The ombudsman, accountability and the courts

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Richard Kirkham is a Senior Lecturer at the University of Sheffield. Out of this same project the author has developed a publicly accessible online database of ombudsman case law through which readers can test the conclusions relied upon in this report. This database is housed by the Ombudsman Association and can be found at https://caselaw.ombudsmanassociation.org/.

Contents

Abbreviations

ADR	Alternative Dispute Resolution
FOS	Financial Ombudsman Service
IPCC	Independent Police Complaints Commission
JR	Judicial Review
LGO	Local Government Ombudsman
LGSCO	Local Government and Social Care Ombudsman
NIPSO	Northern Ireland Public Services Ombudsman
OA	Ombudsman Association
PCA	Parliamentary Commissioner for Administration
PHSO	Parliamentary and Health Service Ombudsman
PO	Pensions Ombudsman
PONI	Police Ombudsman for Northern Ireland
PSO	Public Services Ombudsman
PSOW	Public Services Ombudsman for Wales
OIA	Office of the Independent Adjudicator for Higher Education
SLCC	Scottish Legal Complaints Commission
SPSO	Scottish Public Services Ombudsman

List of Tables

List of Figures

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EXECUTIVE SUMMARY

The ombudsman institution has become one of the main providers of independent redress in the civil and administrative justice system, with a core role of handling complaints about maladministration, poor service or unfair treatment by service providers across large sections of the public and private sector. But, to what extent can we be confident that the ombudsman sector delivers fair and adequate justice? This report summarises the main findings of a Nuffield Foundation funded research project into the accountability and regulatory structure that surrounds the ombudsman sector, with a particular focus on the role of the judiciary.

The role of the courts in providing ombudsman oversight is important because without this input the sector operates in a largely self-regulated manner. A generic feature of a half-century's worth of ombudsman-building in the UK is that it has grown in a reactive fashion to bespoke problems in the administrative and civil justice system. Through this process, little legislative attention has been given to either the ombudsman-court relationship, or the regulation of the ombudsman sector. As a result, the governmental or parliamentary oversight of the sector that exists is ad hoc and intermittent. This outcome has led to gaps in oversight and created an important space for the courts to operate within, as well as incentivising individual schemes to develop their own standards by creating new accountability solutions in order to maintain their legitimacy and increase assurance.

On the impact of judicial decision-making, this report opens a window on a quiet development in the ombudsman sector, which has only been partially reported upon by the sector itself. Although still relatively small, there exists now a significant body of case law around the sector largely, although not exclusively, built up through the regular use of judicial review and statutory appeal mechanisms in which ombudsman decisions have been challenged.

In exploring this development, this report analyses the body of reported case law on the ombudsman sector from 1978 until the end of 2020, and examines the history, trends and features of litigation in this field. Reported case law was identified, core details and outcomes were coded, and judgments subjected to a content analysis study to trace the grounds of law that cases were decided upon and the judicial techniques applied. Interviews were held with members of ombudsman staff with responsibility for considering the impact of the law, and a literature review was undertaken of relevant published material.

This report is the first to offer a full account of public law litigation involving ombuds (throughout this report, the plural for ombudsman will be referred to as 'ombuds') in the UK and will be useful to anyone interested in the role of the courts in overseeing the work of the ombudsman sector, or the potential for using the law to overturn ombudsman decisions. Although focused on the UK, to provide added insight as to the nature of the relationship between the courts and the ombudsman sector, occasional reference is made to the case law of non-UK members of the Ombudsman Association, in particular those schemes based in the Republic of Ireland.

On the role of the courts, the report's main conclusions are that judicial review has had, and should continue to have, an important part to play in the oversight of the ombudsman sector. Nevertheless, the reliance on the judicial role that is identified in this report does raise a number of significant questions as to the adequacy of the legal and regulatory framework within which ombuds operate. In particular, for the vast majority of parties to ombudsman disputes, redress through the courts is an unrealistic option. Therefore, in order to provide assurance that the quality of individual decisions is sufficiently high, supplementary processes are required.

The most important of these supplementary processes have been created by the ombudsman sector itself and standards vary. The research conducted for this report shows that the sector is building towards a more transparent and robust system for evidencing its performance. Internal systems for dealing with complaints and reviewing decisions are now routinely publicised and reported on. Decisions are published for many schemes. Peer review and external review is now a feature of the sector, and several schemes have introduced forms of corporate governance which invite external scrutiny of their work on a more regular basis than provided by the legislature. Further, the Ombudsman Association, a long-standing membership association in the sector, has increased its activity to offer a 'soft' form of oversight and standards promotion. More needs to be done, however, to embed the new approaches across the sector and scrutinise its effectiveness. The report therefore concludes with a series of recommendations designed to make the framework that surrounds the ombudsman more robust.

The report also identifies that the legal framework within which some ombuds operate currently restricts the potential for the office to make a greater impact in advancing administrative justice, good administration and the rule of law. In doing so, this report adds to the growing body of academic and policy reviews that have proposed various legislative reforms in the sector.

The report's relevance is not just to those concerned with the ombudsman sector, but also current debates on the role of judicial review. The study provides empirical context for the work of the courts in judicial review, in a period when the role of judicial review is being looked at by the Conservative Government[1] and has been subject to much debate. The report will also be of interest to those looking to understand equivalent relationships between the courts and the various watchdogs and regulators that operate in the British constitutional set-up, including other specialised non-judicial dispute resolution mechanisms.

Principal findings and recommendations

- **Judicial review should be considered the appropriate solution for legal oversight of the ombudsman sector.** In ombudsman case law, the courts have provided strong background support for the evolution of standards in the sector and upholding standards of good administration, appropriate to the context of particular statutory schemes. In doing so, the courts have illustrated the importance of judicial review both in terms of supporting public authority and pragmatically adapting the grounds of administrative

[1] Lord Faulks (Chair), *The Independent Review of Administrative Law* (CP 407, Ministry of Justice, 2021).

law in accordance with the needs of the statutory scheme under review. With the exception of the Pensions Ombudsman, establishing a right of appeal from an ombudsman decision is not the answer because the experience of those few schemes with an appeal process is that the solution tends to exacerbate the embedded disadvantages experienced by individual complainants.

- **Judicial review acts to assist ombuds in managing their disputes with aggrieved complainants.** In ombudsman case law, judicial review largely serves as a process to filter claims into court which raise important points of law, and bring to an end the complaints of complainants. On both counts, it assists the ombudsman sector in delivering its services more effectively.

- **Judicial review does not offer an efficient route for challenging decisions of an ombudsman.** Unlike in other areas of public administration, in the ombudsman context judicial review is not a particularly effective means by which to challenge decisions made. Very few ombudsman decisions have been successfully challenged in judicial review and there is no evidence of a litigation effect, whereby the commencement of legal proceedings triggers a remedy from an ombudsman before a full hearing. Ombuds are 'law loyalists' and are very well-equipped to abide by the rule of law. There is a higher failure rate of claimants in ombudsman case law when compared to all ordinary judicial review claims, largely explained by the dominance of litigants-in-person amongst the claimants.

- **More targeted use could be made of public law litigation to advance administrative justice.** Opportunities exist to use ombudsman investigations as a catalyst for collective action or reference procedures in order to engage the court in legal proceedings that impact systemic questions of public administration concern. Such actions are also illustrations of how a stronger partnership arrangement could be built between the ombudsman sector and courts and tribunal sector.

- **There is more to be made of the capacity of the office of the ombudsman to (i) promote rule of law values; (ii) work cooperatively with other parts of the justice system; (iii) improve access to justice**. The ombudsman model works better where it is equipped with a broad toolkit of powers. In places, this model has already been implemented. Reform of the public services ombudsman model in England is needed to match developments elsewhere.

- **Solutions exist within the ombudsman sector to advance best practice on procedural fairness.** This report found that the ombudsman sector has been active in creating and advancing standards of procedural fairness. Bottom-up solutions have been developed, demonstrating that the sector has a strong reputational incentive to promote best practice. Some of these solutions should now become statutory duties.

The full list of recommendations contained in this report can be found in chapter 7. The key things that this research calls for are:

- **The Government should renew its commitment to introducing reforming legislation for a new Public Services Ombudsman.** New legislation should update

legislation in line with judgments made in ombudsman case law and the 2016 Draft Bill, and commit to a bolder model of the ombudsman than in the current Bill.

- **There should be a statutory duty for ombudsman schemes to publish their decisions.**
- **There should be a statutory duty for ombudsman schemes to operate an internal review process that complainants and investigated bodies can access.** There should also be an element of external oversight of internal review processes (eg an independent assessor).
- **Renewed consideration should be given as to how to best support Litigants-in-Person in judicial review.** Options include re-evaluating information provided and building new online resources.
- **The legislation of all ombudsman schemes should be subject to Government and/or Parliamentary review on a regular periodic basis** (eg every seven years) to take into account and reflect changes in the administrative justice landscape over time.

Outline of the report

The report has seven chapters. After an introductory chapter, Chapter 2 details three background contexts that need to be understood when evaluating the nature of the court's relationship with the ombudsman sector, these are: the overall legal and regulatory framework in which ombuds operate; the different potential functions of judicial review; and the multiple ways in which an ombudsman can be impacted by the work of the courts.

Chapter 3 considers the extent to which the courts offer an effective redress function for either complainants or investigated bodies aggrieved at the decision-making of an ombudsman.

Chapter 4 looks at the evidence that the courts perform an important role in providing institutional support for the authority of the ombudsman process and in assisting the ombudsman in managing complaints to a conclusion.

Chapter 5 examines the extent to which the courts have structured good administration and procedural fairness standards through the development and the refinement of the law in the ombudsman context.

Chapter 6 takes stock of the remaining gaps left in the current regulatory and legal framework that surrounds the ombudsman sector, before the report ends in chapter 7 with a series of recommendations for reform.

1. INTRODUCTION

The ombudsman, accountability and the courts

1.1 The institution of the ombudsman has become one of the cornerstones of the fragmented bundle of decision-makers and processes that make up the administrative justice system in the UK. Additionally, to provide justice in the field of consumer law, in recent decades increasing reliance has been placed on a disparate range of complaint-handlers, with the ombudsman frequently cited as the optimum non-judicial option.[2] But, to what extent can we be confident that the ombudsman sector delivers fair and adequate justice?

1.2 To paraphrase a famous definition of administrative justice, one of the biggest challenges the sector faces is satisfying users that the qualities of its decision-making processes 'provide arguments for the acceptability of its decisions'.[3] This report examines one part of the current solution to 'satisfying users': the relationship between the ombudsman and the courts. In particular, the report interrogates the degree to, and manner in, which the courts and the law exercise a control function over the ombudsman sector sufficient to provide reassurance as to standards of decision-making.

1.3 As important as the courts are, one of the report's main conclusions is that by itself the prospect of judicial remedy is insufficient to secure fair and adequate justice in the ombudsman sector, let alone satisfy users of that outcome.

1.4 The main option available to challenge the ombudsman in the courts is judicial review. From the user perspective, however, judicial review is often portrayed as a formal process that does not assist greatly in calling ombuds to account. In terms of the *resolution of grievances*, this report substantiates this conclusion. In only a very small number of cases does the court provide remedies for parties in ombudsman disputes. For the vast majority of parties to ombudsman disputes, redress through the courts is an unrealistic option, both in terms of accessibility and the chances of the claim being successful. The conclusion here is that in order to provide assurance that the quality of individual decisions is sufficiently high, supplementary processes are required. Some ideas for expanding the influence of the law through collective legal action are looked at further in this report. Other options for providing further assurance on ombudsman decision-making are also recommended, and will be explored in more detail in a subsequent paper on publication policies and internal review processes run by ombuds themselves.

1.5 Given its limitations therefore, judicial oversight cannot be the main guarantor of decision-making standards in the ombudsman sector. However, the evidence from case law reveals

[2] C. Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales* (Hart Publishing: Oxford, 2019).

[3] J Mashaw *Bureaucratic Justice: Managing Social Security Disability Claims.* (New Haven and London: Yale University Press, 1983), 24.

that the courts have established a rationed but occasionally powerful supervisory role over the ombudsman sector. Without this input, the ombudsman sector would be left largely self-regulated.

1.6 The regulatory environment in the ombudsman sector is one in which most of the other active control mechanisms are operated by the sector itself, meaning that the courts act as one of the main *independent* guardians of the standards applied by ombuds. This makes the import of the judicial role significant in delivering accountability in the ombudsman context. In this respect courts have found ways to deliver upon its duty, particularly, although not entirely, through the process of judicial review.

1.7 The report provides evidence of this broader supervisory role being performed through three functions. First, as already mentioned, by providing a measure of individual redress, including quashing a small handful of ombudsman decisions. Second, and more substantively, the courts provide institutional support for the authority of the ombudsman process. They do this in operating an institutional mechanism through which the legitimacy of the ombudsman system is formally upheld and by assisting in managing persistent complainants towards closure. Third, the courts interrogate and probe the integrity and robustness of the ombudsman sector, and occasionally encourage the development of higher standards in decision-making.

1.8 In the ombudsman context, through these three functions the background influence of the courts is effective in terms of promoting compliance with the law and advancing standards. In making this claim, the report draws upon ideas from other studies of impact in judicial review that indicate that, due to various features of their institutional culture, some forms of public body are more loyal to judicial review and the rule of law than others.[4] Along these lines, individual ombudsman schemes are networked into communities of equivalent schemes that possess strong internal reputational incentives to deliver upon rule of law obligations. The background role of the courts is an important component of this network and a key part of the existing regulatory solution to controlling the ombudsman sector. Due to this de facto role played by the courts, most stakeholders can draw considerable reassurance that ombuds adhere to legal expectations.

1.9 Nevertheless, the report goes on to draw three further conclusions. First, more thought needs to be put into how best to maximise the use of the courts. It is not argued here that it should be easier to access the courts in ombudsman case law, or that the law and judicial review provides the complete answer to ombudsman accountability. Indeed, this report makes a number of recommendations aimed at reducing the need for judicial scrutiny of individual decisions. However, in a few narrow respects there is an argument for enhancing the relationship between the courts and the ombudsman sector, such as through allowing for collective legal actions and/or actions with broader public interest impact and legal questions to be referred to court. Second, where gaps in the legislative design of

[4] Eg D. Cowan, S. Halliday & C. Hunter. 'Adjudicating the implementation of homelessness law: The promise of socio-legal studies'. *Housing Studies*, (2006) 21(3), 381–400; S. Halliday *Judicial review and compliance with administrative law*. Oxford: Hart (2004); V. Bondy, L. Platt & M. Sunkin. *The value and effects of judicial review: The nature of claims, their outcomes and consequences*. (London: Public Law Project, 2015).

ombudsman schemes are identified, regular legislative amendment that follows a considered review is the best way forward. Such a commitment to addressing outmoded aspects of current ombudsman design would in turn reduce the likelihood of successful litigation. Third, many of the best solutions to providing reassurance as to the quality of ombudsman services lies in the sector itself. However, to add transparency to these solutions, some of these solutions should now be confirmed in legislation, albeit treated in law as a duty so as to retain local discretion on the design of those processes.

1.10 A combination of legislative review, update and enhanced regulatory oversight would go a long way towards minimising the need for judicial intervention. However, the current and likely future reality of the imperfect world in which the ombudsman sector operates in is that its regulatory landscape is diverse and weak in terms of external oversight, and political attention to ombudsman affairs is ordinarily low.[5] In that context, the reserve safeguard provided through the supervisory input of judicial review remains essential and should not be weakened.

1.11 The practical importance for the ombudsman sector of the various functions provided by judicial review, as identified in this report, is that without the residuary access to the court's oversight, the ombudsman sector would be largely unsupported in its attempts both to settle complaints and to identify solutions to outdated legislation. The current reliance that the sector places upon self-regulation would become an even more dominant practice.

Research approach

1.12 This report is one of the outputs of a Nuffield Foundation funded project which aims to understand the impact of the different means employed to verify the quality of ombudsman determinations and address user concerns. The overall project examines three aspects of the model that ombuds have built up to provide assurance as to the quality of determinations: judicial oversight; internal review of complaints; and publication of decisions. The objectives of the study are: (1) to map and then (2) analyse the processes in place, leading then to two further objectives, (3) to encourage reform in the sector and (4) to help build capacity for further oversight and research on the ombudsman.

1.13 In exploring the importance of judicial review to the ombudsman sector, the research for this report used a mixture of methods. Four layers of empirical research were undertaken, further consideration of which can be found in an online annex to this report.[6]

[5] For a discussion of the challenges of introducing legislative reform, see R. Kirkham and C. Gill. 'Introduction'. In: Kirkham, R. and Gill, C. (eds.) *A Manifesto for Ombudsman Reform.* (Palgrave Macmillan, 2020), 1-11.

[6] R. Kirkham, *The Ombudsman, accountability and the courts: Annex.* Available at: *https://www.sheffield.ac.uk/law/research/centres-and-institutes/procedural-fairness-accountability-and-ombudsman*

- Reported case law was identified, and analysed through the coding of core details and outcomes.
- Reported case law was subject to a content analysis study to trace the grounds of law that cases were decided upon and the judicial techniques applied.[7]
- For most[8] schemes included in the study, interviews were held with members of ombudsman staff with responsibility for considering the impact of the law, both statutory and case law, on the operation of the office.
- A literature review was undertaken of relevant published material including:
  - Ombuds reports and website based information.
  - Parliamentary and Government reports.
  - Submissions to Parliament and online material provided by former complainants to an ombudsman.
  - Previous research on the ombudsman sector.

1.14 In January 2019, to consider one of the key conclusions of this research - the need for legislative reform - out of this same project a day long workshop was held with presentations from leading figures in the ombudsman sector, as well as stakeholders from public administration, local complaint handlers, politics and the advisory sector.[9] The insights gained from this event are also included in this report.

1.15 In charting the results of this research, this report proceeds as follows. First, (chapter 2) some background is provided as to the context in which the ombudsman operates. Its ad hoc evolution and the accompanying weak regulatory regime around the institution is explored, leading to a discussion of the nature of the ombudsman/court relationship. This relationship is described as a supervisory one. To detail this supervisory relationship the report evidences the court's role in performing three separate functions: providing redress; supporting the ombudsman sector; structuring the promotion of good administration standards. The delivery of each of these functions is then examined in turn (chapters 3-5). In the final sections of the report, the results of the study are analysed and ideas for further adaptations of the legislative and regulatory framework of the ombudsman sector considered (chapter 6). The report concludes with some recommendations for the way forward (chapter 7).

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[7] For more details see R. Kirkham and E. O'Loughlin, 'A Content Analysis of Judicial Decision-Making' in N. Creutzfeldt, M. Mason and K. McConnachie (eds) *Routledge Handbook on Socio-Legal Theory and Method* (Routledge, 2019); and R. Kirkham and E. O'Loughlin, 'Judicial Review and Ombuds: A Systematic Analysis' *Public Law* [2020] 679-700.

[8] One scheme in the study declined to participate for reasons of organisational change at the time the interviews were held. For another, the interview was held in a pilot study in December 2015. The communication with the non-UK and Irish members of the Ombudsman Association were conducted via email. For all other participants (both Irish and UK), the interviews were held either in person or on the phone between October 2018 and June 2019.

[9] For publication of some of the results of that workshop, see R. Kirkham and C. Gill (eds) *A Manifesto for Ombudsman Reform* (Palgrave MacMillan, 2020).

2. THE ROLE OF THE COURTS AND QUALITY CONTROL IN THE OMBUDSMAN SECTOR

2.1 This chapter considers three introductory contexts that need to be understood when evaluating the nature of the court's relationship with the ombudsman sector, these are: the overall legal and regulatory framework within which ombuds operate; the role of judicial review in ombudsman case law; and the multiple ways in which an ombudsman can be impacted by the work of the courts.

Regulation, accountability and the ombudsman sector

The justice system and the growing role of the ombudsman

2.2 The first context that needs to be considered before assessing the effectiveness of the role of judicial review as a form of quality control in the ombudsman sector is the overall legal and regulatory framework in which ombuds operate. This context both explains the importance of the input of the courts and highlights the different ways in which the qualities of the decision-making processes in the sector are defended, interrogated and upheld.

2.3 Compared to the long embedded framework that surrounds the courts, the ombudsman sector remains in an evolutionary phase. Over the last fifty years the sector has become a core part of the UK's justice system, which per annum collectively receives somewhere between 350 to 600 thousand complaints about public and private service providers.[10] With consumer disputes, the work of the small claims court is 'dwarfed' by the work of ombuds and other consumer dispute resolution processes.[11] Likewise, although the tribunals system is the biggest provider of independent administrative justice, in terms of case numbers handled the workload of the public services ombuds is much higher than the overall caseload in judicial review. Even with the rise of online dispute resolution[12] and the current

[10] Based on the reported figures of twenty-one ombudsman schemes in the UK, see Table 1 below. There can be big swings in complaint numbers every year, particularly where the largest scheme is involved, the Financial Ombudsman Service.

[11] C. Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales* (Hart Publishing: Oxford, 2019), 231.

[12] For a discussion of the future of online dispute resolution, see C. Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales* (Hart Publishing: Oxford, 2019), ch.7. Hodges asks the question of whether in the future the Online Court will retake workload from the ombudsman sector. He hypothesises that ombuds 'will probably retain their position' due to: advantages of existing market position; their expertise and specialisation; the inherent helpfulness of their product; the broader remit of the ombudsman to resolve disputes on grounds in addition to the law (ie on what is 'fair and reasonable' or 'maladministration') (ibid, 250).

Table 1: Timeline of introduction and abolition of main UK-based ombuds and ombudsman-like bodies[13]

SCHEME	LEGISLATION	YEAR ESTABLISHED	YEAR OF ABOLITION
Parliamentary Commissioner for Administration (since 2006 commonly referred to as the PHSO)	Parliamentary Commissioner Act 1967	1967	
Northern Ireland Parliamentary Commissioner for Administration (later Assembly Ombudsman)	Parliamentary Commissioner Act (Northern Ireland) 1969	1969	2016
Commissioner for Complaints Northern Ireland	The Commissioner for Complaints Act (Northern Ireland) 1969	1969	2016
Health Service Commissioner	Health Service Commissioners Act 1993 (formerly National Health Service Reorganisation Act 1973)	1973	
Commissioner for Local Administration (Local Government Ombudsman, and since 2017, Local Government and Social Care Ombudsman)	Local Government Act 1974	1974	
Insurance Ombudsman Bureau		1981	2001
Office of the Banking Ombudsman		1986	2001
Building Societies Ombudsman		1987	2001
Investment Ombudsman		1989	2001
Property Ombudsman	Not-for-profit company	1990	
Legal Services Ombudsman		1991	2010
Dispute Resolution Ombudsman / Furniture Ombudsman	Not-for-profit company	1992	
The Waterways Ombudsman	Established under a Trust	1993	
Prisons (and Probation Ombudsman)	Non-statutory body	1994	
Personal Investment Ombudsman Bureau		1994	2001
Housing Ombudsman Service	Housing Act 1996, s.51 & Sch.2	1996	
Scottish Legal Services Ombudsman		2000	2008
Police Ombudsman for Northern Ireland	Police (Northern Ireland) Act 1998, 2000, 2003	2000	
Financial Ombudsman Service	Financial Services and Markets Act 2000	2001	
Removals Industry Ombudsman Scheme	Not-for-profit company	2001	
Scottish Public Services Ombudsman	Scottish Public Services Ombudsman Act 2002	2002	
Ombudsman Services[14]	Non-statutory body	2003	
Independent Office for Police Conduct (before 2018, Independent Police Complaints Commission)	Police Reform Act 2002	2004	
Office of the Independent Adjudicator for Higher Education	Higher Education Act 2004	2004	
Public Services Ombudsman for Wales	Public Services Ombudsman (Wales) Act 2005	2005	
Legal Ombudsman	Legal Services Act 2007	2010	
The Motor Ombudsman[15]	Not-for-profit company	2016	
Northern Ireland Public Services Ombudsman	Public Services Ombudsman Act (Northern Ireland) 2016	2016	
Service Complaints Ombudsman	Armed Forces Service Complaints and Financial Assistance Act 2015	2017	
Rail Ombudsman	Not-for-profit company	2018	
OTHER COMPLAINT HANDLING SCHEMES			
Advertising Standards Authority	Self-regulator - incorporated under Companies Act	1962	
Scottish Legal Complaints Commission	Legal Profession and Legal Aid (Scotland) Act 2007	2008	

[13] Additionally, there are schemes in the British Crown Dependencies: Channel Islands Financial Ombudsman and Financial Services Ombudsman Scheme for the Isle of Man.

[14] First for Communication (2003) and then later Energy (2006) and Property (2007), with more functions following in later years, see https://www.ombudsman-services.org/

[15] Formerly, Motor Codes Ltd, established in 2008.

digitisation agenda,[16] it is unlikely that this current reliance on ombuds will recede any time soon given their embedded position within multiple commercial fields.[17]

2.4 The ombudsman sector is diverse and made up of a number of schemes. There is no definitive list of ombuds or ombudsman-like bodies operating in the UK, although the membership of the Ombudsman Association acts as a proxy-database of operating schemes.[18] Using that membership list as a starting point, this report concentrates on the work of 19 complaint handlers (past and present), including schemes performing ombudsman-like functions, whose decisions are capable of being, or have been, subject to public law litigation (see Table 1 above).

2.5 This list of operating ombuds is by no means static. Governments of different political persuasions have encouraged non-judicial dispute resolution, a policy developed in response to a perceived increased demand amongst the public for greater access to both civil and administrative justice.[19] This policy of overt support for the sector continues. Far from there being any plans to reduce the scale of the sector, new schemes continue to be introduced, as for instance with the Rail Ombudsman in 2018,[20] or in Jersey where the State Assembly has agreed in principle to introduce a new public services ombudsman replacing its current Complaints Board.[21] Other schemes have been given new powers in recent years. Most recently in Wales, with the Public Services Ombudsman (Wales) Act 2019.

2.6 Both overtly and reactively, therefore, over a number of years at a public policy level a trade-off has been made between the provision of court-justice and alternative forms of dispute resolution. This approach has resulted in access to 'high quality' formal justice in the courts, - subject to high regulatory standards (eg in terms of entry into the profession, procedural fairness, transparency, grounds applied, access to appeal, self-regulation and a background legal academy) - being heavily rationed. By contrast, the provision of free 'efficient and mass processing' informal forms of justice - delivered through the complaint-handling model of dispute resolution - has been readily facilitated by the government. This latter form of justice operates in a relatively unstable and arguably weak regulatory framework.

2.7 The motivation for this trade-off in favour of encouraging the development of ombudsman schemes, and other forms of alternative dispute resolution, is largely a practical one:

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[16] J. Tomlinson, *Justice in the Digital State: Assessing the Next Revolution in Administrative Justice.* (Bristol University Press, 2018).

[17] For a recent discussion of this policy trend away from the courts, see C. Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales* (Hart Publishing: Oxford, 2019), in particular chs. 6 and 9.

[18] The nearest to such an agreed account is provided by the Ombudsman Association, see the Ombudsman Association's membership criteria and list of members: https://www.ombudsmanassociation.org/

[19] R. Kirkham (2016) 'A 2020 vision for the ombudsman sector'. *Journal of Social Welfare and Family Law,* 38(1), 103-114.

[20] Alongside these developments, multiple similar forms of ADR have been introduced which possess some features of the ombudsman model, eg the Groceries Code Adjudicator and the Small Business Commissioner.

[21] Government of Jersey, *Jersey Public Services Ombudsman: Consultation*. (2019); *Jersey Public Service Ombudsman Consultation Feedback Report.* (2020).

namely, the need to respond to citizen demand for the redress of grievances and the lack of capacity to deliver justice through the judicial system alone. These underlying drivers continue to dominate public policy discourse and look set to continue.[22] However, this ongoing redesign raises questions as to how a system of dispute resolution, such as the ombudsman sector, *should* be regulated. A generic feature of a half-century's worth of ombudsman-building in the UK is that it has grown up in a reactive fashion to bespoke problems in the administrative and civil justice system. As this evolution has happened, little legislative attention has been given to either the ombudsman-court relationship or the regulation of the ombudsman sector. Most likely, many of those responsible for implementing these new justice solutions were barely aware of the need for continuing regulation of the sector.[23]

2.8 As a consequence, the legal and regulatory framework in which ombuds operate has become highly decentred and in part reliant on informal bottom-up self-regulatory initiatives.[24] The governmental or parliamentary oversight of the sector that does exist is ad hoc and intermittent, and there is no holistic approach adopted. This outcome is in effect a design choice, in that governments past and present have eschewed the option of setting up a bespoke body to oversee the sector, and generally intervene only on a reactive basis or for reasons of budgetary control.

2.9 Given this set-up, as this report will evidence, the courts have regularly been called upon not just to resolve disputes, but to fill in gaps and uncertainties in the wider legal framework and nudge ombuds towards operating higher standards of decision-making and transparency.

External oversight

2.10 Once it became clear that alternative dispute resolution (ADR) had become an embedded feature of the justice landscape, the Government could have introduced a sector-wide regulatory body for ombuds, or for alternative dispute resolution (ADR) more generally. For instance, the Government could have taken the opportunity to impose a tough and autonomous system of regulation under the EU Directive on Consumer ADR in 2015,[25] which required consumer ombuds to report to a 'competent authority'. Instead, the choice was made to adopt a non-specialised approach towards ADR regulation[26] by making a

[22] For a discussion of this balance between the courts and ADR, see C. Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales* (Hart Publishing: Oxford, 2019).

[23] For an analysis of the ad hoc fashion in how design in the administrative justice system is ordinarily carried out, see V. Bondy and A. Le Sueur. *Designing redress: a study about grievances against public bodies.* (Public Law Project: London, 2012); A. Le Sueur, 'Designing redress: who does it, how and why'. *Asia Pacific Law Review*, (2012) 20 (1), 17–44.

