THE CITIZEN'S EXPERIENCE OF ADMINISTRATIVE JUSTICE – ROOM FOR IMPROVEMENTS? SPEECH TO NORTHERN IRELAND OMBUDSMAN – 40th ANNIVERSARY EVENT

INTRODUCTION

I think we have come a long way since I first started working in the legal advice field almost thirty years ago. As a welfare rights worker in the North East of England I used to regularly correspond with a local authority in Co Durham and every initial letter of concern/complaint was given short shrift with a flat denial of liability/responsibility. It was only when a second piece of correspondence came in, that the issue get looked at either by the legal department or other council officials. At the time, I had a discussion with one of the council's solicitors who happily vouched that it was council policy because almost half the complaints were never heard from again so it made economic sense if not best practice.

In spite of progress we still have some way to go in Northern Ireland when it comes to citizen redress in administrative justice.

RIGHTS AND RESPONSIBILITIES

I think in the last twelve years we have had a government in Westminster which had led a rights and responsibilities debate. Unfortunately, the tone and tenor of the debate has often been to use the concept of responsibilities as a blanket to stifle rights. The assertion of rights and entitlements has almost at times, become code for trouble-making. However, you will be pleased to know I aim to keep my contribution at a practical, grounded level which I hope befits the 'can do' mentality often found in the voluntary sector in Northern Ireland.

PRINCIPLES OF GOOD PRACTICE

The Law Commission in England and Wales identified four pillars of administrative justice in its review of Administrative Redress: Public Bodies and the Citizen consultation document issued in July 2008.

These are:

Pillar 1	internal mechanisms for redress, such as formal complaint procedures;
Pillar 2	external, non-court, avenues of redress, such as public inquiries and tribunals;
Pillar 3	public sector ombudsman;
Pillar 4	remedies available in public and private law by way of a court action.

I want to focus on formal complaints, tribunals and also briefly on civil justice issues.

Commencing with complaints mechanisms within public bodies I am impressed with the number of documents that set out principles of good practice that should be applied to dealing with complaints.

For example, the Parliamentary and Health Service Ombudsman sets out six principles of good administration:

1 Getting it right

- quickly acknowledging and putting right cases of maladministration or poor service that have led to injustice or hardship;
- considering all relevant factors when deciding the appropriate remedy, ensuring fairness for the complainant and, where appropriate, for others who have suffered injustice or hardship as a result of the same maladministration or poor service.

2 Being customer focused

- apologising for and explaining the maladministration or poor service;
- understanding and managing people's expectations and needs;
- dealing with people professionally and sensitively;
- providing remedies that take account of people's individual circumstances.

3 Being open and accountable

- being open and clear about how public bodies decide remedies;
- operating a proper system of accountability and delegation in providing remedies;
- keeping a clear record of what public bodies have decided on remedies and why.

4 Acting fairly and proportionately

- offering remedies that are fair and proportionate to the complainant's injustice or hardship;
- providing remedies to others who have suffered injustice or hardship as a result of the same maladministration or poor service, where appropriate;
- treating people without bias, unlawful discrimination or prejudice.

5 Putting things right

- if possible, returning the complainant and, where appropriate, others who have suffered similar injustice or hardship, to the position they would have been in if the maladministration or poor service had not occurred;
- if that is not possible, compensating the complainant and such others appropriately;

- considering fully and seriously all forms of remedy (such as an apology, an explanation, remedial action, or financial compensation);
- providing the appropriate remedy in each case.

6 Seeking continuous improvement

- using the lessons learned from complaints to ensure that maladministration or poor service is not repeated;
- recording and using information on the outcome of complaints to improve services.

These principles are not a checklist to be applied mechanically. Public bodies should use their judgment in applying the principles to produce reasonable, fair and proportionate remedies in the circumstances. The Ombudsman will adopt a similar approach in recommending remedies.

These principles are expanded on in a further document.

The British and Irish Ombudsman Association has issued its guide to principles of good complaint handling setting out seven key principle namely:
clarity of purpose;
accessibility;
flexibility;
openness and transparency;
proportionality
efficiency and
quality of service

Personally, I would find little to argue against with the principles in either document: nonetheless, the question remains, are they applied in practice?

