

Handout for Brian Thompson's presentation

Putting It Right - A strategic approach to resolving administrative disputes. The AJTC published this report on Proportionate Dispute Resolution in May 2012 available at: <http://ajtc.justice.gov.uk/docs/putting-it-right.pdf> The paper aims to:

- consider proportionate dispute resolution in the context of current policy trends in administrative and civil justice;
- suggest that the administrative justice system can be seen as a four-stage cycle, and describe the role of each of these stages in contributing to achieving a more appropriate and proportionate system; and
- make recommendations that will help to shape the development of a strategic approach to appropriate and proportionate administrative justice.

An appropriate and proportionate approach will respect these principles

- In any given context, the terms 'appropriate and proportionate' must relate to more than the financial value and cost of the matter in dispute. They must reflect the importance of the issue concerned and its impact on the life of the individual, along with the systemic importance of the issue to the organisation;
- An appropriate and proportionate approach recognises that disputes may encompass a variety of concerns – an individual may wish to make a complaint about the way they have been treated, to appeal a decision, or to do both. While there can only be a finite number of dispute resolution processes, those that do exist should respect the varied and sometimes complex nature of disputes, and steps should be taken to make clear to users the route/s they can follow;

Complaints and appeals

Users do not understand the distinction and their dispute may not be one or the other but both. Is the distinction between complaints and appeals the correct one? If it is, does it still follow that there need to be separate processes and institutions to deal with them? Even if separate processes and/or institutions are needed, how can the system be designed to ensure that users do not get lost in the maze?

The four stage cycle of administrative justice

- *Preventing* disputes by better legislative design, information and guidance
- *Reducing* dispute escalation through better communication for corrections & queries
- *Resolving* disputes using appropriate and proportionate methods; and
- *Learning* from disputes by seeking out insight and acting upon it.

Preventing Disputes

The main means for preventing disputes can be summarised as:

- Simplifying and stabilising complex laws;
- Providing clear rules and guidance for users;
- Providing good (and independent) advice to users with queries and concerns;
- A ‘right first time’ philosophy by first instance decision makers;
- Strategic intervention

Reducing Escalation

- Better explanations;
- Opportunities for questioning the decision;
- Internal reviews or reconsiderations.

Resolving Disputes

1. Third Party Review
2. Mediation
3. Ombudsmen
4. Ombudsman-like schemes
5. Early Neutral Evaluation
6. Paper Tribunals – a Tribunal which decides - whether at an initial stage or though non-appearance – that a case can and should be resolved by reference to the documents submitted by each side.
7. Tribunals – proceeding with a hearing, with their own familiar characteristics of accessibility, speed, informality and specialisation, e.g. the Social Entitlement Chamber.
8. Tribunal-like Courts – e.g. the County Court resolving small claims & housing cases.
9. Court-like Tribunals – adjudicating in a similar manner to traditional courts, e.g. the Upper Tribunal, dealing mainly with appeals on points of law.
10. Courts – adjudicating with a “traditional” approach, e.g. the Administrative Court –JR

PDR PRINCIPLES & MAPPING FACTORS

- The over-arching objectives should be to resolve (or limit) the issues in dispute, to be accessible, to use resources efficiently, to resolve cases as early as possible, to produce outcomes that are lawful and effective and to enhance the satisfaction of the parties.
- as a general principle, any dispute is potentially suitable for disposal without a formal hearing.
- all schemes within the Administrative Justice system should adopt an

inquisitorial approach, but the trend should increasingly be towards fact-finding by trained administrative staff, not judicial figures, using telephone and/or electronic communication.

- . A Triage system should be used within each scheme to identify the issues in dispute and other relevant circumstances and to *decide* which route should be pursued. Triage should normally be undertaken by suitably trained administrative staff.

General factors to be taken into account in deciding which route should be pursued:

- capacity of the parties to participate effectively
- whether and how the parties are represented
- context of the case, including the history of past disputes
- any identified need for urgency
- nature, importance and complexity of the issues in dispute
- the likelihood of an agreed outcome
- cost to the parties and to the taxpayer

Factors favouring a traditional hearing

- fundamental rights cases, such as asylum and mental health review adjudications where the liberty, life or safety of individuals may be at stake.
- cases where there are allegations of fraud etc or where the credibility of an individual is directly at stake.
- cases, especially those turning on medical considerations, where the presence of the individual is essential.
- cases (e.g. many employment disputes) where there are allegations or counter-allegations about conduct.

