

The “Big Society” and legal paradoxes

by James Hand and Pat Feast

The core themes of the big society have been summarised as “empowering communities, redistributing power and promoting a culture of volunteering” (Kisby, “The Big Society: Power to the People?”, *The Political Quarterly*, vol 81, no 4, 484). It can be seen to varying extents in such policies as neighbourhood planning, “free schools” and reform to the vetting and barring system. As the Prime Minister has noted, it “isn’t one single policy that is being sort of rolled out across the country...[but] a whole stream of things” in the form of an overarching mission (<https://www.gov.uk/government/speeches/pms-speech-on-big-society>). However, the progress of this theme has not been smooth. As Professor Rodney Barker has stated on an LSE blog:

“Is Big Society rhetoric just that, a froth concealing the reality beneath? There are clear contradictions between what the Cameron government says it wants, and what it does. Voluntary action is valued in the rhetoric, and deprived of funding in practice. Choice is applauded in education whilst the ability of 16 year olds to exercise that choice is undermined by the abolition of Educational Maintenance Grants.” (<http://blogs.lse.ac.uk/politicsandpolicy/big-societies-small-platoons-and-the-power-of-ideology/>)

Indeed, if we take the “Big Society” to go hand-in-hand with increased volunteerism, proposed and actual changes to parts of the legal infrastructure are directly at odds with the mission. This article outlines some of those diminishment to volunteerism.

MAGISTRACY

As Alan Lambert noted in “650 years of the office of Justice of the Peace/Magistrate”, (2011) *Amicus Curiae*, issue 88, at p 9: “[t]he magistracy in England & Wales and the UK is unique, as the only lay judges in the world with the power to sentence people to prison”. He further noted the response of a Lord Chief Justice when the future of the lay magistracy was raised: “where will they find 30,000 volunteers to deal with 95 per cent of all cases coming before the court, and what is more, do it for nothing?” However, the numbers of lay magistrates has been falling in recent years. In 2008, there were 29,419 magistrates in England & Wales (figures from <http://www.judiciary.gov.uk/publications/>).

In the following years, the numbers fell at first very slightly (by 0.5% in 2009 and 2.3 in 2010) and then more significantly (by 5%-7% in each of 2011, 2012 and 2013) so that by 2013 the figure stood at 23,401; a decline over five years of over 20 per cent. The number of District Judges (Magistrates’ Courts) – (including Deputy DJ(MC)s), the lay magistrates’ professional counterparts – has fallen by only 5 per cent over the same period, with the number actually rising in 2013.

The widely reported fall in crime in recent years – and the increase in the use of fixed penalties – may account for the general fall but not the disproportionate fall in the numbers of volunteers. While the percentage of minority ethnic magistrates and District Judges (Magistrates’ Courts) is about the same at around 8-10 per cent over the years, there is a significant difference in the gender balance: in 2013 women comprised 29 per cent of District Judges (Magistrates’ Courts), 32 per cent of Deputy District Judges (Magistrates’ Courts), but 52 per cent of the volunteer magistracy.

In a Ministry of Justice commissioned research paper (*The strengths and skills of the Judiciary in the Magistrates’ Courts Ministry of Justice*, Research Series 9/11, revised 2013), it was found that only with regard to “either-way” offences was there a statistically significant difference between the time that the professionals and the volunteers took to deal with the cases. Not unsurprisingly, the lay bench of three took considerably more time to reach a verdict and consider the sentence than the district judges acting alone. The report shows that the professional “magistracy” costs more than the lay magistracy for summary and “sending” hearings, but suggests that a District Judge (Magistrates’ Court) can dispense with an either-way hearing more cheaply.

However, this is only the case when greater costs are levied on the lay bench than on the professional one with regard to the use of premises, and an amount to reflect volunteer time is included. The latter is justified on the basis that volunteer time is a valuable resource drawn on by the courts and so should be included.

EMPLOYMENT TRIBUNAL REFORM

While the reduction in the magistracy may or may not be a deliberate attempt to reduce the role of the volunteer, the reduction in lay membership of employment tribunals was explicit government policy and full abolition has been mooted. Employment tribunals were designed to provide less formal justice and be less legalistic than the courts. This was reflected in their composition: alongside the legally-trained employment judge (formerly chair) there would be two “wing members” who would have practical experience of either running businesses or representing employees’ interests.

Following a consultation in 2011, and contrary to the representations of the majority of the respondents, the government decided to allow unfair dismissal cases to be heard by an employment judge sitting alone (by the Employment Tribunals Act 1996 (Tribunal Composition) Order 2012 (2012 No 988)) as was already the case with, for example, pre-hearing reviews and unlawful deduction claims. The former President of the Employment Tribunals, Judge David Latham, has proposed going further and scrapping the non-legal membership of tribunals and replacing them with the option to draw on a panel of expert assessors who could advise judges in particular cases.

Although unfair dismissal cases historically make up a significant proportion of employment tribunal cases (there were, for example, 8,700 such cases heard in 2011/2012), the removal of the volunteer wing members may have limited effect given the highly restricted room for discretion in determining reasonableness in unfair dismissal (as the tribunals are directed not to think what they would have done as reasonable people but whether any reasonable employer could have dismissed in those circumstances applying a range of reasonable responses test). The same cannot be said of discrimination claims (which numbered a smaller, but still sizeable, 3,449 in 2011/2012). These tribunals are instructed to consider for themselves, taking account of working practices and business considerations, what is reasonable in the case. The insight of the lay members as an essential component of the Employment Appeal Tribunal has also been dispensed with (Enterprise and Regulatory Reform Act 2013, s 12).

