

Administrative Justice Council: Workshop on administrative justice and outsourcing

On 13 January 2020, there was a workshop discussion on outsourcing and administrative justice with experts in administrative justice from the advice and ombudsman sectors. It was chaired by Robert Thomas of the AJC Academic Panel. The purpose of the workshop was to share knowledge and experience about how administrative justice works when public services are delivered by outsourcing companies and the implications of this. There was a wide-ranging discussion about the multiple ways in which the outsourcing of public services and decision-making influences and shapes administrative justice.

Traditionally, administrative justice is understood as concerning challenges by individuals to administrative decisions and public services taken and delivered by public bodies. However, both central and local government have increasingly outsourced such functions to outsourcing providers. Such providers – both private companies and non-profit organisations - increasingly play a greater role in making administrative decisions and delivering public services. It was also noted that there had been concerns raised about outsourcing. Examples include:

- health care professional reports in the benefits system produced by ATOS, Capita, and Maximus, which have been criticised by the Commons Work and Pensions Committee¹
- many local authorities have outsourced welfare decisions, such as housing benefit decisions, and other services to private companies and third sector organisations. In such instances, while the administration may have been outsourced, decision-making accountability still rests with the council.
- the outsourcing of tax credit compliance checks by HMRC to Concentrix Ltd²
- private equity owned residential adult social care homes
- private companies undertaking parking and traffic enforcement
- private companies such as G4S that operate immigration removal centres and the physical and verbal abuse of detainees at Brook House removal centre³

Outsourcing now accounts for an estimated one-third of all public spending. It amounts to a radical transformation of the British state with wider implications that have not been fully understood or explored. For instance, the traditional model of traditional administrative justice assumes that public bodies pursue the public interest, follow the law, and that they will be accountable. But these assumptions may well not apply in the context of “outsourced administrative justice”.

Other points included:

¹ <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/829/829.pdf>

² See <http://www.democraticaudit.com/2016/09/20/justice-outsourced-why-concentrixs-tax-credit-mistakes-matter/>

³ <https://www.bbc.co.uk/news/uk-england-sussex-50304234>

- There is nothing inherently flawed in the concept of outsourcing itself. Much depends upon specific arrangements. The outsourcing of some services can work quite well, but there are concerns about other outsourcing arrangements.
- A major concern is the accountability and transparency when government outsources functions to the private sector. Another issue is whether public bodies that outsource and commission services then also translate the principles of administrative justice, public law, and good administration into outsourcing contracts in order to ensure private providers comply with those principles.
- The Local Government and Social Care Ombudsman holds councils to account for actions of bodies acting on their behalf and is willing to name those bodies where appropriate.
- Advice sector representatives noted the potential for judicial review litigation into the operation of outsourcing schemes if there was systemic unfairness in their operation. There is concern about the general lack of judicial review against outsourcing providers that have been contracted to exercise public functions.
- There is often a long chain of organisations involved in outsourcing with sometimes no-one having to accept the moral weight of the decisions they were taking. Contracts do not necessarily include explicit or robust requirements for private companies to deal with feedback or complaints. It was unclear to users who they should complain to. Ombudsman schemes have restrictions on spending for advertising their role and have to rely on councils and other organisations signposting users to them.
- There is a concern that outsourcing can make it more difficult for users to navigate the redress system and to know how to make complaints and to whom.

Given that outsourcing operates across so many different areas, we ended up by suggesting three principles to ensure the effective of administrative justice in the content of outsourced services:

Principle 1: **Outsourcing should not disadvantage users.** The individual user should not be disadvantaged simply because a service has been outsourced. The same standards and principles of public law and administrative justice should apply across the board. Access to justice should not depend on whether a service is provided by a public or private organisation.

Principle 2 **Outsourcing should not reduce learning from redress.** The responsiveness of the wider system to successful challenges should not differ. The ability to learn from failure should not vary depending upon whether a service is directly provided by a public body or has been outsourced.

Principle 3: **Individual redress alone is not enough. Public bodies and outsourcing providers must assume responsibility for putting things right.** It is insufficient to rely solely on the individual user's right of challenge/enforcement as the sole means of putting things right. The concern is that individual redress alone may not necessarily grapple with the underlying issues. For instance, a social security appeal resolves the individual's case, but typically has no traction on the wider systemic issues. Both

public bodies that outsource services and those outsourcing providers need to take responsible for and focused upon system improvement when redress mechanisms suggest the need to do so.

Robert Thomas

AJC Academic Panel & University of Manchester