

# Enquiry & Assessment Manual 4.0

### Version control and sign off

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### Sign off

Date	Version	Details
15/5/14	Final version 1.0	Email from Chris Morgan following discussion with Mick Martin and Frank Garofalo.
27/6/14	Final version 2.0	Changes notified to Chris Morgan (removal of refer backs, new text on resolutions, new text on casework risk, amendment to continuing care information).
30/9/14	Final version 3.0	Amendment to Annex B. All direct referrals should be sent to Casework Team for consideration. Approved by Neil Armstrong.
24/12/14	Final version 4.0	Focus on process with removal of behavioural / customer service elements. Reference to new standard letter templates and changes to post-decision process.

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## PROCESS OVERVIEW

- When a complaint is received at PHSO, Customer Services will decide if we can investigate the complaint. There are two decision stages to this process:

### **The Enquiry Stage (First stage)**

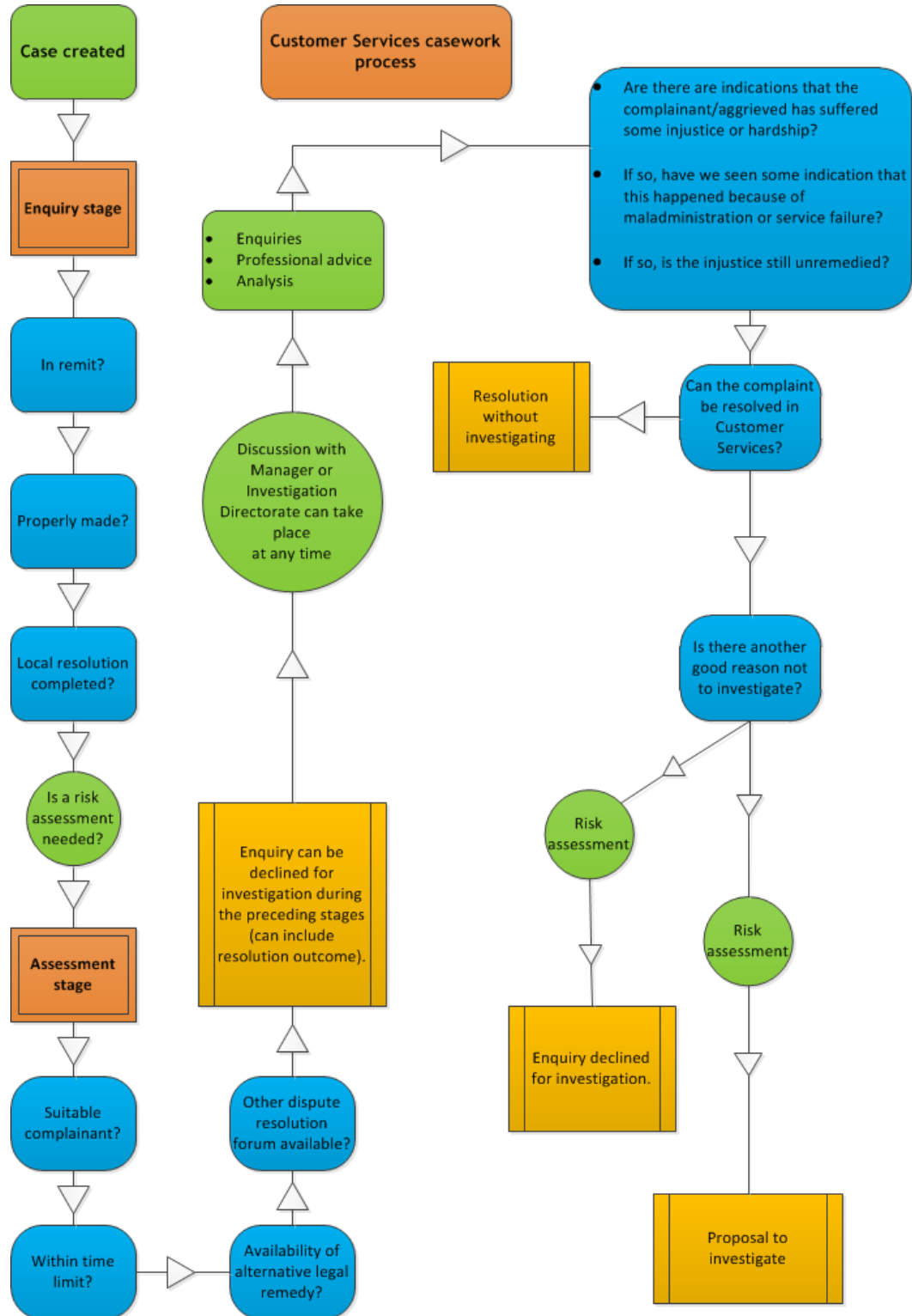
- At this stage, we will decide whether the complaint is in jurisdiction/remit, properly made and not premature. We will also consider if a formal risk assessment is needed at this stage.

### **The Assessment Stage (Second stage)**

- At this stage, we will first make a decision on whether we can investigate the complaint. To do that, PHSO will decide on the following: suitability of complainant; the time limit; alternative legal remedy; and whether another organisation is better placed to look at the complaint.
- If we decide that we can investigate, Customer Services will then decide if we should investigate. This will include:
    - Is there an alternative to investigating that would provide a proportionate and customer focused outcome? (Including seeking a resolution without the need for an investigation.)
    - Is there some indication of an unremedied injustice or hardship arising from maladministration or service failure?
    - Is it proportionate to investigate?
    - Is there an overriding reason why the Ombudsman should not investigate the complaint?
  - Where we decide we cannot or should not investigate, Customer Services will issue a written decision to the complainant. Risk will be assessed and recorded.
  - Where we decide that we will investigate, Customer Services will set out a summary of the complaint to be investigated, tell relevant parties about the proposal to investigate and request relevant papers. Risk will be assessed and recorded.
  - Customer Services Teams will identify and deal with any complaint where there is a real possibility of achieving an early resolution. These cases will normally be of low complexity and low risk and likely to be concluded within a quick timeframe.
  - If Customer Services identify that a case may be suitable for a complex investigation then the case will be referred to a relevant Investigation Manager.

- Customer Services will identify themed cases and potential joint working cases and seek advice on how to handle these as needed.

