

The Developing Administrative Justice Landscape

Executive Summary

This paper by the Administrative Justice and Tribunals Council (AJTC) examines the landscape of the administrative justice “system” and the importance of administrative justice to ordinary people. It is aimed at all those concerned with the delivery of administrative justice.

It provides a brief description of the role of the AJTC and the main components of the administrative justice system – initial decision making and internal review, ombudsmen and other independent complaint handlers, tribunals, inquiries and courts, and other organisations closely concerned with administrative justice in the fields of advice and representation, public legal education and alternative dispute resolution (ADR) provision.

Although administrative justice is usually thought of as being mainly concerned with the interaction between the citizen and the state, a recurring theme emerging from the description of the landscape is that it presents a complex and changing aspect and boundaries between “public” and “private” are becoming increasingly fluid.

There follows a discussion of the landscape under the headings “Getting things right first time” and “Putting things right”. The AJTC’s remit is to look at the whole cycle of administrative justice beginning with the quality of original decision making in organisations, through different forms of adjudication and redress (both internal and external), relationships between agencies and the courts and tribunals, support for users and continuous learning. The paper examines the role of feedback, whether from redress mechanisms or elsewhere, in improving initial decision making. It explores the scope for facilitating transfer of cases from one redress mechanism to another, to ensure that cases are dealt with in a proportionate manner and in the forum best suited to their resolution.

In publishing this paper the AJTC hopes to achieve the following:

- provide a base document which helps the AJTC to focus on component parts of administrative justice and relationships between them
- demonstrate the potential breadth of administrative justice as a subject area
- promote awareness and understanding of it as an area worthy of specific and sustained attention
- foster links among actual and potential stakeholders
- break down barriers in thinking between original decision makers, redress providers, adjudicators and policy makers
- emphasise the centrality of users and their needs
- in conjunction with a sister paper on principles of administrative justice, illustrate the portability of the underlying values relating to decision making and redress in public and some private contexts
- help identify relationships, overlaps and gaps in relation to redress provision
- help identify where further work is needed
- encourage cross-border research over UK jurisdictional boundaries and beyond.

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Introduction

1. This paper represents an initial exploration of the developing administrative justice landscape in the UK. A second paper will seek to describe some general principles in the application of administrative justice which are intended to describe what acting fairly means when taking decisions or seeking to resolve disputes affecting citizens.
2. Administrative justice is a matter of the first importance to every citizen. Government regulates many aspects of everyday life, making decisions in relation to individual people. It is vital that people know what they are entitled to expect from decision makers and where to turn when things go wrong. It is equally vital that systems are in place to ensure that decision makers learn from past mistakes. This is one of the prime ways in which improvements in decision making can be achieved.
3. Criminal justice and civil justice are well understood terms but administrative justice does not yet have the same recognition factor. "Administrative justice" refers not only to principles of justice, but also to the policy sectors or fields (e.g. health, immigration, social security) in which they are applied, and the organisational 'system' as a whole. It is the latter two meanings that will be discussed here. "Principles of administrative justice" will be the subject of the paper referred to in paragraph 1 above.
4. The present paper is a step towards a more detailed mapping of the administrative justice landscape, a task on which the Administrative Justice and Tribunals Council (AJTC) has already embarked, in collaboration with the British and Irish Ombudsman Association (BIOA). It is one of the projects included in the AJTC's Work Programme. As with any mapping exercise it is an ongoing task as the landscape changes, with new features being added and some being removed.
5. A more detailed consideration of administrative justice in Scotland, by the Administrative Justice Steering Group chaired by Lord Philip, was published in June 2009. The Welsh Committee of the AJTC, established in June 2008, has embarked on an examination of the administrative justice landscape in Wales. It should be noted that there are complexities across the various jurisdictions of the United Kingdom and what is true of one part is not necessarily true of another. The present paper does not attempt to explore the differences in depth (though occasional reference is made to them). Rather, it considers common themes of general application.
6. The UK devolution settlements may in fact open up possibilities of experimentation and the piloting of schemes in administrative justice that were not previously possible. There may also be lessons to be learned from jurisdictions outside the UK, such as those in Europe and Australia, where the sense of nurturing a more holistic administrative justice system is arguably more developed than it is in the UK itself.

