

LEGAL SERVICES

Breaking out or breaking down?



Different approaches to resolving civil disputes may soon change our perceptions of justice. LAG's seminar, *Breaking out or breaking down? The future of justice in the new era of dispute resolution* took place in July. **Nony Ardill**, LAG's policy director, reflects on the discussions that took place at this event.

A timely debate

The language of 'proportionate dispute resolution' will be familiar to anyone who has read the government's white paper on tribunals or the latest corporate plan of the Legal Services Commission (LSC) (see August 2004 *Legal Action* 3 and 5).^{*} The civil justice system has been the focus of much criticism for being difficult to access, expensive to run and remote from the communities it serves. The LSC is on the point of refocusing civil legal aid to encourage early resolution of disputes rather than supporting litigation too readily. Across government, there is a new-found enthusiasm for alternative dispute resolution (ADR); recent policy initiatives mention other routes to redress, such as mediation, ombudsmen and complaints schemes, with evident approval.

It is in this context that LAG's seminar took place. We felt the need to promote a discussion about the implications of such fundamental changes to the justice system. Many people would accept that the civil courts and tribunals would benefit from fairly radical reform. But is fragmenting the system into a range of flexible and even 'privatised' options, such as ombudsman and mediation schemes, potentially at odds with the notion of protecting rights – and does it signal a retreat from the rule of law?

The importance of these concerns was reinforced by the level of interest in the event. It was attended by over 50 people, representing government departments, other statutory bodies including ombudsman and complaints services, legal practitioners, national voluntary organisations and academic institutions.

The seminar panel

The four panel members were drawn from diverse disciplines and backgrounds and approached the topic from different – and complementary – angles. Alison Hannah, LAG's director, chaired the seminar.

■ The first speaker was George Pavlich, a professor in the Department of Sociology at the University of Alberta in Canada, and author of *Justice fragmented: mediating community disputes under post-modern conditions* (Routledge, 1996).

■ Professor Martin Partington made the next contribution, speaking in a personal capacity. He is a Law Commissioner currently on secondment from the University of Bristol, who leads the commission's work on housing and administrative law.

■ The third speaker was Walter Merricks, chief ombudsman of the Financial Ombudsman Service (FOS) and a founder member of LAG. He was followed by:

■ Jane Hickman, who is managing partner at Hickman & Rose, one of London's largest criminal law firms, and secretary to the Criminal Appeal Lawyers' Association.

The speakers' contributions were both authoritative and challenging; they are summarised below.



George Pavlich

The Western world has deconstructed the idea of a single route to justice – justice is becoming fragmented. Court-based adversarial systems are no longer seen as the only option; an integrated, rational approach to dispute resolution is starting to emerge, and there is growing interest in community-based models of dispute resolution. The state is being rolled back and many of its functions taken on by corporate and private entities; there is now a shift away from the idea of a comprehensive welfare state.

Those who support community dispute resolution argue that it is free, non-coercive and participatory, and that it helps build community responsibility because it does not rely on the state. But critics argue that, through community dispute resolution, the state is actually expanding its reach, and that this model of justice should be seen as a response to capitalism's crisis of legitimacy.

However, both these views are unhelpful. The state is not monolithic, but represents a complex set of power relationships. The philosopher Jeremy Bentham drew a useful distinction between direct government – ie, the law, the courts, the police – and indirect governance, which operates by shaping people's motivations and roles, helping them to avoid conflict. Community mediation can be seen as a form of indirect governance.

It is important to understand these different forms of power. The coercive power of direct government can be controlled by the rule of

law; indirect governance, which serves to create new identities, needs different control mechanisms. Another key question is whether justice should be understood as a technocratic, managerial issue – or whether it should be understood within the context of an ethical horizon.



Martin Partington

The current changes in the field of administrative justice have their roots in the Leggatt report on tribunals, published in 2001.

This argued for greater coherence, independence and a clearer focus on tribunal users, a view that received a broadly positive public response. The white paper on tribunals is proposing an integrated tribunals service, together with prevention of more disputes by improving the decision-making of government departments.

One can detect a new rhetoric emerging from the Department for Constitutional Affairs on the need to get decisions 'right first time'. However, evidence from Australia – comparing the experience of New South Wales with that of Victoria – suggests that if a fresh approach is to succeed, it needs leadership and vision backed by proper investment.

There is broad satisfaction with the recent major changes in civil justice. Courts are increasingly viewed as a last resort, there is active case management and delays have been reduced. ADR has now moved higher up on the public agenda, but its development is ad hoc and it has patchy support from the judiciary.

We must recognise the impact on users of these changes, and recognise the high levels of unmet legal need. On the other hand, it is also important to be open to new ideas; all too often, lawyers are very resistant to change.

One initiative is the Law Commission's new project on resolution of housing disputes, which followed on from its consultation on renting homes. In this field, useful lessons could be drawn from abroad: for example, in New Zealand, users first had telephone advice from a call centre, if necessary followed by a mediation appointment. Only if the case could not be resolved would it be referred to a tribunal.



Walter Merricks

Civil justice systems are typically assessed on criteria such as whether there is legal representation for both parties, the right to call witnesses, a fair and public hearing, and cost indemnity for the winning party.

