

Designing redress: a study about grievances against public bodies

Varda Bondy

Andrew Le Sueur

Published by

The Public Law Project
150 Caledonian Road
London N1 9RD

www.publiclawproject.org.uk

Also available via the Social Science Research Network in the Queen Mary School of Law Legal Studies Research Paper Series <http://www.ssrn.com/link/Queen-Mary-LEG.html>

ISBN 978-1-898421-15-3

Published in the United Kingdom in August 2012.

Acknowledgements

PLP would like to thank the Nuffield Foundation, which provided financial support for conducting the research on which this report is based.

The authors would like to thank our interviewees, who were generous in offering their time and expertise and who did so on the basis of anonymity. We also thank the participants of a work-in-progress seminar held at the Nuffield Foundation in 2010 for their insightful and constructive criticism. Chris Luff provided efficient research assistance towards the end of the project. We are particularly grateful to Margaret Doyle for support throughout the project and reading drafts of this report.

Errors and omissions are the responsibility of the authors alone.

About the research team

Varda Bondy, solicitor, is Research Director at the Public Law Project. She is also a Visiting Senior Research Fellow in the Department of Law, Queen Mary, University of London, and a Visiting Research Fellow in the School of Law at the University of Essex.

Andrew Le Sueur, barrister, is Professor of Public Law at Queen Mary, University of London, and Director of Studies at the Institute of Law, Jersey.

The Nuffield Foundation is a charitable trust established by Lord Nuffield. Its widest charitable objective is 'the advancement of social well-being'. The Foundation has long had an interest in social welfare and has supported this project to stimulate public discussion and policy development. The views expressed in this report are, however, those of the authors and not necessarily those of the Foundation.

CONTENTS

Section One: Introduction and background	1
<i>Outline</i>	1
<i>Research questions and findings</i>	1
<i>Defining grievance and redress</i>	2
<i>The administrative justice ‘system’ and ‘landscape’</i>	3
<i>Changing contexts</i>	5
<i>Modelling redress mechanisms</i>	5
A supervisory model	6
Overlapping jurisdictions model	8
Filter model	11
Resolution model	13
Section Two: Designing redress: when and where?	16
<i>Introduction</i>	16
<i>What is ‘design’?</i>	16
<i>Contexts in which design takes place</i>	16
New administrative activity requires a redress mechanism	17
Fine-tuning existing redress mechanisms	17
‘Big ticket’ systematic review of redress mechanism	18
<i>Government programmes and the battle of ideas</i>	18
<i>Drivers for design activity</i>	19
Simply consequential on creation of new administrative powers	19
Perceived needs to fill gaps	19
The desire to simplify and rationalise	19
The perceived need to divert grievances from one mechanism to another	20
Changes to redress mechanisms as a result of crisis management	20
Pressures from Europe	21
Financial constraints on government	21
Section Three: Actors and institutions - who designs?	22
<i>Introduction</i>	22
<i>Central government and the UK Parliament</i>	22
Redress design encapsulated in primary legislation	22
Redress design given effect in secondary legislation	24
Redress design in the context of broader government programmes	25
Discussion	26
<i>Redress design in executive agencies and local authorities</i>	26
The Land Registry	27
Brent LBC’s experiment with a complaints forum	27
Lewisham LBC’s innovation: an independent adjudicator for stage 3 complaints	27
Discussion	28
<i>Judges as redress designers</i>	28
Discussion	30
<i>Redress design by the ombudsmen</i>	31
<i>Redress design by advisory bodies</i>	31
Section Four: Design deficiencies and solutions	33
<i>Introduction</i>	33
<i>Deficiencies</i>	33
<i>A more principled approach?</i>	34
<i>Approaches to developing principles</i>	35
<i>What might a statement of principles achieve?</i>	35
<i>In what format might design principles be published?</i>	35
<i>Principles focused on redress design</i>	36
Section Five: Developing principles of redress design	37

Overview of the principles	37
<i>Principle 1: There should be a presumption in favour of all administrative decision-making schemes making an express provision in legislation for an effective pathway and remedies for addressing disputes and grievances</i>	38
Statement of principle	38
Example 1.1: Marine and Coastal Access Act 2009	38
Example 1.2: Pensions Act 2008	39
Example 1.3: Local Government Ombudsman and internal school complaints	39
Discussion of the principle	39
<i>Principle 2: Institutional design should respect constitutional principles</i>	41
Statement of principle	41
Example 2.1: A controversial ouster clause	41
Example 2.2 Appeal and review mechanisms relating to economic regulation	42
Example 2.3: Decision-making by the Child Maintenance and Enforcement Commission under the Welfare Act	42
Discussion of the principle	43
<i>Principle 3: There should be public accountability for the operation of grievance handling</i>	44
Statement of principle	44
Example 3.1 Annual report on tribunals	44
Example 3.2 Value for money audits	44
Example 3.3 Scrutiny by parliamentary committees	45
Example 3.4 Service standards and key performance indicators	45
Discussion of the principle	46
<i>Principle 4: Evidence and research should inform the creation of new redress mechanisms and the reform of existing ones</i>	46
Statement of principle	46
Example 4.1: 2009 legal aid consultation	47
Example 4.2: 2010 legal aid consultation	47
Example 4.3: Local Government Ombudsman ‘Council First’ policy	48
Discussion of the principle	48
<i>Principle 5: There should be opportunities for grass-roots innovations</i>	48
Statement of principle	48
Examples	48
Discussion of the principle	49
<i>Principle 6: Mechanisms should ensure value for money and proportionality</i>	50
Statement of principle	50
Example 6.1 The Early Neutral Evaluation pilot at the Social Security and Child Support Tribunal	50
Example 6.2 Proposals for a new compensation system for administrative wrongs	50
Example 6.3 Attempts to calculate costs	50
Discussion of the principle	51
<i>Principle 7: There should be a good ‘fit’ between the type of grievance and the redress mechanism</i>	52
Statement of principle	52
Example 7.1: Social Fund	52
Example 7.2: Local Government Ombudsman jurisdiction to handle school complaints	53
Example 7.3: Mediation	53
Discussion of the principle	54
<i>Principle 8: Fair and rational criteria and processes should be used to ‘filter’ inappropriate grievances</i>	55
Statement of principle	55
Examples	55
Discussion of the principle	55
<i>Principle 9: As well as dealing with individual grievances, redress mechanisms should contribute to improvements in public services</i>	56
Statement of principle	56
Example 9.1: Independent complaints reviewer	56
Example 9.2: Lewisham Independent Adjudicator	56
Discussion of the principle	57

Section Six: Conclusions

Acronyms and abbreviations

AJTC	Administrative Justice and Tribunals Council
CMEC	Child Maintenance and Enforcement Commission
ECHR	European Convention on Human Rights
ICR	Independent Complaints Reviewer
JCHR	Joint Committee on Human Rights
IRS	Independent Review Service
LASPO	Legal Aid Sentencing and Punishment of Offenders Act
LGO	Local Government Ombudsman
Moj	Ministry of Justice
PASC	Public Accounts Select Committee
PCA	Parliamentary Commissioner for Administration
PHSO	Parliamentary and Health Service Ombudsman
TCEA	Tribunals, Courts and Enforcement Act

Section One

Introduction and background

Outline

Public bodies have in recent years been exhorted to get decisions ‘right first time’.¹ The concept of administrative justice is seen by some scholars as including initial decisions as well as what happens when administrative decisions are challenged. Notwithstanding these developments, the redress of grievances remains central to the concerns of administrative law scholars, and public bodies expend a great deal of time and money handling grievances. It is just about possible to imagine an idealised administrative system in which no errors are ever made by decision-makers and all past, present and future decisions are accepted as correct and legitimate by citizens and business enterprises. In reality, this can never be achieved (except perhaps in well-resourced administrative schemes of limited size and relative simplicity).

This report is concerned with the institutions and procedures by which people in England pursue grievances against public bodies. The existence of adequate redress mechanisms is important for those who are made subject to public bodies’ decision-making. Without such avenues, administration would lack legitimacy. Redress mechanisms are also of instrumental value to public bodies themselves: they enable the quality of initial decisions to be monitored, may generate principles of good administration, and in some cases may assist in defining the legal powers of the public body.

The particular emphasis of the report is on the *design* of redress mechanisms, rather than on how various mechanisms operate or how individuals navigate the array of available, and sometimes overlapping mechanisms. Getting the design of redress right is of importance to all parties and, more generally, in the public interest.

The report is intended to be both research *of* the system (inasmuch as it has an academic focus) and research *for* the system (insofar as insights and findings may be of practical assistance to those who have responsibility for designing redress mechanisms). This report comes out of a project funded by the Nuffield Foundation, carried out by Varda Bondy of the Public Law Project and Andrew Le Sueur of Queen Mary, University of London.²

Research questions and findings

The findings and recommendations that have come out of the project are based principally on a series of interviews with key participants in the administrative justice world (all of whom took part on the basis of anonymity) and desk analysis of practices. The report addresses four main research questions.

¹ See Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (White Paper Cm 6243 published July 2004), hereinafter referred to as *Transforming Public Services*, <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/pubs/adminjust/adminjust.htm>. The concept was first developed in the 1920s from ‘total quality management’ in commercial contexts.

² The Design and Choice of Redress Mechanisms (AJU/35186). The project ran between 2008 and 2012.

- (1) How, conceptually, can the main functions of and relationships between the different redress mechanisms be understood? This is considered later in this section (see ‘Modelling redress mechanisms’, p.12).
- (2) What activities are involved in the process of ‘designing’ grievance redress mechanisms? In what circumstances does design take place and what actors and institutions are involved? Sections Two and Three of the report provide an empirical and analytical mapping of design activities, exposing the different contexts in which redress design takes place.
- (3) In what ways are the processes of design (how design is carried out) and the outcomes (what is designed) deficient? What might a statement of guiding principles on design of redress – a checklist or toolkit, to use vogue terms – contribute to improving design processes and outcomes? What methods could be used to generate a statement of guiding principles? These questions are considered in Section Four.
- (4) What principles might be included in such a checklist or toolkit? This question is explored in Section Five.

Defining grievance and redress

The research study on which this report is based has a wide canvass. Throughout this report, the term ‘grievance’ is used in a broad way to cover the whole range of dissatisfactions that people may encounter in their dealings with public administration. A variety of different terminology has been used in official publications in recent years to describe aspects of grievance. For example, in 2008 the Law Commission for England and Wales issued a consultation paper which posed the question ‘When and how should the individual be able to obtain redress from a public body that has acted in a substandard manner?’ or ‘acted wrongfully’.³ The 2004 White Paper *Transforming Public Services* referred to ‘errors’ and ‘mistakes’.⁴ The Parliamentary and Health Service Ombudsman website in 2011 described the PCA’s remit as being over public bodies which have ‘not acted properly or fairly or have provided a poor service’.⁵

Research by Adler and colleagues has developed typologies of grievances: one, drawing on the views of an advisory committee of academic and practitioner experts, identified the following forms of official wrong, and this has served as a starting point for our own study:⁶

- the decision was based on facts that were incorrect
- the official did not apply the legal rules properly
- the official did not exercise discretion properly
- the official appeared not to have the requisite knowledge or experience
- the official did not do what they said they would do
- the person was not listened to and was not able to put their side of the case
- the person was treated badly by the staff
- the person was kept waiting for too long and/or the application took too long to process
- the person had to disclose sensitive information in an inappropriate setting

³ Law Commission, *Consultation Paper No 187: Administrative Redress: Public Bodies and the Citizen* (2008) paras 1.1 and 3.1, http://www.justice.gov.uk/lawcommission/docs/cp187_Administrative_Redress_Consultation.pdf.

⁴ *Transforming Public Services*, para 1.5.

⁵ <http://www.Ombudsman.org.uk/home>.

⁶ M Adler, ‘Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice’ (2006) 69 *Modern Law Review* 958, 968 drawing on M Adler, C Farrell, S Finch, J Lewis, S Morris and D Philo, *Administrative Grievances: a Developmental Study* (London: National Centre for Social Research, 2006).

- no one was prepared to deal with the problem
- the official did not acknowledge that a mistake has been made or apologise for it
- the person was not offered a choice when they should have been
- although the decision was technically correct, the policy being applied was a bad one
- although the decision was technically correct, the standards were too low because the policy wasn't properly resourced and because insufficient money was being spent on it
- what the person received represented poor value for money.

Adler's typology is of grounds for legitimate grievance. The relationships between such grounds and recourse to a redress mechanism, and the outcome of a grievance process, are not straightforward. There may be situations in which the person is unaware that a decision has been made wrongly or that there is anything that he or she can do about it. In other situations, the public body may readily accept that a wrongful decision has been reached or it may be disputed that a wrongful decision has been made and a process is needed for resolving the grievance. It may also be the case that people *feel* aggrieved and seek to use a redress mechanism where there is no objective ground of complaint.⁷

'Redress' is understood in a broad way in our study, to include the full array of processes and institutions—or mechanisms—through which an aggrieved person may seek to raise a grievance. From an institutional perspective in England, this includes:

- internal complaints systems within the public body responsible for making the initial decision
- complaints handlers, to which a public body may contract out responsibility for dealing with grievances
- applications to the public-sector ombudsmen—notably the Public and Health Service Ombudsman (PHSO) and the Local Government Ombudsman (LGO)—where an aggrieved person believes that injustice has been suffered as a result of maladministration. (The Housing Ombudsman also considers public-sector disputes but is not covered in this report.)
- appeals to the First-tier Tribunal (or other tribunal) and onwards to the Upper Tribunal
- appeals to courts
- claims for judicial review made to the Administrative Court (part of the High Court in England and Wales)
- Mediation

From a process perspective, there is a range of possible techniques that may be used to address a grievance, including adjudication, investigation, mediation and other forms of appropriate or alternative dispute resolution (ADR).

The administrative justice 'system' and 'landscape'

In recent years there has been a growing preoccupation with the multiplicity of existing redress mechanisms within the administrative justice system—their efficiency in resolving disputes in terms of time and cost, as well as questions over citizens' access to appropriate fora of dispute resolution. The complexity and duplication of the systems has been noted in several official reports.⁸

⁷ See the filter model outlined below and discussed further in Section Five.

⁸ See e.g. National Audit Office, *Citizen Redress: What citizens can do if things go wrong with public services* (HC 21 Session 2004-05); Law Commission, *Housing: Proportionate Dispute Resolution, An Issues Paper* (2006), Part 2.

There have been a variety of policy responses to this situation. Institutions have developed: ombudsmen have been created in different contexts; independent complaints adjudicators have been set up; the tribunal system has been reformed; the judicial review system was overhauled in 1978 and again in 2000; court-annexed mediation schemes have been set up and reviewed; changes have been introduced to the legal aid Funding Code designed to affect choice of remedy by potential litigants, and more. All these initiatives can be seen to be consistent with the intention and the spirit of Lord Woolf's *Access to Justice* report (1996) in the sense of being designed to promote early and proportionate dispute resolution.

Another response has been to suggest that people should be provided with better advice on and diagnosis of their problems, to enable them to navigate the variety of potential dispute resolution systems available to them, for example the idea of 'triage plus' proposed by the Law Commission in relation to housing disputes,⁹ though not pursued by government.

Not all of these developments necessarily improved the lack of coherence in the system as a whole, and this continues to present problems for aggrieved citizens, for public authorities whose decisions are challenged and for the grievance-handling agencies. Indeed, institutional restructuring can be seen as both a response and a contributing factor to fragmentation.

Despite repeated acknowledgements that the various mechanisms that deal with administrative justice had developed in an ad hoc manner, the term 'administrative justice system' became increasingly used in various contexts and has come to encompass not only formal dispute resolution processes such as ombudsmen, tribunals and judicial review, but also the myriad of decisions taken by civil servants and other officials. For example, the Tribunals, Courts and Enforcement Act 2007 defines the administrative justice system as:

the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including:

- (a) the procedures for making such decisions
- (b) the law under which such decisions are made, and
- (c) the systems for resolving disputes and airing grievances in relation to such decisions.¹⁰

Along similar lines, the *Administrative Justice in Scotland: The Way Forward 2009* report defines administrative justice as:

initial decision-making by public bodies affecting citizens' rights and interests including the substantive rules under which decisions are made and the procedures followed in making decisions; systems for resolving disputes relating to such decisions and for considering citizens' grievances.¹¹

The benefits of this broad definition, according to the report, are that it delimits a coherent field of inquiry and enables discussion of administrative justice to respond to the full range of citizens' concerns about their interaction with public services. On the other hand, such broad definition may, in fact, mask the extent to which administrative justice (in England and Wales, at any rate) has been allowed to change in response to differing pressures and drivers, at times leading to contradictory principles being promoted, making it increasingly difficult to understand and articulate the roles of the various institutions and the principles that govern, or ought to govern, their operations.

In addition to the expansion of the definition itself, there has been a growth in the number and the nature of bodies that provide administrative redress, as well as an increasing blurring of the boundaries between public and private decision-makers and resolution providers. At the same

⁹ Law Commission (2008) op cit, para 3.27.

¹⁰ Tribunal Courts and Enforcement Act (TCEA) 2007, Sched. 7, para. 14.

¹¹ www.consumerfocus.org.uk/scotland/files/2010/10/Administrative-Justice-in-Scotland-Summary.pdf p.2.

time, the use of ADR, of private as opposed to publicly transparent dispute resolution, was vigorously promoted, coupled with reduced availability of legal aid and access to competent legal advice.

Against this background, the articulation of the state and the nature of the field of administrative justice are becoming increasingly complex. An understanding of the functions of redress mechanisms and their respective inter-relationships, if any, is necessary in order to be able to begin to envisage a true, coherent 'system' rather than merely naming what is an ad hoc collection of mechanisms a 'system'.

Changing contexts

The background against which the research for this report was carried out altered considerably during the course of the three-year project. The world economic downturn, a general election leading to a change in government, and public-sector spending cuts on an unprecedented scale have changed the context in which the research took place.

For example, the availability of legal aid is undoubtedly a central factor affecting access to redress mechanisms by those wishing to challenge decisions made by public bodies. It can also have a 'design effect' in the sense that those dealing with dispute resolution may need to adapt the process depending on whether or not a vulnerable party is to receive legal advice and representation. Legal aid is a major element in shaping the administrative justice system, a shape that is now set to change drastically with the anticipated introduction of wide ranging restrictions contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Bill gave rise to strong criticism, including by judges. Lord Justice Moses asserted, 'Unequal access to the law is morally troubling and inefficient',¹² while Lady Hale warned the government of the undesirable consequences of legal aid cuts on constitutional as well as practical, common-sense levels, as they affect the ability of some to vindicate their rights and enforce the obligations of others towards them.¹³

The low priority now given by government to administrative justice is also evidenced by the decision to abolish the Administrative Justice and Tribunals Council, the advisory body created as part of a package of reforms introduced in 2007 and which took over the role of the former Council on Tribunals.

It is reasonable to assume that for government in 2012, reforming administrative justice is likely to be of interest (if at all) only if it results in costs savings. The dynamics of public debate about reform are therefore now very different to those of 2007.

Modelling redress mechanisms

How, conceptually, can the main functions of, and relationships between, the different redress mechanisms be understood? One way of addressing the question is by developing models. As Rawlings explains in his analysis of trends in judicial review, modelling is a 'use of ideal types to illuminate the basic contours and so the path of historical development and possible futures, an exercise in which we lawyers rarely engage'.¹⁴ Our focus is not so much the historical development of the subject matter but the ways in which the system currently operates. We suggest four main models; the first two each explain an aspect of the relationships between different redress mechanisms, and the latter two describe how essential elements of the process of redress operate within those mechanisms:

¹² Public Law Project Annual Conference, 13 October 2011, www.publiclawproject.org.uk/index.html.

¹³ Law Centres Federation Annual Conference, 25 November 2011, www.lawcentres.org.uk/uploads/Lady_Hale_Opening_Address_at_LCF_Conference_25.11.11.pdf.

¹⁴ R Rawlings, 'Modelling Judicial Review' (2008) 61 *Current Legal Problems* 55, 97.

- a supervisory model
- an overlapping jurisdictions model
- a filter model
- a resolution model.

To be clear: these models are not intended to be mutually exclusive but rather to capture different ways of looking at the different mechanisms. The models are intended as an analytical aide to thinking about the relationships between existing or future mechanisms and considering similarities and differences as between the role and function of those mechanisms.