HOUSE OF LORDS REFORM

The Coalition Government’s 2011 White Paper and draft Bill on House of Lords Reform (Cm 8077) in effect proposed the abolition of a second chamber composed of part-time, as well as some near full-time, volunteer members (who receive an allowance) and its replacement by a new smaller House of full-time, paid, predominantly professional politicians. The breadth of current and past experience the House of Lords can draw on is one of its strengths, and the mode of appointment and the nature of its appointees has meant that it is not only a

much cheaper House to run than the Commons but that it is also a more diverse House (not least in terms of sex, race and religion).

As James Hand noted in “The House of Lords Reform White Paper and draft Bill 2011 and a simpler alternative”, (2011) *Amicus Curiae*, issue 88, at p 3:

“In the era of the fostering of the Big Society, it seems somewhat perverse to professionalise and severely narrow down a body of highly talented, experienced and cost effective volunteers, with members who, while not receiving the honour of a peerage, would receive nigh-on £900,000 (at today’s prices) in salary over their likely 15 year term”.

A House where experts can contribute and retain their previous jobs, rather than be obliged to give up outside interests, provides a useful counter-balance to the way the Commons is moving (where even very much secondary outside jobs may well be prohibited in the near future). While the proposals in this White Paper were highly criticised and subsequently dropped, following a Conservative rebellion and Labour refusing to agree a timetabling motion, they remain very much on the horizon.

VOLUNTEER ADVICE SERVICES

In April 2013, the Legal Aid, Sentencing and Punishment of Offenders Act came into force, with an aim to cut civil legal aid budget by £320 million within a year. Before eventually being passed by a narrow majority, the bill was defeated 14 times by the House of Lords. The effect of the cuts was to remove legal aid for the majority of cases including some housing and benefit cases (those areas exempt from the cuts are some divorces, welfare benefits, clinical negligence and child contact; in relation to immigration, only those cases involving asylum are eligible).

According to the report *Counting the Cost: Advice Services and the Public Spending Reductions* (Bill Sargent Trust, September 2013), 60 per cent of local advice providers reported a drop in their income between 2011/12 and 2012/13 and 60 per cent expected their income to drop in 2014/15. During the same period however providers also identified an increase in requests for their services and commented that workloads had become more complex and time consuming. The same report identifies that most providers are facing:

- a decrease in resources;
- an increase in the number of clients; and
- an increase in the time spent with each client.

While advice charities strive to do more with less, there can be a counter-intuitive effect on volunteers: to quote a Trustee of Bath and North Somerset Citizen’s Advice Bureau, volunteers

“are the backbone of the service and some of them are brilliant but they are reliant on staff. If you have fewer staff, you will have fewer volunteers.” (<http://www.bathchronicle.co.uk/Petition-Bath-advice-bureau-funding-cuts-tops-1/story-19965270-detail/story.html#KzPLTVQ3cFHBSbam.99>).

This becomes all the more true as the complexity of work devolving on advice services increases. Portsmouth CAB have reported that their LSC-funded welfare benefits specialists achieved a 75 per cent success rate in cases proceeding to tribunal, compared with around 38 per cent nationally: “the expertise lost in this area of law is irreplaceable, as is the support and encouragement those specialists gave to our volunteer advisers.” While the Low Commission advocates a greater use of volunteers, there is a need for an infrastructure to be in place and so it calls for greater funding as well (*Tackling the advice deficit - a strategy for access to advice and legal support on social welfare law in England and Wales*, the Low Commission, January 2014). At the University of Portsmouth, which pioneered student CAB advice work as an assessed unit and subsequently developed wider links, we have seen a reduction in opportunities for volunteering in respect of such things as family support, consumer protection and mediation as agencies with whom we previously worked have lost funding (although this has been mitigated by our ability to extend support available via our own free generalist legal advice clinic and other specific clinics).

CONCLUSION

There are many other areas, not least those which are less explicitly law-related, which this article has not touched on. For example, the number of school governors is declining through both the process of academisation (which frequently sees a reduction in the size of governing bodies) and potentially

through the process of reconstitution under the School Governance (Constitution) (England) Regulations 2012, which includes the injunction that governing bodies should be no bigger than necessary. In this case, a reduction in vacancies is not the only problem because (as is also the case with, for example, serving as local councillors) there is a pronounced shortfall of applicants.

While a big society may seek to promote volunteering and cuts in funding may appear to open the door to a greater reliance and empowerment of volunteers, the legal world can show that either due to policy or the depth of cuts this may not be the case on the ground. Volunteers can be a highly cost-effective, inclusive and well-rounded source of manpower, but for them to be able to contribute there have to be vacancies in the first place and sufficient professional infrastructure – which they can both be supported by and support. Organisations within the voluntary sector who have a wealth of experience in dealing not only with individual issues but interacting with other agencies and with sharing information across a range of subjects need to be fully supported by secure funding or a “Big Society” will remain largely a dream with small pockets of excellence.

James Hand

Associate Senior Lecturer, School of Law, Portsmouth Business School, University of Portsmouth

Pat Feast

Senior Lecturer, School of Law, Portsmouth Business School, University of Portsmouth