

Guidance on Jurisdiction

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Introduction

Jurisdiction n. the right or power to administer justice and to apply laws (from the Latin ius iuris "law" and dicere "to speak")

LGO undertakes independent and impartial investigations which provide an effective means of resolving complaints. Our approach is proportionate in each case and pragmatic wherever possible but we must also take care that we operate in line with the legislative framework which gives us our powers.

This guidance has been produced with the input of investigators and other staff across LGO, in order to provide a clear and consistent interpretation of the Local Government Act 1974 and other legislation which affects our work on a day-to-day basis. It is not comprehensive and we expect it to be updated on a regular basis, not only to take account of changes in the law but also to take account of feedback and suggestions from LGO staff.

This builds on earlier versions of our Guidance on Jurisdiction but, where relevant, this version also tries to be clear about the emphasis LGO would generally apply where the law could be interpreted in different ways, or where we are given an element of discretion. Investigators will always need to look at each individual case on its merits and have a wide degree of flexibility in deciding the best approach to take. This Guidance is intended to assist that process, and we encourage everyone who uses it to contribute to its further development by telling us whether it is useful and how it can be improved.

Please email with any suggestions or queries.

Maladministration and Service Failure

Introduction

The term 'maladministration' is deliberately not defined in law and similarly there is no explicit threshold for what constitutes maladministration. Our jurisdiction allows us to investigate alleged or apparent maladministration or service failure. Our investigations often touch on both, and we interpret maladministration to include service failure. As long as we present our findings clearly, we should not need to go in to a detailed explanation of the differences. Case law (*R(ER) v Local Government Ombudsman* [2014] EWCA Civ 1407) [available to LGO staff] has confirmed that we do not have to make separate findings for maladministration and service failure. In our decision statements, we refer to fault rather than maladministration or service failure as this is a simpler term for the public to understand.

What is maladministration?

It is for the Ombudsman to decide whether a particular set of circumstances amount to maladministration. In general terms, it is 'administrative fault by the body in jurisdiction' or 'fault in an action taken by a body acting on behalf of the body in jurisdiction'.

There is no threshold for maladministration, and we should always identify where something has gone wrong in our reports and decision statements. Regardless of how serious the maladministration is, we should not consider it by itself. We must assess the effect the action had on the complainant (the injustice) and whether a remedy should be provided.

Maladministration in broad terms might include:

- flaws in policies or decision making
- poor administrative practice
- failure to adhere to or consider properly statutory guidelines
- failing to consider properly the exceptional circumstances of an individual or a situation
- not properly considering statutory powers or duties
- failing to give an adequate service.

Assessing maladministration

In deciding whether there has been maladministration or service failure causing injustice, we must weigh up all the evidence, including any mitigating factors, to come to a view. In doing so we will make a judgement about what actions (or inactions) were reasonable, fair or appropriate in all the circumstances.

Our role is to identify whether there was any fault and our conclusion should never be that the BinJ's actions were or were not 'reasonable'. This confuses reasonableness (or unreasonableness) with maladministration. If we consider the BinJ's actions have been unreasonable, there must be cause for us to think that (e.g. bias, irrelevant considerations, improper motive in reaching a decision etc). Similarly, if we think the BinJ's actions were reasonable, there will be reasons we think that and these are what we should set out in our decision.

Investigators must explain their analysis and give full reasons for the decisions that they reach.

What is "Wednesbury unreasonable"

We should not say that we find no fault because a BinJ's actions were not 'wholly unreasonable' or 'utterly unreasonable'. We would be applying the Wednesbury unreasonableness test, which is a test developed and used by the courts for a different purpose. Something is "*Wednesbury unreasonable*" if it is:

"so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

Very occasionally we may consider that a council's decision was 'wholly unreasonable' (described by the courts and in the Crossman catalogue as 'perverse', which follows a similar test to that of 'Wednesbury unreasonable'). However, such cases are rare, usually very serious and would generally require legal advice. If a decision looks perverse, carefully

check the decision making process, as the likelihood is there will be fault at some point in the process itself.

Recording maladministration in ECHO

We can, where the issue is minor and has not caused an injustice to the complainant, record the outcome of the investigation in ECHO as 'no mal' if we consider the circumstances warrant it. It is for each investigator to decide whether to record a finding of maladministration in ECHO. Dependent on the circumstances, an investigator may decide to record the outcome as maladministration, however, in a different case, while the fault is the same, the circumstances may be different, and as there is either no or little impact on the complainant which requires a remedy, the investigator may decide to record a finding of no maladministration.

The issues we need to consider are:

- What was the nature of the fault? How significant was it? Were others affected by it?
- What was the injustice and impact on the complainant? Did the circumstances of the complainant make the impact on them more significant? For example, were they vulnerable in some way?
- Is there any outstanding action the council needs to take to remedy the injustice? If the complaint still needs a remedy, you must record a finding of maladministration.

The following are some practical examples of where we may decide not to record a finding of maladministration.

Example one

The council sends a letter but it is wrongly addressed to Mr Scarlett, instead of Ms Scarlett. There is no significant injustice to Ms Scarlett and the council has apologised verbally for its error.

Because this is a minor fault (and there is no significant injustice), we might record it as no maladministration.

BUT, let's say that Ms Scarlett is someone who has undergone gender re-assignment from male to female, and she has told the council in writing on three separate occasions that she should be referred to as Ms Scarlett, instead of Mr Scarlett. The council's error distresses her considerably. In this instance, it would be likely that we would want to say there had been maladministration and injustice, and record it as such.

Example two

Colonel Mustard complained the council changed the locks on the gates to the allotments and the council did not tell him when it did so. You find out that Colonel Mustard is correct in what he says and that he was not given a key for the new locks for seven days. However, you also find out that Colonel Mustard could not have visited the allotments during those seven days as he was away on holiday.

Because this is a minor fault (and there is no significant injustice), we might record it as no maladministration.

BUT, let's say the council failed to tell any of the allotment holders about the new locks and they were all not given keys, we could decide 'mal, no inj' for Colonel Mustard's complaint as he was not personally impacted, but that potentially others were.

Example three

Mrs White discovers when she contacts the council to pay the July instalment of her council tax that the June payment has not been recorded on her account. The council says it will investigate the issue and contacts her the next day to say the payment has been found and recorded on her account. Mrs White requests a copy of her account statement which the council says it will send the next day. However, the council does not send the statement for three weeks.

Because this is a minor fault (and there is no significant injustice), we might record it as no maladministration.

BUT, let's say after waiting the three weeks, Mrs White chased the council. She had to chase the council a further time before the statement was issued. In total, it took the council five weeks to send the statement. Mrs White was frustrated by the delay and at having to ask for the statement a number of times. Because of the circumstances, we might want to say that this was maladministration with no injustice.

Example four

Mrs Peacock complains the council has not taken planning enforcement action against her neighbours who have built an extension to their property which she says does not match the approved plans. The council's policy is to start a planning enforcement investigation within three weeks of the complaint being received. There is a delay of one week, but eventually a full investigation takes place and the council decides the extension was built according to the approved plans.

Because this is a minor fault (and there is no significant injustice), we might record it as no maladministration.

BUT, let's say the council had received complaints about the extension from another neighbour six weeks earlier than when Mrs Peacock complained but had done nothing to consider those complaints. We might in this instance decide the now seven week delay was maladministration.

Is the authority within jurisdiction?

Part IIIA

Under Part IIIA we can investigate the actions of an 'adult social care provider'. Here 'adult social care' means social care within the meaning of Part 1 of the [Health and Social Care Act 2008](#) which is provided to persons aged 18 or over.

Adult social care provider, means a person who carries out an activity which:

- involves, or is connected with, the provision of adult social care, and
- is a regulated activity within the meaning of Part I of the 2008 Act.

For further information on Part IIIA see separate guidance note [available to LGO staff].

Part III

Section 25 lists the types of authorities within jurisdiction for the purpose of Part 3 of the Act.

1. **Local authorities.** The definition of local authority is in Section 34. It includes a county council in England, a district council, the Broads Authority, a London borough council, and the Council of the Isles of Scilly.
2. **Any joint board the constituent authorities of which are all local authorities.** A joint board should not be confused with a joint committee, as they are fundamentally different. There is no general power to create joint boards. Specific powers are contained in a number of statutes and in each case the rules as to the constitution are stated in the enabling statute. Investigators should refer to the Order which established the joint board to identify the constituent authorities. A copy of the Order should be readily available from the joint board. Investigators will then be able to establish whether or not the constituent authorities are all local authorities, as defined by section 34. If so, the joint board is within jurisdiction.

Examples include joint planning boards and joint boards set up under section 6 of the Public Health Act 1936.

3. **Combined authorities.** S 25(1)(cf) says any combined authority established under section 103 of the Local Democracy, Economic Development and Construction Act 2009 is within jurisdiction. The Cities and Local Government Devolution Act 2016 amends the 2009 Act. More detailed guidance can be found in the Casework Policy Forum guidance note on multi-agency bodies and associated list of bodies.

Note *A complaint against a **parish or town council cannot be investigated. But if a parish council is acting on behalf of a district council in respect of one of its functions then the complaint is within jurisdiction and should be registered as a complaint against the district council. In addition, a complaint about a monitoring officer of an authority within jurisdiction in respect of his/her actions relating to a parish council would also be in jurisdiction.***

More detailed guidance about multi-agency bodies can be found in the Casework Policy Forum guidance note [available to LGO staff] and list of bodies [available to LGO staff]. Flowcharts are available as a page resource to help you assess whether a multi-agency body is within jurisdiction.

Fire authorities

All fire authorities are within jurisdiction.

Joint fire authorities are within jurisdiction as a joint authority established by the Local Government Act 1985 Part IV.

Administrative and operational failures of fire authorities are within jurisdiction. Their statutory responsibilities are broad in scope and derive primarily from the Fire Services Act 1947. The responsibilities include providing a fire brigade, training personnel, obtaining information for fire fighting purposes, minimising damage as a result of fire, rescues from road traffic accidents, dealing with spillages of substances and calls to flooding. Fire authorities also have responsibility for enforcing the Fire Precautions Act which covers places where people are employed. Other work is carried out on a goodwill basis such as the inspection of theatres, cinemas etc.

Transport authorities

[Transport for London](#) is within jurisdiction (subject to restrictions on the actions we can investigate – under Schedule 5).

We have had legal advice that South Yorkshire Passenger Transport Executive is not a body in jurisdiction. Transport for Greater Manchester is also not a body in jurisdiction, however Greater Manchester Combined Authority (which is a body in jurisdiction) has delegated to Transport for Greater Manchester Committee (which is also a body in jurisdiction) the functions of monitoring and overseeing the performance of Transport for Greater Manchester and determining issues arising from Metrolink contracts. Therefore a complaint about the tram lines in Manchester could be raised against Transport for Greater Manchester Committee as it ultimately bears responsibility for these.

For complaints about any other Passenger Transport Executive the investigator should check how the body was set up, and its legal status, by getting from them their Articles of Association or the statutory instrument which set them up. The body should then be referred to Tanja Wootton so it can be considered by the Multi-Agency Bodies working group.

Police and Crime Commissioners

The only actions that can be looked at are those of the commissioner him or herself.

The commissioners' main responsibilities are the maintenance of an adequate and efficient police force and to provide adequate buildings, vehicles and equipment. (**But note** a complaint about these matters may be one which affects [all or most](#) of the inhabitants of the area under section 26(7)).

Complaints that **may be** within jurisdiction include such purely administrative acts as land acquisition or disposal and liability as a landlord.

The Ombudsman is expressly prohibited from investigating complaints about action taken by police and crime commissioners in connection with the investigation or prevention of crime. Complainants wishing to complain about such matters should be referred to the relevant police authority or the [Independent Police Complaints Commission](#).

Police and Crime Panel

A Police and Crime Panel is independent of the Office of the Police and Crime Commissioner (PCC) and oversees some of the work of the PCC.

Its role includes:

- Reviewing the PCC's proposals for the amount of council tax local people pay towards policing. It has the power to veto these proposals if it considers the amount is inappropriate.
- Considering the PCC's Police and Crime Panel and Annual Report.
- Considering the PCC's proposals for the appointment of a new Chief Constable, with the power to veto.
- Investigating complaints about the PCC.

The Panel will not scrutinise the performance of the Force as a whole, or the Chief Constable, as this is the responsibility of the PCC.

Since the Panel is a function of a local authority, they fall within our jurisdiction for non-criminal matters and we can investigate complaints about maladministration in a similar way to how we investigate complaints about police authorities. How the complaint is registered in ECHO is dependent on the composition of the Panel. Further guidance can be found in the Casework Policy Forum guidance note on Multi-agency bodies [available to LGO staff].

The Environment Agency and regional flood defence committees

Regional Flood Defence Committees are made up of a chairman appointed by the Department of Environment, Food and Rural Affairs (DEFRA) and representatives appointed by Local authorities, DEFRA and the Environment Agency.

Complaints about the actions of these bodies are within jurisdiction but only in connection with flood defence and land drainage matters. Action by local flood defence committees is outside jurisdiction unless the local committee is acting under delegated authority from the regional committee.

Other Environment Agency functions are within the jurisdiction of PHSO. This includes complaints about the Environment Agency's actions as a statutory planning consultee in relation to flood defence matters.

Any body of persons acting for the authority under s 101 of the Local Government Act 1972

This section authorises the carrying out of council functions by a committee, a sub-committee or an officer of the council or by any other council. It also provides that two or more councils may discharge any of their functions jointly. The councils may also arrange for the discharge of those functions by a joint committee of theirs or by an officer of one of them. Because of the express reference to Joint Committees in section 101(5) of the 1972 Act, the

Ombudsman's finding on the complaint would relate to the joint committee rather than the individual councils.

Internal drainage boards (IDB)

IDBs are within jurisdiction. They operate in areas of special drainage need and have powers to undertake work to secure clean water drainage and water level management within drainage districts. The area of an IDB is not determined by county or metropolitan council boundaries, but by water catchment areas. They are mainly concentrated in the Norfolk Broads, East Anglian Fens, Somerset Levels and Yorkshire. Some IDBs operate under a different title. For example, drainage commissions, drainage boards, district drainage boards and commissioners. But all are within jurisdiction. The following information about IDBs is available:

- A letter [available to LGO staff] dated 24 February 2004 from DEFRA to all IDBs in England enclosing a model complaints procedure. Section 25(7) makes it clear that action taken by another person on behalf of an authority is treated as being action by the authority. The term "person" would include a body of persons either corporate or unincorporated.
- For further information see the [Association of Drainage Authorities](#).

Sea fisheries committees

These committees are within jurisdiction as a committee mentioned in s101(9) of the Local Government Act 1972.

The Homes and Communities Agency (HCA)

The HCA works locally investing in building new homes and creating employment and community facilities. Its investment help build around half of all new homes built in England each year. It also has a regulatory function over social housing providers. It owns public land which it can sell to developers. Under Schedule 5 Paragraph 8, complaints about the HCA are in jurisdiction **only** if they are about "action in connection with functions in relation to town and country planning".

Education appeal panels (EAPs)

EAPs for community, foundation, voluntary aided and voluntary controlled schools are within the Local Government Ombudsman's jurisdiction (s20 of the [School Standards and Framework Act 1998](#)). The actions of EAPs can be investigated when they are dealing with admissions and exclusions of pupils. The complaint should be lodged against the admissions authority.

Academy schools and the appeal panels considering [Academy appeals](#) are not in jurisdiction.