[24] Julia Black, 'Decentring regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory world', 54 (1) (2001) *Current Legal Problems* 103.

[25] 2013/11/EU.

[26] The Alternative Dispute Resolution (ADR) for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (as amended by the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015).

series of pre-existent sector specific market regulators 'competent authorities', rather than establishing one 'super-regulator' for ADR.[27]

2.11 In adopting this light touch regulatory approach, the Government simultaneously encouraged competition in ADR provision in the expectation that this would drive up standards.[28] Through this approach, not only has the competent authority role had little to no impact on *public* services ombuds, in the consumer sector the end result has been the imposition of minimal standards largely focused on reporting requirements and easy to measure performance standards.

2.12 Some formal external oversight of the ombudsman sector is provided through scrutiny by the legislature and the executive. Given that independence in complaint-handling is embedded in the ombudsman model, the purpose of this form of oversight is not to provide external scrutiny of *individual complaint-handling*, although sometimes such work will interrogate individual investigations and decision-making processes to establish systemic patterns of behaviour and to draw out future lessons. Instead, the main purpose of such oversight is ordinarily to provide external scrutiny of an ombudsman's *operational performance*.

2.13 As the focus of political oversight of the ombudsman sector is not on decision-making in individual complaints, the output of such reviews will not be examined in detail in this report. However, a few key points will be noted, as they set the scene for consideration of the other forms of accountability that operate and provide some clues as to how the integrity of the ombudsman sector could be enhanced.

2.14 First, four of the public service ombudsman schemes in the UK are regularly required to give evidence to the legislature.[29] A fifth, the Local Government and Social Care Ombudsman (LGSCO), has sometimes been required to give evidence to Parliament.[30] Such evidence sessions can be the forum for challenging lines of inquiry to be pursued about the performance of ombuds in a number of regards. However, their impact is unreliable given that they do not always lead to a report, are ordinarily one-off events, and are not necessarily accompanied by any extensive supporting research, or follow-up report.

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[27] R. Kirkham, 'The consumer ombudsman model and the ADR Directive: Lessons from the UK'. In P. Cortes (Ed.), *The New Regulatory Framework for Consumer Dispute Resolution*. Oxford: Oxford University Press (2016).

[28] For a review of the divergence in the Consumer ADR sector, see C. Gill, N. Creutzfeldt, J. Williams, S. O'Neill and N. Vivian, *Confusion, Gaps and Overlaps: a Consumer Perspective on the Current Alternative Dispute Resolution System for Disputes Between Consumers and Businesses.* (Project Report. Citizens Advice, London, 2017); BEIS, *Modernising Consumer Markets; Consumer Green Paper* (2018).

[29] The Parliamentary and Health Service Ombudsman, Public Services Ombudsman for Wales, the Scottish Public Services Ombudsman and the Northern Ireland Public Services Ombudsman.

[30] Additionally, in February 2019, the Service Complaints Ombudsman gave evidence to the Defence Committee. The Committee's explanation for the hearing typifies the Parliamentary approach to such review: 'The Ombudsman and the new complaints system have now been in operation for approximately three years and the Committee will take evidence from the Ombudsman on 26 February on her role and the effectiveness of the new system' (see here).

2.15 Second, periodic organisational review of ombuds is only embedded in one of the statutory schemes operating in the UK, the LGSCO, the legislation of which requires that a triennial review is conducted but this review process is not independent.[31]

2.16 Third, there is no umbrella requirement for regular external evaluation in the UK ombudsman sector, as for instance as an obligation under the ADR accreditation scheme or membership of the OA (Ombudsman Association). The OA will be covered more below. External evaluation is at least one of the best practice goals of the OA, and the sector is currently experimenting with processes that benchmark institutional performance across the sector and deploying critical friends within the sector to review each other's organisation.[32] Nevertheless, formally, external evaluation is not mandatory for members.

2.17 Fourth, beyond financial audit, where external operational review does occur it tends to be triggered either by the ongoing commitment of the legislature, or in response to crisis. Table 2 below lists the main external reviews that have taken place of the leading ombuds in the UK and charts an irregular and mixed pattern of external review.

2.18 Fifth, although the focus of independent reviews tends to be operational, on occasion such work can major on the quality and form of the complaint-handling service being supplied. For instance, two recent reports produced for the Financial Ombudsman Service interrogated ongoing grievances and whistle-blowing on its handling of Payment Protection Insurance complaints.[33] In another example, as a result of one external review of complaint-handling at the PHSO, the office changed its decision-making policy in order to admit more complaints for investigation.[34]

2.19 Finally, although causality is difficult to establish, there are several well-documented instances where the process of independent review has played an important role in the adaptation of policy and structure within ombudsman schemes. Some of the most notable examples have involved either the government or the legislature requiring some form of external or quasi-independent review, or a scheme itself commissioning an independent review. The full rigour and independence of such reviews is challengeable and will in any event be limited by their terms of reference. Nevertheless, as a minimum, what such reviews can evidence is a process by which significant organisational change is proposed or accepted as necessary by an authority external to the ombudsman scheme itself. In terms of publicly acknowledging a problem, generating new ideas, or oiling the wheels of change,

[31] Local Government Act 1974, Section 23(12).

[32] For a review of the role that such self-regulatory initiatives could play, see A Stuhmcke, 'Ombuds Can, Ombuds Can't, Ombuds Should, Ombuds Shan't: A Call to Improve Evaluation of the Ombudsman Institution'. In Hertogh M and Kirkham R (eds.) *Research Handbook on the Ombudsman*. (Edward Elgar Publishing 2018).

[33] R. Lloyd, *Report of the Independent Review of the Financial Ombudsman Service*, July 2018; R. Thomas, *The impact of PPI mis-selling on the Financial Ombudsman Service*, Jan 2016

[34] Baroness R. Fritchie, *Review of the Health Service Ombudsman's approach to complaints that NHS failure led to avoidable death*, (2013).

Table 2: Leading independent Reviews in the Ombudsman Sector since 2010

Ombudsman	**Government-led review**	**Regular legislative scrutiny**	**Ombudsman commissioned reviews**
Legal Ombudsman	Ministry of Justice, *Tailored Reviews of the Legal Services Board and Office for Legal Complaints*, July 2017 *Triennial Reviews: Legal Services Board and Office for Legal Complaints*, August 2013		
Local Government and Social Care Ombudsman	Gordon Review, *Governance review of the Local Government Ombudsman service: a report for the Secretary of State for Communities and Local Government*, Nov 2013.	Housing Communities and Local Government Committee, *Work of Local Government & Social Care Ombudsman reviewed*, March 2019. Communities and Local Government Committee, *Further Review of the Local Government Ombudsman* (2013-14) HC 866 Communities and Local Government Committee, *The work of the Local Government Ombudsman* (2012–13) HC 431[35]	Triennial reviews, see LGSCO website R. Thomas, J. Martin and R. Kirkham, *Independent External Evaluation*, Jan 2013
Parliamentary and Health Service Ombudsman	Robert Gordon CB, *Better to Serve the Public: Proposals to Restructure, Reform, Renew and Reinvigorate* Public Services Ombudsmen (Cabinet Office 2014)	Annual attendance at the Constitutional and Public Administration and Constitutional Affairs Committee, plus additional inquiries eg *Time for a People's Ombudsman*, (2013-2014, HC 655)	P.Tyndall, C. Mitchell and C. Gill, *Value for Money Study: Report of the independent peer review of the Parliamentary and Health Service Ombudsman*, Nov 2018. Sir Alex Allan, *Report of a review into issues concerning the PHSO* (2016). Baroness R. Fritchie, *Review of the Health Service Ombudsman's approach to complaints that NHS failure led to avoidable death*, (2013)
Pensions Ombudsman	Department for Work and Pensions, *Triennial Review of Pensions Bodies – Stage 1: Options for delivery*, January 2014		
Scottish Public Services Ombudsman		Annual attendance at the Local Government and Communities Committee	
Public Services Ombudsman for Wales		Annual attendance at the Finance Committee	
Financial Ombudsman Service		Treasury Committee (2018-19)	R. Lloyd, *Report of the Independent Review of the Financial Ombudsman Service*, July 2018. R. Thomas, *The impact of PPI mis-selling on the Financial Ombudsman Service*, Jan 2016 Lord Hunt, *Opening Up and Reaching Out: An agenda for accessibility and excellence in the Financial Ombudsman Service*, 2012.

[35] The preceding report was Select Committee for the Office of the Deputy Prime-Minister: *The Role and Effectiveness of the Local Government Ombudsmen for England* HC 458 (2004-05).

the input of such reviews will have more force still where they are followed up by the legislature.[36]

Self-regulation

2.20 In the absence of regular formal external oversight, in order to maintain professional standards, the most active and consistent forms of controls over the ombudsman sector tend to be non-governmental and voluntary. In the UK and Ireland, the OA acts as a professional association, which brings together the different schemes operating in the sector.[37] Even without statutory backing, given its wide coverage of the sector the OA is well positioned to provide assurance to consumers and citizens as to the standards delivered in the sector. Therefore, as with professional self-regulation generally, a model for the OA to follow could be one of ensuring compliance with standards established by professional peers in the ombudsman sector through the means of controlling entry into the profession and periodic oversight, including a complaint process against practitioners.[38]

2.21 Despite its potential though, the OA cannot yet be viewed as a regulator, as it has multiple purposes and operates more as a vehicle for the evolution and dissemination of best practice than a regulator. To the extent that the OA possesses a control power, it is through its capacity to consider membership applications and subsequent exercises in periodic re-validation. To carry the title 'ombudsman' an organisation must be a member of the OA.[39] The criteria for membership is in many organisational respects more onerous than that required for registration as an ADR body under the EU ADR Directive and

[36] For instance, following (and alongside) a Parliamentary review and two independent reviews of the office, the Local Government Ombudsman underwent significant restructuring (Communities and Local Government Committee, *Further Review of the Local Government Ombudsman* (2013-14) HC 866). The 2016 review of the handling of the recruitment of a senior member of staff by then office-holder at the PHSO, Dame Julie Mellor, led to her resignation (see PHSO statement, 4 July 2016, 'Julie Mellor announces resignation'). The Lord Hunt, *Opening Up and Reaching Out: An agenda for accessibility and excellence in the Financial Ombudsman Service*, 2012 report led to a number of changes in FOS, including the publication of decisions made by the office.

[37] Formed in 1993, the OA was formerly called the British and Irish Ombudsman Association, for more details see http://www.ombudsmanassociation.org/the-ombudsman-association.php

[38] This is a point pursued by Stuhmcke in her work, see Anita Stuhmcke, 'Ombuds Can, Ombuds Can't, Ombuds should, Ombuds Shan't: A Call to Improve Evaluation of the Ombudsman Institution' in Marc Hertogh & Richard Kirkham (eds) *Research Handbook on the Ombudsman* (Edward Elgar: Cheltenham, 2018).

[39] Companies Act 2006, section 56; the Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2014, Schedule 1, Part 1; Companies House, *Incorporation and Names: Guidance* (2021), see Annex A, p.51-2. However, once the title is registered, there is no obvious legal means to force the removal of the ombudsman brand should the scheme subsequently fail to secure revalidation with the OA.

legislation.[40] Nevertheless, the process for considering applications is internally controlled, with the detail of decisions made not aired in public.[41]

2.22 Over time, the ambition of the OA has increased. For instance, by way of guidance it has in recent years put in place a Service Standards Framework[42] and a Caseworker Competency Framework[43] for its members. Neither framework is enforceable, however.

2.23 In addition to the peer pressure created by the OA, improved standards in the sector are driven by bottom-up initiatives. Such initiatives have occurred regularly in recent years. For instance, decisions are now published for many schemes.[44] Internal systems for dealing with complaints and reviewing decisions are now routinely publicised and reported on.[45] Peer review and external review is becoming a common feature of the sector (see Table 2 above), and some schemes have introduced forms of corporate governance which invite an element of external scrutiny of their work on a more regular basis than the legislature. Such innovations are not required by legislation and yet are highly valuable.[46]

2.24 Overall, given the significance of the role conferred on the sector, despite evidence of much good practice the regularity and intensity of oversight of the sector, especially independent oversight, is variable and sometimes infrequent. This leaves an important space for the courts to operate within, albeit one with no clearly defined role when considering challenges to ombudsman decisions.

Challenging ombudsman decisions in the courts

2.25 Ombuds interact with the courts on three levels: case (ie judicial oversight of individual ombudsman decisions), functional (eg division of casework) and normative (setting standards).[47] The latter two roles are supportive of the courts in which ombuds should be seen as operating in a partnership relationship. As a partner institution, there is more work to be done to implement and understand the potential for the ombudsman to support the work of the courts in upholding the rule of law (eg in following through the legal standards set by the court). Some of the canvassed ideas for enhancing this relationship are explored towards the end of this report.

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[40] See Ombudsman Association, *Rules of Association*, Schedule 1 and Ombudsman Association, *Membership Application / Re-validation Check List: Ombudsman Member* (Available at: http://www.ombudsmanassociation.org/the-ombudsman-association.php).

[41] This single instance occurred in 2017 when the Retail Ombudsman (TRO) lost the right to use the title of "Ombudsman". Details of this event are sparse on the OA website, but has been charted by H. Dewdney and M. Williamson 'More Ombudsman Ombishambles', pp.13-14, 18 February 2018 https://ceoemail.com/oo2final.pdf

[42] Ombudsman Association, *Service Standard Framework*

[43] Ombudsman Association, *Caseworker Competency Framework*

[44] For a good example, see https://www.lgo.org.uk/decisions

[45] Eg see the SPSO *Annual Report* (2020), 21.

[46] A follow-up report in this project will explore these features of the ombudsman system in more detail.

[47] Remac refers to these as 'institutional', 'case' and 'normative' levels, M. Remac, *Coordinating Ombudsmen and the Judiciary: A comparative view on the relations between ombudsmen and the judiciary in the Netherlands, England and the European Union*, (Intersentia: Utrecht University, 2014), 12.

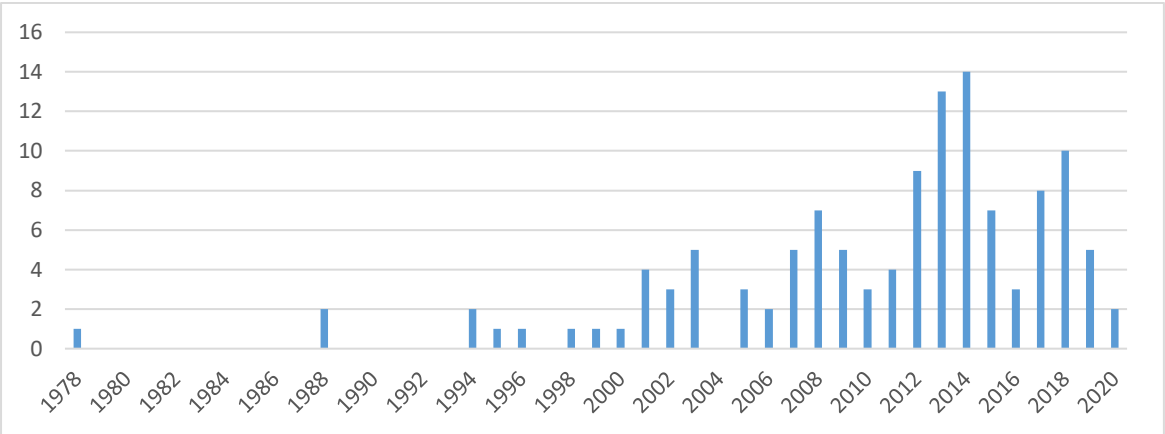
2.26 Although the *functional* and *normative* aspects of the ombudsman/court relationship are important, the research focus of this report is on the interaction between the courts and ombuds in *cases* brought to court involving an ombudsman. The most important form of judicial oversight of the ombudsman sector occurs within challenges to ombudsman decisions. There are two main forms of litigation brought against ombuds in the UK (Table 3 below): judicial review and statutory appeal, with the latter operating within a heavily confined remit on grounds similar to those in judicial review.

Table 3: Judicial routes by which to challenge a decision of a UK ombudsman and ombudsman-like schemes

	Appeal	**Judicial Review**		**Amenability to judicial review uncertain**
Core features	Bespoke statutory arrangement Terms of appeal restricted to a point of law Body investigated bound by ombudsman decision and remedy	All statutory schemes Grounds of judicial review		Non-profit body Arguably a public body for JR purposes Function possibly referred to in legislation Alternative contractual claim possibly available
Schemes	Pensions Ombudsman SLCC	PHSO LGSCO SPSO PSOW NIPSO OIA	Independent Office for Police Conduct FOS Legal Ombudsman	Rail Ombudsman Property Ombudsman Furniture and Home Improvement Ombudsman Ombudsman Services

2.27 In total, there have been almost 300 reported cases in which decisions of ombudsman-like institutions have been challenged in a full hearing. Almost all of these cases have occurred since 1993 and over half involve the Pensions Ombudsman.

Figure 1: Reported fully heard judicial review/appeal of UK ombuds or ombuds-like institutions (excluding the Pensions Ombudsman): statistics over time (1978-2020)



2.28 For a number of reasons, the Pensions Ombudsman is an atypical office in the sector, hence was analysed separately in this study. Instead, this report concentrates on a body of 122 cases that did not involve the Pensions Ombudsman, most of which have been heard since 2000 (Figure 1 above).[48]

A brief history of ombudsman judicial review

2.29 In several of the original cases brought against ombuds, key players in the ombudsman sector once sought to resist the jurisdiction of the court amidst concerns that the autonomy of the ombudsman might be compromised by the imposition of inappropriate legalism.[49] Concerns have also been expressed that the courts might interpret the ombudsman's discretionary powers too narrowly and thereby neuter the institution's potential creativity and undermine the original purpose for establishing a separate dispute resolution process.[50]

2.30 For others, however, the objection to judicial oversight of the ombudsman lies more in an interpretive understanding that the institution was designed to operate purely through 'soft' exchanges with the bodies investigated. Within this arrangement, no new enforceable interests or rights are created for individuals against public organisations,[51] raising the question as to why the judiciary should be interested in the ombudsman's work at all.[52] This is the situation in the Netherlands, for instance, where under the relevant law, the General Administrative Law Act 1994, Article 1:3(1), reports of the ombudsman do not constitute a 'public law act', and thereby do not come within the remit of the administrative

[48] The sample was identified through the law databases: British and Irish Legal Information Institute, Westlaw and LexisNexis, and where possible confirmed with ombudsman schemes. It is not possible to verify that all cases have been successfully found, but equally from my communication with office holders of ombudsman schemes it is unlikely that many case have been missed. See Kirkham and O'Loughlin, *A Study into Ombudsman Judicial Review* (2020), A2, A3, https://www.sheffield.ac.uk/law/research/centres-and-institutes/procedural-fairness-accountability-and-ombudsman for further details on the database search conducted. We chose not to include appeal cases brought against the Pensions Ombudsman in this study (there have been over 160 such cases) as its remit is subtly different to most ombud-like schemes. We did though include 10 appeal cases brought against the Scottish Legal Complaints Commission. We justify this inclusion on the basis that it is a heavily constrained form of appeal, and the legal grounds for appeal in essence match those available in judicial review: Legal Profession and Legal Aid (Scotland) Act 2007 s.21(4). Overall, the patterns we identified for this scheme were in line with other schemes in the study.

[49] *R v Parliamentary Commissioner for Administration ex p Dyer* [1993] EWHC 3 (Admin), [1994] 1 WLR 621; *R (Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365, [2007] All ER (D) 329 (Dec).

[50] See Richard Nobles, 'Rules, Principles and Ombudsmen: *Norwich and Peterborough Building Society v The Financial Ombudsman Service*' (2003) *Modern Law Review* 781, 790-93.

[51] To complicate matters slightly, in some schemes new enforceable rights are created against private bodies. For instance providers are bound to implement decisions of the Pensions Ombudsman and the Financial Ombudsman Service.

[52] T. Endicott, *Administrative Law* (Oxford: Oxford University Press, 3rd ed, 2015), 505-508.

court. Following this logic, for some, ombuds should be understood as operating solely in the political branch both in terms of implementation of powers and oversight.[53]

2.31 With the exception of the Pensions Ombudsman and the SLCC, which both provide for an appeal route to the courts, in the UK ombudsman legislation is silent on the role of the courts in overseeing the office. Despite this silence, in a series of cases from the late seventies onwards, whilst initially reluctant to accept the invitation to review ombudsman decisions,[54] the judiciary has claimed as part of its inherent jurisdiction a responsibility to provide supervisory oversight.

2.32 The case law in this area has been consistent. In *R v Parliamentary Commissioner for Administration Ex Parte Dyer*[55] Lord Justice Simon Brown considered 'the proper ambit of this Court's supervisory jurisdiction over the PCA [Parliamentary Commissioner for Administration]' and went on to 'unhesitatingly reject' the argument that judicial review did not apply.

> Many in government are answerable to Parliament and yet answerable also to the supervisory jurisdiction of this Court. I see nothing about the PCA's role or the statutory framework within which he operates so singular as to take him wholly outside the purview of judicial review.[56]

2.33 Nor did Lord Justice Simon Brown accept the argument that 'the Court should intervene only in the most exceptional cases of abuse of discretion'. This broad conclusion has been followed in cases on other ombuds. For instance, it was stated in *R (Siborurema) v Office of the Independent Adjudicator*:

> The designated operator should, in my view, be subject to the supervision of the High Court. The wish of OIA, which I readily accept to be genuine and well-intentioned, to be free from supervision should not be upheld. Its aspiration to be an informal substitute for court proceedings is not inconsistent with the presence of supervision by way of judicial review.[57]

2.34 With the first cases for other schemes, either the jurisdiction of the court has been assumed[58] or dealt with through only minimal discussion.[59] A similar jurisprudential approach has been taken in Ireland[60] and is implied in the early case law on the ombudsman

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[53] Eg Jason NE Varuhas, *Judicial Capture of Political Accountability* (Policy Exchange 2016), 50.

[54] *Re Fletcher's Application* [1970] 2 All ER 572

[55] [1994] 1 WLR 621.

[56] Ibid, *Dyer*, 625.

[57] [2007] EWCA Civ 1365, para 50, per Pill LJ.

[58] *R v Local Commissioner for Administration ex parte Bradford MBC* [1979] 1 QB 287; *R (Hession) v Health Service Commissioner for Wales* [2001] EWHC 619 (Admin); *R (Norwich and Peterborough Building Society) v Financial Ombudsman Service Ltd* [2002] EWHC 2379 (Admin); *R (Dennis) v Independent Police Complaints Commission* [2008] EWHC 1158 (Admin); *R (Dickie) v Judicial Appointments and Conduct Ombudsman* [2013] EWHC 2448 (Admin); *Layard Horsfall Ltd v The Legal Ombudsman* [2013] EWHC 4137 (QB); *Armagh City Council, Re Judicial Review* [2014] NICA 44 (12 June 2014).

[59] *Argyll & Bute Council, Re Judicial Review* [2007] ScotCS CSOH_168.

[60] Eg *Moran -v- The Garda Siochána Ombudsman Commission* [2011] IEHC 237, [6.4]; *Gorman & anor -v- Ombudsman for the Defence Forces & ors* [2013] IEHC 545; *Ulster Bank Investment Funds Ltd -v- Financial Services Ombudsman* [2006] IEHC 323.

in Gibraltar[61] and Bermuda.[62] In Australia[63] and Canada[64] too, landmark judgments outline a supervisory role for the courts in their relationship with the ombudsman.

2.35 The inherent power of the courts to conduct judicial review of ombuds has become the norm. In response, at no point has the executive or legislature attempted either to block such judicial oversight or, as has sometimes occurred in other countries, insert limitation clauses on the role of the courts.[65]

The role of judicial review in ombudsman case law

2.36 To date, very little has been written on the ombudsman case law that has resulted, and what has been written has generally been based on a selected sample of cases rather than a more systematic review of the body of law that has evolved.[66] Indeed, much of the literature is more a critical commentary on the judgments made than an analysis of the approach of the judiciary towards the ombudsman sector more generally.

2.37 There is no agreed template as to the role of judicial review and in the literature on the process multiple potential contributions have been noted.[67] The ambiguity around the role of judicial review is in part due to its common law origins. Section 31 of the Senior Courts Act 1981 provides a modern statutory foundation for the process of application for judicial review, but otherwise our knowledge of administrative law is derived from precedent and ongoing practice. Unsurprisingly, this situation leaves considerable room for disagreement.

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[61] *Public Services Ombudsman v. Attorney General* [2003–04 Gib LR 35]

[62] *Bermuda Ombudsman v Corporation of Hamilton & Others* [2013] SC (Bda) 72 Civ.

[63] In *Booth v Dillon [No 2]* [1976] VR 434, Dunn J considered a case on the powers of the Victorian Ombudsman and stated: "This Court is only concerned with the question of the Ombudsman's jurisdiction, and not with the merits or otherwise of the investigation." For further discussion of ombudsman case law in Australia, see A Stuhmcke, 'Ombudsman Litigation: The Relationship between the Australian Ombudsman and the Courts' in G Weeks & M Groves (eds), *Administrative Redress In and Out of the Courts*, (Federation Press, Sydney,2019), 155-177; R. Kirkham, & A. Stuhmcke, 'The common law theory and practice of the ombudsman/judiciary relationship', *Common Law World Review*, (2020) vol. 49, no. 1, pp. 56-74.

[64] *Re Ombudsman Act* (1970) 72 WWR 176.

[65] Eg see the Ombudsperson Act 1996 (British Columbia), s. 28: "Proceedings of the Ombudsperson must not be challenged, reviewed or called into question by a court, except on the ground of lack or excess of jurisdiction."

[66] For instance, see R. Nobles, 'Rules, Principles and Ombudsmen: *Norwich and Peterborough Building Society v The Financial Ombudsman Service*' (2003) *Modern Law Review* 781, 790-93; Halford J, 'It's public law, but not as we know it: understanding and making effective use of ombudsman schemes' 14 *Judicial Review* (2009) 81; R. Kirkham, B. Thompson and T. Buck, 'When Putting Things Right Goes Wrong: Enforcing the Recommendations of the Ombudsman' *Public Law* (2009) 510; Varuhas J (2009), 'Governmental Rejections of Ombudsman Findings: What Role for the Courts?' 72 MLR 102; R. Kirkham and A. Allt, 'Making Sense of the Case Law on the Ombudsman' (2016) 38 JSWFL 211, 224; J. Varuhas 'Judicial Capture of Political Accountability', (London: Policy Exchange, 2016).

[67] Judicial review can be understood to deliver a variety of functions. It is fairly uncontroversial that obtaining individual redress and ensuring that administrative decisions are taken in accordance with the law are two of these functions. See *R (Cart) v The Upper Tribunal* [2011] UKSC 28, [37]; and Mark Elliot, 'Judicial Review's Scope, Foundation and Purposes: Joining the Dots' (2012) 1 NZ L Rev 75, 80, but for a broader discussion of the court's role in practice, see for instance this discussion in C. Harlow and R.Rawlings, *Law and Administration*, 3rd edn (Cambridge: Cambridge University Press, 2009), 625.

Academic arguments have been made for a standardised and generalist model for judicial review, but an alternative conception is that the role of judicial review is adjustable according to the legal system under review and the statutory context.[68] Recent debates surrounding the 2021 *Independent Review of Administrative Law* have laid bare the stark differences of viewpoint as to true nature of judicial review.[69]

2.38 To provide an empirically robust account of ombudsman case law, the research that supported this report considered and looked for evidence of three broad 'supervisory' functions that might be performed by the court, and these are looked at in turn in chapters 3-5. These functions are:

- Providing an avenue for redress based on tests of lawfulness;
- Supporting the legal authority of public bodies;
- Structuring the law according to the public system under review.

2.39 This conception of judicial review potentially stands at odds with the current direction of travel in government policy. In recent years, the underlying purpose of judicial review has been the subject of much debate, with some viewing it as providing a narrower judicial service than others. As this report was finalised, the Government launched an *Independent Review of Administrative Law* which looked at the role of the courts within that system.[70] The terms of reference for the *Review* did not detail a clear vision for what the role of the courts is in judicial review. Instead, it stated:

> The Review should examine trends in judicial review of executive action, ("JR"), in particular in relation to the policies and decision making of the Government. It should bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law. It should consider data and evidence on the development of JR and of judicial decision-making and consider what (if any) options for reforms might be justified.[71]

2.40 Thus, the emphasis in the *Review* was placed upon 'the legitimate interest in the citizen being able to challenge the lawfulness of executive action', with no reference to other potential roles of the court. This emphasis on the need to protect individual citizen interests was repeated in the Government's later response to the *Independent Review's* findings.[72]

2.41 In contrast to this narrow focus, this report adopts a broader vision of the purpose of judicial review and examines empirically trends in judicial review of one part of public action, namely legal actions involving an ombudsman. Albeit that ombudsman case law

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[68] Eg Joanna Bell, "Reason-Giving in Administrative Law: Where We Are and Why Have the Courts Not Embraced the 'General Common Law Duty the Give Reasons'?" (2019) 82(6) M.L.R. 983.

[69] Mark Elliott, "Judicial review reform IV: Culture war? Two visions of the UK constitution" *Public Law for Everyone* (April 2021). Available at: https://publiclawforeveryone.com/2021/04/28/judicial-review-reform-iv-culture-war-two-visions-of-the-uk-constitution/

[70] Ministry of Justice 31 July 2020, *Terms of Reference for the Independent Review of Administrative Law* https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review

[71] Ibid

[72] Ministry of Justice, *Government response to the Independent Review of Administrative Law*, March 2021 (CP 408) (available here).

does not concern public decision-making directly managed by the executive, it is indicative of the wider potential of judicial review. As the ongoing debate on the role of judicial review continues, this wider potential should be an important consideration. By contrast, a narrow focus on cases involving the core executive may lead to a limited range of considerations driving the development of policy on judicial review.

