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# THE OMBUDSMAN, TRIBUNALS AND ADMINISTRATIVE JUSTICE

## SECTION

### **Evolving standards in the complaints branch**

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It is well known that dispute resolution schemes in the complaints branch, including ombudsman schemes and complaint-handlers, operate a very different dispute resolution methodology to that typically applied in the courts and tribunals. This methodology is widely accepted, but concerns have always existed regarding the fairness of the procedural safeguards deployed in the complaints branch. This article investigates two specific areas of procedural practice in the complaints branch: the openness of the sector in terms of the decisions that it makes and the grounds upon which they are made; and the capacity to review decisions made in the sector. The article argues that there is evidence that, whilst further refinement could be introduced, procedural safeguards in the sector are more robust than hitherto has been understood.

**Key words:** administrative justice; procedural safeguards; transparency; internal review; ombudsman.

#### **Introduction**

Austerity politics is helping to change the justice landscape in the UK. The combined effect of such measures as the promotion of mediation and arbitration in family law (e.g. Norgrove 2011), reduction in legal aid expenditure, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and more onerous access restrictions on future claimants for judicial

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review (Ministry of Justice 2012, 2013), is towards reducing our reliance on the courtroom for the provision of justice.<sup>1</sup> It is doubtful that this trend will be reversed in the near future, as it builds upon a gradual shift away from court-based litigation which has been occurring for some years (Cornford and Sunkin 2001, Resnick 2004, Mulcahy 2013).

One consequence of this overall policy move away from the courts is that ombudsman schemes and complaint systems in general have become increasingly central figures in the provision of both civil and administrative justice. The importance of the role performed by this sector, what is referred to in this article as the complaints branch, has been an evolving theme for at least 50 years. The EU Directive on alternative dispute resolution for consumer disputes (Directive 2013/11EU) will further heighten the centrality of the role of the complaints branch.

However, concerns remain about the capacity of the complaints branch to handle its upgraded role and a number of studies have revealed areas where significant improvement is required, particularly in the administrative justice system (e.g. NAO 2005, Simmons and Brennan 2013). Many of the issues facing the complaints branch are practical or cultural in nature, such as the need to tackle its alleged complexity, to enhance its accessibility and to make better use of the information derived from complaints to drive improvements in service provision.<sup>2</sup> But another strand of concern is the quality of justice provided. In the ombudsman sector, the work of several ombudsman schemes has been subject to criticism and scrutiny over the years by former users of their service, and this has included unease with the fairness of the processes adopted.<sup>3</sup> Such scrutiny of the ombudsman sector has been repeated in Parliament on more than one occasion (e.g. CLG 2012).

Partly in response to such critical exposure, ombudsman and complaint-handling schemes actively seek ways to strengthen their model of dispute resolution and perceptions of it. This article explores two such strategic initiatives currently being pursued in the complaints

branch which have received little if any attention outside of the complaint-handling community itself. First, some ombudsman schemes have adopted a policy of publishing on their website all the decisions that they make. The objective here is to increase transparency in decision-making. Second, whereas almost all complaint systems have for some time had internal processes in place to consider complaints against their decisions, several schemes have moved towards adding an external element to this process. Here the aim is to promote accountability to uncover faults that occur with the service provided.

The article starts by outlining the core theoretical problems involved in establishing appropriate standards in the complaints branch of our system of justice, and considers the issues of transparency and internal review processes in more detail. Evidence of current practice in the complaints branch is then presented. Overall, the argument is made that a change in practice is occurring in the complaints branch. Moreover, although neither the move towards enhanced transparency or more objective internal review is particularly radical when compared to the procedural safeguards embedded within the legal process operated in courts, both herald a significant progression in the standards adopted in the complaints branch.

### **Procedural standards applied in the complaints branch**

This article refers to standards in the complaints branch generally, but is primarily focussed on two distinct types of institution: ombudsman and complaint-handling schemes. For the purposes of this article, reference to ombudsman schemes include dispute resolution bodies which are independently appointed and represent the last stage in the complaints branch.<sup>4</sup> By contrast, reference to complaint-handling schemes includes:

- Intermediate complaint-handlers that have been set-up in a quasi-independent fashion and are contractually employed by a service provider to investigate complaints about them;

- Complaint-handlers set up and appointed by a Government department;
- Industry complaint-handling schemes set up by a service sector to receive complaints about the service provided in that sector, but which for one reason or another lack full independence.

Ombudsman and complaint-handling schemes perform similar roles in a number of respects, in particular they have been designed to operate in a manner which is distinct from the methodology familiarly employed within courts and tribunals. This methodology is accompanied by different procedural expectations which for some raise questions about the fairness and appropriateness of dispute resolution in the complaints branch.

The differences in process adopted in the courts and the complaints branch respectively are largely attributable to the subtly different objectives being pursued. While the primary and almost sole objective of the courts is to provide for justice in a demonstrably fair manner that inspires public confidence, the goal of the complaints branch is usually understood to be more pragmatic and possibly more in tune with the socio-legal context that the justice system operates within. The core objective of a complaint-handler can be summarised as the resolution of disputes in a manner which is accessible and fair to all complainants, applies a methodology which is inquisitorial and not adversarial, and provides a cost-efficient and prompt method of dispute resolution.

The embedded role of the complaints branch in modern systems of justice has been given strong support by the EU directive on alternative dispute resolution for consumer disputes.

