

# **The Law Commission**

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## **ADMINISTRATIVE REDRESS: PUBLIC BODIES AND THE CITIZEN**

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# THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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**THE LAW COMMISSION**

**ADMINISTRATIVE REDRESS: PUBLIC BODIES AND  
THE CITIZEN**

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# THE LAW COMMISSION

## ADMINISTRATIVE REDRESS: PUBLIC BODIES AND THE CITIZEN

*To the Right Honourable Kenneth Clarke QC, MP, Lord Chancellor and Secretary of State for Justice*

### PART 1 THE ADMINISTRATIVE REDRESS PROJECT

#### INTRODUCTION

- 1.1 This Part sets out the history of the Administrative Redress project and outlines our broad policy in relation to the future of various aspects of this project, and our consultation paper *Administrative Redress: Public Bodies and the Citizen*.<sup>1</sup>
- 1.2 This report brings to a close the state liability aspects of the Administrative Redress project.
- 1.3 This project was notable in that the key stakeholder – Government – was firmly opposed to our proposed reforms. This opposition was expressed both in the formal response and in discussions at both ministerial and official level. Government's formal response was a single document agreed across Government. This is extremely unusual, if not unique, in recent times.
- 1.4 Fundamental to our approach to this project was an acceptance that we needed to consider the extent to which any reforms might divert resources originally allocated for public purposes to individuals as compensation payments. Our approach sought to achieve the appropriate balance between the interests of those seeking redress and any effect this process may have on public bodies.
- 1.5 One of the ways in which we sought to address this issue was to seek to create a dataset outlining the current compensation position of public bodies. This would have been the first stage of a quantitative analysis of the effect that any reforms might have had. In the course of attempting this, we discovered that obtaining even basic figures for the current compensation position of public bodies proved impossible. We do not think there is any justification for this reporting gap. First, we suggest that such figures should be collected in order for public bodies to fulfil their duties of accountability and transparency. Secondly, in the specific context of this project, the lack of such figures made it extremely difficult to rebut the concerns of certain consultees – particularly Government – relating to the presumed effect of our proposals.
- 1.6 In light of this, we feel that it is impractical to attempt to pursue the reform of state liability any further at this time.

<sup>1</sup> *Administrative Redress: Public Bodies and the Citizen* (2008) Law Commission Consultation Paper No 187 (hereafter CP 187).

- 1.7 This project highlighted an important deficiency in the current reporting practice of expenditure by public bodies, which it would be in the public interest to resolve. Consequently, we have decided to make two recommendations in relation to data collation and reporting by public bodies. These build on our experience in this project.
- 1.8 We also state our intention to do more work on ombudsmen.

## HISTORY OF THE PROJECT

### Initial project

- 1.9 The project on remedies against public bodies appeared in the Ninth Programme of law reform, published in March 2005. The origins of the project went back substantially further. At the annual Government Legal Service conference on Developments in Administrative Law in March 2003, Michael Fordham QC identified as a lacuna the (general) inability of the Administrative Court to award damages in judicial review, and suggested that this would be an appropriate area for the Commission's attention.<sup>2</sup>
- 1.10 Fordham's paper led to consideration within the Commission, the result of which was a team paper published in October 2004 under the title *Monetary Remedies in Public Law*. That, in turn, was followed by a seminar in November 2004, attended by senior judges, academics, ombudsmen and others. The broad thrust of that seminar was that our concentration on monetary remedies in judicial review – evident in our discussion paper – was too narrow. There was also concern expressed that we were not dealing sufficiently with non-court mechanisms and broader views of redress.
- 1.11 The Ninth Programme made provision for a scoping paper, published under the title *Remedies against Public Bodies: A Scoping Paper* in October 2006. It set the broad parameters of the project as it has developed since. We took the view that the focus had to be on monetary remedies, rather than seeking to reform every avenue of redress available to a citizen aggrieved by administrative action. However, monetary remedies could only be seen in the context of other remedial options. Importantly, we accepted the need for a broad approach, considering both monetary remedies in judicial review and the availability of monetary remedies in tort concurrently.
- 1.12 Building on the scoping paper, our consultation paper *Administrative Redress: Public Bodies and the Citizen* was published on 3 July 2008.<sup>3</sup> The consultation period closed on 7 November 2008. As this project generated substantial professional and academic interest, we were able to conduct several seminars whilst preparing the consultation paper, including two at the London School of Economics. During the consultation period itself, we also benefited from seminars organised by the British Institute of International and Comparative Law and the University of Liverpool.

<sup>2</sup> Subsequently published as M Fordham, "Reparation for Maladministration: Public Law's Final Frontier" [2003] *Judicial Review* 104.

<sup>3</sup> CP 187.



## **The consultation paper**

- 1.13 Our consultation paper was guided by two overarching principles. The first was that, as a matter of justice, claimants should be entitled to obtain redress for loss caused by clearly substandard administrative action. The second was that special consideration should be given to the role played by public bodies when considering when and under what terms they should be liable for such losses.
- 1.14 Our discussion of redress analysed the various mechanisms currently available for aggrieved individuals. These mechanisms were divided into four broad pillars of administrative justice. The first pillar consisted of internal mechanisms for redress, such as formal complaint procedures. The second pillar was composed of external non-court avenues of redress, such as public inquiries and tribunals. The third pillar consisted of the public sector ombudsmen. Finally, the fourth pillar was formed by the remedies available in public and private law by way of a court action.
- 1.15 We suggested that whilst the vast majority of complaints are handled effectively within the first three pillars, there is a comparatively small number of “residual” complaints where the involvement of the courts is necessary.
- 1.16 The analysis of court-based remedies was divided between those available in judicial review and those available in private law. In private law, the primary focus was on negligence. However, we also considered the current operation of the torts of misfeasance in public office and breach of statutory duty.
- 1.17 In judicial review, we suggested that it is unjust that damages are available in situations covered by EU law and by the Human Rights Act 1998 but are seldom available in other situations solely covered by domestic law.
- 1.18 In private law, we suggested that the current system was untenable. The uncertain and unprincipled nature of negligence in relation to public bodies, coupled with the unpredictable expansion of liability over recent years, has led to a situation that serves neither claimants nor public bodies. Furthermore, recent developments in the tort of misfeasance in public office have rendered its continuance of limited value and inappropriate as a cause of action. Breach of statutory duty is not a suitable cause of action in relation to most forms of administrative wrong-doing.
- 1.19 In light of this, we argued in favour of the reform of court-based administrative redress in both public and private law. In developing the structure of potential reform, we drew heavily on a principle of modified corrective justice outlined in Appendix A of the consultation paper. The “modification” in “modified corrective justice” was intended as a principled recognition of the special position of public bodies, which attenuated the full force of corrective justice as it applies between private individuals.
- 1.20 We provisionally proposed the reform of court-based redress in both public and private law. This would have led to the creation of a specific regime for public bodies based around a series of individual elements. At the core of these individual elements was a requirement to show “serious fault” on the part of the public body, rather than merely – on the public side – illegality or – in tort – negligence.

- 1.21 Additionally, we suggested that damages should be available only if the statutory regime, within which the public body's decision was made, was objectively there to confer a benefit on the relevant class of individuals. The normal rules of causation would also act as a control mechanism for liability. However, an award of damages was to serve only as an ancillary remedy in judicial review, to be claimed alongside the prerogative remedies. In keeping with other remedies available in judicial review, it was suggested that damages should be discretionary.
- 1.22 In private law, we provisionally proposed placing certain activities – those which can be regarded as “truly public”- within a specialised statutory scheme. Within this scheme, the claimant would have had to satisfy the same requirements as the public law scheme in order to establish liability. The general effect of these reforms would have been to restrict liability in some areas and widen the potential for liability in others. Cases which did not satisfy the “truly public” test would have been determined under the normal rules of tort law.
- 1.23 The other significant suggested reform was to modify the operation of the general rule of joint and several liability, which can operate in a particularly unjust way as it applies to public bodies. For example, a failure in a public body's regulatory oversight is often not the direct cause of the claimant's loss – which may be the wrongdoing of another – but the public body, if found liable at all, will have to bear the loss in its entirety. Allowing for a relaxation of the rule where the respondent is a public body would allow for an equitable apportionment of damages.
- 1.24 The object of our provisional proposals was to improve the public and private law systems so as to ensure that they appropriately reflect the special nature of public bodies and balance those considerations with the interests of claimants.
- 1.25 However, improving the court-based system is only part of this project. The other significant part is to facilitate the resolution of cases through non-court mechanisms. This led us to consider the operation of the public sector ombudsmen – primarily the Parliamentary Commissioner for Administration, the Local Government Ombudsman and the Public Services Ombudsman for Wales.
- 1.26 We saw the public sector ombudsmen as a vital pillar of administrative justice. While internal complaint mechanisms resolve a huge number of individual cases, the ombudsmen can undertake large-scale investigations into systemic issues and make findings and recommendations that can effect widespread administrative change. Consequently, the ombudsmen can play a crucial role in improving administrative action to the benefit of both public bodies and claimants.
- 1.27 Within the context of the court-based approach that the project adopted, our analysis focused on access to ombudsmen and the need to ensure the appropriate allocation of cases between courts and ombudsmen.
- 1.28 As we outline later in this report, the continued growth in the importance of ombudsmen and certain recent developments mean that we now subscribe to a wider view as to possible reform of the ombudsmen.

### **Consultation responses**

- 1.29 First, there were the responses to our proposed reforms concerning the availability of monetary remedies in judicial review. In general, these were critical of the elements of our proposed scheme, rather than the overall proposition that there was a gap in the current system which the courts should be enabled to fill.
- 1.30 Second were those responses addressing our proposed reforms to private law. These were almost universally negative. In broad terms there were three elements to this. A large number of consultees disagreed with our analysis of the current law and the assertion that it is unprincipled and in need of reform. Many consultees disagreed with the underlying premise to our proposed reforms, that public bodies should be treated differently to private individuals in certain circumstances. This, it was frequently asserted, undermined a basic principle of the law of England and Wales: that public bodies and private bodies should be treated alike. A substantial number of consultees also stated that the elements of our proposed regime were unworkable and unsuited to the law of England and Wales.
- 1.31 Many consultees, and Government in particular, drew attention to the fact that we were unable to construct a dataset showing the potential quantitative effects of our provisional proposals.
- 1.32 Third were those that considered our provisional proposals in relation to ombudsmen. Generally these were favourable.

### **THE FUTURE OF THE PROJECT**

- 1.33 This report considers the responses to our consultation paper and sets out the future direction of this project. Broadly speaking, we have reached the following conclusions.

#### **Judicial review**

- 1.34 In relation to judicial review, we do not think that the criticisms levelled at the provisional proposals are insurmountable. Furthermore, the issues that the consultation paper addressed will continue to be of vital importance for those involved in this area of the law and we still suggest that the area would benefit from a broader approach than the current mechanisms allow.

#### **Private law**

- 1.35 In relation to private law, the criticisms made of our proposals were more extensive. Many consultees did not think the wide-ranging proposals that we made were either warranted or practicable. In consultation, we failed to convince others of the value of our reforms, and this suggests that there is no practical benefit to taking these forward.
- 1.36 This report aims to explain how we came to our conclusions and deal with the salient criticisms levelled at our provisional proposals. In doing so, we are seeking to encourage further debate, rather than merely setting the record straight from our perspective.

## **Reporting**

- 1.37 With the assistance of officials in HM Treasury, we sought to construct a dataset showing the potential effect of our proposals. This proved to be impossible. Under the current reporting requirements, it is not even possible to establish authoritatively the current level of compensation paid out by public bodies.
- 1.38 Disseminating information on the flow of public money is at the core of accountability and transparency. Given the importance of this issue, we will be making two recommendations.

## **Ombudsmen**

- 1.39 In relation to ombudsmen, consultation responses were broadly in favour of our proposals. However, our original approach to the reform of ombudsmen was slightly limited by the primary focus on court-based mechanisms.
- 1.40 Having received consultation responses and discussed further issues relating to ombudsmen with the Local Government Ombudsman, the Parliamentary Commissioner for Administration and Government, we think that more work is needed in developing this topic. Particularly, we can see value in exploring ombudsmen issues separately to the original focus of the Administrative Redress project.
- 1.41 Therefore, we will be holding a second round of consultation on further proposals, which will be set out in a separate consultation paper to be published later in 2010.

## **THIS REPORT**

- 1.42 This report is split into four Parts subsequent to this one.
- (1) Part 2 revisits the availability of monetary remedies in judicial review.
  - (2) Part 3 considers responses made concerning our private law reform proposals and brings to a close this aspect of our project.
  - (3) Part 4 considers the effect of liability on public bodies and issues in relation to data collation and publication.
  - (4) Part 5 analyses the responses made to our ombudsmen proposals and suggests how we will be taking those aspects of the Administrative Redress project forward.
- 1.43 In addition to this report, we are also publishing (in electronic form) a more detailed Analysis of Consultation Responses.<sup>4</sup> This sets out more comprehensively the responses we received to our provisional proposals.

<sup>4</sup> Available at: [www.lawcom.gov.uk/remedies.htm](http://www.lawcom.gov.uk/remedies.htm).

# **PART 2**

## **JUDICIAL REVIEW**

### **INTRODUCTION**

- 2.1 In our consultation paper, we proposed – given the state of the current law – expanding the availability of judicial review such that:
- (1) the availability of damages in judicial review should be coherent; and
  - (2) unjust gaps in the current regime would be removed.
- 2.2 Specifically, we proposed that damages should be available as an additional remedy in judicial review where the claimant could show “serious fault” in the behaviour of the public body. Our proposed damages remedy would have retained the general approach to remedies in judicial review and would have been discretionary.
- 2.3 In addition to serious fault, we suggested that the availability of a damages remedy should be further limited to situations where the underlying statutory or common law regime conferred some form of benefit. This benefit could have been either procedural or substantive but must have been of a similar nature to the harm suffered by the claimant.
- 2.4 Finally, though normal rules relating to damages – including causation and amount – were to apply within our proposed scheme, there was a good argument for altering the general rule on joint and several liability. This was to apply only to public bodies in the context of our proposed schemes in public and private law. As our proposals relating to joint and several liability were most applicable in the private law context, we will discuss them fully in Part 3.
- 2.5 This Part examines consultation responses and puts forward our final thoughts on the judicial review aspect of the project. In doing so we have divided our analysis into two sections. First, we consider consultation responses and whether we still think there is a case for reform. Second, if there is a case for reform, we ask what would be the appropriate approach for it to take.

### **CONSULTATION RESPONSES AND THE CASE FOR REFORM**

#### **Analysis of consultation responses to our basic proposal for the wider availability of monetary remedies in judicial review**

- 2.6 The suggestion that a wider, but still discretionary, monetary remedy should be available in judicial review was met generally with either a mixed or favourable response. Fifteen consultees were in favour of some reform. However, though agreeing in principle, many of these did disagree with the extent of the proposal or raised concerns as to its possible consequences.

### **Positive consultation responses**

- 2.7 The Bar Law Reform Committee and ALBA accepted the existence of injustice in relation to judicial review. Michael Fordham QC and Professor Duncan Fairgrieve,<sup>1</sup> who have both advocated reform in this area for some time, supported the creation of a wider power to award damages,<sup>2</sup> as did Tom Hickman. Professor David Feldman<sup>3</sup> also thought that the reforms addressed an area where real injustice can occur. Tom Cornford<sup>4</sup> agreed that the proposal would close an “undesirable lacuna” in the current law.
- 2.8 The Parliamentary and Health Service Ombudsman considered that the payment of compensation “focuses the minds of public servants and leads to real learning and real improvements in public services”. Whilst our proposal is chiefly designed to introduce consistency in the law relating to redress for damage caused by public bodies, where this results in better administrative practice this is, of course, of benefit to both public bodies and those who could be affected by substandard administrative behaviour. As we argue in Appendix B, the imposition of liability does not necessarily lead to an improvement in service provision, as there are a wide range of factors in play. However, in some circumstances it can.

### **Negative consultation responses**

WIDER MONETARY REMEDIES ARE INCONSISTENT WITH THE NATURE OF PUBLIC LAW

- 2.9 There were some consultees who disagreed vigorously with the proposal that a wider availability of monetary remedies could or should be introduced in judicial review cases.<sup>5</sup> They opposed the suggestion to allow individuals to claim damages where no private right had been infringed. Such responses drew a sharp distinction between the rights that arise from a public duty, which are owed to the world at large, and private rights that are protected in tort.
- 2.10 During questions following the Bar Law Reform Committee Lecture in 2009,<sup>6</sup> Lord Hoffmann accepted that, if it was felt that private law did not deal properly with public bodies, then there would be a case for widening the availability of damages in judicial review. However, he believed that private law does, in fact, deal appropriately with public bodies and therefore there was no need to reform this area.
- 2.11 The Association of Police Lawyers suggested that allowing wider claims for damages in judicial review would undermine the review nature of the Administrative Court.

<sup>1</sup> British Institute of International and Comparative Law and Institut d’Études Politiques de Paris.

<sup>2</sup> See M Fordham, “Monetary awards in judicial review” [2009] *Public Law* 1.

<sup>3</sup> University of Cambridge.

<sup>4</sup> University of Essex.

<sup>5</sup> For example: Government, Professor Stevens and Lord Hoffmann.

<sup>6</sup> Lord Hoffmann, *Reforming the Law of Public Authority Negligence* at the Bar Council Law Reform Lecture, 17 November 2009, available at <http://www.barcouncil.org.uk/news/OtherSpeechesofInterest/> (last visited 21 April 2010).

- 2.12 Professor Robert Stevens,<sup>7</sup> in his response, argued that allowing individuals to claim compensation for the infringement of public duties, rather than a private right, would be the same as allowing individuals to claim compensation for injuries caused to another (such as allowing a child to sue for injury caused to their father). Along with others, he suggested that damages should be limited to situations where a right was infringed giving rise to a secondary right to damages.
- 2.13 Professor Stevens' restriction of the availability of damages to situations where there is a private law equivalent seems to be based on an assumption of the applicability of private law concerns in the public law sphere. His approach does not take into account sufficiently the way that remedies work in public law. The infringement of a right – be it a private law one, one founded in the Human Rights Act 1998 or in EU law – does not then lead to a right to damages. Public law remedies are available not as of right but are discretionary in their nature. So, even where the Administrative Court is satisfied that there may have been a successful private law action, section 31(4) of the Senior Courts Act 1981 provides that a court “may award damages”.
- 2.14 The essential point is that a rights-based model for the availability of damages in public law does not necessarily work. The current regime allows damages to be restricted where public law concerns lead the court to find this appropriate. Given that the current regime allows for such factors to be taken into account, we thought it better to consider a more holistic approach, rather than one limited to a potentially misguided search for private law “equivalence”.
- 2.15 Our consultation paper sought to ensure that the legal regime reflected the reality of the interaction between individual citizens and public bodies in a balanced and principled way. There are certain situations where a monetary remedy could be justified where there is no private law equivalent, nor an infringed right under either the Human Rights Act 1998 or in EU law. The classic example is the licensing case, where the ability to work in a market is contingent on the possession of a licence which a public body illegally removes. Under the current regime, there is no payment of compensation to make good this illegality.<sup>8</sup> There seems to us no just reason why, following a finding of public law illegality, damages should not be available merely because there is no “right” that has been infringed.
- 2.16 As we outlined in our consultation paper and explore below, the Administrative Court already has the power to grant a monetary remedy.<sup>9</sup> Under our proposals, compensation would only be awarded in circumstances where the court has judged that the decision of a public body was outside the scope of those lawfully available to it *and* that damages are appropriate on the facts of the case. The grounds of review would still have to be made out.
- 2.17 We do not accept that our proposal alters the nature of the action as presently constituted – it merely applies a more coherent approach to the availability of remedies where administrative illegality is made out.

