

REDRESS IN THE ROUND

Administrative Justice

Speech

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

One of the main proposals in last year's White Paper "Transforming Public Services: Complaints, Redress and Tribunals" is that the present Council on Tribunals should become an Administrative Justice Council. In addition to the current duties of the Council on Tribunals, the Administrative Justice Council will, in the words of the White Paper:

- keep under review the performance of the administrative justice system as a whole drawing attention to matters of particular importance or concern;
- review the relationships between the various components of the system (in particular ombudsmen, tribunals and the courts) to ensure that these are clear, comprehensible and flexible;
- identify priorities for, and encourage the conduct of, research;
- provide advice and make recommendations to government on changes to legislation, practice and procedure which will improve the workings of the administrative justice system.

The White Paper envisages that the AJC, as I shall call it, would be an advisory body for the whole administrative justice sector, and would for instance make suggestions for departmental review, for proportionate dispute resolution and for the balance between the different components of the system. It would be concerned to ensure that the relationships between the courts, tribunals, ombudsmen and other ADR routes satisfactorily reflect the needs of users.

The proposals for the AJC go back to the 2001 Leggatt Report "Tribunals for Users: One System, One Service". Leggatt thought the Council on Tribunals' primary role should be to

act as the hub of the wheel of administrative justice. The Council was needed to co-ordinate the arms of the system of administrative justice of which tribunals were parts. In the longer term, the Council should be made responsible for upholding the system of administrative justice and keeping it under review, for monitoring developments in administrative law, and for making recommendations about improvements that might be made to the system.

It is perhaps worth remembering that the Leggatt recommendations were themselves by no means novel. The Justice/All Souls Report of 1988 entitled "Administrative Justice: Some Necessary Reforms" advocated the establishment of an Administrative Review Commission, along the lines of the Australian Administrative Review Council. And the Council on Tribunals itself, in its Special Report on its Functions in 1980, recommended that it should be given a clear general power, in addition to the supervision of tribunals, to act as an advisory body over the whole area of administrative adjudication and the general pattern and organisation of tribunal structure. That recommendation fell on stony ground at the time. 25 years later, it is on the point of becoming a reality.

"Supervision"

Before considering further the role of the AJC, perhaps I could say a brief word about the Council on Tribunals' present role. Its primary function is to keep under review the constitution and working of some 80 or so listed tribunals and from time to time report on them. The listed tribunals are described in the legislation as being under the "supervision" of the Council. As I have indicated, it is envisaged that the Council's present role in relation to tribunals will be continued by the AJC. But the term "supervision" has always struck me as unsatisfactory and misleading. The Council is a purely advisory body, with no executive functions, whereas the word "supervision", to me at any rate, carries strong implications of executive authority. I much prefer the word "oversight". I should also mention that the Council has a comparable though not identical role in respect of certain statutory inquiries; but here the word "supervision" is not used in the legislation.

I mention this because it seems to me that there is scope for misunderstanding what is proposed in respect of the AJC. Although the AJC will be looking at the broad administrative landscape as a whole, including first instance decision making, ombudsmen, the courts, ADR and so on, as well as tribunals and inquiries, as I see it there is no question of its "supervising" these areas in the way it has "supervised" tribunals and will continue to do so (particularly those that will initially be outside the unified Tribunal Service). The notion that the AJC would in any sense be "supervising", say, the Administrative Court would no doubt be anathema to the distinguished High Court judges who make up that court. Similarly, I

would think, the ombudsmen would not relish the notion of being “supervised” by the AJC, and so far as I am concerned that is simply not the position. What the AJC would be doing, again using the language of the White Paper, is reviewing the relationships between the various components of the system to ensure that they satisfactorily reflect the needs of users.

The landscape

I have spoken so far as if the concept of administrative justice was easily defined and readily understood. But of course it is not. It has become well established as a notion but its precise limits are probably impossible to define in any useful way. Most of the tribunals under the oversight of the Council on Tribunals are concerned in some way with disputes between the citizen and the state, and so may seem naturally to fall within the concept of administrative justice. But there are a significant number of tribunals that are concerned with disputes between citizens, be they employer and employee, landlord and tenant or whatever. Some tribunals, such as the Lands Tribunal, have jurisdictions of both types. The White Paper does of course recognise the distinction and talks of administrative justice and justice in the workplace as different things. Both, however, would come within the purview of the AJC.

