

DEVELOPING PRINCIPLES OF ADMINISTRATIVE JUSTICE

INTRODUCTION

1. This paper by the Administrative Justice and Tribunals Council (AJTC) begins by sketching the historical background and context in which some general principles relating to the application of administrative justice have emerged and grown. It then provides an environmental scan, briefly summarising some examples of principles that have been formulated by different bodies, including the Council of Europe and the Parliamentary and Health Service Ombudsman. A second paper by the AJTC *The Developing Administrative Justice Landscape* provides an initial exploration of administrative justice institutions in the UK. Taken together, the two papers provide a backcloth against which the AJTC has developed its *Principles for Administrative Justice* which it will use as a basis for further discussion and dialogue with key stakeholders, including importantly user groups, across the administrative justice system.

The AJTC's remit

2. The AJTC is an advisory Non-Departmental Public Body (NDPB) created under the *Tribunals, Courts and Enforcement Act (TCEA), 2007*. Its function is to keep under review the administrative justice system defined under the Act as follows:

...The overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including:

- (a) *the procedures for making such decisions,*
 - (b) *the law under which such decisions are made, and*
 - (c) *the systems for resolving disputes and airing grievances in relation to such decisions (TCEA 2007, Sch 7, para 14).*
3. The AJTC's statutory remit has, therefore, broadened considerably from that of its predecessor, the Council on Tribunals, to include the whole administrative justice landscape. It embraces decision-making in organisations, internal and external complaint procedures, ombudsman schemes, dispute resolution outside tribunals, the role of tribunals and mechanisms to encourage feedback, learning and improvement.

The AJTC's Purpose and Work Programme

4. As detailed in its *Framework Document* (November 2007) the AJTC's purpose is to help make administrative justice and tribunals increasingly accessible, fair and effective from the perspective of users (p7). As Lord Newton of Braintree, the AJTC's founding chair, said:

Administrative justice ... is about helping to promote good quality decision-making by government, local councils and agencies - and ensuring that there are accessible, fair and effective means of securing correction or redress when grievances arise. These are things that matter to every citizen...The needs of users will be high on our agenda. Using our experience in creating a Framework of Standards for Tribunals, we intend to explore the possibility of developing a set of generally applicable principles of administrative justice (Preface to AJTC's Annual Report 2007/08).

The Importance of Principles

5. Principles of administrative justice are important for a number of reasons. The first was described in the Franks report of 1957, which is considered further below, as follows:

The rule of law stands for the view that decisions should be made by the application of known principles or laws. In general such decisions will be predictable, and the citizen will know where he is. On the other hand, there is what is arbitrary. A decision may be made without principle, without any rules. It is therefore unpredictable, the antithesis of a decision taken in accordance with the rule of law (p6, para 29).

6. Most principles of administrative justice that have been formulated to date are primarily concerned with public bodies, including courts and tribunals, and the interaction between the citizen and the state. However, as explored further in *The Developing Administrative Justice Landscape*, they can be readily transposed into the context of the interaction between citizens themselves, for example, landlord and tenant, employer and employee.

HISTORICAL BACKGROUND AND CONTEXT

7. A fundamental feature of the administrative justice system is the state's duty to protect and promote people's human rights as expressed in the *Human Rights Act* (HRA), 1998, which entered into force in October 2000, thereby incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) into domestic law. Section 6 of the HRA imposes on public bodies the duty to ensure that their decisions and actions are compatible with Convention rights. Any principles of administrative justice must, therefore, correspond closely to the human rights obligations placed on public bodies.

Franks Report

8. Much of the earlier work to define principles was situated in the context of the fast-changing courts, tribunals and inquiries system. As early as 1957, the *Report of the Committee on Administrative Tribunals and Enquiries*, suggested a trinity of principles at the core of the tribunal system, namely: **openness**, **fairness** and **impartiality**. Examples were described as follows:

*Take **openness**. If these procedures were wholly secret, the basis of confidence and acceptability would be lacking. Next take **fairness**. If the objector were not allowed to state his case, there would be nothing to stop oppression. Thirdly, there is **impartiality**. How can the citizen be satisfied unless he feels that those who decide his case come to their decision with open minds? (p5, para 25).*

The report also emphasised that **impartiality** within the system demanded: "the freedom of tribunals from the influence, real or apparent, of (Government) Departments concerned with the subject-matter of their decisions" (p10, para 42).