As advocated by the European Parliament in its resolutions of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters and of 20 May 2010 on delivering a single market to consumers and citizens, any holistic approach to the single market which delivers results for its citizens should as a priority develop simple, affordable, expedient and accessible system of redress. (para.8)

Such goals of simplicity, affordability, expediency and accessibility seem to require a choice of redress mechanisms for a wide variety of disputes. Indeed, many of the benefits of the dispute resolution method deployed in the complaints branch would likely be lost were the procedural requirements adopted by the courts to be imposed upon the complaint-handling community. To paraphrase the words of Lord Justice Mummery in a case on the Office of the Independent Adjudicator, if the ombudsman is to be required to:

... act as a surrogate of the ... court ... it is difficult to see what point there would be in having a scheme, which was established ... not as another court of law or tribunal, but as a more user friendly and affordable alternative procedure for airing ... complaints and grievances. The judicialisation of the [ombudsman] so that it has to perform the same fact-finding functions and to make the same decisions on liability as the ordinary courts and tribunals would not be in the interests of [complainants] generally [Shelly Maxwell v The Office of the Independent Adjudicator for Higher Education [2011] EWCA Civ 1236, at [37-8] per Lord Justice Mummery].

But although complaint-handling schemes can legitimately operate differently, fairness in the resolution of disputes remains paramount for all the usual reasons, above all in order to retain public confidence in the process. It is important, therefore, that due process is embedded within complaints processes somehow, but it is not necessary for it to be implemented in the same manner as the judicial method. This article examines the efforts of the complaint-handling community to demonstrate and deliver due process in two fundamental respects: transparency of decision-making and dealing with complaints about its service. In both areas, well-versed concerns about the complaint-handling process exist.

### **Transparency in decision-making**

Many of the procedural concerns that are sometimes expressed about the complaint-handling process are encapsulated by the criticism that it lacks transparency. Decisions are not made in open court and most of the communications between the complaint-handler and the respective parties take place in private and without any required notice to the other party. Decisions are arrived at by the complaint-handler on the basis of the information that they have received, following inquiries conducted of its volition. In the public sector at least, complaint-handlers also make recommendations as to remedy in the knowledge that often the body complained against has the discretion whether or not to implement the remedy. The concealed nature of this process leads to a suspicion that an element of negotiation between the complaint-handler and the body complained against might enter into the process of finalising recommendations, possibly to the detriment of the complainant. Such concerns are heightened by the lack of procedural right for the respective parties to cross-examine the arguments of the other. Indeed, for the complainant, once the complaint has been submitted he or she is duty bound to rely upon the integrity and competence of the complaint-handler in the resolution of the dispute.

The opaqueness of the decision-making process is made more problematic by the lack of detail in the criteria by which decisions are arrived at. Complaint-handling schemes tend to work off a remit that grants them significant flexibility in the manner in which they come to their findings. Public services ombudsman schemes can make findings on the grounds that ‘maladministration’, ‘undue hardship’ or ‘service failure’. For many complaint-handling schemes the list of grounds offered is longer but does not necessarily add much by way of finer detail. Beyond brief descriptions, the grounds for finding administrative fault have never been detailed in law, either by statute or the courts, and leave the complaint-handler with much flexibility in interpretation and application. While the technique is justifiable (Buck et al 2011, chs.2 and 4), the process retains a mysterious element which is hard to explain to the

user and thereby in conflict with the supposedly user-friendly approach the schemes are trying to embrace and represent.

Finally, not only are the grounds by which decisions are made rather loose, but complaint-handling schemes do not operate a system of precedent. Albeit it is inevitable that equivalent investigations will lead to a certain degree of institutional knowledge and shared understanding developing internally in a complaint-handling scheme, such shared knowledge is not necessarily made available to potential users. Nor is there a body of what might be termed ‘ombudsmanprudence’ equivalent to the study of legal cases that might support a wider understanding of the interpretations applied by complaint schemes. In this scenario, the allegation made against complaint schemes that is hard to rebut is that inconsistent decision-making is a probable outcome.

### **Dealing with complaints against complaint-handlers**

Another familiar concern with complaint-handling schemes is that they do not contain an adequate opportunity to challenge the decisions made by compliant-handlers. This is a critique which applies more to ombudsman schemes than other complaint-handlers. Often with complaint-handlings schemes, once the decision is made there will be a right to pursue a complaint afresh with an independent ombudsman.

Ombudsman schemes in the UK can be subject to judicial review through the courts, but as opposed to an appeal process the purpose of judicial review of an ombudsman scheme is to test whether or not the ombudsman has exercised its powers in accordance with the law. Further, the success rate for claimants through judicial review against ombudsman schemes is particularly low, suggesting that the judiciary have established a very high level of deference to the decision-making of ombudsman schemes.<sup>5</sup> This does not necessarily render the process an ineffective accountability route, as studies have found that judicial review proceedings do



often bring about a changed response from public bodies in out of court settlements (Bondy and Sunkin 2009). Similarly, one study has revealed that as a result of judicial review proceedings brought against ombudsman schemes, out of court settlements have led to investigations being reopened as a result (Thomas et al 2013, p. 72).

Nevertheless, given the cost and general inconvenience to the complainant of commencing judicial review proceedings, it is unwise to place too much reliance on it as the solution to ombudsman accountability (Buck et al 2011, pp. 175-177). Moreover, the frustration for users of the ombudsman with existing arrangements is that they do not allow for the merits of the decision of the ombudsman to be tested in full. After all, ombudsman schemes are as capable of fallibility as any other method of dispute resolution, and given that complainants may not get a significant opportunity to participate in the ombudsman investigation it can appear unfair that they are also denied the means of effective appeal.

