

## **ADMINISTRATIVE JUSTICE: A Forthcoming Research Initiative**

### **Background**

1. The Nuffield Foundation's Trustees have agreed that the area of 'administrative justice' is particularly suitable for a Foundation initiative, and could benefit from strategic and reflective examination. The Foundation has already funded many projects in this area. But much of that funding has concentrated either on single models of adjudication – ombudsman schemes, tribunals or judicial review – or on particular substantive areas – social security, immigration, education and so on.
2. With the Tribunals, Courts and Enforcement Bill before Parliament and forthcoming developments such as the new Administrative Justice and Tribunals Council, the time is ripe for the Foundation to fund a broader initiative in this area. The area is a good one for an independent funder who can consider the interests of citizens and take a wider view about bringing empirical evidence to bear on discussions of policy and practice.
3. We recognise that 'administrative justice' is a wide-ranging if rather imprecise concept. The Foundation's work will start on the basis of a distinction between 'justice in administration', where 'justice' may be in competition with other administrative criteria, and 'administrative justice', which we take to cover reactions to alleged deficiencies in first instance decision-making. "Administrative justice" has at its core the administrative decisions by public authorities that affect individual citizens and the mechanisms available for the provision of redress. These latter include tribunals, ombudsmen, complaints handlers, internal review and other forms of early dispute resolution.
4. For now, we are writing to thank all those who took part in the seminars or who helped in our discussions and the deliberations that informed our views. The help we have had, and the wide-ranging contributions others have made, were immensely valuable in shaping our thoughts. We want at the same time to give an early indication of the topics and issues that Trustees wish to fund. We will be issuing more detailed guidance notes and promoting them widely early in the New Year.

### **Administrative justice, not 'justice in administration'**

5. We recognise that some seminar participants wanted funding for general descriptive studies starting at the point of the initial claims or requests made of the state. Trustees thought that any work on initial claims would have to be placed in the wider context of public administration, with a wider range of

issues to be considered (resources, efficiency and so on). They were also concerned that it would not in any case be possible to measure 'unmet need', as both the concept and the operational measure of 'need' require the making of many assumptions. Finally, they were sceptical that this approach was practically do-able in a representative way even in a small number of areas with the resources the Foundation would have to hand.

6. With these difficulties in mind, the Foundation will seek to fund work that is squarely in the context of administrative justice, with *all* its complex links to initial claims, complaints and decision-making, rather than focussing on initial decision-making *per se*. We recognise that it is undoubtedly the case that better 'first order' decision-making is crucial. A programme of public administration might be of interest in time, but for the moment we propose a more limited agenda. We *are* however interested in the links between initial decision-making and subsequent claims, as can be seen below.

#### **Initial handling/ filtering selection of cases**

7. Though we will not fund baseline studies in public administration, the Foundation will seek to fund work on why some cases go forward while others – equally good – are not pursued. (see Cowan and Halliday, *The Appeal of Internal Review* – a Nuffield funded study that adopted a similar approach) . We plan to issue a call for work in this area early in 2007, starting from the view that it would be most fruitful to adopt a deliberately comparative approach, comparing different starting points, different types of problems and so on. Work that, for instance, compared different outcomes for seemingly similar cases according to their starting points, or the effects of representation or different kinds of help, or that examined the outcomes of different complaints procedures could be included. This type of work does not depend on any definition of "unmet need". Instead it employs a threshold defined by the claimant: he or she felt that the problem was great enough to take a least one step into seeking help. The Foundation will be interested to fund a number of projects in this area.

#### **Feedback to front-line decision makers**

8. As mentioned above, the Foundation will retain a clear analytic distinction between first-tier decision making and any subsequent appeals. But the feedback between them – how decisions made in 'administrative justice' mechanisms can be used to improve 'justice in administration' – is an important issue, and one that is likely to be the subject of our first call for proposals.
9. We know that Martin Partington has produced a descriptive overview of current feedback mechanisms for the Tribunals Service. The Foundation will build on this by commissioning further work, possibly both conceptual and

empirical, of individual feedback mechanisms. This might for example consider the differences between audit or inspection regimes and the various methods employed by various administrative justice mechanisms when providing feedback. We will be seeking to fund work based on ‘telling comparisons’ that might show why some forms of feedback are more likely to yield improvements in front-line decision making than others, and want to look at public reporting and scrutiny as well as the involvement of adjudicators in training. We would like too to examine further how other jurisdictions handle feedback in particular substantive areas of decision-making. In this area, the Foundation believes there is a particular need for work to consider disciplines other than law and the light they might shed on improving public administration and performance.

### **Work starting from questions about the choice of redress mechanism**

10. The seminar series raised a cluster of questions about the factors underlying the selection of different redress mechanisms, and whether the existence of one mechanism rather than another is a mere accident of history or whether certain features made certain types of mechanism more suitable in certain areas. When might an ombudsman be preferred over a tribunal, for example? What is the fact-finding role of various tribunals? Why is institutional independence valued at the outset in some circumstances but not others? When is resolution via negotiation or mediation an appropriate alternative to adjudication?
11. Initially such questions might best be addressed by a commissioned conceptual review, but they could also lead on to more specific empirical work of the type suggested below.

### **Questions about quality**

12. An additional area the Foundation wishes to take forward is work that would examine and empirically test some common assumptions about the value of certain mechanisms and about the relevance of criteria used to assess the quality of administrative justice decision-making. For instance, one very common assumption relates to the superiority of the oral hearing as a mechanism for testing the accuracy of evidence; we should like to fund work that explores this. And while consistency is a common criterion of quality, defining an appropriate level of consistency is problematic: too much consistency might indicate insufficient attention to the facts of the individual case or to ambiguity in some areas of the law; too little consistency raises other concerns. In this strand of work, we would like to move away from descriptive studies and use other, more innovative methodologies, including for instance peer review of cases, psychological studies as well as legal ones, and examinations of users’ views of procedural as compared to substantive issues.

## **How we will proceed**

13. The Foundation will start by issuing more detailed 'framing notes' of the range of issues we would be interested to consider, and issues that researchers would need to bear in mind. In all these areas, we will welcome comparative approaches: research that seeks telling comparisons between different types of problem, or the way different adjudication mechanisms seemingly handle similar sorts of problems or comparisons with the way other jurisdictions work. We will also actively encourage cross-disciplinary approaches, in which political scientists or psychologists or economists work with lawyers or empirical researchers who have studied legal institutions. We expect the first of these notes will be issued in January 2007, with notes for all four areas above available by mid-March.
14. The Foundation will be open for outline expressions of interest in these administrative justice topics in our normal way throughout 2007 and 2008, and possibly beyond, though in the case of some topics we may seek to commission a number of projects at one time. We will also actively commission work in some areas, especially where conceptual or analytic reviews are needed.
15. The Nuffield Foundation typically spends up to £500,000 per year on its 'Access to Justice' programme. Over the next two to three years, we expect a substantial part of this will go into the Administrative Justice Initiative. We will of course ensure that some funds are still available for other research in 'access to justice' and for practical projects.

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