9. From its inception the AJTC's predecessor, the Council on Tribunals, adhered to the above trinity of principles whilst emphasising the importance of other principles such as **efficiency**, **expedition** and **economy**. In addition, the Council stressed that **openness** has to be "expressed in practical steps to ensure **accountability**, so that it is clear where the responsibilities for different tribunals lie" (Council on Tribunals Annual Report 1985/06).

Woolf Report

10. Another important milestone, in the history of defining principles, was the *Access to Justice Report*, July 1996 that considered access to civil justice in England and Wales. The introductory overview to this report identified a number of principles which the civil justice system should meet in order to ensure access to justice:

"The system should:

- a) be just in the results it delivers;*
- b) be fair in the way it treats litigants;*
- c) offer appropriate procedures at a reasonable cost;*
- d) deal with cases with reasonable speed;*
- e) be understandable to those who use it;*
- f) be responsive to the needs of those who use it;*
- g) provide as much certainty as the nature of particular cases allows; and*
- h) be effective: adequately resourced and organised (para 1)."*

Accompanying the report were some draft rules of practice granting wide management powers to the court and introducing the concept of proportionality into the costs regime (Section II: Case Management, Ch.1, para 1).

Leggatt Report

11. In 2001 Sir Anthony Leggatt was asked look at tribunals across the United Kingdom, the object being: *"to recommend a system that is independent, coherent, professional, cost-effective and user-friendly"* (Tribunals for Users, One System, One Service, HMSO 2001, p5, para 1). As well as the Principles outlined in the Franks report, the emphasis of this review shifted to accessibility and meeting the needs of users. It stated, for example, that:

"It is important to remember that tribunals exist to serve the users, not the other way around. They need to be accessible by the variety of users they are intended to help. In order to make the tribunal experience a positive one for users they need advice and support at all stages of the appeal process (p43, para 4.1).

Chapter Seven of the report outlined an enabling approach that would allow unrepresented users to cope within the tribunal system and safeguard its distinctiveness. It emphasised that the: “*approach must be an enabling one: supporting the parties in ways which give them confidence in their own abilities to participate in the process, and in the tribunal’s capacity to compensate for the appellants’ lack of skills or knowledge*” (p86, para 7.5).

12. Further recommendations made by Leggatt included: unifying the individual tribunals into a single system and giving administrative responsibility to a Tribunals Service; improved training of chairs and members; modern merits-based appointment processes with a competency based training and appraisal system; and strong judicial leadership. A central premise was that tribunals should be efficient and ensure the best value use of government resources and taxpayer funds.

Government White Paper

13. Many of the ideas outlined in the Leggatt Report were developed in the 2004 White Paper, *Transforming Public Services, Complaints, Redress and Tribunals*. The principle of manifest independence is reiterated, as is the strong focus on supporting users, together with an emphasis on cost effective and flexible service delivery, citizens’ empowerment and judicial leadership. The paper introduces the concept of Proportionate Dispute Resolution (PDR). “Getting it right first time” is regarded as being essential since, the better the decision-making at first instance, the less need there is for recourse to ombudsmen, tribunals, the courts, or other forms of redress. The White Paper elaborates, by way of example, some possible performance indicators for the Tribunals Service to benefit users, including better standards of original decision-making to improve the functioning of the administrative justice system as a whole (p20, s5.1).