<sup>7</sup> University College London.

<sup>8</sup> See for instance *R v Knowsley Metropolitan Borough Council ex parte Maguire* [1992] COD 499.

<sup>9</sup> Senior Courts Act 1981, s 31(4).

## THE RISK OF INCREASED DELAYS

- 2.18 Several consultees were worried that the wider availability of monetary remedies might increase delay, and therefore costs, in the Administrative Court. Government argued that awarding compensation would necessitate a detailed assessment of facts, and this was likely to result in “cases spending additional time before the courts”. Professor Colin Reid suggested that this delay might create administrative uncertainty.
- 2.19 Considering the structure of judicial review as a whole, we are not convinced that the fears of increased delays are well founded. A procedure for the payment of damages already exists, as there is already the possibility of an award in judicial review. Under our basic proposal, a claimant could only apply for damages as ancillary to the prerogative remedies. The CPR 54 procedure would therefore apply, as in existing actions where damages are payable, and the substance of a claimant’s application would be heard and judged in the usual way. The consideration of ancillary damages would then be undertaken either in the context of normal review proceedings or in a separate hearing subsequent to these. We are not convinced that this procedure would lead to administrative uncertainty, as the primary task of assessing and ruling on the potential public law illegality would have to be done before any consideration of damages would be undertaken.
- 2.20 We do accept that our proposals might lead to a slight increase in the length of litigation, where the court felt it appropriate to hold a “serious fault” hearing subsequent to the main judicial review. However, this would only occur in cases where a claimant had succeeded in the merits hearing of the judicial review *and* it was thought that a subsequent hearing on “serious” fault was necessary. Given the analysis that we undertook in our consultation paper, we do not think that this would be a large number of cases.<sup>10</sup>
- 2.21 It is in relation to separate hearings on “serious fault” that we recognise potential arguments in favour of a purely discretionary award, as is already possible under section 8 of the Human Rights Act 1998 – though admittedly that power does not seek to “compensate” individuals.<sup>11</sup>
- 2.22 Calculation of the amount of damages to be awarded should be no more difficult than the calculation of damages already undertaken in some judicial review cases. Therefore, we do not think this is a major difficulty within our proposed scheme.

## INCREASED FINANCIAL BURDEN ON PUBLIC BODIES

- 2.23 Several consultees were concerned about the increased financial burden on public bodies that would result from the imposition of compensation. In particular, Government felt that our proposals risked creating the impression of a “general right to financial redress” which would over-emphasise the rights of individuals to the detriment of society as a whole. They put this in the context of avoiding the creation of a “compensation culture”.

<sup>10</sup> CP 187, paras 4.155 to 4.166, 6.20 to 6.21 and Appendix C.

<sup>11</sup> See *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin), [2003] HRLR 4, considered in greater depth below.



2.24 The concerns of Government, although unquantified, have some force. However, without data being more easily accessible than is currently the case, it is hard to assess the extent to which such concerns are justifiable in the context of our proposed reforms.

2.25 Government also felt that our proposal would decrease the likelihood of settlement. In particular, it stated that:

A public body will often be willing to settle where it is clear that a claimant has good grounds for judicially reviewing its decision. But where a claim for damages is also made under the new scheme, the public body might well be more reluctant to admit wrong doing of any kind.

2.26 The Public Law Project also suggested that the wider possibility of monetary remedies might have a detrimental effect on settlement.

2.27 We accept that there is an argument that the potential award of damages might discourage settlement. It is equally possible that the risk of losing a case involving damages could encourage settlement. What is obviously true is that settlement already occurs in other actions where damages are the primary remedy. Finally, given the potential injustice of the current system, we think that there may be an argument in favour of the reform even if it did lead to fewer settlements.

2.28 We accept that imposing a monetary remedy would necessarily increase the financial burden on public bodies in judicial review cases. However, we feel that this would be justified in the context of seeking to balance coherently and justly the competing interests of public bodies and citizens.

2.29 We do not feel that the possibility of obtaining compensation will give rise to “speculative” litigation. Damages would only be awarded where there is a finding of illegality against a public body and as an ancillary remedy. In addition, we proposed that the “conferral of benefit” and “serious fault” tests should be used as “gatekeepers” to damages claims. It is therefore unconvincing to claim that claimants would be encouraged to undertake legislation without strong grounds for considering that they are entitled to a remedy and are likely to clear the permission stage in judicial review.

2.30 As Harlow and Rawlings put it, albeit in the context of reforming the availability of damages in general from public bodies,

The ability to award damages ... is a crucial tool in the judicial toolkit and a symbol of subjection of the state to the rule of law.<sup>12</sup>

2.31 We are still of the opinion that, in judicial review, this is a tool whose availability is lacking any coherent sense.

<sup>12</sup> C Harlow and R Rawlings, *Law and Administration* (3rd ed 2009) p 793.

### **Given consultation responses, is there still a case for reform?**

2.32 In considering whether there is still a case for the reform of monetary remedies in judicial review, this section addresses two basic questions.

- (1) What are the functions of judicial review?
- (2) Does the current regime fulfil these functions satisfactorily?

### ***What are the functions of judicial review?***

2.33 Here we explore the proper extent of judicial review in further detail, suggesting that to limit the availability of monetary awards in the way suggested by some consultees is neither necessary nor incontrovertible.

2.34 Judicial review is essentially a challenge to the *legality* of an administrative decision.<sup>13</sup> Consequently, judicial review can ensure that those taking decisions founded in public law stay within the boundaries ascribed to their decision-making, either by Parliament or by operation of the common law.

2.35 In doing this, judicial review allows a certain class of people – those with a “sufficient interest” in the decision – to bring an action challenging that decision.<sup>14</sup> This does not *require* loss or harm to have been suffered.

2.36 The clearest example of those with “sufficient interest” can be seen where the decision is addressed to the claimant and this deprives them of the use of something, such as a licence, or interferes with an otherwise lawful activity.

2.37 However, in recent years, the test for “sufficient interest” has been expanded to include interest groups where it would be almost impossible to show that they suffered any harm as a result of the impugned decision.<sup>15</sup> The logic for this was put succinctly by Lord Diplock in the *Fleet Street Casuals* case:

It would, in my view, be a grave lacuna in our system of public law if a pressure group ... or even a single public spirited taxpayer, were prevented by outdated technical rules of [standing] from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.<sup>16</sup>

2.38 It is manifest in the remedies available to the courts when considering an application, that judicial review focuses on the legality of a decision. The orders challenge the validity of the original decision, rather than seeking to provide for *compensation* to be paid to an individual.

<sup>13</sup> P Craig, *Administrative Law* (6th ed 2008) ch 1.

<sup>14</sup> For the debate on standing rules, see H Woolf, J Jowell and A Le Sueur, *De Smith's Judicial Review* (6th ed 2007) paras 2-001 to 2-005; and P Craig, *Administrative Law* (6th ed 2008) paras 24-027 to 24-040.

<sup>15</sup> Possibly the furthest extent of this is demonstrated in *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement* [1995] 1 WLR 386. Here the World Development Movement challenged the financing of the Pergau Dam, which was to be built in a different country.

<sup>16</sup> *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644.

- 2.39 Many justifications have been put forward for the non-payment of compensation. One frequently espoused is that ordering the payment of compensation would require the court to substitute their judgment as to what would have been the right decision for that taken by the public body. Whilst it is possible to show certain decisions were illegal, in many instances this is very different from deciding what should have been the correct decision.
- 2.40 In its response to our consultation paper, Government expressed the view that the fundamental function of redress mechanisms is to improve service delivery. Such an approach is also espoused in the Government Green Paper, *Rights and Responsibilities*.<sup>17</sup> Particularly, we consider that one of the functions of judicial review is to show where there has been a systemic failure and highlighting where lessons can be learnt, thereby promoting “good administration”. However, we do not think that this is its only – or even primary – function. Judicial review has a remedial function of at least equal importance to the role it can play in improving service delivery.
- 2.41 As we stated briefly above, in fulfilling this alternative function of judicial review, that of remedying injustice, the Administrative Court has a residual power allowing for the payment of a monetary award. This power is currently only available on a limited basis, such that the claimant must show that:
- (1) they have a private law right to compensation;
  - (2) the claim is a state liability claim in EU law; or
  - (3) damages are the appropriate remedy under section 8 of the Human Rights Act 1998.
- 2.42 The first of these situations exists to stem the obvious injustice of preventing the courts from making an award where one would be available in a private law action – for example, in an action for false imprisonment. A claimant would then be forced to launch two separate actions: one in public law challenging the administrative decision and another one in private law seeking compensation. This would be an undesirable result for courts, claimants and defendants alike.
- 2.43 This limited sphere of recovery is overshadowed by two developments in the latter half of the twentieth century that have changed the nature of judicial review profoundly. First is the UK’s membership of the European Union. Second is the entry into force of the Human Rights Act 1998. We consider each in turn.

<sup>17</sup> *Rights and Responsibilities: developing our constitutional framework* (2009) Cm 7577, paras 3.39-3.46.

## DAMAGES IN EU LAW

- 2.44 Under EU law, an action for damages is undoubtedly available to ensure the effective implementation and enforcement (*l'effet utile*) of provisions of EU law. However, the European Court of Justice has made it equally clear, in consistent case law, that the primary purpose of EU law is to protect individuals and, in certain circumstances to afford them enforceable rights. Starting with *Francovich*<sup>18</sup> but continuing in subsequent cases,<sup>19</sup> the Court has developed state liability as a way of ensuring the application of these principles across member states.<sup>20</sup> In so doing, the European Court of Justice effectively uses an action for damages to achieve similar ends to those we ascribe to judicial review.
- 2.45 This development has meant that the Court of Justice introduced UK courts to a very different approach, one which includes the award of damages as a vital component. Of course, even in the circumstances of EU law, a state liability action is part of a larger action. In the *Factortame* litigation for example, whilst damages were sought in subsequent applications, the primary application to the Court was for the *disapplication* of the provisions of the Merchant Shipping Act 1988.<sup>21</sup> Such an action is, at its core, one far more suited to the orders available in the Administrative Court. In this sense it can be seen that *one* function of the award of damages is to ensure the application of EU law, but another, equally important function is the compensation of those who suffer harm as a result of a member state's failure to do this.

## THE HUMAN RIGHTS ACT 1998

- 2.46 Possibly a wider change came with the entry into force of the Human Rights Act 1998. Section 8 of that Act provides that, where a court "is satisfied that the award [of damages] is necessary to afford just satisfaction to the person in whose favour it is made", then it can make such an award against a public authority. The effect of this is to create a specific damages regime, solely applicable to public authorities as defined under the Act. This is applied where a public authority has acted unlawfully in the terms of section 6 of the Human Rights Act 1998, breaching one or more of the "convention rights" contained in section 1 of that Act.
- 2.47 The operation of the Act can be seen in *R (Bernard) v Enfield London Borough Council*.<sup>22</sup> Here the claimant was awarded damages for the 20 months that she was assigned clearly substandard accommodation. Holding that tortious awards were not the proper guide to the award of damages under the Human Rights Act 1998 and that there was no tort equivalent in the instant case, Mr Justice Sullivan (as he then was) held that awards made by the Local Government Ombudsman would provide useful guidance. Local Government Ombudsman awards do not

<sup>18</sup> Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

<sup>19</sup> Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany* [1996] ECR I-1029.

<sup>20</sup> See P Craig and G de Burca, *EU Law: Text, Cases and Materials* (4th ed 2007) ch 9; and P Craig, *EU Administrative Law* (2006) ch 21.

<sup>21</sup> See *R v Secretary of State for Transport ex parte Factortame* (No 2) [1991] 1 AC 603.

<sup>22</sup> *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin), [2003] HRLR 4. This approach was approved in *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124.

follow the same rules as awards made in the law of torts.

- 2.48 We set this out in broad terms to show how the provision of a monetary remedy now forms part of the functions of a court in judicial review. As we set out in our consultation paper, it only does this in certain areas.

***Does the current regime fulfil these functions satisfactorily?***

- 2.49 In our consultation paper we asserted that there was a case for reforming the availability of damages in judicial review. We did this on the basis of an assertion that the current regime was unfair and did not allow courts to make a monetary award in all circumstances where justice would suggest that it was necessary. There are two, related, points here. First that there are gaps in the current legal regime. Second that the current regime does not take into account properly the reality of judicial review claimants.

THERE ARE GAPS IN THE CURRENT LEGAL REGIME

- 2.50 We suggest that the current regime has significant gaps in it. Damages are available in situations where there would be a right to them in private law, where a breach of EU law gives rise to an action for damages or under section 8 of the Human Rights Act 1998.
- 2.51 There are, to us, important situations where the award of damages might be considered appropriate in the interests of justice. The classic example – and one which we have outlined before – is the illegal removal of a licence. Here a licence, which is necessary for the carrying on of a particular economic activity, is removed from an individual – for instance a taxi driver or street trader. Whilst judicial review can address the illegality of such a decision by annulling it, it cannot presently put the claimant back in the position that they would have been in had the illegal action not been carried out. The court cannot award damages to compensate for the loss of earnings between the decision to remove the licence and the judgment rectifying the illegality of that decision. We explore this in greater detail below, when considering specific consultation responses.
- 2.52 Despite the criticisms of some consultees,<sup>23</sup> we maintain the view that it is the function of judicial review to provide such a remedy. We accept that the award of damages is not the *primary* function of judicial review, and that the function of judicial review may not have traditionally included the award of damages. However, in light of recent developments in judicial review, as outlined above, it is unsustainable to argue that this is a good basis to continue to refuse damages to claimants. Outside of the private law equivalent, damages are already available where the illegality was due to a breach of EU law or where there was a breach of the “convention rights” enumerated in section 1 of the Human Rights Act 1998. Therefore, we suggest that the law should approach the question as to whether damages should be available in a more coherent manner.
- 2.53 We accept that in both those actions damages are not “as of right”, as is the case in private law actions. Instead, they are discretionary or – in terms of section 8 of the Human Rights Act 1998 – awarded where “necessary”. In our proposals we specifically stated that, in judicial review, damages awards should continue to be

<sup>23</sup> For example: Government and Professor Stevens.

discretionary. What is important to note is that damages *are* currently available in certain circumstances but not others.

#### THE REALITY OF JUDICIAL REVIEW CLAIMANTS

- 2.54 The reality of the situation is that the majority of judicial review claims are individual applications made by aggrieved citizens seeking relief from illegal administrative behaviour.
- 2.55 Though improved service delivery is a desirable consequence of judicial review, it is not the primary driver for the majority of litigation. It is a fiction to suppose otherwise. If it were the case that actions were brought solely by those trying to promote service change, or some other action of wider public benefit, then the gaps in the remedial structure outlined above would be less problematic. However, this is not the case.
- 2.56 Given that the gaps do exist and that the majority of claims are by those seeking some form of appropriate remedy, we incline to the belief that the regime facing them should acknowledge this. In some cases this means that monetary awards should be awarded in a wider range of circumstances than is presently the case. Simply put, in certain situations no other award will remedy the injustice suffered by the individual claimant.

#### THE APPROPRIATE APPROACH TO REFORM

- 2.57 In this section, we consider two interrelated topics.
- (1) Can limits be placed on the award of damages payable by public bodies in judicial review and, if so, how?
  - (2) Consultation on our proposed scheme.

#### **Can limits be placed on the award of damages payable by public bodies in judicial review and, if so, how?**

- 2.58 We have defended our view that damages should be available in judicial review cases. This issue then turns on a basic question as to whether damages should be available in all cases where a public law illegality has led to monetary loss on the part of a claimant. Alternatively, the scheme could be more restrictive than this.
- 2.59 In our consultation paper, we came to the conclusion that it would be inappropriate for damages to be available in all circumstances where a public law illegality, the *wrong* in this area of law, led to loss on the part of the claimant. In Appendix A of our consultation paper, we explored the possibility of refashioning the general private law concept of corrective justice, so that it took into consideration what we saw as the special position of public bodies. This we labelled “modified corrective justice”. It should be noted that this theoretical concept attracted a high degree of criticism. However, acceptance of “modified corrective justice” is not a condition of the reforms which we put forward; it was merely a tool to give a theoretical foundation to our reaction to failures in the current regime.

- 2.60 Many private lawyers argued in favour of an extremely restrictive approach to damages in public law.<sup>24</sup> They advocated that the law should continue to provide compensation in cases only where there is a private law equivalent to the action pursued (we discussed this type of situation above), or where damages are available under the terms of the Human Rights Act 1998 or EU law.
- 2.61 As we outlined above, we do not think that this is a sustainable argument. We remain convinced that the availability of damages in judicial review should be wider than is presently the case, so as to fulfil properly all the functions of judicial review. We do think that there are good grounds for shielding, in certain circumstances, public authorities from liability for causing damage. In essence, these grounds rest on the particular financial position of public bodies and the particular framework within which they exist. If this premise is accepted, the next logical subject for discussion is the way in which public bodies should be protected. There are two options available:
- (1) limiting the *range of circumstances* in which public bodies are *liable* for causing damage;
  - (2) limiting the *amount* of damages available from public bodies for causing damage.
- 2.62 We recommended limiting the availability of damages by the range of circumstances in which damages could potentially be payable.
- 2.63 Many consultees agreed with the expansion of the availability of damages in judicial review and that there should be mechanisms for their limitation. However, rather than our suggested approach, they suggested alternative ways in which to go about this. It is necessary to consider them before moving on to the elements of our proposed scheme.
- 2.64 The Public Administration Select Committee agreed that introducing a monetary remedy in judicial review cases would encourage the development of better administrative practices. However, they were also concerned that the burden on public bodies could be untenable in circumstances where the damages sought were particularly large, or extended to a large class of claimants.
- 2.65 Essentially, there were two basic approaches adopted by consultees for limiting damages.
- 2.66 First, there were those who suggested discretion as to the availability of the award. Tom Cornford proposed that our regime should be replaced with “a power to withhold damages where to grant them would stultify the performance of the defendant authority’s functions”.

<sup>24</sup> Public lawyers also disliked the concept, but for a wider variety of reasons. For instance, some (especially Tom Cornford) thought it did not recognise sufficiently the public law nature of public bodies and sought to import private law ideas into the relationship between public bodies and citizen claimants.

