



**Law
Commission**
Reforming the law

Administrative Redress: Public Bodies and the Citizen

Summary

Law Com No 322 (Summary)

ADMINISTRATIVE REDRESS: PUBLIC BODIES AND THE CITIZEN

INTRODUCTION

- 1.1 Our report brings to a close the state liability aspects of the Administrative Redress project and sets out our reaction to consultation responses to our consultation paper *Administrative Redress: Public Bodies and the Citizen*.¹
- 1.2 Fundamental to our approach to this project was an acceptance that we needed to consider the extent to which any reforms might divert resources originally allocated for public purposes to individuals as compensation payments. Our approach sought to achieve the appropriate balance between the interests of those seeking redress and any effect this process may have on public bodies.
- 1.3 In seeking to provide an evidence base that our proposals would strike an appropriate balance, we attempted to construct a dataset of the current liability of public bodies. Owing to current reporting and accounting practice, we were unable to do this.
- 1.4 Our proposals were contested by many parties, most notably the key stakeholder Government. That opposition and the inability to access appropriate evidence to counter the opposition mean that we feel that it is impractical to attempt to pursue the reform of state liability any further at this time.
- 1.5 This project highlighted an important deficiency in the current practice for collating and publishing compensation payments made by public bodies, which it would be in the public interest to resolve. Consequently, we have decided to make two recommendations in relation to this. These build on our experience in this project.
- 1.6 We also state our intention to do more work on ombudsmen.
- 1.7 The full report is split into six Parts.
 - (1) Part 1 introduces the project and sets out the key decisions as to the future of the project.
 - (2) Part 2 revisits the availability of monetary remedies in judicial review.
 - (3) Part 3 considers responses made concerning our private law reform proposals and brings to a close this aspect of our project.
 - (4) Part 4 considers the effect of liability on public bodies and issues in relation to data collation and publication.

¹ *Administrative Redress: Public Bodies and the Citizen* (2008) Law Commission Consultation Paper No 187 (hereafter CP 187).

- (5) Part 5 analyses the responses made to our ombudsmen proposals and suggests how we will be taking those aspects of the Administrative Redress project forward.
 - (6) Part 6 gives a short summary of the conclusions contained in the preceding Parts.
- 1.8 In addition to the full report, we are also publishing (in electronic form) a more detailed Analysis of Consultation Responses.² This sets out more comprehensively the responses we received to our provisional proposals.

THE ADMINISTRATIVE REDRESS PROJECT

- 1.9 This project was commenced as part of our Ninth Programme of law reform. A scoping paper was published in October 2006. The scoping paper set out the ambit of the project, which was to address the following question:
- When and how should the individual be able to obtain redress against a public body that has acted wrongfully?
- 1.10 Building on the scoping paper, our consultation paper *Administrative Redress: Public Bodies and the Citizen* was published on 3 July 2008. The consultation period closed on 7 November 2008.
- 1.11 In the consultation paper we proposed two main sets of reforms. The core set of reforms focused on the court-based mechanisms for redress from public bodies. That is an action for judicial review and private law claims against public bodies. Our provisional proposals would have led to the creation of a specific regime for the liability of public bodies, which was to be based around a series of individual elements.
- (1) That the claimant be required to show “serious fault” on the part of the public body, rather than – in judicial review – public law illegality or – in tort – negligence.
 - (2) Damages should be available only if the statutory regime, within which the public body’s decision was made, was objectively there to confer a benefit on the relevant class of individuals (the “conferral of benefit” test).
 - (3) Relating to private law only, that the activity engaged in was one uniquely public in nature, either because the public body was under a special duty to perform it or because it utilised a public law power (the “truly public” test).
- 1.12 Though the first two elements applied to our proposed reforms in both judicial review and private law, they generated a markedly different level of consultation responses in each area. We have chosen to deal with them in the context of the area where they generated the most commentary. That is judicial review for the “conferral of benefit” test and private law for “serious fault”.

² Available at: www.lawcom.gov.uk/remedies.htm.