For the merits of an ombudsman decision to be capable of challenge an appeal process would be required which allowed a considerably wider array of factors to be considered than in judicial review. But such an appeal process is generally thought inappropriate for an ombudsman system as it contradicts the objectives that underpin the introduction of ombudsman schemes and, where applicable, their current legislative design. Several arguments are regularly raised in objection to including appeal processes within ombudsman arrangements.

First, were there to be a process of appeal which allowed for a full reconsideration of all aspects of the decision of the ombudsman process and the overturning of the discretionary judgment of an ombudsman, it would risk undermining the institution's credibility. Without a thorough filtering process to restrict the flow of complaints to the appeal stage, the possibility would arise of the ombudsman process being used simply as a stepping stone to the appeal stage. Moreover, it is uncertain what that filtering process could entail, other than to apply

much the same standards already applied in judicial review, ie the existence of strong evidence that the ombudsman had erred in law.

A second objection follows from the first, namely that a right of appeal might lead to a judicial process being super imposed on the ombudsman process. If the appeal process allowed for the respective parties to interrogate evidence, cross-examine the arguments of the other side and re-open all aspects of the ombudsman's investigation, then this arrangement would be entirely incompatible with the ombudsman role and method. The ombudsman's work, therefore, would be trumped and overridden by a fresh form of dispute resolution. By contrast, the outcome of an unfavourable judgment in judicial review is that the ombudsman is required to reopen its investigation but control of the final decision is retained by the ombudsman. Thus in judicial review the work of the ombudsman is called to account but not replaced.

One response to the two previous objections might be that the appeal route operated could be to another ombudsman scheme, a form of 'super' ombudsman, but here two further generic objections apply.

First, any appeal process built into an ombudsman scheme would lead to disproportionate dispute resolution if it allowed for an additional stage to occur after an ombudsman investigation had already been completed. The prospect would arise of a complaint being considered and rejected first by an internal complaints process, then possibly by an intermediate complaint handler, thereafter by an ombudsman and then by an appeal, with presumably the potential for judicial review to follow.

Finally, an appeal process would undermine the "last resort" role of an ombudsman system, not least the benefits of finality. The ombudsman is a scheme specifically designed to provide a final independent conclusion to an administrative justice dispute, subject to the

capacity for judicial review. This objective would be destroyed by an appeals process and would extend even further the timeline for resolving administrative justice disputes.

Arguments for creating an appeal stage in the ombudsman process, therefore, run against the background goal of establishing an overall system of justice that allows for a range of different dispute resolution processes appropriate for the different forms of dispute that occur. Accordingly, where Parliament has made a decision not to establish a bespoke form of tribunal to deal with complaints against service provision and instead the primary grievance handling route is through an ombudsman, then the concept of building an appeal route into the ombudsman arrangement appears contradictory and undermining if that appeal route is to take a judicial form. Further, even if the form of appeal process operates in line with the same ombudsman methodology as the ombudsman being appealed against, it leads to the formation of a system that is both costly and time-consuming. There is also the likelihood of significant negative side-effects as justice gets delayed and disproportionately weighted towards appealing complainants who are unwilling to accept the administrative justice determinations that two or three different complaint processes within the system have delivered. Overall, the pressure of an appeal process on ombudsman schemes might be to increase costs and slow down proceedings.

But securing satisfactory accountability of ombudsman schemes is an issue of constitutional concern, as well as inextricably linked to the objective of securing fairness in decision-making. As a public body with considerable discretionary power to investigate disputes of considerable value to complainants and the bodies investigated alike, the need for some form of scrutiny of ombudsman decisions is strong.

### **Raising the standards: developments within the complaints branch**

The previous section identified potential weaknesses in the model of dispute resolution employed in the complaints branch, but also argued that the very different standards of fairness that apply in the complaint-handling process to that adopted by the courts are defensible. This is a conclusion that has been supported on numerous occasions by the courts (Buck et al 2011, pp.175-177), leading to the argument that the status of the complaints branch within the overall system of justice is increasingly of an embedded and constitutional nature (Abraham 2008).

However, even if the status of the complaints branch is strong, there remains an onus on schemes within it to operate to the highest standards possible within the confines of the logic of the role that they are set out to perform. This article explores current practice in the complaints branch in two distinct respects, to inquire whether standards in the sector are more robust than previously understood.

## **Openness**

In meeting the challenge to raise standards, one response that could be deployed by members of the complaints branch is to be more open about the results of their work and the grounds upon which they make decisions. With most schemes, while there is an obligation to notify the respective parties of the reasons for a decision, there is no obligation to publish those decisions more widely. In the past, practice in this area has varied considerably from scheme to scheme, with for many years publication of decisions restricted by the costs of publication and the likelihood of anyone paying much attention to the results. The Parliamentary Ombudsman and Health Service Ombudsman (PO/HSO), for instance, for years published a quarterly digest of reports completed but stopped the practice in 2001 (Parliamentary Ombudsman 2002). Since then selected extracts from reports have been reproduced in the annual reports and others have been reproduced in special reports, but many individual

investigations have gone unpublished. Until very recently, the Local Government Ombudsman (LGO) has adopted a similar approach, using selected cases to illustrate or explain the work of the office in digests of cases or factsheets, but has not offered access to the full range of completed investigations. The uncertainty surrounding decision-making in the sector is made more marked by the trend over time towards resolving complaints at the pre-report stage, often by way of a letter rather than a formally completed report (Buck et al 2011, ch.4). The outcomes of such early redress have often not been published.

Transparency is frequently argued as the cure to governance problems and one should perhaps be wary of overstating its remedial qualities. But the strength of the connections between the benefits to be gained from transparency and the perceived weaknesses in the complaint-handling operation do provide strong grounds for believing that more openness about the decision-making process of complaint-handlers could significantly improve confidence in complaint-handling schemes.