School governors

Governors of schools are within jurisdiction when acting on admission (but not exclusion) matters (schedule 30, paragraph 4 [School Standards and Framework Act 1998](#)). This would include in-year admissions, administration of waiting lists and allocation of nursery places within a school. The governing body of a voluntary aided or foundation school is the admissions authority for the school. Beyond this, most actions of governors concern management and internal matters and so are excluded from jurisdiction by schedule 5 LGA.

Note: Governors of Academy schools are not in jurisdiction.

Child protection conferences and safeguarding adult boards and safeguarding children boards

See child protection guidance [available to LGO staff] and safeguarding adults guidance [available to LGO staff].

Note that under Section 29(1) of the Act we can require any person or body to supply information, regardless of whether that body is in jurisdiction.

Ebbsfleet Development Corporation

The Sustainable Communities Plan 2003 identified Ebbsfleet and Eastern Quarry as a possible location for the creation of 10,000 new homes, plus commercial, retail, leisure and community space. Slow progress was made in developing the sites.

In 2014, the Government announced plans to create 15,000 new homes, and establish an Urban Development Corporation to drive forward delivery.

The Ebbsfleet Development Corporation took over the planning functions of Dartford Borough Council, Gravesham Borough Council and Kent County Council – in relation to planning applications and Compulsory Purchase Orders for the Ebbsfleet area on 1 July 2015. As an Urban Development Corporation its functions are within LGO jurisdiction. More information can be found at: <http://www.ebbsfleetdc.org.uk/>

Actions we can investigate

Section 26(1) lists the actions that may be investigated

S26(1) For the purposes of section 24A(1)(b), in relation to an authority to which this Part of the Act applies, the following matters are subject to investigation by a Local Commissioner under this part of the Act –

- (a) alleged or apparent maladministration in connection with the exercise of the authority's administrative functions*
- (b) an alleged or apparent failure in a service which it was the authority's function to provide*
- (c) an alleged or apparent failure to provide such a service*

Section 34B (Part IIIA complaints)

S34B (1) Under this Part, a Local Commissioner may investigate a matter—

which relates to action taken by an adult social care provider in connection with the provision of adult social care...

What are administrative functions?

All functions that are not exclusively judicial or legislative are administrative. Councils' only legislative functions appear to be the making of bye-laws; and complaints about how they are made (or the fact they have been made) would be outside jurisdiction.

It is clear from *R v Local Commissioner for Administration ex parte Bradford Metropolitan City Council* (1979) QB 287 that administrative action includes the making of decisions – “a faulty decision may amount to maladministration”.

The action must be taken in the exercise of the functions of the council (which includes action by members, officers and committees of the council or on behalf of the council under Section 25(7)).

Returning Officers for local elections do not carry out administrative functions of the council. They are appointed by the council and for parliamentary elections they are the mayor or chairman, although they appoint “acting returning officers”. They carry out specified functions under Act of Parliament in a personal capacity, not on behalf of the council.

But most other actions of officers are actions taken in the exercise of the administrative functions of the council. Note, however:

Superintendent Registrars

These officers deal with registration of births, deaths and marriages. Since 2007 they have been employees of the council. Although Superintendent Registrars carry out some functions that are personal to them, they are only exercising those powers by virtue of their employment by the council. Therefore the actions of superintendent registrars are within jurisdiction.

The Registration Officer

The Registration Officer is responsible for the compilation of the Register of Electors. Generally, complaints about maladministration by this officer will be caught by s26(6)(c) as there are rights of appeal to the County Court about their decisions. The rights of appeal relate to registration applications or objections and applications for postal or proxy voting – [s56 Representation of the People Act 1983](#). Appeals must be lodged within 14 days of the decision with prior notice of appeal to the Registration Officer – [Representation of the People \(England and Wales\) Regulations 2001, Regulation 58](#).

It was held in the judicial review case of *Robertson v City of Wakefield Metropolitan Borough Council* (2001) EWHC Admin 915 that an electoral registration officer who sells the register to commercial concerns is processing personal data within the meaning of the Data Protection Act. Therefore electors who do not wish the registration officer to sell their data to

commercial concerns who are likely to use it for direct marketing have a right to object in writing to such sale under s11(1) and can complain to the court for failure to comply with that request under [s11\(2\) of the Data Protection Act 1998](#). It was also held in that case that the sale of the electoral register to commercial concerns without giving individual electors a right to object to their own inclusion on the version of the register that is sold is a breach of their right to respect for their private and family life, home and correspondence, under ECHR Article 8, and the sale of a register without an individual right of objection is also a breach of Article 3 of the First Protocol of the ECHR (which secures the right to free elections).

Approved mental health professionals

The [Mental Health Act 2007](#) established the role of Approved Mental Health Professional (AMHP). AMHPs have key responsibilities relating to the assessment and detention process of people with mental illness. The AMHP need not be a social worker but cannot be a practicing medical practitioner. S/he is appointed by social services authorities under the [Mental Health Act 1983 \(as amended\)](#) for the purposes of discharging functions under the Act (s114). S114(2) provides that no person shall be appointed as an AMHP unless s/he is approved by the authority as having the appropriate competence in dealing with persons who are suffering from mental disorder. S13(4) of the Act places a duty on the authority to direct an approved AMHP, if required by the nearest relative, *“to take the patient’s case into consideration”*. Taken together, the Ombudsman considers these administrative functions are sufficient to put complaints about the way AMHPs carried out their actions within jurisdiction.

Other health professionals

Community health service staff are usually employed by the NHS and often act for the council in the housing allocation process, although some councils have their own clinical staff. Section 113(1A) of the Local Government Act 1972 provides that a council may enter into an agreement with a local NHS body, to place at the council’s disposal an officer of the NHS body for the purposes of the council’s functions. Such an officer, when carrying out the council’s functions, is treated for LGO purposes as a council officer. But the absence of such an agreement does not necessarily mean that the action is not taken on behalf of the council.

Coroners

The LGO has limited jurisdiction to look at complaints about the actions of coroners (see our Casework Guidance Statement on Coroners [available to LGO staff]). Coroners are judicial office holders and not employees of the council. Coroners’ decisions can only be challenged by way of judicial review.

But the service is funded by Local Authorities and usually the authority provides the coroner with administrative support. There is a set of [service standards](#) which the coroner’s office should follow, and these are sent out in a booklet to people using the service

Generally the Judicial Conduct Investigations Office deals with complaints about the personal conduct of coroners, e.g. that they were rude, discourteous or used inappropriate

language at a hearing. It is possible that some complaints about a breach of the service standards could also be seen as a complaint about personal misconduct.

As usual, before we get a complaint the council should already have considered it. So, we can either consider how the council dealt with the complaint and/or look at the actual allegation about the breach of the service standards.

Examples

- *A complaint that the coroner used racist language would be for the Judicial Conduct Investigations Office as one of misconduct.*
- *A complaint that the coroner failed to contact the next of kin for six months would be for the LGO – because it is contrary to the service standards.*

Councillors

The actions of councillors can be investigated in the light of s25(4)(a) of the 1974 Act which says that:

“Any reference to an authority to which this Part of this Act applies includes a reference to the members and officers of that authority”

Where the member's action takes place is not relevant to jurisdiction. It could be on council premises, in hired premises for a surgery, in the member's home, in a constituent's home or anywhere else. Councillors sometimes act on behalf of the council (including acting in a representative role) in carrying out administrative functions. But the mere declaration by a member that s/he is a councillor in any given situation, for example as a neighbour in connection with a dispute about use of land, does not automatically put the complaint in jurisdiction. The facts and circumstances of each case need to be considered. Examples of actions that are within jurisdiction include:

- actions in committee meetings, e.g. failure to declare an interest or providing misleading information;
- acting as an executive member with decision-making powers
- giving a decision on an admin function that they do not have the authority to give
- speaking on behalf of the council, for example at a public meeting explaining proposals for a new road scheme;
- agreeing to pass on an objection to a planning application or undertaking to present a petition to committee but failing to do so;
- giving wrong information to a constituent about when a particular matter is being considered by the council and the constituent misses the deadline for representations/objections.

Complaints that the councillor has breached the Councillors Code of Conduct

Such complaints can be considered by a council's monitoring officer and may then be referred to the standards committee.

If the councillor's action is not in jurisdiction the position is straightforward: the complainant should be referred to the monitoring officer. We could then look at a subsequent complaint about the Monitoring Officer's handling of the issue.

If the councillor's action is in jurisdiction and the complaint has been considered by the council we can look both at the way the council considered the complaint and, if we find this to be faulty, the actions of the councillor.

A complaint that a councillor's conduct breached the council's code of conduct is within jurisdiction if

- the councillor is acting on behalf of the council in connection with an administrative function; and
- the matter which is the subject of his/her action is within jurisdiction.

As in all cases, the person complaining must have suffered injustice as a result of the councillor's action/s.

If the councillor's action is in jurisdiction, but the complaint has not been considered by the monitoring officer or standards committee we need to decide if this would be appropriate. We need to weigh up the alleged fault, the injustice, if the council would prefer to look at the matter itself first and the remedy the complainant wants before deciding if we should investigate.

Examples of action which may be in breach of the code of conduct but not within jurisdiction are:

- *action concerning a matter which is either excluded from jurisdiction (eg a personnel matter) or is not a council function (eg a constituent's management of his/her personal finances)*
- *action not taken in an official capacity that brings the member's office or authority into disrepute. Examples could be:*
 - *drink driving when not on duty*
 - *rudeness to a citizen in a local supermarket*
 - *participation in a brawl in a pub.*

Contractors or other authorities acting for the body in jurisdiction

Contractors or other authorities acting in the exercise of the administrative functions of a body in jurisdiction are acting "on behalf of" that body and are therefore within jurisdiction.

Most councils now contract out many functions, including benefit administration, refuse collection, social care provision at home and in care homes etc.

Where the whole or part of a council's function has been contracted out to another body by the council consider:

- what is the action complained of?
- what is the statutory power or duty of the council?

- was the action taken on behalf of a council?
- have reasonable safeguards and controls been imposed and monitored by the council?

There may be cases where the contracting-out arrangement involves functions which are not purely those of the council and it may be difficult to untangle the whole or part of the complaint as being action on behalf of the council. Where this appears to be the case, investigators should consult their manager.

Even if the service has been removed from the council and some other authority or body has taken it over (eg in Doncaster in 2014 when the Secretary of State removed services from the council) it should be assumed that the actions of the new body are actions of the council and the complaint is therefore **IN** jurisdiction.

Civil enforcement officers (also known as bailiffs)

Civil Enforcement Officers [guidance available to LGO staff] can take action to recover all kinds of debts, including unpaid taxes, rates, fines, child maintenance payments and rent, as well as evicting people. They can work for the courts as well as local authorities. Actions of Civil Enforcement Officers recovering local taxation, road traffic or parking debts for a local authority are within jurisdiction, as they are acting directly for a council.

Bailiffs appointed and employed by the County Court or High Court to collect other debts or conducting evictions are not within jurisdiction, even if it is a council which started the action, as the bailiff is operating for the court, not a council.

[CIVEA](#) (the Civil Enforcement Association) was formed in 2010 by a merger of The Bailiff Services Association and the Association of Civil Enforcement Agencies. It is an independently funded association formed to represent all private certificated enforcement agents in England and Wales. Not all enforcement agents are members of CIVEA. A complaint about a civil enforcement officer who is not council appointed may be referred to the Association.

Who can complain?

S26A

26A (1) Under this Part of this Act, a complaint about a matter may only be made –

(a) by a member of the public who claims to have sustained injustice in consequence of the matter,

(b) by a person authorised in writing by such a member of the public to act on his behalf, or

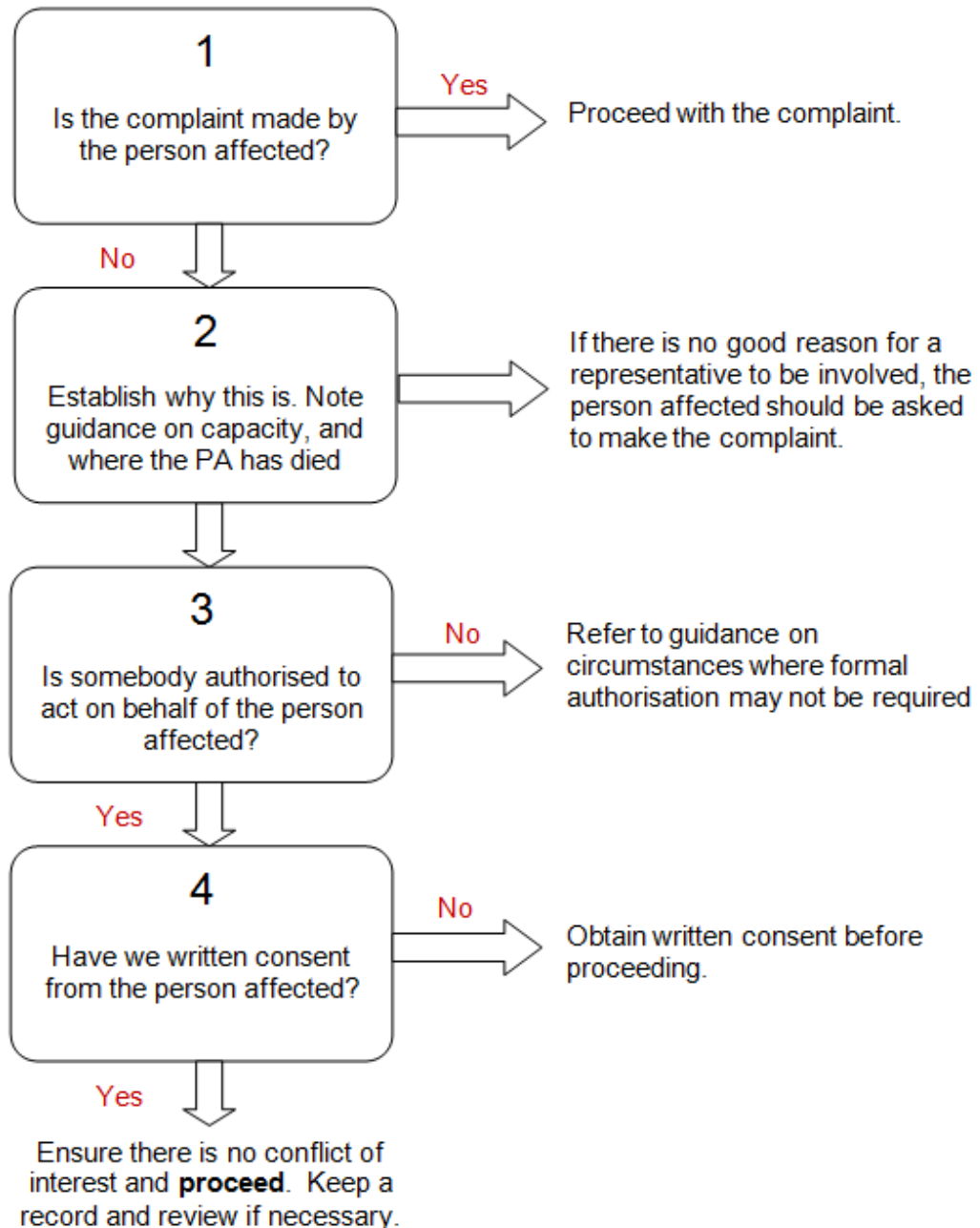
(c) in accordance with subsection (2).

