined, it is not always taken up. The first few cases of cross-sitting have however produced at least two instances where it proved possible to elicit a cross-departmental position from the state, something which can surely only simplify matters for individuals whose lives are no respecters of departmental boundaries.

Linked to this is the minimising of the risk that a decision in one Chamber is insufficiently known in the other, as it cannot safely be assumed that those appearing for the DWP will always be aware of relevant immigration cases (or vice versa so far as the Home Office is concerned) and the areas of law involved are often distinct specialisms among practitioners also. A greater awareness of each other's resources and search tools resulting from cross-sitting helps with this as does the straightforward ability to phone or e-mail a trusted colleague in the other Chamber with whom one has sat, to ask not only whether there have been any recent decisions about X in the other Chamber, but whether there is anything coming up (e.g. an application for permission to appeal to the Court of Appeal) that might be highly relevant, but less immediately visible.

Cross-sitting also serves to promote consistency in interpretation of common procedural rules across Chambers . . .

Cross-sitting also serves to promote consistency in interpretation of common procedural rules across Chambers, contributing to a more unified tribunal jurisprudence, an aim falling squarely within the intended purposes of the Upper Tribunal. As the previous Senior President of Tribunals put it:

> 'The establishment of the Upper Tribunal . . . provides an unprecedented opportunity to work towards a more coherent and distinctive system of tribunal justice, drawing together the strands of the principles developed for the various jurisdictions.'

Cross-sitting can also, and equally usefully, serve to avoid decisions being expressed in terms which may have unintended or undesirable consequences when applied to another Chamber. There may indeed be very real differences in

what one is called upon to do when sitting in another Chamber. One becomes very much aware how one size does not always fit all. Basic conceptual questions, such as what is an appealable decision, or as at what date do the circumstances require to be looked at, may well fall to be answered differently between Chambers. Cultural or jurisdictional differences, too, may be apparent: the extent to which a Chamber operates in an inquisitorial way, for instance. Approaches to developing and publicising the Chamber's case law among its users may also vary. The result is a refreshing and stimulating new perspective on subjects that form part of daily routine in one's 'home' Chamber, providing a catalyst for creative thought.

Not every case would be well suited for cross-ticketing by way of one-off temporary assignments. The process is best suited to relatively weighty cases, perhaps involving troublesome conceptual issues. If there is a wish to effect assignments in relation to other cases, such as those that are shorter and/or faster moving, other strategies may need to emerge, such as ticketing for a block of cases or a period of time.

But cross-ticketing in suitable individual cases does in our view offer real advantages for the reasons given, both for state and individual users. In our experience it has also provided welcome opportunities to see aspects of judgecraft in a new light, with the potential to harness these insights in future. Our hope would be that such opportunities come to be extended more widely where suitable opportunities present themselves. Indeed, in the world post-Crime and Courts Act there may be scope for similar arrangements involving tribunals and courts judiciary, particularly in those areas where the courts too have had to evolve working methods to deal with complex public law issues and litigants in person often face considerable disadvantage.

Christopher Ward sits in the Upper Tribunal (Administrative Appeals Chamber).
Hugo Storey sits in the Upper Tribunal (Asylum and Immigration Chamber).

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in this work. I know the JAC is keen to work closely with the judiciary to find the right solutions.

Other proposals for the future include:

- Widening the scope of online qualifying tests to include assessment of candidate behaviours through the use of situational judgment questions.
- Introducing person specifications to give more clarity on the requirements of roles.
- Increasing the use of work sample selection tools, giving candidates a more realistic preview of the role, and allowing assessors to test how candidates are likely to behave in the role.
- Reviewing what references are needed and when in the process.
- Mindful of the Judicial Skills and Abilities Framework, we are reviewing the qualities and abilities needed for judicial roles. The JAC and Judicial Office are working closely to establish how best to incorporate the framework into the selection process.

I welcome feedback on any of the JAC initiatives and look forward to working to ensure the JAC continues to attract and select candidates of the highest quality for judicial office.

Phillip Sycamore is President of the First-tier Tribunal (Health Education and Social Care Chamber) and JAC Commissioner.

[1] If you would like a copy of the guidance when it becomes available, please contact Siobhan Mahoney at the Judicial Office via *siobhan.mahoney@judiciary.gsi.gov.uk*.
[2] See *http://jac.judiciary.gov.uk/about-jac/research.htm*.
[3] See *http://jac.judiciary.gov.uk/about-jac/diversity-data.htm*.