## Customer Services flowchart



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## THE ENQUIRY STAGE

### Understanding the complaint

1. Customer Services will check if all sections of the PHSO complaint form (if used) have been completed. If not then they may contact the complainant to get the information needed or return the form to the complainant for it to be completed.
2. Customer Services will, in most cases, contact the complainant (or if appropriate, their representative) as part of their consideration in order to understand:
  - What is being complained about;
  - The injustice claimed;
  - The remedy sought (including if they are seeking financial remedy); and
  - Why they are unhappy with the organisation's reply to their complaint.
3. Customer Services will give information to the complainant about what PHSO can and cannot do so as to manage expectations appropriately and will discuss any reasonable adjustments that might be needed. However, if a case is clearly not for PHSO (for example, if obviously out of remit) then we will not need to obtain or give the same level of information as for other cases.
4. Before a case can proceed the following basic data must be captured:
  - Complainant's name and contact details
  - Names and contact details of other relevant parties (for example, aggrieved, representative, MP)
  - Organisation/individuals complained about
  - Commissioning organisations and related organisations (where possible)
5. A case will be held for up to 48 hours at the case creation stage. If, during that time, we are unable to obtain the necessary basic data (for example, if we do not have contact details for the complainant) then we will close the case.

### Obtaining information

6. We should tell complainants and third parties that we may need to obtain (and share) information about the complaint. Complainants who complete a complaint form are also asked to provide consent for us to obtain relevant information/papers (including, for health complaints, medical records).



### Joint working cases

7. If a complaint contains parts that may require us to consider joint working with, for example, the Local Government Ombudsman (LGO), then it will normally be passed to a specialist team in Customer Services to complete the enquiry stage and to then decide if we should investigate. It is a legal requirement for PHSO to talk to the LGO, Scottish Public Services Ombudsman or Public Services Ombudsman for Wales where we identify that a complaint may partly or wholly fall within their jurisdictions.

### Continuing care cases

8. Where the Enquiry stage identifies that a complaint is about NHS continuing healthcare, Customer Services will carry out an assessment and pass any resulting Investigation directly to a specialist team in the Investigations and Resolutions Directorate.

### Can we investigate?

#### Is the complaint within remit?

9. If a complaint is out of remit then the Ombudsman cannot investigate it.
10. The out of remit **categories** are listed below. An explanation of each, including relevant flags to Legal Team briefing notes is at Annex A.
  - Actions abroad other than consular functions<sup>1</sup> (parliamentary cases only)
  - Administrative action taken on judicial authority<sup>2</sup> (parliamentary cases only)
  - Alternative legal remedy achieved<sup>3</sup>
  - Body out of jurisdiction<sup>4</sup>
  - Commencement/conduct of civil/criminal proceedings<sup>5</sup> (parliamentary cases only)
  - Commercial/contractual matters<sup>6</sup>
  - Criminal investigation or national security<sup>7</sup> (parliamentary cases only)
  - Exercise of judicial/legislative functions<sup>8</sup> (parliamentary cases only)
  - Ineligible complainant<sup>9</sup>

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<sup>1</sup> Sections 6(5), Schedule 3 Paragraph 2, 1967 Act

<sup>2</sup> Schedule 3, Paragraphs 6A, 6B and 12, 1967 Act

<sup>3</sup> Section 5(2), 1967 Act; section 4, 1993 Act

<sup>4</sup> Schedule 2, 1967 Act; sections 2, 2A and 2B, 1993 Act

<sup>5</sup> Schedule 3, Paragraph 6, 1967 Act

<sup>6</sup> Schedule 3, Paragraph 9, 1967 Act; section 7(2), 1993 Act

<sup>7</sup> Schedule 3 Paragraph 5, 1967 Act

<sup>8</sup> Section 5(1), 1967 Act

<sup>9</sup> Section 6, 1967 Act; section 9, 1993 Act

- Out of remit - other
- Pre-1996 clinical matters<sup>10</sup> (health cases only)
- Private healthcare (not NHS funded)<sup>11</sup> (health cases only)
- Public service personnel matters<sup>12</sup>
- Three year rule<sup>13</sup> (health cases only)

11. For more information or advice, please refer to the full text of the relevant law or to line management in the first instance and, if necessary, to the Legal Team.

12. If an entire complaint falls within one (or more) of these reasons then the case should be declined for investigation. Where possible, complainants should be advised where their complaint can be sent (for example, to another Ombudsman or complaint handler).

### **Is the complaint properly made?**

13. If the complaint is within remit then we need to decide if it has been properly made. If a complaint has not been properly made then it cannot be accepted for investigation.

14. We should send the complainant an acknowledgement letter explaining that we have safely received their complaint and outlining the next steps. We should also send a letter to the referring MP for Parliamentary cases. Links to the letter templates are detailed below and can be found on Visualfiles under 'General Actions' > 'Letter Templates' > 'Customer Services':

- [Standard Letters - 1a - Acknowledgment letter \(new complaint\) - To Customer](#)
- [Standard Letters - 1b - Acknowledgment letter \(new complaint\) - To MP](#)
- [Standard Letters - 1c - Acknowledgment screen/email for complaints taken over phone - To customer](#)

### **MP referral (parliamentary cases)**

15. In parliamentary cases a complaint must be made in writing to a Member of Parliament and then referred to the Ombudsman by an MP, with the consent of the person aggrieved and a request from the MP that we investigate the complaint.<sup>14</sup> The complainant is required to make the complaint to the MP in writing, but there is no requirement for the referral by the MP to the Ombudsman to be in writing.

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<sup>10</sup> Health Service Commissioners Amendment Act 1996; Commencement Order SI 1996/970 Article 2

<sup>11</sup> Sections 2 and 3, 1993 Act

<sup>12</sup> Schedule 3, paragraph 10, 1967 Act; section 7(1), 1993 Act

<sup>13</sup> Section 9(4A and B), 1993 Act

<sup>14</sup> Section 5(1)(A) 1967 Act

16. **Not properly made and local resolution completed.** If a complaint is received without an MP referral and it looks as if local complaints procedures have been completed then we should explain to the complainant that they need to obtain such a referral.
17. When a complaint is closed because it does not have an MP referral, we should also, if appropriate, provide information to the complainant about the time limit on complaints being referred to PHSO.
18. Complaints closed at this stage will use the closure detail code of '*No MP referral*'. If the complaint comes back to us later with an MP referral, then a new case will be created (with the details linked to the previous one).
19. **Not properly made and premature.** If a complainant makes contact without an MP referral and it is clear that the relevant complaints procedure has not been completed then they should be told about the need to obtain an MP referral and about the need to attempt local resolution first (including any second tier complaint handler).
20. When a complaint is closed because it does not have an MP referral, we should also, if appropriate, provide information to the complainant about the time limit on complaints being referred to PHSO. Complaints closed at this stage will use the closure detail code of '*No MP referral*'. If the complaint comes back to us later with an MP referral, then a new case will be created (with the details linked to the previous one).
21. **MP referrals on cases previously closed as premature.** If a case is closed as premature and the complainant then wants the complaint to be referred back to the Ombudsman again at a later date then the law says that it should be put to the MP in writing and a further referral then made to us.