(2) Where a member of the public by whom a complaint about a matter might have been made under this Part of this Act has died or is otherwise unable to authorise a person to act on his behalf, the complaint may be made –

(a) by his personal representative (if any), or

(b) by a person who appears to a Local Commissioner to be suitable to represent him.

Complaints will usually be made directly by the person who is affected. Where someone wishes to complain on someone else's behalf, we must satisfy ourselves that this is appropriate.



Who are members of the public?

Individuals

An individual does not have to be a citizen or a resident in the area served by a local authority.

Individuals can include MPs.

They can also include councillors and council employees **but**

where the only injustice claimed relates to their position **as** a councillor or employee the complaint is **OUT**.

Examples

*A councillor complains that s/he was not put on a sub-committee, was not allowed to speak at a council meeting or was sanctioned for an alleged breach of the code of conduct. The complainant is **OUT***

*A councillor complains that a neighbour's planning permission will have a detrimental effect on the councillor's amenity and this was not taken into account by the delegated decision maker. The complaint is **IN** because the councillor is complaining as a member of the public.*

*A complaint by a council employee about disciplinary action taken against them after they blew the whistle and reported poor management in a home is **OUT** because they are complaining as an employee.*

*A complaint by the same employee on behalf of their mother who is a resident at the home is **IN** (provided she has given her consent) because this is about the mother's injustice.*

Group of individuals

Often, complaints are received from an individual purporting to represent a group of residents. Always check you have signed letters of authority from the others. Do they want to complain in their own right or are they merely supporting their neighbour in his/her complaint?

Companies, organisations or other bodies

This includes charities, voluntary organisation, partnerships, limited companies, clubs, residents' associations etc (examples below).

But excludes:

- local authorities
- any other body delivering public services – so a **parish council** or a **board of governors** of a school within the public sector cannot make a complaint in their own right (but a private school can)
- a body in public ownership which is carrying on any industry or undertaking
- a body whose members are appointed by the Queen, a minister or government department, or whose funding is mainly provided by Parliament.

When rejecting a complaint by an authority constituted for public service/local government purposes (such as a parish council or board of governors), which appears to have substance

or raise wider public interest issues, investigators should mention that a similar complaint might be considered from an affected individual. Or consider our powers under s26D.

Examples

*A complaint from the Campaign to Preserve Rural England (CPRE) about the way planning permission had been obtained for a major housing development – **IN***

*A civic society complained about development of a historic property in a city centre. The Ombudsman accepted that the role of the CPRE and civic societies was to represent public interest in respect of these matters, and that they were not a part of the authority complained of – **IN**.*

*A housing association complained that housing benefit payments were unreasonably delayed – **IN**.*

*CAMRA (campaign for real ale) complained about the council's decision to grant permission for a change of use of a public house which was of historic importance - **IN**.*

Complaints “on behalf of” a member of the public

We should not send any correspondence or information to anyone who is not either the complainant or their accepted representative.

Who is “authorised to act”

There is no restriction on the kind of person or body that can complain on someone's behalf. Complaints “on behalf of” members of the public must usually be made with their written consent unless there are good reasons why this is not possible. See guidance on consent [available to LGO staff] for more detailed information.

Husband/wife/partner

We frequently receive complaints from a husband or wife who says they make the complaint on behalf of themselves and their spouse/partner. While in most cases the partner will have full knowledge and consent to the complaint being made on their behalf, we should not assume it is the case. Ask for written confirmation from the other party. If this is not appropriate (eg the person is not able to write), speak to them to satisfy yourself they wish to complain also.

Where we receive a complaint from a couple, or people complaining jointly, all sets of details should be recorded on ECHO and person affected type for the additional complainants should be set as ‘Joint PA’. If we receive contact from one half of a couple, but the complaint was only registered in the name of the other half of the couple, we should not disclose any information about the complaint or add them as a ‘joint PA’ without confirming matters with the original complainant first.

Parents/foster parents/guardians

These are generally suitable persons to make complaints on behalf of young children (and we would not usually seek written authority for a child under 14). But you should satisfy

yourself there is no conflict of interest, particularly where the parents are separated and only one parent is making the complaint.

Grandparents will be suitable if they hold some parental responsibility for the child. Otherwise, ensure there is no conflict of interest, and consider checking with the parents or young person. This can be a complex area and investigators need to be satisfied the complaint is genuinely being made on behalf of the child.

See guidance on consent [available to LGO staff] for further information.

Other relatives

Often, relatives or friends make complaints on behalf of people who are elderly or vulnerable.

If there is any reason to believe the person complaining is not acting with consent, the written consent of the elderly or vulnerable person must be asked for. If you do not receive written consent, or having received it still have concerns about its validity, you should consider a visit to the person affected.

Relatives or friends may have a complaint about their own injustice. This might be investigated separately, in addition to or instead of a complaint on behalf of the elderly person.

For more information view the guidance on consent [available to LGO staff].

If you are dissatisfied after appropriate checks, it will be necessary to terminate under s 24A.

Note *even in cases where you do not have consent, if you believe the elderly or vulnerable person is at risk of harm it may be appropriate to use our powers under S26D.* You should also consider whether it is appropriate to raise safeguarding concerns with the appropriate body.

Solicitor or law centre

The solicitor should provide written authority when making the complaint. But we should inform the person affected that we will not usually ask the BinJ to reimburse their solicitor's costs, even if their complaint is upheld.

Other advice centre/voluntary organisation

Ask for written consent or other evidence of authority.

MP

Ask for written consent.

Voluntary organisations

Voluntary organisations may be considered suitable to make complaints on behalf of vulnerable people whose general interest they represent eg children, elderly or disabled persons. However, we will need written consent for the organisation to act on behalf of the complainant.

Landlords acting on behalf of tenants

A landlord can make a complaint on the tenant's behalf, but it is particularly important to be sure the landlord has the tenant's consent [available to LGO staff] to do so. There is a risk of a conflict of interest in relation to information being sought, and any remedy.

A landlord, including a **housing association** may also complain in its own right.

Others

Checks should be made to establish why the person affected is unable to act for him/herself.

Examples

- *A husband made a complaint about home care services on behalf of his wife's mother, who was not capable of making her own complaint because she suffered from Alzheimer's disease. The wife held Enduring Power of Attorney for her mother and confirmed that she would like her husband to make the complaint, both because she was busy caring for her mother and because she found the matter very distressing to deal with. **IN***
- *The parents of an adult daughter with learning disabilities complain she is not receiving adequate support. The council disputes this and says she is happy. The investigator asked the council to appoint an advocate to work with the child to check if she wanted to complain. The advocate confirmed she did want to complain therefore the complaint was **IN**.*
- *A complainant said that several of his neighbours would like to complain along with him about a proposed residents parking scheme. He provided a copy of the letter of complaint, countersigned by the neighbours concerned. **IN***
- *A complaint was accepted from a local residents' association about the way the council closed playground provision on their estate. The residents association requested their chairman to make the complaint, and a copy of the minutes was provided to confirm that. **IN***
- *A Citizens Advice Bureau complained that the council had not given their client proper priority for housing, enclosing a signed consent form. **IN***

*A mother complained her 15 year old son was not being properly cared for by foster carers. The council said the child was happy. The investigator arranged with the child's social worker to speak to him. He confirmed he did not want to complain. **OUT***

Conflict of interest?

An investigator should always consider and keep under review whether a representative is acting in the interests of the complainant and not principally their own. For example, the representative's main objective may be to clear his or her name in relation to events affecting a child or vulnerable person.

A representative may have a complaint about their own injustice. Be clear to separate which parts of the complaint are the complainants (for which consent or deemed consent is required) and which are the representative's and make this clear when writing to them

If you are not satisfied after appropriate checks then advise the representative you cannot accept the complaint.

Where person affected has died

Where the person affected has died, the complaint should be brought/continued by their personal representative. This will be their executor/s if they left a Will, or administrator/s if they did not. In both cases there will be a formal document from the Probate Registry confirming their appointment (“Grant of Probate” or “Grant of letters of Administration”). You can search the probate registry website to find out if a Grant has been issued

It is possible for the LGO to accept a complaint by another “suitable” person. But be clear why there is no personal representative and that the person complaining does not have a conflict of interest. It may be that there is no probate because it is a very small estate, or there was no Will. But satisfy yourself that the representative is not in fact complaining about injustice caused to them. See also the [Guidance on remedies](#).

Example

A terminally ill complainant complained about a grant for housing adaptations. She died before the complaint was determined. She had no relatives or close friends and appeared to have left no Will. Her religious Minister knew of her difficulties and offered to deal with the final stages of the complaint. The Ombudsman accepted the Minister as a suitable representative (but see guidance on remedying injustice where the person affected has died [available to LGO staff]).

Part IIIA complaints

Part IIIA complaints are subject to the same criteria as those in Part III. Section 34C(2) provides specifically that where a member of the public who might have made a complaint has died or is otherwise unable to authorise another person to act on their behalf, the complaints may be made:

- by their personal representatives
- or by a person who appears to the LGO to be suitable to represent them.

Complaints made by LGO staff or others individuals working with LGO

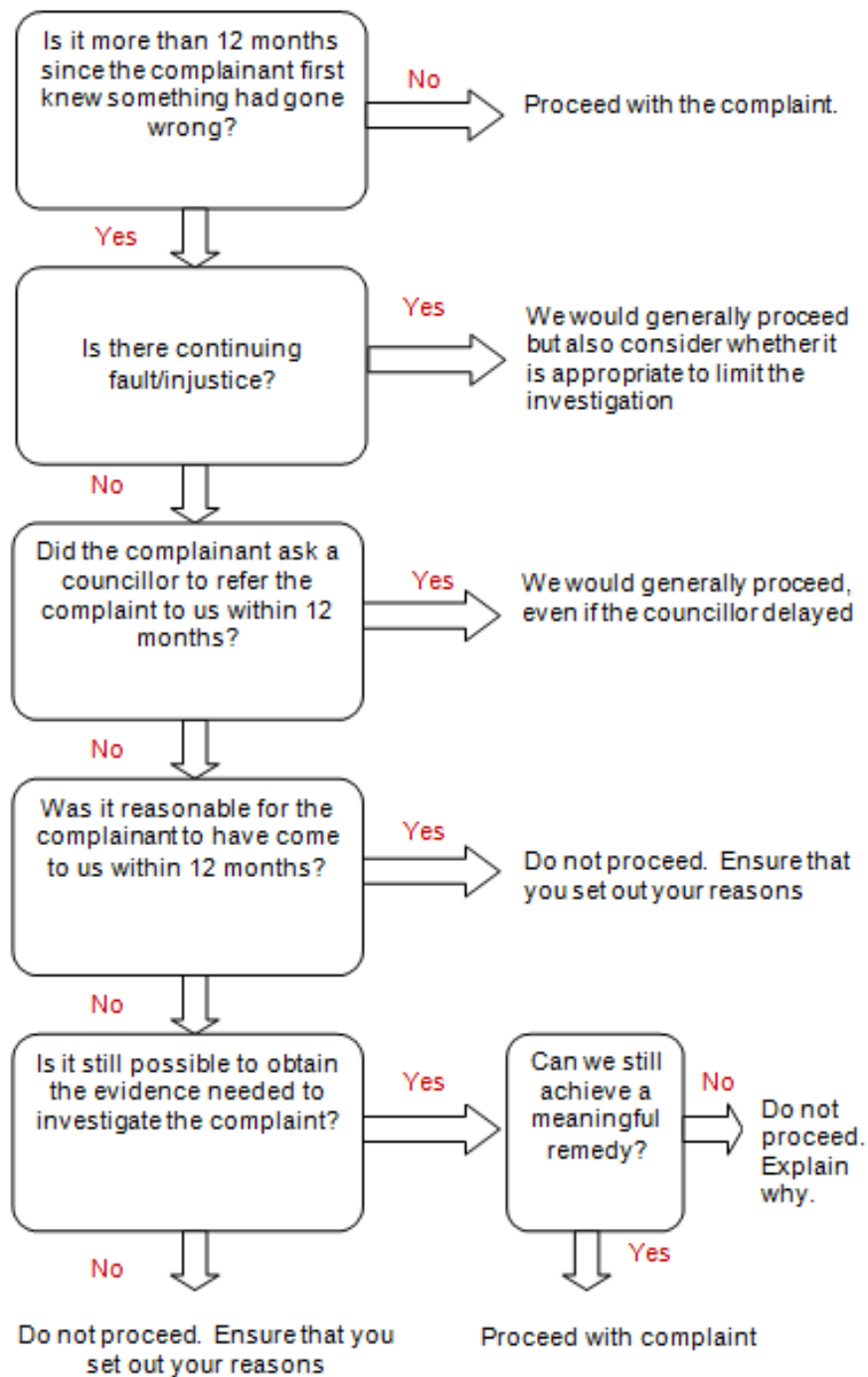
Guidance [available to LGO staff] has been produced about how we deal with complaints made by staff members, other individuals working with LGO and close family members.

Is the complaint in time?

26B Procedure for making complaints

(1) Subject to subsection (3), a complaint about a matter under this Part of this Act must be made –

- *(a) in writing, and*
- *(b) before the end of the permitted period.*
- *(2) In subsection (1)(b), “the permitted period” means the period of 12 months beginning with –*
 - *(a) the day on which the person affected first had notice of the matter, or*
 - *(b) if the person affected has died without having notice of the matter*
 - *(i) the day on which the personal representatives of the person affected first had notice of the matter, or*
 - *(ii) if earlier, the day on which the complainant first had notice of the matter.*
- *(3) A Local Commissioner may disapply either or both of the requirements in subsection (1)(a) and (b) in relation to a particular complaint.*



Section 26B inserts a time limit for a member of the public to bring their complaint to the attention of the Ombudsman. Its intention is two-fold: to provide us with the best opportunity of arriving at a robust, evidence based decision on complaints about recent events and to ensure fairness by enabling us to decline an investigation into historic matters, which could and should have formed the basis of a complaint to us far sooner.

This should not be used to apply a strict cut-off point to exclude complaints where justice demands that we should initiate an investigation, subject to us satisfying ourselves that we can arrive at a sound decision despite the passage of time. Neither should it be used to exclude the investigation of legitimate cases where the injustice could clearly be considered to be ongoing. In such cases, we can more sensibly rely on our general discretion to limit the scope of an investigation where appropriate to do so.

When considering representations from members of the public who claim not to have been aware of our existence, please be mindful that awareness of the LGO scheme is not universal. Many people have limited knowledge of local authority structures and what their entitlement to public services may be. Where they have attempted to engage a local authority's corporate complaints procedure and not been directed to us, it is not reasonable to assume they should have known of our existence.

In all cases the decision and reasons about whether to exercise discretion or not should be clearly recorded within notes and analysis. This should be kept under careful review throughout the course of an investigation.

When does the 12 month period run from?

The 12 month period runs from the day the person affected had notice of the matters alleged in the complaint i.e. the maladministration complained about.

Examples

If planning permission was granted by the council several years ago but the complainant only later discovered that a member taking part in that decision had a personal interest, the 12 months will run from the date of the complainant's discovery.

If the complainant had been waiting for housing from 2011 to 2012, but only later found out that this delay was due to the council's failure to comply with its allocations policy, the 12 months will run from the date of the complainant's discovery.

What do we mean by "making the complaint"?

The person affected must have made the complaint (and not simply produced background correspondence) to the Ombudsman within the 12 months. They may ask a local councillor to refer the complaint to the Ombudsman on their behalf. If the complaint to the councillor is made within 12 months of the date that the complainant first had notice of the matter, and we are satisfied they asked the councillor to refer it to the Ombudsman, we should accept it even if the councillor delays.