One of the key accusations that has been levelled at complaint-handling schemes is that there is a lack of evidence of consistency in decision-making, leading to further concerns that decision-making can be arbitrary. Publishing all decisions offers complaint-handling schemes a number of means by which to provide a riposte to this critique. Open access to all decisions made might, for instance, demonstrate the heavily context dependent nature of decision-making in the complaint-handling process. In other words, it might reveal how difficult comparing different cases really is and how hard it is to substantiate any accusation of inconsistency. Likewise it might demonstrate the potential futility of operating a doctrine of precedent. Alternatively, an opposite result might come about that reveals that comparable cases can be identified with sufficient regularity to enable an assessment of whether or not consistent decision-making does occur within complaint-handling schemes. If there is sufficient comparability of complaints handled then consistent decision-making should be an

essential aspiration of a complaint-handling scheme, with that goal being facilitated by robust internal quality control processes to achieve consistent outputs. Transparency, therefore, will either have the benefit of revealing the consistent nature of decision-making that exists or provide the added motivation needed to force complaint-handling schemes to upgrade their internal quality control processes to achieve consistency.

Similarly, transparency in decision-making could directly address another generic concern with the complaint-handling process, namely that not enough is known about the reasoning behind the decisions made and the perception that the process is too subjective. The degree of discretion and interpretation implicit in the complaint-handling model is significant, but the process is supported by a strong onus on the complaint-handler to support his/her decision with good evidence that rationally explains the final decision according to overall principles of the scheme. With the output of the complaint-handling process on public display and supported by evidence of sound reasoning, it would be much harder to dismiss the work undertaken as unprincipled.

Finally, transparency in decision-making might also help explain, and provide more meaning to, the principles that complaint-handling schemes are working towards. Such messages already exist on the websites of most complaint-handling schemes in the form of general guidance, fact sheets and other efforts to inform the user of the approach adopted within a scheme. Matching these claims to a body of completed investigations is the most obvious way of demonstrating the coherency of the thought-process that goes into resolving disputes in complaint-handling schemes.

Overall, a policy of publishing decisions made within a complaint-handling scheme should not aspire to replicate all features of the classic legal approach. In particular, requiring the reasoning to be applied to follow precedents goes against the standard complaint-handling method which has always sought more flexibility. Nevertheless, publicising more detailed

guidance on the criteria applied in making decisions, alongside publishing decisions, might be beneficial in committing complaint-handlers to demonstrate an appropriately directed rational justification for their decision-making. The existence of the internet provides the means of deploying such a strategy which overrides many of the concerns about the practicality of making such information available, as might have existed previously.

### **Internal and external review**

As argued in an earlier section, there are very sound reasons for not conceding to the need for an appeal process to be embedded within ombudsman schemes. However, in a bid to promote accountability, most ombudsman schemes have voluntarily pursued the option of introducing their own in-house complaint processes to deal with complaints made against them. Internal review processes risk increasing the costs of the service provided and delaying further the point at which a complaint can finally be closed, nevertheless, they can be designed to meet some of the other reasons used to justify not including appeal processes within ombudsman schemes.

First, as will be described shortly, most ombudsman schemes have devised guidance on which complaints will be accepted for internal review. This strategy has allowed a rational filtering process to be integrated into the internal review arrangement to prevent it becoming overloaded.

Second, almost all such processes make it clear that the purpose of the internal complaint process is not to reconsider the merits of the case. At its most challenging, the internal complaints process is designed to identify those investigations that may need to be reopened because of some flaw in the initial investigation or new information has come to light that was not previously taken into account. It might be argued that this process only replicates the task undertaken in judicial review, and in an inferior form. The advantage of the internal

review process though is that it offers a significantly more realistic option for the complainant, as evidenced by the numbers of such reviews that take place when compared to claims for judicial review,<sup>6</sup> and does not affect the right of a complainant to pursue a judicial review.

Third, the process of review does not invite an entirely new set of criteria or a separate forum to override the previous ombudsman investigation. Instead, if the request for a review is upheld, the process may lead to the decision of the ombudsman being slightly altered or the original investigation reopened. Such a remedial approach allows the integrity of the ombudsman model to be preserved.

An internal process of review cannot achieve the same appearance of fairness as an external review process. Thus the internal review may be a genuine attempt to bolster the legitimacy of ombudsman decision-making, but it will always suffer from the perception that the process is inherently bias towards the original decision-maker. This is a difficult argument to counter but, in terms of improving the soundness of decision-making within ombudsman schemes and identifying flaws that may otherwise not yet have been revealed, there are three reasons to be optimistic about the value of the internal review solution.

First, the statistics that are now being published by ombudsman schemes as a matter of course suggest that internal review processes do reveal flaws and do lead to remedies in favour of the complainant.<sup>7</sup>

Second, some ombudsman schemes have taken the concept further and employ an external person to act as their complaints reviewer. Given that such arrangements are set up on a contractual basis they cannot be considered as equivalent to a full independent complaint route, but it is an interesting innovation worthy of further investigation.

Finally, if one considers the way that many ombudsman schemes have evolved, there exists a strong interest on the part of the head of the scheme, namely the ombudsman, in using the internal review processes to enhance the control arrangements within the scheme. In



days gone by, it would commonly have been the case that the ombudsman would have signed off the vast majority of resolved complaints and have been actively involved in their consideration. In other words, there was an in-built incentive for an ombudsman not to expose his/her decision-making to external scrutiny beyond what was necessary to comply with the law. Today, however, most of the large scale ombudsman schemes operate a very different managerial structure with a considerable amount of delegated responsibility built into them. One result is that most ombudsmen handle very few complaints themselves and are preoccupied with the higher level responsibility of ensuring that the external profile of the scheme is healthy and the internal business design of the organisation is fit for purpose. With regard to both core aspirations, a robust internal review process provides the ombudsman overseeing the scheme with an important additional tool of quality control with which (a) to find out if decision-making within her organisation is flawed and can be exposed if necessary and (b) to provide an added element of pressure on staff to maintain high standards.