Contributions welcome – or maybe NOT

Leslie Cuthbert **provides a detailed breakdown of the different forms of intervention that may occur during a tribunal hearing.**

In an ideal hearing, an intervention of some kind by the judge or chair, or occasionally another tribunal member, would be unnecessary. Sadly, few hearings in any jurisdiction are 'ideal'. Whether it is trying to keep a litigant in person focused on the relevant issue, stopping an advocate from overstepping the mark when questioning a witness, or dealing with an inappropriate comment by another member of the panel, interventions are common.

An intervention can be defined in different ways but the Merriam-Webster dictionary describes it as 'to interfere with the outcome or course especially of a condition or process (as to prevent harm or improve functioning)'.

This article will primarily be of assistance to the chairs of tribunals since their role generally includes undertaking active interventions to ensure a fair hearing. But it will hopefully be of interest and benefit to all members of tribunals, especially where a chair may unwittingly engage in what may be termed as 'inappropriate' interventions.

The most well known and authoritative voice in regards to interventions is that of John Heron who identified two styles and six categories of 'helping intervention'.[1]

Heron's model has two basic styles: 'authoritative' and 'facilitative'. If a helping intervention is 'authoritative', it means that the person helping is giving information, challenging the other person or suggesting what the other person should do. If a helping intervention is 'facilitative', it means that the person helping is drawing out ideas, solutions, self-confidence, and so on, from the other person, helping them to reach their own solutions or decisions.

These two styles are further broken down into the following six categories:

1. Offer advice (authoritative).
2. Give information (authoritative).
3. Raise or confront issues (authoritative).
4. Deal with the other person's feelings (facilitative).
5. Help them to work through the problem themselves (facilitative).
6. Offer support (facilitative).

Authoritative interventions see the intervener taking a more dominant or assertive role.

1. Offering advice is a form of prescriptive intervention whereby the intervener explicitly seeks to direct and guide someone else's behaviour – e.g. giving advice or guidance to a witness, explaining to an unrepresented party what they should do in a hearing.
2. Giving information involves the intervener seeking to impart knowledge, information and meaning – e.g. sharing opinions or experience, explaining the background and principles behind the process, helping the other person get a better understanding of the matter.
3. Confronting involves the intervener seeking to raise someone's awareness about some limiting attitude or behaviour of which they are relatively unaware, by challenging them with direct feedback while not making a

personal attack upon them – e.g. challenging the other person's thinking, playing back exactly what the person has said or done, explaining what you think may be holding them back to help them avoid making the same mistake again. The intervener challenges the other person's behaviour or attitude. It should not be aggressive confrontation but instead the 'confronting' ought to be positive and constructive.

Facilitative interventions involve the intervener enabling individuals to become more autonomous and take more responsibility.

4 Dealing with the other person's feelings, also known as cathartic intervention, involves the intervener seeking to enable the individual to release powerful emotions, primarily anxiety, grief and anger – e.g. helping the witness express their feelings or fears or empathising with them.

5 Helping the person to work through the problem themselves, also described as 'catalytic' intervention, sees the intervener seek to enable the individual to learn, develop and problem-solve themselves by encouraging self-reflection, self-direction and self-discovery – e.g. asking questions to encourage fresh thinking, encouraging the other person to generate new options and solutions, listening and summarising what they have said.

6 Offering support involves the intervener affirming the worth and value of the individual's qualities, attitudes, beliefs and/or actions – e.g. building up the person's confidence by focusing on their competences, qualities and achievements or explaining how their contribution is valued.

There are, of course, what equally can be described as 'inappropriate' interventions, again falling into two distinct camps: 'degenerate' and 'perverted'.

Degenerate interventions are those delivered in a misguided manner often 'rooted in lack of awareness, in lack of experience, lack of personal growth, lack of training'.[2]

Perverted interventions, in contrast, are those which are deliberately malicious and intentionally seek to do harm.