When might we exercise discretion to investigate a late complaint?

The reasons for exercising discretion to investigate (or not) must be noted on the file and detailed in the decision. The following guidelines should be taken into account.

In *R v Local Commissioner for Administration, ex parte Bradford Metropolitan City Council* (1979) QB287 in the Court of Appeal, Lord Denning said:

“time bars are not to be enforced rigidly against a complainant where justice requires that the time be extended and his complaint heard”.

It may not have been reasonable for the complainant to have come to us within 12 months if s/he:

- was ill or through some other incapacity was unable to act in time;
- was taking the complaint through the body’s complaints procedure;
- believed that action was being taken on the complaint by the council or its contractors;
- believed a solicitor or other adviser was taking up the complaint on his/her behalf;
- has not at any time allowed the matter to rest for more than a few months.

The above is not an exhaustive list.

Ignorance of the Ombudsman’s existence needs to be looked at carefully as we have been in existence for more than 40 years. But, as stated above, if the PA has language or learning difficulties, or they have not been resident in the UK all their life, it might be appropriate to exercise discretion.

Similarly, if the complainant’s awareness was raised by media coverage of an LGO Focus Report, this would be a factor to take into account.

It may also be relevant to consider whether there might be a wider injustice caused if we do not investigate.

Continuing fault

Some administrative actions are “continuing” (eg a complaint about the continuing failure to take enforcement action for a breach of planning control). If the complaint is about an action or omission which continued over a period of time (failure to take enforcement action over a sustained period) we may take the view that the 12 months does not begin until the end of the period. But if there have been, eg repeated complaints to the council over a period of time, or the period of alleged failure is very lengthy, it may be appropriate to separate parts of the complaint. This is particularly the case where there has been a significant period without the complainant taking any action to pursue the matter and it can be assumed from this that s/he has accepted the council’s position. Or it may be appropriate to exercise discretion for the earlier part in order to make sense of the complaint.

Examples on the exercise of discretion

- *The complainant lost an education admissions appeal last year and accepted the result. But this year a friend’s child was admitted on appeal in similar circumstances – **IN** because the complainant only just found out about the alleged maladministration.*
- *The complainant contacted his ward councillor four years ago about noise from his neighbours and asked the Councillor to contact the Ombudsman for them. The councillor referred the complaint to officers, who took no action and for a long time*

*the complainant assumed he would simply have to put up with it. Recently he complained to the council again, officers have now been to visit him and have agreed there is a nuisance – **IN**, because of the complaint made to the councillor four years ago.*

- *A complaint was made to the council that incorrect advice given by a highways officer had caused the complainants to make a planning application which could not have succeeded, and was rejected on appeal. The council carried out a thorough investigation, but it was almost four years before the complaints procedure was finally concluded, in part because of lengthy negotiations. **IN**, as the complaint had been made promptly once the planning appeal and the council's complaints procedure had run their course.*

Restricting the scope of the investigation

The complainant said that she had experienced problems of antisocial behaviour by her neighbours for 15 years and had been complaining to the council but it had done nothing effective. The problems had escalated in the last two and a half years since the neighbour's teenage son had been convicted of a drugs offence. The investigation was restricted to the last two and a half years (i.e. from when the problem increased). It could be assumed that the complainant had accepted the council's decision to take no action about the earlier problems.

No good reason to exercise discretion

*The complainant objected to his neighbour's planning application which was approved by the council more than two years ago. The complainant says his objections were not taken into account, but he has only now complained to the Ombudsman. The council informed the complainant of his right to come to the LGO in its response to his complain at the time – **OUT**, unless there is some exceptional reason for the late complaint (e.g. health, learning disability, personal circumstances, mistaken belief that the council or a representative was dealing with the complaint).*

Historical allegations

Historical allegations are where so much time has elapsed since the fault complained of occurred that an investigation is likely to be impeded by the passage of time.

In all cases we will consider each complaint on its merits and take account of the unique circumstances of each case. However, we should be cautious about starting an investigation into historical allegations. The main reasons are:

- **Evidence:** The further away in time an investigation takes place from the events to be investigated, the more difficult it may be to establish the material facts with reasonable confidence. In older cases we are less likely to be able to gather sufficient evidence to reach a sound judgement. Even if some evidence is available, we would need to be particularly careful to ensure it is reliable, and provides a full picture.

- **Context:** In many cases we cannot apply current standards, guidance, or professional expectations to historical situations. It is therefore likely to be more difficult to reach a firm and fair conclusion on whether there was maladministration.
- **Remedy:** In historical cases it is likely to be more difficult to achieve a meaningful remedy, given the length of time that has already passed, the difficulty in establishing causality over longer time periods, and changes in the situation of the parties.

Given the above factors, we should not dis-apply the requirements of s26B in historic cases unless we have very clear reasons for doing so that satisfy the following two tests:

- we are confident that there is a realistic prospect of reaching a sound, fair, and meaningful decision, and
- we are satisfied that the complainant could not reasonably be expected to have complained sooner.

Whilst not fettering our discretion or creating a blanket policy, a presumption will exist against exercising discretion unless there are clear and compelling reasons for doing so that satisfy both of the above tests.

The considerations relating to reliable evidence, historical context, and realistic chances of a meaningful remedy have even greater importance when considering historical allegations of serious wrongdoing and should not be set aside because the complaint relates to significant injustice, including allegations of abuse and neglect. The seriousness of the allegation does not remove the obligation to consider the two tests above in relation to all historic cases.

Is the complaint premature?

Section 26(5) Before proceeding to investigate [a matter], a Local Commissioner shall satisfy himself that—

[(a) [the matter has] been brought, by or on behalf of [the person affected], to the notice of the authority to which [it relates] and that that authority has been afforded a reasonable opportunity [to investigate the matter and to respond]; or

(b) in the particular circumstances, it is not reasonable to expect [the matter to be] brought to the notice of that authority or for that authority to be afforded a reasonable opportunity [to investigate the matter and to respond].

Most local authorities and service providers have a two or three stage complaints procedure. These are designed to put things right for people quickly and efficiently when things go wrong. We would normally expect someone to be able to show they had exhausted such procedures before using the LGO service. Even where the complainant urgently needs services, their needs will in most instances be met more quickly by approaching the service provider rather than the Ombudsman.

Unless other statutory time limits exist, we would normally allow a local authority or service provider around 12 weeks to complete its consideration of a complaint. Where someone had delayed in progressing their complaint from one stage to the next, we may allow longer.

Ensuring that people exhaust local resolution procedures before coming to the Ombudsman achieves a number of worthwhile outcomes for all our stakeholders:

- It affords local authorities and service providers an opportunity to learn from mistakes and take remedial action as early as possible in response to a justifiable complaint;
- Where a local authority or service provider feels there has been no fault, it can defend its actions and provide an explanation to the service user; and
- Where local resolution cannot be achieved, the residual matters in dispute have often been refined thereby enabling us to concentrate our limited resources on considering the nub of the complaint.

In limited circumstances in which we would consider dis-application of the requirement that local authorities and service providers are provided with a reasonable opportunity to respond before the Ombudsman considers the issue.

We will consider each complaint individually on its merits and take account of the unique circumstances. However, in general, we should be very cautious about starting an investigation where local resolution methods have not been exhausted except in the following circumstances:

1. **A local authority or service provider has been notified of a complaint but failed to respond within a reasonable time frame:** In March 2009 we updated our external guidance for bodies in jurisdiction on "[Running a complaints system](#)"

Where it is clear the principles and standards contained within that guidance about accessibility, communication, timeliness, fairness, credibility, and accountability have not been met, it may be appropriate to dis-apply the requirement. This would include cases where complaints had been made but not responded to; where someone had not been clearly signposted to the next stage of a procedure; or where reasonable adjustments had not been made in order to assist someone in making their complaint.

2. **A local authority or service provider has refused to consider the complaint, or progress it to the next stage in its procedure:** While we would normally expect a local authority or service provider's complaints procedure to have been exhausted before considering a complaint, there will be circumstances where it would be unreasonable to do so. It is not incumbent upon local authorities or service providers to complete all the stages of their complaints procedures where they feel it would not be merited and can clearly demonstrate they have either given proper consideration to a complaint, or there are good reasons why they will not. (Cost and convenience to the council are not legitimate reasons to curtail the complaints process). They may decide the complaint is either vexatious or unreasonably querulous. In such circumstances it is open to them to refer a complainant to the LGO without

completing the procedure. However, in all such cases it will remain our decision whether to accept the case at an earlier stage than usual.

Note: Children’s social care complaints: where councils refuse to progress to stage 2 of the statutory procedure. Where a complainant requests a stage 2 investigation of their complaint (or where the Council and complainant agree that stage 1 is not appropriate), there is a statutory duty on the Council to carry this out within 25 days.

Where a complaint comes to LGO and the Council is refusing or delaying to conduct such an investigation, and there appears to be no legitimate reason for this, we might make a swift decision on the complaint, recommending that the investigation is carried out by the Council as a matter of urgency.

We should be cautious about investigating the matter ourselves where a stage 2 investigation has not been completed, unless there are clear reasons for us to do so.

- 3. The substance of the complaint has already been the subject of a local independent appeal or review procedure and nothing would be gained by asking the local authority or service provide to consider it under its complaints procedure:** We would not normally expect complainants to go through a review process AND a complaints procedure in succession. These would include complaints about Blue Badge refusals, school transport, school admissions and appeals, and – in some cases – local welfare scheme applications. In cases where local authorities and service providers make decisions, and then administer an appeal process, our role is largely restricted to considering whether there was any prejudicial fault in the way in which the appeal was administered.
- 4. We have received a viable complaint which may merit joint working and one, but not both authorities’ complaints procedures have been exhausted:** In such cases we would not expect someone to have exhausted both BinJ’s corporate or statutory complaints procedures as there is a legitimate expectation that the local resolution response had been ‘joined up’ where the concern was about services being provided by both a local authority and health authority.

Given the above factors, we should not dis-apply the requirements of s26(5) unless we have very clear reasons for doing so *and* are confident that it would be fair to both parties to do so.

Whilst not fettering our discretion, the presumption will be against exercising discretion. As we need to be consistent when applying Section 26(5) to our casework, care should be taken to avoid taking an inconsistent approach in either Intake, Assessment or Investigation on the same complaint. This question of whether a complaint is premature will normally be considered by Intake and Assessment and more details are given in the [Intake Team Manual](#) and [Assessment Manual](#).

Complaints about Council-commissioned services and prematurity

The law says the Ombudsman can treat the actions of third parties as if they were actions of the Council, where any such third party arrangements exist (*Local Government Act 1974, section 25(6) to 25(8)*). This means councils keep responsibility for third party actions, including complaint handling, no matter what the arrangements are with that party.

We have outlined a set of principles to clarify how the LGO will deal with complaints about services a council has commissioned another organisation to provide on its behalf. This is to ensure consistency in our approach. It is also designed to ensure members of the public are informed of their right to seek independent redress at the earliest opportunity rather than being expected to navigate multiple complaints procedures before bringing their complaint to us.

Principles:

- Councils should have clear arrangements in place for handling complaints when they commission other organisations to provide services on their behalf. Failing to do so would be fault. This is set out in the manual for councils.
- The arrangements or service level agreements should set out the responsibilities of each party including:
 - who will respond to the complaint;
 - who will signpost the complainant to the LGO; and
 - at what stage this should happen.
- Regulations also govern how councils should handle complaints about Children's Services and Adult Social Care (*The Children Act 1989 Representations Procedure (England) Regulations 2006, The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009.*) That a third party may be involved does not change the legal requirements.
- Councils should ensure the service provider is aware that the complainant can bring their complaint to us.
- We would generally not expect complainants to complete two (or more) separate complaints procedures before bringing their complaint to us just because a council has decided to commission another body to provide services on its behalf.
- If a member of the public has complained directly to the service provider and has received a response, having completed the service provider's complaints procedure, they can bring their complaint to us at that time.

LGO position:

- Intake will forward such complaints to Assessment for further consideration and not automatically treat them as premature, even though the matter may not have been through a council's own complaints procedure.
- We will consider each case on its own merits.
- Generally speaking, we would not consider the complaint to be premature if the service provider (who is acting on behalf of the council) has responded to the complaint.
- There may be good reasons why in some cases it would be appropriate to expect a complainant to complete more than one process (e.g. where a related safeguarding investigation has been carried out or is ongoing). This decision should generally be made at Assessment but may also be taken at Investigation.
- If we decide the complainant should complete another process (e.g. safeguarding) before we consider the complaint further, we will generally close the complaint using our general discretion.

Is there an alternative remedy?

Introduction

S26(6) A Local Commissioner shall not conduct an investigation under this Part of this Act in respect of any of the following matters, that is to say-

(a) any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment;

(b) any action in respect of which the person aggrieved has or had a right of appeal to a Minister of the Crown or the National Assembly for Wales; or

(c) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law:

Provided that a Local Commissioner may conduct an investigation notwithstanding the existence of such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect the person aggrieved to resort or have resorted to it.

Section 26(6) is intended to ensure people do not ask the Ombudsman to intervene where they have already had recourse to an alternative remedy, or would be better served by doing so. Almost any decision by a public body is actionable in the courts. As we are publicly funded to decide complaints of maladministration causing injustice, we should not be unduly prescriptive in relying on the availability of alternative remedies. It should be noted that Judicial Review is a remedy of last resort. Unlike many alternative remedies, the LGO is free

to use, does not normally require expert representation, and we do not impose costs on those whose cases we do not uphold.

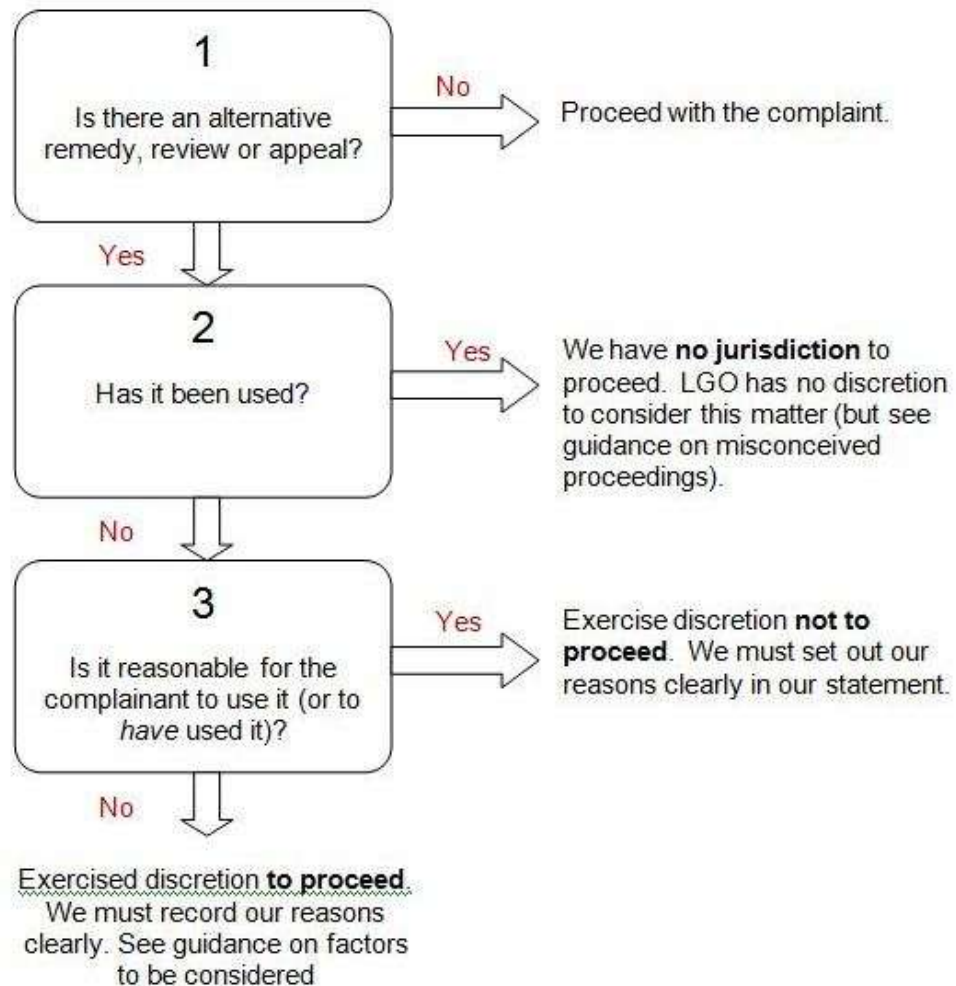
Our emphasis should be on letting people know that where they have used a remedy listed in sub-sections a), b) or c), we no longer retain discretion to consider their complaint. Where an alternative remedy exists but has not been used, we would normally only expect someone to use it as an alternative where the appellate body has the expertise to decide the issue and the appeal will clearly provide the remedy being sought.