The position with inquiries is no clearer. Ordinary planning inquiries seem to fall fairly plainly within the concept of administrative justice. But what of ad hoc inquiries into matters of public concern, for example the Scott or Hutton inquiries? They are often chaired by senior judges, but does that make them part of the administrative justice scene? Or are they better regarded as part of the machinery of government? Much may depend on the nature of the particular inquiry. We have been following with interest the passage of the Inquiries Bill, which deals with inquiries of that kind.

When it comes to ombudsmen, the position is as you all know even more complicated and less susceptible to generalisation. You have statutory and non-statutory ombudsman, public and private sector ombudsmen, ombudsmen who make recommendations and ombudsmen who make binding decisions, and various permutations and combinations. I would regard the Parliamentary Ombudsman and the local government ombudsmen as falling fairly clearly within the administrative justice landscape. But if, as I understand has been mooted, there were to be a supermarket ombudsman, would that be part of the landscape? Walter Merricks’ organisation received a good deal of favourable attention in the White Paper and is part of the regulatory framework established by the Financial Services and Markets Act 2000. But in what sense is it concerned with administrative justice?

We at the Council have been giving some preliminary thought to what might or might not be within the AJC's remit, but are very far from reaching any settled conclusions. In general terms, we suggest the following broad indicators:

- element of public interest (e.g. central/local government, employment)
- distinct from the civil justice system, which is within the purview of the Civil Justice Council
- centred on administrative decision taking
- includes process – openness, fairness, impartiality, independence – as well as remedies
- encompasses whole end-to-end process from first to final decision

But that list raises more questions than it answers. We envisage that in addition to the areas I have already mentioned – first instance decisions and internal departmental review, tribunals, inquiries, ombudsmen, the courts, ADR and so on – the landscape would also include a wide range of regulators and complaints procedures of various kinds. No doubt it could include prison discipline and parole. Whether it would extend to professional disciplinary bodies, for example in the areas of health and the law, may be more open to debate. And there are other areas, such as the universities, the churches, or the armed forces that one would perhaps not normally think of as falling within the administrative justice field.

Since the White Paper was published, it has been proposed that the scope of the AJC's activities, potentially so wide, could be circumscribed by a programme of work agreed from time to time by Ministers. I have to say that I am not greatly attracted to this idea. Apart from the practical difficulties that may arise from the need to obtain the agreement not only of the Lord Chancellor but also of the devolved administrations, the idea of a work programme does not sit very happily with the obligation to keep the whole field of administrative justice under general review. It remains to be seen how to square this particular circle.

Thoughts about the future

As I have indicated, the Council on Tribunals is still at an early stage in its consideration of its future role. We are intending to devote two days' thinking to it in Newcastle later this month. I am sure that the present conference will help us greatly in that regard.

But already I think we are beginning to see how the administrative justice "system" could be made easier for users. For example, the Council has long sought to discourage the needless

proliferation of tribunals and I envisage that the AJC will take a similar stand in relation to the broader landscape. So, for example, I would expect the AJC to work closely with BIOA to warn against the needless proliferation of ombudsmen where there are already existing bodies well equipped or sometimes better equipped to deal with the matters in question.

The AJC would also be alert to opportunities to make it easier to move from one forum to another if the nature of the case seemed to require it. It is now some years since Lord Woolf (a self-confessed 'ombudsmenphile') suggested that there should be power for the courts to refer matters to the ombudsmen and vice versa, but nothing has yet come of that eminently practical proposal. Consideration should be given to a similar arrangement as between tribunals and ombudsmen. Then there is the whole question of ADR and the extent to which courts and tribunals should be steering people in that direction. There need to be mechanisms to establish at an early stage the most appropriate and proportionate way of resolving a dispute. Much will depend on the nature of the individual case and the kind of remedy sought. People need to know at the outset what the options are and to get advice about their relative advantages and disadvantages.

It is here that the Law Commission's current work on housing adjudication is going to be an enormous help. Essentially the Law Commission is pioneering an approach in the housing field that the AJC, in collaboration with other vital players such as BIOA and the new Tribunal Service, will be applying across the whole landscape. It is a formidable challenge, and I am sure that collaboration between all those involved, government, representative organisations, courts and tribunals, and (most challenging of all) users themselves will be the key to success.