#### Complaint made in writing (health cases)

22. In health cases a complaint must be made in writing to be properly made.<sup>15</sup> A complaint made by email is made in writing.
23. **Not properly made and local resolution completed.** If a complainant makes contact by other means (for example, by telephone) and it looks as if local complaints procedures have been completed then we should tell the complainant that they need to make it in writing. We should also, if appropriate, provide information about the time limits on complaints being referred to PHSO.
24. Complaints closed at this stage will use the closure detail code of '*Not properly made - not in writing*'. If the complaint comes back to us later in

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<sup>15</sup> Section 9(2), 1993 Act

writing, then a new case will be created (with the details linked to the previous one).

25. **Not properly made and premature.** If a complainant makes contact by other means and it is clear that the relevant complaints procedure has not been completed then they should be told about the need to submit the complaint in writing and about the need to attempt local resolution first.
26. We should also, if appropriate, provide information about the time limits on complaints being referred to PHSO. Complaints closed at this stage will use the closure detail code of '*Not properly made - not in writing*'. If the complaint comes back to us later in writing, then a new case will be created (with the details linked to the previous one).

### **Complaints made by telephone**

27. Any complaint received over the telephone from a complainant that has not completed any complaints procedure in its entirety must be recorded as '*Not properly made*': either, because there is '*No MP referral*'; or, because it is '*Not properly made - not in writing*'.

### **Equality and diversity considerations**

28. We may need to make reasonable adjustments to the way we provide a service in the light of equality and diversity needs arising on individual cases. We can also consider putting the complainant in contact with an advocacy organisation.

### **Has local resolution been completed?**

29. If the complaint has been properly made then we need to look at whether the complainant has put their complaint directly to the organisation complained about and had a reply. In some cases, a health organisation may ask to self-refer a complaint directly (see Annex B) to the Ombudsman.
30. In health cases, the law prevents the Ombudsman from conducting an investigation unless she is satisfied that the complaints procedure of the health organisation/service provider has been invoked and exhausted, unless in her view it was not reasonable for the complaints procedure to have been invoked or exhausted.<sup>16</sup> There is no requirement in the law for parliamentary complaints to have been looked at by the organisation complained about.
31. A complainant bringing a complaint to the Ombudsman should have given the organisation complained about the opportunity to respond formally to

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<sup>16</sup> Section 4(4) and (5), 1993 Act

their complaint. It is fair for an organisation complained about to be told about and to have the opportunity to respond to (and resolve) a complaint.

32. If a complainant has not started or attempted local resolution then we will normally decline to investigate the complaint at that stage as being '*premature: local resolution not started*'. However, there could be exceptional circumstances in which we would consider waiving that requirement so each should be considered on its merits. For example, if the complainant was suffering particular hardship, had a terminal illness or where it was clear that the relationship between the complainant and the organisation had broken down completely.
33. We describe a complaint as being '*Pre local resolution*' if it has not been made to the original organisation or we consider that the complaints procedure at the organisation has not been completed and should be.
34. If we decide not to require a complainant to have completed previous procedures, we would record this as '*Not reasonable to exhaust the complaints procedure*'.
35. If an organisation has several tiers of internal complaint handling and these have not been completed we still describe the complaint as '*premature*'. If we decide to decline a case when local resolution has been started but not completed then we would use the closure code '*Premature: Local Resolution ongoing*'.
36. Complainants that come to us prematurely should be told about the time limit and that we can put it to one side if we think it is reasonable to do so.

### **Second tier complaint handlers**

37. A number of organisations in jurisdiction have a second tier of complaint handling which complainants can contact after completing the organisation's own complaints procedure.
38. Where a second tier complaint handler is available then we usually require the complainant to have taken their complaint there and the process to have finished before we consider investigating. If a complainant has not completed that process then the case would generally be declined as '*pre-second tier*'.
39. If the second tier has not been completed, we assess a complaint as '*pre-second tier*' and signpost the complainant or, with their agreement, directly refer the papers to the appropriate complaint handler. If a complaint has been fully considered by the second tier handler we assess the complaint as '*Not pre-second tier*'.

40. We may decide to consider a complaint further even if the available second tier has not been attempted or completed, for example, if there is some time critical element to the complaint such as the complainant suffering from a life-threatening condition or if the complainant is particularly vulnerable.
41. **Premature complaints which are likely to be out of remit.** Exceptionally, where a complaint has not exhausted the procedure (it is premature), but where we also assess that if the complaint were to return to us it would be out of our remit, we may decline to investigate for that reason rather than refer it back into the complaints procedure.
42. Where we are satisfied that local resolution (including any second tier) has been completed appropriately or where we are deciding that, exceptionally, local resolution does not need to be completed, we record the complaint as 'not premature'.

### **Risk assessment**

43. During the Enquiry stage of a complaint, Customer Services will consider risk and decide if a formal risk assessment is necessary. Risk must be assessed when a decision is taken to decline a complaint for investigation. Risk should be kept under review and assessed/revised as necessary throughout the life of the case. Please refer to the separate guidance on ['Assessing risk in casework'](#) for more information.

### **Discussion with Managers and Investigation Directorates**

44. Throughout the Customer Services process, we should consider if cases need discussion with managers or the Investigation Directorates before we take a decision on whether to investigate. For example, if the judgment on a case is finely balanced or if it involves, difficult, complex or novel issues.

### **Complaints moving from Enquiry to Assessment**

45. The Customer Services Officer who deals with a case at the Enquiry stage will record the reasons for their decision before the case is passed to Assessment. The decision will ensure that all relevant questions have been considered and will be recorded on Visualfiles.

## **ASSESSMENT**

### **Specific discretion**

46. Suitability of complainant, the time limit and alternative legal remedy must be considered before we take a decision to investigate a complaint.