A supervisory model

This model emphasises the function of redress mechanisms in ensuring that the person who has dealt with the grievance at a previous stage has done so properly. The focus here is not so much on the merit of the individual's grievance but on ensuring that the way in which the grievance has been handled is correct. This model can also be presented as hierarchical in that at each stage the supervision is carried out by a body that is considered more expert, or that is attributed a greater degree of authority. However, there has been a move away from this 'status'-laden description. For example, the Law Commission in its 2008 consultation paper, *Administrative Redress: Public Bodies and the Citizen* avoided a reference to status by describing the administrative justice mechanisms as separate but equally positioned 'pillars' as follows:¹⁵

Pillar 1: Internal mechanisms for redress, such as formal complaint procedures

Pillar 2: External, non-court, avenues of redress, such as public inquiries and tribunals

Pillar 3: Public sector ombudsmen

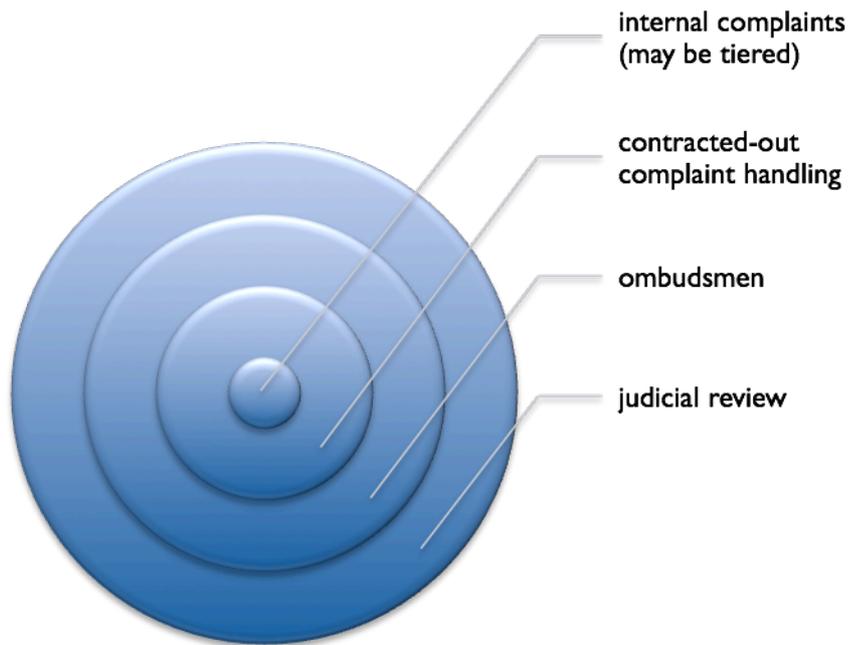
Pillar 4: Court action

Similarly, Ann Abraham, in her 2007 lecture 'The Ombudsman and Paths to Justice: a just alternative or just an alternative?' asked 'Where then does that Ombudsman system sit in relation to the rest of the administrative justice system?' She answered that it is important to recognise the part 'the Ombudsmen can, and already do, play as a system of justice in their own right', which implies that ombudsmen are not in an hierarchical relationship to other mechanisms.¹⁶ It remains the case, however, that ombudsmen decisions can be judicially reviewed by the Administrative Court, but not vice versa. It can be said therefore that the supervisory relationship is found where external influences can be brought to bear upon a grievance redress body by another such body.

Figure 1: A supervisory model

¹⁵ Law Commission (2008) op cit.

¹⁶ www.ombudsman.org.uk/about-us/media-centre/ombudsmans-speeches/archive/sp2007-05.



The different grievance-handling mechanisms can be seen as nested within one another.¹⁷ Each has a degree of autonomy to carry out its role, but is subject to checking or guidance from the mechanism beyond it.

Supervision can be seen at work within internal complaints mechanisms, where there is typically a multi-step internal process by the public body responsible for making the primary decision. As a grievance escalates within a public body, at each step a more senior employee of the body reviews the handling of the grievance, e.g. a typical local authority internal complaints system proceeds from initial decision-maker, to head of department, and finally to chief executive.

In some complaint processes, public bodies choose to use the services of a contracted-in reviewer, a person working at arm's length from the public body, to examine the matter. This may be an ad hoc arrangement to address a particular dispute or it may be an institutionalised arrangement initiated by the public body and a professional complaints handler such as the Independent Complaints Reviewer (in relation to some central government bodies)¹⁸ and an Independent Adjudicator (set up by a small number of local authorities).¹⁹ As well as seeking to resolve the complaint, an independent reviewer is often concerned to identify how well previous steps in the complaint system have operated and to provide feedback to the public body.

Grievances unresolved by internal systems may be taken to an ombudsman. The supervisory role of the ombudsman in seeking to promote good complaints handling by public bodies has been emphasised in recent years with the publication of express guidance, e.g. the Parliamentary Commissioner for Administration's (PCA) *Principles of Good Administration* (2007) and *Principles of Good Complaint Handling* (2009).²⁰

Judicial review can be a final step for an aggrieved person dissatisfied with the handling of a grievance. The historic, common-law power of the High Court and its forerunners (now exercised

¹⁷ This model can also be presented as hierarchical in that at each stage the supervision is carried out by a body that is considered more expert or that is attributed a greater degree of authority.

¹⁸ www.icrev.org.uk/icr_about.shtml.

¹⁹ The authors are aware of the existence (as at 2010) of such an independent complaints handler in only two local authorities, namely the London Borough of Lewisham and Cambridge City Council.

²⁰ www.Ombudsman.org.uk/improving_services/principles/complaint_handling/index.html.

by the Administrative Court) has often been described as a ‘supervisory jurisdiction’. The scope of the supervisory role was, until the end of the 1970s, defined by antiquated and technical legal rules linked to ancient prerogative writs (remedial orders). In more recent decades, the courts have defined the boundaries of their role using more flexible concepts such as ‘public function’ and ‘non-justiciability’. As well as the Court’s supervisory role in relation to the legality of specific administrative decisions, judgments may deal expressly with how redress mechanisms operate, including internal complaints mechanisms²¹ and ombudsmen.²² In relation to tribunals, there has been legal controversy about whether the Administrative Court should have supervisory jurisdiction over the Upper Tribunal created by the Tribunals, Courts and Enforcement Act 2007. Both are superior courts of record, and the Leggatt Report that led to the creation of the Upper Tribunal²³ stated specifically its aim as ‘changing the relationship between tribunals and the supervisory jurisdiction of the High Court’. In the landmark UK Supreme Court judgment in *Cart*, Lady Hale²⁴ held that

‘[T]he scope of judicial review is an artefact of the common law whose object is to maintain the rule of law – that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise. Both tribunals and the courts are there to do Parliament’s bidding. But we all make mistakes. No-one is infallible. The question is, what machinery is necessary and proportionate to keep such mistakes to a minimum? In particular, should there be any jurisdiction in which mistakes of law are, either in theory or in practice, immune from scrutiny in the higher courts?’

She went on to say: ‘Clearly there should always be the possibility that another judge can look at the case and check for error. That second judge should always be someone with more experience or expertise than the judge who first heard the case.’²⁵

Overlapping jurisdictions model

Another way of thinking about the relationship between the grievance-handling processes is to see them as partly overlapping (and therefore also partly interchangeable). A major concern here is to ensure that overlaps between jurisdictions are managed appropriately.

²¹ E.g. whether complaints systems comply with the requirements of ECHR Article 6.

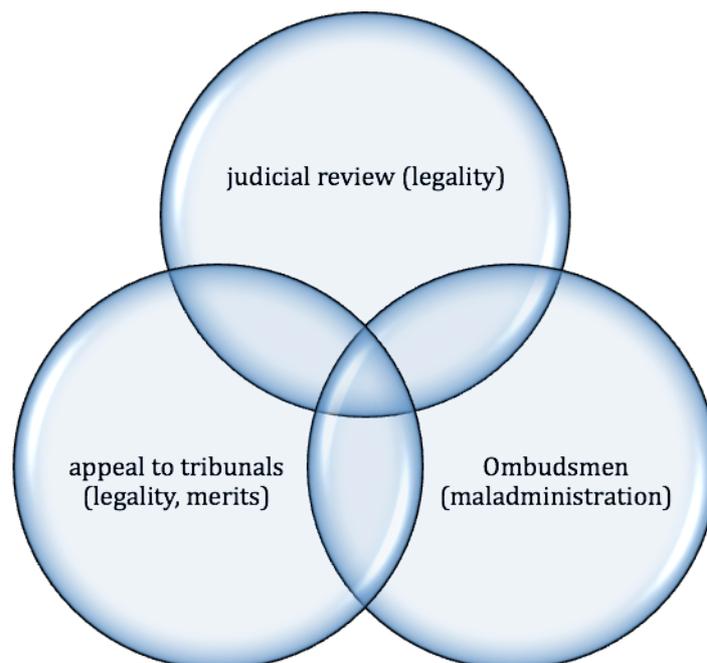
²² E.g. whether an ombudsman is correctly applying the law in carrying out its role – see, e.g., www.communitycare.co.uk/blogs/adult-care-blog/2011/11/mencap-loses-judicial-review-against-health-ombudsman.html.

²³ TCEA 2007.

²⁴ [2011] UKSC 33 para 37.

²⁵ *Ibid* at para 56.

Figure 2: Overlapping jurisdictions



The permeability of the barrier separating the jurisdictions of the PCA²⁶ and the Administrative Court is already evident from the issues arising in the parliamentary debate leading to the passing of the Parliamentary Commissioner Act 1967. Originally, the legislation establishing both the PCA and the Local Government Ombudsman (LGO) contained provisions designed to regulate their respective and separate jurisdictions in the form of The Parliamentary Commissioner Act 1967 section 5(2) and Local Government Act 1974 section 26(6) respectively. These provisions stipulate that, subject to discretion, ombudsmen have no jurisdiction over cases that could be routed to the Administrative Court as judicial review claims, to a tribunal, or to other legal proceedings.

However, the relationships between the various mechanisms of dispute resolution in terms of jurisdiction to consider complaints are not fixed, but are subject to developmental shifts, and in this context, the intended separation between these two jurisdictions has all but disappeared.

While the LGO office collates no data regarding the manner in which the section 26(6) discretion is exercised, LGO investigators suggested to us that they do not reject any complaints by reason of a legal remedy being available if they are capable of dealing with the complaint themselves. Data obtained from the PCA in 2009 identified 36 complaints (out of some 16,000 in all²⁷) as having been rejected in 2008-9 on the basis of the section 5(2) discretion.²⁸ Examples of the reasons given for rejecting a case were:

- 'Complainant should have appealed to challenge the court judgment'
- 'Complainant wanted judicial decision reversed'

²⁶ We use PCA and PHSO (Parliamentary and Health Service Ombudsman) interchangeably. In law, the PCA and Health Service Ombudsman are separate entities; but in practice the same person holds both offices and there is a single organisation.

²⁷ See Annual Report for 2008-9, http://www.ombudsman.org.uk/__data/assets/pdf_file/0009/1017/Annual-Report-2008-09.pdf.

²⁸ Data helpfully provided by the office of the Parliamentary and Health Service Ombudsman to the team in the course of this project.

- ‘Complainant challenging the decision of the Patent Office. Needs to challenge through the High Court’
- ‘Ombudsman could not consider evidence used by the tribunal to overturn the decision’
- ‘Should have challenged the Criminal Injuries Compensation Authority panel as directed’
- ‘Complainant challenging UKBA’s interpretation of the law’

As can be seen from these examples, those cases were in fact rejected because the ombudsman was unable to deal with them, rather than as a result of an exercise of discretion, i.e. weighing if it was unreasonable to expect the aggrieved person to resort to litigation as per section 5(2). Accordingly, both the PCA and the LGO have altered the original design intention of their remit by rendering the statutory bar insignificant through a broad exercise of their discretion, thereby closing jurisdictional gaps with other mechanisms.²⁹

Other aspects of a growing overlap between judicial review and complaint to the ombudsmen are the evolution of the concept of maladministration and the expansion of the remit of judicial review. This means that the concepts of maladministration (ombudsmen’s territory) and unlawfulness (Administrative Court territory) are in many respects overlapping. Failure to follow policy or procedure can amount to maladministration as well as procedural impropriety in judicial review, as can delay.³⁰ Maladministration is, however, often broader than judicial review grounds based on procedural unfairness.

The idea of removing the restrictions on the PCA’s jurisdiction was raised by Lord Woolf in the 1996 *Access to Justice Report*. In 2007, Lord Newton of Braintree proposed an amendment to the Tribunals, Courts and Enforcement Bill that would have had the effect of removing these restrictions:

‘The purpose of what I propose is to get rid of some of the impediments. They were originally intended to make sure that ombudsmen did not trespass on or usurp the jurisdiction of courts or tribunals, but, over time, developing case law has narrowed the discretion of the ombudsmen in a way that has been seen to present them with severe difficulties and has created considerable injustice for complainants’.³¹

However, as can be seen above, the public-sector ombudsmen exercising discretion widely and are hardly impeded by these restrictions.

A different type of overlap can be said to exist between tribunals and the Administrative Court. Since the Tribunals, Courts and Enforcement Act (TCEA) 2007, judicial review powers are now shared between these two avenues of redress. A flexible approach is implemented by judges through case management in particular cases and through judge-led views about expertise and appropriateness of venue.

In the overlaps between mechanisms as described above, it is the complaints handlers who determine whether the complainant’s choice of one mechanism over another is accepted, rejected or re-directed. There can also be an element of choice on the part of complainants, albeit dependent upon the availability of funding, for example in deciding whether to lodge an ombudsman complaint or a judicial review where a dispute is capable of coming within either jurisdiction. Our focus here, though, is on the redress handlers’ perspective rather than that of the user.

²⁹ See also Section Three, ‘Redress Design by Ombudsmen’.

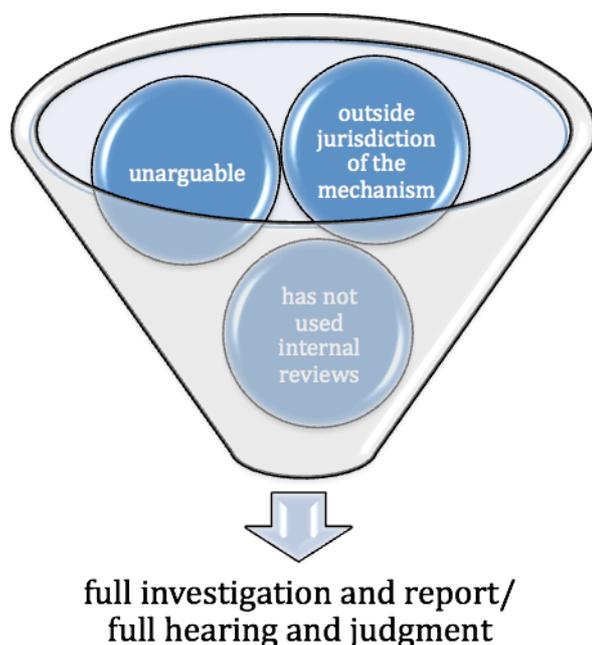
³⁰ *R v Local Commissioner for Administration for the North and North East Area of England ex. p Bradford Metropolitan City Council* [1979] 1 QB 287 at 311H, Lord Denning adopting passage from H.W.R Wade ‘Administrative Law’ 4th ed.

³¹ Hansard HL Debates, 31 January 2007, col 227.

Filter model

The previous two models sought to capture aspects of the relationship between redress mechanisms. Models can also highlight features common to redress mechanisms. One such feature is the practice of ‘filtering’.³² This model highlights the tension within a redress mechanism between detailed (and expensive) work on a relatively small proportion of cases and the need to expend resources filtering out other cases that are thought unsuited to further inquiry or in respect of which the application of resources is seen as unjustifiable. This may be because: a case falls outside the remit of the redress mechanism; the matters complained about appear, on an initial assessment, to be unfounded; or an alternative mechanism, such as internal review, has not been used or completed. Viewed from this perspective, the redress mechanisms seek to *ration* access to costly and time-consuming procedures.

Figure 3: Filter model



Filtering is a major part of the work of external grievance handlers. Except for ‘boutique mechanisms’, which may be dealing with limited and focused types of complaint,³³ filtering cases is a practical necessity and an inevitable fact of life. It can take different forms, for example procedural, jurisdictional and discretionary.

The filtering out of complaints to the LGO, both procedural and jurisdictional, is carried out by the LGO’s advice line team, who deal with all initial contacts with potential complainants. Procedural filtering occurs in respect of cases that are brought prematurely, in other words before exhausting internal processes, and jurisdictional filtering occurs in respect of cases that do not fall within the LGO’s jurisdiction. It is difficult to ascertain exactly how many complaints survive the filtering of cases at various stages, as the figures provided by the LGO do not distinguish between complaints and enquiries. But in any event, only a small number of aggrieved complainants have their complaints investigated. In 2010, of 10,309 matters that reached the investigation team, 2,366 complaints were concluded informally by way of local settlement³⁴ and only 74 complaints led to a report.

³² For further discussion of filtering mechanisms, see Section Five, Principle 8, ‘Fair and rational criteria and processes should be used to ‘filter’ inappropriate grievances’.

³³ E.g. the Independent Complaints Reviewer dealing with all complaints against the Land Registry www.icrev.org.uk/.

³⁴ See ‘Resolution model’, below.

The PCA has a referral mechanism in the form of a requirement that all complaints must be referred to the PCA by a Member of Parliament. This requirement may act as a filter in that it presents an additional hurdle en route to a complaint.³⁵ The MP filter is widely regarded as obsolete. Aside from the MP filter, the PCA has, in common with the LGO, both procedural and jurisdictional filters in place.

In judicial review, a number of different, formal and informal, filters are present at various stages. Unlike ombudsmen complaints, the majority of grievances that result in judicial review claims involve solicitors, who have an important role in effective filtering and signposting from the outset. Moreover, there are pre-action protocol requirements, which operate as a filter prior to formal start of legal proceedings. For example, a letter before claim must be written to the defendant public body setting out the grounds of complaint and the remedies sought.³⁶ Research suggests that approximately 60 per cent of potential legal challenges end at this point.³⁷ Those challenges that do proceed to the Administrative Court are subject to a filter in the form of the requirement that the claimant obtain the permission of the court to proceed with a claim.³⁸

Filtering also takes place through further permission requirements in cases that seek to progress on appeal to the Court of Appeal and UK Supreme Court.

There is no filter for access to the First-tier Tribunal. A pilot introducing early neutral evaluation (ENE, a process similar to permission stage in judicial review, but voluntary) was carried out in 2009 to identify its usefulness in resolving administrative appeals without the need for a full tribunal hearing.³⁹ The pilot was not rolled out, however, and by June 2012 no permanent ENE mechanism had been introduced into the tribunal process. The Health, Education and Social Care (HESC) Chamber of the First-tier Tribunal informs parents appealing against local authority decisions on special educational needs (SEN) of the availability of independent mediation services; this is designed to steer cases away from hearings before the tribunal, but as in the ENE pilot, the use of mediation is voluntary

The filtering function is coupled in some circumstances with a sign-posting function, whereby the complaints handler indicates to the complainant why the complaint cannot be considered within that particular mechanism but could be looked into by a different body. The LGO and the PCA provide some such advice as part of their response to complaints and enquiries. The Administrative Court may do so when refusing permission to proceed with a judicial review, but this occurs only rarely and is not considered by judges to be part of their role. Some tribunals do a limited amount of signposting. Signposting may be problematic – its effectiveness may depend on the quality of the staff performing the signposting, on the individual complainant – who may decide not to pursue a complaint further for a variety of reasons⁴⁰ – as well as on the availability of an

³⁵ For the arguments for and against the MP filter, see the PHSO consultation paper, 'Public Access to the Parliamentary Ombudsman', www.Ombudsman.org.uk/improving-public-service/reports-and-consultations/consultations/direct-access-to-the-parliamentary-Ombudsman/consultation-on-direct-access-to-the-parliamentary-Ombudsman (June 2011). See also PHSO's response www.ombudsman.org.uk/improving-public-service/reports-and-consultations/consultations/direct-access-to-the-parliamentary-ombudsman (Nov 2011).

³⁶ See http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv.

³⁷ See V Bondy and M Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (2009).

³⁸ Senior Courts Act 1981, s 31.

³⁹ <http://www.justice.gov.uk/publications/docs/summary-evaluation-early-neutral-evaluation.pdf>. For a summary of findings, see http://www.asauk.org.uk/go/SubPage_93.html.

⁴⁰ These may include the effort it takes to start the process all over again, finding the time and the energy, etc. (R Moorhead and M Robinson, 'A trouble shared – legal problems clusters in solicitors' and advice agencies', DCA Research Series 8/06 November 2006, pp75-77).

appropriate agency to which to signpost. Ombudsmen have no mechanism for following up on rejected or signposted complaints, and so no data on the efficiency of signposting is available.

Resolution model

A final model seeks to capture another feature common across several redress mechanisms. 'Resolution' is a relatively recent concept in administrative justice. The driving force of this model is the imperative to resolve a grievance at the earliest (and, as a rule, most cost-effective) opportunity. It was articulated in the 2004 White Paper *Transforming Public Services: Complaints, Redress and Tribunals* as the promotion of 'a range of tailored dispute resolution services, so that different types of dispute can be resolved fairly, quickly, efficiently and effectively, without recourse to the expense and formality of courts and tribunals'.⁴¹

The *Transforming Public Services* White Paper itself drew on developments in the field of ADR – originally 'alternative dispute resolution', and later 'appropriate dispute resolution' – and considered how ADR processes could be incorporated into the established mechanisms of court, tribunals, and ombudsmen.⁴²

Two main approaches to promoting this model can be identified as:

- Introducing into established mechanisms ways of arriving at an outcome while circumventing the need to engage in a full process. Examples are mediation, local settlements by ombudsmen, and Early Neutral Evaluation at tribunals.
- Introducing innovative, tailor-made additions to established methods such as setting up telephone helplines, training front-desk staff to point aggrieved people in the right direction, empowering primary decision-makers to put things right and offer compensation without the need for managerial approval, engaging an independent adjudicator and ad hoc arrangements.