2.42 Further, as the research for this report demonstrates, in certain contexts a broader supervisory relationship between the courts and the bodies that it oversees can provide an important accountability safeguard. The important finding in this study is that in the ombudsman context, the accountability provided by the courts is more powerful as delivered through the 'support' and 'structuring' functions of judicial review, than through its 'redress' function.

Additional ombudsman case law

2.43 Although not a central focus of this study, the court's supervisory role is bolstered by a number of additional interactions that ombuds have with the courts, which help confine and detail the manner in which the sector operates. These additional interactions include:

(i) Ombuds and the general law

2.44 As with other organisations, there are multiple claims/appeals brought against an ombudsman, which refer to general legal duties under contract or employment law, equality legislation, data protection laws[73] or the Freedom of Information Act.[74]

2.45 The impact of such measures on the ombudsman sector should not be underestimated. Interviews with ombudsman staff confirmed that some complainants strategically deploy their legal rights under the Freedom of Information Act 2000 to assist the pursuit of their grievances, either during an investigation or once a complaint has been resolved.[75] Likewise, ombudsman staff reported that the GDPR and the reasonable adjustments duties under the Equality Act 2010[76] were bodies of law to which the sector had had to respond

[73] The Data Protection Act 1998 was one of the issues in a claim for the Police Ombudsman for Northern Ireland to disclosing information in *Morley v The Ministry of Defence and others* [2019] NIMaster 1, transcript available through Lexis Library.

[74] Although not explored in this report, the extensive use of FOI requests against the ombudsman sector reflects in part organised strategies on the part of users to interrogate the work of the ombudsman sector, see C. Gill, and N. Creutzfeldt, 'The 'ombuds watchers': collective dissent and legal protest amongst users of public services ombuds.' *Social and Legal Studies* (2018) 27 (3), 383-4. The impact of FOI requests is a significant burden for ombuds. In 2019/20, for instance, the PHSO reported: 'We received 573 Freedom of Information and Data Protection requests compared to 662 in 2018-19 and 577 in 2017-18.' PHSO, *Annual Report 2019/20*. HC 444, 45.

[75] A search of the BAILII database indicates that this practice has led to up to 85 cases being brought against an ombudsman in either the Information Tribunal or to the Scottish Information Commissioner.

[76] By way of example, see the case of *Blamires v Local Government Ombudsman* Case No: 3SP00071, Leeds County Court, 21 June 2017

to, with the impact being one of refinement to existing processes and the costs involved in complying with the law.

(ii) Cases involving non-complaint handling functions of an Ombudsman

2.46 Occasionally claims and appeals are brought against an ombudsman, which challenge a non-complaint handling function of the office.

2.47 Several schemes perform functions in addition to processing complaints about services provided. By way of example, the Public Services Ombudsman for Wales is responsible for investigating complaints about the conduct of local government councillors, and deciding whether a reference should be made to the Adjudication Panel for Wales for adjudication. This process has been challenged in court.[77] A similar but differently designed role has also been subject to legal challenge in Northern Ireland.[78] Likewise, there have been cases involving the discrete role of schemes that oversee the police to carry out investigations into an officer's conduct[79] and to inquire into deaths that occur during police operations.[80]

(iii) Challenging the response of public bodies

2.48 The Administrative Court has devised a novel remedy that can be brought against public bodies who fail to implement the recommendations of an ombudsman.

2.49 This is a rare form of action but can have a big impact. For instance, as a result of the claimant's successful challenge to the Government's decision not to implement the Parliamentary Ombudsman's report in *R (Bradley) v Secretary of State for Work and Pensions and Parliamentary Commissioner for Administration* [2007] EWHC 242 (Admin), considerable financial redress was later made available to thousands of individual citizens. This form of action is discussed further in chapter 5.

(iv) Ombudsman-generated use of the court

2.50 There are a few cases in which the ombudsman brings proceedings against a public body to enforce its powers or refers a legal question to the court.

2.51 This form of action is rarely deployed, but can be useful. In *Deputy Chief Ombudsman v Young* [2011] EWHC 2923 (Admin), the Legal Ombudsman successfully obtained a court order to enforce a Decision Notice it had issued as a result of failing to disclose information necessary for the completion of an investigation. Occasionally, the court has been used to

[77] *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin).

[78] *Patrick Brown v Northern Ireland Local Government Deputy Commissioner for Standards* [2018] NIQB 62; *Jolene Bunting v Northern Ireland Local Government Commissioner for Standards* [2019] NIQB 3.

[79] *R (Chief Constable of West Yorkshire Police) v Independent Police Complaints Commission* [2014] EWCA Civ 1367.

[80] *R (On the Application Of Chief Executive of the IPCC,) v Independent Police Complaints Commission* [2016] EWHC 2993 (Admin).

issue a fine and costs against the defendant,[81] or to obtain an injunction,[82] a restraining order,[83] or to strike out a claim.[84] A final proactive use of the court by ombuds has as yet been rarely used and is not available for many schemes, and that is to make a reference to the court on a point of law.[85]

(v) Other cases: tangential reference to ombudsman powers

2.52 There are other cases in which an ombudsman's report or powers are considered, but in which the ombudsman's decision itself is not at issue and in which an ombudsman may or may not be a party.[86]

2.53 There are multiple scenarios in which this may occur, such as in *Clark & Anor v In Focus Asset Management & Tax Solutions Ltd & Anor*[87] when the claimant was seeking to pursue a remedy to a claim that had already been heard separately by an ombudsman. In *Burgess v BIC UK Ltd*,[88] the question was raised as to whether the Pensions Ombudsman operated as a competent court. In *Rafique-Aldawery v St George's, University of London*,[89] the Court of Appeal upheld an Administrative Court decision to allow judicial review proceedings to be stayed pending an investigation by the Office of the Independent Adjudicator for Higher Education.

Summary of the ombudsman/ court relationship

2.54 Despite there being little reference to the role of the courts in ombudsman legislation, through a variety of interactions with the ombudsman sector the courts have adopted a rationed supervisory role. Further, taken together this body of case law provides a discrete, stable and increasingly detailed set of bespoke ombudsman jurisprudence that within the context of each scheme adds important detail to general provisions of administrative law.

2.55 This body of law has been developed through a variety of legal actions. Through these different forms, ombuds have on occasion been proactive in their use of the law. Most obviously in securing injunctions or pursuing cost orders to deter litigation, but also in

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[81] See also *Legal Ombudsman v Cory* Case No. A00BG293 (Cardiff County Court, 33 November 2016) where a suspended prison committal was made for contempt of court (available at: https://www.bailii.org/ew/cases/Misc/2016/B36.html).

[82] *Bishop v PSOW* [2020] EWHC 1503 (Admin)

[83] *Jakpa v Legal Ombudsman* [2016] EWCA Civ 280

[84] *Clark v FOS, the Legal Ombudsman and others* [2020] EWHC 56 (QB)

[85] *Pensions Ombudsman v EMC Europe Ltd & Ors* [2012] EWHC 3508 (Ch).

[86] A basic search of the BAILLI search engine identifies over 1600 cases in which a judgment in a UK-based court has referred to the work of the ombudsman, although in the majority of these the reference is made in passing without any significant analysis.

[87] [2014] EWCA Civ 118, see also *Morton v First Trust Financial Services Ltd* [2015] NIQB 46.

[88] [2018] EWHC 785 (Ch). See also, The Pensions Ombudsman, *Recoupment in Overpayment Cases: The Pensions Ombudsman is a 'Competent Court'* (April 2019), https://www.pensions-ombudsman.org.uk/wp-content/uploads/Recoupment-in-Overpayment-case-.pdf. For a discussion, S. Thomson, 'Ombudsmen As Courts' (2021) 40(4) *Oxford Journal of Legal Studies* (forthcoming).

[89] [2018] EWCA Civ 2520.

using judgments to secure their status[90] and in lobbying for legal reform where it is deemed necessary to shore up their position.[91] There are some instances of the law being used to protect staff. Overall though, ombuds have rarely been required to use the court to enforce their powers or appeal lower court decisions, reflecting a largely reactive use of the courts and a strong pattern in the ombudsman sector of loyalty to judicial reasoning.

2.56 The rarity in which their legal powers have needed to be backed up by judicial instruction indicates a dominant pattern of respect for the decision-making of ombuds by the authorities that they investigate. Indeed, investigated bodies have strong incentives to retain the ombudsman system, notwithstanding the occasional finding against them. The use of ombuds enables investigated bodies to avoid the costs of litigation and operationally they can benefit from being able to refer difficult complaints onwards to an independent body. There is also a potential reputational advantage for investigated bodies being a member of an ombudsman scheme. By accepting the jurisdiction of an ombudsman to investigate its work, an investigated body can portray the ombudsman as a guarantor of the services being provided and use the process as a selling point in its attempt to retain user, citizen or consumer confidence.

2.57 As will be explored in the next three chapters, however, ombudsman decisions are occasionally challenged in the courts, both by investigated bodies and, more frequently, by complainants. In exploring this body of case law, this report considers the work of the courts in delivering three separate oversight functions: provision of redress, supporting legal authority and structuring the law.

2.58 The import of this combined judicial role is connected to the regulatory environment in which the ombudsman has been allowed to operate. Multiple forms of additional accountability opportunities do exist in the ombudsman sector, but the most active control mechanisms are operated by the ombudsman sector itself. In this context, the courts act as one of the main independent guardians of the standards applied by ombuds. The argument of this report is that this supervisory role is necessary and appropriate.

2.59 There are risks in relying upon the courts to take on this supervisory role, and in the last two chapters of this report it will be argued that rather than placing any new barriers around the operation of judicial review, such risks should be offset by additional safeguards.[92] There are also further opportunities to enhance the interaction between ombuds and the law, which will also be considered towards the end of this report.

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[90] A clear example of this is the judgment in the Channel Islands, *Future Finance limited v Channel Islands Financial Ombudsman* [2019] JRC041, but see also *Gibraltar and Public Services Ombudsman v. Attorney General* [2003–04 Gib LR 35].

[91] On this activity, see N. Bennett, 'The new public services Ombudsman for Wales Act 2019: the story 2014 - 2020', *Journal of Social Welfare and Family Law* (2020) vol.42, 391-405.

[92] For a full explanation of this argument, see R. Kirkham and E. O'Loughlin, 'Judicial Review and Ombuds: A Systematic Analysis' *Public Law* [2020] 679-700 and R. Kirkham & A. Stuhmcke, 'The common law theory and practice of the ombudsman/judiciary relationship', *Common Law World Review*, (2020) vol. 49, no. 1, pp. 56-74.

3. THE COURT PROVIDES A MINIMAL REDRESS FUNCTION

3.1 This chapter considers the extent to which the courts offer an effective redress function for either complainants or investigated bodies aggrieved at the decision-making of an ombudsman. It concludes that individual redress provided in the court occurs at a low rate and, unlike in other areas of public administration, there is little evidence of a strong litigation effect, whereby public law litigation triggers a settlement before a case is heard in court. Nevertheless, the chapter also begins a discussion of how more of a redress value could be extrapolated out of the public law process.

Findings

Rates of litigation

3.2 A core function of any litigation in the courts is to provide redress, albeit the value and importance of this function in the judicial review context is disputed. The process is often referred to as the remedy of last resort and not one designed to deliver justice on a large scale. Yet some empirical research on the practice of administrative law has suggested that the impact of judicial review can be significant, particularly if cases settled before a hearing are factored into the assessment.[93] Further, individual cases and class actions can have a very large impact for numerous citizens that are not an immediate party to the case if they force a public authority to change policy.[94]

3.3 In the ombudsman context, this study found relatively little evidence that the court provides much by way of redress for most claimants. Table 4 below summarises the outcomes in legal claims brought against an ombudsman by individual litigants that resulted in a full hearing. Excluding the Pensions Ombudsman,[95] across a period of over thirty years this study found just 42 such instances out of a caseload of 122 when redress to a claimant was

[93] Eg V. Bondy, & M. Sunkin 'Settlement in judicial review proceedings' *Public Law* [2009] 237–259; 'The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing' *Public Law Project*. (2009).

[94] For instance, in this study on ombudsman case law, see *Council of The Law Society of Scotland v The Scottish Legal Complaints Commission* [2017] ScotCS CSIH_36; *R (Bradley) v Secretary of State for Work and Pensions and Parliamentary Commissioner for Administration* [2007] EWHC 242 (Admin) and *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin).

[95] Pensions Ombudsman case law was removed from the sample because more its decisions are challenged than the rest combined. The Pensions Ombudsman scheme is an outlier in the ombudsman sector in the manner in which it is set-up and operates. It handles relatively few complaints every year (just over 1,000), yet operates an appeal process and has a disproportionate number of decisions (this study found 168 cases) challenged in court when compared to other schemes.

awarded in court in a case against an ombudsman. In a further 138 reported oral permission hearing cases, only six resulted in some form of settlement for the claimant, all other claims were refused permission.[96] Compared to the numbers of complaints dealt with by ombuds (approximately 350-500,000 complaints dealt with per annum in the ombuds that have been subject to judicial review), this number of ombudsman decisions overturned by the court is low. Additionally, as is explored more in Chapter 4, nor is there much evidence that pro-claimant settlements are arrived at before a claim arrives at the hearing stage.

Table 4: Claimant success in full hearings (reported cases)[97] against ombuds and ombud-like bodies, excluding the Pensions Ombudsman (up until the end of 2020)

Courts in which case was heard	*Hearings*	*Claims found at least in part for claimant*
Total	**122**	**42**
Administrative Court	91	30
All Appeal Courts	*31*	*12*
Court of Appeal (inc. NI)	20	6
Supreme Court	1	1
Inner House of Court of Sessions	10	5

3.4 The study did find variable patterns of litigation behaviour, with some schemes attracting more litigation than others. There is no clear explanation for the differences that emerged. The nature and sensitivity of the service being scrutinised by the ombudsman may be a driver. For instance, the most likely ombudsman to be challenged in the courts is the Pensions Ombudsman. Here it may be the surmised that it is the sums of money, and their importance to individuals, that explains why decisions of the Pensions Ombudsman are challenged at a higher rate than other schemes. The Pensions Ombudsman also regularly decide complaints on disputed interpretations of pensions rules, making their decisions more naturally amenable to legal appeal.

3.5 Alternatively, litigation patterns may have more to do with system design and the extent to which complaints can be managed away from the courts. Prior layers of alternative pre-litigation options for challenging a decision might decrease the likelihood of litigation, both by increasing the robustness of scrutiny to weed out weak decisions at an early stage and in creating the conditions for complainant fatigue. For instance, other than those ombuds that have yet to be judicial reviewed once by way of a full hearing, the Financial Ombudsman Service (FOS) experiences the lowest rate of litigation per complaints

[96] See, R. Kirkham, *The Ombudsman, accountability and the courts: Annex,* ch.4.4. Available at: *https://www.sheffield.ac.uk/law/research/centres-and-institutes/procedural-fairness-accountability-and-ombudsman*

[97] Records taken from BAILLI, Westlaw and Lexis Library.

received of all the ombuds in this study. Here, the existence of a multi-layered internal dispute resolution process might be the explanation.

3.6 Such differentials are worthy of further consideration, but if there is a consistent litigation pattern, it is that the inclusion of a statutory appeal process to the courts in an ombudsman process gives rise to a distinctly higher rate of litigation than those where only judicial review was available. This was the pattern for each of the three appeal schemes looked at in this study. Table 5 below provides an approximation of the litigation rates for a selection of schemes, when the number of legal challenges to an ombudsman decision is compared to the number of complaints handled by that scheme. These statistics should be taken as *indicative* only, as they rely upon the reported complaint turnover in annual reports and all schemes operate very different reporting practices. Further, it is likely that this report understates the amount of cases heard. Even with this qualification, however, Table 5 indicates that all three appeal processes experience much higher rates of legal challenge than schemes only challengeable by way of judicial review. Further, when compared to ombudsman schemes performing an equivalent function in another jurisdiction, their litigation rates are also higher. It would appear, therefore, that appeal mechanisms encourage and facilitate more litigation.

Table 5: Litigation rates per numbers of complaints for selected ombudsman (or ombuds-like) schemes[98]

	Mean number of complaints handled per heard **appeal**	Mean number of complaints handled per heard **JR claim**
Scottish Legal Complaints Commission	2k	
Legal Ombudsman		8k
Financial Services Ombudsman (Ireland)	0.5k	
Financial Ombudsman Service (UK)		200k
Pensions Ombudsman	0.5k	
Other ombuds that can be judicially reviewed		20k

Understanding the litigants

Public bodies

3.7 The trigger for legal action in ombudsman case law is most frequently the complainant, followed by private bodies. Public authorities by contrast have generally shown little interest in challenging decision of ombuds. Indeed, the evidence suggests a *declining* likelihood of public bodies bringing actions against an ombudsman. Excluding the Pension Ombudsman, of the first 10 ombudsman cases that were heard in full judicial review

[98] The statistics are based upon the annual reports of ombudsman schemes and published legal challenges during the last 10 years.

proceedings in the UK, four were brought by public bodies (all pre-2000).[99] Of the subsequent 112, only four more have been brought by public bodies.[100]

3.8 It is unclear why this decline in challenges by public bodies has occurred. It may indicate a growing acceptance of, or reconciliation to, the role of the ombudsman over time. In interviews conducted during this research project, it was suggested that public bodies had come to recognise the usefulness of being able to pass on persistent complainants to a higher complaint handling body. An alternative explanation, however, may be that public authorities have identified that the ombudsman process works to their advantage and that there are more effective methods with which to 'play' the ombudsman than seek judicial review.[101] In other words, because 'softer' methods are available to influence the final outcome in an ombudsman investigation - whether through managing information flows, direct communication with the ombudsman or simply refusing to implement in full the recommendations of the ombudsman - public bodies have come to see judicial review as a 'nuclear' option which is only appropriate in a few special scenarios.

Complainants as litigants

3.9 Another finding of this study was that, compared to all judicial review cases, claims in ombudsman case law failed more frequently at the permission stage. The *Independent Review of Administrative Law* reported that in ordinary civil judicial review (ie excluding immigration claims), 25% of permission oral hearings were successful.[102] In this study, out of an identified 138 reported permission cases heard by way of an oral hearing only six were granted permission,[103] plus in another five cases, the permission and full hearing were rolled up into one.[104] Likewise, although this study did not capture complete data on written permission applications, the occasional evidence provided by ombuds on permission

[99] *R v Local Commissioner for Administration ex parte Bradford MBC* [1979] 1 QB 287; *R v Commissioner for Local Administration ex p Eastleigh BC* [1988] QB 855; *Croydon v LGO* [1989] 1 All ER 1033; *Liverpool City Council, R (on Application of) v Local Commissioner For Local Government For North And North East England* [2000] EWCA Civ 54.

[100] *Armagh City Council, Re Judicial Review* [2014] NICA 44; *Argyll & Bute Council, Re Judicial Review* [2007] ScotCS CSOH_168; *North Yorkshire Police Authority v The Independent Police Complaints Commission* [2010] EWHC 1690*; Council of The Law Society of Scotland v The Scottish Legal Complaints Commission* (SLCC) [2017] ScotCS CSIH_36.

[101] For an account of the ongoing relationship between an ombudsman scheme and the bodies it investigates, see Sharon Gilad, "Exchange without capture: The UK financial ombudsman service's struggle for accepted domain". *Public Administration* (2008) 86 (4):907 - 924.

[102] Lord Faulks (Chair), *The Independent Review of Administrative Law* (CP 407, Ministry of Justice, 2021), 167.

[103] *Bennett v Independent Police Complaints Commission & Anor* [2008] EWHC 2550 (QB); *Williams (R on the application of) v IPCC* [2010] EWHC 2963 (Admin); *Walker v Parliamentary and Health Service Ombudsman* [2012] EWHC 535 (Admin); *R (Duddle) v OIAHE* [2013] EWHC 4918 (Admin); *R v Commissioner for Local Administration in England, ex parte Jones and another* (1999); *R (Towry Law Financial Services Ltd) v FOS & Anor* [2004] EWCA Civ 1701.

[104] *R (Sandhar) v OIAHE* [2011] EWCA Civ 1614; *R (Hession) v Health Service Commissioner for Wales* [2001] EWHC 619 (Admin); *R (Brinsons (A Firm)) v Financial Ombudsman Service* [2007] EWHC 2534 (Admin); *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642; *Critchley v FOS* [2019] EWHC 3036 (Admin).

suggests that the success rate of applications is considerably lower than the 27%[105] for all ordinary civil law judicial review applications (see Chapter 4 for a further discussion on this point).

3.10 A likely strong explanation for the low claimant success rate is the large proportion of individual claimants in the sample. Table 6 below illustrates the pattern of success at the permission stage within this sample, per type of litigant, with 80% of claims brought by individual complainants.[106] Table 6 indicates that individuals are refused permission more often than other litigating groups and also identifies a key reason for the lower success rate of individual claimants is the high proportion of legally unrepresented claimants. Given the evidence that we have from ombudsman annual reports of high refusal rates at the permission stage, once refusals at the written permission stage are included the true success rate of individual complainants is almost certainly lower still, and possibly considerably lower, than identified in Table 6.

Table 6: Success rate at the permission stage in all ombudsman case law (not including the Pensions Ombudsman and including reported cases only for permission and full hearings)

Type of litigant	**Number of claims**	**Success rate (%)**
Individuals (represented)	107	66
Litigants-in-person	92	24
Public body	8	100
Business/partnership	41	79
Others (NGO)	1	100

3.11 The findings in this study chime with those laid out in a recent Northern Ireland study on litigants-in-person (LIP) which highlighted the knowledge and practical barriers that LIPs face.[107] In the reported ombudsman case law tested in this study, just under half of individual claimants were litigants-in-person (LIPs) (see Table 6), indicating that the practical barrier of costs regularly prevents the use of legal representation. In the sample for this study, there were also multiple cases being heard in which the LIP was not present, suggesting that the practical barriers may go further than gaining legal advice. The sample tested also provided textual evidence of a knowledge barrier preventing LIPs from being effective in judicial review. A finding of the study was that a lack of arguable grounds or

[105] Lord Faulks (Chair), *The Independent Review of Administrative Law* (CP 407, Ministry of Justice, 2021), 168.
[106] See, R. Kirkham, *The Ombudsman, accountability and the courts: Annex*, ch.5.4. Available at: *https://www.sheffield.ac.uk/law/research/centres-and-institutes/procedural-fairness-accountability-and-ombudsman*
[107] For a recent study into litigants-in-person, see Gráinne McKeever, Lucy Royal-Dawson, Eleanor Kirk and John McCord, *Litigants in person in Northern Ireland: barriers to legal participation* (Ulster University: Belfast, 2018). For further insights into the challenges faced by LIPs, see Liz Trinder, Rosemary Hunter, Emma Hitchings, Joanna Miles, Richard Moorhead, Leanne Smith, Mark Sefton, Victoria Hinchly, Kay Bader and Julia Pearce, *Litigants-in-person in private family law cases* (Ministry of Justice Analytical Series, 2014)

'totally without merit' accounted for approximately three-quarters of the failed oral permission cases identified (see Table 7 below). Additionally, a close reading of the case law revealed a regular pattern of applicants attempting to use the process as an opportunity to appeal the original decision on the merits rather than in law.

Table 7: Reasons given for refusing permission in oral hearings (NB for some cases more than one reason was provided)

Ground applied	**Number of occasions cited**	**%**
1. Totally without merit	20	13
2. Lack of arguable case	89	60
3. Time limit	30	20
4. Alternative remedy	2	1
5. 'No difference' principle	1	1
6. Standing	3	2
7. Abuse of process	4	3

3.12 The large proportion of LIPs and the practical and knowledge barriers that they face by themselves probably provide sufficient explanation as to why individual claimants fail in ombudsman case law at relatively high rates, but the Northern Ireland study also hinted at another challenge that LIPs experience in participating successfully in court.

> **Emotional barriers** arise from the negative feelings associated with both the process and the issue being litigated, and these can then be exacerbated by being unable to overcome intellectual or practical barriers. The most obvious emotional barriers included LIPs struggling to be objective about their case, dealing with the anxiety about the facts of the case that they were living through beyond the court room. This could translate into a struggle to manage emotions to engage with the judge.[108]

Although individual attitudes were not tested in this research, the literature that is available on complainants that go on to dispute ombudsman determinations, suggests that such complainants tend to have strong emotional attachments to their case. A tendency towards extensive communication and provision of information is also a familiar pattern with many LIPs.[109] Further, in many cases such complainants have an almost visceral distrust of the institutional processes put in place to secure justice and pursue their grievance even after court action has been completed.[110] In other words, the emotional characteristics identified as being a common barrier in the in-depth Northern Ireland study of LIPs are highly likely to be present in the ombudsman case law study as well. Supporting evidence for this conclusion can be seen in the case transcripts.

[108] G. McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during Covid-19' *MLR Forum* (03.08.20) https://www.modernlawreview.co.uk/mckeevers-remote-justice/

[109] Tinder et al (n.106 above), 25-6.

[110] C. Gill, and N. Creutzfeldt, 'The 'ombuds watchers': collective dissent and legal protest amongst users of public services ombuds.' *Social and Legal Studies* (2018) 27 (3), 367-388.

3.13 Taken together, therefore, the evidence collated in this study paints a picture of judicial review as a weak source of redress for claimants in the ombudsman context. This outcome is due to judicial review's heavily prescribed procedural structure and in particular the disadvantage to which unrepresented individual claimants are put in this process.

3.14 Arriving at this conclusion in this study does not imply that the provision of redress is not an important function of judicial review. The claim here is only that for ombudsman case law, unlike perhaps in other areas of administrative law, there is no evidence of a strong litigation effect whereby judicial review claims precipitate a positive response at the pre-action or permission stage of judicial review. Certainly, some claims for judicial review do persuade the relevant ombudsman to re-open an investigation, but the evidence shows that this practice happens at very low rates.[111]

Redress: Analysis and potential reforms

Ombuds are rule of law loyalists

3.15 The low success rate in court of litigants against ombuds requires some explanation. An ombudsman is as vulnerable to competence and organisational failures as any other body and, given the relatively small numbers of claims against them, is hardly an active 'repeat player' in court with an embedded advantage due to considerable litigation experience.[112] There are a number of factors though that, due to the nature of ombuds, make it unsurprising that there is a pattern of natural advantage in judicial review for the ombudsman over the individual complainant. These factors make ombuds relatively well equipped to protect themselves against judicial review and to be strategic in the cases that they dispute in court.

3.16 Like all organisations, an ombudsman's internal incentive mechanism is geared towards retaining its reputational legitimacy.[113] In this respect, more so than a standard administrative body responsible for providing a service, an ombudsman's reputation is strongly built around rule of law values, such as the capacity to deliver fairness and justice. An ombudsman is, after all, built around the objective of delivering justice. Therefore, the staff in ombuds can be expected to operate with high levels of 'legal conscientiousness' and 'legal competence', and be keen to display loyalty to rule of law values.[114] Key staff in the organisation are legally trained, independent legal advice is regularly sought, and there is a close relational distance between the internal values of the ombudsman and those of the judiciary. Some of the bigger schemes have a separate legal team.

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[111] Richard Kirkham (2018) Judicial review, litigation effects and the ombudsman, *Journal of Social Welfare and Family Law*, 40:1, 110-125.

[112] M. Galanter, 'Why the 'Haves' come out ahead: Speculation on the limits of legal change'. *Law & Society Review*, (1974) 9(1), 95–160

[113] J. Black 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes.' (2008) 2 *Regulation & Governance* 137.

[114] See generally S. Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart, 2004).

3.17 Evidence of these factors were identified in the research for this report. To bolster legal awareness in the sector, separate schemes talk to each other regularly and share ideas. This practice is supported by the voluntary group, the Ombudsman Association, within which there exists a semi-formalised network of staff from multiple schemes that meet regularly in a 'Legal Interest Group' to discuss legal issues of relevance for the sector. Through that group, the support of the Nuffield Foundation and this project, a public database of relevant cases has been established making it easier still to coordinate knowledge on the case law surrounding the sector.[115] Further, most ombuds are relatively small organisations who will find it easier to pass on the lessons of judicial review internally than large and disparately organised public bodies.

3.18 Collectively, the attributes described above are identified in the literature on legal consciousness as ones most likely to entail that a public authority will be able to ensure that its operation is conducted in close accordance with the rule of law, and that the legal lessons from mistakes made are learnt and subsequently acted upon.[116] In particular, staff are likely to be highly reactive to the messages and guidance provided by case law. Combined, these factors enable ombuds to operate from a strong position in defending themselves against claims in judicial review and/or weed out (and reconsider) at an early stage those cases that are likely to be lost in court.

3.19 Overall, therefore, the evidence points towards judicial review working in favour of the ombudsman sector. Within this study, interviews with legal officers within schemes supported this account, even if the interviewees did also reveal a concern about the costs of judicial review, particularly during a period of austerity. It was also acknowledged by multiple participants that the backdrop of judicial review provided an important safeguard for complainants and its stakeholders. Instances were cited of judgments being helpful in identifying internal problems and procedural flaws, and providing senior management teams with the opportunity to alter their internal practices accordingly.

Judicial appeal is not the answer

3.20 Given this apparent unbalance built into the judicial review process in favour of the ombudsman, it might be tempting to conclude that in order to promote administrative justice there should be a shift towards an alternative judicial process, such as a statutory appeal or tribunal process. Three schemes looked at in this study already operate in this way[117] and, as noted above (Table 5), statutory appeal processes seem to facilitate higher rates of access to the court than those schemes that only allow for judicial review. Notwithstanding this pattern, however, some conclusions can be drawn from the operation of those schemes with a statutory appeal process, which caution against assuming that higher rates of judicial interaction imply better outcomes for individual complainants.