## Suitability of complainant

47. If the complainant is not the aggrieved then we need to consider the suitability of the complainant. Information on what the law says about suitability is available in a Legal Team [Briefing note](#).
48. **Is the complainant the aggrieved?** The law says that the person affected (the aggrieved) must make the complaint themselves unless they can't act for themselves. If the complainant is the aggrieved then they are suitable. If the aggrieved is incapable of bringing the complaint themselves, then they can have someone to bring the complaint on their behalf <sup>17</sup> (if that happens we record the person bringing the complaint as the complainant.)
49. The complainant may choose to have someone represent them for the purposes of the complaint (for example, a friend or lawyer) but, if that happens, the aggrieved is still recorded as the complainant and the person acting for them is a representative. We need to have consent if someone wants a representative - but this could be taken verbally over the phone from the complainant. (We will also have to think about whether the representative is suitable - see below).
50. **Does the complainant have capacity?** If we get a complaint made on behalf of someone said to be unable to complain, we have to check this as we start with the assumption that someone is capable.<sup>18</sup> Sometimes the information the complainant gives us themselves is enough for us to be satisfied that the aggrieved does not have capacity. But we may need to make some further enquiries. We can do this by contacting the aggrieved directly or contacting someone who might be able to tell us about whether they would be able to complain (for example, GP or social worker.)
51. In cases where a parent or guardian brings the complaint we still need to think about whether the child may be able to understand enough to bring the complaint themselves and have the parent/guardian as their representative. There is no age of consent and each case needs to be considered depending on the type of case and the age/maturity of the child.
52. **Is the complainant suitable?** If we are satisfied that the aggrieved person cannot complain for themselves, we have to check whether the complainant is suitable. Considerations include:
- Is there any conflict of interest?
  - Is there any evidence to suggest that the aggrieved person wouldn't want the complainant to have access to confidential information about them?

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<sup>17</sup> 1967 Act, section 6(2); 1993 Act, section 9(3)

<sup>18</sup> It should be remembered that people may be incapable in some areas (e.g. financial matters) but capable in others (e.g. ability to understand and bring a complaint).

- Is there any suggestion that the complainant is not acting in the aggrieved's best interest?
53. The same considerations apply when you are deciding whether someone is a suitable representative.
54. The relevant closure code for this stage is '*Not suitable complainant*'.

### **Time limit**

55. **How old is the complaint?** We must identify whether the complaint is in or out of time.<sup>19</sup> For health complaints the aggrieved must refer the complaint to us within one year from the day they first became aware that they had a reason to complain. For parliamentary complaints the aggrieved must refer the matter to an MP within 12 months from the day they first became aware that they had a reason to complain. More information is available in a Legal Team briefing note.
56. **Why was there a delay?** If the complaint was made outside of the time limit then we can still use discretion to look at it. If a case is out of time then it is our policy to consider the following points before deciding whether to put the time limit to one side:
- Complainant's reasons for delay (could include ill health of the complainant or close family or not being aware of the Ombudsman, especially if not told by the organisation complained about).
  - Time taken for organisation to respond to complaint.
  - Scale of injustice - if the case raises clinical issues you may need clinical advice to help you reach a decision.
  - Wider public interest.
  - Any other relevant factor.
57. **Previously premature cases.** Where a complaint is referred back to the Ombudsman having been closed before as premature, it needs a fresh consideration of the time limit. We will take into account whether the complainant was informed about our time limits - if we didn't warn them it is more likely that we will put the time limit to one side.
58. **Part in time and part out of time?** In some cases different parts may be in or out of time. For example, where new issues form part of a complaint following an earlier premature decision (such as concerns about the intervening complaint handling by the organisation complained about) we may need to make separate judgments about the application of the time limit to those new issues and to the original substance of the complaint. Or the substance of a complaint could be out of time, but specific concerns

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<sup>19</sup> Section 6(3), 1967 Act; section 9(4) 1993 Act



about complaint handling or about a second tier handler could be in time. It is important to look at each of these elements carefully and to take a view on whether they are separate complaints for the purposes of the time limit.

59. The relevant closure code for this stage is '*Out of time*'.

60. **Too old?** Even if a complaint is in time, we still may consider it impractical to investigate very distant events, especially when there is a lack of contemporary evidence. A decision not to investigate one of those cases would be closed under general discretion as '*cannot reasonably achieve more*'.

### Alternative legal remedy

61. The law says that the Ombudsman cannot investigate if there is or was a legal remedy (which includes established methods of challenging for example, right of appeal to a benefit tribunal or court) that the aggrieved should pursue or should have pursued, unless it is (or was) not reasonable for them to do so<sup>20</sup>. More information is available in the Legal Team briefing notes on [alternative legal remedy](#) and [time limits for legal claims](#).

62. Our policy is that if the aggrieved has resorted to a court or tribunal that did (or could have but didn't) provide the full remedy sought the complaint is out of our remit. If the aggrieved has not had a full legal remedy (which includes not taking legal action) we must consider two questions:

- Is or was there an alternative legal remedy?
- If so, is it/was it reasonable for the aggrieved to use it? Points to consider include:
  - Cost (would cost more to take legal action than they would get in compensation).
  - Time needed to pursue legal action.
  - Whether the legal route would give them all the outcome/remedy they want (if it can't give them the whole outcome we would usually say it's not reasonable to expect them to take some parts to court and for us to look at other parts if we can potentially provide all the remedy ourselves). In addition, if we can clearly see a potential claim in negligence then we should consider bringing that to the attention of the complainant, regardless of what they have said they want to achieve.
  - Whether the legal route was the only way that the complainant could obtain (or could have obtained) the outcome they are seeking. For example, the overturning of a planning decision.

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<sup>20</sup> 1967 Act, section 5(2); 1993 Act, section 4

63. The relevant closure code for this stage is '*Reasonable to pursue legal remedy*'.

#### **Other dispute resolution forum appropriate**

64. Some complaints could be considered by both us and another complaint handler. We usually only expect one organisation to investigate (following agreement with the other) and sometimes the other organisation may be more appropriate.
65. The relevant closure code for this stage is '*Other dispute resolution forum appropriate*'.