We should not conflate commonly used alternative remedies with more obscure means of redress which we may direct people to if we are satisfied there has been no maladministration by the BinJ. If – for example – someone approached the LGO alleging defamation, we may be able to look at the actions of the Council and arrive at a view on the extent to which they had or had not sullied someone’s reputation despite the availability of court action for defamation.

Similarly, we would expect a council to respond appropriately – either directly or through its insurers – to a claim for the costs of repairs to a vehicle as a result of an alleged failure to maintain a highway appropriately, despite an individual’s ability to action the matter through the courts so we may decide to look at the complaint.

Another example would be where someone may complain that bailiffs have failed to properly explain the charges they have levied in recovering a debt owed to a council. In such cases we would expect a local authority to satisfy itself that the charges were levied appropriately and provide an explanation, despite the complainant’s ability to bring the bailiff before a magistrate.

Three-part test



Section 26(6) requires us to consider three questions (see flow chart): is there an alternative remedy for the complaint, has it been used, and is it reasonable for the complainant to use it? This chapter is set out under those three headings. These three questions must be kept in mind throughout our investigation.

We may be challenged on the ground that either (a) we failed to consider whether there was an alternative right/remedy or misdirected ourselves on the question; or (b) our decision to investigate or not to investigate was "[Wednesbury unreasonable](#)".

Whether there is a right of appeal is a matter of fact and **MUST** be considered in every case (see below).

An investigator must be able to show they have applied their mind to this question. A record must be made on the file of: a) whether an alternative right/remedy was or is available and b) why it is (or is not) reasonable to expect the complainant to resort to it.

The exercise of the discretion may be reviewed during the investigation if new facts emerge. Any review must be recorded on the file. If it is decided that discretion to investigate should no longer be exercised, a decision should be made to discontinue.

Question 1 – Is there an alternative remedy?

Section 26(6) is in three parts:

A Where the person has or had a right of appeal, reference or review to or before a statutory tribunal (s26(6)(a))

A statutory tribunal is one which is set up by or under an Act of Parliament. Many are supervised by the Council on Tribunals (CoT). The full list is contained in [Schedule 1 of the Tribunals and Inquiries Act 1992](#) as amended.

A tribunal may consist of one person.

The main tribunals relevant to complaints to the Ombudsman are set out below

(i) Information Commissioner

Freedom of Information Act, Environmental Information Regulations and associated Codes of Practice

In order to promote compliance with this legislation, the ICO may:

- conduct assessments to check organisations are complying with the Act;
- issue undertakings committing an authority to a particular course of action to improve its compliance;
- issue practice recommendations specifying steps a public authority should take to ensure conformity to the Codes;
- serve information notices requiring organisations to provide the ICO with specified information;
- serve enforcement notices where there has been a breach of the legislation, requiring organisations to take (or refrain from taking) specified steps in order to ensure they comply with the law;
- issue decision notices detailing the outcome of the ICO's investigation;
- prosecute those who commit criminal offences under the legislation.

It is only when using the powers to issue enforcement notices, decision notices and information notices that the ICO is a tribunal within the Administrative Justice and Tribunals Council (Listed Tribunals) Order 2007 ([SI 2007/2951](#)). In every other respect (including assessments of compliance) it is not. So in order to decide if there is an alternative remedy we need to be clear what remedy the person is seeking. *(Note: even if there is no alternative remedy we may nevertheless decide not to investigate the matter under our general discretionary power (s24A(6) as the ICO is the best placed body to consider the issue).*

Data Protection

The [ICO](#) also has power to take enforcement action against a data controller for breach of one of the eight principles of information handling in the Data Protection Act 1998. But it is NOT acting as a statutory tribunal if it does so.

If a complainant believes there has been a breach s/he may refer the case to the Commissioner under s42 of the Act to consider taking enforcement action. If we decide this would be a better route for the complainant we should exercise our general discretion under s24A(6) to discontinue.

Example

A complainant made a subject access request to the Children's Services Department of a Council regarding records of his placement as a foster child. The Council refused the request. The complainant was advised to approach the Information Commissioner, following which the matter was resolved informally. The decision not to investigate the complaint was made using our general discretionary power under s24A(6).

In some cases the person affected may take action in [court](#) in their own right under the Data Protection Act 1998.

What if the DPA complaint is incidental to another complaint which is wholly within jurisdiction?

If the breach of DPA is incidental to a more substantive complaint that is in jurisdiction, it may be appropriate to exercise discretion in the complainant's favour. We should not require a complainant to make a complaint to the ICO for matters simply about whether a complainant's personal data has been disclosed and we are investigating other related issues.

Example

A complainant believes his amenity was not properly taken into account when the council approved an application for development next to his home. Part of his complaint is that the council breached his data protection rights and confidentiality by referring, on its website, to a letter he wrote to the planning office 'in confidence' raising concerns about the developer's motives. In this case it was appropriate to exercise discretion to look at the whole complaint, as it was not considered reasonable to expect the complainant to make his complaint to two different bodies.

(ii) Education appeal panels

These are set up under the School Standards and Framework Act 1998 to hear appeals against school admission and exclusion decisions. The Ombudsman normally considers it reasonable for a person aggrieved about an admission or exclusion decision to exercise their right of appeal to a panel.

The education appeal panel is a statutory tribunal but is also a body within the Ombudsman's jurisdiction under section 25 LGA 1974.

When considering a complaint after an appeal has been rejected, there may be parts which relate to what happened at the appeal and parts which relate to the original admissions or exclusions process (for example something about the way a decision was taken by the admissions authority which the appeal panel did not consider). Governing bodies which act as admissions authorities are within jurisdiction as are appeal panels considering appeals against decisions of governing bodies. However, schools with academy status are not in jurisdiction. We can consider neither the school's decision nor that of the appeal panel. *(Exception: Academies which have converted during the admissions process – seek advice from your manager if you have one of these).*

There may also be some complaints about education admissions matters which cannot be the subject of an appeal. Examples might be the administration of waiting lists or failure to determine an application for a place. We could consider such complaints provided they are not otherwise excluded on jurisdictional grounds.

Appeals relating to permanent exclusions are the responsibility of the council (or Academy Trust in the case of an Academy which would be outside our jurisdiction). It is the role of the council to set up the independent review panel (IRP) to review the decision of a governing body not to reinstate a permanently excluded pupil. Complaints relating to the IRP would be within jurisdiction.

(iii) Office of the Schools Adjudicator

The Office of the Schools Adjudicator (OSA) helps to clarify the legal position on admissions policies in schools. It does not get involved in decisions about school admissions for individual pupils. Its main powers are:

- ruling on objections to and referrals about state school admission arrangements
- settling disputes over school organisation proposals
- making decisions on requests to vary school admission arrangements
- determining appeals from maintained schools against the intention of the local authority to direct the admission of a particular pupil
- resolving disputes concerning the transfer and disposal of non-playing field land and assets.

The Schools Adjudicator is not a statutory tribunal, and its decisions are not in jurisdiction. So decisions not to investigate a matter because it could be referred to OSA are made in exercise of our general discretion under s24A(6).

(iv) Housing Benefit Appeals

Applicants dissatisfied with the way housing benefit is calculated have a statutory right to appeal to the First-Tier Tribunal (Social Entitlement Chamber) with a further appeal (on a point of law) to The Upper Tribunal.

While the First-Tier Tribunal can consider appeals against the majority of decisions taken by a local authority on housing benefit entitlement there are some exceptions. So the following matters are not subject to appeal and would be within our jurisdiction:

- discretionary housing payment decisions;
- which partner is treated as the claimant for housing benefit;
- who may claim housing benefit on behalf of someone unable to act for themselves;
- when and how housing benefit is paid (i.e. the method of payment, frequency etc);
- whether the council can make a payment 'on account' (an important protection for private tenants whose claims are delayed through no fault of their own);
- a suspension of benefit;
- the exercise of discretion about whether a housing benefit overpayment should be recovered
- the method of recovery of a housing benefit overpayment;
- the scope of local discretionary schemes (for example some councils operate local schemes that disregard income from war pensions).

Examples

- *A complaint that the council had delayed in deciding a claim for council tax reduction – **IN** (no right of appeal)*
- *When housing benefit was eventually assessed, it was overpaid and the council is now seeking to recover it – **OUT** as this carries a right of appeal. But if the council failed to notify the claimant of her appeal rights, this would be reason to exercise discretion.*
- *The council decided that overpaid housing benefit should be recovered from the complainant, because it believed she would have known that she was being overpaid, even though the overpayment was the council's fault – **OUT** (right of appeal). But, if the council failed to notify the claimant of her appeal rights, this would be a reason to exercise discretion.*
- *The council suspended a claimant's housing benefit but the complainant says it had no grounds to do. As a result he was evicted by his landlord for rent arrears. **IN** (no right of appeal against suspension).*

(v) Valuation Tribunals (VTs)

VTs are independent of both the Valuation Officer and the billing authority. They hear appeals about:

- a person's liability to pay the council tax, or whether they are entitled to a discount, or whether the dwelling is an exempt dwelling;
- a completion notice issued by the local council for a dwelling. This notice shows the date the council believe the dwelling is/will be complete or substantially complete and from when council tax should be paid;
- a penalty notice imposed by the local council for failure to provide some information they have requested relating to council tax.
- a decision by the local authority that they are not entitled to council tax reduction or how much council tax reduction has been awarded under its local scheme.

the exercise of discretion to waive council tax in addition to any reduction (so called 'Section 13' relief – from Section 13 of the [Local Government Finance Act 1992](#) incorporated into the Local Government Finance Act 2012). The VT can consider individual appeals that the Council has not exercised discretion in accord with its discretionary scheme. In the above cases, the Tribunal cannot hear appeals about the contents of the council's scheme, only about the way the scheme has been applied to the individual case.

[Information](#) about how to contact the relevant tribunal and the process is available.

(vi) The Upper Tribunal (Lands Chamber)

The Lands Chamber replaced the Lands Tribunal in 2009. The main types of cases relevant to us are:

- *Compulsory purchase*: disputed valuations of compulsorily purchased land or property.
- *Land compensation*: Claims for compensation for loss of value arising from public works, such as noise nuisance from new roads. Or compensation for coal mining subsidence, coast protection works, reservoirs, and drainage works
- *Disturbance payments*: disputes as to the amount offered for permanent or temporary displacement from land/property.
- *Restrictive covenants*: Applications to lift or modify restrictive covenants on land, so that development or change of use can take place and [applications for notices relating to the right to light](#).

Examples

- A complainant owned a property in disrepair which the council proposed to compulsorily purchase. He claimed that the property was in better condition than the council said, was seriously undervalued and that it was inappropriate for the council to compulsorily purchase it. **OUT** – he was advised to make his objections through the statutory consultation process and, if the purchase went ahead, to appeal to the Lands Chamber against the valuation.
- A complainant said that noise from a new road built close to his home caused disturbance to his family, and that his property was being damaged by vibrations from heavy traffic. **OUT** - the complainant was advised to claim compensation through the Lands Chamber
- The complainant owned two derelict buildings that she had planning permission to develop and lease a third (intact) building for a carpet business. She could not complete the planning permission when the council announced a regeneration scheme that involved demolishing the buildings, as her bank withdrew a loan needed for the scheme. She served a blight notice on the council but the council rejected it saying she had no 'qualifying interest' as defined by law, in any of the properties. **IN** - while she could have appealed it was not reasonable to expect her to do so as the council was right that she had no qualifying interest and an appeal could not therefore have succeeded.

(vii) First-Tier Tribunal (Property Chamber), Agricultural Land and Drainage (AL&D)

This tribunal plays an important role in settling disputes and other issues between agricultural tenants and landlords, arising from tenancy agreements held under the [Agricultural Holdings Act 1986](#). It also considers applications under sections 28 and 30 of the [Land Drainage Act 1991](#), about certain drainage disputes between neighbours.

Example

- A neighbour discharged water into a land drain running beneath the complainant's garden, causing flooding in the garden. The complainant asked the council to deal with this as nuisance. The neighbour claimed he had the right to discharge the water. **OUT**. The drain was private and the complainant was advised to appeal to the First-Tier Tribunal (Property Chamber) Agricultural Land and Drainage to establish whether the neighbour was within his rights to use the drain.

(viii) The First-Tier Tribunal (Property Chamber) now hears appeals formerly heard by the Leasehold Valuation Tribunal

The tribunal considers disputes about the reasonableness of service charges under long residential leases. Either the tenant or the landlord may apply to the Tribunal for the determination. The focus of the Tribunal is the reasonableness of the charge. It cannot consider a complaint that the landlord has not done repairs or the services are of poor quality (although these issues may arise in challenging the reasonableness of the charge).

The Tribunal will also be able to vary leases and determine whether there has been a breach of covenant before the landlord forfeits a lease.

Where there is a complaint about the level of service charges for a long residential lease which could go to the Property Chamber, but the complaint relates solely to the failure to provide information about the service charges, exercise of discretion may be appropriate.

If the complainant is uncertain about whether to take proceedings in the Property Chamber or the County Court free advice on the most appropriate route is available from the [Leasehold Advisory Service](#).

(viii) The First-Tier Tribunal – Property Chamber (Residential Property)

This chamber has five regional offices which provide an independent service for settling disputes involving private rented and leasehold property. The tribunal has powers to settle certain disputes which would otherwise have to be dealt with by the courts. It aims to provide easier and cheaper access to justice. While there is a scale of fees for some, but not all, types of dispute, there is no fee for dealing with disputes about the price payable for the acquisition of freeholds or lease extensions and market or fair rents.

The main types of appeals heard by the tribunal include improvement notices, prohibition orders or emergency prohibition orders, demolition orders, interim or final management or empty dwelling management orders and licensing of houses in multiple occupation.