While both these approaches may potentially afford complainants greater flexibility in arriving at satisfactory solutions, concerns have been voiced over these shifts away from full investigative or inquisitorial processes. For example, in the context of ombudsmen, the Advice Services Alliance observed:

'During the last eight years most ombudsmen have developed early resolution techniques. Guided mediation and telephone conciliation by Ombudsman caseworkers are now the mechanisms by which the vast majority of disputes are resolved, in both public and private schemes. This is cheaper and quicker than lengthy in-depth investigations and published reports, and for that reason could benefit complainants. But last year, the Local Government Ombudsman only published a report in 1.37% of cases. Once again, ADR processes are doubly removed from public scrutiny.'⁴³

This emphasis on 'resolution' can deprive complainants of the benefits of a fully transparent and accountable public law remedy, with wider consequences for society. These alternatives also give rise to tension between individual resolution (as in mediation or local settlement by an ombudsman) and the need to learn from complaints so as to improve public services and tension between resolution and precedent setting.

Indeed, it is not always clear what is meant by 'resolution'. In the context of the tribunal reforms, the *Transforming Public Services* White Paper notes that different people want different things in terms of outcome and process:

'Most people seem likely to want the process to be quick, cheap, simple and stress-free, but they may also want it to be rigorous, authoritative and final. Some may prefer an

⁴¹ *Transforming Public Services* op cit.

⁴² Ibid.

⁴³ Val Reid, *ADR Update* No. 28, August 2009, p 5 www.asauk.org.uk/fileLibrary/pdf/adr28001.pdf.

informal process where the dispute is resolved consensually. For some, an important consideration may be that the proceedings remain private.’⁴⁴

Its proposals, however, emphasised ‘resolution’ in the sense of proportionate cost and time required to conclude a case from the perspective of the administrative justice system or the authorities rather than that of the complainant.

There are other uncertainties. Is the meaning of ‘resolution’ the achievement of an outcome that is satisfactory to the complainant – in other words, one that meets the disparate needs identified in the White Paper? Or is it, as also suggested in the White Paper, about finding the most cost-effective method of disposing of complaints? In the latter case, the potential conflict between choice of redress mechanism on the one hand, and the cost of the process on the other, is likely to impact differently upon the complainant and the complaints handler and other stakeholders. For example, a judicial review can be inexpensive for an individual entitled to legal aid, but may not be regarded as a proportionate recourse by the Legal Services Commission. So, despite the official dominance of the user’s perspective as expressed by the Citizens’ Charter and its successors, the inherent conflict between users and providers of dispute resolution mechanisms is ever present.

Another example of the potential difference in perspective between users and providers can be found in the manner in which the majority of LGO complaints are resolved. Of those complaints in which a finding of maladministration causing injustice is made, 99 per cent conclude by way of local settlement. The term ‘local settlement’ is used to describe ‘the outcome of a complaint where, during the course of [the LGO’s] consideration of the complaint, the organisation concerned takes, or agrees to take, some action that the Ombudsman considers is a satisfactory response to the complaint and the investigation is discontinued’.⁴⁵ The complainant may not necessarily agree with this assessment but it is the ombudsman’s view that prevails here, and the investigation will be discontinued regardless of the complainant’s view.

Mediation has been enthusiastically promoted as the exemplary resolution-focused method, with the potential to replace any other dispute resolution mechanism. Since Lord Woolf’s *Access to Justice* report mediation has found its way into the Civil Procedure Rules, court-based mediation schemes,⁴⁶ court judgments,⁴⁷ judges’ speeches,⁴⁸ and Legal Services Commission and Ministry of Justice policies.⁴⁹

⁴⁴ *Transforming Public Services* op cit.

⁴⁵ www.lgo.org.uk/publications/glossary-2010-11/ .

⁴⁶ See, e.g., H Genn et al, *Twisting Arms: Court-referred and court-linked mediation under judicial pressure* (May 2007), Ministry of Justice Research Series 1/07, www.justice.gov.uk/publications/docs/Twisting-arms-meditationreport-Genn-et-al.pdf; and Court of Appeal Mediation Scheme, <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/court-of-appeal/civil-division/mediation.htm>.

⁴⁷ *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935; *Dunnett v Railtrack plc* [2002] EWCA Civ 303; *Hurst v Leeming* [2001] EWHC 1051 (Ch), [2003] 1 Lloyd’s Rep 379; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576.

⁴⁸ Two examples are www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf and <http://www.judiciary.gov.uk/media/speeches/2008/speech-clarke-lj-mor-08052008>.

⁴⁹ Inaugural Lecture to the Faculty of Mediation and ADR (1999), available at webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/speeches/1999/27-1-99.htm (last accessed 11 January 2011). The pledge report (2008–09) is available at www.justice.gov.uk/publications/alternative-dispute-resolution-2008-09.htm; The 2001 Pledge was replaced by the Dispute Resolution Commitment in June 2011, <http://www.justice.gov.uk/guidance/mediation/dispute-resolution-commitment.htm>; see Funding Code for mediation http://www.legalservices.gov.uk/docs/cls_main/Alternative_Dispute_Resolution.pdf.

Since 2007, the LGO has had the power to appoint and pay a mediator in order to resolve complaints.⁵⁰ According to the LGO, cases that have been successfully settled at mediation include those concerning social care services, special educational needs and housing disrepair. However, there is no published information of LGO complaints that have been resolved through mediation.

Mediation undoubtedly may lead to good and cost-effective outcomes in many situations, but in the context of disputes between citizens and public bodies it needs to be adopted, if at all, with caution so as to ensure that it is being utilised for the right reasons. The stated benefits (speed, economy, better outcomes) that the mediation process offers are often more readily applicable to disputes about compensation, where mediation presents a viable alternative to an otherwise lengthy and prohibitively expensive court process. However, in the context of public law disputes, mediations have so far been few and far between. Research conducted by the Public Law Project published in 2009 has shown that there is little room for mediation as an alternative to judicial review as over 90 per cent of judicial review claims settle before reaching final hearing in any event. The study concluded that mediations of judicial review claims are not necessarily cheap or quick, although good outcomes can be achieved in some cases.

⁵⁰ The Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007 SI 2007/1889. For more information, see V Bondy and M Doyle, *Mediation and Judicial Review: A Practical Handbook for Lawyers* (Public Law Project 2011), p61, www.publiclawproject.org.uk/documents/MediationandJudicialReview.pdf.

Section Two

Designing redress: when and where?

Introduction

In this part of the report we seek to map the complex administrative justice landscape in order to identify where in the system people are engaged in activities relating to the design of grievance redress mechanisms.⁵¹ This descriptive and analytical charting exposes the different contexts in which redress is thought about and designed. Only by knowing where and why design takes place can redress mechanisms be considered in an integrated way.

What is ‘design’?

The starting point for this part of our analysis is to understand what is meant by ‘designing’ redress systems. One of the definitions of design given by the *Oxford English Dictionary* is

‘A plan or scheme conceived in the mind and intended for subsequent execution; the preliminary conception of an idea that is to be carried into effect by action.’

The main focus is on the *planning stage* of grievance redress mechanisms (rather than, for example, evaluating how a mechanism operates in practice or how aggrieved people make choices about using the mechanisms – though considerations such as these may be taken into account by those who are planning mechanisms).

As explained in the previous section, the term ‘mechanisms’ is used to refer to the mix of institutional, procedural and remedial features of systems for addressing grievances. These are the matters that are typically committed to paper when a system is described (in legislation, in information disseminated to the public by decision-making public authorities, and in internal documents). These mechanisms do not exist in a void: professional cultures and values – including, for example, ‘customer focus’ and ‘user perspective’ – form an important part of the context in which institutions, procedures and remedies operate.

Contexts in which design takes place

In its most concrete forms, planning activity in relation to the design of grievance redress mechanisms takes place in three main scenarios (outlined here and discussed in more detail later in the report). If (as is suggested in Sections Four and Five) the development of a checklist of guiding principles may be of value in improving the process and outcomes of redress design, it is important to bear in mind that design for redress takes place in very different contexts. Whether it is possible to produce a statement of principles relevant to all three scenarios is discussed below.

⁵¹ See further A Le Sueur, ‘Designing Redress: Who does it, How and Why?’ (2012) 20 *Asia Pacific Law Review* 17.

New administrative activity requires a redress mechanism

Scenario 1 is where a new administrative scheme is created. The paradigm is where a government department's policy preferences are set out in a Bill, which is scrutinised by Parliament.⁵² During this process, consideration is normally given as to how grievances are to be dealt with. A significant proportion of the 50-70 bills passed in a typical parliamentary session will contain executive powers to which redress mechanisms may be attached. Planning is initially done within the central government department responsible for the Bill, with departmental officials working with departmental lawyers and Parliamentary Counsel. Redress is only one of a whole range of design considerations in a new administrative scheme.

Once in a while what is proposed may become a matter of political controversy, and ministers may have a role to play. This most commonly happens following interventions from the Joint Committee on Human Rights (JCHR) or the House of Lords Constitution Committee. In such situations ministers are at least nominally involved in responding to criticisms of the proposal. Design work in this scenario is carried out by a much narrower range of actors than can be seen in relation to fine-tuning (see below).

Fine-tuning existing redress mechanisms

Scenario 2 is where there is an existing redress mechanism and attempts are made to 'fine-tune' its operation by redesigning some aspect of it or clarifying how it relates to other redress mechanisms. Examples of fine-tuning include:

- Transfer of jurisdiction over legal challenges to local authority homelessness decision making from judicial review in the Administrative Court to appeals on point of law in the county courts.⁵³
- The decision of the Land Registry to create an Independent Complaints Reviewer (ICR) (an add-on to its non-statutory internal complaints handling procedures).⁵⁴
- The working practice adopted in 2006 by the London Borough of Southwark of having a duty solicitor present in their Homeless Persons Unit to ensure that case workers have quick access to legal advice at all times; this enabled early responses to potential disputes.⁵⁵
- The decision of the LGO to adopt a 'Council First' requirement insisting that complainants exhaust internal complaints systems before approaching the LGO. This did not require any amendment to the Local Government Act 1974 (the statute creating the LGO).⁵⁶
- The 'toolkit' produced by the 'Getting it right, and righting the wrongs' taskforce set up in 2009 by the Department for Communities and Local Government to examine complaints handling in local authorities.⁵⁷
- The guidance offered by the Court of Appeal in *Anufrijeva* about the relative benefits of making complaints to the PCA or LGO (compared to litigation) where compensation was sought for breach of Convention rights in some circumstances.⁵⁸

⁵² Analysis of what provision is made for redress in bills, and how that is scrutinised by Parliament, is being written up as a separate publication.

⁵³ Housing Act 2006; discussed below.

⁵⁴ Discussed below.

⁵⁵ Interview by PLP of London Borough of Southwark solicitor in August 2006.

⁵⁶ Discussed below.

⁵⁷ www.communities.gov.uk/publications/communities/gettingitrightreport.

⁵⁸ *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406.

- The transfer of jurisdiction in 2011 from the Asylum and Immigration Tribunal to the First-tier Tribunal and Upper Tribunal.⁵⁹
- The Law Commission's recommendations in their Public Services Ombudsmen report on improving institutional design.⁶⁰

As these illustrations show, design activities of this sort are carried out by a very broad range of actors and institutions across the administrative justice system. There may not be any consciousness on the part of the actors that they are engaged in 'design' of systems (e.g. the changes proposed may be seen as merely changes in working practice). Some redress planning is relatively small scale; other examples involve larger-scale change.

Another characteristic is that this type of planning activity quite often falls below the radar of Parliament (as it may not require statutory backing), is rarely the subject of high profile academic study and will not usually arouse much interest outside the specific area of public administration where it takes place.

'Big ticket' systematic review of redress mechanism

Scenario 3 is where there is a high-level political initiative to review the working of a whole area of redress. The examination may be carried out by a bespoke committee working at arm's length from government (e.g. the Leggatt review of tribunals in 2000-01), by the Law Commission of England and Wales (e.g. its current project on public sector ombudsmen and its ill-fated project on compensation for administrative wrongs) or within central government (e.g. the Cabinet Office review of ombudsmen in 2000). Reviews of this sort are rarely the last word in the planning process. It will usually be necessary for any recommendations accepted by government to be worked up into more detailed proposals by departmental officials and be put on a statutory basis.

Government programmes and the battle of ideas

As well as the three concrete settings for the redress design outlined above, two other fields of activity *related to design* can be identified. These do not involve the same sort of 'nuts and bolts' considerations about the practical design features but they do provide important contexts in which designers operate.

One such field of activity is the development of government 'programmes', which seek to steer thinking and practice about redress mechanisms across a broad range of public bodies. The significance of these programmes is discussed below. A programme expands on particular policies in the ambition to implement a holistic vision that goes beyond a tidying-up exercise and engages with basic constitutional and social questions about the relationship between the citizen and the state. Examples include the Citizen's Charter in the 1990s and more recently the 'proportionate dispute resolution' concept set out in the 2004 *Transforming Public Services* White Paper. The latter introduced the concept of proportionate dispute resolution and envisaged 'radical' changes:

'Our strategy turns on its head the Department's traditional emphasis first on courts, judges and court procedure, and second on legal aid to pay mainly for litigation lawyers. It starts instead with the real world problems people face.'⁶¹

Note that, as mentioned in Section One, the *Transforming Public Services* White Paper drew on the government's increased emphasis on out-of-court dispute resolution since the Woolf Access to Justice Report.

⁵⁹ Transfer of Functions of the Asylum and Immigration Tribunal Order 2009.

⁶⁰ Law Commission, *Public Services Ombudsmen* LAW COM No 329 (2011).

⁶¹ *Transforming Public Services*, op cit, Cm 6243 para 2.2.

A further and still more diffuse field of activity is the influencing actions of key actors in the system. These actions seek to propagate or challenge the big ideas about features of the redress systems and to influence the future direction of public policy. Examples include a series of lectures and articles by Ann Abrahams in which she articulates an expansionist view of her office of PHSO;⁶² and lectures by senior members of the judiciary seeking to promote or warn against the rise of ADR.⁶³ Some of the work of the Administrative Justice and Tribunals Council also falls into this category – particularly the championing of the ‘user perspective’ throughout the administrative justice system.

Drivers for design activity

Standing back from the various settings in which redress design activity takes place, a number of drivers for change can be identified.

Simply consequential on creation of new administrative powers

As already discussed, perhaps the most common reason for redress design is that new administrative powers are proposed for a public authority (the Secretary of State, local authorities, etc) and it is regarded as desirable by policy-makers for these to be accompanied by plans for dealing with grievances that may arise from the exercise of those powers.

Perceived needs to fill gaps

A perceived need to fill a gap in the system may be one impetus for change. A notable example was the creation of the PCA and the LGO. In its 1961 report *The Citizen and the Administration: the redress of grievances*, JUSTICE wrote explicitly about the gap in the British constitution left by the Franks Committee, and recommended a Parliamentary Commissioner for Administration. In a more recent development, the Human Rights Act 1998 and the mantra of ‘bringing rights home’ was avowedly about filling a gap in rights protection in the domestic courts. The absence in English law of a right to damages for loss caused by public law wrongs is regarded by many as a gap, one that the Law Commission proposed in June 2008 should be filled with a new cause of action based on ‘principles of modified corrective justice’.⁶⁴

The desire to simplify and rationalise

Another driver is the desire to introduce coherence into an already existing array of remedies and redress mechanisms. This can be illustrated with several examples. The Franks Committee’s recommendations in 1957 on tribunals and the implementation of the Leggatt Review recommendations by the Tribunals, Courts and Enforcement Act 2007 were both aimed at simplifying and rationalising the tribunals system. The reforms to judicial review put in place by Rules of the Supreme Court Order 53 in January 1978 carried out a similar function in relation to judicial review proceedings, with the various ‘prerogative writ’ remedies being combined into a single, uniform and simplified procedure for commencing judicial review in the High Court; there

⁶² A Abraham, ‘The Ombudsman as Part of the UK Constitution: A Contested Role?’ (2008) 61 *Parl. Aff.* 206; ‘The Ombudsman and Individual Rights’ (2008) 61 *Parl. Aff.* 370; ‘The Ombudsman and the Executive: The Road to Accountability’ (2008) *Parl. Aff.* 535; ‘The Future in International Perspective: The Ombudsman as Agent of Rights, Justice and Democracy’ (2008) 61 *Parl. Aff.* 681; ‘The Ombudsman and ‘paths to justice’: a just alternative or just an alternative?’ [2008] *Public Law* 1.

⁶³ See Resolution model above plus R Rothwell, ‘Neuberger warns against mediation and defends legal aid and Jackson’ (2011), *The Law Society Gazette* (4 March: see www.lawgazette.co.uk/news/neuberger-warns-against-mediation-and-defends-legal-aid-and-jackson). Lord Neuberger warned against mediation being used to replace the judicial process and ‘the “insidious” notion... that litigation is a bad thing, and that “other, more consensual means of resolving disputes are necessarily good things”’).

⁶⁴ Law Commission (2008) *op cit.*

was a further round of rationalisation in 2000 when judicial review claims were integrated into the Civil Procedure Rules. In relation to ombudsmen, the Regulatory Reform (Collaboration etc Between Ombudsmen) Order 2007 was designed to provide a legal framework for more effective joint working between the PCA and LGO. An unimplemented Cabinet Office review envisaging a new public-sector ombudsman structure for England had even more ambitious goals of simplification and rationalisation, but did not bear fruit.⁶⁵

The perceived need to divert grievances from one mechanism to another

A further driver is a perceived need to redirect a stream of cases from one redress mechanism to another. This may lead to a more fragmented system, so is not necessary about simplifying and rationalising. Diversion may be prompted by different factors. One may be a perception that a different mechanism offers a more suitable forum or process; cost saving and avoiding backlogs and delays may also be considerations.

Examples include:

- In the report *Access to Justice*, Lord Woolf recommended that challenges to the legality of some aspects of local authority homeless persons decision-making should be transferred from the Crown Office List (the precursor to the Administrative Court) to appeals on point of law to county courts; this was quickly implemented by the Housing Act 1996.
- The creation of contracted-out complaints systems by public bodies: the first to be set up was the ICR, which grew out of problems experienced by the Land Registry; here the diversion was away from the PCA.⁶⁶
- The development in the LGO of the Council First policy of requiring (except in specified and limited circumstances) complainants to show that they have exhausted the local authority complaints procedure before approaching the LGO.

In recent years the dominant pressure to divert has been away from adjudication in courts and tribunals and towards the use of ADR, especially mediation and early neutral evaluation. Local settlement and informal resolution by ombudsmen is an example of such diversion away from more formal investigation. In addition, the PCA and LGO have been conferred with express powers to 'appoint and pay a mediator or other appropriate person to assist him in the conduct of an investigation'.⁶⁷

Changes to redress mechanisms as a result of crisis management

The impetus for some changes to redress mechanisms has been official response to a particular crisis, scandal or disaster. Perhaps most famously, in the 1950s the Crichel Down affair – in which officials failed to honour an undertaking to permit landowners to buy back land that had been compulsorily purchased during the Second World War – led to the Franks inquiry, which made recommendations for greater independence of tribunals from the departments whose appeals they heard, and for other procedural reforms. More recently, various reforms were introduced for dealing with complaints about NHS general practitioners following recommendations made by the official inquiry into murders of patients by Dr Harold Shipman.⁶⁸ The creation of the Child Maintenance and Enforcement Commission (CMEC) in place of the failing Child Support Agency, and the consequential redesign of redress processes, may also be seen as an example of response to crisis (in this case, chronic administrative failures).

⁶⁵ Philip Collcutt, *Review of the public sector Ombudsmen in England* (Cabinet Office 2004).

⁶⁶ See discussion below.

⁶⁷ Regulatory Reform (Collaboration etc Between Ombudsmen) Order 2007.

⁶⁸ The Shipman Inquiry (Dame Janet Smith), *Fifth Report: Safeguarding Patients: Lessons from the Past - Proposals for the Future* (Cm 6394, 2004) ch 27.

