Delivering Justice Roundtable 24 January 2020

This event, held under Chatham House rules, brought together senior judges, Ombuds, officials, regulators and academics who work in all the major types of disputes in England and Wales in a discussion on evaluating the system as a whole. Attendees illustrated many areas of reform, especially in digitisation of processes.

Given various factors leading to a move away from involvement of lawyers and adversarial mode, digitisation can provide a workable solution that forms a critical element in a new system. However, there has been considerable diversification and the ‘Justice System’ now comprises courts, tribunals, public and private ombuds, platforms, various forms of ADR, administrative redress schemes, websites, and a complex advice services landscape. This landscape is now complex and lacks integration, having never been considered holistically. It can be confusing for ultimate users. It can also be considered from other viewpoints, not just that of being a Justice System, but also for example as (several) regulatory systems and social support systems.

It is high time for the landscape to be considered holistically, from a number of viewpoints, especially of ease of use, ability to support good outcomes, social and economic goals, and for efficiency (“We’re paying for all this: are we investing in the right places and do we get good outcomes and value for money?”). As a contribution to this debate, Professor Chris Hodges has posed three questions, which were debated at this event:

1. *How do people identify and access information, advice, support and assistance in solving their problems?*
2. *How do we ensure that dispute resolution pathways are simple, effective and cost-effective and deliver justice to people and organisations?*
3. *How do we identify systemic problems, and address them so as to reduce future risk of recurrence?*

These questions were supported by attendees as being relevant. Some conclusions were as follows.

The advice services landscape has taken major financial shocks, such as loss of legal aid to solicitors and funding to local authorities, and some middle-sized service providers have collapsed while some new areas (pro bono and innovative offerings) have emerged. Problems identified in the Low Commission’s Reports remain and some have got worse. It is currently difficult to provide consistent funding, and consistency or coordination of locally required services. There is a need for initial general support and triage, leading on to availability of expertise. Too many initial offerings are categorized (as legal, or housing, or family, or debt, or consumer, or citizens, or medical) and funded as such. The result does not provide initial general support or the ability to focus required expertise. Providing good initial information and assistance is critical in signposting or focusing onward progression. Without this, the right support is not delivered, problems escalate, and courts or tribunals, as venues of last resort, can face considerable challenges. The rise in litigants in person, and unnecessary or ill-prepared cases, are major consequences. There is an urgent need to examine options for reform. The advice landscape presents a problem that it comes under multiple Ministries and funding sources, so moving to a coordinated holistic approach is a challenge. It was agreed to form an action group to scope this area with some urgency.

It can also be said that some of the same challenges of lack of information and support are also shared by SMEs. Solutions there may lie with regulatory and local authorities, local Business Hubs, and web-based mechanisms.

Extensive digitisation and experimentation on the second issue, of processes and pathways, has been noted above. Digitisation has a long history in some areas, such as the Parking Tribunal and the Financial Ombudsman Service. Considerable learning is available on the design of online systems to maximise user involvement and desired outcomes. (A quarter of cases entering the Energy and
Communications Ombudsmen scheme resolve without any intervention from the Ombudsman, just from the pressure of being in the system.)

A leading example is the creation of the Online Court. The Online Money Claims Court has been a major success. The new system has handled 116,000 claims so far, with 89% user satisfaction rate. The ceiling will increase ceiling from £10k to £25k, to cover 92% of money claims. As with other online systems, such as in Tribunals, Ombuds and online platforms, there has been considerable shift and experimentation in new aspects of procedure. The OMCC will be an end-to-end online process. A video skype pilot is planned.

It is clear that interesting approaches are developing across a wide spectrum of dispute resolution loci, many of which may not attract wide enough attention. Many developments are at different stages of development, and some dispute areas/pathways are under considerable pressure to evolve further. In some cases, a lack of integration between different pathways, or between the three stages referred to above, is acting as a barrier to delivery of justice, for example by confusing people or businesses, or not delivering the type of outcomes that are needed.

There is, therefore, a considerable need for information, monitoring and evaluative research. Professor Linda Mulcahy and bodies such as the Administrative Justice Council are keen to develop things here. It will be important to take an overview of the whole system and to evaluate options and encourage changes, not least increased collaboration between different schemes. Several examples of dialogue and closer cooperation are between courts and tribunals, and between tribunals and public ombuds. The leaders of the Property Tribunal, Property Ombudsman and Housing Ombudsman agreed at this meeting to engage on closer ways of working.

It is notable that a number of new intermediaries are appearing, especially in response to demand for delivery of more or integrated functions. Professor Hodges explained a circular model that is increasingly used in regulatory systems and delivers the functions such as the following:

1. Setting rules. This is increasingly done through (ethical) codes, regulators’ rule books or guidance, and standards, instead of primary or secondary legislation.
2. Identifying problems. This requires input of data, ideally from multiple sources, on what is happening or going wrong.
3. Root cause analysis of problems, identification of relevant solutions (changing behaviour and organisational culture, amending or clarifying rules, procedures or systems) and monitoring to identify further changes. Regulatory authorities increasingly achieve this through collaborative relationships with businesses, rather than through traditional enforcement or a belief in deterrence.
4. Putting things right. This may involve repairing damage or the environment, paying compensation for loss, caring for people, explaining what happened, demonstrating that things have changed and future risk has been reduced.