Factors favouring Early Neutral Evaluation

- identification of a legal and/or factual issue that is decisive
- agreement about the nature and impact of the issue
- willingness to have the case, or an identified issue, evaluated
- most investigations and gathering of evidence has been completed
- convenience of evaluating on the papers without the need for parties to be present.

Factors favouring mediation

- there will be an on-going relationship and future disputes could be limited by an exploration of the issues or explanation of the system
- an apology, concession or explanation could assist resolution
- flexible options need to be explored
- the matter is complex or likely to be lengthy
- the matter involves more than two parties
- legitimate desire of parties to keep the dispute confidential

Factors favouring third party review

- the public body is committed to creating and resourcing a genuinely independent third party review mechanism - whether to save money or to improve its own service
- there is clarity about the scheme's scope, powers and relationships with other relevant institutions
- use of the scheme does not involve unjustified delay or prejudice to the individual's rights.

Factors favouring a route or scheme where hearings are not the norm

- dispute is essentially concerned with service delivery or maladministration
- the dispute is about the quantum of a financial claim
- the dispute is about entitlement to a financial claim, but the issues do not need to be determined with the physical presence of the parties
- outstanding findings of facts can readily be made by written, telephone and/or electronic exchanges
- the dispute does not affect livelihood or reputation or is otherwise objectively of low priority
- the applicant requests such a route.

'One Door'

Users need help with navigating the system. The AJTC suggests:

Developing a portal within the government's Direct.gov website which would direct individuals to the most appropriate place for their grievance (whether potentially a complaint, appeal or both) to be considered and resolved. We speculate that – as well as an FAQ approach - this could involve inter-active decision-tree methodology which would take into account all the circumstances, not least the individual's own preferences about how they would like their case to be resolved.

Active encouragement for all tribunals and other statutory, judicial and independent bodies which receive complaints or appeals to have triage systems which – as well as deciding which internal route to pursue - also permit cases (with the individual's consent) to be referred to another, more appropriate, institution. Even though this could not be mandatory, this may require changes to legislation and/or rules (e.g. to permit direct transfer of papers).

As well as Citizens Advice and other advice services, a number of organisations in the administrative justice system already have considerable expertise at diagnosing problems (such as PHSO and ICE which receive significant volumes of enquiries only to redirect the user elsewhere) and we envisage that this experience could be put to great use in designing and testing virtual 'One Door' approaches.

Learning

A key feature of best practice, yet PHSO said it was a serious deficiency in 2011. Strategic action is needed. The first President of the Social Entitlement Chamber proposed developing

benchmark decisions- advice on questions and interpretations of responses so as to promote consistency- as a better alternative to annual feedback derived from decisions, but not done. *Housing: Proportionate Dispute Resolution* (Law Com 309) (Cm 3377, 2008) available at Project website <http://www.lawcom.gov.uk/project/housing-proportionate-dispute-resolution/>

CONCLUSIONS AND RECOMMENDATIONS

INTRODUCTION

6.1 To achieve the vision for the proportionate resolution of housing problems and disputes, this Report reaches three broad conclusions:

- (1) Triage plus should be adopted as the basic organising principle for those providing advice and assistance with housing problems and disputes.
- (2) Other means of resolving disputes, outside of formal adjudication, should be more actively encouraged and promoted.
- (3) There should be some re-balancing of the jurisdictions as between the courts and the First-tier and Upper Tribunals in the new Tribunals Service, combined with modernisation of procedural rules which effect the ability of the courts to act as efficiently as possible. (para 1.23)

BETTER ADVICE AND ASSISTANCE: PROMOTING TRIAGE PLUS

6.2 We conclude that “trriage plus” should become a central concept in a reformed system for housing problem solving and housing dispute resolution. (para 3.11)

6.3 We recommend that triage plus should comprise:

- (1) Signposting: initial diagnosis and referral.
- (2) Intelligence-gathering and oversight.
- (3) Feedback. (para 3.14)

6.4 We conclude that identifying ways to increase the ability of organisations, in the public, private and voluntary sectors, to facilitate referrals of advice seekers to the appropriate body, is fundamental to ensuring the creation of a holistic approach to resolving housing problems. (para 3.31)

6.5 We conclude that public education and information-provision is central to the signposting concept, and in need of further development. (para 3.34)

6.6 We conclude that signposting is important because: it provides individuals with a

means of obtaining advice about their housing problems; it provides an opportunity to engage them in the process of solving their problems or resolving their disputes; and, where it works well, it should facilitate the resolution of other problems as well. (para 3.37)

6.7 We conclude that the Community Legal Advice Centre/Network models provide a strong basis on which to develop a triage plus system. (para 3. 46)

6.8 We conclude that many agencies work with what they are familiar and reveal a lack of awareness of relevant types of work conducted by other service providers.(para 3.50)

6.9 In order to improve the links between different advice providers, we recommend, first, that all service providers in the housing sector, including advisers, advocacy groups, adjudicatory bodies and government should develop a comprehensive list of housing service providers in their local area, encompassing the range of entities which might be relevant to those engaged in housing disputes. (para3.52).