[115] See *A database of case law on the ombudsman sector:* https://caselaw.ombudsmanassociation.org/

[116] S. Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart, 2004).

[117] The Pensions Ombudsman, the Scottish Legal Complaints Commission and the Financial Services and Pensions Ombudsman (Ireland).

3.21 First, even if they are more frequently used, statutory appeal processes do not necessarily grant enhanced opportunities to the claimant. The grounds available are statutorily restricted to legal questions and, as with judicial review, do not ordinarily operate as a forum to re-rehearse factual investigations.[118]

3.22 Second, the recorded outcomes from appeal processes indicate that it does not favour individual complainants any more than judicial review and tends to assist the body investigated by the ombudsman.[119] The risk here, therefore, is that appeal routes expose the individual to losing a positive decision from the ombudsman more often than it assists them in overturning a negative decision.

3.23 Third, there is some empirical evidence that strongly indicates that appeal processes can work against the complainant. Research conducted by FLAC (Free Legal Advice Centres)[120] on the former Financial Services Ombudsman in Ireland (FSO) found that complainants were often disadvantaged in the appeal process for reasons of 'cost, risk of loss, capacity to cope with the process involved, time constraints, unavailability of affordable legal support and the nature of the appeal'. On the value of the appeal process as a remedial option, FLAC concluded that 'taken together, these factors combined to present an unsurmountable barrier to most respondents in terms of pursuing their case further'.[121] Further, they found that the existence of an appeal route helped to foster a 'war of attrition between provider and consumer, a battle which the provider believed they would win in most cases if the dispute was prolonged enough.'[122]

3.24 Fourth, there are other practical problems with adding an appeal option more widely in the ombudsman sector. FSO had to change its approach to complaint-handling (introducing a new mediation phase) in order to manage the delays and cost to the organisation that the appeal route created, and the uncertainty that the case law was creating.[123] Similarly, with the SLCC, the organised use of the appeal route by the Scottish legal professions in 2016-17 impacted hundreds of cases being investigated by the SLCC. In one month, 18 legal actions were brought against the SLCC, creating delays in decision-making and 'significant costs' for all involved.[124] The appeal route is still in operation but in a recent consultation

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[118] See Legal Profession and Legal Aid (Scotland) Act 2007, s.21 (4) and Pensions Schemes Act 1993, s. 151(4). A similar broad statutory remit applies to the Financial Services and Pension Ombudsman (FSPO) in Ireland (and their predecessor bodies, the Financial Services Ombudsman and the Pensions Ombudsman).

[119] See R. Kirkham, *The Ombudsman, accountability and the courts: Annex*, ch.4.3. Available at: *https://www.sheffield.ac.uk/law/research/centres-and-institutes/procedural-fairness-accountability-and-ombudsman*. With the SLCC the investigated bodies are lawyers, or legal firms, with the Irish Financial Ombudsman Service, financial service providers.

[120] FLAC, *Redressing the Imbalance: A study of legal protections available for consumers of credit and other financial services in Ireland.* (FLAC: Dublin, 2014).

[121] Ibid, p.164.

[122] Ibid, p.169.

[123] Bearing Point, *Strategic and Operational Review: Financial Services Ombudsman and the Pensions Ombudsman*, (FSOB & OPO: Dublin, Jan 2016); Financial Services Ombudsman, *Annual Review 2016*, (FSO: Dublin, 2017), p.2.

[124] Scottish Legal Complaints Commission, *Annual Report 2016-17*, 14.

process the SLCC has called for it to be reformed.[125] Indeed, with the SLCC, the appeal route direct to the Inner Court of Sessions (which is an appeal court) looks disproportionate.

3.25 Finally, it is important to note that those areas where appeal routes are available, namely in pension, legal and financial ombudsman disputes, the matters that are at stake have significant financial consequences which the claimant has already invested considerable money into and/or stands to gain significantly in financial terms. In other words, the financial capacity and incentive to support litigation with personal funds tends to mean that most individual litigants are legally represented. It is questionable whether this situation would be replicated for other ombuds, meaning that the addition of an appeal route would likely only encourage more litigants-in-person to pursue judicial redress with no greater likelihood of success.

3.26 Overall, therefore, the problems presented by the appeal process, particularly as experienced by the SLCC and the FSO in Ireland, make the greater use of bespoke appeal processes in the ombudsman sector an unattractive option. More generally, there is little evidence to suggest that the appeal route provides much benefit to complainants, and much evidence to indicate that it adds costs and burdens to the ombudsman service that reduces the efficiency of the service for complainants and investigated bodies alike.

Arguments for collective or aggregative actions

3.27 This report, therefore, recommends that, if anything, statutory appeal processes should be removed from the ombudsman sector. This proposal has elsewhere been recommended for the SLCC.[126] By contrast, it is suggested here that there is an additional set of roles that the court could be asked to perform that would enhance the potential for individual redress in the ombudsman sector. There are options for aggregating redress claims in collective action and/or public interest litigation that could be explored and experimented with. In the use of the courts, such measures offer much more potential than individual actions for supporting the citizen in their ongoing dealings with service providers and ombudsman.

3.28 The court's role in collective actions could be either as a conduit, alongside the ombudsman, for channelling large numbers of affected participants towards a potential solution, or as a means to resolve issues of law that affect a large-scale decision-making process.

3.29 Whilst most obviously of benefit for citizens, collective action can also benefit administrative and private bodies by more effectively and efficiently resolving patterns of reoccurring disputes and grievance. Benefits include:

[125] E. Robertson, *Fit for the Future*: *Report of the Independent Review of Legal Services Regulation in Scotland* (Scottish Government, Edinburgh, 2018), 44. As this report is finalised, the Scottish Government is considering the results of a further consultation into Legal Services Regulation, see *Complaints against Legal Firms and Lawyers in Scotland: consultation* (December 2020), here.

[126] Ibid (Robertson, 2018).

(1) efficiently creating ways to pool information about recurring problems and enjoined systemic harms;

(2) achieving greater equality in outcomes than individual adjudication; and

(3) securing legal and expert assistance at critical stages in the process.[127]

3.30 There would likely be resistance to aggregating adjudication, particularly from the public sector. It raises the potential for increased costs in redress, by making it easier for individuals to pursue grievances in scenarios where claims would otherwise be more easily defended. There is also the risk of public bodies being administratively and financially overwhelmed with redress claims. From the individual claimant perspective too, there may be a concern that individualised dispute resolution will be lost, a process which ostensibly protects 'individuals from freeform policymaking and compromises in government bureaucracies'.[128]

3.31 For these reasons, it is anticipated here that collective actions would be very much a reserve process used in scenarios where there is evident concern of bottlenecks and overload in an administrative system, or of access to justice concerns for a definable body of potentially affected parties. There would also need to be safeguards around any use of such collective processes.

3.32 To date, in the ombudsman sector only in a very small handful of cases has the court been used this way, and these have been cases brought by way of unorthodox litigation routes.[129] In several of these cases the focus of attention has been not so much on the relevant ombudsman's decision-making, but on the administrative decisions made by investigated bodies. In other words, the concept of collective/public interest litigation has been used to support the work of the ombudsman in its oversight of public and private bodies, as well as to scrutinise the work of ombuds.

3.33 Such potential action goes to the heart of a wider discussion as to how much value the political system is comfortable in extracting from the ombudsman system. Here there have long been arguments that to maximise the impact of the ombudsman it is necessary to reconfigure its powers to enable the office to focus more often, and more quickly, on areas where there is good reason to believe that systemic and ongoing maladministration is occurring. The goal in other words is to concentrate more on instances of maladministration that impacts multiple numbers of citizens.

3.34 Further, it has regularly been argued that solutions need to be found that enhance the capacity of the office to connect with those aggrieved citizens that are less likely to complain. An ongoing criticism of the ombudsman sector is that it suffers from a flaw that

[127] Michael Sant'Ambrogio & Adam S. Zimmerman, 'Collective Decision-Making and Administrative Justice' in M. Hertogh, R. Kirkham, R. Thomas and J. Tomlinson (eds) *Handbook on Administrative Justice* (OUP, forthcoming).
[128] Ibid.
[129] *British Bankers Association v The Financial Services Authority & Anor* [2011] EWHC 999 (Admin).

has been labelled the 'Matthew Effect'.[130] By this effect, although the ambition of the office is to provide a grievance service for the least advantaged in society, there is much evidence that it tends to be most often used by those better equipped to act as empowered consumers.[131] One reason for this outcome is that UK ombuds have tended to be built around a 'consumer model' within which dispute resolution is prioritised. Such a model naturally favours the most vocal of citizens and complainants, and tends to place less emphasis on public deliberation and integrating the perspectives of the broader citizenry and future service users.[132]

3.35 To address this inherent bias in the current ombudsman design and to make more use of the law as a promoter of individual redress, below some suggestions are made as to how more could be made of collective forms of action.

(i) Power for ombuds to refer points of law to court

3.36 One option to enhance public interest litigation is to grant the ombudsman the power to refer points of law to the court. This option is currently only available in two UK based schemes and has as yet yielded little case law,[133] and is considered more in chapter 5 below. However, the power could be widened to other schemes and would allow the ombudsman to act as a conduit to the court for raising points of law of systemic administrative concern. Through this process, ombuds could help resolve legal uncertainties and place added pressure on service providers to adhere to their legal duties in circumstances where it is otherwise unlikely that individual complainants will have the opportunity to bring a legal action.[134]

3.37 Although a rarely used process, there is a useful model that could be adopted in the legal framework of the Charities Commission.[135] It is not anticipated that such a power would be used very often, as the experience of the Charities Commission indicates.[136] Technical considerations as to how a referral power might work if introduced have been explored by the Law Commission,[137] and the report of the Law Commission into the

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[130] B. Hubeau, 'The Profile of Complainants: How to Overcome the "Matthew Effect"?' in Hertogh and Kirkham (eds) Research Handbook in the Ombudsman (Cheltenham: Edward Elgar, 2018).

[131] Ibid

[132] N. O'Brien, 'What future for the ombudsman?' (2015) 86 *The Political Quarterly* 1.

[133] Pensions Act 1993, s.150(7): see *The Pensions Ombudsman v EMC Europe Ltd & Ors* [2012] EWHC 3508 (Ch).

[134] This recommendation was raised as an option in a recent Nuffield Foundation report on administrative law in Wales, Dr Sarah Nason and Ann Sherlock, Dr Huw Pritchard, Dr Helen Taylor, *Public Administration and a Just Wales* (Nuffield Foundation, 2020), 52-55.

[135] Charities Act 2011, ss. 325 and 326.

[136] According to the Law Commission only two had been brought by 2017: see *Her Majesty's Attorney General v The Charity Commission for England and Wales and others* [2012] UKUT 420 (TCC); *The Independent Schools Council v The Charity Commission for England and Wales, The National Council for Voluntary Organisations, HM Attorney General and Others* [2011] UKUT 421 (TCC). For a discussion, see Law Commission, *Technical Issues in Charity Law* Law Com No 375, HC 304 (2017-19), ch.15. See also, A McKenna, 'The Charity Tribunal – where to and from' (2014) 4 Private Client Business 213.

[137] Law Commission (2010-11). *Public Services Ombudsmen* HC 1136, 43-47.

referral power of the Charities Commission did not identify significant concerns.[138] An issue for the ombudsman sector may be a concern that schemes would be pressurised to use the power. However, strong practical disincentives, such as costs and organising an opposing party, would guard against overuse of the power, and likely leave it as a residuary power to be used only as and when really necessary.

(ii) Power for listed designated bodies of referral of complaints to the ombudsman

3.38 A second option might be to grant certain public bodies the power to submit 'super-complaints' to an ombudsman. A range of bodies might be considered appropriate conduits for such cases, such as Parliamentary Select Committees and service providers. However, the idea of referring matters to the ombudsman has also been alluded to in recent discussions on the future of the tribunal sector,[139] and this may be a safer model through which to experiment with the power.

3.39 Tribunals manage a large case load, which contains a rich source of knowledge on the operation of a number of public services. A recent Nuffield Foundation report provided evidence that patterns of wrongful administrative practice could be observed in tribunal case law.[140] Where such systemic patterns of maladministration become apparent in tribunal adjudication, a formal power to channel matters in the direction of the ombudsman might allow for a follow-up of issues which the Tribunal sector is ill-equipped to undertake. The relationship might also be used to allow the judicial branch to highlight areas of recent rulings of courts and tribunals which might have a systemic impact and which would benefit from follow-up to assess how effectively such rulings have been implemented. Such a mechanism might have particular value where the judicial or tribunal ruling required long-term implementation by a provider en masse of a public service.

3.40 A model to follow for the referral proposal may be that contained in the recently established Independent Office for Police Conduct, which has been granted some flexibility to pursue 'super-complaints' if matters are referred to them by listed designated bodies.[141] The idea though does contain risks which would need to be planned for. A danger with this measure is that the ombudsman office may become overwhelmed with investigating referrals, at the cost of dealing with individual complaints. Alternatively, the ombudsman may become pressurised into carrying out investigations with a strong political context. To mitigate these risks, the ombudsman would need to reserve the discretion to decline the

[138] See also the 2017 Law Commission report on the use of the reference process that it would be better if the Charity Commission's power should not be confined by a need to obtain the Attorney-General's consent, Law Commission, *Technical Issues in Charity Law* Law Com No 375, HC 304 (2017-19), para.15.67.

[139] See a speech given by the Senior President of Tribunals, Lord Justice Ryder, Ryder, E., 2019. *Driving improvements: collaboration and peer learning*, speech at OA annual conference, Belfast. Available from: https://www.judiciary.uk/wp-content/uploads/2019/09/2019_09_19_SPT_Ombudsman_Conference_-Belfast_May2019_FINAL-1.pdf [Accessed 29 August 2020].

[140] J. Tomlinson and R. Thomas, *Immigration Judicial Reviews: An Empirical Study* (Nuffield Foundation, 2019).

[141] Policing and Crime Act 2017, ss.25-27.

referral and there would have to be accompanying reporting duties to call such decisions to account.

(iii) Enshrine in law a duty for public bodies to respond lawfully to ombudsman determinations

3.41 A third option to enhance public interest litigation has already been facilitated by the courts in a series of four cases that have allowed judicial review claims to be brought on the grounds of unlawfulness, against public bodies that have refused to implement the recommendations of an ombudsman.[142] In three of these cases the action impacted groups, sometimes large groups, of potentially impacted individuals. In each case, the initial response of the public body to the ombudsman report was found to be perfunctory and not to have provided sufficient reasons for its response. The primary purpose of this form of redress, therefore, is to require public bodies to respond fully and appropriately to reports of the ombudsman office rather than to dictate the appropriate response. With three of these cases, the judicial decision triggered a process, which led eventually to systemic redress for a large body of citizens. The court input was to force the public authority concerned to reconsider its position and to respond directly to the ombudsman's findings. In two of the cases, the public authority did not go on to implement the original ombudsman recommendations in full but did significantly increase the level of collective redress awarded following the court's ruling.[143]

3.42 This form of legal action has been criticised on the grounds that it politicises the work of the courts in judicial review.[144] This argument is made notwithstanding the residuary capacity of public authorities in such cases to continue to refuse to implement recommendations of an ombudsman, provided that they supply adequate and lawful reasons for their decision. This outcome of lawful continued resistance was the outcome in one case demonstrating that the concerns that lawful executive discretion is compromised by judicial intervention need not be realised if the public authority is willing and able to provide justifications for its decision-making which respects the determination of the ombudsman.[145]

3.43 Contrary to the concern that executive authority is compromised by such public interest actions, it is proposed here that public interest actions should become a standard feature of the legal framework around the ombudsman and one supported by legislation. If the aspiration is to expand the reach of administrative law to those ordinarily unable to access

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[142] *R (Bradley) v Secretary of State for Work and Pensions and Parliamentary Commissioner for Administration* [2007] EWHC 242 (Admin); *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin); *R (Gallagher & Anor) v Basildon District Council* [2010] EWHC 2824 (Admin); *R (Nestwood Homes Developments Ltd) v South Holland District Council* [2014] EWHC 863 (Admin).

[143] *R (Bradley) v Secretary of State for Work and Pensions and Parliamentary Commissioner for Administration* [2007] EWHC 242 (Admin); *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin).

[144] Jason NE Varuhas, *Judicial Capture of Political Accountability* (Policy Exchange 2016)

[145] So far the ground has been applied to the Parliamentary Ombudsman and the Local Government Ombudsman, with the exact ground subtly varying depending on the scheme involved. See the case of *R (Nestwood Homes Developments Ltd) v South Holland District Council* [2014] EWHC 863 (Admin)for an example of a public authority successfully meeting the test and in which the court found that the decision not to implement the LGO's recommendations were lawful.

administrative justice, as well as to increase its efficiency, then complainants should be entitled to require public bodies to provide reasons for their refusal to accept the recommendations of the ombudsman, reasons which directly address the ombudsman report.

3.44 Finally, consideration should be given to whether it might be appropriate in some instances for an ombudsman to commence legal proceedings against a public authority if it has failed to provide adequate reasons for not implementing the recommendations of a report. Scenarios where this might be appropriate include a systemic investigation where the unremedied maladministration might concern multiple people, or where a public authority is a persistent offender in terms of refusing to implement ombudsman recommendations.

Summary of the influence of the court's redress function

3.45 Unlike in other areas of public law litigation, the courts do not play a strong role on the provision of redress in the ombudsman sector. Ombuds have proved very adept at managing their processes to protect themselves from litigation, a point to which will be returned. Most litigation is brought by aggrieved complainants, including large numbers of LIPs.

3.46 For reasons to be explored further in the next chapters, ombudsman case law retains strong scrutiny value over the ombudsman sector, notwithstanding the low success rates for claimants. This report though suggests that refinements could be made to the relationship between the courts and the ombudsman that could enhance the input of the ombudsman in terms of fostering redress. Facilitating more collective and/or public interest legal action might be one way forward. These ideas are pursued further in the final chapter of this report.

4. SUPPORTING THE AUTHORITY OF THE OMBUDSMAN

4.1 This chapter looks at the second function of judicial review that this research project tested for, which was evidence of the courts providing institutional support for the authority of the ombudsman process. This function is a very practical consequence of the judicial review process, which is not always appreciated in the literature,[146] but is a particularly important function for an unelected and independent institution such as the ombudsman.

Findings

4.2 Although not a role that is detailed in legislation, one of the major challenges that an ombudsman office has to address is managing complainants towards the closure of their grievances.[147] This is an implicit and unavoidable feature of any civil justice system. Determinations on complaints have to be investigated and made, but once a case is decided, a follow-up duty on an ombudsman is to employ various strategies to manage the gap between the office's assessment of the complaint and 'what they [perceive] as the public's excessive or unrealistic expectations from [service providers] and the [ombudsman]'.[148]

4.3 Even in the best designed system, however, it is unlikely that all parties will be willing to accept an ombudsman's professional judgement of appropriate standards, or its further attempts to explain, justify and manage that decision to a conclusion. Indeed, from the perspective of the user, this 'expectations management' work is a service that can be viewed very negatively. Processes adopted to communicate and work with complainants, risk being seen as designed to manage them out of the system rather than resolve their complaints. As a result of such entrenched differences and ongoing grievance, further work to secure closure to a complaint will often be necessary. It is in this context that the courts play an important role as part of the overall structure through which complaints are closed off.

4.4 Judicial review is designed as a multi-layered process, with claimants required to obtain permission for their case to be fully heard in court. Much of this work is conducted through paper-based applications. Although this study did not obtain full details of the degree to which judicial review claims are resolved at, or before, the permission stage, an indicative

[146] For an exception, see V. Bondy & M. Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, (Public Law Project, 2009); R. Thomas, 'Immigration Judicial Reviews: Resources, Caseload, and "System-manageability Efficiency"' [2016] J.R. 209.

[147] Sharon Gilad, 'Accountability or expectations management? The role of the ombudsman in financial regulation', *Law and Policy* (2008) 30/2: 227-53

[148] *Ibid*, 229.

picture of the claimant's experience in ombudsman case law can be gauged from some of the reports of ombuds.

4.5 Reporting of judicial review patterns is not a uniform practice across the sector but the following provides a snapshot of litigation rates:

- In 2014, the Legal Ombudsman reported that there had been 30 applications for judicial review against it in its first four years of operation, of which seven (23%) had been granted permission.[149]
- Between 2006 and 2013 the PHSO reported that only 14 out of 55 claims for judicial review had been granted permission at the permission stage (25%).[150]
- Between 2006 and 2013, the Local Government Ombudsman reported that it had received 78 claims, with all but five (6%) refused or withdrawn at the permission stage[151] and 2019/20 it received 16 claims, with all bar one rejected at the permission stage.[152]
- Writing in 2015, the Legal Director of the Office of the Independent Adjudicator (OIA) reported that 'Eighty per cent of claimants are refused permission, and around half of claims are refused on the basis that they are "totally without merit"'.[153] This pattern is evidenced in the reporting of judicial review in the OIA's annual reports, with for the last two years the OIA reporting 12 new claims, with none receiving permission.

4.6 This account of low success rate at the permission stage is matched by the review of publicly reported permission hearings conducted in this ombudsman case law study. More permission hearing cases (138) were identified than fully heard cases (122), and in only six of those permission cases was the claimant successful,[154] plus in another five cases, the permission and oral hearing were rolled up into one.[155] Further, the failure of the claimant to establish a viable legal ground upon which to base their challenge was present as an explanation in the large majority of failed oral permission hearings (see Table 7 above).

4.7 What these various figures indicate is that the success rate of legal claims against ombuds at the permission stage is, if anything, lower than judicial review generally.[156] Further,

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[149] Legal Ombudsman, *Annual Report 2014,* 14.

[150] See the Annual Reports of the Parliamentary and Health Services Ombudsman.

[151] See the Annual Reports of the Local Government Ombudsman.

[152] Local Government and Social Care Ombudsman 2019/20, *Annual Report and Accounts,* HC 10119, p.35.

[153] F. Mitchell, *The OIA and judicial review: Ten principles from ten years of challenges*. (Reading: Office of the Independent Adjudicator for Higher Education, 2015), 11.

[154] *Bennett v Independent Police Complaints Commission & Anor* [2008] EWHC 2550 (QB); *Williams (R on the application of) v IPCC* [2010] EWHC 2963 (Admin); *Walker v Parliamentary and Health Service Ombudsman* [2012] EWHC 535 (Admin); *R (Duddle) v OIAHE* [2013] EWHC 4918 (Admin); *R v Commissioner for Local Administration in England, ex parte Jones and another* (1999); *R (Towry Law Financial Services Ltd) v FOS & Anor* [2004] EWCA Civ 1701.

[155] *R (Sandhar) v OIAHE* [2011] EWCA Civ 1614; *R (Hession) v Health Service Commissioner for Wales* [2001] EWHC 619 (Admin); *R (Brinsons (A Firm)) v Financial Ombudsman Service* [2007] EWHC 2534 (Admin); *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642; *Critchley v FOS* [2019] EWHC 3036 (Admin).

[156] Richard Kirkham (2018) Judicial review, litigation effects and the ombudsman, *Journal of Social Welfare and Family Law*, 40:1, 110-125.

there is little evidence of settlements to the litigant's benefit occurring at high rates. The numerically dominant task being performed in ombudsman case law, therefore, is providing the ombudsman sector with a means to close off complaints. Judicial review in effect operates as a 'safety valve' for managing dissatisfied users of ombudsman services who refuse to accept the justice offered to them by an ombudsman.

4.8 Within the judicial review process, particularly within permission hearings, there is also an element of explanatory work being undertaken. This pattern can be observed in ombudsman case law. Many of the reported permission hearings on ombudsman case law evidence the extensive work put in by the judge in managing the claimant through the proceedings.[157] Typically, sympathetic soundings are offset by frank explanations of the limited nature of the judicial review process, occasionally requiring brusque judicial interventions.[158] To quote Lord Justice Wall in one case:

> Before I go any further I think I need to explain to Mr Bain precisely what my function is today. Many litigants in person come to this court thinking that the court has very wide powers to rewrite history, to put the clock back, to wave a wand, in effect, and to say that everything that has happened hitherto has been wrong and we should start again or the order that the judge made is plainly wrong and should be reversed. In fact, the position is very much different to that, because this court is not a court of first instance; it is a court of review. What this court does is to look at what the judge (in this case Black J) did and said, and ask itself: "Is it arguable that what she did was wrong as a matter of law, or that she has in some way made such an error that this court should review her decision?"[159]

Support: Analysis and potential reforms

The benefits of the permission stage

4.9 Given the low likelihood of success through judicial review and its high costs, from the complainant perspective the process might well appear deliberately designed both to obstruct and placate them rather than genuinely engage or enable them to secure justice.[160] There is, therefore, an argument that it might be in the interests of citizens to remove access to judicial review altogether. Ouster clauses restricting judicial review can be found in ombudsman acts elsewhere in the world, and the current government views ouster clauses as an appropriate policy response in certain circumstance. Notwithstanding the challenges that litigants face using judicial review, for several reasons, this is not a conclusion supported by this report.

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[157] Unlike judicial review proceedings, the reports of permission hearings conclude with the oral exchange between the judge and the parties post-judgment.

[158] In one case the judge had to request the forcible removal of the claimant from the court, *R (Williams) v Parliamentary Ombudsman* [2010] EWHC 1432 (Admin). See also *Evans (R on the application of) v IPCC* [2010] EWHC 3484 (Admin).

[159] *Bain, R (on the application of) v IPCC* [2009] EWCA Civ 961, [3].

[160] See S. R. Arnstein, "A Ladder of Citizen Participation" (1969) 35 *Journal of the American Planning Association* 216–224, which McKeever makes use of in her work, G McKeever, 'A Ladder of Legal Participation for Tribunal Users' [2013] *Public Law* 573.

4.10 To begin with, it does not necessarily follow that the judicial review process has no value just because very few cases proceed to a full hearing. In practice, there is now a rich body of literature that demonstrates that, across civil law generally, the courtroom is not equally open and accessible to all, and that for most litigants the early settlement stage is practically more important than adjudication.[161] This 'vanishing trial'[162] phenomenon is well known, and across civil justice fields has shifted the courts towards performing more of a 'management of trial' role.[163] The finding in this study of ombudsman case law that more legal claims are resolved before a full hearing than through a final judgment, merely reflects this wider trend.

4.11 A further criticism of judicial review might be the low opportunity it offers individual claimants to secure a positive outcome, as is the case with ombudsman case law at the permission stage. Against such an argument, however, the value that judges bring to the process of dispute resolution is several, even where the case is not adjudicated by way of full hearing or the structure of the process favours one party.[164]

4.12 First, knowledge of the statutory framework and previous rulings helps establish a reasonably firm framework for the conduct of the dispute. Pre-trial processes, therefore, can be used to signal to all parties at an early stage that certain aspects of the law are settled and authoritative. Indeed, with proper legal advice, the likely range of responses of the judge can be anticipated in advance. For the ombudsman sector this is an important safeguard, as it allows them to manage challenges to their decision-making with confidence provided that they have correctly interpreted the legal signals already sent out by the judiciary. As noted above, this generally is the case in the ombudsman sector as, sensitive to their constitutionally vulnerable position, ombuds exhibit high levels of legal conscientiousness.

4.13 Second, the pre-trial process has strong authority because judges 'stand ready to step from the shadows and resolve the dispute by coercion if the parties cannot agree'.[165] As this study demonstrates, judicial coercion more often than not works in favour of the ombudsman, either at the permission stage or in final hearings. It is through this residuary coercive power, power that the ombudsman does not possess, that judicial review has a particularly necessary role to play in supporting the ombudsman process. What we know about ombudsman litigants is that it is unlikely that non-judicial processes alone are going to be enough to satisfy all dissatisfied complainants. Indeed, the findings in this study

[161] For a recent summary of some of the evidence, see Ayelet Sela and Limor Gabay-Egozi, 'Judicial Procedural Involvement (JPI): A Metric for Judges' Role in Civil Litigation, Settlement, and Access to Justice' *Journal of Law and Society* 47 (2020) 468–98.

[162] M. Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 *J. of Empirical Legal Studies* 459.

[163] J. Resnik, 'Managerial Judges' (1982) 96 *Harvard Law Rev*. 374

[164] Ayelet Sela and Limor Gabay-Egozi, 'Judicial Procedural Involvement (JPI): A Metric for Judges' Role in Civil Litigation, Settlement, and Access to Justice' *Journal of Law and Society* 47 (2020) 468–98, 471.

[165] R. Cooter et al., 'Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior' (1982) 11 *J. of Legal Studies* 225, at 225

indicate a strong residuary demand for an independent look at ombudsman decisions, with litigation against ombuds most likely to be brought by individual complainants, a large proportion of whom are litigants-in person.

4.14 This tendency towards litigation, notwithstanding the low chances of success, connects to a growing body of evidence that a large proportion of complainants that do not secure redress through the ombudsman system will remain dissatisfied with the justice that they have received.[166] In addition, complainants often possess expectations of the nature and capacity of the ombudsman process that cannot be delivered. In this context, the role of judicial review has an important part to play in conferring formal legitimacy on, and support for, the ombudsman sector - and it delivers this role by way of the finality of formal judgment, whether through paper-based or oral permission decisions, or adjudication.

4.15 Without this judicial back-up service, the ombudsman sector would be in a weaker position to defend its integrity. With it, the hard form of filtering system operated by the courts in judicial review provides ombuds with a powerful tool with which to manage their own relations with complainants. In other words, thanks to a track record of judicial support, ombuds can point complainants towards judicial review with a high degree of confidence that on most occasions the complainant will be unsuccessful. Judicial review, therefore, can be seen to operate more in support of the ombudsman sector, rather than as a strong control regime that delivers a chilling effect over ombudsman decision-making.