Tribunals, Courts and Enforcement Act

14. The *Tribunals, Courts and Enforcement Act, 2007* gave effect to the Leggatt recommendations and to the White Paper proposals and provided the legislative basis of the current tribunal reform process. The Act provides for a two-tier tribunal system: a First-tier and Upper Tribunal both of which are split into Chambers incorporating the jurisdictions of what had hitherto been a multitude of different tribunals. The Senior President of Tribunals is obliged, in carrying out his functions to keep in mind the following principles:
 - a) *the need for tribunals to be accessible,*
 - b) *the need for proceedings before tribunals-*
 - (i) *to be fair, and*
 - (ii) *to be handled quickly and efficiently,*
 - c) *the need for members of tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters, and*
 - d) *the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals (s.2[3]).*

The Tribunal Procedure Committee has rule-making powers aimed at ensuring that in all proceedings “justice is done; the system is accessible and fair; and proceedings are handled quickly and efficiently” (s.22[4]).

2009 Green Paper

15. The Green Paper entitled *Rights and Responsibilities: developing our constitutional framework*, published in March 2009, includes a section on the principles of good administration. In anticipation of its publication, the AJTC made a preliminary submission to the Lord Chancellor advocating the **right to administrative justice**. The AJTC said:

“Such a right could provide a secure basis for the development of generally applicable principles of good governance not just in tribunals but across the wider administrative justice landscape. Over time, improvements in the area of administrative justice can only serve to strengthen the compact between the citizen and the State by helping to entrench principles of fairness and transparency in relationships between decision-makers and those whose interests they serve” (ADJUST electronic newsletter Oct. 2008).

PRINCIPLES OF ADMINISTRATIVE JUSTICE: SOME EXAMPLES

16. From the early 1970s there have been a number of initiatives by different bodies to develop a coherent set of principles to promote good administration. Some of these initiatives address the full range of institutions across the administrative justice landscape; others are more precisely targeted towards, for example, original decision-makers.

Justice: ten principles of good administration

17. An early enunciation of principles of administrative justice was undertaken by a Committee of Justice, chaired by Keith Godfellow QC, to consider the impact of the administrative process on citizens. Ten principles of good administration were presented in *Administration under the Law* (1971) with headings subsequently defined, for ease of reading, by the Committee of the Justice-All Souls Review: *Administrative Justice: Some Necessary Reforms* (1988). The Committee of Justice recommended that Parliament should enact a Statement of Principles of Good Administration that would provide “a framework for all government departments, local authorities, statutory undertakers and nationalised industries” (Recommendation 1, p36). Regarding any decision taken in breach, it proposed that where there was no right of appeal to a tribunal or inferior court an aggrieved person should have a right of action in the High Court. Subsequent drafters of principles have not recommended their enactment, leaving questions of implementation and compliance to the state.

Council of Europe: three sets of complementary principles

18. The Committee of Ministers of the Council of Europe has, over the last twenty-five years, developed three sets of principles to promote good administration, the last of which embraces the earlier two, complementary sets. Its long-standing interest in the protection of citizens adversely affected by administrative decisions led to Resolution 77[3] outlining its first five principles *On the Protection of the Individual in Relation to the Acts of Administrative Authorities* in September 1977. In brief these principles concerned citizens' right to be heard, their access to information and to assistance and representation, the duty of administrative authorities to give reasons for their decisions and to indicate available remedies.
19. In March 1980, a further set of principles *Concerning the Exercise of Discretionary Powers by Public Authorities* was annexed to Recommendation No. R[80]2. These principles considered the purposes for which discretionary powers may be used; objectivity and impartiality; equality before the law; proportionality; reasonable time limits; the application of guidelines; and publicity of any departures from guidelines.
20. Finally, in June 2007, the Council of Europe adopted the consolidated *Recommendation of the Committee of Ministers to Member States on Good Administration* together with a Code of Good Administration. The Code provides a comprehensive set of principles relating to legal arrangements, as well as codification, internal and external monitoring, and the dissemination of good practice. It comprises twenty-three Articles grouped under three sub-headings: *basic principles of good administration* (Articles 2-10), *rules governing administrative decisions* (Articles 11-21), and *appeals* (Articles 22-23). The nine basic principles of good administration are: lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy, and transparency.
21. On 29-30 November, 2007 the Council of Europe convened a European conference in Warsaw, entitled *In the Pursuit of Good Administration* to examine how to promote and implement the Recommendation. Conference participants concluded that the Recommendation: "...lays down a minimum standard for a good administration which member states are invited to put into practice and which they should even be able to strengthen". Further, they suggested that member states should make the Recommendation known as widely as possible.
22. The last initiative of the Project Group on Administrative Law, before its activities were suspended due to Council of Europe re-organisation, was an investigation of administrative appeals in the member states. A report *On the Desirability of Preparing a Recommendation on Administrative Appeals*, was produced in December 2007, but the project was not developed further.