6.10 We recommend that existing informal links between advice providers should be formalised. (para 3.55)

6.11 We conclude that more could be done by courts and tribunals to provide information to litigants about local service providers. (para 3.56)

6.12 We recommend that the Court Service takes steps to ensure that all courts are able to offer a list of local firms which have a Legal Services Commission housing contract. (para 3.57)

6.13 We conclude that the development of phone and internet housing information and advice should be encouraged and where possible expanded. (para 3.66)

6.14 We conclude that in determining funding for service providers in the housing sector, consideration should be given to providing resources specifically for education and information work. (para 3.70)

6.15 We conclude that the Legal Services Commission should continue to encourage active programmes of information and community education through the development of Community Legal Advice Centres and Networks. (para 3.71).

6.16 We conclude:

(1) First, that housing service providers should be enabled to obtain and maintain up-to-date information technology systems. This should be included as part of their funding arrangements. (para 3.89)

(2) Secondly, that service providers should be encouraged to use local knowledge to identify issues that need addressing, particularly issues arising at the local level. (para 3.90)

(3) Thirdly, that new ways of communicating the intelligence that has been gathered at local, regional and national levels should be developed, so that all those engaged in housing problem solving and dispute resolution can learn about and, where necessary, improve the services they offer. (para 3.91)

6.17 We conclude that the legitimacy of feedback activity in the housing advice sector should be acknowledged. (para 3.105)

6.18 We recommend that government and other funders recognise the need to fund public policy activity by service providers in the housing sector. (para 3.105)

6.19 We recommend that more work should be done on how to evaluate feedback activities. (para 3.108)

6.20 We conclude that, in the context of developing a proportionate system of housing dispute resolution, it is time for a change of approach in respect of the provision of housing advice. (para 3.111)

NON-FORMAL DISPUTE RESOLUTION

6.21 We recommend that the housing-related jurisdictions of the Local Government Ombudsman and the Independent Housing Ombudsman be kept under review with a view to closing any gaps that may become apparent. (para 4.13)

6.22 We further recommend that housing advisers should gain greater awareness of the role of ombudsmen as part of the triage plus approach; and taking a complaint to one of the relevant ombudsmen services should, wherever appropriate, be one of the options recommended to those seeking advice as part of a triage plus approach. (para 4.14)

6.23 We conclude that complaints handling and other management response techniques should be developed as far as possible as a key component of a housing dispute resolution system. (para 4.27)

6.24 We conclude that the use of mediation in housing disputes should be encouraged and developed, but we do not propose any alteration to the principle that it should be voluntary. (para 4.74)

6.25 We recommend that:

(1) mediation should be available for all housing disputes in the tribunal, but should be provided only where all parties agree;

(2) rules, practice directions and protocols should emphasise the use of alternative dispute resolution, and the court/tribunal should enforce them; and

(3) courts/tribunals should actively promote the availability of alternative dispute resolution methods to litigants and legal representatives. In particular, parties should be provided with information about services available in the locality. (para 4.75)

6.26 We conclude that The Disputes Service provides another form of proportionate and appropriate dispute resolution in the housing context. (para 4.82)

6.27 We conclude that consideration should be given to the development of early neutral evaluation in the context of housing disputes. (para 4.88)

6.28 We conclude that:

(1) the adoption of a mixed approach, adapting various forms of alternative dispute resolution tailored to housing, is likely to be the best approach to supporting an appropriate and proportionate system of non-formal housing dispute resolution;

(2) a pilot of early neutral evaluation should be considered, to be run specifically in relation to housing cases;

(3) though there should be no restrictions at this time on the giving of evidence by expert witnesses, their use should be tightly controlled. Parties should be required to justify the need for instructing expert witnesses prior to a hearing. (para 4.98)