#### **Should we investigate?**

66. The Assessment stage that takes place in Customer Services will decide the following:
- Are there are indications that the complainant/aggrieved has suffered some injustice or hardship?
  - If so, have we seen some indication that this happened because of maladministration or service failure?
  - If so, is the injustice still unremedied?
67. If the answer to all of those questions is yes, then there is a presumption that we will investigate the complaint, unless there is a good reason not to (which includes where there is an alternative to investigating that would provide a proportionate and customer focused outcome).
68. Reasons why we might decide not to investigate include:
- If there is a quicker, more proportionate way to resolve the complaint;
  - If the outcome sought is not reasonable in relation to the claimed injustice;
  - If the outcome sought is not achievable;
  - That an investigation would not be practical, would not reach a satisfactory conclusion and there would be no value in providing that response through an investigation;
  - That the complainant is unhappy with the investigation we are proposing to undertake and we cannot reach agreement on how to proceed; and

- That the nature/theme of the complaint is one that may not be appropriate for PHSO to investigate
69. The most commonly used closure codes for cases declined at the 'should we investigate' stage are:
- *'No indications of maladministration'*
  - *'No evidence of unremedied injustice'*
  - *'Cannot reasonably achieve more'*

### Avoidable death cases

70. We start from the presumption that we will investigate health complaints where there are indications of serious service failure which could have impacted on an individual's chances of survival. However, we must still exercise discretion appropriately and there will be exceptional circumstances in which we do not investigate such cases.

### Linked to lead cases

71. In some types of complaint, especially where a large number of people have been affected by the same error and seek a similar remedy, the Ombudsman might choose to investigate a small number of 'lead' complaints that exemplify the issues complained about. Those not being treated as 'lead' cases will be declined as 'linked to lead' but with the details of the complaint retained to allow us to take action, as necessary, to contact the complainant once the lead complaint or investigation is completed. If a complaint is subsequently made to us about a matter already covered by a 'lead' investigation, then we will also close the complaint as being linked to the lead investigation and retain the details of the complaint with the other linked cases.
72. The relevant closure codes for this stage are:
- *'Linked to lead - properly made'*
  - *'Linked to lead - not properly made'*

### Resolving cases without an investigation (resolution)

73. Resolution at this stage of the process means (for a complaint that is in remit) delivering an answer or outcome that we consider fully resolves the current customer request. This may include some complaints that are 'not properly made' or 'premature'. We should consider the following when deciding whether to close such cases as resolutions:
74. **Are there compelling reasons for the organisation to carry out further work?** It may be that there are a lot of issues which have a poor or no

response from the organisation. Or the explanations needed to answer these questions can only be provided by the organisation itself and are not available to us through clinical advice or the records we hold.

75. **Age of the complaint.** Generally, the older the complaint and the longer it has already spent at local level, the less reasonable it will be to send the case back for further work.
76. **Confidence in the organisation providing resolution/good outcome.** Are you confident that the organisation has a good chance of providing the resolution/outcome the complainant is seeking? Think about the outcome that would resolve the complaint and what effort has already been made at local level. What is the quality of actions already taken or previous complaints handling? What is the relationship between complainant and organisation like?
77. **Complainant's circumstances.** Consider whether it is reasonable to expect the complainant to go back to local level? Do they see the value in further work by the organisation? Have they given any reason why it would not be reasonable to close the case as premature (for example, illness, number of chances already given)?
78. When a case is declined as a resolution at this stage, we must make the following points clear in our contact with both the organisation and the complainant:
  - What the organisation is going to do and who will be responsible.
  - The agreed timescale for the work.
  - We should also tell the complainant that they should return to us promptly if they are unhappy with the outcome of the further work.

#### Proposals to investigate

79. Before investigating we must give the organisation or individual complained about the opportunity to comment on the complaint.<sup>21</sup> We do this by sending a proposal to investigate to those complained about. The 'in principle' investigation will be confirmed (by the Investigator) once we have received and considered any comments that the organisation or individual complained about want to make.
80. A proposal to investigate must include a broad statement of complaint that covers the issues raised by the complainant **that we will be investigating** as well as the claimed injustice and, where appropriate, the outcome sought.

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<sup>21</sup> 1993 Act, section 11(1); 1967 Act, section 7(1)

81. Complaints can consist of a number of separate grievances, possibly made against several different organisations. Not all of those grievances may be suitable for investigation. We need to be clear about what elements of a complaint we are and are not investigating.
82. If we are **narrowing** the complaint as put to us, the decision is ours, but we have to make the decision reasonably and in full knowledge of and after consideration of the complainant's wishes and the complaint as submitted. If we want to **widen** the complaint we are investigating, this will be agreed with the complainant. If the complainant does not agree, we would then decide whether it was possible to carry out a proper investigation if it was limited to the original complaint.
83. Template proposal to investigate letters can be found on Visualfiles under 'General Actions' > 'Letter Templates' > 'Customer Services':
- [Standard Letters - 2a - Accept for formal investigation - Letter to customer](#)
  - [Standard Letters - 2b - Accept for formal investigation - letter to organisation \(+ NHS checklist\)](#)
  - [Standard Letters - 2c - Accept for formal investigation - letter to organisation \(parl\)](#)

### Identifying complex investigations

84. If, during the Assessment process, a case is identified as being appropriate for a complex investigation, then the caseworker should send a brief summary of the case to their manager and a relevant Investigation Manager. We will then decide where the investigation should go next.

### Reviewing risk

85. Case risk must be reviewed (and revised as necessary):
- When a decision is taken to decline a complaint for investigation.
  - When a decision is taken to issue a proposal to investigate.
  - At any other time when the circumstances of the case require it.
86. (Please refer to the separate guidance on ['Assessing risk in casework'](#) for more information.)

## APPROVING AND ISSUING DECISIONS

### Approving decisions

87. A decision to decline a complaint for investigation or to issue a proposal to investigate should be agreed in line with the Delegation Scheme. Unless otherwise stated it is not a requirement for the member of staff approving the decision to also physically sign out the decision.

### **Decisions signed by the Ombudsman**

88. Decisions to decline complaints on cases referred by the Speaker of the House of Commons, the Chairman and members of the Public Administration Select Committee, the Chairman of the Health Select Committee, the Chairman of the Public Accounts Committee and the three main party leaders must be signed by the Ombudsman or Managing Director.
89. The file, with appropriate final drafts for the Ombudsman's signature, should be referred via line management to the Ombudsman's Casework Team.
90. In parliamentary cases, where a covering letter is required for the MP's copy of the final decision letter, it should be signed by the Ombudsman as well. Please include an appropriate draft covering letter when submitting the case.
91. Any queries regarding cases to be signed by the Ombudsman should be directed to the Ombudsman's Casework Manager.

