Early considerations for the establishment of OHPA – the style & format of adjudication

The Shipman Inquiry had been the catalyst for the establishment of OHPA.

The Inquiry had followed other Inquiries of Neale, Kerr-Haslam, and Ayling, and other high-profile cases such as Allitt and Ledward. The then Government responded to the numerous recommendations emanating from all of these, in particular accepting the need to separate adjudication from, initially, the medical profession.

At around the same time of the Shipman Inquiry, the Chancellor had asked Philip Hampton to consider the scope for reducing the administrative burden of regulation, to promote more efficient approaches without compromising regulatory standards or outcomes. The resulting report (Reducing Administrative Burdens, March 2005)[1] sought to raise the quality and effectiveness of the regulatory system, simplifying or consolidating processes.

Building upon these principles, a report, this time by the Better Regulation Task Force (Less is More, March 2005)[2] recommended a cultural change; to improve transparency and understanding by adopting a framework for managing regulation that provided a better balance between the creation of new measures and the simplification of existing rules and regulations.

Unrelated but relevant, in the early 2000s the Lord Chancellor established a review of tribunals, undertaken by Sir Andrew Leggatt. The resulting Leggatt Review (Tribunals for Users: One System, One Service, March 2001)[3] set out the need for reform, with the primary objectives of:

- making clear the complete independence of the judiciary and their decision-making, from Government,
- speeding up the delivery of justice,
- making processes easier for the public to understand, and,
- bringing together the expertise from each tribunal.

The Tribunals Service was created in April 2006 for the purpose of unifying administration of the tribunals system. Most of the changes resulting from the Leggatt Review consequently affected the operations of the tribunals rather than what happens at individual hearings. Operations spanned from provision of premises, training, and IT, to common standards and a presidential system to promote consistency of decision-making and uniformity of procedure. There was therefore, much synergy between the recommendations for the establishment of OHPA and the reforms the tribunals were to implement.

---

[1] Reducing administrative burdens: effective inspection and enforcement. Philip Hampton. March 2005. HM Treasury

[2] Regulation – Less is More. Reducing Burdens, Improving Outcomes. March 2005. A BRTF report to the Prime Minister

[3] Tribunals for Users: One System, One Service. Report of the Review of Tribunals by Sir Andrew Leggatt. March 2001.

The synergy does not end there. In 2010, the Ministry of Justice consulted on merger proposals, bringing together Her Majesty's Courts and Tribunals Services[4]. Whilst the purpose of the merger was primarily financial, other benefits of unification were identified:

- improved public understanding via a single point of access,
- greater utilisation of a shared estate,
- flexible deployment of staff, and opportunities to share best practice, and,
- opportunities for further efficiencies by increasing the use of back-office functions which in turn will improve efficiency on the front line.

It was against this backdrop of change and the various recommendations that OHPA considered the style and format that it might adopt for adjudication.

The Tribunals, Courts & Enforcement Act 2007 put in place a flexible tribunals structure which allows tribunals currently sitting outside the Ministry of Justice to transfer into the new system, as well as allowing new jurisdictions to be added. Since then, the Tackling Concerns Nationally working group opined that OHPA was akin to a tribunal and as such could sit under the Administrative Justice and Tribunals Council[5]. Our early focus was therefore placed upon AJTC with whom we had fruitful discussions. However, this was not to explore whether we should be located within the Tribunals Service from day one (although it should be acknowledged here that this was an aspiration for the longer term) but rather to consider the style and format adopted by the existing tribunals.

Subsequently, we went on to consider the style and format of disciplinary tribunals for other non-health professional groups such as solicitors, police, and actuaries. And finally, we considered how adjudication of health professionals is managed internationally.

The Tribunals Service

The Tribunals Service provides administrative support for the tribunals judiciary who hear cases and decide appeals. Within the Tribunals Service structure, jurisdictions are grouped under Chambers. For example, the Health, Education and Social Care Chamber comprises care standards, mental health, special educational needs and disability, and primary health lists. The General Regulatory Chamber comprises charity, claims management services, consumer credit, environment, estate agents, gambling appeals, immigration services, information rights, local government standards in England, and transport.

We considered the style of one jurisdiction from each of these two chambers, Primary Health Lists (PHL), and Estate Agents (EA), as both deal with the performance and practice of professional practitioners.

---

[4] A platform for the future. A consultation on a unified Courts & Tribunals Service. November 2010. Ministry of Justice

[5] Tackling Concerns Nationally: Establishing the Office of the Health Professions Adjudicator. March 2009. Department of Health

PHL is completely independent of the Department of Health, and is not accountable to the Secretary of State. Its decisions can be directly appealed against to a Judge of the Upper Tribunal. PHL hears applications or appeals from health professionals relating to locally managed performers lists held by Primary Care Trusts, and its panels normally consist of a Tribunal Judge, a Specialist Member, and a Member. The panels will only hold oral hearings into the matters referred to them when both the Applicant and Respondent want one.