Pressures from Europe

The drivers for some changes to redress mechanism can be traced to requirements to respond to principles contained in the European Convention on Human Rights (incorporated into English law by the Human Rights Act 1998). ECHR Article 6, in particular, has been a motivating factor. This requires that determinations in relation to ‘civil rights and obligations’ or ‘criminal charges’ are made by an independent and impartial judicial figure, in public. Originally intended to control trial proceedings to ensure fairness, the precepts developed by the European Court of Human Rights in relation to Article 6 in the context of administrative decision-making have not always been straightforward. Two illustrations highlight the potential influence of Convention rights:

- Housing Benefit Review Boards, consisting of elected councillors, were incompatible with ECHR Article 6 as they lacked independence from the executive and were connected to one of the parties to appeals against determinations of housing benefits.⁶⁹
- The Administrative Court, in hearing claims for judicial review, has had in some circumstances to move beyond its traditional focus on questions of law to adopt a higher degree of scrutiny of factual issues where this is necessary in order to adjudicate on Convention rights.⁷⁰

Financial constraints on government

Especially (but not only) after the world financial crisis of 2008, public-spending constraints on government have been a major factor in shaping official thinking about grievance redress mechanisms, as with almost every aspect of government activity. The availability of funding for advice and representation is under constant pressure. The Administrative Justice and Tribunals Council, created by the Tribunals, Courts and Enforcement Act 2007, was a high-profile casualty. The government’s intention is to abolish it under the Public Bodies Act 2011, although its abolition has been delayed. Even before the public-sector spending cuts, concerns about obtaining value for money in relation to handling grievances was the dominant theme in the work of the National Audit Office’s reports.⁷¹ The courts, too, have been conscious of the need for economy and proportionality in the allocation of resources for redress of grievances.⁷²

Aspects of financial constraint are considered below, including a review of how redress mechanisms have been costed⁷³ and what place, if any, financial considerations ought to have in any statement of design principles that may be developed.⁷⁴

⁶⁹ *Tsfayo v United Kingdom* (2009) 48 EHRR 18. By the time the judgment was delivered, a tribunal created by the Child Support, Pensions and Social Security Act 2000 had already replaced Housing Benefit Review Boards.

⁷⁰ See e.g. *R (on the application of Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545; [2002] 1 W.L.R. 419 (medical witnesses ordered to attend and be cross-examined so that court could reach its own view as to the merits of a medical decision and whether it infringed the patient’s human rights).

⁷¹ See below. Section Three Redress design by advisory bodies and Section Five Principle 6 Example 6.3.

⁷² A recurring theme in the recent UK Supreme Court judgment in *R (on the application of Cart) v Upper Tribunal (Public Law Project and another intervening)* [2011] UKSC 28.

⁷³ See below.

⁷⁴ See below.

Section Three

Actors and institutions – who designs?

Introduction

The previous sections have suggested that the activity of designing redress mechanisms is neither monolithic nor is it carried out only by a specialist cadre of officials; moreover, there is a variety of policy drivers that may provide impetus to the development of redress mechanisms. In a general sense, any attempt to develop a statement or checklist of principles for design would need to take these differing contexts into account. More specifically, there is a need to know where in the so-called ‘administrative justice landscape’ the statement might be *used*, and by whom. There is a risk that a statement of principles would be no more than pious aspirations if they are not embedded in the working practices of those who design redress mechanisms and those who are responsible for scrutinising proposals.

In this section, we therefore add finer grain to the map by considering further the work of different actors and institutions. The aim is to identify different points in the policy development and ratification processes where a checklist of principles about the design of redress could potentially be relevant.⁷⁵

Central government and the UK Parliament

The starting point is to examine where within central government and the parliamentary scrutiny process questions relating to redress mechanisms arise. Officials in central government engage in design activities in two main spheres: (a) in the context of developing specific policies and (b) in relation to broader programmes that seek to shape the general direction or strategy of redress mechanisms.⁷⁶ Parliament is routinely and closely involved in the scrutiny of (a) but has only a peripheral and sporadic role in relation to (b).

Redress design encapsulated in primary legislation

The first and most practical sphere is in relation to the development of specific policies to be given effect to by primary or secondary legislation. The set menu of possible redress mechanisms includes:

- requiring a public body to operate an internal review system⁷⁷

⁷⁵ See principles in Section Five.

⁷⁶ On distinctions between government ‘philosophy’, ‘programmes’ and ‘policies’, see M Hajer, ‘A Frame in the Fields: Policymaking and the Reinvention of Politics’ in M Hajer and H Wagenaar (eds), *Deliberative Policy Analysis: Understanding Governance in the Network Society* (CUP 2003).

⁷⁷ See e.g. Housing Act 1996, section 164 (creating a ‘right to request a review’ of a local authority decision not to put a person on a housing register or to remove a person from it); Crime and Security Act 2010, section 52 (compensation scheme for victims of overseas terrorism); Social Care Charges (Wales) Measure 2010, section 11 (review of social care charges by a local authority); Motor Vehicles (EC Type Approval) Regulations 1992, reg 12; Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001, reg 8.

- creating an appeal to the First-tier Tribunal⁷⁸ or another tribunal⁷⁹
- creating a right of appeal to a court⁸⁰
- stipulating that a newly created public body falls within the jurisdiction of an ombudsman

It is also open to officials to design an *à la carte* redress mechanism for the particular circumstances of the scheme.⁸¹ A bill may also make provision to oust the jurisdiction of the courts or seek in some way to discourage access to the courts. If a redress mechanism is not expressly created, then aggrieved people with legal challenges will be confined to making a claim for judicial review in the Administrative Court and using any non-statutory mechanisms that the public body in question may decide to create.

Officials making up the ‘bill team’, working with departmental lawyers and Parliamentary Counsel, are the key players responsible for developing policy and proposing what, if any, redress mechanisms to include on the face of a bill.⁸² Occasionally, advice may be sought from the Law Officers’ Department (especially where an issue relating to Convention right compatibility needs to be addressed).

A number of ‘guidelines’ or statements of principle exist to influence both the process of developing policy and the content of policy by central government departments. These include, for example, the Cabinet Office’s *A Code of Practice on Consultation* (which operates when a department and some other public bodies decide to run a formal consultation process)⁸³ and *Cabinet Office Guide to Making Legislation*.⁸⁴ Neither of these makes any special provision for policy making about redress mechanisms. So far as can be seen, the only publicly available document focusing specifically on an aspect of redress is the Cabinet Office’s *Guidance on New Ombudsman Schemes*.⁸⁵

Bills are accompanied by Explanatory Notes, drafted within departments: these sometimes deal with issues relating to redress mechanisms where there are potential Convention right issues.

Occasionally, questions of design of redress may become sufficiently politicised for them to become the subject to interest to ministers.⁸⁶

Parliamentarians have a role in scrutinising proposals for redress mechanisms (or their absence). The Joint Committee on Human Rights and the House of Lords Constitution Committee have remits to review all government bills and from time to time they engage with ministers and report to Parliament on perceived inadequacies with proposed redress mechanisms. In 2006, Dawn Oliver called for a ‘checklist’ to be developed:

‘The development and application of procedural, informational and substantive scrutiny standards and checklist items drawn from parliamentary committee reports and other sources should

⁷⁸ See e.g. Education and Skills Act 2008, s 24; Parliamentary Standards Act 2009 (as amended), s 6A (appeal from Compliance Officer); Child Minding and Day Care (Disqualification) (Wales) Regulations 2010 No. 1703 (W. 163); Education (Student Loans) (Repayment) Regulations (Northern Ireland) 2009 No. 128.

⁷⁹ e.g. the Competition Appeal Tribunal.

⁸⁰ e.g. the High Court (see Terrorist Asset-Freezing etc Act 2010, s 26 against determinations of HM Treasury to ‘designate’ a person).

⁸¹ e.g. Broads Authority Act 2009 s 31 establishes a ‘water skiing and wake boarding appeals panel’.

⁸² See E C Page, ‘The Civil Servant as legislator: Law making in the British administration’ (2003) 81 *Parl Admin* 652 and ‘Their word is law: parliamentary counsel and creative policy analysis’ [2009] *Public Law* 790.

⁸³ www.bis.gov.uk/policies/better-regulation/consultation-guidance.

⁸⁴ www.cabinetoffice.gov.uk/resource-library/guide-making-legislation.

⁸⁵ www.cabinetoffice.gov.uk/resource-library/guidance-new-Ombudsmen-scheme.

⁸⁶ e.g. Coastal Access Bill.

promote the careful, systematic and rational scrutiny of Bills and draft Bills in Parliament which is particularly important in the United Kingdom, lacking a written constitution, independent scrutiny body such as the New Zealand Legislation Advisory Committee, or a US-style Supreme Court.⁸⁷

No progress has been made on this.

House of Commons select committees may also take an interest in redress mechanisms during inquiries. This may be prospectively if a select committee is undertaking pre-legislative scrutiny of a draft bill or retrospectively in the course of a thematic inquiry or post-legislative scrutiny.

Draft bills relating to administrative justice do not always receive parliamentary scrutiny. For example, neither the House of Commons Justice Committee nor the House of Lords Constitution Committee was able to find time, or was sufficiently interested, to scrutinise the draft Tribunals, Courts and Enforcement Bill—a major piece of legislation that redesigned the tribunals system. The Constitution Committee did, however, raise issues to do with redress design when the bill ‘proper’ came before Parliament and successfully moved amendments.

Redress design given effect in secondary legislation

Some bills make provision about the chosen redress mechanism on their face; others leave detail to be set out in secondary legislation. Unlike bills, secondary legislation is drafted within the government department responsible for the area of policy in question. Giving evidence to a parliamentary select committee in 2005, a senior government lawyer in the Department for Trade and Industry explained:

‘We have a lot of internal guidance that we use for the preparation of Statutory Instruments, so people do this work under guidance, and the guidance comes from lawyers, policymakers, parliamentary clerks. It is on our intranet. We also look at the Cabinet Office’s intranet, and the Government Legal Service has an intranet called Lion, which again has a lot of guidance on Statutory Instrument procedures. That is the background against which we do the work. When it comes to the work itself, the starting point is when a policy idea comes forward that needs to be taken up into a Statutory Instrument.’⁸⁸

Secondary legislation is subject to more limited parliamentary scrutiny than are bills. Most are not subject to affirmative resolution and so become law without any parliamentary debate. Delegated legislation is, however, scrutinised by committee and their legal advisers. As part of their work, these committees from time to time pick up issues relating to redress mechanisms.

Under House of Commons Standing Order 151, the Joint Committee on Statutory Instruments (JCSI) has a remit to consider whether the legislation in question falls foul of a number of specified flaws – mostly of a technical or drafting kind.⁸⁹ A somewhat broader criterion used by the JCSI is that the legislation ‘is made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specific period’.⁹⁰ [

The House of Lords Select Committee on the Merits of Statutory Instruments has a wider remit to look at issues of substance; from time to time, this committee has taken up issues relating to redress mechanisms.⁹¹

⁸⁷ D Oliver, ‘Improving the scrutiny of bills: the case for standards and checklists’ [2006] *Public Law* 219.

⁸⁸ House of Lords Merits of Statutory Instruments, Minutes of Evidence, 8 November 2005, Anthony Inglese, Director-General of Legal Services, DTI.

⁸⁹ See, e.g., the drafting defect drawn to the attention of Parliament in relation to the Town and Country Planning (Trees) (Amendment) (England) Regulations 2008 (S.I. 2008/2260): JCSI, 31st Report of 2007-08 Session.

⁹⁰ <http://www.publications.parliament.uk/pa/cm200203/cmstords/17519.htm#151> at 151(1)(B)(ii).

⁹¹ See, e.g., exchange of correspondence with minister in relation to the Draft Marine Licensing (Licence Application Appeals) Regulations 2011 in the 24th Report of the 2010-2011 Session.

Redress design in the context of broader government programmes

In addition to developing specific designs for redress in the context of particular policies (given effect to in primary or secondary legislation), a second sphere of central government activity relating to design of redress takes place in relation to broader strategies, often called 'programmes' or 'toolkits'. These seek to have impact across government, including local authorities as well as executive agencies. Prime Minister John Major's Citizen's Charter (1991)⁹² set out 'Principles of Public Service' or 'Service Standards of Central Government', one of which was 'Redress – if things go wrong, the citizen is entitled, at the very least, to a good explanation and an apology. There should be a well-publicised and readily available complaints procedure.'⁹³ This was later expressed as:

'In serving you, every central government Department and agency will aim to ... have a complaints procedure – or procedures – for the services it provides, publicise it, including on the Internet, and send you information about it if you ask.'⁹⁴

The Citizen's Charter was transformed into the Service First programme (1998) in the first Blair administration,⁹⁵ in the context of the broader 'Modernising Government' initiative. The Citizen's Charter and Service First programmes created commitments to 'customer focus' and developing administration and redress with 'a user perspective' (a precept that has come to be strongly championed by the AJTC during its short life).

Three more programmes developed by government over the past dozen years have very specific applicability to grievance redress.

First, in 1999 the Lord Chancellor's Department published a discussion paper on ADR followed in 2001 by a 'pledge that government departments would more seriously consider the use of ADR to resolve disputes in which it was involved'.⁹⁶ The Pledge was replaced in 2011 by the Dispute Resolution Commitment, which includes almost the exact wording on cases that might not be suitable for ADR. Like its predecessor, the Commitment acknowledges that not all types of dispute are suitable for settlement through ADR, for example cases involving abuse of power, public law, human rights, as well as cases where precedent is needed to clarify the law, or where it would be contrary to the public interest to settle.⁹⁷

To date, academic analysis of the scope for ADR in public law cases has been mixed – ranging from scepticism, through cautious welcome, to generally positive responses.⁹⁸

⁹² G Drewry, 'Whatever happened to the Citizen's Charter?' [2002] *Public Law* 9.

⁹³ See House of Commons Public Administration Committee, *From Citizen's Charter to Public Service Guarantees: Entitlements to Public Service* 12th Report of 2007-08, HC 411.

⁹⁴ See *Modernising Government* White Paper Cm 4310 (March 1999), ch 3 <http://www.archive.official-documents.co.uk/document/cm43/4310/4310-03.htm>.

⁹⁵ *Service First: the new Charter programme* (June 1998). HC Hansard, 6 July 1998 col 338. <http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo980706/text/80706w02.htm>.

⁹⁶ For discussion, see M Partington 'Alternative Dispute Resolution: Recent Developments, Future Challenges' (2004) 23 *Civil Justice Quarterly* 99.

⁹⁷ The Dispute Resolution Commitment <http://www.justice.gov.uk/downloads/courts/mediation/drc-guidance-may2011.pdf> at 2.5.

⁹⁸ See M Adler, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' (2006) 69 *Modern Law Review* 958; G Richardson and H Genn, 'Tribunals in Transition: Resolution or Adjudication?' [2007] *Public Law* 116; M Supperstone, D Stilitz and C Sheldon, 'ADR and Public Law' [2006] *Public Law* 299, 319; V Bondy and L Mulcahy with Margaret Doyle and Val Reid, *Mediation and Judicial Review: an empirical research study* (2009); and V Bondy and M Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (2009).

Second, in 2004 the Department for Constitutional Affairs (the successor to the Lord Chancellor's Department) published the *Transforming Public Services White Paper*. It was a response to recommendations made by the Leggatt Review of the tribunal system but it went much further. As we discussed above, it introduced the notion of 'proportionate dispute resolution'.⁹⁹ The White Paper emphasised the fact that there are known unknowns in the context of tribunals: the use of ADR 'may mean a significant reduction in the number of cases which require a full judicial determination or they may turn out to be just another step in the process, adding cost and slowing things down'.

Third, in 2009 the Department for Communities and Local Government led the 'Getting it right, and righting the wrongs' programme, designed to review the availability of redress for citizens when local authority services fail to meet agreed standards.¹⁰⁰ A task force working at arm's length from the Department developed a 'toolkit' for local authorities.

Discussion

Taking stock of design activity within central government and Parliament, the following conclusions can be drawn.

- Officials working in central government departments have a prominent role in designing specific redress mechanisms. In developing proposals for primary and secondary legislation, there are already several 'guides' to which officials ought to have regard. None, however, appear to deal expressly with the general principles relating to the design of redress mechanisms. If a set of principles were developed, consideration would need to be given as to whether these should be incorporated into existing guidelines or whether there is value in having separate guidelines.
- Parliamentarians, especially through the work of committees, have opportunities to scrutinise bills and draft secondary legislation in relation to the adequacy of provision of redress mechanisms. Legal advisers to committees do, from time to time, raise questions about redress that are taken up in correspondence with ministers and if necessary reported to the relevant House(s).
- Parliament is better at scrutinising redress in the context of specific pieces of legislation than in calling government to account for its overarching strategies, articulated in 'programmes', which impact on redress. For example, there has been little parliamentary engagement with the practical and constitutional implications of government preferences for ADR in place of more formal adjudication and (in the case of ombudsmen) investigation. There was no parliamentary debate or inquiry of the vision set out in the Department for Constitutional Affairs' *Transforming Public Services White Paper*. We consider, below, whether a statement of principles on redress design might assist parliamentarians with scrutiny of strategy.¹⁰¹

Redress design in executive agencies and local authorities

Policy-focused officials in central government departments and ministers do not have a monopoly on design of redress mechanisms. Executive agencies, local authorities and other administrative bodies outside Whitehall are also sites for innovation and implementation of decisions about the operation of redress systems.

⁹⁹ See Introduction, above.

¹⁰⁰ www.communities.gov.uk/publications/communities/gettingitrightreport.

¹⁰¹ See Section Four below.

Unlike policy officials working in central government, officials in such bodies do not have easy access to legislation-making powers. A characteristic of design at this level is therefore that the innovations are not put on a statutory basis – they take place within each body’s existing framework of statutory powers. As they do not appear on the face of a bill and are not set up by delegated legislation, they receive no parliamentary scrutiny before they are launched. The following examples illustrate the types of innovation that take place.

The Land Registry

The Land Registry (LR), a non-ministerial government department and trading fund¹⁰² exists to ‘register ownership of land in England and Wales and to record dealings with land once it is registered’. During the 1990s the organisation sought to transform itself to be more customer-focused. The final stop in its internal complaints system was the Land Registry Solicitor; many complainants were articulate and tenacious in pursuing grievances. The LR found it difficult to ‘draw lines’ under some complaints, leading to some grievances remaining unresolved after several years. Many complaints went on to the PCA. The idea emerged of creating an independent complaints handler, who would work at arm’s length from the LR. In 1998, Jodi Berg was appointed as the first Independent Complaints Reviewer (ICR) (as the post came to be known). The ICR is engaged under a three-year contract, with the relationship between the ICR and the LR defined in a ‘service level agreement’. This describes the ICR’s role as ‘to provide a wholly independent complaints review service’ to the LR. The agreement also provides that the ICR’s remit is over maladministration and failure to meet standards of service but excludes matters including ‘complaints concerning the content of decision based on the statutory provisions’ under which the LR operates, and employee complaints. The agreement also outlines the authority of the ICR, the procedure following a complaint, the obligation of the LR to learn from complaints, and a duty on the ICR to produce an annual report to the chief executive.

The work of the ICR has expanded in subsequent years and now covers the Audit Commission, Charity Commission, Homes and Communities Agency, The National Archives and the Northern Ireland Youth Justice Agency. The ICR now brands itself the ‘IRC Office’¹⁰³ and receives funding from each of the agencies from which it receives complaints.

Brent LBC’s experiment with a complaints forum

The complaints manager at the London Borough of Brent set up in 2009 a ‘complaints forum’ at which members of the public and advice organisations would meet to discuss issues relating to complaints handling by the local authority. The meetings were held in the Council Chamber, with refreshments provided. It proved difficult to publicise effectively. At the first meeting there was some enthusiasm from members of the public (though they tended to focus on their own complaints) but it was poorly attended by advice agencies. A second meeting was organised in conjunction with the Local Government Ombudsman: this was poorly attended, with council officers outnumbering members of the public. It was decided that the forum was not an effective use of resources. Brent returned to organising targeted meetings with specific groups (such as law centre and Citizen Advice Bureau advisers).

Lewisham LBC’s innovation: an independent adjudicator for stage 3 complaints

The directly elected mayor of the London Borough of Lewisham became interested in the idea of introducing an independent element to the council’s complaint handling systems. One driver for this change was a perception that a high number of ‘premature’ complaints were being taken to the Local Government Ombudsman. Following a review commissioned by the chief executive, in

¹⁰² <http://www.landregistry.gov.uk/public/about-us/policy-statements/framework-2008>.

¹⁰³ www.icrev.org.uk.

2006 the council agreed to introduce an independent adjudicator (IA) at the third stage of the three-tier internal complaints system. A protocol for complaints handling has been developed. In March 2009 in relation to Lewisham Homes, the IA reported that 'I have had full cooperation from officers in terms of following [the protocol]. There continues to be a positive response to the IA role, and no department or partner has refused to accept my recommendations or awards'.¹⁰⁴ Annual reports by the IA are published on the council's website. In 2010-11, the IA received 74 cases, of which 43 related to the Council and a further 31 related to Lewisham Homes (the arm's-length management organisation that runs most of Lewisham Council homes). Of the complaints determined that year, 56% were upheld either in full or in part.