Example

*The complainant lived abroad but owned a property in England. It had been used as a holiday home but, due to his wife's ill health, the complainant had not visited for many years. The council advised him that complaints were being received that the property and garden were falling into disrepair, and that it would seek an Empty Dwellings Management Order if the property were not to be brought back into use. The complainant objected on the grounds that holiday homes were exempt. **OUT** – he could reasonably be expected to appeal to the Property Chamber. But his ability to attend the tribunal hearing would be a relevant consideration to the exercise of discretion.*

(ix) Adjudicators Appointed to the Traffic Penalty Tribunal (TPT) (formerly the National Parking Adjudication Service (NPAS) and (in London) the Parking and Traffic Appeals Service (PATAS) - known as [London Tribunals](#) since July 2015

The Traffic Management Act 2004 resulted in various regulations; the most relevant being:

- The Civil Enforcement of Parking Contraventions (England) General Regulations 2007 (SI 2007/3483), and
- The Civil Enforcement of Parking Contraventions (England) Representations and Appeals Regulations 2007 (SI 2007/3482).

In addition to parking enforcement, the Act gives enforcing authorities powers with regard to other contraventions, including bus lane and moving traffic contraventions. A full list of these powers is provided in Schedule 7 of the Act. These are explained in more detail in the Highways section [available to LGO staff].

The right of appeal to an Adjudicator on statutory grounds

If the complainant says the contravention did not occur, or that one of the other specified statutory grounds applies (see parking and traffic offences section [available to LGO staff]), there is a right of appeal to the Adjudicator.

There is no right of appeal against an Adjudicator's decision but a review may be granted in certain prescribed circumstances (set out in the appeals regulations).

The right of appeal on grounds of mitigating circumstances (parking only)

A parking Adjudicator can also consider whether, although the contravention occurred, there were mitigating circumstances not covered by the statutory appeal grounds. If minded, the Adjudicator may refer the matter back to the council for reconsideration.

The appeal process is free, relatively informal and simple to use. An appeal can be made in writing but if an appellant wishes to make a personal appearance, this can be arranged outside normal working hours. There are also provisions outside of London for appeals to be heard within the area of any council which is a part of the scheme.

The Ombudsman takes the view that there would need to be an exceptional reason to exercise discretion to investigate a complaint where a right of appeal exists. But note that the appeal on grounds of mitigating circumstances relates to **parking contraventions only** and not other traffic complaints e.g. congestion charging.

Examples

- *A complainant said that he had been given a parking ticket but the council had not dealt properly with his representations as to why the penalty should be waived. He had continued to correspond with the council which eventually told him that he was out of time to appeal. The complainant had been correctly advised as to what his appeal rights were, his complaint was made on one of the statutory grounds for appeal and it was considered reasonable for him to have used them – **OUT***
- *Mr A incurred a parking penalty while driving a hire car. The council issued a PCN to the hire company which responded by providing Mr A's details. The council did not reissue the PCN in his name until two months later. In the meantime he had contacted the council to make representations against the Notice and ask for further photographic evidence. The council did not reply. It could not accept his communication as representations against a PCN which was not yet in his name. **IN** – the council's failure to inform him of this prevented him from making further representations when the PCN was reissued.*

(xi) First-Tier Tribunal (Special Educational Needs and Disability) (SEND)

Appeals to the Tribunal may be made against:

- failure to carry out a statutory assessment or reassessment, following a request;

- failure to make an Education, Health and Care Plan (EHC Plan) after a statutory assessment;
- the content of the EHC Plan or amended EHC Plan (except non-educational needs or provision);
- refusal to change the school named on the EHC Plan;
- failure to amend a EHC Plan following reassessment or an annual review;
- a decision to cease to maintain a EHC Plan; or
- discrimination in the provision of education (Special Educational Needs and Disability Act 2001).

Examples

*A child with an Education Health and Care Plan complains the council has failed to name the school of their choice in the Plan. **OUT** – right of appeal to the First-tier tribunal*

*A child has the need for speech and language therapy written into the educational part of their EHC Plan. The health trust does not have any therapists available so the child does not receive support for several months. **IN** – no right of appeal because this complaint is about failure to make provision and/or delay in making it. The council has ultimate responsibility to provide what is written as an educational need in the EHC Plan (but note the possibility of joint working with PHSO here)*

*A parent complains the council did not tell them of their right of appeal when they complained about the content of a EHC Plan. **IN** – failure to notify of the right of appeal prevented them from appealing within the time limit.*

Further details are given in the practice note on special educational needs [available to LGO staff] and Casework Policy Forum Guidance note on SEN and alternative remedy [available to LGO staff].

Bodies which are not tribunals

- The district auditor.
- Review panels set up as part of the statutory complaints procedures in respect of social services and children’s services matters only.
 - Safeguarding adult boards (SABs) These are now mandatory under the Care Act 2014 and their introduction is being phased in. They include representatives of the local authority, the NHS clinical commissioning group and the chief officer of police. Councils can appoint other members, such as housing authorities or provider organisations. Among their powers, SABs may hear appeals against decisions made by the LA on safeguarding, by the person affected or another interested party. Some decisions carry appeal rights, some of their decisions are **IN** jurisdiction and others **OUT**.
- **Education Transport Appeal Panels**

- Government guidance (non-statutory) says Local authorities should set up a two-stage review/appeals process against decisions on whether to provide assistance with transport to school. The appeal panel is not an independent tribunal so not an alternative remedy within s26(6). In considering the complaint, investigators should check the council's appeal procedure complies with the [Guidance](#).
- District valuer
 - The district valuer may be asked to determine a dispute over the purchase price of a "right to buy" (RTB) dwelling house under s128 of the [Housing Act 1985](#). Note: the Ombudsman would normally expect a RTB applicant to use the district valuer if there is a disagreement on the purchase price and so would terminate the complaint under s24A(6). RTB matters may also be determined in the [County Court](#).

B Where there is a right of appeal to a Minister of the Crown - S26(6)(b)

The main appeals are:

- Planning appeals including appeals against non-determination of a planning permission.
- Enforcement notice appeals.
- Appeals under the Highways Act about the recovery of expenses for making up highways.

The following are not rights of appeal. While they provide a complainant with the opportunity to refer a matter to a Minister this is only in the realm of a request to intervene, rather than to appeal about a specific decision or action, and so are not caught by s26(6)(b):

- Applications to the Secretary of State for Health ([s84 of the Children Act 1989](#)) alleging a council's failure to comply with a statutory duty under this Act.
- Objections to the Minister against compulsory purchase orders (CPOs) - this is because the Minister is not deciding an appeal but simply whether to confirm the order. Note: if the matters complained of could be put to the Minister and could affect the decision on whether to confirm the CPO, consideration should be given whether to discontinue under s24A(6).
- A request for the Secretary of State for the Environment to exercise intervention powers under s 164 of the Housing Act 1985. Where it appears that a tenant or tenants may have difficulty in exercising their right to buy effectively or expeditiously, the Secretary of State may step in and exercise RTB provisions.
- Complaints to the Secretary of State for Education that a school governing body has acted or proposes to act unreasonably or unlawfully in the exercise of its duties (s496, 497, [Education Act 1996](#) and schedule 4, paragraph 10 [School Standards and Framework Act 1998](#)).
- The power of the Secretary of State for Education to direct councils to provide transport to a school or college for sixth form learners 16 (s 509AA(9)).

- Representations to the Secretary of State for the Environment in respect of a failure by the council to determine a Footpath Modification Order under Schedule 14 paragraph 3(2) of the [Wildlife and Countryside Act 1981](#).

C Where there is a remedy by way of proceedings in any court of law - section 26(6)(c)

Note:

- the remedy must be against the body in jurisdiction, not a third party.
- Do not be deflected by words such as “negligence” or “defamation”. Complainants may use such terms, but the action complained of will also be maladministration. The duty is on the investigator to define the complaint in our terms and not assume the complainant’s label is right. Even if it is, there remains the duty to consider discretion. Defamation claims can only be brought in the High Court and no legal help is available, so they are extremely costly.
- S26(6)(c) does not apply where the complaint could have or has been raised in defence of an action brought by the council (See *R v Local Commissioner for Administration ex parte Bradford Metropolitan City Council* (1979).
 - But if the matter has been considered by the court it may be appropriate not to investigate under s24A(6). Exercise care here and consult your AO if in doubt. What orders were sought from the court and what did the court decide? Unless the situation is clear, you may need to ask for the court papers.
 - Where in the course of such proceedings the complainant has made a counterclaim against the council in relation to the subject matter of his complaint, s/he may be treated as having exercised an alternative remedy under s26(6)(c).
- In deciding whether there is an alternative remedy, it is NOT relevant whether or not the proceedings would be likely to succeed. (See *R v Commission for Local Administration ex parte Croydon London Borough Council* (1989).

Examples of statutory provisions that provide a specific right to go to court

Note: Time limits for taking action will often be stated in the part of the Act which gives the right to go to court.

Magistrates Court

In addition to its criminal jurisdiction the Magistrates Court acts as an appellate body in relation to a number of civil matters. For our purposes the main ones are

- [Highways Act 1980](#) – ss 205- 211 apportionments under the Private Street Works Code carry a right of appeal to the Magistrates Court. The Magistrates Court can also make an order for the Highway Authority (HA) to repair a highway which is maintainable at the public expense (s56 Highways Act). As a first step the complainant must serve a notice of disrepair on the HA. If the HA responds with a notice within one month admitting it is liable to maintain the highway, the complainant

may within six months apply to the Magistrates' Court for an order requiring it to be put in proper repair. Where the HA does not respond to the complainant's notice, the complainant may apply to the Crown Court direct. Similar provisions apply.

- [Building Act 1984](#) – s55; Building Regulations. There is a right of appeal where a person is “aggrieved” by a council's rejection of an initial notice, a plans certificate or a final certificate.
- Certain licensing provisions e.g. private hire vehicle licensing and hackney carriage licensing.
- [Licensing Act 2003](#) s181 and Schedule 5 gives a right of appeal against licensing decisions to anyone aggrieved. This includes applicants AND those who made relevant representations in respect of an application. So a local resident has a right of appeal against the council's decision to grant a licence or in respect of the conditions imposed on a licence if he/she made relevant representations in respect of the application. “Relevant representations” is defined in s18(6) of the Act.
- [Environmental Protection Act 1990](#) – s82; an application by a “person aggrieved” in respect of statutory nuisances (see s9 of EPA for full list of statutory nuisances). The council can be joined in proceedings where action is taken against a neighbour.
- [Environmental Protection Act 1990](#)– s91; allows for an application to the court for an order for the council to remove litter, after giving notice to the council.

County Court

- [Housing Act 1985](#) – s181; an application to deal with right to buy matters (subject to the district valuer's jurisdiction to determine the value of a dwelling house under s128 of the Housing Act 1985. Note: in RTB matters where there is a complaint of delay by the council, the Ombudsman normally expects the complainant to use the procedure in s 153A of the Act “Tenants notice of delay”. The 153A tenant's notice is not an alternative right/remedy under s26(6), but we may discontinue under 24A(6) and advise them to use this option.
- [Housing Act 1996](#) – s204; contains a right of appeal on a point of law if the person affected is dissatisfied with the review of a decision on homelessness or has not been given a decision .
- [Secure Tenant of Local Housing Authorities \(Right to Buy\) Regulations 1994](#); disputes about tenants' “Right to repair”.
- Appeals by private landlords against the service of Housing Act Notices.
- [Data Protection Act 1998](#) (note the High Court also has jurisdiction in these cases):
 - s7(9); a complainant can apply to the court if s/he receives no reply to a request within the statutory timescale (currently 40 days) or believes the data controller has wrongly refused their request. The court may order the data controller to comply
 - s13; an individual who suffers damage by reason of any breach of the Act is entitled to compensation. This may include compensation for distress if (a) the individual also suffers damage by reason of the contravention or (b) the

contravention relates to the processing of personal data for 'special purposes' (journalism or artistic/literary purposes)

- s14; a complainant may apply to a court alleging that personal data relating to him/her is inaccurate. If the court is satisfied the data is inaccurate, it may order the data controller to correct, block, erase or destroy the data including other data that contains an expression of opinion based on the inaccurate data. The court can also order the data controller to notify third parties to whom the inaccurate data has been disclosed.

General jurisdiction in tort and contract claims

Action in respect of civil wrongs (torts such as negligence, nuisance, and trespass) are usually heard in the County Court. So, too, would be claims for breach of contract. This is unless the damages claimed are substantial, in which case it will be the High Court. There is no hard and fast rule about the jurisdictional financial limits of these two courts. Regardless of the amount claimed, all proceedings can start in the County Court. A claim of say £50,000 would probably be transferred to the High Court, whereas a claim for £15,000 would probably stay in the County Court. So far as claims for personal injuries are concerned, the High Court will not consider those which are for less than £50,000.

Time limits for making claims in contract and tort are called 'limitation periods'. Broadly, contractual claims must be made within six years from when the contract was breached. Claims in tort may be brought within six years of the damage suffered but personal injury claims must be brought within three years of the damage suffered (unless it is a child when the time limit is three years from their 18th birthday). Public procurement challenges are subject to a three month time limit.

Crown Court

There is a right to apply to the Crown Court where a notice of disrepair of a highway has been served by a complainant on the Highway Authority under section 56 [Highways Act 1980](#) and the authority has not responded.

High Court

Legality of Compulsory Purchase Order (CPO); judicial review; appeals from courts/tribunals on points of law; and traffic congestion orders.

There is a right to go to court for people who claim that their human rights under the European Convention on Human Rights have been breached by a public authority.

An application for judicial review may result in any of the following order(s) of the High Court:

1. An Order to force the council to carry out a duty e.g.: to remove obstructions from a highway. Note In *Wyatt v Hillingdon* 78 LGR (1978-79) the Court of Appeal held that an order could not be made to force the council to carry out its duties under the Chronically Sick and Disabled Persons Act 1970 to provide facilities for disabled persons.
2. A Prohibiting Order to prevent the council from taking particular action.
3. A Quashing Order questioning an unlawful decision.

4. A Declaration that the body concerned has acted contrary to the law.

5. An Injunction. This is an order by the Court either prohibiting the party to whom it is addressed from doing a particular act or requiring the party in question to perform a particular act. In *Bradbury v Enfield LBC - CA*, 1967 an injunction was granted to prevent a local authority from reorganising local schools without following the correct procedures.

6. Damages – but note it is not possible to bring a judicial review action simply to claim damages

1. The process and time limits:

1. The first legal step is the lodging of papers at court for permission to proceed. Failure to exhaust alternative remedies and appeals procedures will usually act as a bar to judicial review. (NB a 'pre-action protocol' applies to judicial review but taking action under the protocol is not 'commencement of proceedings'.

2. Time limits for judicial review are very strict. Proceedings must be issued "promptly and no later than three months from the date when the grounds for the application first arose." The Court's power to extend the time limit is very restricted.

NOTE: *Investigators should exercise caution when considering how reasonable it is to expect the person complaining to use the alternative remedy of Judicial Review. It is expensive (legal costs may be up to £20,000 if the case goes to a full hearing), difficult to pursue as an unrepresented litigant, legal aid is now difficult to obtain and by the time the person affected has exhausted the council's complaints procedure it is likely they are already out of time. See [Question 3](#) below. The Courts have considered the suitability [of judicial review as an alternative legal remedy](#) and decided that complaining to the Ombudsman is generally more appropriate.*

Question 2 – Has the remedy been used?