### **Current practice in the complaints branch**

To what extent have these ideas as to best practice in complaint-handling been embraced in the complaints branch of the justice system in the UK and Northern Ireland? In order to find out, this article uses as its main point of reference the membership of the Ombudsman Association (OA).<sup>8</sup> The OA is a representative association and is widely considered the UK's dominant authority on complaint-handling with over sixty members, albeit not all are UK or Northern Ireland schemes. The OA is a relevant source of authority not just because of the range of its membership, but also because of its declared aspiration. Amongst other things, the OA's objects are to 'define, publish and keep under review criteria for the recognition of ombudsman offices by the Association' and to 'facilitate mutual learning between schemes and to provide services to members designed to develop best practice'.<sup>9</sup> The OA, therefore,

aspires to promote standards in the field, with the most significant manifestation of this work the Criteria which are used to test membership applications to the Association (Ombudsman Association 2011). In the absence of any detailed statutory or judicial instruction on the standards that should exist in the complaints branch, the OA is a natural starting point.

In this study, the work of the OA towards standards in the sector is not fully evaluated as it only offers limited detail on both the issues of transparency and internal review. In one sense this is a frustrating outcome, but the OA is a voluntary association of complaint schemes and its membership is made up of very different schemes in terms of size, remit, authority, history and status. Partly to facilitate such diversity, the OA has made it clear that its role is not to act as a regulatory organisation, but instead one that promotes and encourages best practice through internal debate and the spread of ideas.

To get a better understanding of how the complaints branch deals with the issues of transparency and reviewing complaints made against them, therefore, direct reference must be made to existing practice. To demonstrate the variety of practice in the sector, in the research for this article we looked at a large proportion of the membership schemes of the OA. Some OA schemes were excluded from analysis due to difficulties in accessing the relevant information,<sup>10</sup> but additionally several non-OA schemes were included in the study.<sup>11</sup> This latter collection of complaint-handlers demonstrates both the lack of coordinated oversight of the sector and the range of different bodies that are involved in complaint-handling.

Overall, forty five schemes were tested to ascertain their publically stated policy on the two areas outlined above: transparency and internal review. The information that formed the basis of this study purely referred to information that is readily available on the website. This was a deliberate choice for the reason that for both categories of inquiry – transparency and internal review – the value of the additional procedural safeguards would be much reduced if

not made publically known. In turn, we have taken the website as the best proxy evidence for a scheme's willingness to make public its approach to transparency and review.

In the absence of any formal set of standards in the sector, OA guidance and wider best practice publications on complaint-handling were reviewed to identify relevant procedural safeguards frequently cited as examples of good practice (eg PHSO 2007, LGO 2009, SPSO 2011). From these sources, a series of procedural aspects enmeshed within the complaint-handling process were selected as relevant areas for scrutiny. The following analysis explains the rationale for those choices and the practice currently adopted within the complaints branch. Other choices of analysis could have been made, but this study aspires only to offer an initial picture of any evolutionary patterns in the complaints branch rather than a comprehensive review.<sup>12</sup>

### **Transparency in decision-making**

Although the guidance of the OA does not go into great detail on the standards of openness in decision-making that should apply in the sector, it does lay out the arguments for transparency.

It is good practice to set out clearly what the scheme can and cannot do, as well as the processes and procedures used to review a complaint. So far as it is possible and practicable, final determinations should be published in a way that enables everyone concerned to understand the evidence, the application of rules and policies and the reasons for any conclusions reached. .... Some schemes make their determinations public and, where this is the case, they should be available for convenient reference by their stakeholders, who should also have easy access to the policies (BIOA 2007, p. 18).

Every complaint is unique to the complainant and should be considered on its own merits. However, complaint reviewers should try to make decisions that are consistent. This does not imply treating past decisions as binding precedents where circumstances merit a different outcome. Rather, it places an onus

on the scheme to promote fairness of treatment. Some schemes demonstrate this by publishing past decisions and ensuring that they are accessible to staff and the public policies (BIOA 2007, p. 26).

To ascertain the standards currently applied in the sector, from this broad statement, we drew out two key questions to explore further.

1. Does the scheme publish guidance on its decision-making criteria? If so, how extensive is the information provided?

Unsurprisingly, all the complaint-handling schemes that were studied in this work did use the internet as an opportunity to explain both the process of inquiry that the scheme adopted and the formal criteria applied in making decisions. Although this is a positive outcome, in terms of developing user-friendly standards, a basic requirement that the formal decision-making criteria is published is of only limited value. If the objective is to inform potential users of the service as to the scheme's methods, a complaint-handler needs to go further. For this study, we identified three separate approaches followed by schemes in their attempts to clarify the criteria that they applied in their decision-making. Although the interpretations we applied in our research contained an element of subjectivity, these three distinct approaches reveal significant disparities in the degree of further information made available by schemes.

Formal criteria provided in outline only: Of the 45 ombudsman/complaint-handler schemes evaluated for this study, we concluded that for 12 the information provided was relatively limited in terms of explaining the decision-making criteria employed. Information provided usually centred on the main role and remit of the scheme, such as providing an outline of the test of maladministration and a few examples as to what it might mean, but made available little more by way of detail to provide further assistance to individuals

wishing to complain. We found that although the processes of complaint were ordinarily explained well, it would have been difficult from the information provided on the website alone to comprehend the likelihood of success in complaining or how best to construct a complaint.