### **Issuing decisions not to investigate**

92. In parliamentary cases the decision letter should be addressed to the complainant with a copy sent to the referring MP<sup>22</sup> under a brief covering letter.
93. In health cases the decision letter should be addressed directly to the complainant (and a copy sent under a brief covering letter to any MP involved).<sup>23</sup>
94. If there is a separate aggrieved party who is not the complainant then we should consider on a case-by-case basis as to whether a separate copy of the decision letter should also be sent to them.
95. Professional representatives or advocates can also be sent copies of decision letters providing we have appropriate authorisation from the complainant/aggrieved for them to act on their behalf. (In cases where the representative or advocate is the complainant then the letter will have been addressed directly to them in any case.)

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<sup>22</sup> Section 10(1), 1967 Act.

<sup>23</sup> Section 14(2), 1993 Act.

## Complaints about us

96. Any decision issued by Customer Services should remind the complainant about our process if they are unhappy with our decision or service. Example wording:

*'If you have any questions then please contact me using the details given at the top of this letter. Alternatively, you can contact our Customer Care Team if you have any feedback about our service or decisions we make during your time with us. Please call us on 0345 015 4033 (select option 3) or by email at [feedbackaboutus@ombudsman.org.uk](mailto:feedbackaboutus@ombudsman.org.uk)'*

## Customer survey

97. Complainants will have received information about the customer survey (and the possibility of opting out) as part of the initial acknowledgment of their complaint. However, depending on the length of time a case has been in the office, it may be necessary to include a reminder about the customer survey with our decision. A decision about whether to include this reminder should be taken on a case by case basis (for example, a case closed within one month of receipt is unlikely to need a reminder). Example wording:

*'Our independent research company may also invite you to take part in a survey to help us improve our services. If you would prefer not to take part please call us on 0300 061 4222, or email [customersurvey@ombudsman.org.uk](mailto:customersurvey@ombudsman.org.uk). Information passed to and collected by the research company is kept in the strictest confidence and used for research purposes only'.*

98. If a complainant asks not to be contacted for the customer survey then this should be noted on Visualfiles using the *'not to be contacted for research'* button on the *'case closure'* screen, with reasons noted in the free text field.

## Issuing proposals to investigate

99. The law requires us to write to the organisation complained about and any person<sup>24</sup> specifically named in the complaint as having taken or authorised the actions complained of.<sup>25</sup> We also notify the complainant of the proposal to investigate and, where relevant, the aggrieved, representative and Member of Parliament.

## Writing to the organisation: parliamentary cases

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<sup>24</sup> 'Person' includes companies, partnerships, sub-contractors as well as individuals.

<sup>25</sup> 1967 Act, Section 7(1); 1993 Act, Section 11(1)

100. We are required to give the 'Principal Officer' of the organisation complained against the opportunity to comment on the complaint.<sup>26</sup> Where complaints are made against government departments, we should write to the Permanent Secretary (or equivalent). In the case of other organisations, we should write to the Chief Executive (or equivalent). Where a complaint is made against an executive agency, the letter should normally be addressed to the Chief Executive<sup>27</sup>. Where an organisation has a specific liaison or focal point for our casework then we should also copy the letter to them.

### **Writing to the organisation: health cases**

101. We are required to give the health service organisation, family health service provider or independent provider the opportunity to comment on the complaint<sup>28</sup>.

102. Where a complaint is made about a health service organisation we should normally write to the Chief Executive and copy to the relevant complaints team or complaints manager within that organisation.

103. In respect of a family health service provider we should write direct to that organisation (for example a GP practice).

104. Where an independent provider is to be investigated, we should write to the Chief Executive (or equivalent) of the provider. Note: this should be directed to the provider organisation (for example, UK Specialist Hospitals Ltd) rather than only to the provider location (for example, a treatment centre).

### **Writing to any person specifically named in the complaint**

105. We are required to offer any person specifically named in the complaint as 'having taken or authorised the actions complained of' the opportunity to comment on the complaint<sup>29</sup>.

106. A person specifically named in the complaint is entitled to a separate opportunity to comment on the proposed investigation from that offered to the organisation / provider complained against. Our policy is to make all reasonable efforts to trace a named person to give them the opportunity to comment. However, if we cannot do so (within a reasonable time) we may proceed without giving that opportunity. A decision on whether to proceed without giving that opportunity should be taken on case by case basis and

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<sup>26</sup> 1967 Act, section 7(1)

<sup>27</sup> In some complaints against Executive Agencies we may decide to write direct to, or copy in, the Permanent Secretary of the parent department if the circumstances of the case seem to merit it.

<sup>28</sup> 1993 Act, section 11

<sup>29</sup> 1967 Act, section 7(1); 1993 Act, section 11(1)



taking into account all relevant circumstances, including the seriousness of the allegations made against the named person.

107. We will send the proposal to investigate to the organisation for which a person named in the complaint works and to ask for it to be forwarded to that individual. Where needed, we will check with the organisation in advance that the named individual still works there. We also need to ensure that the individual has received the proposal to investigate.
108. In health complaints made against family health service providers or independent providers, you may need to take account of these additional factors:
109. If a complaint is made against a sole practitioner then they should be recorded as a '*named person*' on Visualfiles. In writing to that practitioner to give them the opportunity to comment on the complaint we should make clear that this notification meets the requirements to notify both the provider and the person specifically named in the complaint.
110. In all other cases (for example, where a Practice has more than one Practitioner) then the opportunity to comment on the complaint should be sent separately to both the organisation/provider and to the person specifically named in the complaint.

#### **Writing to the organisation: second tier complaint handlers**

111. In cases where we are proposing to investigate **only** the handling by a second tier complaint handler we may be required by law to provide the original organisation with details of the complaint that we are investigating against the second tier complaint handler and to give them the opportunity to comment.
112. Where the second tier complaint handler is not a separate organisation within remit but is acting as a complaint handler on behalf of the original organisation (for example, the Adjudicator, Independent Case Examiner and Independent Complaints Reviewer) then we are required to provide the original organisation with details of the complaint and give them the opportunity to comment as if we were investigating the complaint directly against the original organisation.<sup>30</sup>

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<sup>30</sup> This is because any second tier complaint handler who is handling complaints on behalf of a department or organisation in remit as opposed to acting in a separate (legislative) capacity is taking administrative action on behalf of the body in remit. Any complaint that we propose to investigate about the administrative action involved in complaint handling triggers the normal legislative provisions relating to a fresh complaint against the original organisation (or someone acting on its behalf).