In looking at degenerate interventions, the misguided nature may be because the intervention is:

a) *Unsolicited* – when the manner of the intervention is overly intrusive or disrespectful – e.g. asking questions when another tribunal member is in the midst of questioning a witness.

b) *Manipulative* – inappropriate interventions in which the intervener is motivated by self-interest, or any interests other than those of achieving a fair hearing – e.g. intervening simply because they haven't spoken for a while to demonstrate that they are 'in charge' of the hearing.

c) *Compulsive* – inappropriate interventions in which the intervener projects their own unresolved problems on to the individual during the intervention – e.g. inappropriately criticising or colluding with a party about an issue that is being discussed.

d) *Unskilled* – simply incompetent interventions because the intervener has never had the training and has no real grasp of the quality, scope or suitability of the intervention.

Degenerate classes of the six categories are:

1 Prescriptive degeneration

Benevolent take-over – involves creating a dependency by giving advice to an insecure individual who instead needs encouragement to be self-directing.

Moralistic oppression – can create rebelliousness by imposing authoritarian 'shoulds', 'oughts'

and 'musts' on an individual who may appreciate the rationality of the proposal but who feels impelled to reject what's suggested because of the way in which it is presented.

2 Informative degeneration

Seductive over-teaching – the intervener excels in excessive information-giving, so that the individual spoken to becomes overly passive.

Oppressive over-teaching – the intervener goes on for too long giving out too much detail, insensitive to any response from the individual.

3 Confronting degeneration

'The sledgehammer' – the intervener raises issues aggressively, displacing their anxiety into a punitive personal attack on the individual, rather than on the attitude or behaviour that has caused concern.

'The smiler' – the intervener says hurtful things to the individual but in a smiling, friendly or jocular way.

4 Cathartic degeneration

'Nut-cracking' – the intervener makes a detailed intervention into deeply buried distress, which the individual is not yet ready to handle, which can prompt an intense or uncontrolled response.

5 Catalytic degeneration

Implicit take-over – the intervener unwarily imposes their own meaning and viewpoint onto the individual's experience.

'Scraping the bowl' – the intervener goes on beyond the point of productive enabling, trying to make the individual find more to talk about on the same subject.

6 Supportive degeneration

Patronising – the intervener congratulates the individual on their self-improvement but in a manner whereby the individual feels subtly insulted and put down.

Qualified support – the intervener can only give support if at the same time they discreetly remind the individual of the latter's inadequacy in some respect.

Perverted classes of the six categories are:

1 *Perverted prescription* – where the intervener deliberately uses some threat or compulsion to prevent an individual from being able to act in their own best interest.

2 *Perverted information* – involves the intervener deliberately misrepresenting or mis-stating matters to undermine the individual's confidence or point of view.

3 *Perverted confrontation* – involves pushing the person to 'confess' to things never said or done and might also be described as 'oppression'.

4 *Perverted catharsis* – might better be described as 'brain-washing' the person whereby the intervener seeks to break the individual down through extreme mental stress then reintegrate them by means of a number of imposed suggestions.

5 *Perverted catalysis* – involves intentionally leading a person into their own undoing by drawing out any self-indulgent and/or self-destructive tendencies they may have.

6 *Perverted support* – involves affirming or encouraging unprofessional or corrupted behaviour by an individual.

A real-life example

Some time ago I was chairing a Mental Health Tribunal when another member of the tribunal was being appraised. This individual expressed in advance of the hearing their nervousness about being appraised and demonstrated this during the hearing by beginning to ask a multitude of questions, when invited to do so,

Potential day-to-day problems in tribunals and appropriate interventions the chair might make

Situation	Why	Intervention
An argumentative member.	The person may get satisfaction from dominating the panel.	Don't get upset. Try to find merit in an aspect of what they're saying and move on (offer support).
An over-talkative member.	Perhaps because they are too eager, are a 'show off', are exceptionally well informed or it's just their nature.	Ask them a difficult question or thank them when they take a breath and invite the other tribunal member in (catalytic).
A 'stickler'.	The person may have got fixated on a specific issue or may feel that they aren't being heard.	Consider having the other tribunal member respond (prescriptive) or work through the hypothetical situations looking at the different options regarding the issue (catalytic).
A member who won't talk.	This may be because they are too timid, bored or alternatively feel 'superior' to others.	Ask directly for their opinion after indicating respect for their view and compliment their view (offer support).
A personality clash.	This may simply be a difference of opinion or could be due to genuine dislike.	Consider drawing attention to what you see happening and get them to refocus on the task (confrontation).
Side conversations.	It may be that one of the members is distracted by personal matters.	Don't embarrass them but instead ask them a question or invite an opinion on an issue (catalytic).
A confused member.	This may be due to a lack of understanding or misinformation.	Tactfully restate the comment, or ask the other member for their understanding or provide guidance yourself (provide information).