- 2.67 There were also those who suggested a purely discretionary remedy,<sup>25</sup> or one based on section 8 of the Human Rights Act 1998.<sup>26</sup>
- 2.68 Second, there were those who thought that there should be limitations as to the amount awarded, such that the normal rules for the calculation of damages need not apply in all circumstances.
- 2.69 The Public Administration Select Committee suggested that one way of preventing large financial claims would be to give the Administrative Court discretion to cap monetary claims in these cases.
- 2.70 A less discretionary option to that suggested by the Select Committee would be to impose specific damages caps within the general remedies scheme. However, examples in other jurisdictions of damages caps demonstrate that such caps are problematic, and their existence can lead to significant injustice.<sup>27</sup>
- 2.71 In relation to specific caps, it does not seem to us prudent to change the rules relating to the calculation of damages in such an intrusive and formulaic way solely because the defendant is a public body. The concept of a public body encompasses a wide range of actors and the effect of damages may vary considerably due to the particular identity of the defendant public body.
- 2.72 Therefore, of the two suggestions relating to the amount of the award, the more discretionary approach suggested by the Public Administration Select Committee seems preferable.
- 2.73 However, with the exception of the discretionary remedies suggested by Fordham and Hickman, it could be argued that these approaches focus overly on the nature of the defendant public body and its resources rather than the quality or nature of the injustice. Essentially, they say that even if a wrong is committed, because the public body has limited resources then the individual harmed cannot recover.
- 2.74 Widening the ability to award damages at a purely discretionary level, along either the Fordham or Hickman lines, would allow courts to remedy specific injustices. If the model were based fully on section 8 of the Human Rights Act 1998, such damages would not be compensatory but would seek to provide only “just satisfaction”.<sup>28</sup> If this were the case then the regime would be open to the same form of criticism as we have made in general. Where a right to damages was founded in private law then the level of compensation payable would be equivalent to that in a private law action. However, where the wrong committed by the public body existed in public law *solely* then only “just satisfaction” would be awarded.

<sup>25</sup> Michael Fordham QC.

<sup>26</sup> Tom Hickman.

<sup>27</sup> See for example the decision of the Supreme Court of the State of Oregon in *Clarke v Oregon Health and Science University* (2007) P3d 418 (Or).

<sup>28</sup> *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673.



- 2.75 A further argument in favour of a discretionary award might be that it would fulfil a function similar to our proposed reform of joint and several liability. Take – for example – a classic regulatory case, such as the demise of the Bank of Credit and Commerce International. Though a failure of regulation by the public body may have been a factor, the primary wrongdoer was another party. It would, to us, seem unjust if the total amount of compensation could be recovered from the public body. In our private law proposals, the reform of joint and several liability would allow for apportionment. However, in a public law action this would not be possible since the private wrongdoer would not be amenable to judicial review. Making any remedy discretionary may be an acceptable solution to this problem.
- 2.76 There is a chance that over time a purely discretionary remedy would cease to be so – such that there would be a reasonable amount of predictability to the regime. However, at least at the outset, it would be hard to describe such remedies as a complete solution to the current problems of uncertainty and inconsistency in the law.
- 2.77 Under our proposals, we sought to introduce greater consistency to the law regulating the liability of public bodies. We thought that introducing some form of test – and one modelled on an established administrative law action – would increase predictability, even if we left a residual discretion similar to that which exists for all public law remedies.
- 2.78 The Public Administration Select Committee also suggested that, in cases involving substantial amounts of public resources, the Court could give a general compensation order and leave the Government to implement a scheme to compensate individual claimants. This would be similar to the current approach to recommendations made by ombudsmen affecting a large number of people. It is arguable that this solution could provide a neat balance between providing claimants with a remedy and protecting public bodies from insupportable financial liability.
- 2.79 We can now turn to consideration of the individual elements of our proposed limitations of liability.

### ***Serious fault***

- 2.80 Both the “serious fault” test and that relating to “conferral of benefit” existed in both our public law and private law schemes. However, the level of comment relating to them differed between the schemes. “Serious fault” attracted far more comment in relation to its operation as a part of our private law proposals and is therefore considered in more detail in Part 3 of this report. This is hardly surprising as “serious fault” draws on the EU law test of a “sufficiently serious” breach of EU law, applied in a purely administrative law context. However, there are a few points that focus on its operation in public law which are worth dealing with here. “Conferral of benefit” is better examined in the context of public law.
- 2.81 At a practical level, Government suggested that our proposed test would lead to the Administrative Court being involved in “complex issues of fact, which would lead cases to run on for some time”. Whilst there is some merit to this criticism, it is not insurmountable. We do not think that the Administrative Court is ill-equipped to handle factual enquiry. Nor would the courts have to conduct such enquiry in all cases. “Complex issues of fact” would only need to be examined

where administrative illegality had been made out *and* where the underlying regime conferred the appropriate benefit on the claimant, as considered below.

- 2.82 There will be cases where argument on the facts will be necessary and will take some time. However, we suggest that this can be fitted within the existing regime for case management by sending the “serious fault” aspect for separate determination, after the hearing of the merits of the judicial review. As we set out in Part 6 and Appendix C of the consultation paper, we do not envisage many such cases. We would further suggest that cases where this issue does arise are likely to be those where a substantial failure is alleged. In these circumstances more lengthy consideration is exactly what is needed to clarify issues and improve service delivery.

### ***The conferral of benefit test***

- 2.83 The “conferral of benefit test” was a key element of our proposals, and formed part of the proposed reform of both public and private law. In order to avoid unnecessary duplication, we will consider the test’s general operation here as a whole, rather than seeking to split our consideration between its operation in relation to judicial review and private law.
- 2.84 The “conferral of benefit” test is a matter of law rather than fact, and so would allow the Administrative Court to dismiss the compensatory part of any action where it was clearly unmeritorious.
- 2.85 Professor Stephen Bailey<sup>29</sup> was of the view that our “conferral of benefit” test would be “bedevilled by the same difficulties as the current law on breach of statutory duty and is unworkable”. We suggest that the “conferral of benefit” test provides a more robust framework in which the interpretative exercise can be conducted. Essentially, it is a new mechanism for statutory construction that takes, as its point of departure, a realistic appreciation of the object of the statutory scheme, and the impact it has on the claimant.
- 2.86 In drawing up our original “conferral of benefit” test, we accepted – as the law does now – that liability should not be extended to cover all potential losses. Certain statutory regimes focus not on individuals but on wider issues of the public good or macro-economic decisions, such as the setting of income tax rates. In situations where there was no individual element to the statutory regime we did not think it possible, or wise, for the statutory powers or duties to be able to create a right to redress enforceable by individuals.
- 2.87 In consultation, the scope of the test as originally set out was legitimately criticised. It was argued that it failed to capture scenarios which it was clear that we wanted to include in our scheme, and excluded certain purely public decisions where it would be inappropriate to allow monetary claims.
- 2.88 Roderick Bagshaw<sup>30</sup> mentioned that it is hard to see how the decision to enter a person’s name onto a child protection register confers a benefit on that person, rather than the children. Many, including the Bar Law Reform Committee, ALBA

<sup>29</sup> University of Nottingham.

<sup>30</sup> Magdalen College, University of Oxford.

and HM Revenue and Customs, failed to see how the imposition of tax gives rise to a “benefit” to the taxpayer. Colm O’Cinneide<sup>31</sup> drew attention to the possibility that “benefit” could:

Readily be interpreted narrowly as requiring the conferral of some specific form of protection or support for a distinct group of individuals. [“Benefit” needs to be] avoided and alternative wording used.

- 2.89 Such concerns highlight a general difficulty with our proposed test in relation to regulatory regimes; the relationship between the nature of the loss suffered by the claimant and the purpose of the regulatory regime does not easily fit within our original formulation of “benefit”.
- 2.90 We accept that “benefit” as a term is problematic, and that if such a test were to be adopted then alternative language should be used. We are not convinced that the test is unworkable, and think that with some reformulation it could function as intended. However, as we are not pursuing this aspect of the project, we do not feel it is appropriate to develop it further here.

## **CONCLUSIONS**

- 2.91 As we outlined in the Introduction, this project was notable in that reform was dependent on the agreement of those on whom the proposed reforms were focused. The formal response to our proposals from central government was unusual in that it was a single response agreed across Government. However, opposition to our proposed reforms was not limited to Government; many others also made criticisms of our proposed scheme. These criticisms related to both the case for reform itself and individual elements of our proposed reforms.
- 2.92 Having analysed the consultation responses, we do not think that the criticisms made of our proposed reforms are insurmountable. We still consider that there is a good argument in favour of reforming this area of the law.
- 2.93 Some of the criticism focused, in part, on our inability to show in detail how the individual elements of our proposed reforms would work in practice, and what impact the scheme would have. Government, especially, criticised our proposals on this basis.
- 2.94 We did undertake a test exercise in relation to previous judicial review cases, in an effort to show that the introduction of a more readily available monetary remedy would not create an undue burden on public bodies.<sup>32</sup> However, we accept the criticism that we were unable to show how many, if any, new cases would be launched if damages were a more available remedy.
- 2.95 It has always been fundamental to our approach that the liability of public bodies raises different issues to the law governing compensation between private individuals. The imposition of liability on public bodies can divert resources allocated for the public good to individual compensatory awards and legal costs.

<sup>31</sup> University College London.

<sup>32</sup> CP 187, paras 4.155 to 4.164, 6.20 to 6.21 and Appendix C.

We do not see this as the end of any argument. There are good reasons why liability should be imposed on public bodies in certain circumstances, for instance in the interests of justice and to prevent recurrent failures in service delivery. What this does mean though, is that assessing the financial implications of any reforms is particularly important. Our inability to create an assessment of the financial effects of our proposals made it impossible to address certain concerns expressed by Government.

# **PART 3**

## **PRIVATE LAW**

### **INTRODUCTION**

#### **Outline of proposed reforms**

- 3.1 In our consultation paper, we argued that the current state of private law did not reflect appropriately the position of public bodies. The law has developed in a way that is overly restrictive in relation to certain activities carried out by public bodies. The current approach also means that where liability does expand, it sometimes does so in an unpredictable manner. Over the last few decades there has been a general expansion in liability, marked by periods where liability has increased and others where it has retreated. This has happened in a piecemeal fashion in relation to particular aspects of public sector activity. On this basis, we suggested that there was a case for reform.
- 3.2 We proposed a scheme similar to that outlined for public law. We suggested that this allowed for a principled approach to liability that reflected the special position of public bodies.
- 3.3 As with the proposed reform of public law, the private law scheme had the test of “serious fault” at its core and utilised the “conferral of benefit” test to ascertain whether the loss suffered by the claimant was one that should be protected.
- 3.4 In addition to these, there was a test to isolate those actions which are unique to public bodies. In our analysis of the special nature of public bodies, it seemed appropriate to us that our regime should not apply where a public body is doing something with an exact private equivalent – the “equality” principle. The gatekeeper test we suggested was to ask whether the activity is “truly public”. Any activity not within this test would be treated under normal private law rules.
- 3.5 We also proposed a modification to the normal rule on joint and several liability in relation to public bodies within our scheme. We suggested that the way that the rule works in relation to public bodies was unfair. The consequence of the current rule is that the result of imposing any liability on a public body is to burden them with all liability resulting from one instance of damage, irrespective of their culpability. In regulatory claims especially, we suggested that this could have unjust consequences. Though this was to extend to both the public law and private law schemes, the change was of particular importance within private law.
- 3.6 Finally, we proposed the abolition of the torts of misfeasance in public office and, for activity within our proposed scheme (that is, “truly public” activity), breach of statutory duty. In the former case we considered that the action was outmoded and inappropriate, especially if our proposed scheme were adopted. In the second, we felt that breach of statutory duty would serve no purpose within our proposed scheme, were it to be adopted. The action would be wholly superseded by the rules contained within our proposed scheme.

## **Overview of consultation responses**

- 3.7 The general response to these proposals was negative. There were three primary strands to the criticisms made by consultees.
- (1) There was no case for reform. Some consultees suggested that there were no problems with the current law. Others put it that, even if our analysis did disclose problems, these did not warrant the wholesale reform we provisionally proposed. Consultees subscribing to this view suggested that it was better to adhere to the normal, incremental, process for the development of the common law. The current approach, based on the application of the test contained in *Caparo v Dickman*<sup>1</sup> to novel situations, was thought appropriate.
  - (2) Even if there was a case for reform, consultees suggested that the elements of our proposed regime were unsuited to this area and would be unworkable.
  - (3) There was no case for our consequential reform proposals, such as the abolition of misfeasance in public office or partial abolition of breach of statutory duty.
- 3.8 There were parts of our proposals that were favourably received, particularly the adjustment to joint and several liability. Some consultees argued that it would be unjustifiable to implement this change in relation to public bodies alone. Others though – including Government – acknowledged it to be a worthwhile proposal.
- 3.9 This Part will consider these strands of response in turn and then come to some general conclusions.

## **THERE IS NO CASE FOR REFORM**

- 3.10 Criticisms were made during consultation that our analysis of the current position of public bodies in private law was misplaced and did not make out a case for reform. This section sets out our response to these criticisms.

### **The current law addresses the liability of private bodies appropriately**

- 3.11 Our analysis of the current regime by which public bodies can be made liable for their actions in private law is contained in Parts 3 and 4 of our consultation paper.<sup>2</sup> There we sought to show that following *Dorset Yacht v Home Office*,<sup>3</sup> tortious liability of public bodies has undergone general expansion. We did this accepting that there have been periods of retrenchment, such as the retreat from *Anns v Merton London Borough Council*<sup>4</sup> in *Murphy v Brentwood District Council*.<sup>5</sup> We argued that the way in which liability expanded has been both unpredictable and unprincipled. In the latter case, our assertion was that the

<sup>1</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605.

<sup>2</sup> CP 187, paras 3.102 to 3.177 and 4.34 to 4.92.

<sup>3</sup> *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.

<sup>4</sup> *Anns v Merton London Borough Council* [1978] AC 728.

<sup>5</sup> *Murphy v Brentwood District Council* [1991] 1 AC 398.

reasoning as to whether a particular public body should be subject to a duty of care is not explored in an open and coherent manner.

- 3.12 In our consultation paper, we posited the idea that public bodies are different to private individuals. Public bodies are constructs of public law, either possessing individual legal personality as a matter of the prerogative or as statute-based entities, as in the case of local authorities. Public law thereby gives public bodies the ability to enter into private law arrangements or to act in other ways approximating to a private individual. However, public bodies exist to perform public functions and in certain cases are compelled to enter into relationships with individuals where private individuals would not be under the same duty. Take, for example, homelessness. Certain charities provide an identical, or in some cases much more comprehensive, service to that provided by a local authority. However, only the local authority is obliged to act under, and is constrained by, the duties contained in Part 7 of the Housing Act 1996.
- 3.13 In his lecture to the Bar Law Reform Committee,<sup>6</sup> Lord Hoffmann highlighted section 1 of the National Health Service Act 2006, which requires the Secretary of State to “promote” a “comprehensive health service”. This highlights how the NHS is different to private healthcare providers, who are not subject to this duty, and therefore have much greater discretion as to the services they undertake. All actions undertaken by the NHS are the result of a basic statutory duty, and its scope of actions is determined accordingly.
- 3.14 We accepted, as part of our approach to this area, the “equality principle” espoused by many consultees.<sup>7</sup> We did not intend to alter liability where a public body was in an *identical* position to a private individual. Rather, we sought to accept that the range of legal relationships into which public bodies enter is different to that of private individuals.
- 3.15 In consultation it was asserted that public bodies are not to be treated differently to private individuals, and that the current law does not do this. This builds on the classic Diceyan proclamation that all are “subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”.<sup>8</sup> It was argued that the imposition of a duty of care on a public body should solely be carried out under the normal rules contained in the test in *Caparo v Dickman*,<sup>9</sup> particularly that it is “fair, just and reasonable” to establish a duty of care.
- 3.16 We suggest that such assertions are not sustainable when one analyses the current case law. Take, for example, the case of *Smith v Chief Constable of Sussex*,<sup>10</sup> which considered whether a duty of care was owed to the public by the police. *Smith* was another re-examination of the rule in *Hill v Chief Constable of*

<sup>6</sup> Lord Hoffmann, *Reforming the Law of Public Authority Negligence* at the Bar Council Law Reform Lecture, 17 November 2009, available at <http://www.barcouncil.org.uk/news/OtherSpeechesofInterest/> (last visited 21 April 2010).

<sup>7</sup> For example: Lord Hoffmann, Professor Stevens and Paul Mitchell.

<sup>8</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed 1959) p 193.

<sup>9</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605.

<sup>10</sup> *Smith v Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225.

*West Yorkshire Police*,<sup>11</sup> in which the House of Lords rejected the possibility that there could be a duty of care in relation to general policing activity.

- 3.17 In *Smith* the argument was made that the imposition of liability would have a catastrophic effect on policing.<sup>12</sup> The House of Lords (with Lord Bingham dissenting) rejected the direct challenge to *Hill*, and accepted the policy reasons – though with a slight variation to those in *Hill* – for not establishing a duty of care. Here the court accepted that public bodies are different but still sought to fit its analysis of them within the terminology of the general test for private law.
- 3.18 Such an acceptance of the true nature and responsibilities of public bodies can potentially be read into “fair, just and reasonable” under the *Caparo* test. However, we argued that courts are introducing factors into the test which are wholly ignored when only private parties are concerned. We accept that these factors are important in relation to public bodies; in fact, this formed the basis of our assertion that public bodies are unique. Their inclusion in existing cases means that, in effect, a modified version of the *Caparo* test is already being applied to public bodies when compared to that applied to private individuals.
- 3.19 The limits of this position – whereby the special nature of the police is accepted but not really argued out openly – can be seen in *Brooks v Commissioner of the Metropolitan Police*, where Lord Steyn suggested that then the *Hill* principle would not apply in certain cases of “outrageous negligence”. However, he thought “it would be unwise to try to predict accurately what unusual cases could conceivably arise”.<sup>13</sup> In *Smith*, Lord Phillips suggested that the particular facts were close to that requirement,<sup>14</sup> before going on to acknowledge the problems in the current law – stating that:

The issues of policy raised by this appeal are not readily resolved by a court of law. It is not easy to evaluate the extent to which the existence of a common law duty of care in relation to protecting members of the public against criminal injury would in fact impact adversely on the performance by the police of their duties. I am inclined to think that this is an area where the law can better be determined by Parliament than by the courts. For this reason I have been pleased to observe that the Law Commission has just published a consultation paper No 187 on Administrative Redress: Public Bodies and the Citizen (2008) that directly addresses the issues raised by this appeal.<sup>15</sup>

<sup>11</sup> *Hill v Chief Constable of West Yorkshire* [1989] AC 53. Jacqueline Hill was the last victim of Peter Sutcliffe, the “Yorkshire Ripper”.

<sup>12</sup> *Smith v Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225 at [121] to [135], by Lord Brown.

<sup>13</sup> *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495 at [34].

<sup>14</sup> *Smith v Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225 at [101].

<sup>15</sup> As above at [102].