AREAS FOR ATTENTION

There are a number of areas I think need particular attention.

First, I still find on occasions in some public bodies, a mind-set that complaints are a necessary evil and that the average complainant ranges from difficult to downright vexatious. I often hear it said that the Northern Ireland is a litigious society. The reality is much more complex. Some people will readily litigate and have considerable experience of doing so. Nonetheless, I regularly come across individuals either unwilling to complain or take action or who only do so with a marked reluctance and only after a particular poor experience of public service. In addition, many of the people coming to the Law Centre are taking action (legal or otherwise) for the first time and are unfamiliar with options, procedures and remedies. The serial litigant is the exception not the rule. Each complaint should be dealt with on its merits, proportionately, fairly

and in an open-minded way recognising that this is an individual who has been left unhappy by his or her experience of public service decision-making.

Second, public authorities could be better at getting individuals to identify what outcome they would like from any complaint as early as possible. My experience with complaints against the health service is a particular example. I recently dealt with someone who has been poorly treated on attending hospital and it has led to considerable distress in a situation where early intervention would have avoided significant pain and embarrassment. The correspondence about the complaint was going nowhere quickly. I read the correspondence and asked the woman what outcome she was looking for and she replied an apology and reassurance that steps would be taken to ensure that a similar situation did not occur again. I also asked her if she had any interest in going to court to seek compensation. She said that was not her aim. The next letter to the hospital set out clearly what was being sought and that no legal action was contemplated. Freed from the shackles of defensive correspondence an apology was provided along with an admittance that a review of procedures was underway and the complainant would be told to the outcome. This left her satisfied.

On the health and social services side I would also strongly recommend that modest value monetary compensation be added to possible remedies. The overall cost and time spent litigating small value health service claims through the courts is disproportionate and an alternative should be available through the complaints procedures in Northern Ireland.

A third area that needs attention is how to harness new technology effectively in delivering of public services and redress while not leaving certain sections of society behind. There is effectively an 80/20 (or arguably perhaps an 85/15) divide in that the vast majority of people are comfortable with IT, telephones and other technology however, it is also how public bodies deals with those who aren't that is a litmus test of service delivery. The 15 per cent are often both those most in need of services and those most likely to fall through the gaps in provision. People with mental health problems, the learning disabled, the very elderly and those for whom English is not a first language can often struggle to engage with claiming or seeking redress through IT and telephony. I have had the opportunity recently to compare what the Department of Work and Pensions and HMRC are doing with services particularly those aimed at vulnerable customers.

DWP's definition of vulnerable customers are those people 'who have difficulty dealing with the demands of claiming processes at the time when they need to access a service'.

The guidance recognises that vulnerability is not a static state and is often associated with particular circumstances or situations and can only be determined by a measured assessment. The guidance outlines personal factors that are associated with being vulnerable. The definition is a sophisticated and modern starting point for recognizing the vulnerabilities of some claimants which acknowledges that individuals can move into and out of vulnerabilities while others remain vulnerable during a lifetime.

In contrast, HMRC guidance sets out that 'any cases involving vulnerable persons are to be regarded as sensitive cases'. The HMRC definition of a vulnerable person is a person who is either a disabled person or a relevant minor. The expanded definition refers to the Mental Health Act 1983 or a person receiving DLA care components at the middle or high rate or Attendance Allowance. A relevant minor is a child under the age of 18 for whom at least one of their parents has died. Guidance goes beyond this to cover problems of language and literacy. Nonetheless, the definition is narrow, dated and not related to individual factors and circumstances. Ironically, there are examples of good practice within HMRC delivery of services yet, it does not feel as if it is embedded institutionally.

My point is this. The experience of both claiming entitlements, receiving public services and obtaining administrative redress whether through complaints procedures, tribunals, civil courts or Ombudsmen is that the facilitation of vulnerable complainants is not being dealt with in a consistent, clear and best practice approach. The move to embrace new technology is welcome and desirable through it may inadvertently leave others even further behind. This is an area for joined up thinking to facilitate both embracing technology while thinking carefully about how to facilitate the most vulnerable potential complainants at the same time.