113. Where a second tier complaint handler is a separate organisation within our remit or otherwise in remit but an entirely separate entity from the original organisation, then we are not required to provide the original organisation with details of the complaint and to give it the opportunity to comment. However, in those circumstances we should think about whether we should notify the original organisation of the investigation. We should only do so if it is for the purposes of the investigation or the report. Examples of this would be where we are concerned that original documents may be lost or destroyed if they are not notified, or where we need comments from the original organisation complained about on any aspect of the investigation against the second tier complaint handler or on any recommendations or findings.

## **OTHER INFORMATION**

### **Preparing the case file for investigation**

114. Before a case file is passed from Assessment to Investigation, the caseworker should ensure that the casefile (physical and electronic) is ordered properly and that material evidence is appropriately flagged/referenced on the physical file.

### **Recording evidence-based decisions**

115. For each stage of the Customer Services process we must set out sufficient evidence to demonstrate that the decision is sound and can be defended if challenged.

116. The material evidence that we have considered in reaching our decision should be identified, flagged on the case file and filed in the 'evidence' section.

117. Material evidence will vary between cases but it will usually include: the complaint letter/form to PHSO; the organisation's final response; legal/jurisdictional/clinical advice; and relevant enquiry responses from the organisation and other parties.

118. Correspondence between PHSO and the complainant/organisation should also be flagged on the casefile.

### **Visualfiles**

119. We should ensure that the following are captured correctly:

- Complainant details (name, address etc.)
- Details of other relevant parties (for example, aggrieved, MP, representative etc.)

- Organisation details
- Details of any named persons complained about
- Decision (Closure type, closure code detail and action code)
- Casework keywords and themes

### **Complaints about service or decisions**

120. If someone is unhappy with our decision on their complaint or with the way we have dealt with them then we should direct them to our Customer Care Team. They will deal with any feedback about our service or decisions. Complainants can contact the Customer Care Team on 0345 015 4033 (select option 3) or by email at [feedbackaboutus@ombudsman.org.uk](mailto:feedbackaboutus@ombudsman.org.uk).

## Annex A Definition and explanation of out of remit categories

- Actions abroad other than consular functions<sup>31</sup> (parliamentary cases only)

With the exception of certain consular functions, actions taken by officers within control zones or by British sea-fishery officers, actions taken outside the UK do not fall within the Ombudsman's remit.

- Administrative action taken on judicial authority<sup>32</sup> (parliamentary cases only)

The Ombudsman can investigate the administrative actions of the administrative staff of courts in England, Wales or Northern Ireland and (generally) of tribunals when their staff are appointed by or with the consent of an organisation in jurisdiction. However, those actions cannot be investigated where the member of staff is acting at the direction of or on the authority (whether express or implied) of a judge or member of a tribunal. For example, if a tribunal chair instructed a member of the tribunal's staff not to add a particular piece of evidence to an appeal bundle.

- Alternative legal remedy achieved<sup>33</sup>

An alternative legal remedy is a remedy available to a complainant achievable through legal action.

Both the 1993 and 1967 Acts prevent the Ombudsman investigating where the aggrieved has or had a right of appeal to a tribunal or court of law: except in circumstances where it was not reasonable for the person to have resorted to that remedy. Our policy is that if the aggrieved has resorted to a court or tribunal that did (or could have but didn't) provide the full remedy, this takes the complaint out of our remit. If one has not been achieved then it could fall within our remit. Please refer to the detailed guidance and the linked case flowchart which are available in the Legal Team's Briefing Note.

- Body out of jurisdiction<sup>34</sup>

Where the organisation complained against is not within PHSO's jurisdiction. Bodies which fall within PHSO's parliamentary jurisdiction are largely listed in Schedule 2 to the 1967 Act. The types of health bodies and other health providers subject to PHSO's health jurisdiction are described in Section 2 of the 1993 Act. However, be aware that PHSO can investigate some actions taken by other parties on behalf of bodies in jurisdiction (for example, a private hospital which carries out an operation under contract to an NHS Trust). In addition, please be aware that Direct Payments for Healthcare (including Personal Budgets) mean that a

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<sup>31</sup> Sections 6(5), Schedule 3 Paragraph 2, 1967 Act

<sup>32</sup> Schedule 3, Paragraphs 6A, 6B and 12, 1967 Act

<sup>33</sup> Section 5(2), 1967 Act; section 4, 1993 Act

<sup>34</sup> Schedule 2, 1967 Act; sections 2, 2A and 2B 1993 Act

variety of non-NHS providers of services purchased with Direct Payments will fall within the remit of the Health Service Ombudsman.

When a complaint falls outside of our remit we will provide appropriate help to complainants by providing details of complaint handlers who may be able to assist them.

- Commencement/conduct of civil/criminal proceedings<sup>35</sup> (parliamentary cases only)

The Ombudsman is prevented from investigating the commencement or conduct of court proceedings (for example, a decision by an organisation in jurisdiction to use or not to use certain evidence in court). The decision whether (or not) to take proceedings is generally within remit as that is taken before proceedings are commenced (technically the decision to commence and the action of commencing are different and separate actions). Whether or not to investigate a decision to commence proceedings would therefore fall within the Ombudsman's discretion.

- Commercial/contractual matters<sup>36</sup>

In parliamentary cases the Ombudsman is prevented from investigating matters relating to commercial transactions or commercial contracts. For example, the decision of an organisation within jurisdiction to award a particular contract. The Legal Team's briefing note on this subject is focused on the parliamentary jurisdiction.

In health cases the 1993 Act contains a similar restriction but it does allow investigation of matters relating to certain NHS contracts (for example, where a health trust has contracted out service provision to an independent provider).

- Criminal investigation or national security<sup>37</sup> (parliamentary cases only)

These restrictions were intended to prevent the Ombudsman from investigating certain complaints about the investigation of serious crime or national security issues by the Home Secretary. This does not exclude the Ombudsman from investigating matters arising from the investigation of all criminal matters (for example, a department's handling of a benefit fraud investigation could be subject to investigation). A Legal Team briefing note is available.

- Exercise of judicial/legislative functions<sup>38</sup> (parliamentary cases only)

This category covers several different types of complaint. It is intended to record complaints about the actions of some organisations and individuals that are

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<sup>35</sup> Schedule 3, paragraph 6, 1967 Act

<sup>36</sup> Schedule 3, paragraph 9, 1967 Act; section 7(2), 1993 Act

<sup>37</sup> Schedule 3 paragraph 5, 1967 Act

<sup>38</sup> Section 5(1), 1967 Act

excluded from jurisdiction and also about the non-administrative functions of some organisations within the Ombudsman's jurisdiction.