3.20 In his recent Bar Law Reform Committee lecture, Lord Hoffmann asserted that the decision in *Anns v Merton London Borough Council*<sup>16</sup> “destabilised” the law.<sup>17</sup> However, he suggested that this destabilisation had now been rectified by subsequent cases, such as *Stovin v Wise*<sup>18</sup> and *Gorringe v Calderdale Metropolitan Borough Council*.<sup>19</sup> Based on these cases, Lord Hoffmann drew the following conclusion:

The present position of English law, as it was before 1978, is therefore that public bodies owe no duty of care by virtue only of the fact that they have statutory powers or public law duties. An actual relationship with the claimant, such as would give rise to a duty of care on the part of a private body, is required. The effect is to take out of the law of negligence most questions of whether a public body has made the right decisions about how it should exercise its powers, that is to say, questions of administration.<sup>20</sup>

3.21 However, we suggest that there is little in the history of this area of law to suggest that it is truly stable. The perceived necessity to resort to primary legislation to crystallise a rule of common law would seem to support this. For example, section 1 of the Compensation Act 2006 puts in statutory form the rule in *Tomlinson v Congleton Borough Council*.<sup>21</sup> This states that courts should have regard to the desirability of the provision of particular activities before imposing liability.

3.22 Nor do we accept the assertion made by Lord Hoffmann that the law is clear. In his Bar Law Reform Committee speech he acknowledged that there remain members of the judiciary who do not agree. Uncertainty as to the law among the judiciary is of itself evidence of a lack of clarity; principles, however convincingly explained, are only clear when the judiciary as a whole accept them as such. Lord Phillips’ observations in *Smith* demonstrate that this is not yet the case.

3.23 The fact that, in effect, private law works differently in relation to public bodies than in relation to others is not – of itself – problematic. Our consultation paper’s underlying premise was that public bodies are special. Where we suggested that there is a problem is in delineating how this works in a transparent and coherent manner. Therefore, we do question the suitability of having, in effect, two versions of the *Caparo* test; one which applies to public bodies and another – more limited version – for all other defendants.

<sup>16</sup> *Anns v Merton London Borough Council* [1978] AC 728.

<sup>17</sup> Lord Hoffmann, *Reforming the Law of Public Authority Negligence* at the Bar Council Law Reform Lecture, 17 November 2009, available at <http://www.barcouncil.org.uk/news/OtherSpeechesofInterest/> (last visited 21 April 2010). Others made a similar point during consultation. For instance Professor Stevens.

<sup>18</sup> *Stovin v Wise* [1996] AC 923.

<sup>19</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057.

<sup>20</sup> Lord Hoffmann, *Reforming the Law of Public Authority Negligence* at the Bar Council Law Reform Lecture, 17 November 2009, para 15, available at <http://www.barcouncil.org.uk/news/OtherSpeechesofInterest/> (last visited 21 April 2010).

<sup>21</sup> *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46.

- 3.24 We still conclude that the way in which the law has developed is piecemeal and unprincipled so far as the particular requirements of public bodies are concerned. We do this on the basis that the law currently fails to assess openly the framework in which public bodies operate. We remain convinced that this discloses a case for reform.

**If reform is needed then the incremental process is preferable**

- 3.25 This argument focused on the general approach to liability in negligence and the way that it develops through individual cases. Consultees' analysis was based on the consideration of specific fields of action by public bodies, for instance policing and education.<sup>22</sup> Our assertion that this was an inappropriate way for the law to develop attracted particular criticism from many academics and practitioners. Colm O'Conneide neatly expressed the view shared by many others, including ALBA and the Bar Law Reform Committee:

The paper correctly notes that the case-law concerning liability for negligence in this area lacks conceptual clarity. However, the incremental extension of the scope of liability of public authorities in cases such as *Phelps*<sup>23</sup> and *Smith*<sup>24</sup> represents a relatively tried and tested common law method of regulating the imposition of liability in negligence cases. The consultation paper does not examine in detail why reliance on this standard method for determining negligence liability is deficient or otherwise lacking when it comes to the context of public authority liability.

- 3.26 We accept that this is the basic principle of the common law and one embedded in our legal system. However, it is not the only way in which law can or should develop.
- 3.27 What seemed clear to us was that private law struggles to reconcile the reality of public law preferences with private law models such as corrective justice or a general private law rights-based model. In seeking to address this, we thought that this might be a situation where Parliamentary intervention may be necessary. As Lord Justice Buxton put it:

There is no place in the English forensic process for the sort of review of opinion, practicalities and collateral damage that is undertaken by the Law Commission before it sets about changing the law.<sup>25</sup>

**THE PROPOSED REFORMS WERE UNSUITABLE AND UNWORKABLE**

- 3.28 In this section we consider the consultation responses to the elements of our proposed regime relating to the reform of actions in private law. The "conferral of benefit" test, which was designed to apply in a similar fashion in both our public

<sup>22</sup> CP 187, paras 4.42 to 4.49.

<sup>23</sup> *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619.

<sup>24</sup> *Smith v Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225.

<sup>25</sup> R Buxton, "How the common law gets made: *Hedley Byrne* and other cautionary tales" (2009) 125 *Law Quarterly Review* 60, 60.

law and private law regimes, was considered in Part 2 above. Consequently, it is not examined here.

- 3.29 As many of the criticisms made of the “serious fault” test related to its applicability in this context – rather than in relation to our proposed reform of judicial review – these are explored below.
- 3.30 In addition to these tests, one element of our proposed reforms applied solely to actions in private law. That was the “truly public” test.
- 3.31 Finally, this is the appropriate place to consider certain consultation responses relating to our proposed reform of joint and several liability.

### **Serious fault**

- 3.32 Many consultees disagreed with the “serious fault” test on the basis that it was inappropriate as a replacement, in relation to public bodies, for the current fault tests in the law of negligence. It is important to note that we did not intend it to be a complete replacement. The “serious fault” test was only to apply within our scheme. Outside of this, normal tortious principles would apply. The purpose of the test was to move the liability of public bodies, where they are acting as public bodies in a unique sense, into a regime more appropriate to them. In doing this, we settled on a term borrowed from EU law.
- 3.33 We accept that the “serious fault” concept would be novel outside of administrative law. However, we do not accept that this means it is wholly inappropriate. Criticising our adoption of the test, Professor Robert Stevens drew a distinction:

Between serious culpability and the violation of an important duty or right. By “serious fault” the paper seems to mean the former: a degree of blameworthiness greater than mere negligence. The [European Court of Justice’s] jurisprudence concerns violation of important norms, not degrees of culpability higher than mere negligence. The European approach lends no support at all for what is proposed here.

- 3.34 Similarly, Professor Carol Harlow<sup>26</sup> does not see the parallel with EU law as “entirely exact”:

It is contestable whether member state liability for non-transposition and implementation of EU law is in fact fault liability: many commentators see it as non-fault based. However this may be, the question normally asked today is “did the member state *manifestly and gravely* disregard the limits on its discretion?”, a test based on judicial review, which links illegality to liability. Since the gravity test refers to *breach* not *damage*, it is of course capable of being interpreted as fault liability but the “sufficiently serious breach” test does not operate entirely as a fault test. [In the *British Telecom* case] the main reason why the action failed was...because the law was

<sup>26</sup> London School of Economics and Political Science.

hard to comprehend. Often it is a test based on outcome: the more serious the damage, the more serious the breach...the test may be appropriate in cases of regulatory [liability] but, used more widely as a standard for breach of care, I have my doubts.

- 3.35 We disagree with Professor Stevens' analysis. We do not consider it accurate to characterise the line of case law beginning with *Francovich*<sup>27</sup> as concerned solely with the violation of important norms. As Professor Harlow points out, the need for a member state to "manifestly and gravely" disregard the limits of its discretion turns on culpability rather than the "seriousness" of the norm breached. In *Francovich*, the Italian state had obviously failed to comply with its clear obligation to transpose the directive. On the other hand, in *ex parte British Telecommunications* the United Kingdom's interpretation of the directive was not manifestly wrong, and excusable in the absence of Community guidance on its meaning.<sup>28</sup> A similar situation occurred in *Brinkman Tabakfabriken*; the provision in question was open to a "number of perfectly tenable interpretations".<sup>29</sup>
- 3.36 However, the EU action for damages does not merely concern itself with failure to transpose directives, something which can be seen as primarily an administrative law failure. In *Brasserie du Pêcheur* the European Court of Justice set out a list of factors to be taken into account more generally when considering breach of a rule of EU law.<sup>30</sup> Considerations that the court should take into account when addressing possible state liability included "the complexity of the situations to be regulated"<sup>31</sup> and "whether the infringement and the damage caused was intentional or involuntary".<sup>32</sup> These, at least in relation to administrative behaviour, do not seem entirely divorced from the sort of considerations that a court would have to undertake when assessing whether or not a defendant has breached a duty of care. What we were suggesting was a different formulation for such considerations, rather than an inherently alien concept.
- 3.37 That said, our provisional proposals recognised that the EU law test of "sufficiently serious breach" is essentially a public law concept. Consequently, we did not suggest importing it into the "serious fault" regime without any modification. "Serious fault", as envisaged in the consultation paper, straddles both public and private law. EU jurisprudence provides useful guidance as to the sorts of considerations that may lead a court to conclude whether certain conduct by the respondent constitutes serious administrative failure. However, the court would be expected to do so within the broader context of "serious fault" as explained at paragraphs 4.143 to 4.147 of the consultation paper. This would include such factors as:

<sup>27</sup> Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

<sup>28</sup> Case C-392/93 *R v HM Treasury ex parte British Telecommunications* [1996] ECR I-1631.

<sup>29</sup> Case C-319/96 *Brinkmann Tabakfabriken v Skatteministeriat* [1998] ECR I-5255 at [32].

<sup>30</sup> Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany* [1996] ECR I-1029.

<sup>31</sup> As above at [43].

<sup>32</sup> As above at [56].

The knowledge of the public body at the time that the harm occurred that its conduct could cause harm, and whether it knew or should have known about vulnerable potential victims.

- 3.38 An alternative objection was made by a collection of consultees, who thought that “serious fault” would be setting the standard too high. For instance, whilst discussing *Osman v UK*,<sup>33</sup> the Association of Personal Injury Lawyers stated that “the ECHR... soundly rejected the Government’s argument that there was a requirement to prove ‘gross dereliction’ or ‘wilful disregard’ of duty”. The Association of Personal Injury Lawyers went on to submit that the “serious fault” proposals:

Would introduce a similarly rigid standard that is too high, goes too far and effectively elevates the burden of proof in tortious claims against a public body to a criminal standard rather than a civil one. For example, if a police driver driving under a “blue light” kills a pedestrian they will be held liable in tort...only if their standard of driving is such that it would be sufficient to sustain a charge of manslaughter... [The Association of Personal Injury Lawyers] believes this to be fundamentally wrong.

- 3.39 Government criticised the test as it thought that it would prevent the striking out of unmeritorious claims, arguing that this is easier under the current negligence regime. We accept that there is merit to this, and this would be a particular concern in the formative stages of any new test. However, “serious fault” should be seen within the context of the regime as a whole. Both “conferral of benefit” and “truly public” are legal tests and would allow for the striking out of claims that did not meet their requirements at an early stage.

#### **The “truly public” test**

- 3.40 In putting forward our proposals, we sought to limit our proposed reforms to those situations where we felt that public bodies were acting in a way unique to them. The “truly public” test was designed to delineate between those situations where a public body was acting in a manner in which there was a direct private equivalent, and those where the legal framework imposed on the public body was such that there was no exact private law equivalent.<sup>34</sup>
- 3.41 The test resulted, therefore, from our acceptance of the basic premise of the equality principle. Where a public body is acting in an identical situation to that of a private individual, they should be treated in an identical manner. However, where there is not equality, because there is not an identical private comparator, we did not think that public bodies should be subject to the same rules as private individuals.
- 3.42 In general, the response to our proposed “truly public” test was negative in tone. Although some consultees were broadly supportive of the reasoning behind the

<sup>33</sup> *Osman v United Kingdom* (2000) 29 EHRR 245 (App No 23452/94).

<sup>34</sup> We accept the problems of nomenclature with this test. However, we do not think that these remove the legitimate aim that the test sought to achieve.

test, they did not feel that it was workable in practice. Other responses to the consultation disagreed with the aim of the test altogether.

- 3.43 Responses that criticised the aim of the test altogether were of two main types. The first type were criticisms which were founded on a basic disagreement with our conclusion that *any* actions by public bodies that cause damage merit special protection from liability. Typically these comments argued that our proposal would create a “two tiered” system of justice, or failed to recognise that existing law offered a sufficient degree of protection for public bodies. Since we have already discussed the grounds for reform and our justification for treating public bodies differently, we will not consider this first type of criticism here.
- 3.44 Responses of the second type criticised our proposed test on the grounds that the dividing line it was seeking to draw (between unique and non-unique acts) was flawed, or in the wrong place.

***The public nature of the activity is irrelevant***

- 3.45 Professor Mark Aronson<sup>35</sup> criticised the proposed test strongly. He found that it was unclear what our intention as to its application was and whether “truly public” meant all public administration or only acts that had no lawful private sector analogue. In either case, Professor Aronson argued that the focus on the public nature of the act was unnecessary. Instead, he submitted that an appropriate limiting factor would be to ask whether a court was “competent” or that it was its “proper role” to assess the act or omission in the case at hand. We do not think that a “justiciability” style test would be preferable to the option we decided on. In public law, the notion that there are activities which courts are entirely unequipped to consider was rejected in the GCHQ case.<sup>36</sup> Our own analysis of the need for particular protection for public bodies did not rest on the idea that courts are ill-equipped to determine these issues.
- 3.46 In further criticism, Professor Aronson gave the example of a private body regulating the rules of scrums in rugby. He submitted that there is no logical reason why this private body should be subject to intrusive scrutiny, whilst an analogous public body would not be. Though there is logic to this argument, we feel there is good reason not to pursue such a line. According to our proposed test, whether an action of a body was within or outside our proposed scheme would depend on the nature of the power and relationship between the individuals and the “scrums regulator”. For example, if the regulator attracted public funding, or used public law powers to extract a funding levy from rugby teams and regulation was compulsory, we suggest that it would be a public body. Where it took action to which there was no private equivalent – as it was wielding an essentially public law power – then it would fall within the scheme. Conversely, were it merely to be voluntary and lacking in public law powers – so no different from any individual giving their opinion on the matter – then it would not fall within our test. The purpose of our test was to focus on the nature of the power being utilised as opposed to a functional approach focused on the activity being regulated.

<sup>35</sup> University of New South Wales.

<sup>36</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

***The inclusion of private bodies within the test is inappropriate***

- 3.47 By focusing on the nature of the power being wielded, we accepted that in certain circumstances bodies normally considered private would fall within our scheme when undertaking certain activities.
- 3.48 The Association of Child Abuse Lawyers criticised the proposed test's inclusion of private bodies within our proposed scheme. The Association of Private Injury Lawyers also argued that it was "anomalous" to say that private parties could carry out "truly public" activities.
- 3.49 Whilst we accept that this is a contestable area, we suggest that such criticism is slightly misplaced and fails to take into account the way in which certain powers, based in public law, work. In seeking to include private bodies, though only where they are undertaking an activity of a "truly public" nature, we were seeking to establish within our private law scheme an alternative to the amenability test in judicial review or that for a public authority under the Human Rights Act 1998. Both of those have problems, as they do not necessarily focus on the nature of the action, rather on the nature of the body itself. Consequently, where a body is founded in public law, all of its actions would be within our scheme. However, this would not help us delineate clearly between that which is merely undertaken by a public body and that which is unique to that body.
- 3.50 In response to the specific criticisms made, both amenability in judicial review and the test outlined by the House of Lords in *YL v Birmingham City Council*,<sup>37</sup> already capture bodies founded in private law where they are doing something that utilises compulsive public law powers. Similarly, the EU law test in *Foster v British Gas* also allows for a private company to be considered a public authority where it is possessed of special powers.<sup>38</sup>
- 3.51 To conclude, the inclusion of private bodies exercising public functions is a legitimate concern. However, not including bodies founded in private law, where they are actually performing a function of a public law nature, would be more problematic and diverge from the situation already in existence in judicial review, under the Human Rights Act 1998 and in EU law.

***The test was unworkable***

- 3.52 Most consultees expressed objections to the feasibility of the "truly public" test, rather than its underlying purpose. Many responses argued that it was unclear, and posed scenarios to us where they felt the test would be difficult to apply in practice.
- 3.53 Whilst generally supportive of our proposals, Professor Harlow expressed doubts as to the possibility of maintaining a firm boundary between public and non-public activities. She cited French administrative law as an example of the dangers of creeping borders, and suggested that the associated costs of litigation

<sup>37</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

<sup>38</sup> *Foster v British Gas* [1991] 2 AC 306.

outweighed the benefits of maintaining a strict divide. The Association of Personal Injury Lawyers and the Association of Child Abuse Lawyers agreed with this perspective, and submitted that the resulting confusion would result in large amounts of costly satellite litigation.

- 3.54 Although it may take some time for the scope of “truly public” activity to become settled, this is not necessarily a reason for not attempting the exercise altogether. Any statutory definition attempting to act as a gatekeeper is likely to give rise to a certain number of border disputes. However, we do not feel that this test is more susceptible to the phenomenon than any other. Whilst part of our reasoning as to the need for reform in this area did rest on questions of cost, our proposals were also designed to introduce principled coherency into the law. We therefore disagree that the potential for boundary litigation outweighs the benefits of introducing the test.
- 3.55 Professor Bailey felt that the attempt to draw a dividing line between public and private activities was fundamentally flawed. He commented that there were very few activities that “are *intrinsicly* peculiar to the state”.
- 3.56 It is accepted that an attempt to enumerate, in the abstract, activities intrinsically peculiar to the state, is unlikely to succeed. We would note, however, that this was not our intention. Instead the test is designed to highlight specifically activities where the relationship of the public body to the individual is not the same as a private law relationship governed by tort. Our view is that the theoretical justification for placing certain activities of public bodies in a special regime applies only where they have no private sector equivalent. Once it is determined that a defendant had a certain power or duty to act, it should be equally possible to determine whether or not a natural person could be, or is, subject to an equivalent power or duty.
- 3.57 Tom Cornford argued that the second limb of our test (that a body breached a special statutory duty) was far too broad in scope. Since it was arguable that all statutory powers must be exercised with the aim of achieving statutory duties, in practice nearly every act by a public body could be conceived of as “truly public”. Cornford gives the examples of healthcare in the NHS and teaching in state schools. Similarly, the Bar Law Reform Committee and ALBA raised the criticism that our test would inappropriately include medical treatment provided by the NHS. Conversely, Birmingham City Council supported the proposal and thought that the “truly public” test was workable.
- 3.58 In response to these points, we accept that the examples given above would be caught within the test for “truly public”. Duties such as that contained in section 1 of the National Health Service Act 2006 apply uniquely to a public body, rather than to a private healthcare supplier. However, we did not think that would be sufficient to mean that all action under that section would entail liability. Our scheme consisted of several, interrelated, elements. Where an action would fail in relation to section 1 of the National Health Service Act 2006 is under the “conferral of benefit” test. It is hard to see a provision requiring the Secretary of State to promote a “comprehensive health service” as fulfilling that test.



### **Joint and several liability**

- 3.59 This element of our proposals was popular with public bodies who, in general, agreed with the approach put forward. Government, in its response, stated the following:

Government welcomes the Law Commission's consideration of the problems that the inflexible application of the principle of joint and several liability can cause public bodies, and agrees that it is worth exploring whether the courts should have discretion to abandon the rule. The Law Commission suggests that the discretion should be limited only to "truly public" cases, but as it looks further at how best to frame any such discretion, the Law Commission may conclude that it can and should include some instances beyond the "truly public".