The AJTC's remit

7. The AJTC is the successor advisory body to the Council on Tribunals and its new role and remit can best be understood by tracing its origins. This begins with the Review of Tribunals chaired by Sir Andrew Leggatt. The report *Tribunals for Users: One System, One Service* (2001) acknowledged that tribunals were one of several avenues of redress for citizens aggrieved with a decision of a public service or body. The report recommended not only that the proposed two-tier tribunal structure be kept under review, but that the relationships amongst all of the other avenues of redress should also be

subject to oversight. The reason for this is that, from the user's perspective, the system of administrative justice should operate coherently and efficiently.

8. These ideas were subsequently developed in the 2004 White Paper, *Transforming Public Services, Complaints, Redress and Tribunals* (Cm 6243). This title is significant because policy had evolved to ensure that the mechanisms for 'putting things right' between citizens and public services should also contribute to 'getting things right first time'. Both of these aspects, the resolving and improving, were encompassed by the new concept of 'proportionate dispute resolution' which may be summarised as trying to match a dispute to the most appropriate resolution technique. The White Paper described the range of methods for dispute resolution in the administrative landscape: public bodies' internal complaints systems, the ombudsmen, tribunals and the courts. There were also alternative dispute resolution (ADR) methods including: adjudication, arbitration, conciliation, early neutral evaluation, mediation and negotiation. The White Paper envisaged that the AJTC "would be concerned to ensure that the relationships between the courts, tribunals, ombudsmen and other ADR routes satisfactorily reflect the needs of users".
9. The Leggatt recommendations and the White Paper proposals were given effect by the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007).

Defining the administrative justice system

10. Under the TCEA 2007, the AJTC is to keep under review the administrative justice system. This is defined as:

"...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, Sched. 7, para. 14)

11. In practice, one of the difficulties faced by the citizen is that there is at present no coherent system of administrative justice. Rather, the 'system' comprises a large number of disparate elements that have to a great extent developed separately to perform different functions. The paragraphs that follow give a brief account of the constituent elements.

Brief description of the landscape

Initial decision making and internal review

12. The statutory definition makes it clear that initial decision making is to be regarded as an integral part of the administrative justice system. Indeed, it may be regarded as being at its core. Administrative justice is conventionally regarded as that aspect of the justice system that is concerned with disputes between the citizen and the state. So initial decision making in this connection is concerned with original decisions by central and local government, the NHS and a variety of government agencies that affect particular persons, including businesses.
13. It may also encompass the processes of internal review of decisions. Internal review has been a feature of social security decision making for some while, and also other areas such as criminal injuries compensation and indirect taxation. It is on the increase. For example, an optional internal review prior to appeal was recently introduced in respect of

both direct and indirect tax. Additionally, many public bodies have established internal complaints procedures, and this is now regarded as good practice.

14. It would be wrong to take too narrow a view of what constitutes the state. For example, the privatisation of a range of public utilities led to the establishment by Parliament of a range of regulatory bodies that may properly be regarded as emanations of the state. There are other regulatory bodies that have been established in such fields as charities, financial services or gambling to which the same applies. Furthermore, as more of central and local government business is privatised or contracted out to private agencies, a wider view must be taken of what constitutes administrative justice. Indeed, the Health Bill currently before Parliament would extend the remit of the Local Government Ombudsman to consider complaints from people who have arranged their own adult social care.

Ombudsmen and other independent complaint handlers

15. It is now generally recognised that ombudsmen and other independent complaint handlers are an essential part of the administrative justice landscape. It has been accurately observed that ombudsmen constitute a genus rather than a species. At one end of the spectrum there are the classic public sector ombudsmen now represented by the Parliamentary and Health Service Ombudsman, the Scottish Public Services Ombudsman, the Public Services Ombudsman for Wales, the Northern Ireland Ombudsman and the Local Government Ombudsman (England). These are established under statute and are typically concerned with complaints of maladministration giving rise to injustice. Their decisions are not binding but their recommendations are almost always complied with. At the other end of the spectrum are non-statutory ombudsmen set up by particular sectors such as the removals industry to resolve disputes between firms and customers.
16. Between the two ends of the spectrum there is a range of bodies dealing in different ways with complaints and disputes, either between citizen and state or between firms and individuals. Thus for example the Financial Ombudsman Service is established under statute to resolve disputes between financial institutions and their customers. The FOS is not confined to issues of legality or maladministration but must look to achieve a fair result. Determinations are binding on the firm but not on the complainant. Notwithstanding that the FOS is dealing with disputes between financial institutions and their customers, it regards itself as firmly part of the administrative justice landscape.
17. In a pamphlet "Lessons from Ombudsmania" published by the National Consumer Council in 2008 it was considered that drawing too categorical a distinction between public and private sector ombudsmen was not a helpful approach. The pamphlet advocated a role for the AJTC in maintaining oversight of the ombudsman sector as a whole. The pamphlet deplored the unnecessary proliferation of ombudsmen schemes and considered that it was not in the interests of consumers that there should be competing ombudsmen in a particular sector. The AJTC strongly agrees.
18. Another sort of complaint handling body has come to the fore in recent years, exemplified by the Independent Case Examiner, the Independent Complaints Reviewer and the Adjudicator. These bodies provide an independent complaint handling service in respect of a number of government departments and agencies. They are able to dispose of a large number of complaints without the need for the complainant to go to an ombudsman, court or tribunal. Some of them are associate members of the British and Irish Ombudsman Association.