- 1.13 Secondly, we suggested a set of reforms for certain of the public sector ombudsmen, specifically the Parliamentary Commissioner for Administration, the Local Government Ombudsman and the Public Services Ombudsman for Wales. The reforms were aimed at improving access to the ombudsmen and providing certain additional tools that would aid them in undertaking their role as part of the redress system for administrative injustice.

JUDICIAL REVIEW

- 1.14 In judicial review we suggested that an award of damages should serve as an ancillary remedy, to be claimed alongside the prerogative remedies.
- 1.15 The purpose of the damages remedy was to fill a gap that we suggested existed in the current regime, whereby damages can only be claimed where there is an existing private law right to damages, where there is a breach of EU law or under the Human Rights Act 1998. In keeping with other remedies available in judicial review, we suggested that damages should be discretionary.

Consultation responses

- 1.16 The suggestion that a wider, but still discretionary, monetary remedy should be available in judicial review was met generally with a mixed response.
- 1.17 Of those who agreed in principle, some disagreed with the extent of our provisional proposals or raised concerns as to its possible consequences.
- 1.18 However, some consultees – including Government – disagreed vigorously with the provisional proposals. Of these, a number opposed our scheme as it would allow individuals to claim damages where no private right had been infringed and in doing so would fundamentally alter the nature of judicial review.
- 1.19 Certain consultees, most especially Government, were concerned that any increased availability of monetary remedies would lead automatically to increased delays in the Administrative Court.
- 1.20 Several consultees were concerned about the increased financial burden on public bodies that would result from the imposition of compensation. Government felt that our proposals risked over-emphasising the rights of individual claimants to the detriment of society as a whole.
- 1.21 Whilst agreeing that reform was necessary, some consultees suggested that the creation of a discretionary remedy, or a remedy with a discretionary power to limit damages, would be more appropriate than our “serious fault” scheme.
- 1.22 The “conferral of benefit” test was thought to be unworkable by some consultees, and scenarios were suggested where it would not function as an appropriate gatekeeper into our “serious fault” scheme. Others criticised the use of the term “benefit”.

Our conclusions

- 1.23 We do not accept that our proposal alters the nature of judicial review as presently constituted – it merely applies a more coherent approach to the availability of remedies where administrative illegality is made out.

- 1.24 Whilst we accept that our proposals could lead to a slight increase in the length of some individual cases where further argument on “serious fault” was necessary, we do not think that this would be a large number of cases.
- 1.25 We accept that it is important to bear in mind the balance between individual redress and the consequences that the payment of compensation can have on public bodies. We attempted to create a dataset on liability in order to assess this more thoroughly. As we detail in our full report, we encountered significant difficulties when attempting to do this. On the basis of our experience, we make recommendations relating to the collation and publication of compensation figures by public bodies.
- 1.26 Having analysed the consultation responses, we do not think that the criticisms made of our proposed reforms are insurmountable. We still consider that there is a good argument in favour of reforming this area of the law.
- 1.27 Such reform could either be along the lines we proposed, or by the creation of a more discretionary power for the courts to award damages than that contained in section 31(4) of the Senior Courts Act 1981.
- 1.28 However, given the substantial opposition to our proposals – in particular from Government but also from others – coupled with the lack of a dataset that would have assisted in addressing some of these concerns, we accept that we cannot take this part of the project any further.

PRIVATE LAW

- 1.29 In private law, we provisionally proposed placing certain activities – those which can be regarded as “truly public” – within our “serious fault” scheme. Therefore the claimant would have had to satisfy the same requirements as the public law scheme in order to establish liability. Cases which did not satisfy the “truly public” test would have been determined under the normal rules of tort law.
- 1.30 The other significant reform we provisionally proposed was to modify the normal operation of the rule on joint and several liability. Presently this can operate in a particularly unfair way as it applies to public bodies. Our provisional proposal was to give judges a discretionary power to apportion claims for public body defendants.