- 3.60 Mr Justice Silber argues that "joint and several liability might serve the interests of claimants but it means that the total loss is recovered against the 'last man standing'". As we suggested in our consultation paper, we think the result of this is that it can distort the rational imposition of liability.
- 3.61 Conversely, certain consultees – notably the Association of Personal Injury Lawyers – thought that modifying the rule could lead to injustice for claimants. In their opinion, the rule ensures that "the innocent victim is fully compensated". In a similar vein, the Association of Child Abuse Lawyers submitted that "it is better for an even partially guilty party to pay than no one at all".
- 3.62 Some consultees, such as Colm O'Cinneide, wondered "why this reform should be confined to public authorities alone" and that "any such proposal needs to be the subject of a separate consultation exercise".
- 3.63 However, our proposals were designed to operate as a whole within the specifics of the project. We considered the operation of the rule in relation to public bodies and that in this context it was potentially unsatisfactory. Previously, in 1996, we undertook a Government-initiated investigation into the operation of the rule on joint and several liability in civil law as a whole. There, we recommended that it did not merit a full law reform project.<sup>39</sup> Consequently, we did not consider it necessary to propose any wider changes to the rule.

### **CONSEQUENTIAL REFORMS**

- 3.64 Consultees also commented on matters that we thought would be consequential to our primary reform. These concerned the abolition of misfeasance in public office and the partial abolition of breach of statutory duty.

#### **Abolition of misfeasance in public office**

- 3.65 In our consultation paper we suggested that this tort was not fulfilling any useful purpose at present and would definitely not fulfil any purpose were our proposed scheme brought into force. We therefore suggested that it should be abolished. Whilst a number of consultees agreed with our proposals, many did not. They raised two grounds for preserving the tort.

<sup>39</sup> The Law Commission, *Feasibility Investigation of Joint and Several Liability* (1996).

3.66 First, many consultees stated that misfeasance still played a necessary role as a marker for particularly opprobrious action by public officials. Professor Harlow thought that there was value in keeping actions where exemplary damages were available, so as to reinforce the seriousness of the public body's wrongful actions. Colm O'Conneide suggested that the tort of misfeasance in public office is still "of potential importance" as it "carries with it a connotation of serious wrongdoing".

3.67 In *Kuddus v Chief Constable of Leicestershire*, the utility of the action was put as follows:

[It] serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct. It serves to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times.<sup>40</sup>

3.68 Within the current legal framework, we accept that the tort of misfeasance can perform a useful marker function. However, within the scheme of our proposed reform we are not convinced that maintaining a separate tort of misfeasance is the only way in which this marker function can be preserved.

3.69 The second argument for retaining the tort arose in relation to certain activities where it was thought that there was a continuing need for misfeasance, particularly policing. The Association of Police Lawyers suggested that an action for misfeasance allows the claimant to pin liability on the individual police officer whose acts or decisions are impugned. Unlike negligence claims which are brought vicariously against the relevant Chief Constable or Commissioner of the Metropolitan Police Force, misfeasance gives the victim of deliberate abuse of public office the chance to hold the officer *personally* responsible.

3.70 This is a valid argument. Under our proposed serious fault regime there would be no facility to bring a personal action against a transgressing public official. However, we still think that the unjust way in which the tort of misfeasance can work in certain situations, such as the *Three Rivers* case,<sup>41</sup> outweighs the potential benefits of an action focusing on individuals. Therefore, we still subscribe to the view that there is a good case for abolishing the tort.

3.71 We would note that both the marker function and personal attribution of the tort could be satisfied by the criminal offence of misfeasance in public office. This is defined by Archbold as the wilful neglect of duty or misconduct by a public officer to an extent that amounts to "an abuse of the public's trust in the office holder".<sup>42</sup> Recent case law has underlined that the offence relates only to deliberate acts

<sup>40</sup> *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122 at [79], by Lord Hutton.

<sup>41</sup> *Three Rivers District Council v Governor and Company of the Bank of England* [2004] UKHL 48, [2005] 1 AC 610. The case was brought due to alleged regulatory failure by the Bank of England. However, this was done through an action of misfeasance against named individuals at the Bank, which necessitated an intrusive and distressing investigation into their conduct.

<sup>42</sup> PJ Richardson (ed), *Archbold: Criminal pleading evidence and practice 2010* (58th ed 2009) para 25-381.

and that the threshold of fault is high.<sup>43</sup> In this way, an individual who has done serious wrong can be “marked” personally. The use of deterrent sentences for the offence further highlights this fact.<sup>44</sup>

- 3.72 We suggest that the criminal law action is potentially more suitable than the tort of misfeasance in public office. We therefore remain unconvinced of the necessity of retaining misfeasance as a separate tort within our proposed scheme.

### **Partial abolition of breach of statutory duty**

- 3.73 Our proposal in relation to breach of statutory duty caused a number of problems. One of these related to the way in which the proposal was expressed in the consultation paper. We were not suggesting that breach of statutory duty should be abolished against public bodies in general. Similarly, we were not suggesting the removal of employment law for civil servants, or the removal of health and safety duties under the Health and Safety at Work etc Act 1974. Our suggestion was that breach of statutory duty should be removed in any circumstances where there was an actionable statutory provision that related to “truly public” activities.
- 3.74 Responses to our proposed partial abolition of the tort really turned on whether a consultee agreed with our general scheme. As we have already considered the criticisms of the scheme as a whole, there seems no real point in separating out the reaction to the consequent removal of breach of statutory duty, especially as we are not continuing with the general reform.

### **CONCLUSIONS**

- 3.75 In this Part we have sought to address some of the criticisms made of our proposed reforms to this area. This is not to detract from the general approach stated in Part 1. Consequently, we do not intend to take this part of the project further or make any formal recommendations. However, we have come to the following specific conclusions in relation to the subject matter of this aspect of the Administrative Redress project.
- 3.76 First, we accept that we have not persuaded many consultees that there is a case for reform. This is not to say that we accept that our case for reform was fundamentally flawed. We do not.
- 3.77 Second, we accept that we were unable to persuade consultees that the adoption of our proposed reforms was preferable to the normal, incremental process through which the common law develops. However, in doing this, we note that the criticisms of our proposals did not necessarily agree with each other. Some criticised us for making liability too hard to establish, others for widening it in an unjustified manner.

<sup>43</sup> *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73.

<sup>44</sup> See for example *R v Gellion* [2006] EWCA Crim 281, [2006] 2 Cr App R (S) 69.

3.78 Finally, as with our proposed reform of public law, the lack of a reliable dataset meant that we could not assess fully the potential impact of our proposals. This lessened our ability to address the concerns raised by consultees. Given the importance of this issue in general – and not just in the context of our proposed reforms – in the next Part we outline in greater detail the problems we encountered in attempting to obtain the relevant data and our suggestions for the reform of the current system for reporting.

# PART 4

## REPORTING

### INTRODUCTION

- 4.1 This Part considers issues that arose in the context of our project, relating to the reporting of compensation figures by public bodies. The collation and reporting of compensation data raises important issues concerning the accountability and transparency of public bodies. The lack of easily accessible data on such matters is clearly problematic, as it does not allow citizens to build an accurate picture as to the allocation of public resources.
- 4.2 In the specific context of this project, the reporting of compensation figures would also have allowed us to assess more fully the financial implications of our proposed reforms.
- 4.3 This related to the effect that any change to liability may have on administrative behaviour, and in particular service provision. We examined this in Part 6 and Appendix B of our consultation paper.
- 4.4 Such analysis requires knowledge as to the current extent of public body liability in financial terms. It is difficult to assess the effect of any changes to liability unless the current situation is known. This is because the significance of any change is, in part, dependent on the relative value of the change to the existing extent of liability. An increase in financial liability of a few per cent – though not to be discounted – is potentially of a very different nature to the situation where a change to the legal position occasions the doubling or trebling of a public body's compensation payments.
- 4.5 Finally, it should be noted that under current administrative practice, reform proposals should normally be subject to an impact assessment, detailing costs and benefits.

### ADMINISTRATIVE BEHAVIOUR

- 4.6 In this section, we set out part of our analysis concerning the way in which public bodies react to compensation awards.<sup>1</sup> These could be awards made by a court, within a specific redress scheme, given as an *ex gratia* payment, made in settlement of an existing or threatened claim, or given as an award by an ombudsman. For the purposes of this analysis, the mechanism by which the award is made is of a lesser importance than the fact that it is made at all.
- 4.7 This is not to say that the mechanism is not important. In our consultation paper we stated a preference for non court-based redress mechanisms, such as internal complaints procedures, tribunals and ombudsmen. However, once an award is made – and paid – then the effects are broadly similar.
- 4.8 In considering this, we set out the options open to a public body. We think that these fall into two categories. First, a public body makes a primary response, which is to react directly to the initial compensation award. Here it considers how

<sup>1</sup> A much more comprehensive analysis is contained in CP 187, Appendix B.

to mitigate the loss to its finances contained in that particular award. Subsequently, the public body may take further steps in reaction to the award, which seek to address the future. These steps are distinct from those taken to settle the original award. In setting these out, we are not suggesting which are more likely to happen, merely detailing the options open to public bodies.

- 4.9 We then set out a brief summary of the results of our analysis in Appendix B of the consultation paper. This suggested that there was no set way in which a public body would react, and that the imposition of financial liability does not necessarily lead to defensive administration. The reality is far more nuanced than is frequently assumed. We set out the consultation responses we received on this issue.
- 4.10 Finally, we highlight another potential effect of the imposition of liability, that of administrative disruption. This is distinguishable from defensive administration, in that it does not necessarily affect the extent of service delivery or the final choices as to the nature of service delivery. Rather, it makes achieving the same delivery more difficult.

#### **Primary response**

- 4.11 As a basic premise, we accepted the idea that there are only limited resources available to a public body. Therefore, the payment of some of these resources as compensation directly detracts from the resources available to the public body.
- 4.12 In order to recoup the loss of monies paid out in compensation, there are a number of options available to a public body. First, it may reduce service provision in the area that occasioned the compensation payment. However, caution is required in assuming that this would be an effect of monetary liability. If the compensation payment was in an area where there was a statutory duty on the public body to provide a particular service, then it may not be possible to reduce service provision in that area. It may instead react by altering or withdrawing service provision in other areas.
- 4.13 Alternatively, a public body could react by making good the compensation loss through a change to organisational practice (such as a change to travel arrangements) or staff redundancies.

#### **Subsequent practice**

- 4.14 There are then questions as to how the public body alters its behaviour subsequent to its direct reaction to the compensation payment. Again, there are a number of possible responses. The public body could seek to improve subsequent service delivery, so as to avoid future compensation payments. Alternatively, it could reduce or withdraw from particular aspects of service provision. This could either be in the area directly relating to the original compensation payment, or it could be in another area of service provision. This would allow a body to offset possible future losses, where it does not think it desirable or possible to withdraw from service provision in the area occasioning the original compensation payment. Another option would be to seek to offset future compensation payments through other measures, such as efficiency savings. In certain circumstances, the public body could choose to borrow the

money. Finally, it could do nothing, especially if it thought the original compensation payment was a “one off”.

- 4.15 There is a further difficulty when assessing the implications of law reform in this respect. This concerns attempting to draw long-term conclusions. Whilst the imposition of liability can be seen as occasioning distinct costs, any reaction to this may be made over both the long and the short term. Practice may also vary considerably by the public body owing to other factors. The public body may undertake an organisational investigation to see how to reduce the liability, pay out in the short term, and subsequently withdraw from service delivery. Similarly, an improvement in service delivery may be the initial reaction but as the perceived danger of liability diminishes the public body could return to its earlier behaviour.
- 4.16 As we set out below, we were unable to explore this in more detail, as the initial figures on compensation are not available.
- 4.17 Finally, we have tended to focus on the effects of successful compensation claims, rather than the volume of claims in total. There is an argument that the sheer weight of litigation – even if a public body were successful in defending all of them – may occasion that public body to rethink its approach to the particular area of service delivery.

#### **Defensive administration**

- 4.18 In Appendix B of our consultation paper, we conducted a considerable literature review into the *likely* effects of changes to liability to administrative behaviour. This was done in order to assess the legitimacy of claims that changes to liability will result in defensive administration.
- 4.19 Our provisional conclusions were that there are three possibilities for subsequent practice as a result of the imposition of liability:
- (1) Public bodies’ behaviour might not change at all in reaction to changes in liability.
  - (2) Their behaviour might change appropriately – the imposition of liability might deter negligent behaviour or decision-making, resulting in better public service provision.
  - (3) They might over-react, and inappropriately distort their behaviour to avoid liability, harming the service they provide to the public.
- 4.20 We came to the broad conclusion that which of these outcomes occurs is heavily context-specific. The context includes the nature of the organisation itself.
- 4.21 We did not think it possible to make accurate general statements as to the likely outcome of any given change in liability on a range of public bodies. We think it can be concluded that it is less likely than has been supposed that changes in liability will result in changes to behaviour. However, it would be reasonable to observe that, where a change in behaviour can be shown, it is more likely to be seen as promoting defensive rather than effective administration. Beyond this, we would hold any general statement as open to doubt.

- 4.22 In response to our consultation paper, several consultees put forward broad statements that defensive administration would occur. The Association of Police Lawyers considered that “there is a real danger that the new statutory system would expand liability and divert resources from core police business”. This was similar to the argument accepted by the House of Lords in *Smith v Chief Constable of Sussex*.<sup>2</sup> Similar examples can be found in other cases, for instance *Barrett v Enfield London Borough Council*,<sup>3</sup> or *Phelps v Hillingdon London Borough Council*.<sup>4</sup>
- 4.23 Commenting on the *Smith* case,<sup>5</sup> Jonathan Morgan<sup>6</sup> points out in a recent note that the court accepted the assertions on negative effects without a basis in empirical evidence. He also highlights that we were unable to provide the same when putting forward our proposals.
- 4.24 Echoing general concerns over the lack of empirical research, Professor Stevens opined that the “proposals are not based upon any empirical evidence of a problem... No evidence is produced to show whether the delivery of public services will improve or worsen under the proposals for change”.
- 4.25 Unfortunately, it was not until after we published our consultation paper that Professor Sunkin<sup>7</sup> and others published a major quantitative study into the effects of judicial review on local authorities.<sup>8</sup> They found that:

Quantitative analysis shows that judicial review litigation may act as a modest driver to improvements in the quality of local government services, at least in so far as quality is defined by the Government’s performance indicators. The effect of litigation in this regard occurs when the incidence of challenge increases from that typically experienced by the authority.

- 4.26 They stated that the reaction of local authorities was more nuanced than has been traditionally thought. This matches our theoretical analysis in Appendix B of the consultation paper. Most importantly though, their final conclusion was that:

Judicial review is also an important resource for local authorities enabling change in response to judgments that are rooted in grievances arising from peoples’ experience of services and giving expression to claims that might otherwise be neglected as being

<sup>2</sup> *Smith v Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225.

<sup>3</sup> *Barrett v Enfield London Borough Council* [2001] 2 AC 550.

<sup>4</sup> *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619.

<sup>5</sup> J Morgan, “Policy reasoning in tort law: the courts, the Law Commission and the critics” (2009) 125 *Law Quarterly Review* 215.

<sup>6</sup> University of Cambridge.

<sup>7</sup> University of Essex.

<sup>8</sup> L Platt, M Sunkin, K Calvo, “Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales” (2010) *Journal of Public Administration Research and Theory* (forthcoming). This article draws on a study of the impact of public law litigation on the quality of services provided by local authorities in England & Wales, funded by the Economic and Social Research Council (Res 153-25-0081). We are thankful to the authors for allowing us access to the results of their research before publication.



politically unpopular. As well as guiding authorities as to their legal duties, judgments give expression to the needs of individualised administrative justice; to the requirement that public authorities are able to justify their actions in law and that they act fairly and in a manner that is compatible with human rights. These requirements are not foreign to public administration. On the contrary they accord with the ethos of public service and are of value to administrators as they resolve tensions that lie at the heart of their tasks. Such values are endogenous to the way [authorities] construct their best interests. The image of judicial review that is provided by our research is rather more positive than is commonly presented.

- 4.27 We are glad that such work has been undertaken, especially as it backs up our argument that there can potentially be positive benefits to litigation. Most importantly, it refutes blanket assertions as to the detrimental effects of liability.

#### **Administrative disruption**

- 4.28 The other potential effect that we put forward in our consultation paper was that of administrative disruption. Differing from defensive administration, this considers whether the effect of a particular change to liability would be to disrupt administrative practice, making the delivery of service more difficult rather than necessarily leading to an alteration in service provision.

- 4.29 In its response to consultation, Government outlined how this could happen, by adversely affecting the way in which public bodies learn from mistakes. They stated that:

As part of their accountability to the public, public bodies need to promote a mature, two-way dialogue on what has happened when an individual is unhappy and seeks redress. Litigation, although appropriate in some extreme circumstances, is generally not the best mechanism for achieving this. For the dialogue to work, the public body must be genuinely committed to listening to individuals and to delivering improvements. A threat of litigation, particularly large damages claims, could change the nature of the debate from an open one to a debate that is influenced by the legal ramifications.

- 4.30 However, the Public Administration Select Committee argued that:

Administrative disruption is a genuine risk, but one that in our experience tends to be overstated by administrators, who can find it hard to implement reasonable but perhaps uncomfortable changes in their working practices and organisational culture.

- 4.31 Unfortunately, other consultees did not comment on this potential phenomenon. What seems likely to us is that there is no standard response on the part of public bodies. In some cases changes in liability may promote the establishment of improved administrative practice. This is envisaged as a beneficial outcome by Harlow and Rawlings in their analysis of the subject.<sup>9</sup> In other cases changes in

<sup>9</sup> See C Harlow and R Rawlings, *Law and Administration* (3rd ed, 2009) ch 17.

liability will lead to a break down in feedback mechanisms, as a public body takes an antagonistic approach to the imposition of liability. This seemed to be the Government's concern in its response. It is also similar to arguments put forward in the case law, as outlined above.

### **ANALYSIS OF GOVERNMENT LIABILITY**

- 4.32 Whilst preparing our consultation paper, and subsequently, we encountered significant difficulties in attempting to create a dataset on the liability of public bodies. Here, we explore this issue in greater depth. This is done as one of the lessons that can be drawn from this project. It is solely in this context that we wish to draw conclusions and make formal recommendations.
- 4.33 The importance of this issue became very clear during the development of this project. First, reporting on the flow of public resources is at the heart of the accountability and transparency of public bodies. Second, Government places importance on data as part of the impact assessment process.

### **Consultation responses**

- 4.34 In our consultation paper we were unable to set out the implications of our proposals in a quantifiable form, a fact which was criticised by many consultees. This was despite considerable effort being expended on attempting to create a liability dataset by ourselves and officials HM Treasury. In its response, Government stated that:

A further – and very significant – difficulty with these proposals is the potentially huge financial impact of any changes. As is stated in the consultation paper... there are no comprehensive figures setting out the present cost of providing redress, making it difficult to quantify the impact of amending the law. However, the sheer scale of the figures quoted... indicate the potential difficulties for the public purse.

