

24 October 2020

**Response to Call for Evidence
Independent Review of Administrative Law**

I am pleased to be able to respond to your Call for Evidence on judicial review (JR). I would like to raise a fundamental issue about the position of JR in the firmament of mechanisms by which citizens may challenge actions by the state, and a couple of consequential issues. This may be outside your terms of reference, but I believe it is both of fundamental importance and needs to be taken into account. Your review is a rare opportunity to avoid ‘merely’ tinkering with a specific procedure and instead to achieve very significant change for the better across the system as a whole. If you feel that this wider perspective is outside your remit, perhaps you would still make the point to relevant Ministers.

The points below arise from a recent holistic review that I published in 2019 that looked at the dispute resolution mechanisms for all major types of disputes in England and Wales.¹ The research process for that book involved discussions with many judges (at all levels), Ombudsmen, officials (in various Departments), and diverse representatives of civil society in consumer, trade union, advice, policy and business bodies. That book contains quite a bit of detail, and there are also and other materials on what sort of remedies people really need, so I will make this Response short but am happy to discuss further.

I suggest that the basic questions in designing and assessing any dispute resolution system are:

1. **What is the outcome that people seek, and that the state should ensure is delivered?** The implications of this raise issues of remedies. At the micro level, we should be delivering fair outcomes, such as rectification and redress but possibly also a wider suite of responses and in some cases aiming to rebuild relationships. At the macro level, we should be identifying the existence of problems, learning and improving performance. The current scorecard of this country in delivering administrative justice on both the micro and macro levels is far from satisfactory. Do we deliver holistic solutions to people, such as rectification of mistakes, apologies and restoration of trust relationships, care and support, repair and redress, and future change? Does a decision-making institution therefore have a holistic toolbox of remedies and responses? Or do people need to go elsewhere as well, or find themselves with their problems not being fully resolved?
2. **Can people identify where to go to get help and rectification?** Is the architecture of pathways right? Are there too many options? My book highlighted the confusing maze of possible pathways for claims against the state, notably: departmental or unit complaint mechanisms; some external review mechanisms; tribunals; judicial review; several public ombudsmen; inquests; public inquiries. There is huge confusion between different modes and mechanisms: appeals or re-hearings. Further, the local advice services landscape is far too fragmented, and not integrated with the ‘second tier’ of courts/ombudsmen etc.
3. **Is the dispute resolution pathway simple and effective to use? Is the model right?** We have inherited an *adversarial* model, that has a number of inherently problematic consequences: driving people apart rather than seeking understanding and consensual resolution; requiring funding for intermediaries on both sides (lawyers) that is simply unaffordable as a system and too often fails to deliver justice to individuals; taking too long. On the plus side, where funding is available,

¹ C Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England & Wales* (Hart, 2019).

determined lawyers can root out injustice, and serious attempts are being made to modernise the system with digitisation.

However, it is clear from looking at various Ombudsmen models (importantly, including those operating in market sectors and consumer disputes and not just the public sector Ombudsmen), that their *investigative* model is notably efficient and speedy in many cases. They have already successfully adopted online systems and are integrating them with national complaint platforms (such as Resolver: different models could be proposed, and Belgium has a good one here). The next step will be to integrate the consumer Ombudsmen better with local advice services (which are very important for claims by citizens against the state, but the advice landscape is in serious trouble).

My question is: can we simplify the number of pathways by merging the complaint, judicial and Ombudsman pathways? This might not require formal merger, but closer and more integrated ways of working.²

4. **Do we learn and improve?** The record in the public administration system as a whole is poor. There are repeated instances where Presidents of Tribunals and the public Ombudsmen issue reports that highlight systemic bad practice in the public sector, yet little improves. Indeed, some recent reports record things just getting worse. In contrast, there are outstanding examples in the private sector where performance improves, based on learning from questions, audits, management information, complaints, disputes and other information. The key elements here seem to me to be:
- a. A Code of Ethical Practice – rather than a multiplicity of rules. There can be detailed rules in guidance documents, but the simple messages that officials and citizens can understand are contained in governing ethical codes.
 - b. The adoption of Ethical Practice. In other words, people consciously seek to do the right thing all the time. This model has been outstandingly successful in high-risk industries like the aviation safety and nuclear industries, where it is called ‘open and just culture’. Regulators adopt an approach that is responsive depending on the motivation of organisations, seeking to support most rather than try to deter them.³ At the centre of this approach is the nurture of a shared ethical *culture* in organisations, and between regulators and businesses.⁴
 - c. A digitised system that captures all available data on performance and feeds it back. Important functions performed by the leading consumer Ombudsmen are as data collection and aggregation centres, and bodies for feeding back lessons, in addition to dispute resolution.
 - d. The ability for a regulatory authority to oversee and intervene. The combination of the elements listed above (ethical code and approach, plus data collection, feedback and learning) mean that regulatory interventions can be evidence-based, targeted, risk-based, and efficient.

Could such a model, which has proved to be so successful in some consumer sectors and markets, and improved the behaviour, culture and performance of many commercial organisations, be adopted in the public sector? I would urge consideration of this issue.

I hope these thoughts are helpful.

Yours sincerely,

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² A working group is looking at closer ways of working in the property sector between the Tribunal and various Ombudsmen and ADR schemes.

³ G Russel and C Hodges (eds), *Regulatory Delivery*: (Hart, 2019)

⁴ C Hodges and R Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (Hart, 2017).