not all of which were relevant to the central issues for the tribunal to determine. Presumably they did so in an effort to demonstrate to the appraiser that they satisfied the required competencies. This, however, meant that the other tribunal member was getting less of a chance to ask questions themselves and was also diverting us from the key legal questions we had to decide. I therefore invited the other tribunal member to ask their questions first of the parties present before passing over to the member being appraised (as a way of offering support to the member who otherwise may have felt under-utilised).

Secondly, while I could have intervened in a confrontational way and pointed out that the tribunal member was straying from our core function by asking irrelevant questions, I decided that this might well have had an even greater negative effect undermining their confidence. Instead I chose to offer support and validation in another way by referring back to the questions

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Sharing skills to counter cross purposes

Melanie Lewis explains the development of a cross-jurisdictional training course for HESC. Contributing to this article are _Edward Yeates_, of SEND, who provides his expertise on learning disabilities, and _Robin Caley_, a specialist member from Mental Health, who looks at issues of concern to hearing-impaired users.

In 2012, an idea was formulated to run cross-jurisdictional training across the Health Education and Social Care Chamber (HESC), which comprises the Mental Health jurisdiction and the Special Educational Needs, Care Standards and Primary Health Lists jurisdiction. Both come under the same Chamber President, but each has their own Deputy Chamber President with separate administrations.

Cross-jurisdictional training requires a willingness to come out of your 'jurisdictional box', if cross-ticketing or assignment has not already taken you there.

Salaried judges but also fee-paid judges and specialist members sit across the jurisdictions of HESC and increasingly in other Chambers. There is also a fit in the subject matter of the jurisdictions. For example, many cases before SEND concern children on the autistic spectrum, some of whom will go on to come under the Mental Health Services, living in premises which could be the subject of an appeal to the Care Standards jurisdiction.

Why cross-jurisdictional training?

Cross-jurisdictional training has been adopted by the Judicial College as a policy but is still to be widely implemented.

All tribunals should maintain the function of accessibility emphasised in the Leggat Report, reminding us that 'No matter how good tribunals may be they do not fulfil their function unless they are accessible by the people who want to use them and unless the users receive the help they need to prepare and present their cases'. This is especially so at a time of public funding cuts.

All judicial office-holders are full members of the panel they sit on and all have taken the same judicial oath. All must work to and demonstrate the same judicial competences, whichever jurisdiction they sit in.

The aim of the course was a practical one: to consider key communication issues which may arise in any tribunal setting . . .

Inevitably, there was some resistance as to how relevant such training was to members' work. We challenged this by introductory remarks on the benefits of sharing experience. Overall, the feedback was positive.

In the cross-jurisdictional world, judicial office-holders need to develop and take responsibility for their own portfolio of learning, which increasingly will include e-learning. This may involve the tribunal prospectus giving detailed information about what the course offers.

Designing a course

The aim of the course was a practical one: to consider key communication issues which may arise in any tribunal setting, consider the reasons why problems occur and strategies for dealing with them.

Pre-reading was not extensive but references were made to other material that delegates could access. A document was prepared on 'Dealing with conflict and distress in tribunal hearing

strategies to avoid and de-escalate problems', which referred to guidance issued by the Senior President and similar guidance issued in Australia. A presentation was given on this topic by a specialist member who reminded us that telling an angry litigant to 'Be quiet' was less likely to succeed than acknowledging their anger and setting structures for the hearing.

As the course developed, we worked on developing non-jurisdictional case studies where delegates could draw on the presentations they heard and identify some practical strategies. At all points during the day, delegates were encouraged to partner a delegate from a different jurisdiction and invited to share experiences.

Further materials were referred to – such as the Advocate's Gateway website, which gives free access to practical, evidence-based guidance on vulnerable witnesses and defendants.

Learning disability

People with a learning disability may come into contact with the Tribunals Service as witnesses (including young people) or appellants (parents, young people or patients).

A learning disability is a lifelong condition that means people need help to understand new information, learn new skills and cope independently.