- 4.35 The Government response went on to state that:

Anecdotal evidence gathered from Government departments illustrates very real concern about the potential cost of these proposals. The consequential loss that could flow from “truly public” decisions (currently non-justiciable) could be enormous...

- 4.36 We accept this criticism. We did seek to establish liability figures by establishing a Government Contact Group, through which we received significant support from HM Treasury. Despite this, owing to the way that reporting practice is currently formulated, liability figures were not (and still are not) available.
- 4.37 Consequently, we feel it appropriate that we should explore the issue in this report, considering both current reporting procedures and impact assessments.

### **Reporting**

- 4.38 Under section 5(1) of the Government Resources and Accounts Act 2000, Government departments must submit resource accounts detailing the “resources acquired, held or disposed of by the department during the year” and “the use by the department of resources during the year”. Though initially

imposed on central government departments, this requirement has been successively expanded to include other public bodies.<sup>10</sup>

- 4.39 Resource accounts are to be prepared in accordance with directions issued by HM Treasury.<sup>11</sup> Section 5(3) provides that such directions should be issued “with a view to ensuring that the resource accounts... present a true and fair view” and, “conform to generally accepted accounting practice subject to such adaptations as are necessary in the context of departmental accounts”.
- 4.40 The current directions are issued as Dear Accounting Officer letters.<sup>12</sup> HM Treasury also maintains a *Financial Reporting Manual 2010-11*,<sup>13</sup> which adjusts International Accounting Standards so that they apply appropriately to public bodies. The *Financial Reporting Manual 2010-11* works in conjunction with the general guidance on allocating public expenditure, contained in HM Treasury’s *Managing Public Money*.<sup>14</sup> This “sets out the main principles for dealing with resources used by public sector organisations in the UK”.<sup>15</sup> It does so whilst acknowledging that these may need adjustment to the specific circumstances of individual public bodies.
- 4.41 The high level principles of *Managing Public Money* apply to a wide range of public bodies. However, local authority accounts are governed by a Code of Practice on Local Authority Accounting.<sup>16</sup> The other key difference between central and local government is that the Audit Commission in England and the Auditor General for Wales audit local authorities’ accounts, whilst the National Audit Office audits those of central government.<sup>17</sup>
- 4.42 At its simplest, Government expenditure and allocations can be divided between liabilities, provisions liabilities, special payments and contingent liabilities:
- (1) *Liabilities* concern expenditure for which there is a distinct obligation to pay, for instance under an employment contract.

<sup>10</sup> This now encompasses a diverse range of bodies. For instance: Government Resources and Accounts Act 2000 (Audit of Public Bodies) Order 2008, SI 2008 No 817, art 9 (Pensions Ombudsman); Government Resources and Accounts Act 2000 (Audit of Public Bodies) Order 2005, SI 2005 No 913, art 3 (British Transport Police Authority); and Government Resources and Accounts Act 2000 (Audit of Public Bodies) Order 2004, SI 2004 No 1715, art 3 (Sea Fish Industry Authority).

<sup>11</sup> Government Resources and Accounts Act 2000, s 5(2).

<sup>12</sup> See <http://www.hm-treasury.gov.uk/d/dao0409.pdf> (last visited 21 April 2010).

<sup>13</sup> HM Treasury, *Financial Reporting Manual 2010-11* (2010), available at: [http://www.hm-treasury.gov.uk/frem\\_index.htm](http://www.hm-treasury.gov.uk/frem_index.htm) (last visited 21 April 2010).

<sup>14</sup> HM Treasury, *Managing Public Money* (2007).

<sup>15</sup> HM Treasury, *Managing Public Money* (2007) p 5.

<sup>16</sup> The Chartered Institute of Public Finance and Accountancy, *Code of Practice on Local Authority Accounting in the United Kingdom 2010-11* (2009).

<sup>17</sup> Audit Commission Act 1998, s 2 and sch 2.

- (2) *Provisions* record “a present obligation (legal or constructive) as a result of a past event” for an indeterminate amount capable of estimation.<sup>18</sup> Under IAS 37, which is the accounting standard that the *Financial Reporting Manual 2010-11* adjusts for the governmental context, this can include court cases. Provisions relate to those activities and expenditure that have been authorised by Parliament.<sup>19</sup>
- (3) *Special Payments* cover expenditure “outside the normal range of departmental activity” and therefore unauthorised directly by Parliament.<sup>20</sup> Special payments can include compensation payments and *ex gratia* payments (which “go beyond statutory cover, legal liability, or administrative rules”).<sup>21</sup>
- (4) *Contingent liabilities* are an estimate about the future need for provisions. When these crystallise they will be recorded in one of the categories detailed above.
- 4.43 In seeking to ascertain Government expenditure on compensation, we encountered a potential confusion in relation to these categories. This turns on the distinction between a provision and a special payment. As outlined above, provisions are indeterminate figures capable of estimation and authorised by Parliament, whereas special payments concern expenditure outside normal activity. It is unclear how compensation figures are ascribed to each or either of these categories under the current reporting practice of public bodies.
- 4.44 Within the context of a service delivery department, the costs of redress mechanisms and any payments made to individuals as a result of a mistake in service delivery should be seen as falling within the general activities of departments. Such expenditure would therefore be placed in the category of provisions, since service failure is inherently linked to the core business of the department.
- 4.45 In non-service delivery departments, for instance the Cabinet Office, the necessity of making an individual award to an aggrieved citizen may not be seen as part of the core business of the department. In such a case, the expenditure may be categorised as a “special payment” rather than a “provision”.
- 4.46 Many injuries at work are not necessarily the result of the core business of the department. In this case, any compensatory payments would properly be categorised as a special payment.
- 4.47 The essential problem, for the purposes of our analysis, is that all of the above would fall into what lawyers would term a compensatory award. Unfortunately, within the current regime for reporting, provisions are not broken down by what could be termed a “compensatory award for service failure” and that which is just normal expenditure when no mistake has been made.

<sup>18</sup> HM Treasury, *Financial Reporting Manual 2010-11* (2010), available at: [http://www.hm-treasury.gov.uk/frem\\_index.htm](http://www.hm-treasury.gov.uk/frem_index.htm) (last visited 21 April 2010).

<sup>19</sup> HM Treasury, *Managing Public Money* (2007).

<sup>20</sup> HM Treasury, *Managing Public Money* (2007) A.4.13.1.

<sup>21</sup> HM Treasury, *Managing Public Money* (2007) box A.4.13A.

- 4.48 In our discussions with HM Treasury, we queried whether special payments could be taken as a useful proxy for compensatory awards. It seems that there is in fact no clear guidance as to the classification of what lawyers would regard as compensation awards between special payments and provisions. In larger departments engaged in service provision, it does seem that the tendency is to list such compensatory payments as provisions.
- 4.49 Furthermore, it is unclear into which of the categories settlements, where these occur after the commencement of legal action, fall.
- 4.50 What is clear is that there is no specific reporting requirement allowing for compensation payments to be disaggregated from other resource allocations, either as provisions or as special payments.
- 4.51 Reporting requirements are not the only way in which information is required to be disseminated by public bodies. Other mechanisms, such as specific publication requirements, could be used to fill the gap that currently exists in reporting requirements.

### **Impact assessments**

- 4.52 In the late 1990s, Government adopted a focus on “better regulation”. This led to the establishment of the Better Regulation Task Force which has subsequently become the Better Regulation Executive, which is now part of the Department for Business, Innovation and Skills.
- 4.53 Initially, the task force concentrated its efforts on reducing the regulatory burden placed on businesses and voluntary sector organisations. One of the methods adopted to achieve this was to impose a requirement that regulatory impact assessments be prepared. These meant that Government policy choices could be scrutinised in terms of the cost of changes to the regulatory regime for businesses. Whilst regulatory impact assessments were widely used, they were heavily criticised by the British Chambers of Commerce in 2004 for failing to provide sufficient factual data and quantification of the costs and benefits of proposals.<sup>22</sup> Similarly, the National Audit Office noted difficulties and gaps in the provision of quantitative data for costs and benefits.<sup>23</sup>
- 4.54 In 2007, Government announced its intention to extend its focus on “better regulation” to include public bodies.<sup>24</sup> “Regulatory impact assessments” were replaced with “impact assessments” which should identify, and where possible quantify, all of the costs and benefits of proposed Government action. The purpose of impact assessments is to ensure that public bodies comply with the five *Principles of Good Regulation*.<sup>25</sup> Originally enunciated by the Better

<sup>22</sup> British Chambers of Commerce, *Are Regulators Raising Their Game? UK Regulatory Impact Assessments in 2002/3* (2004) pp 11 to 13.

<sup>23</sup> Evaluation of Regulatory Impact Assessment Compendium Report 2003-4, Report by the Comptroller and Auditor General (2003-04) HC 358, paras 2.39 to 2.56.

<sup>24</sup> HM Government, *Cutting Bureaucracy for our Public Services* (2007). See now: Department for Business Innovation and Skills, *Impact Assessment Guidance*, <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments> (last visited 21 April 2010).

<sup>25</sup> See BRE website: <http://www.berr.gov.uk/bre/> (last visited 21 April 2010).

Regulation Task Force in 1998,<sup>26</sup> these state that any regulation should be: transparent, accountable, proportionate, consistent, and targeted. Although these principles are frequently used to implement a reduction in information reporting on the part of public bodies,<sup>27</sup> this is not a pre-requisite or even necessarily a desirable consequence of their application. As the most recent Government report on the issue notes, regulation is frequently necessary and effective regulation has positive effects.<sup>28</sup>

- 4.55 The present position is that public bodies should weigh up the impact of any policy before adopting it. With regard to activities that could conceivably give rise to a complaint or litigation then it is in both their interests and that of the citizen to assess this potential burden properly.

#### **The case for reform**

- 4.56 Accepting that there is confusion as to the categorisation of compensation figures, this section outlines three reasons why reform to current reporting practice would be desirable. These are: principles of accountability and legitimacy, improved service delivery, and the ability to make structured reforms.

#### **Accountability and transparency**

- 4.57 Accountability and transparency are core values for modern governance. Together, accountability and transparency, help ensure Government's legitimacy.
- 4.58 The requirements of accountability are, however, open to significant debate. Professor Harlow, in surveying the concept in other jurisdictions of the EU, notes that there are linked terms in French law relating to "legal accountability" and "fiscal accountability".<sup>29</sup> These can be contrasted with the notion of "political accountability" and such mechanisms as "ministerial accountability" to the UK Parliament.<sup>30</sup> Lord saw accountability as vital for a democratic system of governance.<sup>31</sup> We do not propose to explore in great detail the academic debate concerning the meaning of accountability. What does seem clear to us though, is that accountability is capable of a multitude of meanings, one of which includes the need to account in fiscal terms.
- 4.59 Acceptance of the importance of the accountability and transparency can be seen in the Government White Paper on the *Governance of Britain – Constitutional Renewal*.<sup>32</sup> Accountability is mentioned some 11 times and transparency, 13.

<sup>26</sup> Better Regulation Task Force, *Principles of Good Regulation* (1998) p 1.

<sup>27</sup> HM Government, *Cutting Bureaucracy for our Public Services* (2007).

<sup>28</sup> Department for Business, Innovation and Skills, *Better Regulation, Better Benefits: Getting the Balance Right* (2009) p 7.

<sup>29</sup> C Harlow, *Accountability in the European Union* (2002) ch 1.

<sup>30</sup> R Scott, "Ministerial accountability" [1996] *Public Law* 410.

<sup>31</sup> C Lord, *Democracy in the European Union* (1998).

<sup>32</sup> *The Governance of Britain – Constitutional Renewal* (2007-08) Cm 7342-I.

- 4.60 What is clear to us is that in the form of reporting clearly on the allocation of public resources to Parliament, accountability can be seen as a fundamental constitutional requirement.
- 4.61 Though a more modern concept, greater transparency in the actions of Government is establishing itself in a similar fashion.
- 4.62 We suggest that reporting compensation figures should form a constituent part of the process of accounting for public body expenditure. In the interests of both accounting to Parliament for the way that its resources are distributed and being transparent to citizens, it seems to us necessary to report on such payments openly and clearly.

### ***Improved decision-making***

- 4.63 In her *Principles of Good Administrative Practice*, the Parliamentary Commissioner for Administration sets out six principles – which are also annexed to *Managing Public Money*.<sup>33</sup> These are:
- (1) getting it right,
  - (2) being customer focused,
  - (3) being open and accountable,
  - (4) acting fairly and proportionately,
  - (5) putting things right, and
  - (6) seeking continuous improvement.
- 4.64 The necessity of continuously improving service delivery – that is, “getting it right” and “seeking continuous improvement” in the terms of the principles set out above – is another reason to collect and report compensation data. Such reporting would allow Government, and others, to assess the areas in which money is being spent as part of a mechanism for service improvement. This, the Government stated in its response to consultation, is at the core of any system of administrative redress and mirrors the approach taken in the recent Green Paper on *Rights and Responsibilities*.<sup>34</sup>
- 4.65 Of course, as Professor Michael A Jones<sup>35</sup> suggested in response to our consultation paper, a basic examination of this issue will only result in an analysis of current monies spent. What it is hard to do is consider any savings that have accrued through the imposition of liability, for instance where liability has resulted in a beneficial change of behaviour that saves money compared to persisting with the impugned policy.

<sup>33</sup> Parliamentary and Health Service Ombudsman, *Principles of Good Administration: Response to Consultation* (2007); and HM Treasury, *Managing Public Money* (2007) annex 4.3.

<sup>34</sup> *Rights and Responsibilities: developing our constitutional framework* (2009) Cm 7577.

<sup>35</sup> University of Liverpool.

- 4.66 However, such is an example of exactly the sort of behaviour that liability should encourage. This was the conclusion that we drew from our research in Appendix B and recent quantitative research<sup>36</sup> shows that liability can lead to improvements in service delivery. However, for that to happen – for instance through the impact assessment process –there needs to be accurate data concerning that liability.
- 4.67 The availability of data would allow Government and other public bodies to act in the most economically efficient manner. Activities which affect the potential liability of public bodies are all-pervasive. It is easy to imagine that nearly all policy decisions undertaken by Government could in some way touch on this subject.
- 4.68 One of the aims here would be to allow for an assessment of repeat payments, that is, where changes to behaviour do not occur and instead a practice develops of paying compensation rather than changing service delivery. This assessment would be undertaken with the aim of determining best practice. It would show where timely changes to service delivery would have been the better practice in purely economic terms.
- 4.69 During consultation, we did receive an anecdotal example where a change in policy to repairing highways rather than paying compensation had resulted in an overall cost saving for the public body involved. Such action ties in with the move to better regulation and the need to ensure value for money in the distribution of public funds.

#### ***Informing debate***

- 4.70 We have accepted that the inability to create a dataset for our proposals was a real problem. Given the importance of the issue both for public bodies worried about their liability and citizens who feel aggrieved by the current system, we suggest that collecting such data as we are proposing below on compensation would allow for a structured and rational debate on the subject.

#### **Recommendations**

- 4.71 Given the above, we feel that the absence of publication of information on compensation is a subject on which we should make formal recommendations. We are concerned with the result rather than the mechanism. Whether publication is best achieved by a reporting requirement or some other mechanism is a matter for the discretion of the bodies to whom these recommendations are directed.
- 4.72 We accept that creating any additional publication requirement will have cost implications. It is clear from what we have said that we also believe that it is likely to produce benefits in terms of improvements in services. However, we consider that it would be prudent for any new system to be trialled in a pilot study, to ascertain more accurately the costs and benefits of full scale implementation.

<sup>36</sup> See L Platt, M Sunkin, K Calvo, “Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales” (2010) *Journal of Public Administration Research and Theory* (forthcoming).



- 4.73 Therefore, **we recommend, subject to the successful completion of any pilot study, that HM Treasury ensure the costs of compensation to central government bodies are regularly collated and published.**
- 4.74 In doing this, we suggest that it would be beneficial for public bodies to report the costs of the following:
- (1) all compensation payments made after the commencement of legal proceedings but before judgment (therefore, all settlements);
  - (2) all compensation payments made after judgment;
  - (3) legal costs (for instance, costs of solicitors/counsel/court fees/other disbursements) of cases terminating in (1); and
  - (4) legal costs of cases terminating in (2).
- 4.75 In addition, these should all be broken down into a finite list of subject areas or causes of action. For instance: employment disputes, personal injury claims, other negligence, breach of statutory duty, misfeasance in public office, and "other".
- 4.76 Specifying the commencement of legal proceedings as a threshold provides a convenient cut off point that is universally recognised.
- 4.77 It is important to recognise that this data is already being generated. The amount of compensation paid, either in the form of a court order or in a settlement, will be readily available to the parties. While the figures in some settlements will be confidential, any concerns in relation to confidentiality should be overcome by collating the data such that individual awards need not be disclosed. The costs of litigation should also be readily available. Where a Government department uses the Treasury Solicitor's Department, they bill the client department in a way equivalent to lawyers in private practice. Where the work is handled by an outside firm of solicitors, they will bill the Department in the usual manner. Therefore, this recommendation, in general, merely requires the collation and publication of data already available, rather than the creation of new systems for the generation of the data in the first place. The only exception to this would be relating to the categorisation of the legal action.
- 4.78 It is equally important that the broader public sector should be aware of its own expenditure on compensation and associated legal costs. Therefore, **we also recommend that the Department for Communities and Local Government and the Welsh Assembly Government should similarly consider the most appropriate way for local government to collate and publish this information. As with the recommendation above, this is made subject to the successful completion of a pilot study.**

4.79 These are the only recommendations made in this report.<sup>37</sup>

## **CONCLUSIONS**

4.80 Clear and open governance is the cornerstone of any democratic system. This includes the requirement that the way in which public money is spent should be outlined openly and clearly. In the UK, this is the bedrock of parliamentary power and the reason for the creation of many of its enduring institutions.

4.81 We do not challenge Government's commitment to this basic principle. We are proposing a minor change that will allow citizens to assess the way in which public monies are spent on this important issue. Given the purported development of a "compensation culture" we believe that both citizens' and Government's interests would be best served by greater statistical information on this topic.

<sup>37</sup> Owing to the nature of these recommendations, we are not accompanying them with a published impact assessment. The recommendations are founded on the necessity of further work through a pilot study. Therefore, as the current policy is only at the development/options stage of the process, the formal requirement to publish has not yet engaged: Better Regulation Executive, *Impact Assessment Toolkit* (2010) p 89.