Discussion

Design innovations in local authorities and executive agencies have produced new systems of redress. These are driven by small teams or individuals keen to 'try something new' to address real world problems their organisations are facing. Ideas may emerge from politicians (as in the case of the Lewisham example) or officials. Particular individuals are capable of exerting considerable influence on thinking about the development of new redress systems. Those involved in design activities may have much closer knowledge of the day-to-day problems of the public authorities than policy-focused officials in Whitehall.

While a bill team cannot fail to recognise that they are engaged in redress design activities (see above), the same cannot be said for the much broader range of politicians and officials working at local government and executive agency level. In some circumstances, there may be little consciousness that an activity amounts to 'redress design' (as we have defined it).¹⁰⁵ In part this may be because there is not always a bright line between design and other activities intended to improve the quality of administration within an organisation (for example, introducing training for decision-makers).

One characteristic of these innovations is their lack of express statutory footing: they are achieved within the bodies' existing legal powers (often without, apparently, any express discussion about the extent of those powers). The absence of the need to obtain legislative authorisation means that there is little or no parliamentary oversight of the innovations. This is not to say, however, that there is an absence of other forms of accountability (for example, annual reports). New processes can be tested and abandoned if they do not work (as with the Brent forum example).

In the absence of legislative frameworks, contracts take centre stage. Thus both the Land Registry's Independent Complaints Reviewer and Lewisham's independent adjudicator have their arm's-length relationship with the decision-making body whose grievances they handle regulated by framework agreements. In this context, the adjective 'independent' is somewhat problematic. While the ICR and Lewisham's IA both report high levels of professional respect from decision-makers for their professional autonomy, clearly neither body meets the objective standards for independence demanded by Convention rights or the British and Irish Ombudsman Association (renamed in 2012 as Ombudsman Association). They remain part of the decision-making body's internal complaints procedures notwithstanding the epithet 'independent'.

Judges as redress designers

The higher judiciary are involved in the design of redress mechanisms in several different ways.

First and most obviously: through case law, judges are able to shape the jurisdiction of the courts in cases against public bodies. In a common law system, this is relatively uncontroversial. So, for example, in 1984 the House of Lords held that decisions taken by ministers under prerogative

¹⁰⁴ www.lewisham.gov.uk/.../3613334eafe64614a365578fe7784d9dFirstReportoftheIAforLH241109.PDF.

¹⁰⁵ See above Section Two

powers were subject to judicial review.¹⁰⁶ In 2000, the House of Lords clarified that under the Human Rights Act 1998, the standard of review of administrative decisions challenged on grounds of non-conformity with 'qualified rights' was proportionality not merely unreasonableness.¹⁰⁷ In recent years, the courts have developed legitimate expectation as a ground of review, providing a basis for legal challenge where none existed previously.¹⁰⁸

In a constitutional system based on parliamentary supremacy, it is open to Parliament to reverse the effect of judicial decisions – as illustrated by the introduction of section 145 of the Health and Social Care Act 2008, which reversed the House of Lords' decision in *YL v Birmingham City Council* (in which it had been held that private-sector care homes were not carrying out a 'function of a public nature' and were accordingly outside the ambit of the Human Rights Act).

Second: courts from time to time seek through judgments to define or redefine the relationship between the court system and other methods of redress, as the following three illustrations show.

- Thus in a 2001 judicial review challenge to a local authority's decision to close a care home, the Court of Appeal took the opportunity to issue guidance on the desirability of using mediation and other forms of ADR instead of legal challenge in the courts.¹⁰⁹ The Court said: 'This case will have served some purpose if it makes it clear that the lawyers acting on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable. If they cannot resolve the whole of the dispute by the use of the complaints procedure they should resolve the dispute so far as is practicable without involving litigation. At least in this way some of the expense and delay will be avoided. We hope that the highly skilled and caring practitioners who practise in this area will learn from what we regard as the very unfortunate history of this case.'
- In 2003, the Court of Appeal considered cases in which asylum seekers sought damages for breaches of ECHR Article 8 by local authorities that failed to provide suitable accommodation.¹¹⁰ The court laid down guidance on the relationship between courts, internal review procedures and ombudsmen in this context: 'Before giving permission to apply for judicial review, the Administrative Court judge should require the claimant to explain why it would not be more appropriate to use any available internal complaint procedure or proceed by making a claim to the PCA or LGO at least in the first instance. The complaint procedures of the PCA and the LGO are designed to deal economically (the claimant pays no costs and does not require a lawyer) and expeditiously with claims for compensation for maladministration. (From inquiries the court has made it is apparent that the timescale of resolving complaints compares favourably with that of litigation.)'
- In June 2011, the Supreme Court, in two landmark decisions in England and Wales as well as in Scotland, considered the nature of the relationship between judicial review proceedings and the work of the Upper Tribunal.¹¹¹ The question was what, if any, restrictions there should be on the circumstances in which a person could seek judicial review of a refusal of permission to appeal to the Upper Tribunal. Holding that the criteria should be that there was an important point of principle or practice at stake, or there was some other compelling reason for the

¹⁰⁶ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

¹⁰⁷ *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532. This was a conscious attempt to steer the lower courts to the correct approach under the HRA as the issue did not need to be decided on the facts of *Daly*.

¹⁰⁸ See e.g. *R (on the application of Coughlan) v North & East Devon Health Authority* [1999] EWCA Civ 1871.

¹⁰⁹ *Re Cowl (Practice Note); Cowl v Plymouth City Council* [2001] EWCA Civ 1935; [2002] 1 WLR 803.

¹¹⁰ *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406.

¹¹¹ *R (on the application of Cart) v Upper Tribunal* [2011] UKSC 28 and *Eba v Advocate General for Scotland* [2011] UKSC 29.

Administrative Court to consider the matter, the Supreme Court recommended that the Civil Procedure Rule Committee¹¹² might wish to streamline procedures in this context.

Third: the senior judiciary and people co-opted by them have a leading role in rule-making and development of strategies for the Administrative Court. Here judicial decision-making is exercised not through judgments but through committees. Thus, the Lord Chancellor set up a review, chaired by Sir Jeffery Bowman (a chartered accountant) of the procedures in the Administrative Court ahead of the coming into force of the Human Rights Act in October 2000.¹¹³ More recently, a working group of five judges was asked by the Civil Sub-committee of the Judicial Executive Board to develop a policy for the Administrative Court to sit more routinely in regional centres outside London.¹¹⁴

Fourth: senior judges, through public lectures and extra-judicial writing, contribute to the battle of ideas over redress mechanisms.¹¹⁵ Issues pursued by judges include the desirability of incorporating the ECHR into domestic law, arguments for and against the creation of a UK Supreme Court, and the desirability or otherwise of the promotion of ADR and other forms of mediation.

Discussion

Judges are involved in design activity in a range of ways. Design carried out by judgments is perhaps the most problematic.

How successful the courts are in encouraging new practices is open to question. In several respects, it may be suggested that the litigation process and the courtroom setting are ill-suited to developing ideas about the development of redress mechanisms.

- The court has no easy access to empirical evidence, the benefit of practical experience in operating other redress systems, or resource implications to inform policy making.
- The court hears a limited range of views. In *Anufrijeva*, the Court of Appeal did not formally hear from the LGO and PCA to find out the views of those organisations about the desirability of using ombudsmen rather than the courts to decide on Human Rights Act compensation claims. There is also no easy way in which ‘user perspective’ can be identified and taken into account.
- There is no scope for consultation.
- There is no requirement for post-judgment assessment of the success or otherwise of the changes promoted by the court. Certainly, courts are not institutionally suited to monitor compliance with changes and must rely on sporadic opportunities in individual cases to pronounce on systemic change. Research suggests, however, that generally, judicial review challenges have a potential to drive improvements in the quality of local authorities’ performance.¹¹⁶ More specifically, an example of the courts providing more ‘hard-edged’ binding directions on the design of grievance handling systems can be found in the series of cases in which UK courts have been called on to consider whether the design of internal complaints systems is compatible with article 6 of the European Convention on Human

¹¹² See www.justice.gov.uk/about/moj/advisory-groups/civil-procedure-rule-committee.htm.

¹¹³ Only one judge served on the committee (Lord Justice Simon Brown). See T Cornford and M Sunkin, ‘The Bowman report, access to justice and the recent reforms of the judicial review procedure’ [2001] *Public Law* 11.

¹¹⁴ S Nason, ‘Regionalisation of the Administrative Court and the tribunalisation of judicial review’ [2009] *Public Law* 440.

¹¹⁵ See Section One Resolution model above.

¹¹⁶ Sunkin et al, ‘The Positive Effect of Judicial Review on the Quality of Local Government’ [2010] *Judicial Review* 337.

Rights.¹¹⁷ The courts also have a strategic role in laying down how ombudsman recommendations should be implemented¹¹⁸ and on ensuring that ombudsmen operate within their legal framework.¹¹⁹

Redress design by the Ombudsmen

The two main public-sector ombudsmen organisations – the PHSO and the LGO – are, like judges, both a redress mechanism and have a role in the design of redress mechanisms.

Some design activity relates to the operation of the statutory frameworks within which the ombudsmen operate. The ombudsmen's approach to section 5(2) of the Parliamentary Commission Act 1967 and s 26(6) of the Local Government Act 1974 is of especial significance. These provisions state that the ombudsmen shall not conduct investigations into any action in respect of which the aggrieved person has or had a right of appeal, reference or review to a tribunal or minister subject to the proviso that the ombudsman 'may conduct an investigation notwithstanding the existence of such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect the person aggrieved to resort or to have resorted to it'. As discussed earlier, both the LGO and the PCA interpret this statutory bar rather widely.

Another example of design activity, examined elsewhere in the report, is the LGO's 'Council First' policy.¹²⁰ This illustrates ombudsmen influence on design (and re-design) of first-tier complaints handling. Ombudsmen's use of mediation and other non-investigatory approaches could also be seen as an example of redress design.

Redress design by advisory bodies

Another set of state actors engaged in redress design can loosely be described as 'advisory bodies'. They include:

- the Administrative Justice and Tribunals Council
- the Law Commission of England and Wales
- the National Audit Office
- the House of Commons select committee on public administration

Though each has a distinct statutory remit, they have all contributed to the production of designs for redress.

The AJTC was established in 2007 by the Tribunals, Courts and Enforcement Act 2007 (which set up a new tribunal system in the UK) as a successor the Council on Tribunals (which had a narrow remit). The AJTC's role was to keep 'under review the administrative justice system as a whole with a view to making it accessible, fair and efficient. We seek to ensure that the relationships between the courts, tribunals, ombudsmen and alternative dispute resolution providers satisfactorily reflect the needs of users'.¹²¹ It is to be abolished in 2012 as part of a cost-savings drive across central government. The functions performed by the AJTC are planned to transfer to the Ministry of Justice, a move which poses challenges to the independence of the oversight to be carried out. The AJTC during its short life sought to work at both an over-arching level and to

¹¹⁷ E.g. *Tower Hamlets LBC v Begum (Runa)* [2003] UKHL 5; *Birmingham City Council v Ali* [2008] EWCA Civ 1228. Also a recent case decided by the ECHR: *Heather Moor & Edgcomb Ltd v United Kingdom* 1550/09 [2011] ECHR 1019.

¹¹⁸ *R (on the application of Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36.

¹¹⁹ E.g. *R v Commissioner for Local Administration, ex p Croydon London Borough Council* [1989] 1 All ER 1033; *R (Siborurema) v Office of the Independent Adjudicator for Higher Education* [2007] EWCA Civ 1365.

¹²⁰ See below, Section Five, Principle 4, Example 4.3.

¹²¹ See www.justice.gov.uk/ajtc/.

deal with particular aspects of the design of specific redress mechanisms. The former included publication of a discussion document on the 'landscape' of administrative justice, which sought to lead discussion about the relationships between different redress mechanisms and the aims of administrative justice in the UK. The latter included responses to government consultations.

The AJTC made a contribution to redress design in a 2012 paper, 'Putting it right: a strategic approach to resolving administrative disputes'.¹²² This looks at the four-stage cycle of preventing, reducing, resolving and learning from complaints and disputes. It identifies 'mapping factors' and makes several recommendations to government, including having a single complaints portal for administrative justice complaints and an inventory of dispute resolution systems in administrative justice. It discusses the factors to consider in triage and in assessing suitability for mediation and suggests ways to improve learning from decisions, especially by tribunals.

The Law Commission of England and Wales (the general law reform body) has over many years carried out projects on aspects of administrative justice, including judicial review procedures, social housing dispute resolution, compensation for harm caused by official wrongs, and a review of public-sector ombudsmen. The reputation of the Law Commission, at least in the areas of public law, is not riding high at the moment: the previous government rejected key recommendations about housing disputes and, in a major setback, comprehensively rejected proposals developed by the Law Commission for a new framework for compensation for administrative wrongs. Its current work on ombudsmen is more modest in its ambitions.

The National Audit Office (NAO) (which scrutinises public spending on behalf of Parliament) has issued a series of reports on projects designed to measure the efficiency and effectiveness of internal complaints handling in various central government agencies, along with a broad-based report, *Citizen redress: What citizens can do if things go wrong with public services* in 2004. Its particular focus on efficiency has distanced the work of the NAO from other bodies working on administrative justice reform.

Within Parliament, the Public Administrative Select Committee (PASC) in the House of Commons (a cross-party committee of ten backbench MPs) has two main roles. One is the reports it makes in relation to the PCA's work: it both calls the PCA to account and supports the PCA when, as has happened on a few occasions in recent years, ministers have been reluctant to accept PCA findings and recommendations following investigations into maladministration in central government. The other is its more sporadic inquiries into other aspects of administrative justice.

¹²² <http://ajtc.justice.gov.uk/index.htm>.

Section Four

Design deficiencies and solutions

Introduction

This section of the report moves on to examine the ways in which the *processes* of designing redress mechanisms and the *outcomes* of those processes may be said to be deficient and to suggest a possible strategy for addressing some of the main weaknesses.

Deficiencies

The mapping exercise conducted in Sections Two and Three of this report reveals a constant flow of activity in designing and redesigning redress mechanisms against public bodies. It shows that design produces different degrees of change (from the small-scale and low-key to paradigm shifts). A wide range of constitutional actors is involved in design work, stimulated by a number of different drivers. Design takes place in a wide variety of contexts.

A distinction can be drawn between particular redress mechanisms and what has come to be called the administrative justice ‘landscape’ as a whole. While some of the particular processes for dealing with grievances have grown up spontaneously with little or no planning,¹²³ most individual redress systems are the product of a design. In other words, it is possible to identify a line of documents relating to policy-making and public deliberation that led to the creation of an ombudsmen, a reform of the tribunal system and so on. The same cannot be said about the administrative justice landscape as a whole: the multiplicity of different types of redress has largely been allowed to develop organically with little coordination or oversight.

This has created various practical problems.¹²⁴ For example, the grounds of judicial review (developed by the courts) and the meaning of ‘maladministration’ (dealt with by ombudsmen) have converged over the past 20 years or so leading to lack of clarity about where and how some grievances ought to be examined. Another practical problem is that despite exhortations from the courts and government, the use of ADR techniques such as mediation and conciliation to deal with disputes against public bodies remains controversial and unclear. In another example, projects designed to improve complaint handling appear to have either overlooked or dismissed human rights and rule of law considerations.¹²⁵

The organic administrative redress landscape may also have advantages over a more tightly coordinated system: it may make change easier to achieve and encourage new ideas and practices to be implemented. It may also be respectful of the institutional autonomy of office-holders and bodies. It should not be assumed that they would necessarily welcome strong external constraints.

Why is there a lack of coordination at landscape level? One explanation is that there is no single body in central government with either the institutional capacity or inclination to take on the role.

¹²³ Some internal complaints systems may fall into this category; as may the early centuries in the development of the High Court’s ‘supervisory jurisdiction’ to judicially review lower courts and administrative bodies.

¹²⁴ See further A Le Sueur, ‘Administrative justice and the resolution of disputes’, chapter 10 in J Jowell and D Oliver, *The Changing Constitution* (7th edn, Oxford: OUP 2011).

¹²⁵ For instance www.communities.gov.uk/publications/communities/gettingitrightreport.

The Ministry of Justice (before 2006, the Department of Constitutional Affairs and before 2003, the Lord Chancellor's Department) has a general responsibility for administrative justice. Its remit is not comprehensive, however. The Cabinet Office has responsibility for policy on ombudsmen. The Department for Communities and Local Government takes the lead on administrative justice in relation to the work of local authorities in England. All have, over recent decades, produced initiatives intended to improve grievance handling with only limited evidence of joined-up thinking. The closest to an overarching vision in the past decade was the Department for Constitutional Affairs' *Transforming Public Services* White Paper in 2004, which had a twin aim of setting out proposals for the reform of adjudicative tribunals in the UK and unveiling the idea of 'proportionate dispute resolution' (PDR). PDR sought to be a strategy for preventing disputes between citizens and public bodies arising, and if they do, encouraging non-judicial resolution.

Interest in promoting a grand vision of administrative justice in central government is heavily dependent on three factors. First is the predilections of ministers and senior officials – who at any given time have multiple calls on their time and reforming zeal. Second are the vagaries of central government reorganisation. Third is the need to cope with the dramatic budget cuts imposed across the whole of government by the new Conservative/Liberal Democrat coalition government, which came to office in May 2010. English administrative justice policy has been affected by all of these concerns. The team responsible for *Transforming Public Services* moved on to other things. In 2006, the new Ministry of Justice was far larger than its predecessors, having acquired a whole new set of responsibilities for prisons and many aspects of criminal justice policy (transferred from the Home Office). In the context of an austere cost-cutting culture there is little interest in major initiatives to reform administrative justice (except, perhaps, if any changes were recognised as capable of achieving significant savings). The cumulative result is that administrative justice has become a poor cousin within the Ministry of Justice, invited to the ball less often than it was in the past. In the other two departments – the Cabinet Office and the Department for Communities and Local Government – administrative justice has only ever been a very small aspect of their remit.

A more principled approach?

One of the questions this project has sought to address is: 'What practical steps in the medium and longer term might be taken in response to the problems of complexity, duplication and lack of coherence in the ways grievances are addressed?'

In the absence of any direct political or executive coordination of policy-making about redress (see above), an alternative has been to look to the development of statements of principle about aspects of administrative justice. Both the PHSO¹²⁶ and the LGO¹²⁷ have published statements of principles intended to guide the *operation* of complaints systems, as has the Ombudsman Association (formerly BIOA).¹²⁸

The Administrative Justice and Tribunal Council's *Principles for Administrative Justice* presented seven general principles 'that should apply right across the administrative justice landscape'.¹²⁹ That publication helpfully acknowledged four 'potential pitfalls' in setting out principles. Two were of general application: (i) principles of themselves will not have an impact without a frame of reference against which to measure adherence; (ii) a comprehensive set of principles in any system will to some extent be in tension with each other. Two were specifically related to the AJTC's role: (iii) its remit to review the system from 'the user perspective' may be at variance with the

¹²⁶ PHSO, *Principles of Good Administration* (2009), *Principles of Good Complaint Handling* (2009), and *Principles for Remedy* (2009).

¹²⁷ LGO, *Remedies: Guidance on good practice 6* (2005) and *Guidance on running a complaints system* (2009).

¹²⁸ BIOA, *Guide to principles of good complaint handling* (2007).

¹²⁹ AJTC, *Principles for Administrative Justice* (2010), 1.

perspectives of other players in the administrative justice system; and (iv) the AJTC is an advisory body with no power to impose principles on others.¹³⁰

Approaches to developing principles

Different approaches for generating a statement or checklist of principles may be described as inductive and deductive. There are advantages and disadvantages to each approach.

An inductive approach would try to draw principles from many instances of practical experience. This is the approach suggested by Dawn Oliver for the creation of a legislative scrutiny checklist, using material from the reports of the House of Lords Constitution Committee (which has a role of examining all government bills for any breach of constitutional principles).¹³¹ Such an approach was also used by the PHSO in the statement of good administrative practice first drafted in 2004:¹³²

‘The Principles are broad statements of what I believe bodies within the Ombudsman’s jurisdiction should do to deliver good administration and customer service. Based on the considerable expertise and experience of my Office in handling large numbers of complaints over the past 40 years, the Principles show the sorts of behaviour we expect and the tests we apply when determining complaints. I am pleased that the Principles have been welcomed across Government and the NHS and hope that public bodies and policy makers will find them a useful contribution to improving public services.’

In drafting a statement of principle for redress design, an approach along these lines would be to reflect on experience and identify those points on which there is broad consensus.

A deductive approach would be to start from a more abstract standpoint and seek to elucidate the important features of redress mechanisms in a constitutional democracy, and the processes by which they are created.

What might a statement of principles achieve?

Looking at the various statements of principles or guidance about grievance systems, it is possible to identify different goals they may seek to achieve. First, some are tools intended to improve the quality of public service by seeking to encourage (high) standards of administrative behaviour and decision-making in a variety of different contexts. Second, they may be regarded as having an accountability purpose: they are standards against which the behaviours of administrators are assessed (e.g. by the ombudsmen). Thirdly, statements of principles may be regarded as an aid to design of decision-making systems.