4.16 Third, judges can steer litigants towards closure through direct procedural involvement in the litigation. In the public law context, this role is effectively formalised in the pre-action protocol and permission stages. As noted above, the evidence from the oral permission hearings is that this interventionary role of the judge can be quite active in some cases. Most frequently in ombudsman case law, the messages being delivered towards the claimant indicated the legal limitations of the course of action they were pursuing. Sometimes though, these judicial communications can assist litigants in understanding their potential for securing a settlement, and likewise nudge the ombudsman towards recognising that their legal position is not robust. The literature on LIPs has noted that this 'case management' role places a strong burden on the court system,[167] but in the context of the administrative justice system as a whole looks necessary and appropriate where ombudsman case law is concerned. It also works in favour of the complainants sometimes. In the sample identified in this study, in six permission hearings permission was granted, yet the case did not proceed to a full hearing. In each case, the transcript clearly indicated that at the next stage the ombudsman concerned was going to reconsider or reopen the complaint. Here too, this finding connects to a wider body of research on the importance of judicial signals conveyed through the written and oral interactions made during litigation.[168]

[166] Eg N. Creutzfeldt, *Ombudsmen and ADR* (Palgrave MacMillan, 2018).

[167] Tinder et al (n.106 above), 30-33.

[168] Ayelet Sela and Limor Gabay-Egozi, 'Judicial Procedural Involvement (JPI): A Metric for Judges' Role in Civil Litigation, Settlement, and Access to Justice' *Journal of Law and Society* 47 (2020) 468–98, 482.

4.17 Fourth, beyond dispute resolution, there is a wider value of judicial review that is of strong benefit for an independent institution such as the ombudsman, namely the identification and resolution of flaws in the ombudsman's legal framework. This is a third function of judicial review, which will be explored in the next chapter. To perform this role, the existence of a regular flow of cases into court is important. The strong filtering process that is built into judicial review means that it is well designed to perform this service without overloading the capacity of the court. In particular, the permission stage works to identify the strong *legal* claims brought against ombuds and systematically weed out claims brought solely on the substantive merits of an ombudsman's findings of fact.

4.18 Thus while there is a risk that the potential for judicial review serves to add pain to the complainant's journey, this has to be offset against the risk that the judicial filtering process is too successful. In other words, if it is made too hard for complainants to apply for judicial review, over time individual claimants may be discouraged from bringing claims, which might in turn reduce the ability of the court to fulfil a meaningful supervisory function. An associated danger is that in the future the law will develop more in line with the demands of litigation brought by better-funded investigated parties than complainants.

Summary: The need for alternative methods of dispute resolution

4.19 The background support provided by the courts to the ombudsman is of strong value in providing formal legitimacy to the ombudsman decision-making process. Against that, the low success rate of individual complainants, especially LIPs, raises some concerns. A particular concern is that courts become burdened with managing ombudsman cases and litigants become more cynical of the justice system. On this point, previous studies on LIPs have highlighted the importance of better court information for litigants, such as a stand-alone webpage for LIPs,[169] and additional specialised training for the judiciary.[170] It has also been proposed that the court system should consider offering 'coaching' sessions to equip LIPs with the basic skills to manage the procedural dimension of the court process.[171]

4.20 However much the judicial review process is refined though, judicial review is deliberately designed to be a narrowly structured process, which limits the potential for individuals to pursue their grievance. To deal with the residuary sense of injustice that results, complainants need alternative opportunities to pursue their dissatisfaction with the decisions made by ombuds, and those opportunities need to be viable.

4.21 In the search for solutions the ombudsman sector has led the way in steering complainants away from legal action, and have ordinarily done so without any legislative instruction. The main solution that has been developed within the sector to avoid judicial review has been to develop various forms of internal review process. The Financial

[169] The Courts Service do provide some information eg see *A Handbook for Litigants-in-Person* (2013) and a web page, but the advice is very generic (see here).
[170] Tinder et al (n.106 above), especially ch.6
[171] Ibid 113-115.

Ombudsman Service, for instance, operates a layered four stage process for considering complaints to increase the opportunities for complainants to participate in and comment on the handling of their complaint.[172] In a similar vein, the Scottish Legal Complaints Commission has an in-built Determination Committee stage, to which complainants can refer a complaint should they not accept the recommendations of an investigation.[173] Other schemes have formalised their internal review processes and publicly report on them.

4.22 These solutions are a necessary part of the overall structure for dealing with dissatisfaction with ombudsman services. They are accessible, offer a measure of additional participation on the part of the user,[174] and are free to use for the complainant. They are capable of allowing for a second look at decisions, albeit that the second look remains under the control of the ombudsman office. However, not being independent, two design features would make them more robust. First, internal review processes should in turn be potentially subject to judicial oversight. This is the case at present, and is another reason why judicial review adds value to the ombudsman sector. Second, internal review processes should be subject to minimal statutory authority, complete with reporting duties and a measure of transparency.

[172] See https://www.financial-ombudsman.org.uk/consumers/expect

[173] See https://www.scottishlegalcomplaints.org.uk/your-complaint/our-process/determination/

[174] Participation has been identified in several recent studies on administrative justice as the key to reducing citizen dissatisfaction with dispute resolution mechanisms, see G McKeever, 'A Ladder of Legal Participation for Tribunal Users' [2013] *Public Law* 573.

5. STRUCTURING STANDARDS OF GOOD ADMINISTRATION AND PROCEDURAL FAIRNESS

5.1 This chapter looks at a third function of judicial review, which is described here as structuring good administration and procedural fairness standards through the judicial interpretation and refinement of the law. There is considerable disagreement in the literature as to the extent to which the courts should perform this role, both in general debates on judicial review[175] and on ombudsman case law specifically.[176] The research for this study, however, found that regardless of differing views on the overriding role that the courts should play in judicial review, the courts have provided an important service in terms of adding missing detail to the legal framework around the operation of the ombudsman sector. This added detail has in turn added to the robustness of the ombudsman model and the judicial role serves to fill a gap left by the light-touch regulatory environment in which the sector operates.

5.2 However, although the narrative presented here describes the court's contribution to the oversight of the ombudsman sector as a positive one of institutional building, the next two chapters will conclude this report by considering the limitations of relying upon the judiciary to perform this quasi-regulatory function. In particular, there are issues, or gaps in oversight, that can only be insufficiently provided for by the judiciary. There also remains the risk of the judiciary imposing standards on the ombudsman sector that are out of line with the 'alternative justice' rationale for the introduction of ombuds.

Findings

The judicial approach towards ombudsman case law

5.3 The starting position for understanding the ombudsman/court relationship, repeated in numerous judgments, is that what has evolved in ombudsman case law is a relationship within which the court has a distinct and accepted supervisory role. In line with standard accounts of judicial review, the judicial role is one focused on interrogating the veracity and legality of the decision made by an ombudsman, rather than reconsidering its

[175] Eg See Lord Sumption, 'The Limits of Law' in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart 2016) 15; and Special Issue: 'Reflections on the Rise of Judicial Power' (2017) 36(2) UQLJ 205, as compared to the different approaches adopted towards judicial review in several countries as outlined in Dean R Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (CUP 2018) 75.

[176] Jason NE Varuhas, *Judicial Capture of Political Accountability* (Policy Exchange 2016) 50 compared to R. Kirkham and E. O'Loughlin, 'Judicial Review and Ombuds: A Systematic Analysis' *Public Law* [2020] 679-700.

substance.[177] A series of judicial statements from lead ombudsman cases support this proposition. For instance:

> All that said … it does not follow that this court will readily be persuaded to interfere with the exercise of the [Parliamentary Ombudsman's] discretion. Quite the contrary. The intended width of these discretions is made strikingly clear by the legislature.[178]

> It is for the [Office of the Independent Adjudicator] in each case to decide the nature and extent of the investigation required having regard to the nature of the particular complaint and on any application for judicial review the court should recognise the expertise of the OIA.[179]

> [A] court should treat a decision of the [Financial Ombudsman Service] with respect and give it a reasonably generous margin of appreciation in order to reflect the particular expertise whichthe [FOS] has and which he will make use of in reaching any conclusion.[180]

> [T]he Court's supervisory jurisdiction should be exercised with sensitivity to the special nature of the [Scottish Public Services] Ombudsman's constitutional role and function.[181]

5.4 Equivalent statements can be found within the case law on other schemes.[182] This is an approach rooted in an understanding of the purposes for which ombuds have been established, purposes which the court has repeatedly demonstrated a willingness to support. In line with this interpretation of the law on ombuds, the form of the following citation on the role of the court is repeated regularly in ombudsman case law.

> The principles of law that must be applied are well known and clear. … The court's supervisory role is there to ensure that he has acted properly and lawfully. However much the court may disagree with the ultimate conclusion, it must not usurp the Ombudsman's statutory function. It is likely to be very rare that the court will feel able to conclude that the Ombudsman's conclusions are perverse, if only because he must make a qualitative judgment based upon [his department's] wide experience of having to put mistaken administration onto one side of the line or the other. I have to say that in this case I would not have made the same judgment as the Ombudsman; but I am not asked to make any personal judgment and the real question is whether any reasonable Ombudsman was entitled to hold the view expressed in this careful report.[183]

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[177] See R. Kirkham and A. Allt Making Sense of the Case Law on the Ombudsman' *Journal of Social Welfare and Family Law* 38:2, 211-227.

[178] *R v Parliamentary Commissioner for Administration ex p Dyer* [1994] 1 WLR 621, pp. 626E-G, per Simon-Brown LJ.

[179] *Siborurma*, para 60, per Moore-Bick LJ.

[180] *Walker, Re Judicial Review* [2013] NIQB 12, para 11, per Horner J.

[181] *Argyll & Bute Council v SPSO* [2007] CSOH 168, para. 16, per Lord Machphail.

[182] Eg *R (Crawford) v The Legal Ombudsman & Anor* [2014] EWHC 182; *Muldoon v Independent Police Complaints Commission* [2009] EWHC 3633, para 19; *Martin, Re: Judicial Review* [2012] NIQB 89, [28] – [30] (Northern Ireland Police Ombudsman).

[183] *Doy v. Commissioner for Local Administration* [2001] EWHC 361, para 16.

5.5 In other words, the court has interpreted its role with regard to the ombudsman as in line with standard judicial review, but simultaneously adopted a deferential stance towards the specialism of the ombudsman office.

5.6 The restrained nature of judicial review naturally reduces the frequency in which ombudsman decision-making is overturned by the courts, but a court can still exercise a powerful influence if it chooses to operate in an interventionist manner towards ombuds. Several recent studies have noted the variable patterns of judicial reasoning applied by the courts in judicial review. Such studies illustrate the flexible parameters of the grounds of judicial review and the difficulties in relying upon standard textbook typologies of administrative law grounds to capture the full nuances of how judicial review judgments are made.[184] A recent study conducted by the author suggests that such variances are especially evident in ombudsman case law where the courts have, on a selective basis, applied an interventionist approach towards the sector.[185]

5.7 Two main lines of legal reasoning have created the space for the judiciary to adopt a selective interventionist approach.

5.8 First, as with all legislation, the legislation that defines the powers of ombuds can grow old and out of fit with modern developments and practice, creating uncertainty. Gaps have also been left in the detail of the legislation which have been dealt with through the considerable discretionary power granted to ombuds. This is a situation which in turn creates potential for overlaps between the authority of ombuds and other accountability institutions. Such legislative shortcomings leads to opportunities for, and indeed necessity of, litigation and in response the courts have been required to make some influential interpretations of law which have added significant detail to existing statutory law.

5.9 Second, even though ombuds have been granted wide discretionary powers to manage their operations, the common law provides a repository of flexible legal grounds for the judiciary to apply to their exercise. Whilst overall deference has been the watchword, these grounds have been used selectively by the courts to advance the decision-making standards on the ombudsman sector, as well as to shape the institutional architecture in which ombuds operate.

5.10 This chapter identifies seven forms of judicial influence that the courts have had on the ombudsman sector:

- Defining procedural fairness standards
- Setting standards on reasons
- Triggering institutional learning

[184] Eg see S. Nason, *Reconstructing Judicial Review* (Oxford: Hart, 2016); D. Night, *Vigilance and restraint in the common law of judicial review* (Cambridge: Cambridge University Press, 2018); JR Bell, *The Anatomy of Administrative Law* (Hart 2020).

[185] R. Kirkham and E. O'Loughlin, 'Judicial Review and Ombuds: A Systematic Analysis' *Public Law* [2020] 679-700.

- Enforcing freedom of information and equality duties
- Demarcating and managing responsibility between ombuds and other dispute resolution mechanisms
- Creating and enforcing institutional solutions
- Supporting ombudsman submissions to court.

(i) Defining procedural fairness standards

5.11 A key area where the courts have been prepared to step in and add detail is in the consideration of standards of procedural fairness applied. This is a judicial input that directly connects to one of the perceived weaknesses of the ombudsman model. The courts, through the various grounds of procedural fairness developed in the common law, possess the capacity to force the ombudsman sector to reflect upon and enhance its decision-making processes.

5.12 Table 8 provides examples of significant ombudsman case law that has forced a direct response from the ombudsman sector, which in turn has had a long-term impact on ombudsman practice. Those responses have been confirmed in interviews with ombudsman staff and where possible documentary evidence.

Table 8: Examples of case law leading to alteration in ombudsman practice

Legal uncertainty clarified	Landscape altering judgment
Information should be shared between parties	*R v Local Commissioner For Local Government Ex p Turpin* [2002] JPL 326, [64-71]
Terms of investigation restricted by original complaint and only expandable following consultation	*Cavanagh & Ors v Health Service Commissioner* [2005] EWCA Civ 1578; *Miller & Anor v The Health Service Commissioner for England* [2018] EWCA Civ 144
Admissibility of complaints which may lead to a financial remedy	*JR55* [2016] UKSC 22; *Miller & Anor v The Health Service Commissioner for England* [2018] EWCA Civ 144
Decision statement required for discontinuing investigation	*Maxhuni v LGO* [2002] EWCA Civ 973
Process necessary to avoid predetermination	*Miller & Anor v The Health Service Commissioner for England* [2018] EWCA Civ 144

5.13 The influence of the courts on the ombudsman is not just one of raising the standards of the sector, judicial decisions are also used to verify the standards that are currently practiced, thereby formally confirming the integrity of the ombudsman model.[186]

5.14 For instance, a regular argument raised by claimants is that the ombudsman is in some way biased, with either the individual office holder being challenged or the staff of the office made up of too many members of the sector being overseen. Such arguments have

[186] See also cases such as *R(Crosby) v IPCC* [2009] EWHC 2515 (Admin) which verify the standards of scrutiny applied by an ombudsman (in this instance that a complaint had to be made on a 'balance of probabilities' test).

almost always been unsuccessful in court.[187] Perhaps the most challenging example of this argument was in the Republic of Ireland, in *Gorman & anor -v- Ombudsman for the Defence Forces & ors.*[188] In this case the suitability of the appointment of a former member of the Defence Forces to the position of Ombudsman for the Defence Forces was raised on the grounds of ultra vires and bias, with both arguments being rejected.

5.15 Similarly, claimants have attempted a variety of arguments that challenge the basic ombudsman investigatory process. In *Heather Moor & Edgecomb Ltd* the question at issue was whether the investigatory process required a public hearing to be offered to the claimant. The court confirmed that it did not, other than in exceptional circumstances.[189] This case is one of the few cases in which the impact of the ECHR on the ombudsman sector has been considered. The few brief references to the Convention in case law have either concluded that an ombudsman process operates in a quasi-judicial capacity, hence does not involve direct determination of any civil right or obligation;[190] or that the overall decision-making process (ie from original decision and thereafter through to subsequent judicial review) is compatible.[191]

5.16 The functionality of complaint schemes has also been challenged. In *The Department of Justice v Bell,*[192] the Department of Justice successfully appealed a High Court declaration that it had 'acted unlawfully by failing to provide a sufficient level of funding to the Police Ombudsman for Northern Ireland (PONI) to enable it to carry out its statutory obligation to investigate the applicant's complaint, within a reasonable period of time'.[193] In other words, an ombudsman could not be deemed to be acting unfairly simply because it was short of resources.

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[187] Eg *R (Sandhar) v OIAHE* [2011] EWCA Civ 1614

[188] [2013] IEHC 545 and recently considered in the Irealand Supreme Court: *Gorman & Anor -v- Ombudsman for the Defence Forces & Ors* [527/13 SC].

[189] *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642. This issue was considered further in *R (Calland) v Financial Ombudsman Service* [2013] EWHC 1327 (Admin)

[190] *Miah v IPCC* [2016] EWHC 3310 (Admin), [22], per Mr Justice Higginbottom.

[191] Eg *Morrison v The Independent Police Complaints Commission & Ors* [2009] EWHC 2589 (Admin); *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23

[192] [2017] NICA 69.

[193] *Ibid*, [1]. But see *Martin, Re Judicial Review* [2012] NIQB 89, in which Treacy J stated ([45-46]: 'I think it only right to acknowledge that Mr Holmes filed a very helpful affidavit in which he expressed his regret for the lengthy and unsatisfactory delays and acknowledged the applicant's understandable frustration at the delay which resulted in large measure from the chronic underfunding. I note that in para 38 of his affidavit he states his belief that the DoJ accepted at the material time that the Ombudsman's office was, as he put it, "woefully underfunded" for the volume of work presented to it by what he characterised as historic cases. In the rather exceptional if not unique circumstances of the present case I think it right that the court should acknowledge by this judgment the breach of statutory duty. But as the letter from Mr Holmes happily makes clear matters have progressed and the investigation has now been initiated. In those circumstances it does not appear any further order from the court is required.'

(ii) Setting standards on reasons

5.17 The most successful ground for claimants that challenge ombudsman decisions is one that directly addresses the quality of the ombudsman decision itself.[194] This study found that in 12 cases an ombudsman decision was quashed due to flaws in its reasoning[195] and in a further twelve cases ombudsman decisions were found to be irrational.[196] This is potentially a controversial approach, as ordinarily courts are reluctant to pass judgment on the substance of the discretionary decisions of public decision-makers. It also implies that judges are better placed to develop the integrity of an administrative decision-making process than the administrative body itself or the legislature.

5.18 A deeper analysis of ombudsman case law though reveals that a focus on the quality of reasoning is a powerful theme in ombudsman case law. This might be justified on the basis that it connects directly to the ombudsman claim to deliver 'fair justice'. An ombudsman is under a legal duty to provide written reasons at various stages of its decision-making process, and according to case law the supporting reasoning supplied can be expected to be sufficiently extensive[197] to deliver 'adequate and comprehensible reasons'.[198]

5.19 Further, high standards of reasoning are not just promoted in cases found against ombuds, obiter and general guidance also promotes the need for coherent reasons in cases that uphold the ombudsman decision. A pattern of high judicial expectations on reasons can be identified in at least sixteen cases which provide added judicial instruction on the

[194] See R. Kirkham and E. O'Loughlin, 'Judicial Review and Ombuds: A Systematic Analysis' *Public Law* [2020] 679-700.

[195] *Adams v The Commission for Local Administration In England & Ors* [2011] EWHC 2972 (Admin); *Bartos v A Decision of The Scottish Legal Complaints Commission* [2015] ScotCS CSIH_50; *R (Balchin) v Parliamentary Commissioner for Administration (No 3)* [2002] EWHC 1876 (Admin); *R v PCA, ex parte Balchin (No 2)* (2000) 79 P. & C.R. 157 (x2); *R (Cardao-Pito) v OIAHE* [2012] EWHC 203 (Admin) (x2); *R (Turpin) v Commissioner for Local Administration* [2002] JPL 326; *R. (Hughes) v Local Government Ombudsman* [2001] EWHC Admin 349; *R (Aviva Life & Pensions UK Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin); *R v Commissioner for Local Administration ex p Eastleigh BC* [1988] QB 855
R (Crawford) v The Legal Ombudsman & Anor [2014] EWHC 182 (Admin); *R (Hafiz & Haque Solicitors) v Legal Ombudsman* [2014] EWHC 1539 (Admin); *JR55, Re Application for Judicial Review* (Northern Ireland) [2016] UKSC 22.

[196] *JR55, Re Application for Judicial Review (Northern Ireland)* [2016] UKSC 22; *R. (Hughes) v Local Government Ombudsman* [2001] EWHC Admin 349; *R (Crawford) v The Legal Ombudsman & Anor* [2014] EWHC 182 (Admin); *R (Dennis) v Independent Police Complaints Commission* [2008] EWHC 1158 (Admin); *R (Hafiz & Haque Solicitors) v Legal Ombudsman* [2014] EWHC 1539 (Admin); *Stenhouse v The Legal Ombudsman & Anor* [2016] EWHC 612 (Admin); *R (Garrison Investment Analysis) v Financial Ombudsman Service* [2006] EWHC 2466 (Admin); *Miller & Anor v The Health Service Commissioner for England* [2018] EWCA Civ 144; *Kelly v Financial Ombudsman Service Ltd* [2017] EWHC 3581 (Admin); *Newman v The Parliamentary and Health Service Commissioner* [2017] EWHC 3336 (TCC); *Benson v SLCC* [2019] CSIH 33; *MacGregor v SLCC* [2019] CSIH 58.

[197] *Adams*

[198] *Bartos* [1].

standards that can be expected of ombudsman decisions.[199] This is significant, in that legislation on the ombudsman provides no such detail other than to require reasons for determinations made. Further, in only seven of these cases[200] was specific reference made to general case law on reasons, lending the impression that a bespoke legal standard is being developed for the ombudsman sector within which the operational and non-judicial context of the ombudsman institution has been regularly noted.[201] Thus, even though standards of reasoning akin to judicial standards are not required,[202] from the case law quality criteria can be discerned,[203] as well as the importance of accessibility to all relevant parties.[204] And this duty to provide reasons extends beyond final reports to include other stages of the decision-making process.[205] This approach shows the weight that courts give to the particular policy framework in question when interrogating the standard of reasons given by the decision-maker, with in the ombudsman context the weight given particularly high.

(iii) Triggering Institutional Learning

Table 9: Examples of case law in which the judiciary offered guidance

Institutional learning recommended	Landscape altering judgment
Review test for clinical failure	*Atwood v The Health Service Commissioner* [2008] EWHC 2315; *Miller & Anor v The Health Service Commissioner for England* [2018] EWCA Civ 144
Publication of decisions; Establish Register of Monetary awards	*R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2009] 1 All ER 328
Provision of information to prospective judicial applicants	*R (Dickie) v Judicial Appointments and Conduct Ombudsman* [2013] EWHC 2448 (Admin)
The need for suitable expertise amongst staff	*Bartos v A Decision of The Scottish Legal Complaints Commission* 2015 SC 690, [87]-[91]
The importance of proportional dispute resolution	*Stenhouse v The Legal Ombudsman* [2016] EWHC 612 (Admin); *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406
Be wary of fettering discretion to investigate issues to procedural irregularities and instances of acting unfairly.	*R (Budd) v OIAHE* [2010] EWHC 1056 (Admin)
Provide opportunity for face to face contact to disabled complainant	*R (Duddle) v OIAHE* [2013] EWHC 4918 (Admin)

[199] See R. Kirkham and E. O'Loughlin, *A Study into Ombudsman Judicial Review, Online Appendix: Evidence of Results* (2020) , at B22: https://www.sheffield.ac.uk/law/research/centres-and-institutes/procedural-fairness-accountability-and-ombudsman

[200] *Balchin (No 2*); *Cardao-Pito*; *Adams*; *Stenhouse*; *Atwood*; *Crawford*; *Newman*.

[201] *Herd* [37].

[202] *Rapp* [38]; *Atwood* [48]; *Garrison Investment Analysis* [5].

[203] *Stenhouse* [36]; *Cardao-Pito* [29].

[204] *Dennis* [20].

[205] *Adams* [34]. See also *Maxhuni.*

5.20 As well as detailing the law, judgments can take a more speculative tone as to what the correct standard of decision-making should be, and in doing so cajole the ombudsman towards altering its internal practices. Table 9 identifies some leading examples.

5.21 The direct impact of these judgments is harder to evidence than the responses of the sector towards judicial decisions on standards of procedural fairness but on occasion, a trail can be identified. The rulings of the court in the cases of *Atwood v The Health Service Commissioner*[206] and *Miller & Anor v The Health Service Commissioner for England*[207] are good examples. In both cases an issue at stake was the test that the Health Service Commissioner had used to establish whether there had been clinical failure, with the court quashing the report of the Commissioner. In both instances, the Commissioner went on to issue new guidance on its implementation of its clinical failure remit.[208]

(iv) Freedom of Information Requests and the Equality Act

5.22 Although it will not be dealt with in detail in this report, the ombudsman sector is impacted by general statutory duties that apply to all public bodies. Two such duties are worth highlighting as they were often cited in the interviews that supported this study.

5.23 Using the Freedom of Information Act 2000, some complainants strategically deploy their legal rights to assist the pursuit of their grievances either during or once a complaint has been resolved. A search of the BAILII database indicates that this practice has led to up to 85 cases being brought against an ombudsman in either the Information Tribunal or to the Scottish Information Commissioner.[209] This workload impacts upon the ombudsman sector in two significant ways: in terms of added costs and also in reconsidering their internal processes in order to ensure that considerations of disclosure of information is more firmly embedded in decision-making processes.

5.24 A further impact of the law, and judicial decision-making, on the processes of the ombudsman sector is generated by the Equality Act 2010, s.20, under which service providers are required to make reasonable adjustments for parties with a recognised disability under the Act.[210] The impact of this legislation on ombuds in terms of litigation is hard to quantify as claims are brought to the County Court where records are harder to trace. However, interviews with ombudsman staff reported that this was a body of law to which the sector had had to respond to, with again the impact being one of refinement to existing processes and the costs involved in complying with the law. By way of example, in the case of *Blamires v Local Government Ombudsman*,[211] the LGO was found to have failed to have fully acknowledged or taken account of the claimant's needs, and thereby

[206] [2008] EWHC 2315

[207] [2018] EWCA Civ 144

[208] The policy response to the decision in Atwood was effectively rejected by the court in *Miller*. The new policy of the Commissioner (ie the PHSO) can be found here, PHSO, *The Ombudsman's Clinical Standard*, available at https://www.ombudsman.org.uk/sites/default/files/0434_Clinical_Standards_Final.pdf (undated).

[209] A search of BAILLII of the terms 'Ombudsman' and 'Freedom of Information' identifies 85 cases that have been considered by either the Scottish Information Commissioner or the Information Tribunal.

[210] See s.6, Equality Act 2010.

[211] *Blamires v Local Government Ombudsman* Case No: 3SP00071, Leeds County Court, 21 June 2017

failed to make reasonable adjustments in terms of both the information provided and the way that that information had been provided. Notably, the lack of resources of the office was not accepted as a legitimate reason to justify the service provided. In finding against the LGO, the County Court made an award of £7,500 for injury to feelings, and a further £2,500 for aggravated damages and another £2,500 for consequent breaches of the Data Protection Act 1998.

(v) Demarcating and managing the responsibility between ombuds and other dispute resolution mechanisms

5.25 As noted in the introduction, as well as a hierarchical relationship, there is an important partnership relationship between the courts and ombuds in terms of managing the distribution of case work between institutions in the justice system. The boundary lines between the ombuds and other ADR mechanisms can also raise uncertainties. There are multiple cases where this division has been at issue as detailed in Table 10, and the question of admissibility of a claim in court or the nature of the ombudsman's work.[212]

5.26 Such divisions are also tackled in cases in which the ombudsman is not a party (or is an interested party only). For instance, complainants will sometimes be required to enforce the decision of an ombudsman against a body complained against, or be incentivised to pursue legal remedies in addition to that awarded by an ombudsman. These cases serve to clarify both the limits of the remit of the ombudsman and the institution's power in the overall administrative and civil justice system. Such judgments can be particularly helpful for an ombudsman in providing legal cover for some of the perceived injustices that might result from using their services.

5.27 For instance, *Clark & Anor v In Focus Asset Management & Tax Solutions Ltd & Anor*[213] concerned a scenario in which the compensation sought was higher than the maximum award that FOS could make. In *Clark,* FOS had made the maximum award that it could under its statutory powers, but it had also recommended that the complainant should be paid a sum three times in excess of that award.[214] Having accepted the award, the claimants brought legal proceedings to recover the full amount of the remedy proposed by FOS, but which had not been legally enforceable under the scheme. The court, therefore, had to decide whether consumers could take legal proceedings on an issue that had been resolved by FOS, after they had accepted an award under the scheme. The Court of Appeal ruled that the common law doctrine of *res judicata* applied, which precluded a person who has obtained a decision from one court or tribunal from bringing a claim before another court or tribunal for the same complaint.

[212] Eg one question that has been asked is whether an ombudsman's work constitute an arbitration.

[213] [2014] EWCA Civ 118, see also *Morton v First Trust Financial Services Ltd* [2015] NIQB 46.

[214] The power to make recommendations in excess of the award is contained in s.229(5) Financial Services and Markets Act 2000.