FORMAL DISPUTE RESOLUTION

6.29 From the options open to us, we conclude the following option is to be preferred: a recommendation that, while the creation of a more specialist jurisdiction might remain a long-term goal, any progress towards that goal should be measured and tested. (paras 5.43 and 5.46)

6.30 We conclude that Government should keep under review the possibility that further specific housing matters may be transferred to the Land, Property and Housing Chamber of the First-tier Tribunal, or to the Upper Tribunal. (para 5.47)

6.31 We conclude that there are important interim reforms that can be made. (para 5.48)

(1) First, implementation of our recommendations in Renting Homes would, by clarifying the respective obligations of landlords and occupiers, go a considerable way to improving their understanding of their legal positions. This is a key element in a system of proportionate dispute resolution. (para 5.49)

(2) Second, there are specific changes that could be made to the ways in which the courts operate. (para 5.50)

(3) Third, it is important to ask what lessons can be learned from the way in which tribunals operate to see whether they can be applied in the court service. (para 5.51)

6.32 We recommend that the following issues should be considered:

(1) The Civil Committee and the Tribunals Committee of the Judicial Studies Board should jointly consider whether there are aspects of the training developed by the latter which could with advantage be promoted by the former.

(2) The Civil Committee of the Judicial Studies Board and the Residential Property Tribunals Service might also consider whether there are training issues over which they could collaborate.

(3) Further consideration should be given to the desirability of the “ticketing” of specialist housing judges.

(4) Consideration should be given to encouraging and enabling every court centre to have a duty service available, to which judges could refer those appearing in court unrepresented.

(5) Through development of its website, the Court Service should provide those appearing before courts with as much information as practicable about how to prepare for the hearing and the sources of advice and assistance are available locally to help those summoned to court.

(6) Given the evidence that attendance at a hearing affects the outcome of decisions, the Court Service should discuss with the Tribunals Service ways in which the latter has been able to encourage more parties to attend their hearings.

(7) Consideration should be given to enabling courts to sit with expert surveyor assessors. (para 5.52)

6.33 We recommend that there should be no change of jurisdictions without legal aid being made available before a tribunal on the same basis as it is available before a court. (para 5.53)

6.34 We recommend that what we describe as “stand-alone” housing disrepair cases should be transferred to the new Tribunal. (para 5.54)

6.35 We recommend, in the alternative, that the Government should take power to establish a pilot scheme, whereby, in certain parts of the country, such cases should be transferred to the new Tribunal. (para 5.56)

6.36 We recommend that all of the jurisdictions arising from the Mobile Homes Act 1983 should be transferred to the First-tier Tribunal. (para 5.71)

6.37 We recommend that, if our recommendation for a pilot study relating to the transfer of disrepair cases to the First-tier Tribunal is accepted, consideration should be given to including housing related statutory nuisance cases and Defective Premises Act cases as well. (para 5.75)

6.38 We conclude that a general principle is that wherever possible, persons bringing proceedings, whether before a court or a tribunal, should be able to have their matters dealt with in a single process. (para 5.78)

6.39 We recommend that whichever forum – the County Court or the Upper Tribunal – is to exercise the jurisdiction under Housing Act 1996, section 204, that forum should have full power to issue whatever associated interim relief is necessary. (para 5.86)

6.40 A forum with the interim relief powers we propose should necessarily have an out-of-hours facility. Any transfer of jurisdiction over judicial review matters must involve providing access to the tribunal on an out-of-hours, emergency basis where appropriate. (para 5.88)

6.41 We have concluded that we cannot persist with our provisional proposal to transfer appeals against homeless determinations under Housing Act 1996, section 204 to the Upper

Tribunal. We therefore make no final recommendation on this question. However, we would see considerable advantage in the Government taking the power to establish a pilot in defined areas of the country in which these appeals would be transferred from the county court to the Upper Tribunal. (paras 5.98 and 5.99)

6.42 If a pilot were to be established to assess the desirability of transferring homelessness statutory appeals, consideration should be given to simultaneously piloting giving the Upper Tribunal jurisdiction to deal with other homelessness and housing related judicial review applications (such a jurisdiction being concurrent with, rather than replacing, that of the Administrative Court). (para 5.102)

6.43 In respect of other housing appeals, despite the advantages that we see in a unified appeal route and a specialist forum to mould housing law, we cannot make a recommendation on this issue. We think, however, that the matter deserves further consideration. (para 5.112)

6.44 We recommend that, for consistency, jurisdiction over rented housing disrepair claims should be transferred to RPT Wales – but there should be no change to the present system of governance of RPT Wales. (para 5.118)