Consultation responses

- 1.31 The response to our provisional proposals was overwhelmingly negative.
- 1.32 Some consultees thought that there was no basic case for reform, maintaining that there are no problems with the current law. Other consultees suggested that, even if our analysis did disclose problems, these did not warrant the wholesale reform we provisionally proposed. Consultees subscribing to this view suggested that it was better to adhere to the normal, incremental, process by which the common law has traditionally developed in this area.
- 1.33 Many consultees suggested that the individual elements of our proposed regime were unsuited to this area and would be unworkable. The majority of criticisms

focused on the “serious fault” test, though a significant number also thought that our “truly public” test was flawed.

- 1.34 Finally, where addressed, some consultees were in favour of reform to the rule on joint and several liability. However, a significant number opposed it.

Our conclusions

- 1.35 Our private law proposals were subject to a high degree of criticism. However, not all such criticism was equally valid and many consultees were also in complete opposition with each other as to the state of the law and the necessity for reform.
- 1.36 We still maintain that the current law is inappropriate and unclear in its approach to public bodies. We suggest that there would be merit in the systematic reform of the area, rather than relying on the incremental approach inherent in the common law process.
- 1.37 That said, we accept that we failed to convince many consultees of the need for reform. We also accept that we have not convinced consultees or Government that our proposed changes would be preferable to the current incremental approach of the law in this area. We do not, therefore, think that there is value in pursuing reform further.
- 1.38 As with judicial review, we would have benefited from a dataset to more fully assess the impact of our proposals.

REPORTING

- 1.39 Within this project we encountered significant problems in seeking to create a dataset covering the current compensation liability of public bodies. Though the data does seem to be generated, it is not collated or published in an accessible manner. Without this dataset, we were unable to estimate the costs of the current redress system, or prove that our proposed changes would be beneficial.
- 1.40 We suggest that the lack of collated and clearly accessible data means that the current regime fails to fulfil the requirements of accountability and transparency that are key to our system of governance. The lack of data is also a problem for practitioners, judges and policy-makers in this area. Fears of defensive administration cannot be confirmed or refuted, and administrators are unable to assess policy on the basis of properly formulated impact assessments.

Our conclusions

- 1.41 Clear and open governance is the cornerstone of any democratic system. This includes the requirement that the way in which public money is spent should be outlined openly and clearly. In the UK, this is the bedrock of parliamentary power and the reason for the creation of many of its enduring institutions.
- 1.42 We do not challenge Government’s commitment to this basic principle. We are proposing a minor change that would allow citizens to assess the way in which public monies are spent on this important issue. Given the purported development of a “compensation culture” we believe that both citizens’ and

Government's interests would be best served by more statistical information on this topic.

Recommendations

- 1.43 **We recommend, subject to the successful completion of any pilot study, that HM Treasury ensure the costs of compensation to central government bodies are regularly collated and published.**
- 1.44 In doing this, we suggest that it would be beneficial for public bodies to report the costs of the following:
- (1) all compensation payments made after the commencement of legal proceedings but before judgment (therefore, all settlements);
 - (2) all compensation payments made after judgment;
 - (3) legal costs (for instance, costs of solicitors/counsel/court fees/other disbursements) of cases terminating in (1); and
 - (4) legal costs of cases terminating in (2).
- 1.45 In addition, these should all be broken down into a finite list of subject areas or causes of action. For instance: employment disputes, personal injury claims, other negligence, breach of statutory duty, misfeasance in public office, and "other".
- 1.46 **We also recommend that the Department for Communities and Local Government and the Welsh Assembly Government should similarly consider the most appropriate way for local government to collate and publish this information. As with the recommendation above, this is made subject to the successful completion of a pilot study.**
- 1.47 These are the only recommendations made in this report.

OMBUDSMEN

- 1.48 In our consultation paper we proposed a series of potential reforms to certain public sector ombudsmen: the Parliamentary Commissioner for Administration; the Local Government Ombudsman; and, the Public Services Ombudsman for Wales. The four main reforms proposed were:
- (1) the creation of a specific power to stay an application for judicial review;
 - (2) that access to the ombudsman could be improved by modifying the statutory bar;
 - (3) a power for the ombudsmen to refer a point of law to the courts; and
 - (4) removing the MP filter in relation to the Parliamentary Commissioner for Administration.