Table 10: Examples of case law clarifying the boundary lines between the ombudsman and the courts

Legal uncertainty clarified	Defining judgment
Resolving overlaps in jurisdiction between the courts and the ombudsman	*R v Commissioner for Local Administration ex parte Croydon LBC* [1989] 1 All ER 1033; *R v Local Commissioner For Local Government Ex p Liverpool* [2000] EWCA Civ 54; *Scholarastica Umo* [2003] EWHC 3202 (Admin); *ER v LGO* [2014] EWCA Civ 1407
Admissibility of complaints which may lead to a financial remedy	*JR55* [2016] UKSC 22; *Miller & Anor v The Health Service Commissioner for England* [2018] EWCA Civ 144
Admissibility of claims in court	*Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, [81]; *Jones v Powys Health Board* [2008] EWHC 2562 (Admin), [40]-[42]; *Kemp (a Patient), R (on the application of) v Denbighshire Local Health Board & Anor* [2006] EWHC 181 (Admin) [[69]-[74]; *Stojak, R (on the application of) v Sheffield City Council* [2009] EWHC 3412 (Admin); *Argentum Lex Wealth Management Ltd v Giannotti* [2011] EWCA Civ 1341; *R v Regents Park College and the Conference of Colleges Appeal Tribunal ex parte Carnell* [2008] EW HC 739 (Admin); *Crawford, R (On the Application Of) v The University of Newcastle Upon Tyne* [2014] EWHC 1197 (Admin); *Kwao v University of Keele* [2013] EWHC 56 (Admin)
Demarcating workload between separate accountability institutions	*Bartos v A Decision of The Scottish Legal Complaints Commission* [2015] ScotCS CSIH_50*; Anderson Strathern Llp & Anor v A Decision of The Scottish Legal Complaints Commission* [2016] ScotCS CSIH_71*; Council of The Law Society of Scotland v The Scottish Legal Complaints Commission (SLCC)* [2017] ScotCS CSIH_36.
Capacity to consider issues where other body responsible for legal enforcement	*R (Cardao-Pito) v OIAHE* [2012] EWHC 203 (Admin); *R (Maxwell) v OIAHE* [2011] EWCA Civ 1236; *R (Mencap) v PHSO & EHRC* [2011] EWHC 3351 (Admin)

> I am satisfied that the ombudsman's award is a judicial decision for the purposes of the requirements of *res judicata*. The process involves giving the parties an opportunity to state their case: the award is not the product of the ombudsman's enquiries alone. The ombudsman is not making an administrative decision. …. The decision of the European Court of Human Rights on this point in *Heather Moor & Edgecomb Ltd v UK* (App no 1550/09) that the ombudsman was a "court or tribunal" for the purposes of article 6 of the Convention makes this clear.[215]

5.28 Further, the judgment goes some way towards defending the potential injustice that the interpretation of the law that it arrived at might create, thereby contributing to an overall understanding of how the different branches of the justice system must be understood to interrelate.

[215] *Clark*, per Lady Justice Arden at [82].

> Although there may, at first sight, appear to be an unfairness in preventing a claimant from taking legal proceedings to recover the balance of his loss over the award made by the ombudsman, it is important to remember that the claimant himself holds many of the cards. He can consider the award issued by the ombudsman and any recommendation that the ombudsman makes for additional compensation and, with the benefit of that independent evaluation of his claim, decide whether to take the award or to reject it. If he rejects it, his right to bring proceedings in the courts is untrammelled. If he takes it, he has benefited from a practical scheme which he has been able to use without risk of costs.[216]

(vi) Creating and enforcing institutional solutions

5.29 As well as detailing the boundary lines around the ombudsman's operation, there are multiple cases in which the courts have filled in legislative gaps left uncovered by Parliament. In *Clark*, referred to above, this meant applying a judicial presumption that unless legislation states otherwise legislation incorporates any existing principle or rule of law.

> Parliament in general enacts legislation on this basis. Indeed, from time to time, it may make a deliberate decision to leave the matter silent and let the courts resolve it either because there is no consensus on any other solution or because there would be so many different circumstances that might occur and the matter is best left to judicial decision. The court would be failing in its duty if it did not consider what common law principles might apply.[217]

5.30 Similarly, in *British Bankers Association*[218] the regulatory approach of the Financial Services Authority (FSA), and as a consequence the subsequent decision-making of the FOS, was under scrutiny. The case involved the approach of the FSA and FOS towards the widespread alleged mis-selling of payment protection insurance policies (PPIs). At issue was the lawfulness of the FSA and FOS decision-making in enforcing FSA-made rules, the reach of which was left undefined in legislation. The court found, amongst other points, that it was lawful to oblige firms to abide by the bespoke rules issued by FSA on the manner in which insurance policies including PPI policies can be sold. It was also lawful that the FOS should base its decisions on those FSA rules.

5.31 This was an issue which at the time of the case already involved hundreds of thousands of complaints, and many years later is still a large feature of the work of FOS. To have interpreted the silence of the legislation on the point in favour of the BBA would have severely undermined the power of the ombudsman process. Instead, the court filled the gap in law by clarifying the legality of the practice of FOS relying on FSA rules.[219]

5.32 This creative gap-filling capacity of the courts has been applied most radically in a series of cases in which the courts have concluded that it possesses the power to review not

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[216] *Clark*, per Lady Justice Black at [124].

[217] *Ibid*, per Lady Justice Arden at [112].

[218] *British Bankers Association, R (on the application of) v The Financial Services Authority & Anor* [2011] EWHC 999 (Admin)

[219] On this point, see also *Berkeley Burke SIPP Administration Limited v. Financial Ombudsman Service Limited* [2018] EWHC 2878

just decisions of the ombudsman, but also public authorities who have decided not to comply with ombudsman decisions (see Table 11 below).[220]

5.33 The impact of this new remedy against public authorities is nuanced, with the exact interpretation varying from scheme to scheme. What these four cases demonstrate, however, is that the courts are willing to adopt a 'supervisory' role over the ombudsman sector and be proactive in that role by designing solutions that strengthen the authority of the ombudsman. In recognising the duty of public authorities to respond rationally to ombudsman reports, the courts have through the law both confirmed the importance of a dialogue process between the ombudsman sector and public authorities, and imposed a standard of rationality on that process. The detail of this 'dialogue process' was left silent in the original ombudsman legislation.

Table 11: Cases in which public body responses to ombudsman reports has been challenged

	Public Body response quashed	**Public Body response upheld**
Parliamentary Ombudsman	*R (Bradley) v Secretary of State for Work and Pensions and Parliamentary Commissioner for Administration* [2007] EWHC 242 (Admin) *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin)	
Local Government Ombudsman	*R (Gallagher & Anor) v Basildon District Council* [2010] EWHC 2824 (Admin)	*R (Nestwood Homes Developments Ltd) v South Holland District Council* [2014] EWHC 863 (Admin)

5.34 What these cases also illustrate is the potential for the courts to be used as a vehicle through which 'group complaints' might be channelled. In both the *Bradley* and *Equitable Members Action Group* cases what was at issue was a systemic finding of maladministration which affected thousands of complainants and which in both instances ultimately led to the construction of a large-scale compensation arrangements by the Government.

(vii) Ombudsman submissions to court

5.35 Another potential route by which the court can enhance the integrity of ombudsman decision-making is through supporting legal actions brought by ombuds. Broadly, these can occur through three forms.

5.36 A first form of ombudsman-inspired use of the court is a legal application to support its complaint-handling function. One available measure is to enforce its legal powers to collate

[220] Alongside these cases should be considered *Eastleigh*, in which this relationship principle was originally laid out. For a discussion see R. Kirkham, B. Thompson and T. Buck 'When Putting Things Right Goes Wrong: Enforcing the Recommendations of the Ombudsman' [2008] PL 510.

evidence during an investigation, including the attendance of witnesses.[221] Probably due to the clarity of the ombudsman's investigatory powers in legislation, this is an option that ombuds in the UK have only rarely been required to pursue.[222] Elsewhere in the world though, two smaller schemes have been required to seek the support of the court in the early years of their operation.[223] Similarly, some schemes have power to enforce the compliance of investigated bodies with their recommendations in the courts, as with the Legal Ombudsman in *Deputy Chief Ombudsman v Young* [2011] EWHC 2923 (Admin) and *Legal Ombudsman v Cory*.[224]

5.37 A second form of use of the courts to support the work of the ombudsman is an interesting measure that is currently only allowed for in two UK schemes; this is the power to make a reference to the court on a point of law.[225] In the Pensions Ombudsman scheme, this is allowed for under section 150(7) of the Pension Schemes Act 1993 but has been a rarely used provision. This option was pursued in *The Pensions Ombudsman v EMC Europe Ltd & Ors*[226] to resolve a jurisdictional question.[227]

5.38 The Financial Ombudsman Service provides for such a process indirectly through its rules, and requires the agreement of both parties to the complaint. The FCA Handbook, DISP 3.4.2 states:[228]

> The Ombudsman may, with the complainant's consent, cease to consider the merits of a complaint so that it may be referred to a court to consider as a test case, if:

[221] This is a standard power in ombudsman schemes.

[222] This study only identified two reported cases of such proceedings having been heard by way of full hearing, *Subpoena (Adoption: Commissioner for Local Administration), Re*; [1996] 2 F.L.R. 629. In *Taggart, Re* [2003] NIQB 2, the applicant challenged unsuccessfully a decision of the Police Ombudsman in Northern Ireland requiring him to attend an interview.

[223] In Gibraltar, the Supreme Court instructed the Commissioner of Police to disclose a police report to the Ombudsman following the Commissioner's refusal to disclose on the ground of public interest immunity (Public Services Ombudsman v. Attorney General [2003–04 Gib LR 35]). In Bermuda, in *Corporation of Hamilton v Bermuda Ombudsman* the court found that the Mayor and Deputy Mayor were in Contempt of Court in failing to attend an interview with the Ombudsman, albeit the judge exercised his discretion not to make a declaration to that effect, leavig it to the parties to arrange the next steps ([2014] SC (Bda) 1 Civ).

[224] See also *Legal Ombudsman v Cory* Case No. A00BG293 (Cardiff County Court, 33 November 2016) where a suspended prison committal was made for contempt of court (available at: https://www.bailii.org/ew/cases/Misc/2016/B36.html).

[225] See the Pensions Ombudsman and the Financial Ombudsman Service.

[226] [2012] EWHC 3508 (Ch).

[227] The question emerged from an ongoing, and protracted, complaint against EMC Europe. The facts of the case suggest that the reference was applied for as a route to facilitate bringing to an end a much delayed investigation, as much as to seek clarification on the law. The case was originally submitted to the Pensions Ombudsman on 13 May 2005, but was deferred to allow the Pensions Regulator to complete an ongoing investigation into the scheme. Shortly after the receipt of the complaint the Ombudsman had inferred that it had jurisdiction but at a later stage (February 2010) conceded that it did not, a position that it eventually confirmed in a reference in March 2011.

[228] See FCA Handbook, https://www.handbook.fca.org.uk/handbook/DISP/3/. The Financial Conduct Authority has the power to make the rules under Schedule 17, Para.14.

> (1) before the Ombudsman has made a determination, they have received in writing from the respondent:
>
> > (a) a detailed statement of how and why, in the respondent's opinion, the complaint raises an important or novel point of law with significant consequences; and
> >
> > (b) an undertaking in favour of the complainant that, if the complainant or the respondent commences court proceedings against the other in respect of the complaint in any court in the United Kingdom within six months of the complaint being dismissed, the respondent will:
> >
> > > (i) pay the complainant's reasonable costs and disbursements (to be assessed, if not agreed, on an indemnity basis) in connection with the proceedings at first instance and any subsequent appeal proceedings brought by the respondent; and
> > >
> > > (ii) make interim payments on account of such costs if and to the extent that it appears reasonable to do so; and
>
> (2) the Ombudsman considers that the complaint:
>
> > (a) raises an important or novel point of law, which has important consequences; and
> >
> > (b) would more suitably be dealt with by a court as a test case.

5.39 To date the FOS power for referral has not been used, suggesting that alongside the Pensions Ombudsman experience, there has to date been no great need for a power of referral.

5.40 A third 'supporting' function of the courts occurs where ombuds attempt to strike out claims[229] or obtain a cost order.[230] Another use of the court is simply to protect its staff. Although rare, the court has been used to issue a fine and costs against the defendant, or obtain an injunction,[231] a restraining order.[232] Such actions suggest that ombuds, like other litigants, are not immune from using the court process to exert power and protect their position. However, as Sthumcke has noted of Australian schemes, outside of such actions the overall pattern of the ombudsman's use of the law is one of low direct use of the courts, with more forceful legal arguments being deployed in only 'limited and reactive' ways.[233] Thus, the ombudsman is only rarely the proactive party in ombudsman case law and is normally highly accepting of the judgments of the court.

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[229] *R. v. CLA ex parte Colin Field* [2000] COD 58; *Clark v FOS, the Legal Ombudsman and others* [2020] EWHC 56 (QB).

[230] Eg *Leach, Re* [2001] EWHC Admin 455; *Gopikrishna, R (on the application of) v The Office of the Independent Adjudicator for Higher Education & Ors* [2015] EWHC 1224 (Admin); *Seifert v The Pensions Ombudsman* [1999] Pens. L.R. 29; *Price v Scottish Legal Complaints Commission* [2016] ScotCS CSIH_53.

[231] *Bishop v PSOW* [2020] EWHC 1503 (Admin)

[232] *Jakpa v Legal Ombudsman* [2016] EWCA Civ 280. See also *Legal Ombudsman v Cory* Case No. A00BG293 (Cardiff County Court, 33 November 2016) where a suspended prison committal was made for contempt of court (available at: https://www.bailii.org/ew/cases/Misc/2016/B36.html).

[233] A Stuhmcke, 'Ombudsman Litigation: The Relationship between the Australian Ombudsman and the Courts' in G Weeks & M Groves (eds), *Administrative Redress In and Out of the Courts*, (Federation Press, Sydney, 2019), 155-177.

Structuring: Analysis and potential reforms

Problem-solving v public-life conceptions of the role of judicial review

5.41 This study of ombudsman case law provides only a very narrow window into the work of the courts in judicial review but it is nevertheless an instructive one when considering what the role of judicial review should be and how that role may need to flex according to different contexts.

5.42 One way to understand the potential roles of judicial review is to distinguish between two general conceptions of the court. One conception of the court conceives it as a 'problem-solving' institution, with an emphasis on a dispute resolution function; the second is a 'public-life' conception, in which the court has a broader role to promote public values, most obviously the rule of law.[234] The emphasis that has often been placed in public policy upon the first conception is often connected with justice policies that focus on promoting alternative dispute resolution processes and early settlement over adjudication.[235] In administrative justice terms, the vision of judicial review as simply a 'last resort' process by which the citizen can secure a narrowly defined remedy also fits within this conception of the judicial role. The emphasis in such a conception of the judicial role is on solving the individual citizen's problem, not on developing the law. The Government's *Response to the Independent Review of Administrative Law* displays features of this approach, one which underplays and even ignores the potential for the potential in the judicial review process to advance and refine the rule of law.[236]

5.43 The dominant critique in the literature of an excessive emphasis on the 'problem-solving' role of the courts is that it is driven by efficiency, and entails an exercise in reducing access to the courts.[237] This has led to concerns about the 'vanishing trial'. In the long-term, such an approach to the role of the courts has a damaging impact on the capacity of the rule of law to operate as a source of control over the exercise of public power or a generator of trust in public administration. Moreover, if the 'public-life' conception of the court becomes minimised, this means that opportunities are reduced for 'creating, applying, pronouncing, and interpreting the law, substantiating political rights and democratic procedures, and promoting public values and exerting judicial power in a transparent process'.[238]

5.44 On this debate, this study confirms that the 'problem-solving' role of the courts in public law litigation against the ombudsman has had a minimal impact in terms of providing redress, or even in providing opportunities to experience justice in the courtroom. Access

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[234] D. Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83 Georgetown Law J. 2619.

[235] O. Fiss, 'Against Settlement' (1984) 93 Yale Law J. 1073.

[236] Ministry of Justice, *Government response to the Independent Review of Administrative Law*, March 2021 (CP 408) (available here).

[237] L. Mulcahy, 'The Collective Interest in Private Dispute Resolution' (2012) 33 Oxford J. of Legal Studies 59

[238] Ayelet Sela and Limor Gabay-Egozi, 'Judicial Procedural Involvement (JPI): A Metric for Judges' Role in Civil Litigation, Settlement, and Access to Justice' Journal of Law and Society 47 (2020) 468–98, 490, citing J. Resnik, 'Whither and Whether Adjudication?' (2006) 86 Boston University Law Rev. 1101.

to court-based justice has been a minor feature of the process. Instead, as detailed in Chapters 3 and 4 above, ombudsman litigation is characterised more by a tendency to manage disputes to closure and confirm the legal structure in which the challenged body, in this instance the ombudsman, is operating within.

5.45 Were this to be the only role being performed by the court in ombudsman public law litigation, its work would not provide a convincing delivery of the Government's claim aspiration for judicial review, namely that it enables the citizen 'to challenge the lawfulness of executive action'.[239] This study, however, has identified a much more sophisticated judicial role being performed in ombudsman case law, one which delivers on both the 'problem-solving' *and* 'public-life' conceptions of the court. Indeed, in ombudsman case law at least, this report finds that some of the strongest concerns about the 'vanishing trial' have not been realised. Far from the courts being prevented from adjudicating on important matters of law that deserved public attention, through the permission process the courts have regularly been able to concentrate its resources in order to identify cases that have led to refinements of the legal frameworks within which ombuds operate.

5.46 Further, what the study shows is that in the ombudsman sector there is no evidence of excessive litigation (see chapter 2). Indeed, across the ombudsman sector, full hearings of judicial review cases have stabilised in number, notwithstanding the increase in the number of complaints being handled. Nor according to the records provided by ombudsman offices is there a strong litigation effect in which ombuds as a matter of course settle cases before they arrive in court. As for the courts potentially exerting a chilling effect on the exercise of ombudsman decision-making, the interviews that supported this project raised little reason to believe that this was a real concern, other than the extra costs associated with retaining higher standards of decision-making as developed in the jurisprudence. The one exception to this finding concerned the operation of statutory appeal processes. At the same time, there has been sufficient case law available to the courts for them to refine certain aspects of statutory schemes that have become dated over time and liable to an array of unanswered practical uncertainties.

5.47 The findings of this study, therefore, suggest that a focus on the 'problem-solving', or dispute-resolution, role of the courts captures only part of what happens in judicial review, at least as practiced in the ombudsman case law.

Observations for the role of judicial review

5.48 Given the evidence of activity in ombudsman case law, the overall recommendation in this report is that the appropriate solution for securing supervisory *legal* oversight of the sector should remains judicial review. There are also implications that follow from this study that are relevant as to how we think about the role of judicial review generally, as well as specifically with regard to the ombudsman sector.

5.49 To begin with, there is value in having a legal process in place, other than legislative amendment, which allows the law to be refined and clarified. In ombudsman case law, the

[239] Ministry of Justice 31 July 2020, *Terms of Reference for the Independent Review of Administrative Law* https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review

need for refinements to the law has regularly been identified, and it is well known in the sector that other uncertainties and limitations exist in current legislation. Further, a number of reasons, including pressures on Government time, mean that legislative space for statutory reform cannot be relied upon in the short-to-medium term. In ombudsman case law, therefore, the courts provide an important gap-filling role, with much of this work achieved through traditional techniques of statutory interpretation. This chapter has provided evidence that this role has been exercised constructively and to great effect.

5.50 As an aside, a further benefit of judicial review is that claims can be used by ombuds as an additional form of quality control, whereby so-called PAP (Pre-Action Protocol) applications are internally tested against best practice to verify the robustness of the scheme's decision-making and to identify potential weak points

5.51 In terms of procedure, the existing model of using judicial discretionary powers to control the flow of cases through, in particular, the permission stage, offers an effective practical solution to the main goals of judicial review. In the ombudsman context, this process enables the court to select a small number of cases through which to consider the uncertainties of the legal regime around the ombudsman sector, whilst also protecting the system from being overburdened.[240] This suggests that there is little merit in reducing the justiciability of ombudsman decisions. Any attempt to do so would only increase the potential for the law to stagnate.

5.52 However, a regular theme of debates around judicial review for a number of decades has concerned the process for accessing judicial review. Arguments are sometimes raised that the system is too open to abuse. As detailed in Chapters 3 and 4 though, in the ombudsman context, no abuse of the judicial review process was identified. Instead, there was considerable evidence of individual citizens trying to use the system but failing through poorly developed legal claims.

5.53 What this outcome points to is a need to find better ways to facilitate and further support litigants-in-person. A strong finding of this study was the much-repeated observation that litigants-in-person fail at the permission stage in large numbers. Intriguingly, however, although on a very small sample (there were 17 Litigants-in Person whose case was heard by way of a *full hearing* against an ombudsman), this study found no disparity between the success rates of LIPs and other individual claimants if they can get past the permission stage. Potentially, therefore, the permission stage might be working in favour of LIPs by enabling the court to identify at an early stage those cases with legal merit, and that once in court the judge is able to draw out the best of the legal argument of the LIP notwithstanding their lack of representation. If judicial refinements to the legal framework

[240] This inherent capacity of the overall judicial review process to manage access to court according to context is captured in the work of V.Bondy and M.Sunkin, Accessing judicial review. *Public Law, 2008*, 647–667; *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, Public Law Project (2009).

are to reflect the concerns of users of ombudsman services, it is important that these voices are retained and better integrated into the judicial process.

Conclusions on the structuring role of the courts

5.54 Further details of the work of the courts in ombudsman judicial review can be found in articles written during this project. [241] But in summary, the body of law that has evolved around the ombudsman sector is now considerable. In amongst this jurisprudence, the judiciary has found a range of ways to influence the operation of the sector. They have done this both through the very standard technique of resolving gaps in legal understanding through statutory interpretation, and adapting the common law to promote standards of good administration. The courts have gone about this work by establishing procedural fairness standards, and bespoke solutions, to meet the context of the statutory schemes in operation in the ombudsman sector.[242] The ongoing impact on the ombudsman sector of some of these rulings has been considerable.

5.55 Whether the legal solutions that have been identified by the courts are the correct ones is an issue of debate, but it is telling that to date later legislation has in all but one instance confirmed the case law previously developed in court. [243] The evidence is low, therefore, that in structuring the law to add detail the courts have been acting contrary to legislative intention. Instead, ordinarily, the work of the courts has been focused on filling in gaps in legislative schemes that have become apparent over time and were not addressed in the original legislative design. Further, much of this work has been achieved through obiter and judicial guidance, rather than quashing ombudsman decisions[244] and judicial review has operated to encourage a form of dialogue. By this process, the courts have used their judgments intermittently to nudge the ombudsman sector towards identifying better solutions for its procedural design, and the sector has later responded by refining its operations. Several examples of this dynamic can be cited.[245] For instance, in the case of *Heather*, Rix LJ's discussed the need for more transparency in the work of the Financial Ombudsman Service. In particular, reference was made to the recommendations of the

[241] For further discussion of these points, see R. Kirkham and E. O'Loughlin, 'Judicial Review and Ombuds: A Systematic Analysis' *Public Law* [2020] 679-700.
[242] Ibid.
[243] The one possible exception to this general pattern is the Public Services Ombudsman (Northern Ireland) 2016 Act which expressly provides for the Ombudsman making financial recommendations. This provision was drafted during the period when the *JR55* ([2016] 4 All E.R. 779) litigation was passing through the judicial system in which both the Northern Ireland Court of Appeal and ultimately the Supreme Court issued a ruling that appeared to restrict the powers of the former Northern Ireland Commissioner for Complaints to make such a recommendation.
[244] R. Kirkham and E. O'Loughlin, 'Judicial Review and Ombuds: A Systematic Analysis' *Public Law* [2020] 679-700.
[245] Ibid

Hunt review, for the publication of decisions and its obligations under the Financial Services and Management Act 2000 to keep a register of its monetary awards.[246]

5.56 Further, the nature of ombudsman offices, being by virtue of their need to retain reputation heavily legal loyalists, makes them ideal institutions to receive and take seriously legal direction provided by the courts.

5.57 Overall, ombudsman judicial review is an example of a branch of law where there is much value in seeing judicial review as delivering a broader service than simply testing the legality of the actions of public authority.

5.58 The findings in this chapter indicate that the supervisory function of the courts has become an important part of the accountability structure that has grown around the ombudsman sector. There are though limitations and risks attached to this development, which will be discussed in the following chapter.

[246] See *Heather Moor & Edgecomb Ltd* [2008] Bus. L.R. 1486 at [87]–[90]. Subsequently, the FOS directly cited Rix LJ's comments on transparency in its decision to consult publicly on how to publish its decisions: Financial Ombudsman Service, *Publishing ombudsman decisions: next steps* (Financial Ombudsman Service, 2011), pp.10–11, *https://www.financial-ombudsman.org.uk/publications/policy-statements/publishing-decisions-sep11.pdf*

6. DEALING WITH GAPS LEFT BY THE COURT AND EXISTING LAW

6.1 In this chapter, some of the implications of this study's findings are followed through and recommendations for the future are considered. The study was undertaken to examine the rigour and suitability of procedural fairness in the ombudsman sector, with a focus on the role of the courts. However, judicial review is only one component of the sector's overarching regulatory set-up, albeit an important one. A complete evaluation of the judicial input requires an appreciation of the broader context in which ombudsman judicial review operates. In this respect, there are multiple safeguards in place to uphold standards in the sector and the key for the future of accountability in the ombudsman sector is to make the most of the additional solutions that have been created in recent years.

The strengths of decentred regulation

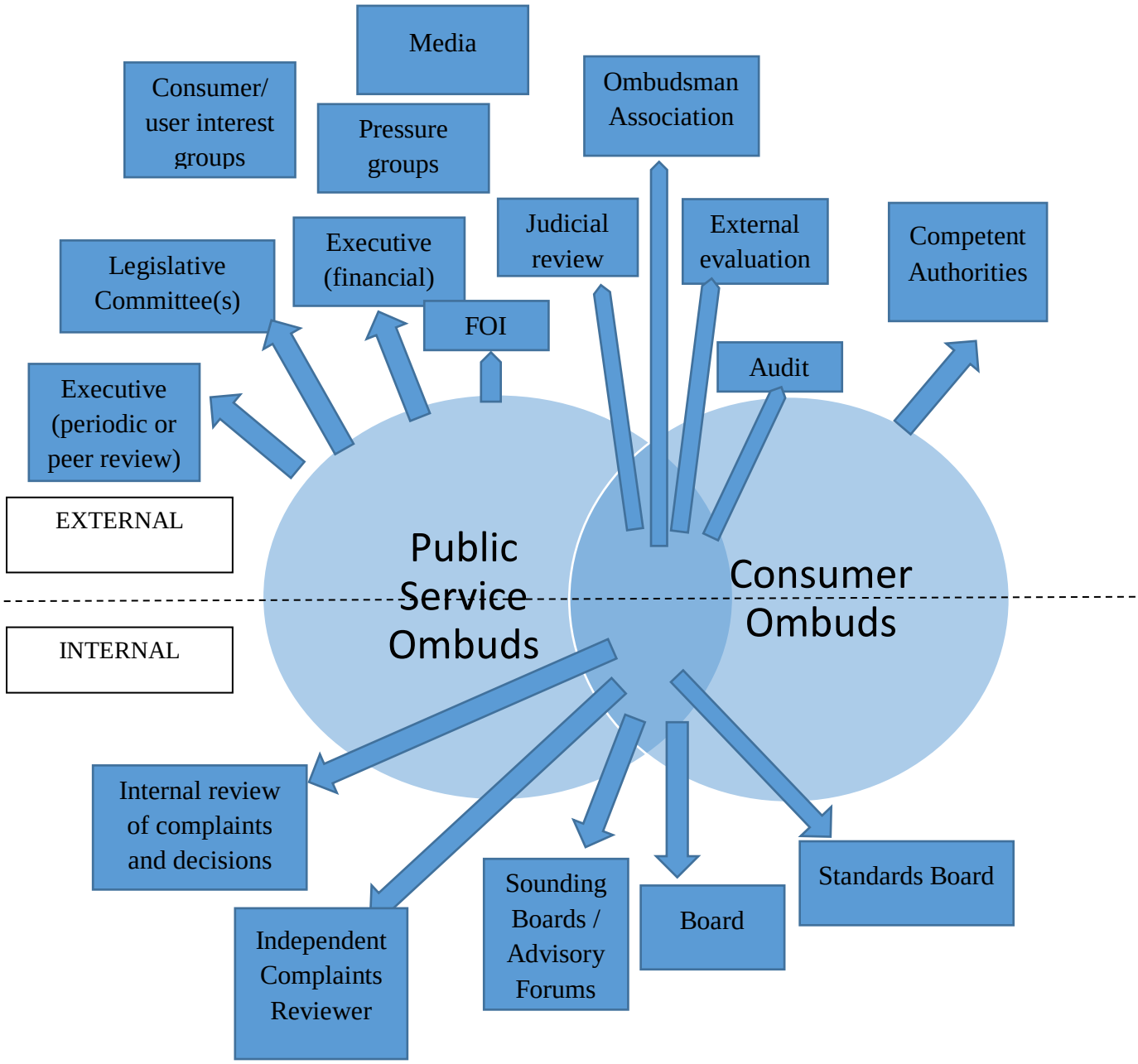
6.2 In this report, the system of regulation that operates in the ombudsman sector has been described as decentred, meaning that the manner in which standards, particularly procedural fairness standards, are enforced has become dependent on a variety of localised solutions.[247] Designers of institutions in the administrative justice system are not always fully aware of the implications of their work or fully accountable in that role, thus this decentred regulatory solution has probably been stumbled on more than chosen.[248] Nevertheless, governments past and present have eschewed more formal top-down approaches to regulation of the ombudsman sector, such as setting up a body to oversee the sector. Instead, governments have ordinarily chosen to intervene only on a reactive basis or for reasons of budgetary control. The outcome of this approach is that oversight of the ombudsman sector has come to be delivered through a network of different actors, of which the court is just one member. Figure 2 below provides an illustration of some of the key features of the resultant regulatory framework.

6.3 In terms of establishing effective control over ombudsman performance, there are advantages to this arrangement. To begin with, a decentred approach caters for the complexity in the sector. Although the sector has a uniform purpose, its growth has been ad hoc, with delivery fragmented across multiple different institutions each set up with subtly different powers and purposes. In this context, a uniformly imposed regulatory model would be hard to construct and risk becoming unduly inflexible.