Conversely, EA only hears appeals against decisions made by the Office of Fair Trading relating to an order prohibiting a person acting as an estate agent, an order warning a person that they have not met their duties under the Estate Agents Act 1979, or a decision refusing to revoke or vary a prohibition or warning order.

Professional Disciplinary Tribunals
Somewhat confusingly given the title, not all tribunals do indeed sit within the Tribunals Service but rather function as adjudicators within or external to a professional body or regulator. The Police Disciplinary Tribunal and the Actuaries Disciplinary Tribunal are equivalent to a healthcare regulator final stage fitness to practise panel or committee in that they reside within the respective regulator. Both have procedural rules updated in 2008. Their hearings are not held in public.

The Solicitors Disciplinary Tribunal (SDT) is constituted as a Statutory Tribunal under the Solicitors Act 1974. It adjudicates upon alleged breaches of rules or code of professional conduct, and has the power to strike off a solicitor from the Roll, suspend from practice, fine or reprimand. The SDT decisions can be subject of appeal to the High Court; the time limit for appeal is 28 days from the date of receipt of the Tribunal's Findings.

The SDT is wholly separate from and independent of the Solicitors Regulation Authority, which instigates over 90 per cent of the cases dealt with by the SDT. Hearings are usually in public, and the evidential procedures are broadly in line with those of the High Court.

The Law Society collects from individual solicitors an amount to fund the Tribunal as part of its exercise to collect fees in connection with the issue of practising certificates. (OHPA too needed to establish a funding mechanism, underwritten in full by the referring regulators, so there was also more for us to learn from here.)

Healthcare practitioner regulation in other countries
In 2009, the GMC commissioned a comparative study of ten international medical regulatory systems (Rand Corporation)[6]; a purposive sample of the countries of origin of the ten largest groups of non-UK qualified doctors registered in the UK. The published report describes a number of

[6] International Comparison of Ten Medical Regulatory Systems. 2009 RAND Corporation; Technical Reports

different medical regulatory systems, from a unitary state authorised body through to the decentralised polycentric systems where regulation is the prerogative of the medical associations. Unsurprisingly given the range of style of regulation, the extent of independence varies significantly. Although all countries included in the study have disciplinary procedures, a substantial variation in the structure of the bodies responsible was also noted.

The New Zealand Health Practitioners Disciplinary Tribunal hears and determines disciplinary proceedings brought against all health practitioners. Its hearings are held in public. The route of appeal is to the High Court. This was the closest equivalent to OHPA we found. It was also of interest that the New Zealand Tribunal routinely awarded costs against those whose cases it considered, as provision had also been made for OHPA to exercise a costs jurisdiction.

A preferred style & format for OHPA

There is a wide range of styles of adjudicating body, with no one format currently predominating. The consideration of the different professions was undertaken to review the processes and procedures utilised, and whether these sat well with the need for better, less burdensome regulation, and were transferrable to the health sector.

Having considered in detail the differing organisations and systems alongside, what was then, an urgent need to move final stage adjudication to an independent body, OHPA defined some outline criteria to shape its style and format. OHPA also pledged to speed up proceedings, and to deliver publicly accessible and transparent decision-making, not only bringing it in line with the Hampton principles, but also closely aligning itself with the Tribunals Service.

OHPA decided to adopt a format analogous to the Solicitors Disciplinary Tribunal. There are many similarities between the legislation, the relationship with the referring and professional bodies, and the overall approach to adjudication. In the longer-term, OHPA also hoped to work toward a more inclusive model involving all health practitioners more akin to the current New Zealand model.

A way forward without OHPA?

Returning to health professional regulation in the UK, the processes are well advanced when compared both with non-health professional regulation and health professional regulation at an international level. Where the UK regulators remain out of step is with the wider agenda to simplify and consolidate regulation.

Historically, healthcare professions have captured regulation and accumulated procedural rules without considering what perhaps might be simplified or consolidated. The Department of Health (DH) has contributed to this: it has neither made procedural change a legislative priority nor a simple exercise for those seeking to achieve it. It would certainly have assisted OHPA, and in the future could assist the individual regulators, if the DH adopted the BERR recommendations toward

deregulation, removing regulations from the statute book. Greater liberalisation, consolidation and rationalisation should bring the regulations into a more manageable form, and improve transparency and reduce costs.

In the absence of OHPA to introduce unification, and given the current economic climate, health professionals should look to the regulators to reduce their spending on adjudication. If organisations as large and culturally different as HM Courts and Tribunals Services can merge and share back-office functions and estate, and deploy their staff to manage need and workload, then why can't the regulators achieve this too?

Wendy Harris