A person with a learning disability may need extra support to live independently and to cope with everyday activities. The kind of help they need depends on the extent and nature of their disability. People with a learning disability have different levels of ability in thinking and dealing with everyday life. Someone with a learning disability is likely to have extra communication needs that can make coping with certain situations difficult and stressful.

Everyday tasks that people with a learning disability may find difficult include:

- Filling in forms.
- Following instructions/directions.
- Concentrating for long periods.
- Telling the time.
- Understanding or describing time periods.
- Remembering things.
- Reading, writing and comprehension.
- Explaining things.
- Managing their home (doing shopping, cooking etc).
- Managing money and bills.
- Keeping appointments.
- Using public transport on their own.
- Understanding social norms and the world around them.

It will not always be obvious that someone has a learning disability (although some people do have clear physical characteristics, for example, people with Down's syndrome). But there are questions you can ask or signs that will help you identify that the person may need extra support. Asking people about the support they receive and the school they are at or used to go to is helpful.

Some people with a learning disability may try to hide their condition to fit in or to avoid drawing attention to themselves. It is possible for a person to be unaware they have a learning disability. They may never have used any support services or had an assessment.

Some people may tell you they have a learning difficulty, not a learning disability. A person with a learning difficulty will have problems in one or two areas of their learning but will manage well in other areas of their development. There are many different types of specific learning difficulty. The best known is dyslexia where the person will have problems with spelling, reading

and/or writing. They will usually be able to manage other aspects of their life without any significant problems.

People with a learning disability will have problems with a range of aspects of daily living. The situation is complicated by the fact that some people who are considered to have a learning disability prefer to use the term 'learning difficulty' when describing their situation.

Approximately two to three per cent of the population have a learning disability. People with a learning disability are more likely to suffer from common mental health problems such as depression and anxiety, but also more severe and rarer conditions such as schizophrenia.

People with a learning disability may have difficulties speaking, understanding and expressing themselves. They may have problems remembering things or concentrating. They may have difficulties with social interactions.

To communicate well with people with a learning disability, you need to understand the difficulties that someone with a learning disability may have. You may need to change the way you communicate and you should always try to respond to each person's individual communication needs.

Here are some practical tips, which may help you to improve your communication with a person who has a learning disability:

- It is important to take time to establish rapport so as to help the person feel comfortable in the situation. Someone with a learning disability is less likely to communicate at their best if they are anxious.
- Always explain to the person exactly what is going to happen.
- It may be helpful to use the person's name at the start of each sentence.
- Speaking slowly and clearly using simple language will help to increase the person's understanding.
- Avoid using jargon, long words or long sentences.
- It can be helpful to encourage the person to let you know if they don't understand something.
- Emphasise key words and use concrete terms not abstract terms, for example, 'at breakfast time' rather than 'early on'.
- Break large pieces of information into smaller chunks and ensure you give the person time to understand the information.
- Be patient and calm while communicating, don't rush the person you are talking to – they may need longer to process the questions and think about their answers. As a rule of thumb allow six to seven seconds between asking a question and expecting a response.
- Avoid double-negative statements or vague questions.
- Be aware that repeating the same question may suggest to the person that they have given the wrong answer when asked the first time. It can be helpful to ask the same question in a different way, particularly to check that the person has understood the question and to check the consistency of answers.
- Be aware that a person with a learning disability may be eager to please or be acquiescent (likely to answer 'yes'). This can be checked by asking the same question in a different way, where you would expect a negative answer.
- Wherever possible, several short sessions are likely to be better than one long session. This may help with the person's concentration levels and reduce anxiety.
- Ensuring the environment is free from distracting noises and that it is as calm as possible will help reduce anxiety.

Communicating with deaf people

Jack Ashley MP said, in *The Price of Deafness,* published in 1976 by the Disability Alliance, that:

> 'The problems of deaf people derive largely from public ignorance of their plight and indifference to their disability. Few people without personal experience of deafness can comprehend this much-misunderstood malady: many unthinkingly attribute to the deaf inattention, stupidity or, indeed, ignorance, not realising that personal communication with people whose hearing is impaired or destroyed involves subtle and complex problems requiring deep understanding and endless patience . . . Public indifference is a direct consequence of public ignorance. If it were possible to enlighten people about the severity of the disability and about ways in which they can help, their attitudes could be changed in time. But given the nature of deafness, its invisibility, its effect on relationships, its confusing gradations between hard of hearing and totally deaf and its awesome capacity for creating misunderstandings, no one can be wildly optimistic about an early prospect of radically new public attitudes.'