**Extensive provision of examples and assistance:** We found that 19 schemes used the website to outline both the role and remit of the office and to provide more detailed and advanced information on how the range of issues that were considered might be implemented. Thus frequently schemes make available fact sheets, examples and case studies to provide some meaning to the tests applied by the scheme. A particularly good example of the guidance that can be provided is the Legal Ombudsman's 'template letter of complaint' which provides users when constructing a complaint with a structured set of issues to address and explain.<sup>13</sup>

**Provision and publication of a Code:** Alongside guidance and examples, we found that 14 of the complaint-handling schemes that we looked at made available codes of practice or codes of assessment to demonstrate in more detail the decision-making criteria applied. This strategy has been a common feature of private service ombudsman schemes for some time, but is now beginning to occur in public service schemes as well, as for example with the 'Assessment Code' used by the Local Government Ombudsman which was introduced in 2013. Other ombudsman schemes have introduced principles of good administration, which although primarily targeted at the bodies being investigated do also provide an indication of the standards being applied by complaint-handlers.

Although it would be an unlawful fetter of powers to apply rigidly such codes, one could envisage codes having the benefit of establishing a form of internal accountability and

measure of consistency in decision-making. In turn, such codes might offer value to complainants wishing to understand better what will be used to assess their claim; and therefore, how best to structure their claim and demonstrate what they believe to be the merits of their particular complaint. The effectiveness of such codes in all these respects needs to be tested, but the initiative of having a code of practice or code of assessment seems an overtly clear way to enhance the transparency of the complaint process.

## 2. Does the scheme publish all (or most) of its decisions?

There is no clear standard of publication within the complaints branch and in this study we found a number of different strategies pursued. What we did find though was some evidence of a shift towards a general policy of openness in the sector.

**Full publication:** The most open strategy employed was one of full publication of all decisions made, including in some instances complaints settled without formal investigation. We found that 10 schemes out of 45 reviewed for this study had a fully open publication policy for all decisions. Two of the largest schemes, the Financial Ombudsman Service and the Local Government Ombudsman, had committed to this strategy during the previous year. With such a policy only the prospect of future legal action or a need to retain the anonymity of the complainant will justify the non-publication of a decision.<sup>14</sup>

**Selective publication of decisions:** A more selective publication strategy is operated by most other complaint-handling schemes. With this strategy, decisions are published but not the full range. This might be for a variety of reasons, such as the extra cost involved in compiling such information or a perceived need to protect the confidentiality of the bodies (or

individuals) complained against. The concern is, however, that an additional reason for non-disclosure might be a lack of confidence in the robustness or consistency of decision-making.

Of the 45 schemes analysed for this study we found that 23 published some, albeit a limited amount, of information about their decisions. This information often took the form of case studies or small summaries/digests of their decisions, whether in the annual report or on the website. The limited publication strategy does not enable any external verification of the consistency of decision-making but does at least provide individuals with a solid understanding of the type and nature of complaints that the complaint-handler will be able to deal with.

No decisions published: The least open strategy of all is adopted by schemes that only provide reference to the types of cases they deal with and do not provide any useful case studies or meaningful digests. We found that 12 schemes studied fell into this category. In an era when publishing information online is quick and easy, and highly accessible to the target audience, the failure to provide at least case studies on their websites is difficult to justify on a resources basis.

### **Reviewing decisions of complaint-handlers and ombudsman schemes**

An effective complaints handling procedure is appropriately and clearly communicated, easily understood and available to all.

Complaints should be welcomed by informed and empowered staff.

A complaints procedure should be well publicised.

A complaints procedure should be easily understood without any specialist knowledge.

A complaints procedure should be designed with regard to the needs of minority and vulnerable groups. Where appropriate, service providers should make available material and support to help people access and use the procedure (SPSO 2011, p. 2).

As with transparency in decision-making, there is little formal guidance to be found on the procedures that should be in place for internal review processes. The summary of good practice in complaint-handling from the Scottish Public Services Ombudsman cited above provides a useful starting point, but in our tests we have gone a little further in following through the logic of a meaningful complaints process.

1. Is the ability for a decision of the complaint-handler to be externally reviewed (whether that be to an ombudsman scheme or to the courts) publically advertised?

Procedural transparency should entail making complainants aware of the opportunities to pursue their complaint once the complaint-handler has concluded its investigations. This is a point emphasised by complaint-handlers in their work with investigated bodies, and in turn it would be inconsistent for complaint-handlers not to be open about any future routes of complaint. Being open with complainants about the potential to pursue a complaint further does remove some of the finality that is associated with ombudsman schemes but it is a core accountability requirement.

Of the 45 schemes tested, we found that all bar 6 schemes were fully transparent on the website about the next external stage in the complaint cycle. For most of the 6 schemes that did not make this information clear there was no clear redress route left after its decision had been finalised.

We found some variance in the degree of transparency deployed in explaining the subsequent legal routes available, but where there was an overlap between the work of



complaint-handlers and other legal options we found some good examples of those options being explained.

2. Is the capacity for the complainant to have the decision of the complaint handler internally reviewed publically advertised?

To optimise the transparency value of an internal review process it should be easily known to would-be complainants. This statement of good practice is backed up in best practice guidance on complaints systems, as produced by ombudsman schemes themselves (eg PHSO 2007, pp. 6-7, LGO 2009, p. 2). Perhaps surprisingly, we found that this was an area where many complaint-handling schemes were not fully transparent.