Tribunals

19. The Franks Report in 1957 (Cmnd 218) listed the advantages of tribunals over the courts as being “cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject”. Until recently, a feature of tribunals was that they had grown up on an ad hoc basis and had tended to proliferate unnecessarily. The situation has changed markedly since the establishment of the First-tier Tribunal and Upper Tribunal under the TCEA 2007 in November 2008. A number of existing central government tribunals have been brought together in the first three chambers of the First-tier Tribunal, dealing with social entitlement, war pensions, and health, education and social care. As from April 2009 all the tax tribunals were brought within the unified system, and the Lands Tribunal has since become a separate chamber in the Upper Tribunal. A general regulatory chamber of the First-tier Tribunal is expected to follow, starting in September 2009 with the bringing in of the jurisdictions of the Charity Tribunal, the Consumer Credit Appeals Tribunal and the Estate Agents Appeals Panel. The Government has also decided to incorporate asylum and immigration appeals into the new structure from 2010.
20. This new structure does not embrace tribunals that sit only in Scotland, Wales or Northern Ireland, though the Upper Tribunal will hear appeals from certain tribunals that sit only in Wales (namely the Mental Health Review Tribunal and the Special Educational Needs Tribunal for Wales). The organisation and administration of tribunals that only sit in Scotland is under active consideration by the Scottish Government following the First Report of the Administrative Justice Steering Group chaired by Lord Philip, which was published in October 2008.
21. There also remain a large number of English tribunals and other bodies with adjudicative functions that, at least for the time being, will form no part of the new structure. These include the so-called local government tribunals such as school admission and exclusion panels, adjudicators concerned with parking and traffic, and also valuation tribunals as presently constituted, though the changes to the valuation tribunal system that are currently in progress may alter the position.
22. Most of the tribunals considered in the Leggatt Review came under the supervision of the Council on Tribunals, and the AJTC maintains oversight of them. This is a distinct and separate function of the AJTC, additional to its oversight of the overall administrative justice system.
23. It is important to note that some of these tribunals have jurisdictions that are not concerned with administrative justice as traditionally conceived, in that they deal with party and party disputes rather than disputes between citizen and state. Employment tribunals are the most prominent example. Others include the Copyright Tribunal, the Lands Tribunal, agricultural land tribunals, and the various tribunals constituting the Residential Property Tribunal Service (RPTS). The Lands Tribunal and the RPTS deal with both ‘citizen and state’ and ‘party and party’ disputes. A common characteristic of tribunals dealing with ‘party and party’ disputes is that they decide cases against the background of a special legislative regime that Parliament has entrusted to a specialist tribunal rather than the courts. This is a characteristic that they share with ‘citizen and state’ tribunals and it would be unhelpful to draw too rigid a line between the two sorts of tribunal.
24. Another type of tribunal, which for the most part has lain outside the remit of the Council on Tribunals and the AJTC, is that concerned with regulation and discipline in the professions. Many of these are established under statute and there is a strong case for regarding those as being a part of the administrative justice landscape. How far this

applies to non-statutory tribunals in the world of sport, for example, may be open to debate.

