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editorial

Uncharted waters, no compass?

At last, the Department for Constitutional Affairs (DCA) has broken its silence on the subject of the tribunal system. Its white paper, *Transforming public services: complaints, redress and tribunals*, represents an ambitious position statement on the future of dispute resolution between citizen and state, worker and employer. Firmly located within the current vogue for user-friendly reform of public services, *Transforming public services* sets out a model that would provide a range of options for resolving disputes – while aiming to stop them arising in the first place (see page 4 of this issue).

The white paper adopts many of the findings of the Leggatt review of tribunals, including a view that the present system is incoherent and inefficient. The document endorses the need for a new type of organisation, which is visibly independent from the departments whose decisions are reviewed. Under this model, users would enter the tribunal system through a single gateway. They would benefit from standardised information; tribunals would share hearing centres; and tribunal judges, led by a senior president, would have a common status and work more flexibly across jurisdictional boundaries.

More radically, the DCA proposes re-engineering the processes of redress so that resolution of many disputes would be possible without formal hearings. The DCA makes no secret of its enthusiasm for ombudsman services. The Financial Ombudsman Service (FOS), in particular, is praised for its multiple tiers of intervention – ranging from initial advice through to conciliation and adjudication, with a final decision by the ombudsman only if necessary. Two attractions of the FOS scheme are its feedback systems, designed to help the industry avoid future disputes, and its low unit cost – an average of £217 per case.

It would be unfair to suggest that *Transforming public services* lacks a genuine mission to improve the system for users. But it is clear that these proposals are also firmly driven by resource factors. Persuading decision-makers to 'get it right first time' would certainly reduce departmental expenditure. Judges are expensive – and by allowing certain disputes to be resolved by staff with delegated judicial powers, as is suggested, no doubt savings could be made. Tribunal hearings also cost money: the questionable assumption seems to be

that other processes, such as mediation, would cost less.

LAG agrees that alternative processes could work well for certain users. Not all disputes have to be resolved at a full hearing. Early neutral evaluation could certainly be used to good effect in many cases. But some central questions need to be addressed. Who decides, and at what stage, how a particular case should be handled? And what are the implications of blurring the boundaries between judicial and non-judicial staff?

Another concern is that the DCA's theoretical guarantee of the right to a hearing means little in practice if users have to fight a strong presumption against one being held. If too few cases are decided by judges and the higher courts rarely hear appeals, there is a real danger that complex and evolving legal areas will become semi-detached from the rule of law.

The idea of extending the role of tribunal judges raises more subtle problems. Expecting them to develop mediation techniques in addition to conventional judgecraft skills is unrealistic – it also confuses two entirely different professional approaches, both underpinned by distinct ethical frameworks. Judges' roles could be further confused by expecting them to comment, ombudsman-style, on the manner in which a department took its original decision.

Transforming public services is predictably blunt about the DCA's aim of ensuring that the majority of people with disputes against the state have their case resolved 'with little support or assistance'. It can see no justification for extending legal aid. But it concedes that the not for profit sector should have a larger role in providing users with independent advice on the merits and presentation of their cases. The decision to pilot an 'enhanced advice project' is to be welcomed.

The ambition behind this white paper is both its strength and its weakness. LAG agrees that the vision of proportionate dispute resolution must be given a chance to succeed. But such a profound transformation will be an expensive process, not least in terms of IT infrastructure – it cannot be viewed as a cost-cutting exercise. The DCA must also engage in a proper dialogue to bring about a profound reappraisal of what society understands to be the values and purpose of the justice system. The new tribunals' organisation must be equipped with this vital compass to deal with the uncharted waters that lie ahead.

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