The general rule

Where a complainant has exercised his/her right of appeal, reference or review or remedy by way of proceedings in any court of law, the **Ombudsman has no jurisdiction**. This is the case even if the appeal may not provide or have provided a complete remedy for all the injustice claimed. The case of *R v The Commissioner for Local Administration ex parte PH* (1999) EHCA Civ 916 ("ex parte PH") was concerned with a complaint made about a local authority's failure to provide education for H. H's mother had previously judicially reviewed the Council for this failure and the matter had settled. She then came to the Ombudsman seeking compensation. The Ombudsman told H's mother that he had no jurisdiction to investigate because she had resorted to her remedy in court. Mrs H judicially reviewed the Ombudsman. In dismissing her application Mr Justice Turner said:

"It can hardly have been the intention of Parliament to have provided two remedies, one substantive by way of judicial review and one compensatory by way of the Local Commissioner. The essential feature of the legislation is the creation of a legal right to complain about a grievance, but in respect of which

there had been no available form of redress whether through the common law or by means of judicial review. Where a party has ventilated a grievance by means of judicial review it was not contemplated that they should enjoy an alternative, let alone an additional right by way of a complaint to a Local Government Commissioner. It follows that in my judgment the Commissioner was correct when he concluded that he had no jurisdiction to investigate the Applicant's complaint, and this application must be dismissed."

When does an action begin?

This will usually be the application to the court for a summons or writ or the lodging of an appropriate appeal e.g. with the Secretary of State. With regard to an application for permission to seek judicial review, the Ombudsman, following leading Counsel's advice, has decided that if a complainant has made an application to the Court for permission to take judicial review proceedings this is "resorting to the remedy" even if the application is rejected or withdrawn before the hearing. In such cases the Ombudsman cannot exercise her discretion to investigate.

Note: *In judicial review the right is exercised when the complainant makes his/her application to the court. Issuing a Pre action Protocol is not making an application to Court, though the fact the complainant has done so is a relevant matter to take into account in considering whether it is reasonable to expect the person to resort to judicial review under s26(6)(c)*

Misconceived proceedings

Where proceedings that have been taken are misconceived the Ombudsman retains jurisdiction. Misconceived proceedings are those where the action taken does not amount to the pursuit of an available right or remedy. For example, an application for permission to judicially review a council's decision, claiming negligence by the council and seeking compensation for damage/injury would be misconceived because there is no jurisdiction to consider such claims in the judicial review court. Likewise, proceedings may be misconceived where for other reasons the appeal or other action is struck out by the court or a tribunal at a preliminary stage because there is no legal basis for the action. Misconceived proceedings would not include those that were simply hopeless on the merits, for example a planning appeal made on valid grounds but which was bound to fail on the facts.

Complaints where litigation or an appeal is commenced after the investigation has started

We cease to have jurisdiction once the litigation or appeal has started. The complaint should be discontinued under s24A(6) after checking to satisfy yourself that the proceedings are on the same point.

Complaints where the litigation or an appeal is proceeding and not finalised

Extra caution is required in these cases because it may be difficult to know whether any part of a complaint is capable of separation until the litigation is finalised. The advice in the

paragraph below should be followed. Where there is uncertainty about the possibility of the litigation incorporating any aspect of the complaint, reference should be made to a manager.

But where the general rule applies, is a part of the complaint separable from the matter which has been litigated?

There may be cases where an element of the complaint may be distinguished from the matter in respect of which the complainant had resorted to an alternative remedy. But caution is needed to ensure that there is a properly justified decision for the separation of the complaint and there is no danger of the Ombudsman deciding matters which have already, directly or indirectly, been adjudicated on by a tribunal, minister or judge. It is essential to check the papers to ensure that this is the case. This will include any judgment, transcript or decision. Where there have been judicial review proceedings, the application to the court and any reply by the respondent are key documents. Where there is a suggestion that an element of the complaint may have been considered in this way it is advisable to look further into relevant correspondence or formal evidence.

Where the litigation has not gone beyond the initial stages of lodging papers at court/tribunal, there is less material upon which a decision about separation of a complaint might be taken. In cases of uncertainty, reference should be made to a manager or legal advice should be sought.

When considering whether the subject matter of a complaint is properly separable from a matter which has been the subject of ALR note that we do not have jurisdiction to investigate the consequences of a decision if the decision itself is excluded by section 26(6) of the 1974 Act (see *R (on the application of ER) v The Commissioner for Local Government Administration* [2014] EWCA Civ 1407).

Misleading advice in planning cases

A complaint that a council has given wrong pre-application advice about the need for planning permission does not relate to any later refusal of planning permission for the same proposal. So Section 26(6)(b) will not apply to the issue of the wrong advice.

A complaint that:

- a council advised an applicant that no planning permission was required for their proposal;
- the applicant carried out the development in reliance on that advice;
- the council later told the applicant that planning permission was required;
- the applicant applied for planning permission but it is refused,

is therefore within jurisdiction (even if the applicant appealed).

A complaint from an applicant who is misled by a council as to the need for planning permission but later is granted permission by the council (or on appeal) is also within jurisdiction. But consider whether the PA has suffered a significant injustice.

There may be cases where the misleading advice relates to being told by a council that planning permission is required but would be bound to be granted. It may be that the

complainant then relies on that advice and buys the property but planning permission is refused. These complaints are also within jurisdiction. But in each case the reasonableness of the complainant in acting on the misleading advice needs to be considered.

We must distinguish between the delay inevitable in the process of appealing against a planning decision and a council's delay in dealing with a matter prior to the decision on it

In cases where there is delay, inevitable or not, in the process of appealing the Ombudsman has no jurisdiction to investigate.

In *R v The Commission for Local Administration ex parte Colin Field* (1999) EWHC Admin 754 Mr Justice Keene said:

"I take the point that the statutory appeal to the Secretary of State against a refusal of planning permission provides no compensation for the delay which inevitably occurs. However, the fact is that wherever there is a right of appeal to a minister of the Crown ... there will inevitably be some delay if the right is exercised, as it often will be, and where there is such delay, loss may very well result as it has in the present case. Yet Parliament has chosen expressly to exclude jurisdiction on the part of the Local Government Ombudsman in such cases. It seems to me that in those circumstances Parliament must have contemplated that there would be situations where loss has been suffered and where no remedy for that loss would be provided and yet the Local Government Ombudsman would have no jurisdiction to intervene. I therefore do not find the argument based upon the lack of remedy through the statutory appeal to the Secretary of State persuasive on this particular issue."

Grounds for rejection where a complainant has already resorted (or resorts after an investigation has begun) to an alternative right or remedy – s26(6), s24A(6) or both?

- Where the complainant had already resorted to an alternative right or remedy, the complaint should be rejected under s26(6).
- Where we have exercised 26 (6) discretion to investigate the complaint, but it appears during the course of the investigation that it is more appropriate for the complainant to exercise their alternative right or remedy, a decision to discontinue should be made under s24A(6). This accords with the decision of the Court of Appeal in *R v Commissioner for Local Administration ex parte Croydon LBC* (1989) 1 All ER 1033 (QBD).
- Where the complainant actually resorts to an alternative remedy during the investigation, we have no jurisdiction to continue and must discontinue under s26(6).
- Where there is some separable element in the complaint which might not have been dealt with in the court proceedings, but there are reasons why the complaint should not be investigated, these should be explained. Reference should be made to s26(6) and s24A(6).

- Where the complainant disputes that the matter he complains about was dealt with in proceedings, it would usually be necessary to obtain the court papers to establish the facts.

Where the relevant legal proceedings have been instigated by the council

- In these cases s26(6) would not apply. But we may still consider the exercise of discretion under s24A(6) (see above).
- A decision to discontinue may be appropriate where the matter has been or might be litigated to such an extent that there would be no useful purpose to be served by investigation, or an investigation might stray in to matters decided or to be decided by the court.

Question 3 – Is it (or was it) reasonable for the person complaining to use the alternative remedy?

Even if there is a right of appeal, reference, review or remedy by way of proceedings in any court of law, s26(6) contains a “proviso” that the Ombudsman may conduct an investigation if in the particular circumstances it is not reasonable to expect the person to resort to it. (We refer to this as “exercising s26(6)(6) discretion”).

The Ombudsman’s discretion under s26(6) is wide, but it still needs to be regarded as an exception to the usual rule. This does not excuse a failure to consider it, or superficial consideration. In each case it must be considered carefully, taking account of all the circumstances of the complainant and the facts of the complaint. Discretion must not be exercised (or not exercised) automatically.

In every case the question to be asked is “Is it reasonable to expect this complainant in the circumstances of this case to use the alternative right or remedy?” A clear record of the decision to exercise discretion or not should be made in every case. This should be kept under regular review throughout the course of an investigation.

What factors should be considered?

- When an appeal to a Minister or to a Tribunal is available about the actual subject of the complaint.
 - The Ombudsman normally expects the complainant to use that appeal. An exception would be where the authority should have informed the complainant about the right but failed to do so (and it is not possible to have the appeal heard now).
- A complaint about the refusal of planning permission.
 - The Ombudsman usually considers it reasonable to expect complainants to appeal. This is even if there is a clear allegation of maladministration (e.g. bias by a planning officer or a member’s interest) because what most applicants want is to get the planning permission and Parliament has expressly provided the right of appeal as a means to that end.
- The fact that a council has put a matter in the hands of its insurers.

- This may indicate that the council considers a legal remedy may be available. But do not assume this is the case. We have to make our own assessment. And it is not relevant whether the council thinks it is reasonable for the person to go to court. That judgment is for us.

Where discretion is not exercised on the main subject of the complaint a complaint about the handling between the council and insurer of a claim for damages will not usually be accepted.

- The availability of legal help, help at court, and legal representation (formerly legal aid).
 - This is relevant to the decision whether to exercise discretion. If the complainant is not funded in this way we should take into account the costs the complainant is risking against the benefits s/he is seeking. The higher the ratio of costs to benefit, the more likely discretion is to be exercised. If legal help has been requested but refused, the reason for refusal may be relevant. If it is because the Legal Aid Agency considers there was, for example, no arguable claim, it may be that s26(6)(c) does not apply.

See the [Legal Aid Agency](#) website for more detailed information

- Where discretion is exercised to investigate the main subject, a complaint about the handling of the insurance claim will usually be accepted for consideration.
- The nature of the case makes it unreasonable to expect the person to go to court.
 - An example of this would be where a young child or vulnerable person would be required to give evidence.
- Small claims up to £5,000.
 - There is a [simple procedure in the County Court](#) for dealing with small claims. (site gives free step-by-step instructions on how to make a claim in the County Court.) Usually, solicitors are not required, so that the only costs will be the court fees. The website contains information about these. Fees are based on a sliding scale depending on the value of the claim (Fee remission is available for claimants on a low income). It is also possible to make a money claim on line. If the fees are high relative to the monetary value of the claim, it may not be reasonable to expect the person to go to court. Check the up-to-date court costs that would be involved (see link above).
 - The possibility of court proceedings arising during an investigation would be relevant – e.g. if the complainant tells you s/he has already instructed a solicitor and is considering legal action.
- Unrecovered costs and expenses.
 - Where a statute has set up a specific right of appeal, the fact that the appellate body does not have power to award costs is not generally a ground for exercising discretion. This is on the basis that Parliament would have made a provision for the award of costs had that been its intention. This

principle has been confirmed in the Courts - R v The Commissioner for Local Administration ex parte PH (sometimes ex parte H) 1998 (Ex parte PH) [available to LGO staff].

Some reasons why we might exercise discretion under s26(6)

- Where the complainant was unaware of the right of appeal and the authority failed to advise them of it.
- Where the complainant was prevented by absence, illness or some other incapacity from resorting to appeal.
- Where there is no possibility of bringing an out-of-time appeal and there are good reasons why the right was not exercised earlier.
- Where the legal costs are likely to be high compared with the benefit claimed (unless the complaint turns on a point of law which is unclear, or disputed statutory interpretation).
- Where the complainant wants a remedy which the Court cannot provide e.g. an apology. However, where this form of analysis is the basis for an investigation, then this should be borne in mind throughout the investigation. In these circumstances, the rationale for investigation should be recorded. Where it is considered that a non-monetary result is the only basis on which an investigation is commenced, it would not be proper for the LGO to recommend a financial payment (see *JR55* [2016] UKSC 22.)

Some reasons why we might not exercise discretion under s26(6)

- If there is a specific statutory right to appeal against the council's actions, the LGO will not usually exercise discretion.
- Failure of an authority to comply with contractual obligations will not normally be investigated if the Ombudsman is being asked to interpret the law, e.g. where there is a legal dispute as to the meaning of a document. Enforcing duties under leases, whether commercial or long-term residential (e.g. bought under right to buy) is usually best left to the courts.
- The Ombudsman would generally expect disputes about the level of service charges for residential long-term leases to be dealt with by appeal to the First-Tier Tribunal (Property Chamber).
- Where someone complains of damage to or loss of his or her goods caused by an employee or contractor of the council, it would generally be reasonable to expect them to go to court. It would be appropriate to exercise discretion, however, where the complaint forms part of a wider complaint about the provision of some service by the council, or where the costs of court action would be disproportionately high. In certain circumstances the employees or contractors may be personally liable. In such cases reference should be made both to 26(6) and 24A(6).

S26(6)(c) and Judicial Review

- The case of *R v Commission for Local Administration ex parte Liverpool City Council* (2001) 1 All ER 462 (CA) highlighted the overlap between maladministration and matters which can be raised in judicial review proceedings. Lord Justice Henry said:

“What may not have been recognised back in 1974 was the emergence of judicial review to the point where most if not all matters which could form the basis for complaint of maladministration are matters for which the elastic qualities of judicial review might provide a remedy.”
- Lord Justice Henry’s judgment includes the following guidance on when it might be more appropriate for the Ombudsman to consider the matter.
 - The allegation can be best investigated by the resources and powers of the Ombudsman.
 - The Ombudsman is in a position to get to the bottom of the prima facie case of maladministration and the complainants would be unlikely to reach that goal *“having regards to the weaknesses of the coercive fact finding potential of judicial review ... it would be very difficult, if not impossible, for the complainants to obtain the necessary evidence in judicial review proceedings.”*
 - The complainants are unlikely to have the means to pursue a remedy through the courts.
 - The Ombudsman’s investigation and report can provide a just remedy when judicial review might fail to do so.
- Although not expressly mentioned in the Liverpool case the Ombudsman considers the following may also be relevant considerations:
 - Uncertainty whether there is a remedy by means of judicial review (or other court proceedings).
 - The strict time limits for judicial review (ie would it be reasonable in the circumstances of the case to expect the complainant to make or have made the application in time).
 - The availability of Legal Aid Agency funding.
- In judicial review proceedings evidence is in the form of witness statements. The absence of oral evidence means there is no way of testing what is said by cross-examination. The process of judicial review, unlike other litigation, does not include the right to see the opponent’s files. So a complainant who judicially reviews the council has to rely on information s/he has gathered prior to the action commencing. The difficulty of obtaining key evidence may therefore be a relevant consideration in deciding whether to exercise discretion.

Examples of how exercise of discretion works in practice

The Ombudsman exercised discretion to investigate the way the council refused to grant the complainant planning permission for a roof extension. The complainant needed to build the extension without delay, and could not wait for the outcome of an appeal. He was forced to

build a smaller extension under his permitted development rights. An appeal could not have achieved any useful outcome for him. Discretion was exercised to investigate.

The applicant for planning permission was a prospective lessee of premises and when she was refused planning permission, the owner disposed of the premises elsewhere. Discretion was exercised and the complaint investigated. An appeal would not have achieved any useful outcome as the premises had been disposed of.