Inquiries

25. The AJTC's oversight of statutory inquiries, another separate function that it has inherited from the Council on Tribunals, is largely confined to land use inquiries and certain accident inquiries. In England and Wales, land use inquiries of the kind considered in the Franks Report of 1957 are mostly conducted by inspectors from the Planning Inspectorate. Where, as in the huge majority of cases, the inspector makes the decision, the inspector is in effect a one-person tribunal. In the case of called-in planning applications and "recovered" appeals, the inspector makes recommendations to the Secretary of State. In Scotland, inquiries of this kind are conducted by reporters, who work for the Scottish Government Directorate for Planning and Environmental Appeals. An important recent development, mainly for England and Wales, is the establishment by the Planning Act 2008 of the Infrastructure Planning Commission to decide on major infrastructure projects. The Commission will be formally established in October 2009.
26. Most ad hoc inquiries, whether statutory inquiries under the Inquiries Act 2005 or non-statutory inquiries, are outside the AJTC's inquiry remit, but in so far as they are concerned with good administration and learning lessons from the past they too can be regarded as part of the administrative justice system.

Courts

27. Administrative justice in the courts is typically associated in many people's minds with the Administrative Court, or in Scotland the Court of Session, and the jurisdiction to conduct judicial review or statutory appeal and review. It is indeed in these courts and the other senior appellate courts of the UK that the most important recent developments in administrative law have taken place. However, in a review of the administrative justice landscape it is important not to forget the role of other courts, such as the county courts in homelessness and other cases, the Crown Court and magistrates' courts in some of their non-criminal jurisdictions, and the sheriff court in Scotland. Also noteworthy is the provision in the TCEA 2007 for the Upper Tribunal to hear judicial review cases, subject to certain conditions being met.
28. The jurisdiction of the courts in the administrative justice landscape is not confined to 'public law' in a narrow sense. The courts also deal with cases based on tort (delict in Scotland) and contract that have a strong administrative justice content. This was the subject of a recent Law Commission Report to which further reference is made below.

Other bodies

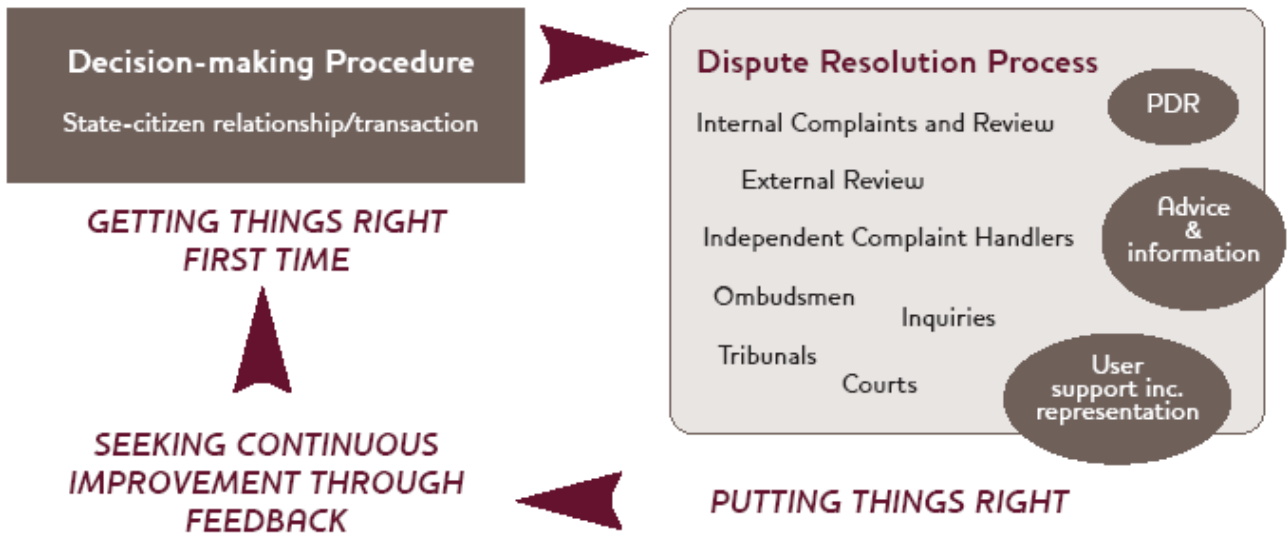
29. This brief outline of the salient components of the administrative justice landscape would not be complete without mention of other organisations closely concerned with administrative justice, whether in the field of advice and representation, public legal education or ADR provision. They play a crucial role in informing people of their entitlements and the options available to them when things go wrong.

Discussion of the landscape

30. The following paragraphs explore some of the emerging themes in a little more detail, starting with a consideration of 'getting things right first time' and then looking at 'putting things right'. In reality, these are two sides of the same coin, and both involve treating people fairly.

