

# | DON'T JUST SIT THERE, PLAY A FULL PART



**Mark Hinchliffe** describes why it is important that non-legal panel members are equal members of the team.

**I**N 1957, THE FRANKS COMMITTEE subjected the tribunal system to detailed scrutiny.<sup>1</sup> Franks concluded that the advantages of tribunals included expert knowledge of their particular subject, which was an essential aspect of the service that tribunals offer to the public.

The next major review was more than 40 years later, when Sir Andrew Leggatt reported that: ‘One of the great advantages that tribunals have over ordinary courts is that tribunal decisions are often made jointly by panels comprising lawyers, experts and members of the community who are able to meld their knowledge and experience in order to bring a broad range of skills to bear on decisions.’<sup>2</sup>

## Teamwork

As tribunals mushroomed and now, to a degree, have coalesced, an important message has emerged. An essential ingredient and a unique feature of the tribunal justice process is teamwork. As Leggatt saw things, teamwork in the tribunal world involved melding, fusing and jointly applying individual knowledge, experience, skill, intellect, analysis and informed opinion onto shared judicial tasks.

Judicial tasks, of course, are as much ‘people tasks’ as legal tasks – involving working as a judicial team to stage-manage and use the hearing to put people at their ease and so create the best climate to obtain the best possible evidence. Until this is done, those of us who sit on panels cannot properly move on to the next stages of sifting and weighing that evidence, applying the law, and trying to reach

a legally sustainable, evidentially supported and objectively reasoned decision that is both fair and just. If we can’t work as an effective team, we are unlikely to succeed in our principle task of doing justice.

## Idiosyncracies

The strength of the panel lies in its legitimacy, its broad intellectual base, its ability to discuss, and its processes for shared and cohesive decision-making. There are mechanisms for the containment and control of individual tendencies

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that judges who sit alone may find difficult to spot and restrain. One of the benefits of a panel is that idiosyncracies are less likely to adversely affect the outcome, especially if panel members have the confidence to engage with each other clearly and confidently, but without being dogmatic or inflexible. This can be quite a

tough call. But we need to remember that we are selected, not as individual decision-makers, but for the individual contributions that we make to the collective work of the judicial team.

## Joint expertise

Teamwork for tribunals is a specific and particular skill: a method of working together and pooling all relevant knowledge and experience. It uses joint expertise to the full, and works in a planned, respectful and mutually supportive way in order to achieve a fair and effective hearing and a just outcome. Depending on the history, culture, function and framework of the jurisdiction, panel members come in different shapes and sizes. At one extreme, psychiatrists doing mental health cases in the

Health, Education and Social Care Chamber of the First-tier Tribunal will generally have to examine the patient on a one-to-one basis, and then formally give an expert opinion on the patient's mental state. Then there are the Employment Tribunals, Special Educational Needs and Care Standards panels, whose members have knowledge and experience relevant to the jurisdiction.

### **Legitimacy**

At the other extreme, a number of panels dealing with the qualifications or conduct of professionals, or matters seen as the preserve or domain of a particular discipline, set great store by the presence of a member who is non-legal and, also, not a member of the profession or discipline in question. These panels are particularly worried at suggestions that the days of the non-legal, non-specialist member might be numbered, given that part of the rationale for continued involvement is that, not only in terms of being fair, but also in terms of looking fair, the non-legal, non-specialist member contributes something intangible to the legitimacy of the panel that, possibly, the lawyers and the expert professionals do not.

### **'Real world'**

In a recent series of training events held for the Family Health Services Appeal Authority, the JSB surveyed members' views on non-legal and non-medical members in a questionnaire. This particular tribunal comprises a lawyer, a medical member and a non-legal member. Asked what contribution, if any, the non-legal and non-medical members made to a panel charged with the complexities of assessing medical practice, a high proportion of responses referred to the need for balance and stressed the value of a perspective from an independent and right-thinking member of the public, living in the 'real world'. More than one delegate pointed out that medical practice generally involved more than just the doctor, dentist or nurse – there was the ordinary person on the receiving end too.