For example, this category would include complaints about the actions or decisions of a judge. It would also include complaints about the actions or decisions of tribunal members (even though in such cases the actions of the administrative support to the tribunal or the judge might be investigable).

Complaints against the Pensions Ombudsman are covered by this aspect of the legislation and a specific Legal Team briefing note is available.

- Ineligible complainant<sup>39</sup>

Complaints cannot be made by local authorities, certain public organisations and certain publicly funded organisations on their own behalf. However, under the 1993 Act a public organisation may represent on behalf of an individual (this is covered by a Legal Team briefing note).

Under the 1967 Act complaints must generally relate to actions that took place while the aggrieved was resident in the UK, or while present in the UK, or relate to rights or obligations which accrued or arose in the UK. An aggrieved non-UK citizen living abroad can't complain unless it relates to a right or obligation arising in the UK. However, UK citizens with the right of abode in the UK but living abroad, may complain about the exercise of consular functions abroad. Considerations about the suitability of any complainant (whether under the 1993 or 1967 Act) will form part of the Assessment process.

- Out of remit - other

Cases closed as out of remit for other reasons

For example, if there is a complaint about maladministration, service failure or failure to provide a service but no claim of injustice/hardship flowing from the alleged fault (for example, someone who wished to complain generally that a government department was not doing a good job), then we cannot consider it. (Note however that in these circumstances the injustice may be outrage).

- Pre-1996 clinical matters<sup>40</sup> (health cases only)

The Ombudsman is prevented from investigating complaints about clinical care and treatment prior to 1 April 1996. However, clinical matters prior to that date can be investigated if part of the same action took place on or after 1 April 1996.

- Private healthcare (not NHS funded)<sup>41</sup> (health cases only)

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<sup>39</sup> Section 6, 1967 Act; section 9, 1993 Act

<sup>40</sup> Health Service Commissioners Amendment Act 1996; Commencement Order SI 1996/970 Article 2

<sup>41</sup> Sections 2 and 3, 1993 Act

The Ombudsman's powers of investigation are largely limited to the actions of those providing NHS care and treatment. (Sections 2 to 3 of the 1993 Act refer). However, NHS care and treatment can extend to private healthcare providers carrying out functions or providing services on behalf of the NHS. In addition, private healthcare can also be provided in an NHS setting. It is also possible for healthcare provided to an individual to be a mix of NHS and private care.

It should not be assumed that healthcare provided in a private setting is out of remit nor that healthcare provided in an NHS setting is automatically within remit. The circumstances of the cases in which these types of issues arise are often unique to those particular cases, and it is therefore difficult to provide general advice about them. More detailed advice about how to identify what actions of bodies and providers are within remit is provided in the Legal Team's briefing note on NHS services.

Advice should be sought on individual cases from the Legal Team where appropriate. It may also be necessary to contact the organisation or provider in question or the complainant in order to establish exactly the circumstances in which the services complained about were being provided.

All issues relating to whether the care and treatment provided falls within PHSO's remit must be resolved before a decision is taken on whether a complaint is to be investigated.

- Public service personnel matters<sup>42</sup>

The Ombudsman is prevented from investigating complaints in relation to public service personnel matters. This was intended to prevent public sector employees (including civil servants and health service employees) from pursuing grievances relating to their employment via the Ombudsman. However, NHS personnel can complain if their complaint arises from the investigation of a matter under the NHS complaints procedure. A Legal Team briefing note is available.

- Three year rule<sup>43</sup> (health cases only)

The Ombudsman is prevented from investigating the actions of health providers (whether individuals or organisations) or independent providers (again whether individuals or organisations) providing an NHS service if the complaint is made more than three years after the last day on which the provider stopped being a provider. For example, we could not look at a complaint about a GP if it was made to the Ombudsman more than three years after the GP's retirement.

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<sup>42</sup> Schedule 3, paragraph 10, 1967 Act; section 7(1), 1993 Act

<sup>43</sup> Section 9(4A and B), 1993 Act

## **Annex B Self-referrals of health complaints by health organisations**

### **Self-referral of health complaints**

Health organisations (but not GPs, dentists etc.) can refer complaints to the Ombudsman and request that we investigate. These powers are set out in the Health Service Commissioners Act 1993 (Section 10). This provision was meant to cover exceptional cases 'where an authority wishes to ensure that justice is seen to be done, or where it feels that it cannot properly investigate a complaint itself'.

In practice, these cases are few and far between and in most cases we expect the organisation complained about to have investigated and responded to a complaint in line with the NHS complaints regulations. However, we do need to be aware of the potential for referrals by health organisations and of how to consider them.

Points to consider:

- Self-referral complaints must have been made to the organisation in writing, by a suitable complainant and within one year from knowing about the issues complained about (though this time limit can be put to one side by the Ombudsman if she considers it appropriate).
- Organisations wanting to make a self-referral to the Ombudsman must do so within 12 months of receiving the complaint. We have no discretion to waive that requirement.
- The Ombudsman has discretion to decide if a self-referral is properly made. If a self-referral request is received then we should consider whether it meets the criteria set out above (made in writing, suitable complainant and in-time). Any request for a self-referral must be treated as a complaint and a decision made on whether or not to accept it for investigation. If it is unclear whether the organisation is making a self-referral (as opposed to, for example, contacting us for general advice) then we should ask them.
- Organisations should not see self-referrals as a way of passing complaints to the Ombudsman that they do not want to deal with. The types of cases which might be accepted as self-referrals include:
  - Where relations have seriously broken down between the organisation and the complainant to the extent that progress on the complaint is no longer possible.
  - Where the subject matter of the complaint is so serious (and possibly so widespread within the organisation) that it does not feel able to investigate it properly.



- We would expect the organisation, at the point at which they refer it to us, to say clearly that they are asking us to investigate the complaint and to explain why they are unable to consider the complaint, or complete their consideration.
- We normally see self-referrals as an **alternative** to the organisation investigating the complaint themselves. That is because if the organisation has already investigated then the complainant can simply be signposted to the Ombudsman to make their complaint directly. However, the law does not say that a self-referral can only be made if the organisation has not investigated. In exceptional circumstances we might accept a self-referral even if the Trust has already investigated it.

There is no requirement for the organisation to obtain the consent of the complainant before referring the matter to us. However, it is helpful if organisations can do this, because one of the first steps in our work on a complaint would be to find out if the complainant wants the Ombudsman to consider their complaint. If a self-referral is received then it should be sent to the Ombudsman's Casework Team for consideration.