Grounds for judicial review

23. The Council of Europe principles of good administration reflect the principles enshrined in the ECHR, and correspond closely to the grounds for judicial review developed by the courts under the heads of **illegality**, **irrationality**, and **procedural impropriety**, including the principles of natural justice (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374).

Council on Tribunals: Framework of Standards for Tribunals

24. In its *Framework of Standards for Tribunals* (November, 2002), the Council on Tribunals outlined three overarching principles, from which it developed more detailed standards, as follows:
- 1) Tribunals should be independent and provide open, fair and impartial hearings;
 - 2) Tribunals should be accessible to users and focus on the needs of users; and
 - 3) Tribunals should offer cost effective procedures and be properly resourced and organised.

These principles are reflected in the *Tribunals Service Framework Document* and *Strategic and Business Plan 2007-08*.

Parliamentary and Health Service Ombudsman (PHSO) principles

25. In March 2007, some months prior to the Council of Europe's adoption of its last Recommendation on Good Administration, the Parliamentary and Health Service Ombudsman (PHSO) published its six *Principles of Good Administration* for original decision-makers. Underlying these is the core principle of "Getting it right first time". Recognising, however, that inevitably things will sometimes go wrong and mistakes will be made, the principle of "Putting things right" will be called into play. Other headline principles are "Being customer focused", "Being open and accountable", "Acting fairly and proportionately", and "Seeking continuous improvement".
26. Using the same broad headings, the PHSO subsequently published *Principles for Remedy* (October 2007), with the underlying principle of ensuring that service providers restore aggrieved complainants to the position they would have been in if the maladministration or poor service had not occurred. If that is not possible, the PHSO urges the service provider to compensate the person/s appropriately. The Principles are formulated to encourage public bodies to "be fair and take responsibility, acknowledge failures and apologise for them, make amends, and use the opportunity to improve their services".
27. Following extensive consultation with stakeholders, in November 2008, the PHSO published its third guide to *Principles of Good Complaint Handling*. These are seen to be essential since "everyone has the right to expect a good service from public bodies and to have things put right if they go wrong". Good complaint handling helps to ensure that customers receive the service they are entitled to. Moreover, complaints are regarded as a valuable source of feedback and provide an audit trail. They also give early warning of service delivery failures.

28. In a publication *Improving Public Service: A Matter of Principle* (December 2008), the PHSO presents a number of case studies which: “demonstrate how things might have been handled differently if the public body concerned had had in mind the Ombudsman’s three sets of principles”.

British and Irish Ombudsman Association (BIOA)

29. The British and Irish Ombudsman Association (BIOA) has developed a number of criteria that Ombudsman schemes must demonstrate if they wish to be formally recognised by BIOA, including **independence**, **accessibility** and **procedural fairness** (*Criteria for Recognition of an Ombudsman* [undated]). BIOA published a *Guide to Principles of Good Complaint Handling* (April 2007) which the PHSO regards as being compatible with its more recently published principles on the same theme. The BIOA principles emphasise **clarity of purpose**, **accessibility**, **flexibility**, **openness and transparency**, **proportionality**, **efficiency**, and **quality outcomes**. More recently (October 2009), BIOA has produced its *Guide to Principles of Good Governance*.

Customer Service Excellence Standard

30. Informed by the principles of **customer focus**, **information and access**, and **timeliness and quality**, the Cabinet Office produced a guide and self-assessment tool to ensure standards of excellence in customer service are met. *The Customer Service Excellence Standard* (2007) provides examples of what needs to be done and how success can be measured.