Advertised on the website: Communication of the right to complaint could occur by a number of means. The most transparent means is to advertise the internal review process on the website. Out of the 45 tested schemes we found that only 28 schemes advertised their internal review process clearly on their websites. Even within this category, accessibility to the relevant information on the internal review process varied between schemes, with some websites considerably less helpful on the matter than others.

Internal reviews not publically advertised: We found that 17 complaint-handlers did not publically advertise an internal complaints process on the website. For this study we did not inquire further about any processes that may be in place, although noted that in some cases information about internal review processes was referred to in other published documents, such as annual reports.

It is unlikely that internal review processes are not in place, simply because they are not advertised on the website. However, the absence of an express reference to an internal review

process on the website does illustrate the conservative approach to the matter traditionally taken within the sector, an approach borne out of a fear that such a strategy might encourage complainants to perceive the complaint handling process as simply an intermediate stage. For ombudsman schemes in particular, this viewpoint should be considered within the context of their position in the complaints cycle. Ombudsman schemes generally have a duty, often confirmed in statute, to operate as a dispute resolution body of last resort. As such, part of their role is to bring closure to a dispute, to inform the complainant that however much sympathy they may have for the complainant's circumstances in law there is no validity to their complaint. To open up that 'final' decision to further review, therefore, risks prolonging the dispute even further, with all the unsatisfactory consequences that follow from that. Moreover, it cannot be ignored that some complainants are serial complainers and/or may have psychological issues that ultimately have to be confronted and not merely appeased through the provision of yet another opportunity to complain (New South Wales Ombudsman 2012).

With such concerns in mind, an alternative option by which to communicate the right to a review to complainants is through verbal or written communication with the complainant either when the complaint is first made or at a later stage in the process. The least transparent option of all is only to make the option to review known to the complainant once the complainant goes to the trouble of inquiring about the review process.

3. Are the criteria by which the complaint-handler decides which complaints can be internally reviewed publically advertised?

One of the challenges for internal review processes is to establish rational criteria by which appropriate requests for review are filtered into the review process. Of the 28 schemes tested that advertised their internal review process on the website, we found that 20 schemes

published the criteria by which such requests for the internal review would be considered. While this is generally a positive figure, we found that the information provided was often short and limited, and did not provide for the user particularly detailed information on what the scheme will consider when evaluating the internal review.

4. Does the complaint-handler accept complaints about service standards, procedural standards and/or merits of the original decision?

Following on from the previous test, the choice of criteria by which to consider requests for internal review is important. The criteria should not be too extensive, otherwise the process will become too burdensome on the organisation and risk encouraging the expectations of the complainant. On the other hand, the criteria need to have some bite otherwise the internal review process will appear to be protective of the organisation and will have less chance of gaining the confidence of the complainant.

Of the schemes tested that advertised on the website the criteria used in their internal review process, we found that no schemes seemed to offer to review the substance or the merits of the original decision. However, a number of schemes used elusive language, such as “if you are not happy with the decision”, without fully articulating whether or not substantive matters can be considered for an internal review.

In relation to procedural aspects, such as complaints against inadequate service or general procedural failures within the complaint-handler scheme, all but two schemes made it clear that they were willing to allow internal reviews based on procedural and service issues.

5. Are the potential outcomes of internal review publically advertised? What are they?

Along with the criteria to be applied, an important feature of the internal review process that the complainant will want to know is the potential outcomes.

Of the 28 schemes tested that advertised their internal review process on the website, we found that only 3 provided full detail on the potential remedies that they made available if a request for review was upheld. 7 schemes provided some limited information but often only listed one example and tended to mention the issue in passing rather than dedicate space to articulate in full the remedies available. Of those limited number that provided information on the redress available to individuals who have an internal review upheld, the most common remedies included: compensation, apology, and a formal re-consideration of the decision.

6. Does the complaint-handler publicise the results of internal reviews eg in the Annual report?

As is frequently argued by ombudsman schemes themselves in much of their guidance and contributions to wider debates on complaint-handling in general, an important stage in the complaint-handling cycle that should be included is one where the lessons from complaints are learned and acted upon. A degree of evidence that this is occurring, and evidence that the process is taken seriously, can be provided through the publication of performance figures on the internal review process and the outcomes.

Of the 28 schemes tested that advertised their internal review process on the website, we found that only 13 publicise the outcome of successful internal reviews on their websites and/or in their annual reports. An example of good practice can be found with Ofsted, who have an external reviewer who considers the internal reviews against Ofsted. The external reviewer is part of a separate entity that displays its decisions on its website and produces its own annual reports. This makes the complaints about Ofsted clearly accessible to individuals considering launching a complaint.

7. Does the complaint-handler employ an external reviewer or attempt to build chinese walls into the internal review process?

The use of external reviewer to deal with complaints about the service provided by complaint-handlers is a relatively new innovation. Specific guidance on this procedural option appears absent from the general guidance on good complaint-handling that emanates from the OA and ombudsman schemes themselves, but the practice was discussed in a workshop at the OA's 2013 conference.

Of the 28 schemes tested in this research that advertised their internal review process on the website, only 5 employ an external reviewer.<sup>15</sup> Given the element of independence that the employment of such a figure provides and the subsequent added credence it adds to the process, it is unsurprising that the use of the external reviewer was advertised on all the relevant websites.

A further 7 schemes identified in this study operate with a quasi-independent review mechanism. This is where an individual is employed internally within the ombudsman or complaint-handler, however, that individual's sole role is to work on and review the internal complaints. This arrangement entails that the review is conducted by an individual whose predominant role is not conducting investigations and who has not been involved in the initial complaint.