Another message from this small but illuminating survey was that, when there is a team, and when it works well, the benefits are immense. But when it goes wrong, the dysfunction can potentially prejudice efficient decision-making and even threaten the quality of justice itself. This means that the dynamics of panel functioning should not be left entirely to chance. Like every other aspect of judgecraft, people saw a clear role for practical training.

### **Competence**

It is necessary, therefore, to think about making teamwork work. The chair needs to manage panel relationships effectively, but all members need to be aware of their role and contribution, and of the impact of their personalities on the process. These skills are a refinement of our everyday social skills, but are nevertheless specific to the judicial task, and they need to be honed through training, practice and experience. They are a fundamental part of the JSB competences appraisal process.

### **Plain English**

Most panel members said they found it relatively easy to express their opinions, even where there was strong disagreement. Interestingly, many non-legal members saw a role for themselves in making the lawyers and medical members justify and explain their views in plain English. But ease of contribution depended on the willingness of others to listen and to keep an open mind. Personalities, especially the personality and style of the chair, were seen as having an important influence. Knowing yourself and developing confidence were repeatedly identified as crucial factors. But contrasting styles and approaches, as well as our differing or competing opinions, were generally seen as a good thing, ultimately enhancing the process of teamwork and the quality of the eventual decision.

Disagreement can be helpful if it builds togetherness, opens up new perspectives, and encourages everyone to discuss issues and find new solutions. It becomes harmful if it turns into conflict,

diverts energy from the judicial task, amplifies differences in values, weakens or destroys morale, or causes a position to become entrenched.

### Confidence

Although most expert and non-legal members were hesitant about contradicting the lawyer on matters of legal interpretation, very few panel members saw difficulty in expressing disagreement on the application of the law. The legal members were content with this approach too, feeling that non-legal colleagues often had the benefit of having sat on similar cases. Again, the key was seen as confidence, with constructive and professional disagreement allowing for the exchange of logical arguments and propositions in order to arrive at the correct decision.

### Roles

To maximise the benefit of the multi-background tribunal, the allocation of roles is vital. Every member should make a public contribution, by asking appropriate questions – and be seen to do so. Panel members also recognised the need to become adept at asking questions that are short, neutral, open, relevant and evidence-based.

### Expectations

Different people, of course, have different expectations of the panel member. The expectations of the legal member may be different from those of the parties' representatives, or those of a person with a direct interest in the case, or a member of the public. Accordingly, the JSB mini-survey concluded with questions that encouraged delegates to imagine what expectations others may have of each team member, including the non-legal member. Answers included an expectation that the non-legal member would be robust, receptive, unbiased, straightforward, informed, well prepared, and the voice of 'common sense'.

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And, on top of that, every member needs to be a chameleon, switching as appropriate between an interpersonal role that promotes an unthreatening, structured, polite and focused interplay between all participants in the process; the enabling role, especially in relation to reluctant, shy or nervous witnesses; and the adjudicatory role, which remains at the heart of the judicial function and involves sound judgement based on evidence and supported by coherent reasons. How (and when) each role is deployed will depend on the nature, dynamics and stage of the case, the needs of the participants, and the particular strengths and

interests of the panel member. The chair or tribunal judge may be the conductor of the orchestra, but the symphony will not sound right unless each instrument is heard, and heard at the right time.

### Equal members

This year, the JSB is taking this session to members of the new Tax and Finance Chamber, where non-legal involvement is an important feature. We hope to derive more insights to add to our survey. In the meantime, the role of the panel

member is sure to remain complex and multi-faceted. The member may be there because of their professional background and expertise – or precisely because they do not bring the interests of any particular interest group to the table. Either way, the process of teamwork for tribunals requires special skills, developed through training and experience, to ensure that the non-lawyers fully play their part and make their contribution as equal members of the team.

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<sup>1</sup> Report of the Committee on Administrative Tribunals and Enquiries 1957, Cmnd, 218.

<sup>2</sup> *Tribunals for Users: One System, One Service* – published 16 August 2001.