Leading examples where the above functions are delivered in integrated systems are the consumer Ombudsmen, platforms such as Resolver, links with regulatory authorities (e.g. using redress powers), and collaborative arrangements such as under the Primary Authority scheme and the Ethical Business Regulation model. By contrast, this approach also indicates the relevance or otherwise of what sort of remedies are available from dispute resolution systems – awards of money are do not necessarily address people who seek information, change, care, repaired relationships or reduced future risk/incidence.

Such a system is based on availability of data and its analysis – increasingly involving AI. There is wide agreement that data from dispute resolution systems, and even initial questions about problems, is an important source of data that can feed back into changes in behaviour, culture and risk. Equally, effecting changes in behaviour and culture requires more than just statistics on incidence of problems, and usually requires external interventions or internal desire to change (the Ethical Business Practice
model). All the public and private Ombudsmen aim to use insights to influence systemic change in organizations and build trust: this is a major USP over courts and tribunals as traditionally construed.

Another example of new intermediaries has been constructed to assist SMEs – the Groceries Code Adjudicator, Pubs Code Adjudicator and Small Business Commissioner (an idea copied from Australia, where it has been notably successful). These intermediaries may have the following functions: providing information to all; assisting through mediation or arbitration; own-initiative investigation of bodies with regulatory-style inspection and information-gathering powers, especially acting on confidential tip-offs; requiring payment of sums owed; requiring systemic changes to comply with ethical practice Codes. These schemes are likely to be developed.

A further example in the personal injury space is administrative redress schemes based on those operated with great success in all Nordic states. A major reason for adopting these is their ability to support an ‘open and just culture’, which has been shown to be essential in achieving safety outcomes. The continuation of blame and adversarialism in negligence claims against the NHS is one impediment to this culture change.

Given this wider focus on achieving outcomes, and delivering a series of functions effectively, that a regulatory model is well-established in many consumer markets, is spreading to the property sector and appears to be emerging in relation to the labour market and hence employment. The model typically involves a regulator, code and independent body providing information, dispute resolution, data collection and feedback functions. If this functionality is to be achieved, bodies such as tribunals, Ombuds and other ADR schemes should explore means of coordination.

There was general agreement at this event to seek cooperation between related and overlapping systems.

Ideas contributed include:

- A need for information, research and evaluation. A further conference on case studies.
- A need for a coherent overview and monitoring.
- Various examples of closer ways of working between organizations.
- A number of items for reform, such as: enabling the public Ombudsmen to undertake own-initiative investigations and to remove the MP filter to the PHSO; adoption of single portals (employment, consumer); joining up of advice and dispute resolution pathways (family).

Outcomes generally agreed at the event

1. Advice Landscape. Agreement that this is hugely important for many reasons, not least acting as the first line for many other important types of problems (family, housing, debt, employment, health, mental health). Agreement that a small group will take forward scoping of possible solutions and will report back. Particular issues will be: better coordination and use of funds, ensuring effective delivery of the types of advice needed at local level, and providing initial general advice with speedy access to specialist advice rather than providing multiple specialist outputs.

2. Property. Agreement (in first ever meeting) by the Property Tribunal, Property Ombuds and Housing Ombuds to (a) work towards a closer way of collaborative working and (b) scope ideas for the future regulatory system.

3. Online court project. Agreement that the successful achievement of this project is important.

4. Consumer. Agreement to discuss closing gaps and more consistent working between Ombuds/ADRs.

5. Citizen/State. Agreement to continue existing discussions on closer ways of working between Tribunals and Ombuds. For public Ombuds: Need to remove the MP filter to free scope for more
access to PHSO, and to have own-initiative powers. Achieving systemic change remains a challenge, which might be helped by spread of an approach based on an ethical practice Code.

6. **Personal injury.** Suggestion that achieving an open (no blame) culture in the NHS is critical and the continued existence of an adversarial, fault-based system for compensation is a serious barrier to achieving that. Possible voluntary moves in this direction by pharmaceutical and medical device manufacturers.

7. **Commercial.** Agreement to consider a series of ideas for streamlining process.

8. **Employment.** Closer engagement between ACAS and ETs, maybe with a single portal. Possibility of considering a new model involving: the new Labour Market Regulator; an Ethical Business Practice Code and culture; a single portal for information, assistance, dispute resolution, and circulation of data involving an integrated ACAS-ETs; and enabling earlier intervention.

9. **Family.** Agree need to address serious problems in different areas. The initial advice stage has a critical effect on subsequent dispute resolution.

10. It was universally agreed that data is vital to drive better analysis of underlying problems and intervention universally acknowledged.

11. **Suggestions for research** to be made to the academic team.

12. There is a need for follow-up events and means for people across the system to share information on developments and plans. The idea of some sort of monitoring or coordination has been raised.

13. Details of relevant officials in different Ministries to be circulated among them, so as to facilitate communication on coordination.