Of the remaining schemes that did not clarify the process of internal review on the website, it is probable that others operate in a manner aimed at reducing bias and increasing creditably of the review scheme. For example, different case reviewers and/or senior management will be allocated responsibility to conduct internal reviews, with every effort made to separate the matter from the original investigator or member of staff complained against.

**Conclusions: The future of standard setting in the complaints branch**

Complaint-handling is a curious but essential component of the modern justice system, whether that be in the civil or administrative justice sector. It would be incorrect to describe the complaints branch as being unregulated, but the degree of control that is exercised over the system is spread across a range of mechanisms with no one party exercising full responsibility. Ad hocery is rife in the sector and although the judiciary has pronounced their opinion on some aspects of the procedural safeguards adopted in the complaints branch, the law provides little guidance on the specific issues of transparency and internal review that have been explored in this article. The most informative direction is provided by the OA, but the extent to which that guidance can be used as a standard bearer for the complaints branch is restricted by its organisational need to accommodate a wide variety of disparate complaint schemes.

What this article has shown, however, is that notwithstanding the lack of coordinated standard setting in the complaints branch, best practice is advancing. Moreover, that best practice is potentially capable of meeting some of the lead concerns that have been levelled at the quality of justice delivered in the complaints branch.

With regard to transparency, we found considerable evidence of the use of codes to provide a formal template for the manner in which complaint-handling schemes applied their remit. The use of codes, and their publication, remains in the minority but some of the codes employed have only been introduced in recent years. Alongside the increased use of codes in the complaints branch, there is a much greater likelihood of decisions being published than 10 years ago, with two of the largest ombudsman schemes having introduced a policy of publication during 2013. The willingness to adopt such a policy requires an ombudsman scheme to embrace the need to demonstrate consistency in decision-making, thus acting as an incentive to high standards. The amount of internal upgrading of the quality control mechanisms within an organisation required to make such a policy publically robust should

not be underestimated. Where implanted in tandem, the effectiveness of a publication strategy involving both codes and decisions requires further scrutiny, but potentially it serves an important accountability function on a number of levels and could help promote better understanding of the work of the complaint-handlers.

The value of internal reviews is a more contentious issue, but building into the complaints-handling model an additional layer of accountability also serves as a positive incentive to enhance standards in the sector. Such processes have probably always been in place but until recently were poorly advertised. Investing resources in internal reviews carries risks, as well as costs but, where made a centrepiece of the complaint-handler's relationship with complainants, it operates as a statement of confidence in the service provided. In this respect, the strongest statement that a scheme is taking the process of review seriously is to employ an external reviewer to manage the process and ideally to report back generic findings on an annual basis.

What we found in our research was that more work could be done by complaint-handlers to be transparent about the internal review services that they offered. Indeed, ironically given current debates about using complaint systems as learning processes, we found little publically stated acknowledgement that internal reviews were being used to improve the quality of service provide. Nevertheless, internal review processes do lead to changes in decisions on many occasions and the model of the external reviewer is steadily becoming embedded in the complaints branch.

The development of greater openness and more sophisticated internal review models in the complaints branch is a positive development. Care must be taken to generalise such standards to all complaints-handling bodies given the diversity in the sector, but such developments suggest that there is potential for the complaints branch to make a more robust claim about the procedural safeguards it employs.

## Notes

1. For an analysis of the likely impact of some of these developments see the contributions to the special edition of the *Journal of Social Welfare and Family Law* [2013] 35:1.
2. See the Public Administration Select Committee's inquiry on Complaints: Do they make a difference? <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-select-committee/inquiries/parliament-2010/complaints-handling/complaints-do-they-make-a-difference/>
3. The internet provides a convenient source of anti-ombudsman sentiment, see [www.ombudsmanwatch.org/](http://www.ombudsmanwatch.org/). See also submissions to the Select Committee for Communities and Local Government (CLG 2012) and the Public Administration Select Committee's inquiry on the Parliamentary Ombudsman Service, <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-select-committee/inquiries/parliament-2010/complaints-handling/parliaments-ombudsman-service/> .
4. This does not include the ability of the complainant to challenge the decision of the ombudsman in the courts.
5. For instance, for the last three recorded years there have been 28 applications for judicial review against the LGO and none have been successful in court, indeed only three have made it passed the permission stage (Thomas et al 2013, p. 72).
6. For instance, in 2011-12 the LGO processed 986 requests for internal review (LGO 2012, p. 28).
7. Eg. For 2011/12, in 70 cases out of 986 the LGO changed its response as a result of an internal complaint (LGO 2012, p. 28).
8. The Association's name was changed in 2012 from the British and Irish Ombudsman Association.
9. See the Ombudsman Association website, <http://www.ombudsmanassociation.org/association-objects.php>
10. This was because either the website was not functioning at the time of the research or because the complaint-handling function was a very small part of a larger regulatory function.
11. These were: the Charity Commission, the Professional Conduct Committee for the Bar Standards Board, the Independent Complaints Resolution Service, Ofcom, the Judicial Conduct Investigation Office (formerly the Office of Judicial Complaints), Ofsted and the Prisoner Ombudsman for Northern Ireland.
12. The study was undertaken in Autumn 2013.
13. <http://www.legalombudsman.org.uk/downloads/documents/publications/Formal-Complaint-Template.pdf>
14. This can be the case even when a complainant's name is anonymised if the particular facts of the case are so unique in nature that the individual involved could be easily traced.



15. These were the Financial Ombudsman Service, the Property Ombudsman, the Insolvency Service, Ofsted and the Scottish Public Sector Ombudsman.

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