Mr Ashley was right to not be wildly optimistic about a change of public attitude. People still at times refer to elderly relatives or loved ones as having 'selective deafness' or say 'They can hear when they want to'. If you are a hearing aid user, many factors can affect your level of understanding: the room lighting; noise distractions; how many people are involved; the distance the person speaking is from you; whether their face is clear; the rate of speech; topics changing. Lip-reading is an amazing skill but most is guess work as too many words look the same on the lips. It is also a myth to think that all people with a hearing loss are good lip-readers.

As Jack Ashley stated, the confusing gradations between hard of hearing and totally deaf do not help. There is also the important factor of the age of onset. Those born profoundly deaf, or who are becoming deaf before acquiring speech, will have a very different experience to someone who is gradually going deaf through old age. And the problem is enormous – Action on Hearing Loss says that one in six people has a hearing loss and predicts that it will be one in four by 2030.

For those who were born deaf or went to a school for the deaf, they are more than likely to be British Sign Language (BSL) users. BSL has no written format but is a visual gestural language. It has its own syntax and grammar and does not follow the rules of English. For example: using English you would ask 'what is your name, where do you live?' In BSL they would sign 'Name what, live where?' There are also deaf people who have a very good command of English and, in addition to BSL, will also use Sign Supporting English (SSE). They use the signs of BSL but follow the rules of English grammar. No wonder it is confusing, but the golden rule is to remember they are all individuals so you should not presume one rule fits all.

Deafness and blindness are often coupled together under sensory impairment, yet they are so far apart in social needs.

Deafness and blindness are often coupled together under sensory impairment, yet they are so far apart in social needs. People sometimes make comparisons without knowing. However, one person who was entitled to make a comparison was Helen Keller, who said:

> 'I have found my deafness to be a much greater handicap than my blindness. In many ways, I have found that acuteness in other senses and the kindness of people have

> richly compensated me for blindness. With deafness, it is different. In advancing years I have grown closer to the deaf, because I have come to regard hearing as the key sense. Deafness, by fettering the powers of utterance, cheats many of their birthright to knowledge . . .'

So what can you do if you meet a deaf person? The rules for effective communication are:

- Try to find out the person's preferred method of communication.
- Minimise background noise.
- Be aware lack of soft furnishings increases echo.
- Good lighting (too bright or too dark can strain the eyes).
- Make sure the light is on your face and there is no shadow – do not stand with your back to the window.
- Stand or sit one to two metres apart but at the same level.
- Look directly at the person (when using an interpreter face the deaf person not the interpreter).
- Keep face and mouth clear.
- Speak clearly, keep a rhythm – there is nothing worse than exaggerated, very slow speech.
- Do not shout, all it does is distort the face.
- Finally, if you have a BSL user before the panel, you need a qualified interpreter. They will have a badge with a yellow border that states NRCDP Registered.

In summary, it is hoped that in future the judiciary's Learning Management System will provide a forum for posting similar background information and practice tips.

Melanie Lewis sits in the First-tier Tribunal (Health, Education and Social Care).
Edward Yeates sits in the First-tier Tribunal (Special Educational Needs and Disability).
Robin Caley is a specialist member of the First-tier Tribunal (Mental Health).

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that had been asked which were relevant and by developing them further, where necessary, and by complimenting the member on having raised an important point. This was designed to also enable the member to reflect on the questions they were asking and to maintain their focus. As a result with the next witnesses, after our colleague had asked their questions, the member being appraised asked fewer questions all of which were focused on the relevant issues for us to decide.

Conclusion

A great way to understand the helping/intervening styles you most often use is to ask your colleagues directly for feedback. A more 'supportive' style with a focus on facilitative interventions as opposed to authoritative may, as might be expected however, often help the members of a tribunal gain confidence and so solve more of the problems for themselves.

Reflect on hearings you have been involved in and consider which forms of intervention were used and how effective they were. In the future, should an issue arise, hopefully you will consider all the different options available to you rather than simply go with your 'tried and tested' intervention strategy – maybe the result will be an even better one.