[247] Julia Black, 'Decentring regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory world', 54 (1) (2001) *Current Legal Problems* 103

[248] A point made by Dr Sarah Nason and Ann Sherlock, Dr Huw Pritchard, Dr Helen Taylor, *Public Administration and a Just Wales* (Nuffield Foundation, 2020), 1.

Figure 2: Decentred regulation and the oversight of the ombudsman sector



6.4 Additionally, decentred regulation looks efficient given the variety of other actors involved that can be expected to call the ombudsman to account. The sector cuts across different systems (political, business, legal) each with a strong interest in the output of ombuds, making it likely that there will be 'regulation in many rooms' [249] even without the intervention of governmental control. Above all, being relatively weak institutions, ombuds

[249] Julia Black, 'Decentring regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory world', 54 (1) (2001) *Current Legal Problems* 103, 108, citing L. Nader and C. Nader, 'A Wide Angle on Regulation: An Anthropological Perspective' in R. Noll (ed.), *Regulatory Policy and the Social Sciences* (Berkeley, Calif., 1985).

have a strong reputational incentive to retain legitimacy in the eyes of their key stakeholders in order to retain authority.[250] In the context of fair decision-making, this implies that ombuds themselves are pushed to innovate in order to find ways to satisfy their users.

6.5 Decentred regulation is also an approach that, in the right context, is capable of delivering gradual homogenization in the sector around a uniformity of standards, ultimately delivering a tendency towards higher standards. In the literature on organisational change, it has been argued that a key context in which homogenization is most likely to occur is where 'the organizations in a field transact with agencies of the state'.[251] The research for this study has found that this homogenization hypothesis probably applies in the ombudsman sector and the standards of procedural fairness that are applied. Explanations for this trend may in part be due to the resource reliance of much of sector on the UK Government. This reliance may encourage separate schemes to be highly attuned to consistent messaging from that single source of power. But it is also relevant that ombuds are constructed to be inherently rule-bound bureaucratic organisations and thereby more likely to be sympathetic to homogenous rules of conduct.

6.6 Other patterns of behaviour that foster homogenization have been identified in the literature,[252] and also mirror those found in the ombudsman sector.

6.7 First, homogenization is more likely to occur where there is background potential for coercion around a uniform set of standards. Decentred regulation implies that reliance is not placed on a command and control structure to achieve control over a sector, instead local actors are trusted to deliver appropriate outcomes and performance standards. But this approach does not mean that there are no residuary hierarchical efforts to coerce organisations into behaving in prescribed ways, only that they are rarely used. This account describes well the situation in the ombudsman sector, and the background supervisory judicial role that has been described in this report. The judicial input may be sporadic and random in nature, but it does operate as a background pressure that exerts influence, and can be called upon if necessary to enforce homogenous legal standards.

6.8 The current role of the courts allows the judiciary some room to identify weaknesses in the current legal framework within which the ombudsman operates and to enhance standards of procedural fairness. Additionally, the courts can provide support for the ombudsman sector by clarifying the institutional relationships between an ombudsman and other organisations, and the responsibilities owed towards an ombudsman. In doing so the courts can provide reassurance as to the integrity of the ombudsman sector, test whether appropriate standards have been met, and assist in the management of grievances around a core set of principles.

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[250] Ibid, Black.

[251] See P. DiMaggio and W. Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields" (1983) 48 *American Sociological Review* 147, 155. This idea has also been explored by Simon Halliday, 'The governance of compliance with public law', P.L. (2013) 312.

[252] Ibid, DiMaggio and Powell.

6.9 Second, homogenization is more likely where there are strong cultural similarities between different organisations in a field. It has been noted elsewhere that when organisations are poorly understood and vulnerable or in search of cultural legitimacy, there is a tendency for them to model their operations on similar organisations.[253] As a result, ideas that are generated by one organisation are then copied elsewhere.[254] An example of this tendency in the ombudsman sector is the decision of the Financial Ombudsman Service to publish all of its decisions online. This practice has subsequently been adopted by several other schemes and is now pushed as best practice in the sector.

6.10 Thirdly, and linked, homogenization is assisted by the collective efforts of members of an occupation to define the conditions and methods of their work.[255] The drift towards the professionalization of values and the herding of those values is a strong feature of the ombudsman sector. Since 1993, the sector has met as a voluntary association, now called the Ombudsman Association. Membership of this association has demanded adherence to certain set standards and today various sub-groups of the OA add detail to specific aspects of the ombudsman's work.

6.11 When you factor in as well the close relationship between the work of the ombudsman and the rule of law enterprise, it is unsurprising that the courts are able to exert significant influence on the development of standards in the ombudsman sector. The professional networks in place in the sector are particularly strong and well organised, and act as 'engines' to diffuse and imbue new legal standards and react to and anticipate judicial nudges.[256]

The risks of decentred-regulation

6.12 Recognition of this wider regulatory system represents an important counter-balance to occasional portrayals of the sector as an inferior form of justice to the courtroom deliberately set-up to be efficient more than just, with lower standards of, for instance, procedural fairness accepted as a reasonable trade-off for much enhanced opportunities to access to justice.

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[253] March, James G. and Johan P. Olsen *Ambiguity and Choice in Organizations*. Bergen, Norway: Universitetsforlaget, 1976.

[254] DiMaggio and Powell in their work refer to this as 'mimetic' behaviour: P. DiMaggio and W. Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields" (1983) 48 *American Sociological Review* 147.

[255] Ibid, 152.

[256] Simon Halliday, 'The governance of compliance with public law', P.L. (2013) 312, 320-1. Consider as well that ombuds can act as disseminators of best practice in the sector that it oversees. See, for instance, the work of the Pensions Ombudsman's annual legal forum, made up of representatives from a range of providers, legal firms, large scheme employers and industry bodies, with a role 'to discuss matters of mutual interest and how those matters influence our work and our decision-making ability and those of our stakeholders', Pensions Ombudsman, *Annual Report 2019/20*, 54.

6.13 Notwithstanding these largely positive findings, however, there are risks in the current decentred regulatory set-up for the ombudsman sector. Here, three main types of risk that have been identified in this report are considered further.

Lack of citizen buy-in

6.14 A first form of risk is that not enough is done to buy citizens into the ombudsman process. Organisationally, schemes can become overloaded with dealing with persistent dissatisfied complainants and reputation-wise they can suffer in terms of public profile. Most damagingly of all, schemes can lose the trust of key stakeholders, in particular complainants. Not all users of ombudsman services accept the policy trade-off that ADR represents, leaving a strong residuary demand for additional scrutiny of decisions made in the sector. This leaves ombuds with a significant practical challenge of assisting complainants towards the full closure of their complaints. As noted in this report, the courts have a small part to play aiding this process, but they cannot satisfy in full the underlying demand for ombudsman decision-making to be tested.

Stagnation

6.15 A second risk of the decentred approach is that the ombudsman sector lacks the capacity to respond to ongoing developments and shifts in the needs placed on the sector. As a result, reforms cannot be implemented in full and this situation might lead to stagnation in the sector with problem areas left unresolved. Some of the problems the ombuds might face in needing to evolve might be to do with their legal powers, but legislative amendment can be hard to secure. Effectively, the current set-up place too much reliance on the courts to act as a reserve problem-solver and designer of 'patched' legal solutions to gaps in legislation. But the low case rate in court means that appropriate cases come to court randomly, and not always in a timely fashion or at all. Additionally, sometimes what is required to resolve the problem in the design of the legal framework is outside the reach of judicial techniques of statutory interpretation or common law innovation. There is also the need for a reserve process to guard against the potential for the courts to establish legalistic procedural standards on the sector contrary to the originating purpose for the sector or otherwise establish poorly designed legal solutions.

Insufficiently critical

6.16 A third risk is that too much emphasis is placed upon the ombudsman sector to challenge itself and protect it from becoming complacent. The danger here is that over time the sector is insufficiently critical in its decision-making and that it becomes more of a procedural process for managing complainant expectations than a strong justice institution, and generally too deferential to the bureaucratic organisations that it oversees.

6.17 On this latter risk, the ombudsman is necessarily well integrated into a broader system of administrative decision-making and was introduced as a result of policy decisions to improve access to justice and speed-up dispute resolution. As described in one recent study by Gill et al, in its attempts to deliver these goals, over time the office has come to operate

as a 'managerial ombudsman'.[257] By this model, the ombudsman is 'a nested institution, operating within and constrained by its wider institutional context and influenced by and reflecting broader patterns of change in public administration and the wider justice system.'[258] Along these lines, chapter 4 of this report charted how the ombudsman and the courts work together to manage the expectations of complainants and move them through and eventually out of the grievance process.

6.18 This broader conception of the ombudsman as having a role beyond a simple model of complaint-handling and providing justice is not necessarily problematic. The underlying issue is the compatibility of the purposes of the ombudsman and the values that are being promoted through a managerial approach. Writing specifically about the public sector, Gill et al conclude:

> The danger with adopting [managerial values] is that the ombudsman loses its ability to maintain an independent critique of public institutions, which are themselves dominated by a managerial ethos. A managerial ombudsman, overseeing a managerial public administration may serve merely as a tool for maintaining the current administrative orthodoxy rather than as a means of challenging it.[259]

6.19 Thus there is a risk that the values of speed, efficiency and keeping stakeholders happy outweigh justice and a more dynamic contribution from the ombudsman.[260] Here the particular concern is that as efficient and earnest as the complaint system may be, it may also become too focused on adopting uncritically prevalent bureaucratic standards as defined by the overseen sector itself.[261]

6.20 This concern matches the cynicism as to the value of the ombudsman sector that exists amongst some of its current and former users,[262] which identifies a lack of critical edge in ombudsman performance. Capturing this cynicism, in a recent article Hockey described some ombuds as operating as 'closed-circuit complaint systems'. By this description, Hockey is describing a system which is 'designed to adjudicate on whether an organisation ... has complied with [its] own rules and procedures for handling complaints'.[263]

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[257] Chris Gill, Tom Mullen and Nial Vivian, 'The Managerial Ombudsman' (2020) 83(4) MLR 797–830.
[258] Ibid 828.
[259] Ibid 827.
[260] Eg see M. Doyle, & N. O'Brien, *Reimagining Administrative Justice: Human Rights in Small Places*. (London: Palgrave Macmillan 2019..
[261] Eg Erving Goffman, "On Cooling the Mark Out: Some Aspects of Adaptation to Failure," *Psychiatry: Journal of Interpersonal Relations* (1952) 15: 451-63; Laura Nader, *No Access to Law: Alternatives to the American Judicial System*. New York: Academic Press, 1980).
[262] Eg see the evidence submitted by LGO Watch and Public Service Ombudsman Watchers which talks of the '15 Pillars of Injustice', in Communities and Local Government Committee, *The Work of the Local Government Ombudsman* HC 431-II (2012-13), Ev w17-24. For an analysis, see C. Harlow, 'Ombudsmen: 'hunting lions' or 'swatting flies'' in Marc Hertogh & Richard Kirkham (eds) *Research Handbook on the Ombudsman* (Edward Elgar: Cheltenham, 2018), 73-6.
[263] D. Hockey, 'The Ombudsman Complaint System; a Lack of Transparency and Impartiality' Public Organization Review (2020).

6.21 Thus a form of 'confirmation bias' might set in within an ombudsman's decision-making structure, which limits its capacity to reflect upon the appropriateness of those standards.[264] This risk is particularly problematic when dealing with complainants less-well equipped to resist and push the boundaries of the dominant norms. Over time, therefore, ombuds may become too tolerant of low service standards, and unless professional/bureaucratic standards are carefully calibrated, cynicism and fatalism towards ombudsman decision-making may be an equally likely response of complainants,[265] together with a sense of 'sham justice'.[266]

Strengthening the ombudsman model

> [The] UK ombudsman sector should reflect upon and seek to enunciate a set of values that allows the office's mission to be set aside from that of the broader managerialist project of public administration reform.[267]

6.22 Overall, the conclusions of this study are in tune with a long line of academic critique of the ombudsman sector for several decades now. On the one hand, it confirms the existence of a sophisticated network of accountability and scrutiny mechanisms that surrounds the ombudsman sector. It has also, in some detail, described how within that network, the courts play an important part in not just providing reassurance as to the quality of ombudsman decision-making, but in enhancing the standards within which the sector operates.

6.23 However, that same long line of academic critique has regularly highlighted the limitations of the current design of the ombudsman sector and has argued for reform. Building on that history, this report concludes by considering the value of three broad forms of reform, all of which should help address the risks identified above as being inherent in the current design of the ombudsman sector.

I. Convert into law some of the best practice solutions that have been created

6.24 In order to address the risks of loss of confidence amongst complainants, there is a heavy burden on ombuds to manage complaints towards closure and evidence quality of decision-making. In a bid to overcome and tackle these challenges, the sector has largely chosen to innovate and self-regulate itself, with a number of new solutions and processes created to match the user-demand for heightened scrutiny of ombudsman decisions.

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[264] D. Kahneman, *Thinking, Fast and Slow* (Allen Lane, 2011).

[265] See C. Gill, and N. Creutzfeldt, 'The 'ombuds watchers': collective dissent and legal protest amongst users of public services ombuds.' *Social and Legal Studies* (2018) 27 (3), 367-388.

[266] Joe Tomlinson has argued that 'sham justice' exists where institutions are perceived to promise a level of justice that the institution is not equipped to deliver, see J. Tomlinson, 'The gap between promise and performance: strong, weak, modest and sham systems of administrative justice, *Admin Law Blog* (2017).

[267] Chris Gill, Tom Mullen and Nial Vivian, 'The Managerial Ombudsman' (2020) 83(4) MLR 797–830, 828.

6.25 About these new mechanisms and processes relatively little is known, although through such bottom-up initiatives, the sector seeks to build a more transparent and robust system for evidencing its performance. The main approaches will be summarised here.

(i) Internal Review

6.26 Part of the trade-off in favour of the ombud as a justice provider has been a general acceptance that an ombudsman's decision should be considered as final, with no further layers of scrutiny other than the prospect of judicial review. The difficulty with this arrangement is that the absence of an additional appeal option contributes to a generic concern with ADR that it weakens the capacity of justice systems to arrive at the 'just' decision due to the more opaque and less rule-bound processes applied when compared with court-based solutions. Two solutions have evolved internally to address this 'justice void' that should now be confirmed in legislation.

6.27 First, providing complainants with an opportunity for a *service* review is now a universal feature of the ombud process, described by the Scottish Public Services Ombudsman as:

> a customer service complaint is: [a]n expression of dissatisfaction by one or more individuals (including bodies under … jurisdiction) about the [ombudsman's] action or lack of action in relation to our service or about the standard of service provided by or on behalf of the [ombudsman].[268]

6.28 The need for a service review mechanism creates few debates, other than the degree to which they are effective or would benefit from an independent element tagged onto the process. Several schemes now operate with an independent assessor who acts as either the last port of call for service complaints, or who retrospectively reviews a sample of investigated complaints and offers critical feedback on the quality of case-handling.[269]

6.29 By contrast, there remains more disagreement around the need for, and role of a second solution, which is an additional stage enabling the ombudsman *decision* itself to be reviewed internally. Here, there is a tension in the ombudsman technique between the goal of bringing a complaint to a close, and providing for the optimum level of procedural fairness. A common line in the sector has always been that an ombudsman owns a complaint, and once a decision has been made proportionate dispute resolution requires finality. After all, the decision under investigation will ordinarily have already been reconsidered once already by the investigated body concerned.

6.30 Under stakeholder pressure, in particular from complainants, that standard line against adding a new layer to the process is looking increasingly unsustainable and several schemes have now developed transparent formal processes of decision review. The argument for a decision review process has been well expressed by the Housing Ombudsman:

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[268] SPSO. *Annual Report* (2017-18).

[269] See for instance, Financial Ombudsman Service, *The Independent Assessor's Annual Report 2019/20*, copy available here.

> *Fairness*
>
> There is no appeal against the Ombudsman's determinations. Our process must however be conducted in a way that is fair to the parties. This means that we must provide an opportunity to the parties to understand and challenge the basis of our determinations.
>
> *Customer care*
>
> People often seek review of our determinations because they do not agree with them. However, there are also those who may not understand them. A review can be used to help the parties understand our decisions. It is an opportunity to provide further explanation where the parties appear not to have understood either the determination itself, or the way in which it was made.
>
> *Risk mitigation*
>
> In the absence of an appeal mechanism the only route available to the parties to challenge any of our decisions is to seek judicial review. Although opportunities for the parties to seek judicial review are limited, the consequences for the Service could be serious. Reviewing a determination mitigates against the risks of both judicial review proceedings being started and being successful.[270]

6.31 Additionally, when interviewed for this study, some legal officers in ombudsman offices suggested that a powerful reason for some form of decision review process was that it provided for a focused form of quality control, with the complainants providing a reasonably strong indicator of those decisions most likely to be difficult to defend. Notably, this explanation was sometimes provided by schemes that did not currently have a formal review process. In these circumstances it was conceded that informally, where a challenge was made to their decisions, senior staff would ordinarily take the opportunity to double-check the decisions made. In effect, therefore, internal review was already happening.

6.32 Finally, review processes might also create a useful management tool, in providing staff with an added incentive to firm up decisions before they are published in the full knowledge that it could potentially be unpicked at a later stage of review.

6.33 Each of these reasons can be seen to connect to the background drivers that underpin the institutional design of an ombudsman, namely: the need to demonstrate procedural fairness; the requirement to manage complainant expectations; and the responsibility to retain the reputation of the office.

6.34 Being an internal process, there will be a limit to the amount that the *perception* of fairness can be enhanced by decision review, but the annual reports provided by different ombudsmans show that a good number of reviews do lead to decisions being reopened.[271] In other words, even if in most reviews the original decision is upheld, the decision review process does identify errors and thereby exercises an important mode of quality control that is potentially beneficial for institutional learning within the ombudsman office.

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[270] Housing Ombudsman. *Guidance on Reviews of Determinations*. (2018). The Housing Ombudsman has updated its guidance, which can now be found here.

[271] Eg Public Services Ombudsman for Wales, *Annual Report 2019/20*, 40-1; Scottish Public Services Ombudsman, *Annual Report 2019/20*, 21.

6.35 In order to shore up this shift in ombudsman practice, schemes should be placed under a statutory duty to operate both a decision and a service review process, and be required to report on the throughput and outcomes of cases considered.

(ii) Publication of decisions

6.36 An ombudsman adjudicates and makes decisions on disputes. The relative lack of formality around the standard ombudsman decision-making process leaves room for flexibility and innovation which befits the problem-solving and pragmatic nature of the ombudsman method, but it also creates space for criticism and concerns as to the integrity of the decision-making process operated.

6.37 Standard criticisms directed at the ombudsman sector concern: the competence of decision-makers, an excessive reliance on paper-based decision-making, institutional bias towards service providers, the general opaque nature of decision-making and the absence of a detailed definition of the standards applied.[272] Such allegations are difficult to refute. Further, a question that arises from this function, and the degree of discretionary power ombuds possess, is the extent to which it is necessary for them to evidence their decision-making in public. In partial response to this situation, the practice of a number of schemes is now to publish online all reports and decision statements.

6.38 On the duty to be transparent, there is considerable looseness, and it might be argued laxity, in existing law on the standards that operate in the sector. Although all ombuds are required to provide reasons for their decisions to the parties to a dispute, currently only the Financial Ombudsman Service is under a statutory duty to publish all 'determinations'.[273] It is recommended here that all schemes should be placed under a similar duty.

6.39 The publication strategies that have been deployed in the ombudsman sector to date have in large part been driven by a desire and/ or need to defend and demonstrate the quality of justice an office provides. Justice in the ombudsman sector is a difficult concept to define, and an ombudsman is, in a very real sense, required to work hard to provide arguments for the acceptability of its decisions if it is to retain influence over complainants and service providers. Publication policies however, provide a means to improve the institution's claim to providing justice in two specific regards: through (i) detailing the reasoning and good administration standards being applied in decision-making and (ii) providing a public defence of the quality and procedural fairness of ombudsman decision-making.

6.40 Publication policies have a further value in the disciplining effect that the exercise places on ombudsman offices to evidence the quality of their reasoning[274] and also offer

[272] Eg see the evidence submitted by LGO Watch and Public Service Ombudsman Watchers which talks of the '15 Pillars of Injustice', in Communities and Local Government Committee, *The Work of the Local Government Ombudsman* HC 431-II (2012-13), Ev w17-24. For an analysis, see C. Harlow, 'Ombudsmen: 'hunting lions' or 'swatting flies'' in Marc Hertogh & Richard Kirkham (eds) *Research Handbook on the Ombudsman* (Edward Elgar: Cheltenham, 2018), 73-6.

[273] Financial Services and Markets Act 2000, s.230A(1).

[274] Nb Schedule 1, Para.7 of the Draft Public Services Ombudsman Bill, partly addresses this point but as currently written is insufficient.

potential in terms of evidencing, towards a wider body of stakeholders, the consistency in which the office applies standards of administrative fault. Along these lines, the Financial Ombudsman Services described the reasons for its publication policy as to:

- ensure that our stakeholders had access to a full, accurate and balanced picture of the decisions we reach;
- ensure that interested parties could see for themselves the decision we made …;
- avoid any risk of being seen to "editorialise" on which decisions should be publicly available; …..
- set clear guidelines about what information should not be included in the decisions we publish; and
- give further assurance to our stakeholders about the quality and consistency of our work.[275]

6.41 The Local Government and Social Care Ombudsman already has a full publication policy for its decision-making,[276] and the PHSO has introduced one in 2021.[277] Whilst the detail of the policy does not need to be set-out in law, the duty to establish and report on a publication scheme should be included in future ombudsman legislation.

(iii) Seeking external feedback and oversight: standards boards and advisory panels

6.42 To retain the long-term confidence of complainants, the decision-making structure of the ombudsman needs to be capable of marrying the standards of justice applied with the reasonable expectations of *both* users and service providers. To gauge the appropriate level for the standards being applied, one solution that is practised is to establish various dialogue channels with all stakeholders through which alternative perspectives can be heard, carefully considered and, if necessary, integrated into updated standards.

6.43 To achieve this, many ombuds now deploy a range of boards or forums, made up of stakeholders and relevant expertise, to offer both constructive criticism or guidance to the scheme and to identify relevant viewpoints. For instance, in October 2019, the PHSO created a new Expert Advisory Panel to provide the organisation with additional independent advice and feedback. The SLCC operates an Independent Consumer Panel, which has a role 'to assist the SLCC in understanding and taking account of the interests of consumers of legal services. This includes providing feedback to the SLCC, from a consumer viewpoint, on the effectiveness of policies and procedures.'[278] The Office of the Independent Adjudicator for Higher Education operates two such panels, the Higher Education Advisory Panel 'which provides expert opinion on practice in higher education providers' and the Disability Experts Panel which 'is made up of disability practitioners

[275] Financial Ombudsman Service, *Transparency and the Financial Ombudsman Service*, September 2011, 9.
[276] See https://www.lgo.org.uk/decisions
[277] PHSO, *Annual Report 2019/20*, HC 444, 20.
[278] SLCC, Annual Report 2019/20, (link here), 12.

and experts in disability matters from specialist organisations and higher education providers'.[279]

6.44 Such panels have the potential to help attune the mindset of ombudsman schemes to the needs of the sector and the citizens that they are working with, and avoid some of the risk discussed above of the values of the ombudsman office becoming out of line with the needs of the sector that they investigate. A variant of this approach more particular to the maintenance of procedural fairness is a model deployed by some private sector schemes of establishing a 'Standards Board'. This model concentrates attention on the standards applied in decision-making. A Standards Board is made up of a cross-section of interested parties in the issues raised in ombudsman complaints eg representatives of users of services, providers and regulators. Its role is not to reconsider ombudsman decisions, but to offer feedback on a sample. For instance, the *Bye-Laws Governing the Furniture and Home Improvement Ombudsman's Standards Board* state:

> The Ombudsman's Standards Board helps to provide an invaluable set of checks and balances by advising us on our rules, practices and procedures and by reviewing a cross section of our decided cases in order to provide independent feedback to our staff. This helps to ensure that our decisions continue to be fair and equitable for all parties.[280]

6.45 As with the proposals on publishing decisions and integrating decision reviews, the goal is twofold: first, to provide increased assurance that fair and correct decisions are being made and second, to integrate a forum in which the standards being applied within an ombudsman is being challenged and tested from external perspectives. An alternative model adopted by several schemes is to keep this work in-house, through the establishment different forms of quality and assurance committees to review regularly (eg quarterly) a sample of internal decisions.

II. Establish a requirement for regular internal and external critique and review

6.46 The proposals listed above are all innovations that have been created within the ombudsman sector and are indicative of the broader standards promotion work carried out. Much of this work is impressive. Nevertheless, self-regulation creates a perception problem, however well-designed the solutions put in place. The risk is that the ombudsman system is viewed as an institutional buttress for bureaucracy and the service providers that it investigates.

6.47 To retain the long-term confidence of complainants, regular or ad hoc independent input has a role to play in either forcing or triggering moments of recalibration and institutional learning where internal processes might have become too conservative. Judicial intervention may be one such process, but not all cases are appropriate for judicial consideration of the standards applied by the ombudsman. Furthermore, legal proceedings are reliant on an available litigant and one may not always be available. To optimise the likelihood of external voices triggering institutional learning, additional solutions maybe necessary.

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[279] OIAHE, Annual Report 2019, (link here), 43-44.

[280] Dispute Resolution Ombudsman, *Standards Board: Terms of Reference* (2018)

6.48 The standard solution, especially in the public sector, is externally imposed political oversight, whether by the executive or parliament. Political oversight can prove very powerful and has a clear purpose in terms of enhancing the public accountability of the ombudsman sector. Political scrutiny can involve an independent account of past and current practice, and offer direction as to the efficacy of various performance standards in the sector. Nevertheless, the power of political reviews are reduced by their tendency to be reactive and infrequent. In the political realm, it is ordinarily only when something goes wrong that the ombudsman sector is subject to serious scrutiny of the standards of organisational performance, and decision-making, that it is delivering. Even where an annual legislative appearance is built into a scheme, it is expecting too much for one relatively short meeting to deliver powerful scrutiny, let alone any form of regulatory check. Further, the capacity of political reviews to address individual grievances with the ombudsman process is a minor by-product of its work.

6.49 Historically, the ombudsman sector has largely been free of scandal amongst its leadership, but there have been instances when inappropriate or poor decision-making by the office-holder could possibly have been picked upon more quickly if a more active model of oversight had been in place. For more systematic and deeper oversight of an ombudsman scheme, alternative solutions are required. Here too there are already evolving practices in the sector that could be built upon.

(i) Establish an internal advisory board

6.50 Many schemes now operate some form of corporate governance solution, which involves the integration of a formal advisory board into the governance structure. The model is common in the private sector,[281] is mimicked on an informal basis by several public service schemes, and was included as a formal part of the design for the proposed new Whitehall-based public services ombudsman.[282]

6.51 The Board model has value in that it creates a body with specific responsibility to oversee the work of the office on a more regular basis than can be achieved by the legislature.[283] An example of this approach in the public sector is that taken by the Public Services Ombudsman for Wales (PSOW), which operates an advisory panel. The Advisory Panel's terms of reference are as follows:[284]

> **Status of the Advisory Panel**
>
> The Advisory Panel is a non-statutory forum whose main role is to provide support and advice to the Ombudsman in providing leadership and good governance of the office of the Public Services Ombudsman for Wales. The Advisory Panel also brings an external perspective to assist in the development of policy and practice. The Advisory Panel provides specific advice and support to the Ombudsman on:

[281] See too the Board of Trustees/Directors built into the OIAHE scheme, see here for further details.

[282] Cabinet Office. (2016). *Draft Public Service Ombudsman Bill.* Cm. 9374.

[283] For a discussion, see B. Thompson, 'The Challenges of Independence, Accountability and Governance in the Ombudsman Sector'. In: R. Kirkham and C. Gill (eds.) *A Manifesto for Ombudsman Reform.* (Palgrave Macmillan, 2020), 143-158.

[284] See Advisory Panel – Terms of Reference

- vision, values and purposes;
- strategic direction and planning.

The Advisory Panel is an advisory only body to the Ombudsman, and does not make decisions in its own right.

Role of the Panel

To assist the Ombudsman in establishing:

- governance arrangements, including Terms of Reference of any sub-committees;
- the PSOW's strategic direction, aims and objectives and targets;
- key business policies;
- key employment strategies and policies.

To scrutinise and assure:

- the Three Year Strategic Plan and the Annual Operational Plan;
- high level budget allocation;
- the budget estimates submission to the Finance Committee of the National Assembly for Wales.

To monitor and review:

- operational performance and delivery;
- financial performance;
- effectiveness of employment strategies and policies;
- diversity and equal opportunities, particularly in relation to the Equality Act 2010 external communications strategies and stakeholder relations;
- health and safety and business continuity.

6.52 It can be seen from the terms of reference for the PSOW's Advisory Panel that it is set up to explore issues similar to those that a legislative committee would look at but on a more frequent basis, meeting three or four times a year. The Advisory Panel also produces a review each year[285] and is made up of a collection of former ombudsman, auditors and leading figures from the bodies overseen by the office.

6.53 The corporate board solution does not, however, necessarily provide for independent oversight or transparency. In the public service ombudsman schemes, where voluntary boards are set up appointments are made by the relevant ombudsman and the role is more advisory than oversight.

(ii) Independent review

6.54 Another option is to provide for periodic *best practice review*. This is another solution that the sector itself is beginning to develop. Anticipating perhaps the possibility of external review being imposed upon it by the legislature, in recent times a practice of independent

[285] The 2019-20 review can be found through this link.

evaluation through peer review has been promoted.[286] Several such reviews have already occurred and the need for a periodic independent peer review could over time be included within the criteria of the membership of the OA.