# **PART 5**

## **OMBUDSMEN**

### **INTRODUCTION**

- 5.1 In this Part we look at the last limb of the Administrative Redress project, that concerning the public sector ombudsmen. By public sector ombudsmen, we mean the statutorily established Parliamentary Commissioner for Administration, Commissioner for Local Administration, Health Service Commissioners, and the Public Services Ombudsman for Wales. We now suggest that this list should include the Independent Housing Ombudsman, owing to the role accorded to it under the Housing Act 1996 and the Housing and Regeneration Act 2008.
- 5.2 In our consultation paper, we stated that we considered the public sector ombudsmen to be a vital “pillar” of administrative justice. In coming to this conclusion, we asserted that internal complaint mechanisms resolve the vast majority of individual cases and should almost always be the initial mechanism that an aggrieved citizen turns to. We acknowledged that tribunals have an important role – one that has been made more effective by the reforms contained in the Tribunals, Courts and Enforcement Act 2007. There remains a distinct function for courts, especially when considering the orders available to the Administrative Court. However, alongside these mechanisms, we concluded that the public sector ombudsmen have developed into a vital part of the regime for public sector redress.
- 5.3 Partly, this is due to the nature of an ombudsman’s investigations. They can undertake large-scale investigations into systemic issues, and their findings and recommendations can lead to widespread administrative change. Consequently, ombudsmen play a crucial role in improving administrative action to the benefit of both public bodies and claimants.
- 5.4 This is also the result of the concept of maladministration that lies at the heart of ombudsmen’s jurisdiction. The way in which maladministration has developed means that matters which are not strictly illegal can still be subject to an ombudsman’s investigation. This can include very important issues such as delay, turpitude and incompetence.
- 5.5 Finally, and unlike the Administrative Court, ombudsmen have a wide discretion to recommend financial compensation where they think this is appropriate.
- 5.6 Having considered the ombudsmen in the context of our consultation paper, and having received favourable consultation responses that raised further issues, we now think that there is an argument for embarking on a wider examination of the ombudsmen – focused on those listed above.
- 5.7 We still want to take forward those issues that we isolated when proposing reform of the ombudsmen within the context of the initial focus of the Administrative Redress project. However, shorn of the judicial review and private law aspects of the project, we are of the opinion that it is worthwhile looking at the ombudsmen more broadly.

## **Our proposals**

- 5.8 Having established the importance of ombudsmen in our consultation paper as a vital part of the general regime for administrative redress within the UK, we next proposed a series of potential reforms. These were underpinned by the aim of improving access to ombudsmen and our recognition of the need for ombudsmen to co-exist with other avenues of redress, particularly the courts. The four main reforms proposed were:
- (1) the creation of a specific power to stay an application for judicial review;
  - (2) that access to the ombudsman could be improved by modifying the statutory bar;
  - (3) a power for the ombudsmen to refer a point of law to the courts; and
  - (4) removing the MP filter in relation to the Parliamentary Commissioner for Administration.
- 5.9 Our stay proposal was designed to allow for the transfer of suitable claims to an ombudsman. We thought that this should include a level of compulsion to achieve this end. We accepted that this could result in ombudsmen dealing with potentially unwilling complainants but we thought that this was not necessarily a significant problem, given the nature of the ombudsmen processes.
- 5.10 Though the Administrative Court has broad case management powers and can order a stay relating to alternative dispute resolution under CPR 26.4, this is really focused on settlement rather than an alternative form of redress. Consequently, we thought that there is a need for a dedicated power.
- 5.11 The statutory bar is the rule that recourse may not be had to an ombudsman if the complaint has been, or could be, pursued in a court of law. In relation to the Parliamentary Commissioner for Administration, this rule is currently formulated in section 5(2) of the Parliamentary Commissioner Act 1967. Our analysis highlighted inconsistencies in its approach and a potential for injustice. Though there is discretion to disapply the rule, we thought that its replacement with more widely drawn discretion would be preferable.
- 5.12 Our suggested power to make a reference on a point of law was designed to aid ombudsmen in their work. It seemed to us sensible that if a claim was broadly concerned with maladministration but that some issues needed recourse to a court for legal clarification, then ombudsmen should have a power to make a reference allowing for that clarification to occur and all of the issues in the claim to be addressed by the ombudsmen. We did not envisage that this would be used often.
- 5.13 The MP filter is the requirement in section 5(1) of the Parliamentary Commissioner Act 1967 that a written complaint be sent to an MP before it is referred to the Parliamentary Commissioner for Administration. In suggesting the removal of this as a requirement, we put forward two alternative approaches. One was simply to abolish the filter outright. The other, which we called the dual track, was to keep the current statutory provisions but also allow individuals to submit claims directly to the Parliamentary Commissioner for Administration.

## **CONSULTATION RESPONSES**

5.14 Our ombudsmen proposals received broadly favourable commentary during consultation. Whilst certain elements were criticised and some commentators raised particular worries or suggested that we may have missed certain issues, the overarching view was that our proposals were a move in the right direction.

5.15 In this section, we will consider the responses to consultation in more detail, as they related to individual elements of our proposals.

### **Additional power to stay**

5.16 Richard Kirkham<sup>1</sup> described this proposal as a “sensible solution” to the existing “bias in the system towards pursuing a dispute by way of judicial review”. Lord Justice Sullivan agreed with the underlying premise that “a significant proportion of certain types of claim in the Administrative Court would be equally well, if not better, dealt with by ombudsmen”.

5.17 Government agreed that “there may be some merit in exploring further the statutory frameworks governing the ombudsmen” and that “it may be worth looking further at whether there are cases before the courts which would benefit from being stayed and referred to the ombudsmen for possible investigation”. They envisaged that there would be only a limited number of such cases.

5.18 In its response, the Local Government Ombudsman agreed with the proposal, and suggested that “the effectiveness of such referral orders should, however, be reviewed after an appropriate period”. It was also, along with others, worried about the cost implications.

5.19 All of these, we thought, were important points and we accept that further consideration is needed as to how exactly the power to stay should be structured and implemented. Certain consultees, such as the Housing Law Practitioners’ Association, suggested that existing case management powers are sufficient. Whilst we accept that there are already wide-ranging case management powers available to courts, we suggested that a dedicated power to refer cases to the ombudsman was desirable.

5.20 Government highlighted some worries, particularly concerning the potential cost of the proposal and whether it could be abused in a way that creates additional delay in governmental action. The Administrative Justice and Tribunals Council suggested that any proposals should not impinge on an ombudsman’s discretion as to whether to investigate a particular complaint.

5.21 However, we are less convinced by the arguments relating to abuse. Whilst it is essential that the provisions, in whatever form, do not encourage abuse, we are confident that the courts can be trusted to exercise judgment in deciding whether a case ought to be transferred to the ombudsman.

5.22 Professor Carol Harlow was worried that the proposals were an attempt to create a hierarchy, an approach which has not worked to date. However, our proposals were not aimed at creating a hierarchy. Courts would still retain certain tools

<sup>1</sup> University of Sheffield.

unavailable to ombudsmen. We proposed that, as both courts and ombudsmen can occupy the same factual ground, there needs to be a suitable set of tools available to allocate individual claims appropriately. This is not the same as placing one *above* the other; rather, it makes allowances for the fact that one will be *more appropriate* than the other in any given factual matrix.

- 5.23 Finally, it is worth noting that there is now a dedicated duty to transfer cases from the Administrative Court to the Upper Tribunal contained in section 31A of the Senior Courts Act 1981.<sup>2</sup> This states that the court must transfer a matter if certain conditions are met. We suggest that its operation merits further analysis.

#### **Modification to the statutory bar**

- 5.24 In all, thirty-one responses commented on our statutory bar proposal. Twenty-six consultees favoured modification as proposed, five objected to it. Government expressed concerns that the proposal would create additional delays. Their concern was that claimants would be allowed to go to a court and then the ombudsman, or vice versa, and that this would hinder public bodies in their functions.
- 5.25 Mr Justice Silber suggested that there would have to be “clearly structured rules of discretion”. This point was echoed by Professor Reid.<sup>3</sup> Conversely, the Local Government Ombudsman and Parliamentary and Health Service Ombudsman thought that concerns as to discretion were overstated and, in the case of the Parliamentary and Health Service Ombudsman, the “residual discretion not to investigate will help avoid any duplication of jeopardy”.
- 5.26 Government was also concerned that our proposals would incur additional costs and that it would need careful thought and budgeting. We agree with this. They also suggested that the statutory bar is “an important mechanism for preventing duplication between the courts and the ombudsmen”. However, they accepted that “there may be confusion about when the existing discretion to disapply the statutory bar should operate”.
- 5.27 Colm O’Cinneide suggested that our proposed reforms should be “accompanied by a wide-ranging review of the funding, status, profile and structure of the various ombudsman institutions”. He also noted that

If ombudsmen are to play a similar role in the UK as they successfully do in the Nordic countries, a wholesale review of how they operate in the UK context is required.

- 5.28 As with Government concerns regarding funding, we accept that any further proposals need to explore more fully the resource implications that they may entail. However, we do not think that we are in a position to complete as wide ranging a review as Colm O’Cinneide suggested and we are not currently convinced that the unique nature of the UK constitution would accommodate ombudsmen in the Nordic sense. In many ways, our constitution explains the particular nature of the ombudsmen regimes we have adopted, such that the first

<sup>2</sup> Inserted by the Tribunals, Courts and Enforcement Act 2007, s 19(1).

<sup>3</sup> University of Dundee.

ombudsman was an officer of Parliament rather than an independent redress mechanism – as is the case with Nordic systems. Such systems also use ombudsmen as the preferred form of administrative redress.

- 5.29 The ability for the UK constitution to assimilate various ombudsmen models is an important issue. What is appropriate in the UK context may differ from that which works perfectly well in other countries, with different constitutional backgrounds. As a related point, what is very interesting currently is the variety of ombudsmen systems already present in the UK public sector. We think this an area which would benefit from further engagement and further comparative research.

#### **Reference on a point of law**

- 5.30 In consultation, twenty-eight consultees supported this proposal, whilst one did not. The Administrative Justice and Tribunals Council argued that:

[The power] would serve to complement the ombudsmen's functions and utility without compromising their non-judicial role. Complainants would not need to initiate separate proceedings specifically for the purpose of obtaining determination of unresolved or disputed points of law nor would they bear the cost of making referrals.

- 5.31 Several consultees called for further consideration of how the process is expected to operate in practice, with Mr Justice Silber asking whether “a procedure [could] be adopted which is similar to the case stated procedure?”. We appreciate the need for more detailed analysis on this matter.
- 5.32 Government, York Law School and others worried about the funding for such a reference, and whether it would be appropriate to impose any charge on a complainant.
- 5.33 Finally, the Parliamentary Commissioner for Administration noted that there may be difficult issues with its jurisdiction, which covers the UK as a whole. This point was also raised by Colin Reid.

#### **Removal of the MP filter**

- 5.34 Thirty-two consultees responded and all but one were in agreement with the proposal to abolish the MP filter in its present form.
- 5.35 Those expressing support tended to do so for the reasons given in our consultation paper, namely that it is an anachronism and may operate as a bar to potentially worthy claims.
- 5.36 However, Professor Harlow disagreed with the proposal, suggesting that the MP filter is not about redress and that any reforms are more properly “a question for the House of Commons and more particularly the Public Administration Select Committee, to which the Parliamentary Commissioner for Administration in any event has full access”.
- 5.37 Access is an important issue and one that we thought worthy of consideration within the context of our project. During consultation many did agree with Professor Harlow's salient point, that the role of and relationship with Parliament is key to the Parliamentary Commissioner. However, most used this argument to

support retention of the MP filter in some form, rather than to suggest that we should not conduct reform in this area at all.

5.38 With regard to our alternative proposals of a dual system (which would retain the MP filter but it not be a *requirement*) and outright abolition, sixteen consultees preferred a dual system. Eight consultees favoured outright abolition.

5.39 The Parliamentary and Health Service Ombudsman suggested that the MP filter is:

At least in part, an acknowledgement of [the] close constitutional relationship between my office and Parliament... [A dual system would allow MPs to] retain, in partnership with the ombudsman, an important part in the handling of their constituents' grievances.

5.40 The Public Administration Select Committee also agreed with the dual track and stated that the Parliamentary and Health Service Ombudsman:

Relies on [the Public Administration Select Committee], and on MPs more widely, to apply political pressure to the Government where it is unwilling to accept her recommendations. It is in the [Parliamentary Health Service Ombudsman]'s interests to maintain a close working relationship with MPs, and to keep them aware of her work...without a notification requirement, the removal of the MP filter would mean that MPs would no longer automatically be aware of issues referred to the PHSO by their constituents. There is...a case for such a notification requirement.

5.41 Richard Kirkham argued that the relationship between the Parliamentary Ombudsman and Parliament "was one of the main reasons for the success of the office".

5.42 We agree with the essence of these responses, and also subscribe to the view that a strong relationship with Parliament and its Public Administration Select Committee is vital to the Parliamentary Commissioner for Administration.

5.43 Given the importance of the issue, this is a subject that requires more thought. This is especially true when considering the developments that have occurred since our original consultation, to which we now turn.

#### **WIDER ISSUES WITH OMBUDSMEN**

5.44 In this section we explore some of the issues that consultation showed were particularly important for consultees. We also outline some, though not all, of the developments that have occurred since the publication of our consultation paper and the end of the consultation period on 7 November 2008. In doing this, we consider the following:

- (1) the nature of the ombudsman process;
- (2) relationship of ombudsmen with Parliament; and
- (3) the nature of findings and recommendations.



### The nature of the ombudsman process

- 5.45 During consultation it became apparent that an ombudsman's investigation is very different in its nature from the adversarial processes of a court. Ombudsmen were designed as inquisitorial fact finding institutions. They were designed to sort through the minutiae of administrative decision making and see if the process amounted to maladministration resulting in injustice. Therefore, ombudsmen can be seen as the appropriate bodies to decide on issues such as whether there has been unjust delay or whether those subject to an administrative process have been treated properly.
- 5.46 This is very different to the way in which a case before the Administrative Court is formulated. There, the essential question the court asks is whether the action was *legal*. This is not to suggest that the Administrative Court is not a competent fact finding body. The recent case of *R (Al-Sweady) v Secretary of State for Defence* is a good example of a situation where the Administrative Court had to engage in a complicated piece of factual analysis that necessitated the calling of witnesses. In *Al-Sweady*, which concerned alleged human rights abuses and the question of whether any potential human rights violations had been investigated, there were significant disagreements as to the facts, which the Administrative Court needed to decide in order to resolve the matter.<sup>4</sup>
- 5.47 In relation to the inherent nature of ombudsmen, which has become a key theme for the project,<sup>5</sup> there is the continuing question as to the extent of any potential overlap between unlawfulness in the context of judicial review and maladministration for the purposes of an ombudsman's investigation. Maladministration was left deliberately undefined in the Parliamentary Commissioner Act 1967, such that the Parliamentary Commissioner would define it on the basis of its own case law. Subsequently, maladministration has developed both in the ombudsmen's own understanding and in case law, as can be seen in the *ex parte Eastleigh* judgment.<sup>6</sup> It can be taken to include, amongst other things:
- (1) corruption;
  - (2) bias and unfair discrimination; and
  - (3) making a decision on the basis of faulty information which should have been properly ascertained and assembled.<sup>7</sup>
- 5.48 These would also be grounds for judicial review. However, whilst this overlap is the case now, it was not necessarily true before the growth of judicial review. The

<sup>4</sup> *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin), [2010] HRLR 2.

<sup>5</sup> The continuing relevance of this issue can be seen by the fact it is currently the subject of Nuffield Foundation funded research by Professor Andrew Le Sueur of Queen Mary, University of London and Varda Bondy of the Public Law Project.

<sup>6</sup> *R v Local Commissioner for Administration ex parte Eastleigh Borough Council* [1988] QB 855.

<sup>7</sup> H Woolf, J Jowell and A Le Sueur, *De Smith's Judicial Review* (6th ed 2007) para 1-071.

change in attitudes to the possibility of judicial review can be seen most noticeably in relation to the last of the examples given above, where the operation of the Human Rights Act 1998 has involved the Administrative Court in more fact-based analysis and widened its ability to question what were traditionally thought of as policy decisions.

- 5.49 Though the above shows that there are certain shared characteristics between ombudsmen, there is no set ombudsman model for the UK. Therefore, we consider that there is value in exploring recent changes to the different regimes in order to ascertain whether certain features can be exported amongst them. This, we suggest, is the sort of work that Colm O’Cinneide was suggesting in his response to our consultation paper.
- 5.50 For instance, the Local Government Ombudsman has recently changed the way in which complaints can be made by setting up a general advice line. Following this lead, we may wish to consider the requirement for there to be a written complaint to the Parliamentary Commissioner for Administration<sup>8</sup> and the Public Services Ombudsman for Wales.<sup>9</sup>
- 5.51 In consultation, the possibility of self-generated investigations – such that the ombudsmen do not require a complaint before opening an investigation – and the development of an ombudsmen equivalent of class actions were mentioned. Both of these are interesting points. Since the first, especially, would change fundamentally the nature of ombudsmen as currently construed, we think that thorough consideration is necessary before any recommendations could be made on these subjects.

### **The relationship of ombudsmen with Parliament**

- 5.52 Debates on the renewal of Parliament and remedying a perceived breakdown in the relationship between Parliament and citizens have come to prominence recently.<sup>10</sup> There are, of course, many ways that one can go about attempting to address the issues contained in the debate. In the context of our continuing project on administrative redress, there seem to be two important subjects which are worthy of further, more detailed consideration. The first is the developing practice of holding pre-appointment hearings for certain public posts. The second concerns the special relationship between the Parliamentary Commissioner for Administration and Parliament.

### ***The general relationship of ombudsmen with Parliament***

- 5.53 In this section we consider the general relationship of ombudsmen with Parliament. The intricacies of the relationship between Parliament and its Parliamentary Commissioner are examined subsequently. There seem to us to be two avenues that are worthy of further exploration: pre-appointment hearings and the ongoing relationship with select committees.

<sup>8</sup> Parliamentary Commissioner Act 1967, s 5(1)(a).

<sup>9</sup> Public Services Ombudsman (Wales) Act 2005, s 5(1)(a).

<sup>10</sup> See *Rebuilding the House*, Report of the House of Commons Reform Committee (2008-09) HC 1117.

## PRE-APPOINTMENT HEARINGS

- 5.54 The Public Administration Select Committee noted in 2003 that although Ministers are formally responsible to Parliament for public appointments, ... in practice Parliament plays hardly any role in making appointments or supervising public patronage.<sup>11</sup>
- 5.55 The Committee therefore suggested that pre-appointment hearings should be held by select committees for “peak appointments”, with the option of entering a letter of reservation where it felt the candidate was unsuitable. In 2007 the Public Administration Select Committee again considered evidence on confirmation hearings and similar proposals were made by the Conservative Party Democracy Taskforce.<sup>12</sup>
- 5.56 In its Green Paper on the *Governance of Britain*, Government stated a broad ambition of strengthening the role of Parliament in relation to certain public appointments. This included, as an example, pre-appointment hearings for the following:
- (1) Parliamentary Commissioner for Administration;
  - (2) Health Service Commissioners;
  - (3) Local Government Ombudsman.<sup>13</sup>
- 5.57 Though the hearing was to be non-binding, the Green Paper envisaged that the Minister would decide whether to appoint in the light of the select committee hearing. The hearings were to cover: “the candidate’s suitability for the role, his or her key priorities, and the process used in selection”.<sup>14</sup>
- 5.58 A more formal list was issued, after discussion with the Liaison Committee, in the Government response to the Liaison Committee’s special report on pre-appointment hearings.<sup>15</sup> This list was also annexed to the Cabinet Office’s current guidance on pre-appointment hearings by select committees.<sup>16</sup>
- 5.59 The first such hearing for a Local Government Ombudsman was held on Monday 12 October 2009.
- 5.60 More dramatically, a recent report of the House of Commons Select Committee for Children, Schools and Families refused to endorse Government’s suggested candidate, concluding that:

<sup>11</sup> Fourth Report of the Public Administration Select Committee (2002-03) HC 165-I, para 103.