Getting things right first time – a dynamic model

31. Getting things right first time is the most important objective of any administrative justice system. Good initial decision making by administrative bodies is reliant upon those bodies having an organisational clarity of purpose and understanding of their remit. It will also involve many of the principles applicable to good adjudication, such as acting without bias, ensuring that timely and helpful information is available to those affected by a decision, listening to what they have to say, being able to give reasons for decisions and having mechanisms for review. The initiative to get things right must come from within the organisations concerned.
32. To this end, it is essential that organisations learn and apply lessons not only from redress mechanisms but also from other sorts of feedback, such as complaints. Good complaint handling and other responses to feedback need to be embedded in corporate governance systems, strategic and business plans, internal communications, staff training, and appraisal and reward of individuals. Moreover, a dynamic organisational model would require appropriate mechanisms for decision makers to comment on and contribute to the resolution of systemic issues as well as individual case points.
33. Feedback from redress mechanisms is only one part of the picture, though an important one that is of particular relevance to the AJTC remit of keeping under review the overall system of administrative justice. Some redress mechanisms are inherently better suited to providing feedback than others. The Law Commission in its 2008 consultation paper *Administrative Redress: Public Bodies and the Citizen* (Law Com CP 187) considered the research on the impact of judicial review, in the context of predicting the effects of its proposals to reform the liability of public authorities in negligence. Its general conclusion was that it is “not well suited to fostering good administration more broadly”. However, recent research on the relationship between judicial review and the performance of local authorities tends to indicate that the position may vary according to the context.
34. There may be more hope that adjudication by tribunals will be able to play a part in learning lessons which can be used to improve administration. The President of Social Security and Child Support Appeal Tribunals produced an annual report on standards of decision making; however, it is not clear that the feedback thus provided was acted upon to best effect. Feedback has potential as a powerful tool to improve standards and the AJTC is committed to working with decision makers, the Senior President of Tribunals and other stakeholders to promote awareness and sharing of new initiatives in feedback, and to develop a model of good practice. The AJTC will also work with others to produce reports on areas of special concern.
35. Best practice guides on the creation and operation of complaint handling processes all stress the importance of learning the lessons from complaints. Unfortunately this aspect of complaint handling by public bodies is poor, a finding which has been a recurrent feature in the monitoring of the NHS complaints procedure by researchers, the ombudsman and the regulator. It seems however, that when complaints have been referred from these internal processes to the ombudsmen, their suggestions for improvement have a much better rate of implementation.
36. The dynamic model for “getting things right first time”, as described in the foregoing paragraphs, may be illustrated in diagrammatic form as below:



Putting things right – choosing between avenues of redress

37. The kind of administrative justice disputes with which people are mainly concerned may be broadly classified into two categories, those that are about rights, and those that are about standards of service. Rights disputes may be directed into appeals, which can be considered by tribunals and the courts. This includes the range of tribunals most of which will be incorporated into the First-tier Tribunal over the two stage implementation in November 2008 and April 2009. The appeal at this stage can be on fact and law and, following Leggatt, there will be a wider right to an appeal on a point of law to the new Upper Tribunal. So, for example, social security claimants could appeal their benefit determination before a tribunal, now the Social Entitlement Chamber of the First-tier Tribunal. If they were dissatisfied with the outcome they could seek to appeal on a point of law before what were the Social Security and Child Support Commissioners, who became part of the Administrative Appeals Chamber of the Upper Tribunal from November 2008.
38. Conceptually claims for judicial review are different from a rights claim, but the process of determining a legal argument by the courts, after a hearing or on the papers, are similar to appeals on law before the courts and second tier tribunals. As stated above, there is now legislative provision which, if its conditions are satisfied, would permit the High Court in England and Wales and in Northern Ireland and the Court of Session in Scotland to transfer judicial reviews to be determined by the Upper Tribunal (TCEA, 2007, ss.15-21).
39. There could also be other public law rights claims heard before the courts, in particular a claim of a breach of human rights by a public authority. The Human Rights Act 1998 incorporates into domestic law most rights in the European Convention of Human Rights (ECHR) as Convention rights. Indeed tribunals as well as courts are under a duty to interpret legislation compatibly with Convention rights.
40. The other category, concerned with standards of service, encompasses complaints of maladministration causing injustice which will be raised initially with public bodies using their own complaints procedures and then may be taken to a relevant ombudsman. The analytical distinction between rights and service standards is not absolute. There can of course be an overlap between the two categories. Indeed, in the wider European context there is an increasing discussion about creating an overall “right to good administration”.