However, a better set of criteria (one that the FOS fits perfectly!) might include whether the system is accessible to users, tackles real grievances and delivers merit-based outcomes

with high user satisfaction. Other factors might be proportionate costs distributed fairly, and whether the system provides feedback to policy-makers.

The FOS was able to design its system from scratch. It is a semi-judicial organisation with a non-adversarial approach, focusing on early resolution of disputes that cannot be resolved through internal complaints schemes. It is a free service, handling 1,000 telephone calls per day and resolving 90,000 disputes every year. It makes no distinction between legal issues and maladministration; complaints are assessed on their merits – it does not matter how well they are pleaded. No costs are awarded and legal representation has no effect on the chances of success.

The FOS offers a 'no surprises' approach, using early neutral evaluation to weed out complaints without merit, and employing conciliation techniques to resolve cases at an early stage. However, the 'losing' party is allowed to make representations to the FOS, ensuring due process. Hearings are only needed for around 20 cases per year. Seventy-five per cent of complainants are satisfied with the outcome, even though only 40 per cent of complaints are upheld.

Through its newsletter and website, the FOS provides important feedback to the financial services sector. It is under commercial pressure to keep unit costs low (currently £220 per complaint); the FOS has well-trained staff, efficient IT systems and uses modern management techniques. In essence, it has made ADR mainstream – no one takes financial services disputes to court any more.



Jane Hickman

It is important to consider what motivates people to work in public services, and how this relates to the role of lawyers within a 'new' system of justice. Govern-

ment policies, including those relating to the justice system, seem to be driven solely by an economic agenda. While this can bring some positive results – for example, the Woolf reforms – it has also had negative consequences, such as the policy of full costs recovery.

It seems that the Human Rights Act 1998 is now viewed by ministers as a 'blip'. What is emerging is the antithesis of a rights-based society. Cuts in the scope of legal aid – such as for personal injury – have left people without legal remedies. Legal resources previously available to help people enforce their rights (and so avoid falling into social exclusion) are now drying up. There is a suggestion that people no longer need access to legal advice in the same way, because they can use ADR processes and are anyway more aware of their rights.

However, this is not my own view. ADR is not suitable for all cases. Though schemes

such as the FOS can work well, many people, especially the socially excluded, do not get near to using them. It is important for the government to recognise this and engage in a proper debate about the future of the justice system.

There is also an important concern that a lawyer-free system of dispute resolution cannot deal with more complex cases. When 'real' conflicts occur, there might be no lawyers, no hearings and no adversarial system to resolve them. Do we want a world where lawyers are only available for the super-rich? The government is in danger of throwing out the baby with the bath water. At the very least, alternative systems of redress should be backed up with a second tier of lawyers for complex cases and rights issues.

Comments and questions

The panel's contributions led to a range of comments from the floor, and in common with most good debates, the seminar generated a number of questions, not all of which lent themselves to easy answers.

Legitimacy

There was concern about the suggestion that justice could be subsumed into the state; any means of redress would effectively be made redundant if the government insists it can always make decisions that are 'right first time'. The question was asked how can we develop a more sophisticated justice system that can incorporate ADR options but, nonetheless, work within the shadow of the rule of law? A further, related question was whether the state can sub-contract legitimacy to organisations such as ombudsmen, or whether these bodies only work because they operate within the safeguard of the state's power.

In response to these points, Jane Hickman argued for a rule-based framework that gives second tier access to the civil justice system and can deal with imbalances of power. Walter Merricks commented that the FOS now derives its legitimacy from the state – but it originated from the wish of the financial services industry and the consumer movement to experiment with a different approach to dispute resolution. The view of George Pavlich was that legitimacy currently derives from a number of sources – economic, political and community-based. Under post-modern conditions, the state has been recast and the very nature of legitimacy is open to debate. Power is not intrinsically coercive – but all power relations have dangers and we must seek to uncover these. In this context, he warned that 'Big Brother has already created the you that is being watched.'

A coherent system?

Another participant suggested that the traditional rule of law has excluded certain discourses; ADR approaches can serve to empower certain voices – such as those of women. Concern was voiced that the different elements of the current administrative justice system do not fit together coherently. Much work remains to be done to design a system for today's needs.

Asked what could be done in practical terms to improve the system, Martin Partington suggested that early advice and information was crucial – but not necessarily from a solicitor's office. Different models should be explored; for example, telephone advice might sometimes be better than using solicitors (who can be intimidating and expensive) or queuing at a citizens advice bureau. He agreed with Jane Hickman that good diagnostic advice skills were important, and that there should be a second tier of highly qualified lawyers to pick up on rights issues.

Some unresolved questions

While few participants suggested that we should resist new thinking about dispute resolution, the legitimacy of these alternative approaches must be clarified and understood. Validation on purely economic grounds is not enough. There is also a danger of these models setting up new barriers to justice – even though they might avoid traditional barriers to access. Within a system that offers a range of options for redress, how do we ensure that people use the best process for their own particular case? Who decides this – and on what criteria?

If the justice system is to break out, rather than break down, we must be very clear about the type of system we want and the ethical and legal framework in which it operates. George Pavlich's final comment called for intellectual honesty and flexibility, and made the point that 'no formulaic model should be followed slavishly'. This is advice we would, perhaps, do well to heed.

* *Transforming public services: complaints, redress and tribunals* is available at: www.dca.gov.uk.

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