<sup>12</sup> Public Administration Select Committee, *Oral and written evidence given by Ms Janet Gaymer CBE* (19 June 2007); and Conservative Democracy Taskforce, *Power to the People: Rebuilding Parliament* (2007) p 4.

<sup>13</sup> *The Governance of Britain* (2007) CM 7170, para 77.

<sup>14</sup> As above, para 76.

<sup>15</sup> First Special Report of the Liaison Committee (2007-08) HC 594.

<sup>16</sup> Cabinet Office, *Pre-appointment Hearings by Select Committees: Guidance for Departments* (2009) annex A.

While we are satisfied that Maggie Atkinson demonstrated a high degree of professional competence, we feel unable to endorse her appointment, as we would like to have seen more sign of determination to assert the independence of the role, to challenge the status quo on children's behalf, and to stretch the remit of the post, in particular by championing children's rights.<sup>17</sup>

- 5.61 Government however, rejected this finding and Maggie Atkinson was still appointed. What is clear is that such hearings are now becoming the norm; this is an interesting constitutional development and one worthy of further study in relation to ombudsmen.
- 5.62 Interestingly, the Public Services Ombudsman for Wales is appointed on the nomination of the National Assembly for Wales.<sup>18</sup>

#### ONGOING RELATIONSHIP WITH SELECT COMMITTEES

- 5.63 Given the suggested role of select committees in the appointment of ombudsmen, it seems to us that a logical conclusion to draw is that there should also be an increasingly formalised ongoing interaction between select committees and those whose selection they played a part in.
- 5.64 There are many forms that such a role could take. One model would be the existing relationship that the Parliamentary Commissioner for Administration has with the Public Administration Select Committee. Alternatively, it may be more appropriate to have a requirement to submit regular reports or a system of annual hearings. We think this is an area which would merit detailed investigation.
- 5.65 If such a line were taken then there is an equivalent argument that we need to consider further the relationship between the Public Services Ombudsman for Wales and the National Assembly for Wales.

#### ***The relationship between the Parliamentary Commissioner for Administration and Parliament***

- 5.66 As we outlined above, during consultation there was a large degree of support for changing to the MP filter in its present form. However, there was less support for its outright abolition. A high proportion of consultees, and importantly both the Parliamentary Commissioner for Administration and the Public Administration Select Committee, favoured the dual track approach we put forward as an alternative. In favouring dual track, consultees stressed that the relationship with Parliament was vital for the *Parliamentary* Commissioner, and that the MP filter was vital to this relationship.
- 5.67 We accept the foundational assertion that the relationship with Parliament is vital. However, we do not necessarily think that it is dependent on the existence or not of the MP filter. In fact we would suggest that the argument has been undermined by the change in the rules to allow *any* MP to forward a complaint, rather than the complainant's constituency MP. Following this, it is hard to maintain an argument

<sup>17</sup> Eighth Report of the Children Schools and Families Committee (2008-09) HC 998-I, para 18.

<sup>18</sup> Public Services Ombudsman (Wales) Act 2005, sch 1, para 1.

that the Parliamentary Commissioner's primary purpose is to aid MPs in their constituency role.

- 5.68 Furthermore, such a limited approach to the relationship does not seem to accord with the reality of the Parliamentary Commissioner for Administration undertaking large-scale investigations with a wide-ranging remit. Examples here would be investigations into final salary occupational pensions, the regulation of *Equitable Life*, the treatment of persons interned by Japan during the Second World War, or the recent report into the UK Border Agency.<sup>19</sup>
- 5.69 An alternative approach to the Parliamentary Commissioner's relationship with Parliament is to concentrate more on the relationship with the Public Administration Select Committee. This, it is suggested, is a better line to take.
- 5.70 It is clear that the Public Administration Select Committee, rather than individual MPs, has taken centre stage when it comes to matters which are politically contentious for the Parliamentary Commissioner. The *Equitable Life* affair was the most vivid example of this. The Parliamentary Commissioner's first report was endorsed by the Select Committee.<sup>20</sup> This was then rejected by Government. The rejection of the Parliamentary Commissioner's findings led the Select Committee to issue a further report. This was followed by a special report from the Parliamentary Commissioner. A special report is one made under section 10(3) of the Parliamentary Commissioner Act 1967 and is used where the Parliamentary Commissioner thinks that an "injustice has not been, or will not be, remedied". The special report is laid before both Houses of Parliament. Both of these were also rejected by Government, leading to two special reports from the Select Committee, where the Select Committee felt the need to make further observations to the House under Standing Order 133.<sup>21</sup> Here, one can see clearly the symbiotic relationship that has developed between the Select Committee and the office of Parliamentary Commissioner for Administration.

### **The nature of findings and recommendations**

- 5.71 The final topic that needs to be considered is the relationship between the different ombudsmen and those whom they investigate. Essentially, this turns on the nature of ombudsmen's findings and recommendations. Here it is instructive to consider the differences between the Parliamentary Commissioner for Administration and the Local Government Ombudsman, in the light of recent case law on the issue.

<sup>19</sup> Trusting in the pensions promise: government bodies and the security of final salary occupational pensions, Report of the Parliamentary and Health Service Ombudsman (2005-06) HC 984; *Equitable Life: a decade of regulatory failure*, Report of the Parliamentary and Health Service Ombudsman (2007-08) HC 815; "A debt of honour": The ex gratia scheme for British groups interned by the Japanese during the Second World War, Report of the Parliamentary and Health Service Ombudsman (2005-06) HC 324; "Fast and Fair?": a report by the Parliamentary Ombudsman on the UK Border Agency, Report of the Parliamentary and Health Service Ombudsman (2009-10) HC 329.

<sup>20</sup> *Equitable Life: a decade of regulatory failure*, Report of the Parliamentary and Health Service Ombudsman (2007-08) HC 815.

<sup>21</sup> Second Report of the Public Administration Select Committee (2008-09) HC 41; Sixth Report of the Public Administration Select Committee (2008-09) HC 219; Third Special Report of the Public Administration Select Committee (2008-09) HC 569; Fourth Special Report of the Public Administration Select Committee (2008-09) HC 953.

- 5.72 A clear contrast can be seen between the public law effect of a report of the Parliamentary Commissioner, and the findings or recommendations that it contains, and a report of the Local Government Ombudsman. In part this could be seen as a direct result of the structure of the Parliamentary Commissioner's relationship with Parliament.

### **Local Government Ombudsman**

- 5.73 Section 31 of the Local Government Act 1974 provides that where the Local Government Ombudsman has found maladministration, a "failure in a service which it was the function of an authority to provide", or a "failure to provide such a service",<sup>22</sup> then a report should be laid before the relevant authority and "it shall be the duty of that authority to consider the report".<sup>23</sup> Where the report relates to maladministration, the report can recommend actions that the authority should take to "remedy any injustice sustained by the person affected in consequence of the maladministration" and "prevent injustice being caused in the future in consequence of similar maladministration".<sup>24</sup> Describing the system, Lord Donaldson of Lynton in *ex parte Eastleigh BC* put it thus:

The Parliamentary intention was that reports by ombudsmen should be loyally accepted by the local authorities concerned... Whilst I am very far from encouraging councils to seek judicial review of an ombudsman's report, which, bearing in mind the nature of his office and duties and the qualifications of those who hold that office, is inherently unlikely to succeed, in the absence of a successful application for judicial review and the giving of relief by the court, local authorities should not dispute an ombudsman's report and should carry out their statutory duties in relation to it.<sup>25</sup>

- 5.74 Therefore, the situation in relation to the Local Government Ombudsman is that the public authority should follow recommendations unless there are sufficiently good reasons for them not to do so – sufficient in the sense of their being able to bring an action for judicial review challenging the ombudsman's report. The courts distinguished themselves from this position in relation to the Parliamentary Commissioner for Administration in the *Bradley* and *Equitable Life* judgments, which we consider in the next section.

### **Parliamentary Commissioner for Administration**

- 5.75 An alternative approach can be seen when considering the Parliamentary Commissioner for Administration. In the context of the Parliamentary Commissioner a distinction is drawn between a *finding* that a member of the public has "sustained injustice in consequence of maladministration", within the terms of section 5(1)(a) of the Parliamentary Commissioner Act 1967, and any *recommendations* that are made as a consequence of these findings.

<sup>22</sup> Local Government Act 1974, s 31(1).

<sup>23</sup> As above, s 31(2).

<sup>24</sup> As above, s 31(2B).

<sup>25</sup> *R v Local Commissioner for Administration ex parte Eastleigh Borough Council* [1988] QB 855, 867.

5.76 This topic has been subject to litigation in *R (Bradley) v Secretary of State for Works and Pensions* in the Court of Appeal<sup>26</sup> and, more recently, *R (Equitable Members Action Group) v HM Treasury* in the Administrative Court.<sup>27</sup>

5.77 In *Bradley*, the court asserted that the Minister could only reject the Parliamentary Commissioner's *findings* where they had "cogent reasons" to do so. Specifically, the Court endorsed the following sentence in the skeleton argument:

The question is not whether the defendant himself considers that there was maladministration, but whether in the circumstances his rejection of the ombudsman's finding to this effect is based on cogent reasons.<sup>28</sup>

5.78 The court based this assertion, and distinguished the position of the Parliamentary Commissioner from the Local Government Ombudsman,<sup>29</sup> on the scheme of the Parliamentary Commissioner Act 1967. In particular the court noted that:

The purpose for which the legislation was introduced was to give Members of Parliament – in particular, Members of the House of Commons – access to the services of an independent and authoritative investigator as "a better instrument which they can use to protect the citizen".<sup>30</sup>

5.79 This issue was returned to in the recent *Equitable Life* decision. The court began by stating that the Parliamentary Commissioner had to be seen in the context of its relationship with Parliament. Following the lead given in *Bradley*, the Administrative Court held that the primary place for the enforcement of an ombudsman's findings – and, seemingly, all issues relating to recommendations – is Parliament. This leaves remedies as a political issue, to be dealt with in Parliament and outside the competence of the courts. The courts in both *Bradley* and *Equitable Life* accepted that this is the proper setting for the Parliamentary Commissioner and that which was envisaged by the Parliamentary Commissioner Act 1967, even if they might have differed slightly on emphasis. As Lord Justice Wall put it in *Bradley*:

The role of the ombudsman under the 1967 Act is not only to report to Parliament, but, where appropriate, vigorously to alert Parliament to an injustice which has occurred through maladministration. It is, therefore, for Parliament to provide the remedy, subject only to the role of the courts in ensuring that the acts of the ombudsman herself

<sup>26</sup> *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114.

<sup>27</sup> *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin), (2009) 159 NLJ 1514

<sup>28</sup> *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114 at [72], by Sir John Chadwick.

<sup>29</sup> The position of the Local Government Ombudsman is discussed below.

<sup>30</sup> *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114 at [40], by Sir John Chadwick.

and the role of the relevant departments in responding to her reports are themselves lawful.<sup>31</sup>

5.80 However, the judgments still did not answer important questions concerning the Parliamentary Commissioner of Administration's relationship with Parliament. Though the relationship with Parliament and the need to protect the political process is obviously at their core, the question remains as to whether the Commissioner is primarily a servant of individual MPs, which may bolster arguments for retaining the MP filter, or the servant of Parliament as a whole, through the institution of the Public Administration Select Committee. This is particularly true with *Equitable Life*, where the process leading to the court case was one that led to a number of reports from the Public Administration Select Committee. This does not mean that individual MPs are irrelevant to the work of the Parliamentary Commissioner. Rather, it is just hard to see this encapsulating the reality of the Parliamentary Commissioner's role and relationship with Parliament. We appreciate that this is a contentious issue and suggest that it is one which requires further analysis and consultation.

#### ***Public Services Ombudsman for Wales***

5.81 The ombudsman issues reports under section 16 of the Public Services Ombudsman (Wales) Act 2005. These state what action the ombudsman requires to be taken. Section 19(2)(a) then imposes a duty on the public body to report to the ombudsman the action it has undertaken or proposes to undertake. If the ombudsman is not satisfied with the response, or lack of it, then a special report can be issued under section 22. Alternatively, if the ombudsman considers that there is "wilful disregard" "without lawful excuse" in the response of the public body then, under section 20(1) he can issue a certificate to that effect to the High Court. However no such certificate has ever been issued.

5.82 There is no direct case law at present on the nature of the findings and recommendations of the Public Services Ombudsman for Wales.

5.83 As with the position of the Parliamentary Commissioner for Administration and the Local Government Ombudsman, we think that this area needs further consideration and analysis.

#### ***Conclusions on findings and recommendations***

5.84 What is clear is that the law relating to the nature of ombudsmen's findings and recommendations is still developing, and has necessitated recourse to the courts twice in as many years. The situation now is that the effect of an ombudsman's report varies between ombudsmen. We take no current view on this issue. Rather, we seek to highlight it as a potential anomaly.

5.85 There is, of course, an argument to say that courts are the proper place for such debates and that issues relating to ombudsmen's findings and recommendations should be left to the common law process.

<sup>31</sup> *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114 at [142].



- 5.86 This could definitely be argued when considering the effect of the *ex parte Eastleigh* judgment on the Local Government Ombudsman regime. Following *ex parte Eastleigh*, it is hard to see how further protection is needed for Local Government Ombudsman recommendations. This is borne out by the non-compliance statistics, where current data gives “unsatisfactory outcomes” (where the authority has not followed an ombudsman’s recommendations issued in a report based on a finding of injustice resulting from maladministration) as 0% for 2008/09. Over the last 10 years, the average yearly level of unsatisfactory outcomes is 0.8%.<sup>32</sup>
- 5.87 However, there is always the alternative argument, that such litigation shows that there may be a case for legislative clarification of the position. There is also the potential argument that the common law may have gone too far, and that the *ex parte Eastleigh* judgment actually goes further than that envisaged in the statute. What we are sure of is that this is an area which merits further investigation.

### **CONCLUSIONS**

- 5.88 As we outlined in Part 1 and explored more fully above, we suggest that the ombudsmen aspects of our Administrative Redress project are becoming increasingly important.
- 5.89 Given the content of consultation responses and recent developments, we have concluded there are strong arguments in favour of re-consulting on more developed proposals, away from the rest of the project.

### **Proposal**

- 5.90 We will be revisiting the issues raised in relation to ombudsmen with a view to issuing a further consultation paper later in 2010.
- 5.91 We would expect such consultation to be followed by a final report, including recommendations, in 2011.

<sup>32</sup> Data supplied by the office of the Local Government Ombudsman (26 October 2009).

## **PART 6**

# **SUMMARY OF CONCLUSIONS**

### **OVERVIEW**

- 6.1 Given the level of opposition to our proposed reforms, we do not intend to take forward our provisional proposals relating to judicial review or private law, and we are not making any recommendations in these areas.
- 6.2 However, we do consider it worthwhile to make recommendations as to the publication of compensation figures within the reporting process for public bodies.
- 6.3 Whilst we are not making any recommendations in this report concerning ombudsmen, we do intend to explore the area further and conduct additional consultation. This will take place later in 2010.
- 6.4 We would expect such consultation to be followed by a final report, including recommendations, in 2011.
- 6.5 This Part now summarises our conclusions on the various aspects of this project and our reasons for continuing with the ombudsmen element.

### **JUDICIAL REVIEW**

- 6.6 In relation to this aspect of the project, we still consider that there is a strong argument in favour of reform. This could either be along the lines we proposed, or by the creation of a more discretionary power for the courts to award damages than that contained in section 31(4) of the Senior Courts Act 1981.
- 6.7 However, given the substantial opposition to our proposals – in particular from Government but also from others – coupled with the lack of a dataset that would have assisted in addressing some of these concerns, we accept that we cannot take this part of the project any further.

### **PRIVATE LAW**

- 6.8 Our private law proposals were subject to a high degree of criticism. However, not all such criticism was equally valid and many consultees were also in complete opposition with each other as to the state of the law and the necessity for reform.
- 6.9 That said, we accept that we failed to convince many consultees of the need for reform. We also accept that we have not convinced consultees or Government that our proposed changes would be preferable to the current incremental approach of the law in this area. We do not, therefore, think that there is value in pushing for reform.
- 6.10 As with judicial review, we would have benefited from a dataset to more fully assess the impact of our proposals in order to justify them.

## **REPORTING**

- 6.11 Within this project we encountered significant problems in seeking to create a dataset covering the current compensation liability of public bodies. Without this, we have been unable to estimate the costs of the current redress systems, or prove that our proposed changes would be beneficial.
- 6.12 We suggest that the lack of such clearly accessible data means that the current regime fails to fulfil the requirements of accountability and transparency that are key to our system of governance. The lack of data is also a problem for practitioners, judges and policy-makers in this area. Fears of defensive administration cannot be confirmed or refuted, and administrators are unable to assess policy on the basis of properly formulated impact assessments.
- 6.13 We suggest that better empirical evidence would facilitate measured consideration of the liability of public bodies.

### ***Recommendations***

- 6.14 **We recommend, subject to the successful completion of any pilot study, that HM Treasury ensure the costs of compensation to central government bodies are regularly collated and published.**
- 6.15 In doing this, we suggest that it would be beneficial for public bodies to report the costs of the following:
- (1) all compensation payments made after the commencement of legal proceedings but before judgment (therefore, all settlements);
  - (2) all compensation payments made after judgment;
  - (3) legal costs (for instance, costs of solicitors/counsel/court fees/other disbursements) of cases terminating in (1); and
  - (4) legal costs of cases terminating in (2).
- 6.16 In addition, these should all be broken down into a finite list of subject areas or causes of action. For instance: employment disputes, personal injury claims, other negligence, breach of statutory duty, misfeasance in public office, and "other".
- 6.17 **We also recommend that the Department for Communities and Local Government and the Welsh Assembly Government should similarly consider the most appropriate way for local government to collate and publish this information. As with the recommendation above, this is made subject to the successful completion of a pilot study.**
- 6.18 These are the only recommendations made in this report.

## **OMBUDSMEN**

- 6.19 Consultation responses to our proposals relating to ombudsmen were less numerous than for our other proposals, but were generally more positive.
- 6.20 However, given the importance of the area and our policy of bringing the court-based parts of this project to a close, we think that wider consideration of the topic is merited.
- 6.21 We also feel that recent constitutional developments mean that the administrative landscape in relation to ombudsmen is currently in a state of flux. These include the adoption of pre-appointment hearings and case law on the enforceability of findings by the Parliamentary Commissioner for Administration.
- 6.22 We therefore intend to undertake a further process of review and consultation in this area.

(Signed) JAMES MUNBY, *Chairman*  
ELIZABETH COOKE  
DAVID HERTZELL  
JEREMY HORDER  
FRANCES PATTERSON

MARK ORMEROD, *Chief Executive*  
21 April 2010