Leslie Cuthbert sits in the First-tier Tribunal (Health, Education and Social Care)

[1] Heron J (2001) (5th ed) *Helping the client – a creative practical guide*. SAGE publications, London.

[2] Heron 2001.

Two views over a matter of PRINCIPLE

Upper Tribunal judge *Christopher Ward* (left) and *Harald Hesral*, appeal judge in Bavaria, discuss the respective techniques used in the United Kingdom and Germany to get to the heart of the matter when investigating facts.

In 2012, Christopher Ward, of the Upper Tribunal (Administrative Appeals Chamber), took part in a two-week individual study trip to Munich through the European Judicial Training Network. His host there was Dr Harald Hesral, a presiding judge of the Bayerisches Landessozialgericht (Bavarian Regional Social Court of Appeal). The following is an account of one of their discussions on the differences and similarities of the two jurisdictions.

CW: One of the most striking impressions I have from my visit is of the role played by you and your colleagues in actively investigating the facts of cases. Yours is, I appreciate, a jurisdiction allowing appeals on fact and law and presumably the court below adopts a similar approach to its cases?

HH: Yes. It is a fundamental principle that it is the duty of the court to investigate the facts for itself. It goes by various names, e.g. the Amtsermittlungsgrundsatz.* Let's call it the A-principle for short.

[In Germany] . . . the court is not stuck with the facts as demonstrated by evidence from the parties, but can, indeed must, dig deeper.

CW: We have something a bit similar – we say some jurisdictions are 'inquisitorial'. But what that entails is not always clear. Nor does every court or tribunal apply that approach, or to the same extent. What courts does the A-principle apply to in Germany?

HH: All those exercising public law jurisdictions – these include the social court and the tax court as well as the general public law court. And there are other pockets where it applies too, particularly in certain types of family matter. What links them is the state's interest in getting the matter as objectively 'right' as possible and the need for the courts to exercise control over the state's actions.

CW: In the UK too that interest of the state is acknowledged – above all in social security cases where the only real 'win' is that a person gets neither more nor less than the amount they are properly entitled to. In those cases, it is accepted that there is an inquisitorial jurisdiction. In some other areas too, such as the education of children with special needs. But you would find, too, areas of state involvement where the principle is not established to the same degree. It seems rather more firmly entrenched in Germany?

HH: In Germany, the A-principle is seen as a fundamental part of the rule of law – indeed, it appears in the German Basic Law.

CW: Whereas we, with our unwritten constitution, rely on decisions of the higher courts, which in this area generally do not seek to express the application of the inquisitorial principle in such a cross-cutting sort of way! But perhaps we could explore what it means in practice – let's say in a social court as we, and many of the readers, have experience of such a jurisdiction.

HH: Above all, it means that, while of course it is for the parties to decide what they are appealing about, the court is not stuck with the facts as

demonstrated by evidence from the parties, but can, indeed must, dig deeper. We can and do, for instance, call for the files from other relevant proceedings; put sets of questions to witnesses and send out for medical evidence, whether through questionnaires or quite detailed expert opinions from treating doctors. Would a UK court or tribunal adopt a similar approach?

CW: There is a difference between the panel composition in Germany and the UK. My understanding is that the non-legal members of the German social court are (with limited exceptions) there primarily to represent the community and do so to enhance the acceptance of the court by society at large. In the UK, where we have panel members other than a single judge at all (by no means all the time), they are generally there because they have some sort of specific role – a doctor for instance, or sometimes a person with experience of disability. Also, pragmatism may account for some of the differences: I believe a German social court may have power to order more complex and possibly more valuable provision than does its UK opposite number, which will generally be concerned specifically with whether a person is entitled to a particular cash benefit. So while a tribunal could do most of the things you mention, the frequency with it will do so is much reduced: often it will rely less on getting in further evidence than on specialist evaluation of such evidence as it already has.

[In the UK] . . . if a tribunal thinks there is enough material to enable it to decide the case, it is unlikely to go off to look for further evidence itself.

HH: What determines when a tribunal will call for more evidence?

CW: I would say this is one of the ambiguities about the inquisitorial principle. In what is supposed to be a cooperative process, it is for each party to prove what they can. And a party who does not put forward the evidence they might is not necessarily going to be bailed out by the inquisitorial principle – if a tribunal thinks there is enough material to enable it to decide the case, it is unlikely to go off to look for further evidence itself. If on the other hand it thinks there are glaring gaps in what has been presented to it, then it probably will. This degree of flexibility can work harshly for a party who invites the tribunal to approach (say) their doctor. The party does not do so themselves and maybe the tribunal decides it does not need to either. Is there more definition in Germany?