Consultation responses

- 1.49 Government suggested that “there may be some merit in exploring further the statutory frameworks governing the ombudsmen”.
- 1.50 In relation to the creation of a specific power to stay an application for judicial review, Government thought that “it may be worth looking further at whether there are cases before the courts which would benefit from being stayed and referred to the ombudsmen for possible investigation”. Other consultees also thought there was merit to the proposal. Government was worried about the potential cost of any reform.
- 1.51 The majority of consultation responses on the subject favoured our proposed reform to the statutory bar. However, Government expressed concerns that the proposal would create additional delays and costs.
- 1.52 The vast majority of consultees who commented on the provisional proposal supported the creation of a power for an ombudsman to make a reference to a court on a point of law. Several consultees did, however, suggest that further work needs to be done on the details of how such a mechanism would operate in practice.

Wider issues

- 1.53 Outside our specific proposals, there were other issues that consultation showed were particularly important for consultees. These included developments that occurred after the publication of the consultation paper and the end of the consultation period on 7 November 2008. Primarily we think that the following need further consideration:
- (1) the nature of the ombudsman process;
 - (2) relationship of ombudsmen with Parliament; and
 - (3) the nature of findings and recommendations.

The nature of the ombudsman process

- 1.54 During consultation it was highlighted to us that an investigation by an ombudsman is very different in its nature to the adversarial processes of a court. Ombudsmen were designed primarily as inquisitorial fact finding institutions able to sort through the minutiae of administrative decision making. We think that it would be useful to examine this issue further and consider whether any reforms would aid this process.
- 1.55 In consultation, the possibility of self-generated investigations – such that an ombudsman does not require a complaint before opening an investigation – and the development of an ombudsman equivalent of class actions were mentioned. The first would change fundamentally the nature of an ombudsman as a complaints investigator. We think that thorough consideration and consultation is necessary before any recommendations could be made.

The relationship of ombudsmen with Parliament

- 1.56 The renewal of Parliament and remedying a perceived breakdown in the relationship between Parliament and citizens came to prominence after the consultation paper had been published.³ In the context of ombudsmen, there are two important subjects which we consider as requiring further, more detailed consideration.
- 1.57 The first is the developing practice of holding pre-appointment hearings for certain public posts. This happened recently with the appointment of Jane Martin as Local Government Ombudsman.
- 1.58 The second concerns relationships between ombudsmen and committees of either the UK Parliament or the National Assembly for Wales. This would include the relationship between the Parliamentary Commissioner for Administration and the House of Commons Select Committee on Public Administration. It would also include the developing relationship between the Public Services Ombudsman for Wales and the National Assembly for Wales.

The nature of findings and recommendations

- 1.59 The final topic to be considered is the relationship between the different ombudsmen and those whom they investigate. Essentially, this turns on the effect of an ombudsman's findings.
- 1.60 There is currently a fundamental difference between the effect of findings of the Local Government Ombudsman and those of the Parliamentary Commissioner for Administration. This is due to two judgments. That of *ex parte Eastleigh BC*⁴ concerning the Local Government Ombudsman and that of *Bradley*⁵ in relation to the Parliamentary Commissioner for Administration. The effect of these judgments is that it is far easier in legal terms for a public body to reject the findings of the Parliamentary Commissioner for Administration than it is to reject the findings of the Local Government Ombudsman.
- 1.61 We make no comment as to the correct approach that should be taken but we point out that there is a difference and that this merits further consideration.

Our conclusions

- 1.62 Given the consultation responses, the importance of the area and recent constitutional developments, we think that further consideration of the public sector ombudsmen is merited.
- 1.63 We therefore intend to publish a consultation paper focusing solely on the public sector ombudsmen later in 2010. We would expect this to be followed by a final report in 2011.

³ See Rebuilding the House, Report of the House of Commons Reform Committee (2008-09) HC 1117.

⁴ *R v Local Commissioner for Administration ex parte Eastleigh Borough Council* [1988] QB 855.

⁵ *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114.