I'd like now to turn to the question of tribunal and administrative justice. More people use tribunals than courts each year. In Northern Ireland we have around twenty tribunals managed from Northern Ireland handling around 20,000 – 25,000 appeals covering among other issues social security, employment, housing, mental health and educational matters. There are also UK wide tribunals not managed locally covering for example, immigration and tax. The Leggatt review of tribunals in 2001 noted the fragmented, piecemeal approach to tribunals with a lack of real independence from the appeals process and the sponsoring department. The review triggered major reform in England and Wales encompassing administrative, substantive and legislative change. This culminated in the Tribunals Courts and Enforcement Act being passed in July 2008. In effect, we have moved to much greater coherence and independence through the creation of a Tribunals Service, a first tier and an upper tribunal system across tribunals and oversight and accountability mechanisms including an Administrative Justice and Tribunal's Council (AJTC) with significant statutory powers to review the work of tribunals. The AJTC replaces the Council of Tribunals which emerged from the Franks report in 1958. The council of Tribunals role had never extended to tribunals managed from Northern Ireland.

In Northern Ireland we are potentially in danger of missing out once again. Only the UK managed tribunals (for example, tax and immigration are covered by the new oversight, legislative and structural reform arrangements). In Northern Ireland we have moved a significant distance towards embracing the administrative reform with the Northern Ireland Courts Service taking responsibility for managing new and eventually existing Northern Ireland tribunals. The substantive and legislative reforms remain in abeyance. Scotland and Wales have their own free-standing AJTCs with members

participating on a statutory basis in the AJTC which covers Britain. There remains no input from Northern Ireland. The lack of research into the work of tribunals, the difficulty in accessing statistics for tribunals as a whole, the lack of consistency in approach to complaints, user feedback, publishing of annual reports and business plans is symptomatic of a lack of scrutiny and coherence. Appellants and consumer groups have been short-changed on this front for far too long and we must not lose the opportunity to embrace substantive tribunal reform on this occasion. The Law Centre with funding from Nuffield has embarked on a research project led by Brian Thompson at the University of Liverpool and Gránnie McKeever at the University of Ulster to undertake a scoping study providing a template on how tribunal reform could be implemented in Northern Ireland alongside a qualitative user study of users and other key stakeholders in social security and employment tribunals. We hope to publish the research in the spring of 2010 and hold a major conference in partnership with the President of the Appeals Service. This is designed to maintain the impetus and momentum for substantive reform.

The other area when oversight and review lags behind England and Wales is civil justice and Alternative Dispute Resolution (ADR). The final report of the review of civil justice was published in June 2000. The report recommended the introduction of a Civil Justice Council for Northern Ireland with a general remit to consider whether the civil justice system is as accessible, fair and efficient as possible. The report suggested the council should include representatives with experience and knowledge of consumer affairs, include the advice sector, legal academics and other representation alongside the judiciary and representatives of the legal profession. The reported argued that the council should function as an advisory body.

Last year, a civil justice committee was convened for the first time comprising judiciary and representatives of both sides of the legal profession. The committee has done valuable work on pre-action protocols and rules in key parts of civil justice in the courts. However, the work of the committee is focussed inwards lacking consumer and other user input. The time is long overdue for implementation of a strategy for integrated oversight and consumer involvement across administrative justice, civil justice and tribunals as a whole.

Finally (and briefly) Alternative Dispute Resolution (ADR) struggles to gain a foothold within Northern Ireland. In family law and across other areas there are at best green shoots to be found for example, with genuine interest in collaborative law and the desire to develop family mediation services. However, there is a lack of a clear lead within government departments for ADR and a pro-active co-ordinated approach within the institutions in the profession. Too often ADR is championed by individuals working heroically and individually with limited support.

All of which takes me back to the citizen's experience of administrative justice. The back- drop of devolution of policing and justice provides both opportunities and pitfalls. Assuming devolution will take place (and I remain an optimist) then, it is vital that devolution does not become code for policing and criminal justice.

CONCLUSION

There must be an agenda for improving citizen redress and bringing the reform of civil and administrative justice tribunal reform into the 21st Century. We must not forget that more people use tribunals, Ombudsman and complaints procedures and ADR than courts.

That alone should be the driver to ensure citizen's redress gets the long overdue attention it deserves.

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