In what format might design principles be published?

There are a variety of ways in which principles of redress design could be expressed.

They could be stated in legislation. An example, emphasising the principle of the importance of user perspectives in public administration, is section 112 of the Public Services Reform (Scotland) Act 2010, which requires scrutiny authorities listed in a schedule to this Act of the Scottish Parliament ‘to make arrangements which: (a) secure continuous improvement in user focus in the exercise of their scrutiny functions and (b) demonstrate that improvement’.

Some principles might be thought to be of such fundamental importance that they ought to be encapsulated as rights in a Bill of Rights with higher constitutional status than ordinary legislation. The current inquiry into a proposed British Bill of Rights would provide an opportunity to

¹³⁰ AJTC, *Principles for Administrative Justice* (2010), 5.

¹³¹ D Oliver, ‘Improving the scrutiny of Bills: the case for standards and checklists’ [2006] *Public Law* 219.

¹³² PHSO, *Principles of Good Administration* (2009).

enshrine a broad right to administrative justice in the United Kingdom, which may be thought of as including a variety of different principles such as a prompt decision-making and explaining decisions.

Principles might be stated in documents that are not directly legally enforceable, as a code of practice or guidance of the kinds drafted by the ombudsmen in recent years.¹³³

Principles focused on redress design

What has been missing from the suite of principles statements to emerge in recent years is one that focuses on the activity of *designing* redress. The principles discussed in the next section of this report are both narrower and broader than what has gone before.

In the ‘design’ rather than ‘delivery’ perspective, the focus is *narrower* in that the principles are designed to inform policy-making and review *at the point at which grievance redress mechanisms are being (re)designed*. This encourages more fine-grained articulation of relevant principles than can be found in the existing iterations. Moreover, as the focus of this study is on the policy-making stage, questions not previously addressed in the various statements of principles can be addressed (e.g. what legislation setting up an administrative system ought to say about grievance redress).

The focus is also *broader* than the principles articulated by the PCA, LGO and Ombudsman Association insofar as we are concerned with the whole administrative justice landscape – including the work of judiciary-based redress mechanisms (i.e. courts and tribunals), not merely the non-judicial mechanisms which are the primary subject matter of the PCA, LGO and Ombudsman Association statements of principle. The AJTC’s work on mapping out ‘the landscape’ coincided in time with our own.¹³⁴ The mapping project was intended to achieve a wide range of outcomes, including to ‘promote awareness and understanding of it as an area worthy of specific sustained attention’, ‘help identify relations, overlaps and gaps in relation to redress provision’ and to ‘help identify where future work is needed’.¹³⁵ The anticipated abolition of the AJTC in 2012 will bring a halt to its own work on developing system-wide approaches.

¹³³ See above, notes 125 and 126.

¹³⁴ See AJTC, *The Developing Administrative Justice Landscape* (September 2009), which seeks to describe the system.

¹³⁵ *Ibid*, p1.

Section Five

Developing principles of redress design

Overview of the principles

The aim of this section of the report is to explore some principles that may be thought to be candidates for inclusion in a statement of principles about redress design. Clearly, a great deal of further debate would be needed before anything approaching a definitive statement could be produced capable of commanding broad consensus (assuming that the idea of a statement of principles is accepted in the first place).

The first three principles relate to the *constitutional context*: they are premised on the idea that redressing grievances is a constitutional activity – it conditions the relationship between citizens and the state.

1. There should be a presumption in favour of all administrative decision-making schemes making an express provision in legislation for effective pathways and remedies for addressing grievances.
2. The design of grievance redress mechanisms should (i) include processes for considering compatibility with principles and rights protected by the British constitution and Convention rights and (ii) should be compatible with them.
3. Grievance-handlers should be held to account for their work. A design of a grievance-handling system should facilitate accountability by considering the methods of accountability and the ‘audience’. The appropriate mix of accountability mechanisms varies according to the context in which a grievance system operates.

Two of the principles are about the process of design that has been explored in Sections Two and Three:

4. Where a new grievance redress system is being created, or an existing one reformed, policy-making should be informed by evidence and research.
5. There should be opportunities for grass-roots innovation.

The remaining principles focus on the substance of the design:

6. The design of a grievance handling system should ensure that the costs of creating, running and using a grievance redress system provide value for money and are proportionate.
7. There should be a good ‘fit’ between the types of grievance and the redress mechanism.
8. It should be anticipated that if a redress mechanism is created it will be used by (i) people who have complaints that are obviously without substance and (ii) by people who may have a legitimate grievance but who are seeking to raise it using the wrong mechanism. Fair, rational and effective ‘filters’ should be put in place.
9. As well as resolving individual grievances, redress mechanisms should contribute to improvements in public service by providing opportunities for public bodies to learn lessons.

This list of possible principles is not exhaustive. For example, consideration should be given to the need for ‘independence’ of the complaints handler, which is a far from straightforward concept. Thought should also be given as to what, if any, principles relate to design decisions about whether oral hearings ought to be part of a design and the appropriate mix of means of expressing a grievance (for example, by telephone, online, only by written application and so on).

Principle 1: There should be a presumption in favour of all administrative decision-making schemes making an express provision in legislation for an effective pathway and remedies for addressing disputes and grievances.

Statement of principle

Whenever a public body has power to make decisions affecting people, there should be a presumption that there are effective pathways and remedies for dealing with grievances and disputes. This principle is concerned only with *whether* some sort of express provision for grievance-redress ought to be made in the legislative framework for an administrative scheme; other principles (discussed below) address the considerations that should inform decisions about what sort of mechanism should be created.

Example 1.1: Marine and Coastal Access Act 2009

The Department for Environment, Food and Rural Affairs (Defra) planned a scheme under which the coast of England would become accessible on foot by members of the public for recreational purposes. This would have an obvious impact on landowners in coastal areas. Defra did not, however, want to create any sort of appeal mechanism in relation to routes of paths proposed by Natural England, even though a comparable scheme set up by the Countryside and Rights of Way Act 2000 (for inland access rights) had included a right to appeal to a tribunal. This failure was criticised by two parliamentary committees examining the draft bill as a ‘fundamental weakness’.¹³⁶ Scrutinising the bill, the House of Lords Constitution Committee recommended that ‘The range of powers contained in the bill to require coastal landowners to permit public access to their property ought, in our view, to be accompanied by a right of appeal to an independent body. The possibility of making a claim for judicial review in the High Court is neither a proportionate nor realistic option for the vast majority of aggrieved citizens in this context.’¹³⁷ The Joint Committee on Human Rights (JCHR) also expressed concerns about the absence of an appeal.¹³⁸

Defra believed that the lesson to be learnt from the 2000 Act was that appeals to a tribunal were ‘disproportionately lengthy and expensive’. A compromise emerged during the bill’s passage in the House of Lords: a duty was placed on the Secretary of State to refer objections to a proposed route of the coastal path to ‘an appointed person’ (in practice, the Planning Inspectorate). The Secretary of State would be bound by findings of fact by the appointed person except in defined circumstances and is required to state his reasons for not following a recommendation (whether a statement of fact or otherwise) of an appointed person when making a determination.¹³⁹ The JCHR was satisfied with the outcome, though warned that ‘The human rights concern raised by this Bill, namely the need for an opportunity to challenge factual determinations before an independent court or tribunal, is an issue which often arises in Bills in a number of different

¹³⁶ House of Commons Select Committee on Environment, Food and Rural Affairs, Draft Marine Bill: Coastal Access Provisions, 9th Report of 2007-08, HC 656, para 46; Joint Committee on the Draft Marine Bill, Draft Marine Bill, 1st Report of 2007-08, HL 159-I/HC 552-I.

¹³⁷ House of Lords Constitution Committee, 1st Report of 2008-09, HL 13.

¹³⁸ Joint Committee on Human Rights, 21st Report of 2008-09, HL 142/HC 918.

¹³⁹ House of Lords Hansard, 1 June 2009, col 45. See now Marine and Coastal Access Act 2009, Schedule 19, para 4.

contexts, and we look forward to the Government building on the approach it has taken in this Bill when the issue arises again in the future.’¹⁴⁰

Example 1.2: Pensions Act 2008

The Department for Work and Pensions introduced a bill conferring various sanction powers on the Pensions Regulator, for example on employers who fail to enrol ‘jobholders’ onto a pension scheme. A specialist tribunal, the Pensions Regulator Tribunal, already existed. The bill created rights of appeal to the tribunal in respect of some but not all of the sanctions. In its scrutiny of bill, the House of Lords Constitution Committee wrote to the minister in charge of the bill to raise its concerns about the absence of appeal rights from some compliance notices.¹⁴¹ The minister responded that he appreciated the Committee’s concerns, but explained that it was originally judged that ‘most notices did not in themselves constitute statutory decisions’ and that ‘recipients of notices could request formal review following the issue of a compliance notice, following which the Regulator could withdraw or vary a notice’. The minister undertook to reflect further on the issue. The Constitution Committee did not pursue the matter during the bill’s passage and the government did not bring forward any amendments to the bill.¹⁴²

Example 1.3: Local Government Ombudsman and internal school complaints

In April 2010, a pilot project for a new procedure for handling complaints about schools in England was created by the LGO, with plans for a national roll-out by September 2011 after the conclusion of a pilot and its evaluation. This came about as a result of the Apprenticeships, Skills, Children and Learning Act 2009, which conferred jurisdiction on the LGO to deal with internal school matters (in addition to its existing remit over education matters). Speaking in the House of Commons, the then Secretary of State (Ed Balls) said: ‘Strengthening the role of parents in schools is an important part of the children’s plan, but we also want to ensure that when parents feel that their complaints are not being properly listened to, they have a proper right of resort. In our consultation, parents made clear their view that the opportunity to complain to the local government Ombudsman would be welcome, and we are taking that step in the Bill. That is the right approach, and it will be used in a very small minority of cases’.¹⁴³

This new LGO jurisdiction was abolished unceremoniously by the incoming government, however, before it was even fully tested, without an alternative provision being put in place. The White Paper *The Importance of Teaching* simply states that ‘Schools are best placed to address parents’ concerns - and in almost every case, teachers and head teachers can resolve concerns and issues quickly and easily. Sometimes parents and schools have issues that cannot be resolved locally, and so we will make sure that parents have a route to complain in the most cost effective way, repealing recent legislation which introduced a role for the Local Government Ombudsman.’¹⁴⁴

Discussion of the principle

The inclusion of an appropriate pathway for addressing people’s disputes and grievances, and the availability of an effective remedy where wrongful action is established, has been accepted in many contexts as an important element in the overall design of administrative schemes. As examples 1.1 and 1.2 demonstrate, however, express provision is not always made when schemes are planned, and example 1.3 illustrates how not to treat grievance mechanisms.

¹⁴⁰ <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/142/142.pdf> at 1.10.

¹⁴¹ House of Lords Constitution Committee, Annual Report 2007-08, 4th Report of 2008-09, HL 20, Appendix.

¹⁴² Letter to Lord Goodlad from Lord McKenzie.

¹⁴³ House of Commons Hansard, 23 February, col 28 (Second Reading debate).

¹⁴⁴ <http://www.education.gov.uk/schools/toolsandinitiatives/schoolswhitepaper/b0068570/the-importance-of-teaching/> At paragraph 6.8.

What counts as ‘appropriate’ and ‘effective’ varies according to the context.

In developing the design for a new scheme or reforming an existing one, consideration of the requirements of the Human Rights Act 1998 may strongly influence what is provided. Where a Convention right may be in issue when the public body in question makes decisions, Article 13 of the European Convention on Human Rights (ECHR) requires there to be an ‘effective remedy’. This does not necessarily mean a ‘full’ right of appeal to a judicial body, but it does require that the grievance handler is independent of the public body. Similarly, where a ‘civil right or obligation’ or a ‘criminal matter’ falling within the scope of Article 6 ECHR may be at stake, there is a requirement that an aggrieved person has access to an independent court or tribunal with ‘full jurisdiction’ to adjudicate on the matter that has arisen. The lengthy debate, on and off the floor of the House of Lords, over appeal rights in the Marine and Coastal Access Act has put down a marker as to what may in future be expected of policy-makers, both from the point of view of Human Rights Act compliance and the constitutional principle of access to an independent grievance-handler.

Where Convention rights do not feature, policy-makers designing administrative systems may have more leeway to decide what, if anything, should be provided by way of grievance processes. It is in these situations that the principle being discussed here comes into play. The following table summarises some of the main considerations that may be thought by policy-makers to come into play.

Box 1 Considerations against creation of an express grievance process in legislation	Box 2 Considerations in favour of an express grievance process in legislation
<ul style="list-style-type: none"> (a) a process would be expensive to set up and run (b) a process would risk causing delay in the implementation of the administrative scheme (c) providing opportunities for a person to make representations <i>before</i> a decision is thought to be an adequate substitute for a right to question a decision <i>after</i> it has been made (an opportunity to make representations prior to a decision being made can be an adequate substitute to a post-decision challenge) (d) the action of the public body that may be challenged is not regarded as a ‘decision’ or ‘determination’ (e) the desirability of allowing a public body to innovate 	<ul style="list-style-type: none"> (f) providing a process may enable proportionate dispute resolution if aggrieved persons are steered away from judicial review (g) it is regarded as important that grievances are handled by people with suitable expertise in the subject matter (e.g. internal complaints or a specialist tribunal) (h) the Human Rights Act requires an express grievance process (i) public confidence in the administrative scheme is likely to be enhanced by express provision

In what, if any, circumstances, may it be justifiable for there to be no express provision in legislation for such a process? Examples 1.1 and 1.2 above show that policy-makers can expect parliamentarians to be sceptical of claims that express provision of a grievance procedure is not required.

Factors (a) and (b) may be legitimate concerns but it does not follow that they justify the omission of any provision for grievance-handling; rather, they point to the need to create processes that strike a balance between the issues at stake, cost and speed.

Factor(c) is a product of muddled thinking about the content of administrative justice. The common law has for many years recognised that procedural propriety may require *both* rights to participate in the decision-making process before a final determination *and* rights to challenge a determination once it is made. These are not mutually exclusive rights: indeed, the ground of challenge may be that the decision-maker failed to take proper account of representations before the decision took place.

In relation to factor (d), it is the case that there may be one or more preliminary steps on the way to making a final decision and that it will not be necessary or desirable to provide for a pathway to challenge those steps. There are good practical reasons for saying that a public body should be allowed to reach its decision before being subject to challenge by an aggrieved person. Care should, however, be taken about mischaracterising a final step as merely a preliminary one. In example 1.2, it is not entirely convincing to portray the imposition of a sanction in the form of a compliance notice as ‘not final’.

In deciding whether there is a justification for not including an express redress pathway, consideration needs to be given to the efficacy – in the particular context – of the two possible fallbacks. If a statutory framework for an administrative scheme is silent on the provision of a pathway and remedy, an aggrieved person will normally have only two possible ways of raising their concerns: (i) the public body may as a matter of discretion have set up an internal complaints procedure and (ii) a claim for judicial review made to the Administrative Court. Other avenues – including complaints to an ombudsman or an appeal to a tribunal – exist only if legislation expressly states that they are available. In relation to (i): internal complaints procedures may either be expressly required by the legislation establishing a scheme or set up as a matter of discretion by a public body.

In relation to (ii): judicial review may fail to provide an appropriate and effective remedy for several reasons (despite the courts’ willingness to be flexible and innovative in their approach). First, the capacity of judicial review to deal with disputes about facts is very limited. Second, judicial review is often unable to deal adequately with grievances about the exercise of official discretion because the courts apply high ‘thresholds’ in considering whether a public body has stepped outside its legal powers. Third, judicial review is, compared to other pathways, very expensive for claimants and public bodies. Fourth, judicial review claims may take a considerable amount of time to be resolved.

Principle 2: institutional design should respect constitutional principles

Statement of principle

The design of grievance redress mechanisms should (i) include processes for considering compatibility with principles and rights protected by the British constitution and Convention rights and (ii) be compatible with them.

Example 2.1: A controversial ouster clause

In 2002-3, the Home Office proposed to redesign appeal rights in relation to immigration and asylum decision-making. A clause was included in the Asylum and Immigration (Treatment of Claimants etc.) Bill, which would have inserted a new section 108A in the Nationality, Immigration, and Asylum Act 2002. The proposal sought to make determinations of the Asylum and

Immigration Tribunal exclusive and final and to oust the jurisdiction of the Administrative Court. This sparked a great deal of political and legal controversy. Opponents of the proposals said that the clause infringed the principle of the rule of law, undermined the independence of the judiciary, and would impede the constitutional right of access to justice. In 2004, during the bill's passage through Parliament, the *government* dropped the clause. Judicial control over immigration and asylum decision-making has been subject to significant reforms in subsequent years.

Example 2.2 Appeal and review mechanisms relating to economic regulation

In March 2004, the House of Lords Constitution Committee produced a report entitled *The Regulatory State: Ensuring its Accountability*, chapter 11 ('Improving the Appeals Mechanisms') of which examined how regulators' decisions could be challenged.¹⁴⁵ The Committee stated that 'Challenge constitutes the most powerful form of accountability'. The report recommended:

230. Appeals should provide an opportunity for the regulated to have their objections reviewed on the merits of the case, subject only to the condition that the appeal body should have the clear ability and power to identify and penalise appeals designed to frustrate equitable regulation.

231. Simplified systems of fast track appeals and arbitration should be developed for decisions by the Competition Commission and the Competition Appeal Tribunal and made available subject to the agreement of each of the parties concerned.

232. We further recommend that a Regulatory Appeals Tribunal should be set up to cover regulatory decisions that do not fall within the jurisdiction of either the Competition Commission or the Competition Appeal Tribunal, with a similar provision for fast track appeals and arbitration.

The *government* rejected these recommendations, saying that it

'believes that the existing appeals arrangements are broadly proportionate, and that universal adoption of review on the merits could have a significant impact on the current regulatory framework. The Government's view is underpinned by two principles. First, routes of appeal, whether by judicial review, appeal on the merits by way of a review or appeal on the merits by way of a rehearing must be proportionate to the specific circumstances and the type of decision the regulator is taking. Appeals can impose costs as well as benefits on the regulatory regime, both financial costs and costs of time taken to prepare for and hear appeals. Second, appeals should be seen as part of a wider web of regulatory accountability; for example, increasing the transparency of regulatory decision-making can contribute to regulatory certainty just as much as increased recourse to *ex post* appeals'.¹⁴⁶

Example 2.3: Decision-making by CMEC under the Welfare Act

In 2009, the Department for Work and Pensions proposed new arrangements for imposing civil sanctions on absent parents who fail to provide financial support to their children. The Welfare Reform Bill (amending the Child Support Act 1991) sought to give civil servants or contracted-out staff working for the Child Maintenance Enforcement Commission (CMEC, a non-departmental public body) power to remove driving licences from parents. Previously, disqualification from driving was a sanction that could only be ordered by magistrates, on applications from CMEC. The JCHR called for the proposal to be withdrawn from the Bill, but stated that should it proceed, then the procedure to be followed ought to be clarified, ensuring the right to make representations. The JCHR also expressed concerns over a proposal in the Bill for CMEC to recover their costs when an order is affirmed or varied upon an appeal to a Magistrates Court as this may prevent access to an independent and impartial tribunal:¹⁴⁷

¹⁴⁵ 6th Report of 2003-2004, HL 68.

¹⁴⁶ House of Lords Constitution Committee, *The Regulatory State: Ensuring its Accountability: The Government's Response* 12th Report of 2003-2004, HL 150, paras 60-61, <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/150/15006.htm>

¹⁴⁷ 14th Report of 2008-2009, HL 78/HC 414, para 173.

‘We are concerned that the costs provisions in the Bill create a significant disincentive to non-resident parents who might seek to appeal. We are concerned that this may create an unnecessary barrier to the right to a hearing by an independent and impartial tribunal, inconsistent with the requirements of Article 6 ECHR. We recommend that, if these proposals are not dropped, the Bill should be amended to ensure that the discretion to award costs in favour of either party remains with the court and that, generally, a non-resident parent will be able to recover their costs in respect of a successful appeal.’

The government rejected this recommendation and section 39DA of the Child Support Act 1991 now includes provision for mandatory costs orders.

Discussion of the principle

Nobody would demur from the general proposition that grievance-redress mechanisms should be designed and operated in ways that are congruent with the basic constitutional norms of the United Kingdom. While easy to state the principle, there are several different kinds of challenge in applying this in practice, relating to both the process of design and the substance of design.