Australian Administrative Review Council

31. Examples of principles that have been formulated in another jurisdiction are those developed by the *Australian Administrative Review Council* (August 2007). These are published in a series of Best Practice Guides covering the following: Lawfulness; Natural Justice; Evidence, Facts and Findings; Reasons; and Accountability.

Conflicting Principles?

32. It is clear from the above that principles come in a wide variety of forms and that they are not self-standing and autonomous. Moreover, principles may not be universal across all aspects of the administrative justice system. In addition, they may contain inherent tension even if they are interpreted flexibly as the following quotation suggests:

“...underlying values of administrative justice are not wholly consistent the one with the other. There may be circumstances in which openness may properly yield to confidentiality; where fairness of process may conflict with efficiency. Each of these values is contingent upon the context in which it is asserted. One of the challenges for those who govern, and for those who criticise government, is to achieve an appropriate balance between conflicting values” (M. Partington, 2008, p150).

CONCLUSION

33. In developing its own *Principles for Administrative Justice*, the AJTC has a broad and solid foundation to build upon, based upon work carried out both in the common law jurisdictions and in Europe. The twin foci of its work will be to address the administrative justice system as a whole and to ground its principles in the practical experience and expectations of users of that system.

LIST OF SOURCE MATERIALS

Introduction

- Tribunals, Courts and Enforcement Act, 2007
- AJTC Framework Document, November 2007
- AJTC Work Programme, July 2008
- Preface to AJTC Annual Report 2007/8
- Report of the Committee on Administrative Tribunals and Enquiries, Cmnd 218, 957

Historical background and context

- Human Rights Act, c.42, 1998
- Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950
- Council on Tribunals, Annual Report 1985/86
- Access to Justice Report, July 1996
- Tribunals for Users: One System, One Service, Cm 6243, 2001
- Transforming Public Services, Complaints, Redress and Tribunals, Cm 6243, 2004
- Rights and Responsibilities: developing our constitutional framework, Cm 7577, 2009
- ATJC, "British Bill of Rights and Responsibilities: A Right to Administrative Justice", ADJUST electronic newsletter, October 2008.

Examples of Principles

- Justice, Administration under Law, 1971
- Justice-All Souls, Administrative Justice: Some Necessary Reforms, Oxford, Clarendon Press, 1988
- Committee of Ministers of the Council of Europe, Resolution (77)3, On the Protection of the Individual in Relation to the Acts of Administrative Authorities, 28 September 1977
- Annex to Recommendation No. R(80)2, Concerning the Exercise of Discretionary Powers by Administrative Authorities, 11 March 1980
- Recommendation CM/Rec. (2007)7 of the Committee of Ministers to member states on good administration, 20 June 2007
- Council of Europe, European Conference "In Pursuit of Good Administration", Warsaw, 29-30 November 2007
- Working party of the Project Group on Administrative Law, "Report on the desirability of preparing a recommendation on administrative appeals", CJ-DA-GT (2007)9, Strasbourg, 7 December 2007
- *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
- Council on Tribunals, Framework of Standards for Tribunals, November 2002.

Parliamentary and Health Service Ombudsman

- Principles of Good Administration, March 2007
- Principles for Remedy, October 2007
- Principles of good complaint handling, November 2008
- Improving Public Service: A Matter of Principle, December 2008

British and Irish Ombudsman Association

- Criteria for recognition of an Ombudsman Scheme, (undated)
- Guide to Principles of Good Complaint Handling, April 2007
- Guide to Principles of Good Governance, October 2009
- Cabinet Office, Customer Service excellence: The Government Standard, 2007
- Australian Government Administrative Review Council, ARC Best Practice Guides: Guide 1 - Lawfulness, Guide 2 - Natural Justice, Guide 3 - Evidence Facts and Findings, Guide 4 - Reasons, Guide 5 - Accountability, August 2007
- M. Partington, Introduction to the English Legal System (fourth edition) OUP, 2008.