6.55 Peer review, however, does not entirely address the perception problem with self-regulated solutions. Reviews can be set up as 'independent' but the membership and the finding of such reviews is ordinarily organised by the ombudsman scheme under review. Responding to such concerns, the Public Administration Select Committee recently commended this practice in relation to the Parliamentary and Health Services Ombudsman.

> The Committee recommends that the PHSO repeat a peer review process every three to four years. For future reviews it also recommends that the PHSO considers how to reach outside the Ombudsman sector to obtain informed perspectives from professional peers with relevant experience in related sectors. This would potentially add further value to a review's conclusions in the eyes of Parliament and the public. Engaging directly with people with direct experience of the PHSO's service and other stakeholders would also add value and complement existing customer satisfaction data.[287]

6.56 A further problem is that peer review cannot alone address shortfalls in statutory power. Thus a further option is *mandatory periodic review*. To enhance the impact of independent reviews by statute it could be a requirement for ombuds to organise an independent review on a proportionate periodic basis, as has occurred in Australia for instance (eg once every 7 years). To maximise the perception of independence and actively to engage ongoing scrutiny, such reports should be reported direct to the legislature.[288]

6.57 To buttress the system, therefore, and to avoid stagnation and reduce the burden on the courts, the sector should be subject to periodic legislative/executive-led review and consider the need for legislative reform. Such a review has occurred in both Northern Ireland[289] and Wales,[290] and led to legislative reform. As of now, the most pressing demand is for new legislation on a Public Services Ombudsman for England, which has yet to be introduced, notwithstanding an executive-commissioned review in 2014.[291]

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[286] See C. Gill, 'Accountability and improvement in the ombuds sector: the role of peer review', UK Administrative Justice Institute blog (27 September 2019). https://ukaji.org/2019/09/27/accountability-and-improvement-in-the-ombuds-sector-the-role-of-peerreview/

[287] House of Commons Public Administration and Constitutional Affairs Committee, *PHSO Annual Scrutiny 2017/18: Towards a Modern and Effective Ombudsman Service* HC1855 (2017-19), p.9.

[288] See Anita Stuhmcke, 'Ombuds Can, Ombuds Can't, Ombuds should, Ombuds Shan't: A Call to Improve Evaluation of the Ombudsman Institution' in Marc Hertogh & Richard Kirkham (eds) *Research Handbook on the Ombudsman* (Edward Elgar: Cheltenham, 2018), 425-6.

[289] Deloitte MCS Ltd., *Review of the Offices of the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints*, (Office of the First and Deputy First Minister, 2004); Northern Ireland Committee for the Office of the First and Deputy First Minister, *Proposals to update legislation to reform office of the Northern Ireland Ombudsman*, (2010) http://archive.niassembly.gov.uk/centre/2007mandate/Committee-consultation-on-NI-Ombudsman.pdf.

[290] Eg Equality, Local Government and Communities Committee, *Public Services Ombudsman (Wales) Bill 2018* (March 2018).

[291] Robert Gordon CB, *Better to Serve the Public: Proposals to Restructure, Reform, Renew and Reinvigorate Public Services Ombudsmen* (Cabinet Office 2014).

III. Upgrading the ombudsman model

6.58 Alongside formalising some of the recent advances in the ombudsman process and building into the ombudsman sector regular legislative review, there are a series of measures that could be introduced that could integrate the office more coherently within the overall administrative and civil justice system, and make more use of the office in enforcing the rule of law. These recommendations are listed below in the final chapter of this report. The recommendations are mainly focused on the long-standing call for new legislation on a Public Services Ombudsman for England but include broader templates for the sector as a whole. Most of the recommendations made refer to narrow elements of the ombudsman's work, but a few points are worth dwelling on further here.

6.59 Both ombuds and courts occupy important roles in the modern justice system. However, the nature of the relationship between the ombudsman sector and the courts is complex, and this report has only explored in depth one aspect of that relationship, namely the manner in which the courts deal with ombudsman case law. Other aspects of the relationship are important though, but as yet under-developed and under-explored. There is significant untapped potential for the two institutions to work in partnership through a better-organised division of labour and increased co-operative endeavours to promote mutual goals. These goals would include strengthening the effectiveness of the rule of law, calling public power to account[292] and enhancing trust in the public and private provision of services.[293]

6.60 Illustrating this point in terms of administrative justice, citing the submission of Dr Chris Gill,[294] the Jersey Law Commission report provided a threefold typology by which the broader potential of the ombudsman can be understood:

> **Spokesperson**: working collaboratively with courts and tribunals, the ombudsman could distil and disseminate important decisions taken by other redress mechanisms. This would draw on the institution's skill in packaging messages in ways that are accessible to administrators. Rather than only drawing on its own casework, it could bring together and disseminate important, crosscutting administrative justice principles. Drawing on its closer understanding of bureaucratic decision-makers, the ombudsman could be charged with the coherent presentation of administrative justice principles to bureaucratic audiences.
>
> **Relationship manager**: here the ombudsman would function as a conduit for interchange between decision-makers and redress mechanisms. The ombudsman could either create professional networks or develop existing ones, which would function as spaces in which administrative justice principles could be disseminated and as fora in which shared understandings of good practice could be jointly developed. This would capitalise on the ombudsman's ability to enter into professional networks and would allow it to extend its scope as a policy actor. This would also allow the ombudsman to identify more clearly areas where the decision-makers require training or guidance.

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[292] E. Rubin, Beyond Camelot: Rethinking Politics and Law for the Modern State (Princeton: Princeton University Press, 2007), chapter 2; Eg C. Scott, 'Accountability in the regulatory state', (2000) 27 *Journal of Law and Society* 38.

[293] D. Vitale, 'A Trust Network Model for Social Rights Fulfilment' *Oxford Journal of Legal Studies* 38 [2018] 706-732.

[294] For Chris Gill's wider writing on the ombudsman sector, see his personal webpage (as of writing, the University of Glasgow).

> **System fixer**: The third dimension of the ombudsman as learning agent would require new powers of own-initiative investigation, which could be harnessed to trouble-shoot problem areas within the administrative justice system. For example, the ombudsman might launch an investigation in areas where there are high levels of successful appeals, or in response to concerns raised in the annual reports of the Senior President of Tribunals. The ombudsman might also investigate where new initiatives have a significant knock on effect on the administrative justice system, such as currently in relation to mandatory reconsideration. There is also potential for the ombudsman to follow up individual cases. Particularly where important legal precedents are set, the ombudsman could have a role akin to Special Masters in the US court system. Here, judges might refer cases to the ombudsman for follow up where public interest issues appear to be at stake. Such a proactive role is quite different from the firefighting approach currently adopted by the [Local Government Ombudsman in England]; however, … the potential benefits of the ombudsman within the administrative justice system are currently underdeveloped.

6.61 Each of these forms of ombudsman contribution exist at present, albeit in limited form and debates continue in the sector as to how to make more of their potential.[295] This broader partnership between the courts and the ombudsman is worthy of future research as it relates to the question of how best to optimise the potential of the ombudsman sector[296] and best design the administrative justice system.

6.62 A key part of the partnership potential is contained in the flexible method of operation that is in-built in the ombudsman design, unlike with the courts. The flexibility in investigatory approach that the ombudsman enjoys means that it is in a strong position to act as a proactive voice for promoting standards of good administration and creating dialogue with the bodies that it investigates and between service providers and citizens.[297] It can do this by bringing together the combined lessons from its work, and integrating those lessons with the findings of the courts and other branches of the accountability network. The ombudsman also has a range of dissemination techniques through which to distil lessons (eg published guidance, training). These techniques go beyond those of the court and could be used to advance rule of law standards.

6.63 The arguments in favour of using the ombudsman this way centre on the importance of reconstructing the institution so that it is capable of capturing the needs of vulnerable groups of citizens as well as those more confident in taking advantage of existing processes. With a primary focus on consumer ombuds, Chris Hodges has also argued that the rich knowledge contained within complaints should be better used to promote various regulatory goals, including justice and adherence to the rule of law. Identifying and

[295] Some consideration of these issues has begun at a European level. For a literature review and discussion, see European Network of Councils for the Judiciary, *The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution* (European Law Institute, 2018).

[296] On this wider discussion, see N.O'Brien, 'Ombudsmen and Public Authorities: A Modest Proposal'. In: *Research Handbook on The Ombudsman*, M. Hertogh and R. Kirkham (eds), Cheltenham: Edward Elgar.

[297] Doyle, M., & O'Brien, N. (2019). *Reimagining Administrative Justice: Human Rights in Small Places*. London: Palgrave Macmillan.

aggregating this data can help facilitate the oversight of 'market behaviour' and triggers appropriate intervention where problems are identified.[298]

6.64 This proactive capacity of the ombudsman model is widely captured in the literature on the ombudsman, which highlights the under-utilised capacity of the office of the ombudsman. This body of literature argues for ombuds to be set-up with more ambitious powers than currently is the case in the UK.[299] For instance, it is regularly advocated that the institution should be reformed to enable it to pursue own-initiative investigations and act as a 'complaint standards authority'.[300]

6.65 Such proposals are no longer merely academic ideas. Recent legislation has seen the granting of both sets of powers to the Northern Irish and Welsh public service ombudsman schemes,[301] and the Scottish Public Services Ombudsman was the pioneer of the complaints standard authority role.[302] The recently established Independent Office for Police Conduct has also been granted some flexibility to pursue 'super-complaints' if matters are referred to them by listed designated bodies,[303] and a 2020 review of the Legal Services Regulation recommended the implementation of own-initiative investigations for the Legal Ombudsman.[304]

6.66 Within the unimplemented 2016 proposals for a new English Public Services Ombudsman, however, expanded powers were still resisted by Government.[305] Common arguments against[306] include a concern as to the potential for this new oversight power to add red tape to the work of service providers. In a complex accountability field, there is also the potential for duplication and possibly competition in accountability with other oversight bodies (ie redundancy).[307] Another fear is that given this power, ombuds would experience mission drift, becoming more attracted to high profile investigations than dealing with the day-to-day fare of individual complainants. This is coupled with a concern of ombudsman overreach, as offices go rogue dealing in politicised disputes which

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[298] C. Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales* (Hart Publishing: Oxford, 2019), 249.

[299] See for instance C. Gill, 'The Ombud and Own-Initiative Investigations Powers' in R. Kirkham and C. Gill (eds) *A Manifesto for Ombudsman Reform* (Palgrave MacMillan, 2020), 77-94.

[300] C. Gill, 'The Ombud and 'Complaints-Standards Authority' Powers in R. Kirkham and C. Gill (eds) *A Manifesto for Ombudsman Reform* (Palgrave MacMillan, 2020), 95-108.

[301] Public Services Ombudsman (Northern Ireland) Act 2016; Public Services Ombudsman (Wales) Act 2019).

[302] Public Services Reform (Scotland) Act 2010.

[303] Policing and Crime Act 2017, ss.25-27.

[304] S. Mayson, *Reforming Legal Services: Regulation Beyond the Echo Chambers* (Centre for Ethics & Law, University College London, 2020), 266.

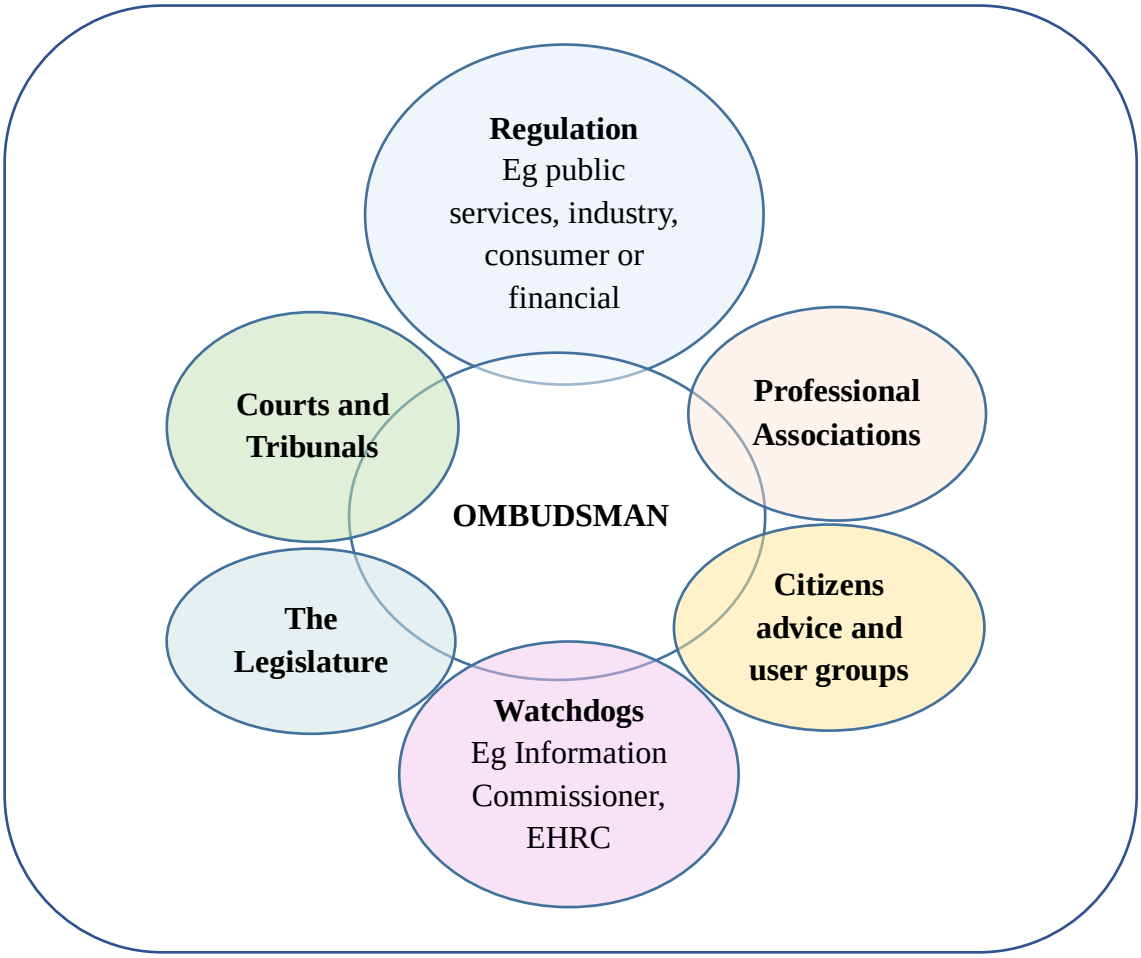
[305] Cabinet Office. (2015). *A Public Service Ombudsman Government Response to Consultation*. Available from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/486797/PSO_-_Consultation_Response_-_Final.pdf

[306] C. Gill, 'The Ombud and Own-Initiative Investigations Powers' in R. Kirkham and C. Gill (eds) *A Manifesto for Ombudsman Reform* (Palgrave MacMillan, 2020), 86-90.

[307] Eg C. Scott, 'Accountability in the regulatory state', (2000) 27 *Journal of Law and Society* 38.

undermine the integrity of the office.[308] Finally, there is a question as to whether a complaint-handling body is well-equipped to deliver organisational learning, given the different skill-sets required and the accompanying costs and expertise required for such work.[309] There is even the risk that a focus on complaint data might paint an unrepresentativeness picture of the needs of the service being provide. Overall, the argument against expanding the powers of the ombudsman is that the task of using complaints to generate lessons that can improve public administration is a difficult enterprise for which there are no guarantees of success.[310]

Figure 3: Partnerships that require ongoing management in the ombudsman sector



[308] For a summary see Schillemans, T. 'Redundant Accountability: The Joint Impact of Horizontal and Vertical Accountability on Autonomous Agencies', (2010) 34 *Public Administration Quarterly*, 300–37 or D. Pond *The Impact of Parliamentary Officers on Canadian Parliamentary Democracy: A Study of The Commissioner of the Environment and Sustainable Development & The Environmental Commissioner of Ontario*, (Canadian Study of Parliament Group, 2010).

[309] Chris Gill, Tom Mullen and Nial Vivian, 'The Managerial Ombudsman' (2020) 83(4) MLR 797–830, 807.

[310] Ibid 809.

6.67 Most of these concerns can potentially be dealt with through placing obligations on the ombudsman to consult, report and account for decisions made, coupled with establishing processes to follow-up such obligations.[311] Ombuds can also be placed under a duty to publish guidance in order to clarify the criteria by which decisions will be made under any new powers created.

6.68 More broadly though, what these various concerns with expanding the remit of the ombudsman point to is a need to appreciate and tackle the overlapping nature of the accountabilty network in the UK. As depicted in Figure 3 above, ombuds interact with the legislature and user and professional groups. They also sit within a wider network of watchdogs, regulators and judicial bodies each with a specialised capacity to promote good governance, professional standards and the rule of law. There will always be potential for conflict and confusion between these different branches of the accountability network. Ombuds, therefore, should be under a duty not just to report on the use of their powers but on how they manage their relationships with other institutions. Memorandums of understanding between different accountability bodies and scrutiny of those working relationships should be a feature of the ombudsman's work.[312]

Summary of gaps that need addressing in the ombudsman sector

6.69 The ombudsman sector in the UK has over a fifty-year period evolved a multi-layered decentred regulatory structure, within which the court plays an important role. The existence of this complex structure provides considerable assurance that suitable standards of procedural fairness are delivered within the sector.

6.70 However, three generic risks potentially remain: a lack of citizen buy-in to an ombudsman's work or respect for their decision-making; stagnation in the sector caused either by complacency or lack of support by the political branch; and the adoption of an insufficiently critical approach towards its investigatory role by an ombudsman.

6.71 In response to these concerns, this chapter has argued that the next phase of development in the ombudsman sector should extend along three strands. First, legislation should be refined to integrate some of the best practice developments that have occurred in the sector, developments that have often been specifically directed at improving the procedural fairness standards that operate in the sector. Second, accountability arrangements should be enhanced, again mirroring best practice developments. Finally, the powers of the ombudsman should be expanded to equip the office to play a more powerful role in promoting good administration. Such enhanced powers would also enable the office

[311] Eg see Public Services Ombudsman (Wales) Act, s. 4(3).

[312] See for instance, *The Memorandum of Understanding between the Housing Ombudsman and the Regulator of Social Housing*, (2020). Available at: https://www.housing-ombudsman.org.uk/wp-content/uploads/2020/09/MOU-Ombudsman-and-Regulator-20200901.pdf

to work more fruitfully in partnership with other institutions in the administrative justice system.

6.72 In chapter 7, the recommendations that follow from these findings are listed.

7. CONCLUSIONS AND RECOMMENDATIONS

This report has detailed the contribution that the judiciary makes towards overseeing the ombudsman sector and providing stakeholders with assurance that the qualities of decision-making processes in the sector are sufficient to 'provide arguments for the acceptability of its decisions'. The report has also described how the contribution of the court needs to be considered alongside other oversight processes that operate in the sector. In doing so, the report has identified a number of areas where reform is needed to upgrade the operation of the ombudsman sector and make more of this method of providing justice. In this final section, summarises the main conclusions of the study and lists the recommendations that follow.

General: the role of judicial review

This report has focused on ombudsman case law, but it contains some important observations for judicial review more widely. In particular, the report evidenced the breadth of functions delivered though judicial review and, as a process, its effectiveness in rationing fully heard cases down to those that raise questions of legal uncertainty. In ombudsman case law, the courts have performed a strong gap-filling role and have adapted grounds of administrative law in a bespoke fashion relevant to the ombudsman sector. In doing so, the courts have provided strong background support for the evolution of standards in the sector and upholding standards of good administration, appropriate to the context of particular statutory schemes.

The wider import of this finding is to confirm the importance of judicial review in supporting the authority of non-executive bodies, such as the ombudsman. Judicial review is an important part of the overall regulatory structure surrounding the ombudsman sector in that it provides a means through which the law can be adjusted during often quite extensive periods during which the legislature does not find time to update the legislation.

Although there was not much evidence of redress being delivered through the judicial review process, this is explainable by the high capacity of the ombudsman sector to anticipate and guard itself against judicial override. This level of high loyalty to the rule of law allows the courts to provide considerable support for the courts.

This report also added to that research that has identified the role of the litigant-in-person as one of the biggest challenges that the judicial review faces.

RECOMMENDATIONS

I. There should be a general presumption that judicial review is the appropriate solution for legal oversight of the sector, as appeal process tend only to exacerbate the embedded disadvantages experienced by individual complainants. Consideration should be given to whether the appeal route

within the Scottish Legal Complaints Commission scheme is sustainable and whether it should be replaced by a residuary right to judicial review.[313]

II. Consideration should be given as to how to best support the continued input of claimants into judicial review, especially Litigants-in-Person. Options include:

- re-evaluating the information material provided from the perspective of litigants-in-person and (if necessary) redesigning such information with their various needs in mind.

- establishing a single authoritative website for judicial review claims.

- providing some useful resources on subject specific areas, eg of ombudsman case law. As a start, a link could be made to the ombudsman case law database put together for this study and which is now publicly available and can be found at https://caselaw.ombudsmanassociation.org/.

Expanding the role and powers of the ombudsman

This report found that it was unrealistic to expect more from the courts in terms of providing a more powerful scrutiny of individual decisions on complaints. At the same time, there is a long-standing concern that, driven by the demand on the office to provide an efficient complaint-handling service, not enough has been done to equip it to improve the quality of public administration or to work for those communities of people least able, or likely, to access complaint systems. As a result, the ombudsman sector has become adept at managing complaint systems, but has not achieved the full potential or purpose for which the office was originally established.

There is more to be made of the capacity of the office of the ombudsman to (i) promote rule of law values; (ii) work cooperatively with other parts of the justice system; (iii) improve access to justice. Already in the sector, it has been widely accepted that the ombudsman model works better where it is equipped with a broad toolkit of powers. In places, this model has already been implemented. Reform of the public services ombudsman model in England is needed to match developments elsewhere.

RECOMMENDATIONS

III. A bolder role in the justice system for ombuds should be confirmed in statute, thus formally recognising the multiple roles they already undertake. Where

[313] Doubts as to the appropriateness of this appeal process have been aired in a recent review of the complaints system in Scotland: E. Robertson, *Fit for the Future*: *Report of the Independent Review of Legal Services Regulation in Scotland* (Scottish Government, Edinburgh, 2018), 44. As this report is finalised, the Scottish Government is considering the results of a further consultation into Legal Services Regulation, see *Complaints against Legal Firms and Lawyers in Scotland: consultation* (December 2020), here.

currently legislation does not provide sufficient powers to deliver these roles adequately, legislation should be amended. For instance, a new public services ombudsman for England might copy from the Ombudsman Act (Queensland) 2001 s.5:

The objects of this Act are—

(a) to give people a timely, effective, independent and just way of having administrative actions of agencies investigated; and

(b) to improve the quality of decision-making and administrative practice in agencies.

To which could be added further duties:

(c) to address instances of systemic maladministration in public service; and

(d) to create trust in public administration and accountability of public bodies.

IV. Where possible ombudsman schemes should be granted a broad toolkit of powers to maximise their capacity to work in partnership with the courts. This should include the power for an ombudsman to commence investigations of its own-initiative. Such a power should be accompanied by a duty to provide guidance on the criteria to be applied in deciding whether or not to commence an own-initiative investigation; a duty to consult with relevant parties before commencing an investigation; and a duty to report publicly on the scope of the investigation and the reasons for undertaking the investigation.

V. Options should be explored through which the ombudsman sector and the courts (including Tribunal Services) can operate a strong partnership relationship. In particular, consideration should be given to providing Tribunals the power to refer matters to an ombudsman for further investigation, a model for which might be the 'super-complaint' model adapted from the Independent Office for Police Conduct. By this model, the Senior President for Tribunals could be named a designated body with the power to refer matters to an ombudsman 'where as a result of one or more cases decided at a tribunal there is evidence of systemic maladministration on the part of a public service provider that it would be in the public interest for an ombudsman to investigate.'

VI. There should be a power in an ombudsman to refer to the Administrative Appeals Chamber of the Upper Tribunal – which is a United Kingdom Superior Court of Record – any issues they believe require guidance by

judicial review determination or individual redress beyond their powers.[314] Such a power might be particularly useful where uncertainty surrounding the interpretation of the law had been identified as a cause of systemic administrative error and/or injustice.

Upgrading the procedural fairness of the ombudsman and legislative reform

This report found that the ombudsman sector has been active in creating and advancing standards of procedural fairness. Bottom-up solutions have been developed, demonstrating that the sector has a strong reputational incentive to promote best practice.

However, two generic issues indicate that now is an opportune moment to formalise some of the innovations that have been put in place. First, some of the innovations are so important for the robustness of the ombudsman claim to procedural fairness that they should be made a duty on the ombudsman office by being embedded in legislation. Second, for the English public sector ombudsman schemes much of the legislation is now dated and there are a series of gaps in the legislation which require updating.

Implementing legislation should avoid being overly prescriptive on questions of process and practice, allowing the ombudsman as much discretion as possible to meet the demands of the multiple roles it is required to play.

RECOMMENDATIONS

VII. The courts should not be seen as the primary mechanism by which the correctness of an ombudsman decision is challenged. Alternative internal procedures, possibly overseen by the ombudsman sector itself, should be built-up as the main route through which complainant grievances are settled. Internal arrangements for the reconsideration of ombudsman decisions should include both a 'service' review and a 'decision' review element. The duty to provide for these arrangements should be provided for in legislation. To provide an element of reassurance as to the veracity of internal review processes:

(i) The duty to establish and operate an internal review process at the request of the parties to the original complaint should be a legislative obligation. Existing alternative internal procedures, possibly overseen by the ombudsman sector itself, should be further built-up as the main route through which grievances are channelled.

[314] This is a direct citation of a recommendation made by Lord Justice Ryder, see Ryder, E., 2019. *Driving improvements: collaboration and peer learning*, speech at OA annual conference, Belfast. Available from: https://www.judiciary.uk/wp-content/uploads/2019/09/2019_09_19_SPT_Ombudsman_Conference_-Belfast_May2019_FINAL-1.pdf [Accessed 29 August 2020].

(ii) There should be an element of external oversight of internal review processes (eg an independent assessor).

(iii) Schemes should be required to publish and report on the output of internal review processes. These procedures should be highlighted in the publications, and websites, of ombuds, and in the Annual Report.

VIII. To aid future transparency and accountability in the sector, ombuds should be under a statutory obligation to explain and report annually on the following:

- Judicial review/ appeals heard in court (and outcomes of the cases ie whether a decision is upheld, partially upheld etc);
- Judicial review/ appeals claims resolved at the permission stage (and decisions made by the ombudsman in resolving the claim);
- Complaints about the office received and resolved through an internal process (and decisions made by the ombudsman in reviewing the complaint).[315]

IX. Ombuds should be under a duty to publish their decisions (subject to an overriding duty for confidentiality where necessary).

X. Ombuds should be required by legislation to put in place oversight arrangements that allow a diverse selection of external stakeholders to review their decisions on a regular basis, such as though the establishment of a Quality Assurance Board or a team of independent assessors.

XI. The Government should renew its commitment to introducing reforming legislation for a new Public Services Ombudsman to replace the PHSO and LGSCO. This commitment though needs to go further than the 2016 Draft Bill. This legislation should update legislation in line with judgments made in ombudsman case law and the 2016 Draft Bill. In addition to specific judgments, there are a series of further uncertainties that have been raised in case law that should be clarified further in new legislation eg around procedural fairness, their capacity to award financial redress, the authority of ombudsman decisions, the question of whether ombudsman decisions can be quashed internally or whether a court judgment is required. Table 12 summarises some of the recommended technical amendments that would be needed.

[315] There are already some reporting requirements regarding challenges to the office in the membership of the Ombudsman Association, see Ombudsman Association, *Membership Application / Re-validation Check List: Ombudsman Member* (Available at: http://www.ombudsmanassociation.org/the-ombudsman-association.php).

Table 12: Recommended legislative reform proposals for a public service ombudsman's discretionary powers

Clarification to ombudsman powers listed in Draft Public Services Ombudsman Bill			**Powers that should also be included and further clarified**	
Receipt of complaint (cl.l4-5) Referral of complaints to the ombudsman (cl.18) Reopening and expanding investigations on the basis of new evidence (cl.4(6) and cl.13) Power to investigate private bodies (cl.6(2)) Power to adopt informal techniques (cl.10(5)) Distinction between findings and recommendations (cl.14(8))	Definition of administrative fault (cl.6(1)) Jurisdiction of ombudsman where alternative financial remedy might be available (cl.7) Duty to give notice on establishing terms of investigation Confirmation that recommendations have been implemented		Power to make a financial recommendation Making ombudsman findings binding Power and duty to share information Ombudsman power to quash its own decision Duty to explain standards of clinical failure applied	Power to launch an own-initiative investigation Power to operate as a Complaint Standards Authority Power to refer legal question to the courts Power of Parliament (or executive) to refer matter to ombudsman[316] Power of court to stay proceedings

XII. Ombudsman legislation should confirm in law that it is the duty of public bodies to accept the findings of the ombudsman unless there are legal grounds not to do so. For a public body to raise an objection as to the legality of an ombudsman report it should be necessary to apply to the High Court.

XIII. The legislation of all ombudsman schemes should be subject to Government and/or Parliamentary review on a regular periodic basis (eg every seven years) to take into account and reflect changes in the administrative justice landscape over time. Such a duty should be enshrined in legislation. In the alternative, all ombudsman schemes should be under a duty to organise, and report, a periodic independent evaluation of the office.

[316] Eg see Ombudsperson Act (British Columbia), s.10(3); Ombudsman Act (New Zealand), s.13(5).