This was reflected in the 2009 Green Paper on Rights and Responsibilities (Cm 7577) and will underlie the AJTC's forthcoming paper on principles of administrative justice.

41. In particular there is overlap between maladministration and unlawful or negligent administrative action, maladministration being wider. In addition the ombudsmen can play a role in protecting human rights and indeed, before the coming into force of the Human Rights Act, ombudsmen would be making maladministration findings on issues that might now be more likely, in the public consciousness, to be labelled as breach of human rights than maladministration. For instance, failure to respect confidentiality in schools and in medical and social care establishments can be bad practice, maladministration or a breach of Article 8 of the ECHR which confers a right to respect for a person's private and family life, home and correspondence.
42. This overlap in the nature of rights and service claims gives rise to the possibility that there is more than one avenue of redress. Furthermore, the design of legislation focusing on rights and service standards is not always fully attentive to the most suitable type of redress option. The Law Commission for England and Wales published in 2008 a consultation paper on *Administrative Redress: Public Bodies and the Citizen*, referred to above. The paper provided an overview of the redress mechanisms in administrative justice, which it termed the pillars of administrative justice, and it particularly considered the relationship "between two of the central pillars of administrative redress", the public sector ombudsmen and the courts. Essentially, the Law Commission was applying the idea of trying to match the dispute, and the potential redress, to the most appropriate method of resolution. Whether a case is begun with the ombudsman or the court, it may become subsequently apparent that the other redress mechanism is more appropriate. Therefore it should be possible to transfer to the more appropriate mechanism.
43. The Law Commission's provisional recommendations proceeded on the footing that ombudsmen provide a system of justice in their own right. The Commission thought this could be strengthened by enabling the courts to stay proceedings so that a case could be referred to an ombudsman, providing the ombudsmen with a power to refer matters of law to the courts for adjudication, and modifying the statutory bar which precludes the ombudsmen from investigating a complaint if the complainant has or had recourse to legal remedy before a court or tribunal. The AJTC strongly agrees that facilitating the transfer of cases from one forum to another in this way would serve the user well. The idea could be developed further, for example by applying the same principles to the relationship between ombudsmen and tribunals.
44. ADR in its various forms may also be used in disputes about both rights and standards of service. The Senior President of Tribunals is required by statute to have regard to "the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals" (TCEA 2007, s. 2(3)(d)). One of the items in the AJTC's work programme is to build on its survey of the use of ADR techniques by tribunals, which was published in February 2008. The Tribunals Service has conducted two pilot studies of early dispute resolution, one in employment tribunal cases, in particular cases concerning sex, race and disability discrimination, and the other in the Social Security and Child Support Appeal Tribunals dealing with disability living allowance and attendance allowance. The technique used in employment cases was a form of judicial mediation, and in social security and child support cases, early neutral evaluation, where the parties' cases were assessed: this could result in the DWP withdrawing a weak case or an appellant withdrawing or seeking to strengthen arguments and evidence identified as weak.
45. For some the use of ADR, in particular, mediation in public law is problematic. There is a concern about inequalities between the citizen and the state, which it is feared that a mediator may not be able to offset. Other concerns relate to the confidentiality in

mediation cutting across the transparency and accountability normally expected in public service delivery. Others argue that in public law one either has or has not a right and so there is no scope for negotiation. Some research is being conducted on ADR in judicial review. Whatever the outcome, it would be unwise to rule out the use of ADR techniques simply because the dispute in question is a matter of public law.

46. However, the AJTC accepts that mediation is not a panacea and is not appropriate in some, perhaps a majority, of tribunals where entitlement is concerned. Mediation may have most potential early in the life of a dispute or in narrowing down issues for resolution. There is some way to go in promoting awareness of and confidence in the range of techniques available. For that reason, the AJTC is keen to encourage further research in all forms of proportionate dispute resolution, not just mediation. This is part of the wider administrative justice research agenda that the AJTC is seeking to foster.

Conclusion

47. From the user's perspective, the concept of the administrative justice system should be one which seeks to emphasise links, not only amongst the various redress mechanisms seeking the best match between those mechanisms and disputes to be resolved, but also between the redress mechanisms and the decision making which gave rise to the dispute, so as to get things right first time. This needs to be understood in the context of a developing concept of administrative justice that is not limited to disputes between citizen and state but includes principles and ideas about fair treatment and transparency which are relevant in many areas of life where there are imbalances of power.