One difficulty is that, in the absence of a codified constitution, there may be uncertainty as to the scope – or even the existence – of a particular constitutional principle and rights. In relation to rights, the Human Rights Act 1998 provides a surer guide as to relations between the State and individuals than existed prior to October 2000 (when the Act came fully into force), but Convention rights are not the whole picture. To give one example: what are the guiding principles in deciding whether it is constitutionally acceptable to create an appeal on point of law only (or leave an aggrieved person to resort to judicial review) rather than have an appeal on the merits from an administrative decision-maker? In circumstances where ECHR Article 6 is engaged (because the administrative decision involves a ‘civil right or obligation’), case law of the European Court of Human Rights requires access to a judicial body with sufficiently full jurisdiction to be able itself to substitute its own view of ‘simple questions of fact’. But this does not exhaust the rather complicated set of factors that are relevant to this aspect of redress design. No easily accessible analysis of the issues to be considered is available for those responsible for designing a system. While the case law of the European Court of Human Rights provides a sophisticated and detailed guide as to what is and is not acceptable, there is no comparable guide to the norms of the British constitution. There have been calls for a template to be developed, based perhaps on the reports made since 1999 by the House of Lords Constitution Committee.¹⁴⁸ No such checklist has yet been published, however, either by government or the Constitution Committee.

A second difficulty is that what is necessary in order to comply with a constitutional norm may be contested (for example, the government and parliamentary committees may disagree). The examples set out above provide some illustrations of this. Disagreement about norms is perhaps inherent in the British system but this observation is of little assistance to officials who have the task of designing administrative and redress processes.

Awareness of, and engagement with, constitutional principles and rights (including Convention rights) as relevant to the design of grievance systems is mostly confined to situations in which a new system will be backed by primary legislation. Here, there are processes within government and Parliament to consider compliance. The Cabinet Office’s *Guide to Making Legislation* states: ‘Consideration of the impact of legislation on Convention rights is an integral part of the policy-

¹⁴⁸ See e.g. Dawn Oliver, ‘Improving the Scrutiny of Bills: The Case for Standards and Checklists’ [2006] *Public Law* 219.

making process, not a last-minute compliance exercise'; 'Legislative provisions should contain appropriate safeguards and limitations to ensure compliance with the Convention rights; but these should not repeat the more general safeguards already guaranteed by the Human Rights Act and the Convention rights; and 'Early discussion with departmental legal advisers is essential'. The ministers in charge of the bill in each House are required by section 19 of the Human Rights Act 1998 to certify that in their opinion the proposals are compliant with Convention rights (or, in exceptional cases, acknowledge that they are not). All government bills are subject to the critical scrutiny of the Joint Committee on Human Rights and any concerns of that committee will be drawn to the attention of Parliament.

Where grievance systems are created or developed without primary legislation, awareness of and engagement with constitutional rights and principles is not embedded. Change not backed by primary legislation is also likely to fall under the radar of external scrutiny by anybody with expertise and interest in constitutional matters.

Principle 3: There should be public accountability for the operation of grievance handling

Statement of principle

Grievance-handlers should be publicly accountable for their work. A design of a grievance-handling system may facilitate accountability by considering the methods of accountability (e.g. reporting requirements) and the 'audience' (which may include initial decision-makers, Parliament, and the general public). The appropriate mix of accountability mechanisms varies according to the context in which a grievance system operates.

Example 3.1 Annual report on tribunals

TCEA 2007 section 43 places a statutory duty on the Senior President of Tribunals, liaising with the Lord Chancellor, to prepare and publish an annual report on the operation of the First-Tier Tribunal and Upper Tribunal. These are publicly accessible on the www.tribunals.gov.uk and www.judiciary.gov.uk websites.

Example 3.2 Value-for-money audits

The remit of the NAO includes reporting to Parliament on the economy, efficiency and effectiveness with which these government departments and agencies have used public money. In a series of reports, the NAO has examined internal complaints mechanisms and one arms' length complaint handling body.

Reports by the NAO relating to grievance-handling	
Citizen Redress: What citizens can do if things go wrong with public services	HC 21 Session 2004-2005 (March 2005)
Department for Work and Pensions: Handling Customer Complaints	HC 995 Session 2007-2008 (July 2008)
Feeding back? Learning from complaints handling in health and social care	HC 853 Session 2007-2008 (October 2008)
The Independent Police Complaints Commission	HC 1035 Session 2007-2008 (November 2008)
NAO Briefing: Administration of time-limited compensation schemes	July 2008

Example 3.3 Scrutiny by parliamentary committees

The House of Commons PASC has responsibility for examining 'the quality and standards of administration within the Civil Service' and conducts an annual review of the work of the Parliamentary and Health Service Ombudsman.

Reports by PASC relating to grievance-handling	
Parliament and the Ombudsman	HC 107 4th Report of 2009-2010
Justice denied? The Ombudsman's report on Equitable Life	HC 41 2nd Report of 2008-2009
When Citizens Complain	HC 409 5th Report of 2007-2008
The Ombudsman in Question: the Ombudsman's report on pensions and its constitutional implications	HC 1081 6th Report of 2005-2006
Tax Credits: putting things right	HC 577 2nd Report of 2005-2006
A Debt of Honour	HC 735 1st Report of 2005-2006
Choice, Voice and Public Services	HC 49 4th Report of 2004-2005
Ombudsman Issues	HC 448 3rd Report of 2002-2003

Other select committees from time to time carry out inquiries on grievance-handling, for example the House of Commons Work and Pensions Committee, *Decision making and appeals in the benefits system* (2nd Report of 2009-2001, HC 313).

Example 3.4 Service standards and key performance indicators

Over the past 25 years, target-setting, as part of a 'measurement' and 'performance' culture, became an important tool of attempts to improve service delivery and accountability in central and local government.¹⁴⁹ Most grievance-handling systems have 'service standards' and report on their performance against these indicators. For example:

- The Independent Case Examiner deals with complaints against numerous government agencies, including the Child Support Agency and Jobcentre Plus. Its standards of service include: reaching a decision in 80% of new complaints within 25 working days (performance as of 31 December 2010: 72.3%) and completing investigations in 55% of complaints within 6 months (55.2%).¹⁵⁰

¹⁴⁹ See generally House of Commons Public Administration Committee, *On Target? Government by Measurement* 5th Report of 2002-2003, HC 61.

¹⁵⁰ Source: <http://www.ind-case-exam.org.uk/en/info/standards.asp>.

- The LGO has adopted the following service standards: 50% of complaints decided within 13 weeks; 80% within 26 weeks; 96% within 52 weeks.¹⁵¹ The LGO's annual reports provide data on performance against these and other standards.

Discussion of the accountability principle

The starting point is to recognise that the work of public bodies in seeking to deal with grievances is part of the bodies' public powers and ought, therefore, to be subject to accountability requirements. Accountability 'is a principle which requires public authorities to explain their actions and be subject to scrutiny'.¹⁵² Accountability is important in and of itself in a modern democracy; the duty to explain publicly one's actions may also have instrumental value – for example as a tool to encourage lesson-learning from experience *including lessons from different systems* (see Principle 9) or as an aid to the strategic development of grievance handling systems.

A wide range of different accountability mechanisms may operate in relation to grievance handling. The challenge at the design stage is to identify what are the appropriate elements for the particular context in question:

- Should performance targets be set? If so, what should those targets consist of? Targets might consist of quantitative (e.g. timeliness in dealing with grievances) and qualitative data (e.g. user satisfaction). Who should set the targets? What will happen if targets are not met?
- What record-keeping should be expected of the grievance-handler?
- What public reporting obligations should there be, e.g. by way of an annual report?
- What value-for-money and other financial audits will the grievance handling process be subject to?
- Where the grievance process is established by legislation: should any or all of the above be legal requirements (in primary or secondary legislation) or left to the body in question to establish by practice?

Principle 4: Evidence and research should inform the creation of new redress mechanisms and the reform of existing ones

Statement of principle

Before reforms are introduced, evidence should be evaluated carefully. Where evidence is not available, research should be commissioned. Where evidence is derived from research carried out by the body seeking to rely on it, it is particularly important that the research methods are transparent and rigorous, and the conclusions able to withstand scrutiny, to avoid an appearance of bias. Pilots should be used whenever appropriate.

¹⁵¹ Source: <http://www.lgo.org.uk/guidance-inv/service-standards/>.

¹⁵² 'Accountability' in P Cane and J Conaghan, *The New Oxford Companion to Law* (OUP 2008) p7.

Example 4.1: 2009 legal aid consultation

In 2009, the Ministry of Justice (MoJ) published its consultation 'Legal Aid: Refocusing on Priority Cases'. One of the proposals was to withdraw the capacity of solicitors to award themselves public funding for emergency representation for all judicial reviews without having formally to apply to the Legal Services Commission. The stated rationale for this was that this power had been misused by solicitors in cases that lacked sufficient merit. The MoJ cited official statistics showing an increase in the number of judicial review claims issued and a decrease in the rate of grant of permission to proceed by the court. However, these figures did not necessarily provide a reliable basis for the MoJ's assumption that solicitors' powers had been abused.¹⁵³ In fact, the reasons for the decline in permission grant rates over a decade or so are complex, and cannot be viewed in isolation from other factors, such as the increase in rates of settlements at all stages of the process, as well as shifts in judicial approaches to the permission requirement of arguability.¹⁵⁴ The proposal drew extensive criticism and objections and was not, in the end, implemented.

Example 4.2: 2010 legal aid consultation

In 2010, the MoJ issued its consultation 'Proposals for the Reform of Legal Aid in England and Wales'.¹⁵⁵ One of its stated aims was to provide a 'substantial contribution to the MoJ's target of a real reduction of 23% in its budget'. The consultation stated that 'too often, those seeking civil legal aid find the process time-consuming, inconvenient and stressful'. It proposed a simple, straightforward telephone service, based on the current Community Legal Advice (CLA) helpline, to be made compulsory so as to provide a 'single gateway to civil legal aid services'. This is understood to mean that in order to access public funding and legal advice, callers will first have to satisfy a call centre worker that they are financially eligible for legal aid and within the scope of the legal aid scheme. If they are, they would in most cases be transferred to the CLA specialist telephone advice service. Only if the case is too complex to be dealt with by telephone or if the client is identified as having specific needs, such as mental impairment, will callers be referred to face-to-face advice services. In support of the proposal, the MoJ cited an unpublished, 'in-house' survey that indicated that many disabled and ethnic minority users would rather use the helpline than receive face-to-face advice. The Public Law Project (PLP) requested and obtained a copy of the survey from the MoJ shortly before the deadline for responses to the consultation¹⁵⁶ and concluded that the research report relied on did not support this assertion. For example, in its response to the consultation,¹⁵⁷ PLP pointed out that of the 121 ethnic minority users questioned (a small number for a survey of its kind in any event) the CLA had resolved problems for only 35 per cent. The survey focused solely on client satisfaction, which is not an indicator of the quality of the advice, and, moreover, the survey was carried out with persons who had chosen to use the telephone service as opposed to being compelled to do so. Nor was a comparison made between that service and face-to-face contact with solicitors. The government decided to go ahead with implementing this proposal, despite widespread objections and the absence of credible evidence on which to base such radical changes.¹⁵⁸ When implemented, this scheme is quite likely to be challenged by way of judicial review, in particular in respect of the decision to include community

¹⁵³ See V Bondy and M Sunkin, 'The Use of Statistics in Proposing Reforms to the Public Funding of Judicial Review Litigation: a critical View' (2009) 14 *Judicial Review* 372.

¹⁵⁴ V Bondy and M Sunkin, *The Dynamics of Judicial Review* (PLP 2009) pp52 onwards.

¹⁵⁵ <http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-consultation.pdf>.

¹⁵⁶ MoJ email dated 8 February 2011 reads: 'It will be possible for you to have a copy of the study however the original survey data referenced is held by the LSC. The survey data and analysis is normally used internally by CLA services and the LSC and is not currently formatted designed for external use. Whilst the LSC are happy to share the results it will take a few days to summarise the data and provide the context so it will be understandable...'

¹⁵⁷ <http://www.publiclawproject.org.uk/documents/PLPresponsetoLegalAidconsultation14Feb2011.pdf>.

¹⁵⁸ <http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf>.

care as one of the categories of law included in the scheme, on the basis that it would preclude vulnerable individuals from obtaining timely access to legal advice and, consequently, access to justice. Such a judicial review could give the court an opportunity to scrutinise more closely the unpublished evidence upon which the MoJ has relied.

Example 4.3: LGO 'Council First' policy

The LGO introduced the 'Council First' policy in April 2009, which insists (subject to certain exceptions) on complainants exhausting all (usually three) stages of their local authority's internal complaints processes before their complaint can be accepted by the LGO. The rationale for the new policy, officially, was that there had been an improvement in the quality of internal complaints processes. This view appeared, at best, to be based on anecdotal evidence, namely an impression on the part of LGO investigators that there were now fewer complaints reaching the LGO regarding poor quality of internal complaints, and impressions gained by those providing training to local authorities on good complaints handling. In fact, the only available published evidence was a pilot study, 'Ultimate Rung', carried out by the LGO in 1998, which supported the opposite view. In the pilot study complainants were required to exhaust all three stages of internal complaints procedures before they could submit their complaint to the LGO. The pilot concluded that complainants overwhelmingly disliked being required to exhaust councils' procedures and only 16 per cent were satisfied with their council's response to their complaints; the majority felt that councils were incapable of considering their complaints impartially and independently, which is why they complained to the LGO in the first place. Local authorities themselves preferred a degree of flexibility in this regard, and, in addition, the pilot exercise did not result in any significant savings in time and money either for councils or for the LGO. No further studies have been carried out since then, nor has any other evidence emerged to show that internal complaints operate satisfactorily. Unofficially, it has been suggested to us that the change was designed to reduce the number of claims reaching the LGO.

Discussion of the principle

In examples 4.1 and 4.2 above, it is difficult to resist the conclusion that research and statistical data were used to support the predetermined policy objective of limiting legal aid expenditure rather than used as a genuine process of impartial evaluation. In example 4.3 it appears that earlier research findings were ignored in favour of anecdotal evidence to achieve a goal of limiting the number of complaints reaching the LGO. In all three examples the conclusions appear to have been policy, rather than evidence, led. This may not only lead to the undermining of confidence in the public bodies concerned, but also give rise to bad policies that are likely to lead to unintended injustices.

Principle 5: There should be opportunities for grassroots innovations

Statement of principle

When designing redress mechanisms a body should be able to innovate within its statutory powers.

Examples

In Section Three above, we considered numerous examples of innovations introduced by bodies dealing with complaints, including the appointment of an Independent Complaints Reviewer (ICR) to deal with Land Registry complaints, and the creation of an independent adjudicator in the London Borough of Lewisham. Those involved in the above processes considered them successful. In the case of the ICR, the close interaction with the Land Registry and the expertise and focus of

the ICR have led to genuine lesson learning, resulting in improved procedures and a significant reduction in the number of complaints (see Principle 9 below). These outcomes would have been unlikely to flow from court proceedings, and less likely to flow from ombudsman involvement, as systemic issues would not be as readily identified. This is partly because fewer complaints would reach the ombudsman, and also because of the close contact and cumulative expertise developed by the ICR in this particular model. Similarly, in Lewisham, the mayor commented on the value derived from the Independent Adjudicator's Fifth Annual Report, which resulted in lesson learning and specific action taken, an outcome that would not have arisen from merely receiving the LGO's annual letter that was too general to enable lesson learning.¹⁵⁹

The regionalisation of the Administrative Court, initiated by the Judges' Council, could be considered another instance of grassroots innovation.¹⁶⁰ This entailed the establishment of regional centres in Birmingham, Cardiff, Leeds and Manchester to deal with judicial review. The change was driven by slim, if any, evidence, and various assumptions. Its stated aims included a desire to improve access to justice, to remove discrimination against those who are not in the Southeast of England, to save costs both to individuals and to the public purse, and not least, to relieve pressure on the increasing backlog of cases in the Administrative Court. As the change was viewed as merely administrative in nature, it was not considered to require great scrutiny, and the programme was rolled out despite numerous misgivings on the part of public law practitioners and representative bodies.¹⁶¹ Research by Nason and Sunkin suggests that although regionalisation has yet to have major impact, the reform has implications for access to justice, including affecting levels of expertise of judges in the various courts.¹⁶² There has also been an increase in the number of litigants in person and a greater concentration of cases in the hands of fewer solicitors. These consequences show that reforms of an apparently merely administrative nature may nevertheless have important implications, raising the question of whether this method of reform is ideally suited for bringing about changes of this nature.

Discussion of the principle

We can use two models for interpreting how the administrative justice system is developing or ought to develop: through more centralised planning and uniformity or by creating a climate for public authorities to try out innovative ways of dealing with complaints. In the absence of planning and coordination, innovation has an important role to fulfil in introducing changes in order to respond to particular problems.

This could, however, create tension between the flexibility needed to improve efficiency and quality so as to respond appropriately to specific circumstances, and a risk of abuse (for example, local innovations could reduce access to, openness and accountability of redress mechanisms). Proper consideration must be given to compliance with constitutional and human rights requirements and to other principles. Regard must be had to ensuring that innovation is for the benefit of users, rather than creating restrictions and inconsistencies so as to create a postcode lottery. Innovations that take place within organisations' existing frameworks enable those organisations to respond to changing circumstances and to address previously unforeseen problems. The obvious advantage in being able to do so is the ability to develop tailor made solutions by those with inside knowledge who are most familiar with the day-to-day issues arising

¹⁵⁹ <http://councilmeetings.lewisham.gov.uk/ieListDocuments.aspx?CIId=139&MID=2086>.

¹⁶⁰ Report of the Judicial Working Group, *Justice Outside London*, http://www.judiciary.gov.uk/publications-and-reports/reports/general/justice-outside-london/index/?wbc_purpose=Basic&WBCMODE=PresentationUnpublished%2cPresentationUnpublished.rss.

¹⁶¹ e.g. Constitutional and Administrative Law Bar Association (ALBA) May 2008, http://www.adminlaw.org.uk/events_consultations/consultation_papers.php.

¹⁶² S Nason and M Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2012) 75 *Modern Law Review*, forthcoming.

and who are, therefore, best placed to come up with appropriate solutions. This has to be weighed against the risk of changes taking place without express statutory footing and appropriate scrutiny.

Principle 6: Mechanisms should ensure value for money and proportionality

Statement of principle

The financial public and private costs of creating, running and using a grievance redress system should ensure value for money and should be proportionate.

Example 6.1 The Early Neutral Evaluation pilot at the Social Security and Child Support Tribunal

In 2010, a pilot sought to establish the cost-effectiveness of early neutral evaluation (ENE, a form of alternative dispute resolution) and whether it resulted in swifter, more proportionate resolution of cases. Proportionate resolution was defined as ‘resolving disputes earlier and more effectively through strongly evidenced cases and opportunities to settle appeals outside of a tribunal’.¹⁶³ The evaluation found that the use of ENE did not achieve swifter resolution of cases, nor was it cost effective as compared with the usual process. It did, however, have numerous positive outcomes that had nothing to do with proportionality as defined.¹⁶⁴

Example 6.2 Proposals for a new compensation system for administrative wrongs

In 2008, after several years’ work, the Law Commission of England and Wales published a consultation paper entitled *Administrative Redress: Public Bodies and the Citizen*.¹⁶⁵ This project examined ‘when and how citizens should be able to obtain redress from the state for seriously substandard administrative action’. Using a concept of ‘modified corrective justice’, the Law Commission sought ‘to develop a principled approach that properly reflects the special position of public bodies and affords them appropriate protection from undeserving claims’. The proposal was, after some delay, ‘firmly rejected’ by the government, in part because of the absence of detailed costing of administering this form of redress, an essential, though not exclusive element of proportionality.¹⁶⁶

Example 6.3 Attempts to calculate costs

The difficulty of quantifying the costs of different ways of dealing with grievances can be illustrated with two examples. First, in 2005 the National Audit Office estimated ‘very roughly’ that handling a complaint internally costs on average £155; appeals to tribunals, £455, and independent complaint handlers and ombudsmen costs were ‘mostly around £1,500 to £2,000’. A second example is that in 2010, the Law Commission considered costs in its consultation paper on *Public Service Ombudsmen*: it reported that the cost of disposing of an individual complaint by the LGO in 2009-10 was £689; by the PCA the figure was £2,584. For judicial review claims, the Law

¹⁶³ C Hay, K McKenna and T Buck, *Evaluation of Early Neutral Evaluation Alternative Dispute Resolution in the Social Security and Child Support Tribunal* (Ministry of Justice Research Series 2/10, January 2010), <http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/evaluation-early-neutral-evaluation.pdf>.

¹⁶⁴ E.g. positive outcomes for staff involved in the pilot in terms of professional development, and a stronger sense of shared responsibility, as well as approval of the process by appellants who welcomed the chance to talk through their case.

¹⁶⁵ Law Commission (2008) op cit.

¹⁶⁶ Ibid.