HH: The test is what is 'required' in order to make the necessary findings in the case. And what is 'required' comes down to a question of proximity to the submissions and the subject matter of the case. So, yes, perhaps there is more definition. But ultimately it still comes down to a judgement in the individual case how far the court needs to go.

CW: I notice that you've been speaking so far about questions of fact, not law. Does the court have to adopt an approach to the law which is similarly independent of the parties' submissions? I would say that was an important part of the inquisitorial principle, especially where unrepresented parties are concerned.

HH: Yes. Conceptually this relies though on the proposition that the court is taken to know the law, rather than as part of the A-principle. But I can see that the outcome may be similar.

CW: It seems as if a lot of investigation falls to a German court. Does the court have to do all this work, or can some of it be left to the parties?

HH: The principle is that it is the court's duty to investigate the facts, but the parties are to be involved. If a party doesn't cooperate, they

may find that matters are decided against them if they haven't come up with the evidence or exceptionally where they are totally silent they may face measures such as being deemed to have withdrawn their case. But the primary duty remains the court's.

CW: I can see how that may provide clarity about who is responsible, and put the court in the driving seat in terms of saying what is needed. Does it make a difference if a party is legally represented?

HH: Representation by a lawyer (or occasionally someone else) is the norm in the social courts although it is not obligatory at the lower levels. A court will be readier to assume that a represented party has fulfilled its duty of cooperation with the court, in terms of putting forward the facts to support the case and suggested lines of inquiry. Equally, a court will tend to assume that if a lawyer is silent on a point, it is for good reason. But if it is obvious that even a lawyer has proceeded on the basis of false legal assumptions, then the A-principle will kick in, regardless of a lawyer being involved.

The big question for people working in UK tribunals is: do you feel the German approach helps litigants in person?

CW: We have a much wider range of representatives – occasionally lawyers, but more commonly advisers from local authorities or the voluntary sector, who are probably not legally qualified. Within limits, it's a judgement call how far a tribunal can rely on the way a representative is putting a case and not be required to dig deeper, but most tribunals would probably ask about what they wanted to know about regardless. More commonly still, a party may have no representative at all. That's increasingly the situation in courts as well as tribunals because of cuts in legal aid and is one of the main reasons why there is so much interest in the inquisitorial jurisdiction right now. The somewhat ill-defined edges of the inquisitorial principle in the UK do have their advantages: it makes a very flexible tool in the hands of first instance tribunals to get to what they regard as the heart of the matter (and in the hands of appellate tribunals where they consider that something has been missed at first instance) but the same lack of definition can lead to parties being left uncertain and potentially relevant evidence not being obtained. We've been talking about the German A-principle, with its basis defined in legislation, with clearer indications as to its extent and responsibility for implementing it. The big question for people working in UK tribunals is: do you feel the German approach helps litigants in person?

HH: Undoubtedly the A-principle does more to get to the truth and to further the protection of rights than the system in ordinary civil courts in Germany, where the principle does not apply. This is particularly true where one party has less experience of legal matters and it contributes significantly in my view to ensuring equality of arms, something that is then taken further by the availability of legal aid in our social courts. It might be a fair comment that the principle requires to be interpreted in a proportionate way if it is not to result in an over-engineered solution for the smaller cases in the social courts, with the additional expense and delay resulting from too many expensive medical opinions having to be obtained (and all the more so as there are generally two levels of appeal on fact in Germany). But that is a question of detailed implementation: overall the A-principle is seen as thoroughly valuable for the reasons I have mentioned.

CW: Harald, many thanks both from me and on behalf of the readers of *Tribunals* for being willing to explore with me an issue which is so topical for all of us working in the British tribunals system.

* Principle of official examination/determination.

AIMS AND SCOPE

1 To provide articles to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before them.

2 To address common concerns and to encourage and promote a sense of cohesion among tribunal members.

3 To provide a link between all those who serve on tribunals.

4 To provide readers with material in an interesting, lively and informative style.

5 To encourage readers to contribute their own thoughts and experiences that may benefit others.

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