Commission based its impact assessment on ‘administrative’ costs of a full-day hearing as £1,117 with legal costs, including junior counsel, of £16,242 for the claimant and public body.¹⁶⁷

Discussion of the principle

There are a number of challenges in applying principles of value for money and proportionality to pathways of redress including:¹⁶⁸

- the difficulty of quantifying the costs of different ways of dealing with grievances
- the need to identify the perspective from which an assessment of proportionality is made
- the challenge of improving efficiency without compromising the quality of the service
- where access to redress is restricted as a result of savings, the impact of any disputes that remain unresolved on individuals and society in terms of physical and mental health, solvency, education, crime and self-esteem

The absence of an agreed formula for making calculations about costs makes comparisons between mechanisms difficult, if not impossible. There is variability in how departments define disputes, variations in cost patterns as between type of dispute, time spent, number of staff involved etc. When attempting to compare costs of avenues of dispute resolution, it is necessary to look at mechanisms as a whole in terms of impact and benefits, and to avoid reliance on figures produced with a particular outcome in mind. In particular, unit cost is not, and should not be the only measure of proportionality. Other important aspects of proportionality ought to be considered, such as effective sign-posting, effective lesson learning and the dissemination of good practice.

A policy-maker considering the design of a grievance system needs to look at this in two ways. Firstly, the perspective of individual ‘users’. The AJTC and others have championed the idea of ‘user perspectives’ or ‘journeys’ through administrative systems in recent years. In this context, the cost to individuals of using a grievance-handling pathway is balanced against the value of what is at stake for that person. This concept was at the heart of the reforms to the civil justice system introduced following Lord Woolf’s *Access to Justice* inquiry. The difficulty in applying cost-control mechanisms designed for the civil justice system generally to the administrative justice context, however, is that while the former typically involves money claims the latter often does not. What is at stake for the complainant, therefore, is not readily quantifiable in financial terms.

The second perspective is that of the grievance-handling institutions, and is about focusing institutional resources on ‘deserving’ complainants. From this perspective, proportionality may involve directing resources away from unmeritorious grievances towards those that require fuller consideration. The *Transforming Public Services* White Paper stated that ‘there should be no disproportionate barriers to users in terms of cost, speed or complexity, but misconceived or trivial complaints should be identified and rooted out quickly’.¹⁶⁹ This conception of proportionality is essentially about rationing the resources devoted to misguided or vexatious complainants. The concept and practice of ‘filtering’ grievances, and the principles that should inform this task, are examined in Principle 8 below.

In designing a new, or reforming an existing, grievance-handling pathway, policy-makers need to consider how misconceived or trivial complaints are to be managed. They also need to consider the cost of any filtering mechanism (the staff and resources required to assess and reject or signpost complaints).

¹⁶⁷ CP 196. http://lawcommission.justice.gov.uk/docs/cp196_Public_Services_Ombudsmen_Consultation.pdf.

¹⁶⁸ For an early discussion, see M Adler, ‘Tribunal Reform: Dispute Resolution and the Pursuit of Administrative Justice’ (2006) 69 *Modern Law Review* 958.

¹⁶⁹ *Transforming Public Services*, op cit, para 1.7.

As to the elements of quality of outcome and the hidden cost of unmet needs, they are obviously difficult to quantify, but much has been written about the personal and societal cost of unmet needs in relation to disputes that concern the more vulnerable members of society. For example, in 2006 the Legal Service Research Council *Causes of Action* report found that more than one-third of civil justice problems led to adverse physical and mental health issues, and 27 per cent led to a stress-related illness.¹⁷⁰ A report by Shelter in the same year established that experience of multiple housing problems, which are frequently a subject of dispute with local authorities, increases children's risk of ill-health and disability by up to 25 per cent during childhood and early adulthood.¹⁷¹ These consequences have not only human but financial costs, which are often not factored into an assessment of the cost element of redress when considering proportionality.

Principle 7: There should be a good 'fit' between the type of grievance and the redress mechanism

Statement of principle

When designing a redress mechanism it is necessary to anticipate what kinds of grievances are likely to arise from the decision-making process, and seek to achieve a match between those and various types of mechanisms that may be available.

Example 7.1: Social Fund

The Independent Review Service (IRS) was set up in 1988 to provide an independent review of discretionary Social Fund decisions, usually made in Jobcentre Plus offices.¹⁷² The IRS is funded by the Department for Work and Pensions but operates independently and is free of charge for complainants. It has the power to investigate and to consider the process of how a decision was made, as well as to consider the merits of the original decision. It covers England, Wales and Scotland and has reviewed more than 500,000 decisions since it began. Its 2010-11 annual report states that its unit cost per case was £86, and it cleared 99.2 per cent of straightforward cases within 12 days. Its caseload reflects a high volume of relatively low-value but often urgent cases. This is a redress mechanism that presents an excellent 'fit' between the nature of the dispute and the mode of resolution, as well as being proportionate in terms of speed and cost. According to the AJTC, the IRS provided an efficient and cost-effective service to its users and was therefore the right mechanism for the second-tier review process it was set up to deal with.

The Welfare Reform Act 2012 section 70 abolishes the discretionary Social Fund (probably from April 2013), leading to the abolition of the IRS. However, no provisions were made to set up a dispute resolution mechanism to deal with the inevitable challenges between the new local services which would replace the Crisis loan and the recipients of the benefit. The AJTC therefore suggested that the expertise and methodology developed by the service could be preserved for dealing with disputes in respect of this and other similar benefits, such as Social Security and Child Support.¹⁷³

¹⁷⁰ P Pleasance, N Balmer and A Buck, *Causes of action: civil law and social justice* (TSO 2006).

¹⁷¹ Shelter, *Chance of a Lifetime: the impact of bad housing on children's lives* (2006)
http://england.shelter.org.uk/_data/assets/pdf_file/0016/39202/Chance_of_a_Lifetime.pdf.

¹⁷² <http://www.irs-review.org.uk/>.

¹⁷³ See letter from Richard Thomas http://www.justice.gov.uk/ajtc/docs/Chair_letter_to_IDS_final.pdf.

*Example 7.2: LGO jurisdiction to handle school complaints*¹⁷⁴

A move to improve accountability of public services by strengthening the arrangements for complaints about schools was rooted in two reports published in 2008.¹⁷⁵ As a result, the (then Labour) government began a consultation on handling parents' complaints about school issues.¹⁷⁶ This consultation resulted in the conferment of jurisdiction on the LGO to deal with internal school matters (in addition to its existing remit over education matters) under the Apprenticeships, Skills, Children and Learning Act 2009.

The new jurisdiction was piloted from April 2010, with the intention to roll it out nationally from September 2011. Before the LGO was in a position to analyse the results of the pilot, the jurisdiction was abolished, leaving a complaint to the Secretary of State as the only redress available beyond school-level consideration of a complaint. A report on the pilot work of the LGO considered the approach taken by the policy team handling complaints made to the Secretary of State and describes the role as one of 'brokering':

'The Department's policy teams do not have any formal powers of direction in undertaking this complaints handling activity. Rather, the emphasis was reported by staff, to be on encouraging schools to reflect and evaluate their response to the parent's initial complaint. Similarly, there is an emphasis on encouraging parents to review the basis of their complaint and to objectively view the action taken by the school.'¹⁷⁷

This is an example of an abortive attempt to create a 'fit' between a dispute and the mechanism dealing with it.

Example 7.3: Mediation

Although it is commonly claimed that every type of dispute is capable of being mediated, there is, to date, little experience of mediation in the context of public law disputes. It is therefore important at least to attempt to articulate the factors that make disputes 'suitable' for mediation in order to assist disputants in considering mediation.

The Regulatory Reform Order 2007 gave the ombudsmen the power to appoint a mediator as opposed to by way of an investigation or local settlement.¹⁷⁸ Although this power is rarely used, the LGO has identified factors that help identify cases that may be suitable for mediation, including whether there is an ongoing relationship between the complainant and the local authority, where a simple resolution of the complaint is unlikely to be achieved and where there is a history of complaints leading to positions becoming entrenched. According to the LGO, cases that have been successfully settled at mediation include those concerning social care services, special educational needs and housing disrepair.¹⁷⁹

Despite enthusiastic endorsement of mediation as an alternative to all forms of litigation by judges and policy makers,¹⁸⁰ public law practitioners do not often resort to it. Research revealed deep-rooted scepticism on the part of practitioners as to the suitability of mediation to address the type

¹⁷⁴ See also Principle 1, example 1.3 above.

¹⁷⁵ Report on pupil behaviour by Sir Alan Steer (2008); House of Commons Public Administration Select Committee, *When Citizens Complain* (2008).

¹⁷⁶ Department for Education, *A New Way of Handling Parents Complaints on School Issues*, <http://www.education.gov.uk/consultations/downloadableDocs/Complaints%20full%20document.doc>.

¹⁷⁷ <https://www.education.gov.uk/publications/eOrderingDownload/DFE-RR193.pdf> p43.

¹⁷⁸ The Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007 SI 2007/1889.

¹⁷⁹ Reproduced from V Bondy and M Doyle, *Mediation in Judicial Review: A Practical Handbook for Lawyers* (PLP 2011) <http://www.publiclawproject.org.uk/documents/MJRhandbookFINAL.pdf>.

¹⁸⁰ See Section One above (Resolution model).

of dispute dealt with in judicial review claims. Nevertheless, case studies have shown that in some cases mediation enables the parties to reach outcomes that are more satisfactory than could be reached in a successful judicial review. It is difficult, however, to draw up a checklist so as to match a dispute with mediation in the context of public law disputes. Instead, it is necessary for parties to understand the process and apply it in individual cases.¹⁸¹

Discussion of the principle

In seeking to achieve a match between grievance and redress mechanisms, it is necessary first to identify what type of grievances are likely to arise and what are the appropriate tools to be utilised in those circumstances. There are different ways of interpreting 'fit'. One aspect of 'fit' is value for money and proportionality, as discussed in Principle 6. But 'fit' is more than value for money. In its guidance for the Cabinet Office, BIOA (now Ombudsman Association) recommended identifying the function to be carried out before establishing the mechanism:

'If you are seeking to provide a means of truly independent investigation of complaints about a service, whether in the public or private sector, with the objective of providing a remedy for the complainant for any failure and recommendations for improving the service, an Ombudsman scheme is likely to be appropriate. It will have greater recognition and acceptance if it is set up as 'BIOA compliant'.

If you are seeking to provide a means of appeal against a decision by a body such as a Government department, a tribunal may be in some circumstances more appropriate (contact the Ministry of Justice).

If you are seeking to create a body which will supplement the Department's own internal complaint-handling procedures, but which will carry out its functions internally reporting to the Department, then an independent complaints examiner may be more appropriate.

If you are seeking to create a service whose primary aim is advocacy, such as the Children's Commissioner for England, the title 'Ombudsman' is not appropriate.'¹⁸²

Another way to approach 'fit' is to consider the nature of the decision that is being challenged. For example, if the majority of challenges are likely to be to professional judgements, then judicial review would be inappropriate as judges cannot substitute their discretion for that of the original decision maker. If complaints are about whether an individual meets certain statutory criteria for qualifying for a particular benefit or status, judicial review may be an appropriate forum. These aspects can be ascertained from previous experience, through empirical research and consultation, or by looking at similar statutes. If a complaint rests on a dispute as to facts, then mediation might not be the appropriate mechanism because it is not a fact-finding or determining forum.

One aspect to consider is the speed with which a remedy is required. While a court has the power to issue an interim injunction, most complaints-handling bodies do not have emergency procedures. The IRS, given in the example 7.1 above, can respond to urgency.

In conclusion, in order to design redress that 'fits', numerous factors need be considered, including:

- categories of wrongfulness: whether disputes are about legality, about the merits of decisions, or complaints about maladministration
- whether disputes are about fact, point of law or exercise of discretion

¹⁸¹ Ibid. Also for detailed analysis of the use of mediation in public law disputes see V Bondy and L Mulcahy with M Doyle and V Reid, *Mediation and Judicial Review: An empirical research study* (PLP 2009), <http://www.publiclawproject.org.uk/documents/MediationandJudicialReview.pdf>.

¹⁸² Cabinet Office, *Ombudsman Schemes - Guidance for Departments*, <http://www.bioa.org.uk/docs/CabinetOfficeGuidanceNov09.pdf>.

- the type of power used by the public body, e.g. discretionary
- are cases likely to turn on complex facts
- is the decision-making likely to be polycentric, involving a number of different players, requiring a flexible format which allows for any number of interested parties, including those representing interests of third parties
- the type of outcome to be sought e.g. specific performance, injunction, financial award
- whether an ongoing relationship between the parties could be endangered or enhanced by a court using a particular process
- whether a civil right or obligation is at stake
- is there a need for binding decisions as opposed to recommendations
- whether professional or other expertise is required as opposed to just legal expertise
- the availability or otherwise of legal advice and funding for representation in a challenge
- is there a need for investigation or adjudication, and whether the method employed should be inquisitorial or adversarial

Principle 8: Fair and rational criteria and processes should be used to ‘filter’ inappropriate grievances

Statement of principle

It should be anticipated that if a redress mechanism is created it will be used (i) by people who have complaints that are obviously without substance and (ii) by people who may have a legitimate grievance but who are seeking to raise it using the wrong mechanism. Filtering is accordingly a major part of the work of complaint handlers, and careful design of modes of filtering is essential in ensuring the effectiveness of a mechanism.¹⁸³

Examples

Examples of filter mechanisms are discussed above, in Section One (filter model).

Discussion of the principle

In designing a grievance-handling mechanism, filtering may be thought to perform one or more of three functions:

- resolving – where the filter itself leads to resolution of a dispute – for example, where judicial review claims settle as a result of permission being granted
- signposting – where a complainant is directed to another mechanism or agency that can deal with that grievance more appropriately – for example, where the LGO’s Advice Line directs a complainant away from the ombudsman
- rejecting – where a complaint has no possible merit – for example, where permission to proceed to judicial review is refused

¹⁸³ See Section One (Filter model).

Principle 9: As well as dealing with individual grievances, redress mechanisms should contribute to improvements in public services

Statement of principle

When designing a redress mechanism, there should be clarity as to whether, and if so how, complaints handlers should identify systemic problems and bring them to the attention of the decision-makers for suitable action.

Example 9.1: Independent complaints reviewer

In the case of the ICR,¹⁸⁴ lesson learning is made possible because of a number of factors, both structural and cultural, including:

- close contact between the ICR and those responsible for handling complaints at the Land Registry
- the relationship of trust and challenge that has developed between the Land Registry and the ICR team
- the terms of the contract between the two institutions
- the relatively small number of complaints, and the focus of a small number of investigators on one particular agency, allowing the ICR to spot trends that might not be spotted by the ombudsman

Concrete examples of outcomes arising from this lesson learning included:

- rolling out of a programme of engagement based on an understanding of what consumers want, and following recommendations by the ICR
- a protocol for meeting with customers, devised after observing such meetings, that included a written agenda
- various administrative improvements for keeping file notes, sending documents to both parties in inter-party disputes and not only to the party requesting them as previously, procedures for dealing with staff who are also disputants, and ensuring transparency in dealing with disputes

The Land Registry believes that these improvements have reduced the number of new complaints.

Example 9.2: Lewisham Independent Adjudicator

In the case of the Lewisham independent adjudicator,¹⁸⁵ some of the same factors as in example 9.1 apply and contribute to effective lesson learning. A relatively small number of complaints, which are all handled by a single adjudicator, allow the adjudicator to spot trends and feedback. Specific trends and failures are noted in the annual report to the mayor, with a level of detail that enables the local authority – and ultimately the mayor – to identify what recommendations have been carried out. This contrasts with the more general feedback that is typical of the LGO annual letters to local authorities, something noted by the Lewisham mayor in a Council meeting:

‘The Mayor agreed that two amendments be made arising from concerns raised by the Independent Adjudicator and he accepted advice from the Chief Executive that compared to previous years, the report from the Ombudsman of only 16 lines was very sparse and

¹⁸⁴ See Section Three (Redress design in executive agencies and local authorities).

¹⁸⁵ See Section Three (Redress design in executive agencies and local authorities).

that a representation should be made to the Ombudsman on the sufficiency of their report.¹⁸⁶

Discussion of the principle

Lesson learning could potentially occur at various levels.

i Within the organisation complained about: this may be achieved by monitoring and analysing the nature of internal complaints made to it. The role of the complained-about body has been articulated by both the PCA and the LGO. According to the PCA, 'Public bodies should have systems to record, analyse and report on the learning from complaints. Public bodies should feed that learning back into the system to improve their performance'.¹⁸⁷ The LGO recommend that 'senior management should take real ownership of complaints procedures. They should have a system for receiving reports on complaints and outcomes and ensure that any learning and improvement from complaints is properly disseminated and implemented'.¹⁸⁸

ii Instigated by the complaints handler: an ombudsman or independent adjudicator alerting public bodies to issues arising repeatedly, and suggesting necessary improvements if appropriate, may instigate lesson learning. In relation to the PCA and the LGO, however, despite the examples given in *Aiming for the Best*,¹⁸⁹ the annual review letters are general and tend not to draw conclusions or feed back to authorities for lesson learning. In comparison to the IRC and independent adjudicators (see above), the ombudsmen deal with a wide variety of bodies and areas of complaint; this may present a challenge in identifying systemic issues.

Tribunals may notify public bodies of the need to improve certain aspects of services where large numbers of similar claims come before them. The AJTC, in its *Right First Time* paper,¹⁹⁰ stated that tribunals are well-placed to spot systemic and recurring problems, and recommended that Tribunals should

- separately highlight situations in their formal decisions where cases exhibit serious systemic problems which the Tribunal considers that the original decision-maker should address
- ensure that serious systemic issues are included in contributions to the Annual Report of the Senior President of Tribunals with a recommendation that MoJ seek rectification from the relevant public body as appropriate

iii) Interorganisational learning: by one decision-making body considering other bodies' failures as well as successes, for example through published guidance, workshops, case studies, and networks. The National Audit Office in its 2008 report *Feeding back? Learning from complaints handling in health and social care* said that neither the National Health Service nor social care have any formal means of capturing cross-organisational learning.¹⁹¹ Despite the establishment of Voices for Improvement Action Network (VIAN) in September 2006 to foster closer working relationships across health and social care, no methods appear to have been developed to improve learning or to provide toolkits or a good-practice database.

¹⁸⁶ <http://councilmeetings.lewisham.gov.uk/ieListDocuments.aspx?Cid=139&MID=2086>.

¹⁸⁷ <http://www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples/principles-of-good-complaint-handling-full/9>.

¹⁸⁸ LGO, *Guidance on Running a Complaints System* p.19, <http://www.lgo.org.uk/publications/advice-and-guidance/>.

¹⁸⁹ LGO, *Aiming for the best: using lessons from complaints to improve public services* (2011).

¹⁹⁰ [http://ajtc.justice.gov.uk/docs/AJTC_Right_first_time_web\(7\).pdf](http://ajtc.justice.gov.uk/docs/AJTC_Right_first_time_web(7).pdf) at p31.

¹⁹¹ http://www.nao.org.uk/publications/0708/learning_from_complaints.aspx.

While lesson learning leading to improvements in decision making is recognised as being an important function of redress mechanisms, it is still often an aspiration rather than a reality.

Section Six

Conclusions

This report explores how grievance resolution mechanisms are designed. The administrative justice 'landscape' is sprawling and only lightly and sporadically coordinated by central government. The report seeks to encourage debate on what improvements might be achieved in the current climate to the processes through which redress mechanisms are designed, and to the end products of those processes.

The report has sought to understand the process of designing redress mechanisms through an analytical map of why, by whom, when and where design takes place.

Design may be needed for several different reasons. It will typically occur when a new administrative scheme is being planned and policy-makers and parliamentarians consider how disputes will be handled. From time to time, there are major reviews of the operation of redress mechanisms, leading to reforms. Government may also seek to influence the design of redress mechanisms at programmatic level, recent examples of which are the Citizen's Charter (1990), bringing home Convention rights through the Human Rights Act (1998) and 'proportionate dispute resolution' (2004).

Attempting to identify drivers for change, the report suggests a range of factors which may prompt developments including: the desire to simplify and rationalise the administrative justice system; the perceived need to fill gaps; attempts to divert grievances from one mechanism to another; as a result of managing a particular crisis; responding to pressures from Europe; and impact of financial restraints on government.

Design of redress mechanisms is not an activity confined to any special body but may be seen across the whole face of government. Designers include: ministers and officials in central government departments; parliamentarians; local authorities and executive agencies; judges; the various ombudsmen; and through advisory bodies such as the Administrative Justice and Tribunals Council, the Law Commission of England and Wales; the National Audit Office; and the House of Commons Public Administration Select Committee.

Addressing the research question 'What practical steps in the medium and longer term might be taken in response to the problems of complexity, duplication and lack of coherence in the ways grievances are addressed?', the report identifies the possibility of developing a set of design principles as one potentially promising way forward. A statement of principles might lead to the development of good behaviours in relation to redress design; it may also serve an accountability function by providing a template against which to measure the success or otherwise of a grievance mechanism.

The report goes on to outline and discuss several different principles. These do not purport to be an exhaustive list of considerations to be taken into account in designing redress but rather are intended to be a starting point for a discussion about the advantages and disadvantages of such a project. The report suggests that principles would be needed about the constitutional context in which design takes place, the process by which design is developed, and the substance of designs.

ISBN 978-1-898421-15-3