All or most?

Is the complaint about action which affects all or most of the inhabitants of the area?

Section 26(7) covers this

S26(7) A Local Commissioner shall not conduct an investigation in respect of any action which in his opinion affects all or most of the inhabitants of the following

(aa) where the complaint relates to a National Park authority, the area of the Park for which it is such an authority;

(a) where the complaint relates to the Commission for the New Towns, the area of the new town or towns to which the complaint relates;

(b)

(ba) where the complaint relates to the Urban Regeneration Agency, any designated area within the meaning of Part III of the Leasehold Reform, Housing and Urban Development Act 1993;

(c) in any other case, the area of the authority concerned.

Remember the area of the authority means the **whole** of the local government area, e.g. the whole county or whole district.

Very few actions will affect all of the inhabitants so rejecting a complaint under this section will be rare. As to how many are “most”, the Ombudsman has interpreted it to mean a sizeable majority. Therefore a complaint about council tax increases will affect “most”.

The type of complaint that is clearly out of jurisdiction is where the complainant complains that a particular project is a waste of public money and that his or her only injustice is that he or she suffers as a council tax payer. In the decision letter, investigators should mention the possibility of complaining to the district auditor.

Some failures in public services that are available to all but used by comparatively few (eg failure to maintain a particular footpath) are not caught by this section as most of the inhabitants of an area are not affected by the failure.

A good test is to ask if the complainant is particularly affected by the alleged maladministration, i.e. has he or she suffered some injustice above and beyond that suffered by the public generally.

The section refers to the Local Commissioner’s “opinion”. So long as the question is considered properly and fairly the opinion would be unlikely to be open to a successful challenge. As always, set out your reasons in the decision statement.

A complaint may be expressed in a way that is caught by the section eg “the community centre which has been built next door to me is a waste of money”. But this formulation may disguise a complaint which would be within jurisdiction and so the investigator should probe to seek clarification from the complainant. This may reveal a legitimate complaint, such as the person complaining was not consulted before the council built the community centre next door, which affects their privacy.

Examples of complaints which would be OUT

- *That a council did not obtain value for money in a tendering exercise.*
- *That a council has changed its refuse collection from weekly to fortnightly (or introduced a different method of collecting waste). But note there may occasionally be complaints where the person affected has an extra injustice, eg because of a disability.*
- *That a council has increased parking charges in the town centre.*
- *That a council has reduced the speed limit on its rural roads.*
- *That a particular project was a waste of taxpayer’s money.*

Examples of complaints which would be IN

- *That a council introduced parking charges at its country parks. IN because it is unlikely that a sizeable majority of the population will use the parks and pay for the parking.*
- *Similarly, removal of parking or other concessions for pensioners or people with disabilities would be IN.*

Is there an absolute bar?

Part III Schedule 5 – Matters not subject to investigation

1 The commencement or conduct of civil or criminal proceedings before any court of law.

2 Action taken by or on behalf of any [police] authority in connection with the investigation or prevention of crime.

3

(1) Action taken in matters relating to contractual or other commercial transactions of any authority to which Part 3 of this Act applies relating to –

(a) the operation of public passenger transport;

(b) the carrying on of a dock or harbour undertaking;

(c) the provision of entertainment;

(d) the provision and operation of industrial establishments;

(e) the provision and operation of markets.

(2) Sub-paragraph (1) does not include transactions for or relating to –

(a) the acquisition or disposal of land;

(b) the acquisition or disposal of moorings which are not moorings provided in connection with a dock or harbour undertaking.

(3) Sub-paragraph (1)(a) does not include action taken by or on behalf of the London Transport Users Committee in operating a procedure for examining complaints or reviewing decisions.

(4) Sub-paragraph (1)(e) does not include transactions relating to –

(a) the grant, renewal or revocation of a licence to occupy a pitch or stall in a fair or market, or

(b) the attachment of any condition to such a licence.

4 Action taken in respect of appointments or removals, pay, discipline, superannuation or other personnel matters.

5

(1) Any action taken by a local education authority in the exercise of functions under section 370 of the Education Act 1996 or section 17 of the Education (No 2) Act 1986 (secular instruction in county schools and in voluntary schools).

(2) Any action concerning--

(a) the giving of instruction, whether secular or religious, or

(b) conduct, curriculum, internal organisation, management or discipline, in any school or other educational establishment maintained by the authority except so far as relating to Special Educational Needs (within the meaning given by section 312 of the Education Act 1996).

5A

Action which—

(a) is taken by or on behalf of a local authority in its capacity as a registered provider of social housing, and

(b) is action in connection with its housing activities so far as they relate to the provision or management of social housing (and here “social housing” has the same meaning as in Part 2 of the Housing and Regeneration Act 2008).

5B

In the case of a local authority which is a registered provider of social housing, action taken by or on behalf of the authority in connection with the management of dwellings owned by

the authority and let on a long lease (and here “long lease” has the meaning given by section 59(3) of the Landlord and Tenant Act 1987).

6 Action taken by or on behalf of an authority mentioned in section 25(1)(ba) [or (bb)] of this Act which is not action in connection with functions in relation to housing.

7 Action taken by or on behalf of an authority mentioned in section 25(1)(bd) of this Act which is not action in connection with functions in relation to town and country planning.

8 Action taken by or on behalf of the Homes and Communities Agency which is not action in connection with functions in relation to town and country planning.

Part IIIA Schedule 5A

- 1. A matter which could be the subject of an investigation by a Local Commissioner under Part 3.*
- 2. A matter which could be the subject of an investigation by the Health Service Commissioner under the HSCA 1993.*
- 3. The commencement or conduct of civil or criminal proceedings before any court of law.*
- 4. Action taken in respect of appointments or removals, pay, discipline, superannuation or other personnel matters.*

Generally

Schedule 5 lists the matters which are specifically excluded from our jurisdiction. There are, of course, other restrictions, particularly in s26(6). The main items in schedule 5 are:

- commencement of court proceedings;
- matters concerning the investigation and prevention of crime;
- specified contractual or other commercial transactions;
- personnel matters, and
- certain educational matters.

Each of these will be considered in turn

Sch 5 Para 1 The commencement or conduct of civil or criminal proceedings in any court of law

The exclusion of court proceedings from the Ombudsman’s jurisdiction was intended to prevent us considering those matters decided by the courts using different evidential standards, and applying the more restrictive test of legality as opposed to maladministration. But there is no prohibition of an investigation about whether, had fault not occurred, court proceedings could have been avoided. This is because, in such cases the court proceedings are the injustice as opposed to the fault. We have in the past criticised councils for taking bankruptcy proceedings where – even though the application was successful – we did not feel it was a proportionate response to enforcement of a debt, given the prohibitive nature of the costs involved for the person being made bankrupt. We have also found fault with

councils obtaining Liability Orders from the courts for unpaid Council Tax where they should not have done so.

What is a court?

Applications dealt with by a single magistrate, for example certain warrants for entry that environmental health officers seek are before a court of law (s148 Magistrates' Court Act 1980 and s 5 and schedule 1 Interpretation Act 1978). This will always be the case unless the Act giving the Magistrates the power to act states otherwise.

A tribunal is not a Court of Law. (But s26(6) precludes an Ombudsman from deciding the same issue which went to the tribunal).

A coroner's court also does not fall within the definition of a court for schedule 5.1.

These matters are **OUT** of jurisdiction

- The issue of the writ/summons in the civil court or the laying of an information in the Magistrates' Court (this is "commencement").
- Action by court bailiffs (unless they are acting as agents of the authority – (see below).
- Reports written by social workers or other officers for court proceedings (or the use of a report written previously, in subsequent court proceedings) and evidence given by council officers in any proceedings (this is "conduct" of proceedings). If a report had been submitted as part of a court process but had been so peripheral as to have had no significant impact on the substantive matters considered by the court, we might take the view that the report was not part of the conduct of proceedings. In such a case we might consider the content of that report as part of an investigation.

These matters are **IN** jurisdiction

- The process leading up to the council's decision to commence proceedings.
- all actions or inactions before the issue of the writ/summons/laying of information.
- The council's failure to prosecute or consider a prosecution (e.g. for non-compliance with an enforcement notice or breach of an abatement order).
- Bailiffs acting as agents for the council (e.g. to recover council tax).
- A council's conduct at an inquest.

Example

The Council issued a summons then obtained a liability order for a council tax debt. The complainant agrees that the amount demanded is correct but complains about the way the council's bailiff went about collecting the money. IN but only in respect of the way the debt was recovered. The existence of the debt is OUT (and was probably appealable)

Sch 5 para 2 Action taken by or on behalf of any policing body in connection with the investigation or prevention of crime

Police and Crime Commissioners and the Mayor's office for Policing and Crime (London) are bodies within jurisdiction (see chapter on [is the authority in jurisdiction](#)) but only their administrative actions are subject to investigation. Complaints about operational matters, such as how a crime was or was not investigated and about crime prevention are excluded from jurisdiction, as are complaints against individual police officers. Such complaints should be referred to the relevant policing body or to the [Independent Police Complaints Commissioner](#).

Examples

*A police officer carrying out a child protection investigation of alleged physical and sexual abuse asked a teenage girl questions about her sexual experience. The parents complained about the manner of questioning – **OUT***

*A social worker mistakenly suspected a mother of giving a child an overdose and contacted the police. A police officer interviewed the mother. The child was in fact gravely ill, taking medication under proper medical supervision. The mother was deeply distressed by the police contact. The actions of the police officer were **OUT**. (However the social worker's actions would be **IN**).*

Sch 5 para 3 Contractual and commercial transactions

Paragraph 3(1) first lists the contractual or commercial matters that are not subject to investigation. They are transactions relating to:

- (a) the operation of public passenger transport;
- (b) the carrying on of a dock or harbour undertaking;
- (c) the provision of entertainment;
- (d) the provision and operation of industrial establishments;
- (e) the provision and operation of markets (but this is qualified by paragraph 3(4))

It follows that any other contractual or commercial matters are subject to investigation. Paragraph 3(2) qualifies some of the exclusions in para 3(1) by specifically providing that transactions relating to the following are **IN** jurisdiction.

- the acquisition or disposal of land;
- the acquisition or disposal of moorings which are not moorings provided in connection with a dock or harbour undertaking.
- the grant, renewal or revocation of a licence to occupy a pitch or stall in a fair or market, or
- the attachment of any condition to such a licence.

There is no definition of 'commercial transactions' provided for in the 1974 Act. However, we take the view that a commercial transaction (contractual or otherwise) is usually one which

involves the buying or selling of merchandise or services with a view (at least on the part of the party to the transaction which is not a public authority) to making a profit. Legal advice has previously been sought about this matter; this is available as a [page resource](#).

When determining whether a transaction is 'commercial' what needs to be considered?

The question whether a transaction is 'commercial' is a matter for our judgement on the individual facts. Only at the limits, where it can be said that no reasonable business person would treat the subject matter as commercial, is there a serious risk of judicial intervention.

The key question in determining whether a contract or other transaction is 'commercial' in character is whether it is the sort of transaction that could be expected to feature in the ordinary dealings of business people.

The making of a charge by an authority for the provision of a service will not make the provision of that service a commercial transaction, even though a contract between a member of the public and the authority has been entered into. It is significant commercial transactions entered into by companies or large organisations that are out of jurisdiction. Both the authority and the contracting party have an equal bargaining position and if there is disagreement about the terms of the commercial contract, this can be referred to the court.

The exercise of regulatory functions etc. should not be regarded as a 'commercial' activity nor should activities that are administrative in nature.

It will often be helpful to ask whether the transaction reflects a 'local authority/ordinary citizen's relationship rather than, for example, a buyer/seller one.

Traditionally, where a relationship between a public body and those dealing with it involves rights and obligations created by legislation, the courts have traditionally been slow to infer an intention to form a contract or commercial relationship.

In some circumstances purely 'professional' activities might not be treated as 'commercial' but the procurement of professional services (accountancy, legal, etc.) in the ordinary course of business probably would be.

An action does not become 'commercial' solely because it is made with a business motive. Commercial organisations habitually make gifts, donations, endowments, etc. which are not themselves 'commercial transactions' even if rooted in a desire to enhance the goodwill and public reputation of the business. So a 'gratuitous transaction of a kind commonplace in the commercial world' would not be made 'commercial' merely because there is a sound commercial reason for it.

Public passenger transport does not have to belong to the authority complained against. So a complaint that the council failed to consult residents when accepting a bus company's suggestion for a change of route would be outside jurisdiction as a commercial transaction. But if the complaint is, for example, about the way the council dealt with a planning application for a new bus garage, the complaint is about the exercise of planning powers and is within jurisdiction. So, too, may a complaint about the placing of bus stops and bus

shelters where these decisions have been taken by the council if the decisions were not part of a contract.

Action taken by or on behalf of the London Transport Users Committee in operating a procedure for examining complaints or reviewing decisions is explicitly brought INTO jurisdiction by sch 5 paragraph 3(3).

Examples

- *Ms D filled in the application forms for an Oyster Card for her child and sent them to Transport for London (TfL) who acknowledged receipt but then lost the forms. **IN** because this is not a transaction relating to the “operation” of public passenger transport” but one for the provision of concessionary fares.*
- *Mr E complained the Council’s contractors have repeatedly failed to follow the night time working restriction in the construction of the tram link that will adjoin his property. **IN** because this is not the “operation” of public passenger transport but construction of the tramlink.*
- *Company H takes over the operation of a council’s school transport services. As part of the contract, Company H is required to use existing council-owned coaches but says that some are unsafe. **OUT** because this is a contract relating to the operation of public passenger transport*

Docks and harbour undertakings

Some councils are harbour authorities and have responsibility for the operation of ports and piers located within their area. Contract and commercial transactions relating to the carrying on of these responsibilities are **OUT**. But transactions for moorings which are not part of such undertakings are **IN** under para 3(2).

Examples

- *Company F contracts to take over the running of a local dock and harbour and objects to the way the council has interpreted and enforced a term in the contract. **OUT** - this is the carrying on of a dock or harbour undertaking.*
- *Mr A negotiated with the authority for a mooring for his boat having been assured that he would be allocated one with a water supply alongside, as he is disabled. Shortly after he took possession the authority moved the water supply to some distance away. (**IN** because this is specifically included by para 3(2)).*

Provision of entertainment relates to theatres, concert halls etc where the provision is made by the council. It does not apply to sports activities or to the council’s action in respect of the hiring of halls, meeting rooms etc.

Example

- *A charity has booked a local authority venue to hold a series of concerts which are open to the public and for which they have produced a large number of wristbands for sale. Having finalised the contract the council now says the music must be turned*

off by 21:30. **OUT** because this is a contractual transaction relating to the provision of entertainment).

Markets and fairs

According to case law, a market is a gathering of buyers and sellers at regular intervals in a fixed place. Markets are sometimes authorised by local Acts or a Royal Charter to be held in a specific place. It may be necessary to find out the status of the market from the authority before coming to a decision whether the complaint is within or out of jurisdiction.

A car boot sale is a market (*Newcastle v Noble* (1990) 89 LGR 618).

Street trading licences are **IN**. They are issued under the [Local Government \(Miscellaneous Provisions\) Act 1982](#). The licence may be subject to specific conditions relating to the particular trade in question and general conditions which flow from a council's general policy on street trading.

Temporary markets are **OUT**. They may be authorised by the Local Government (Miscellaneous Provisions) Act 1982 s 37. The Act relates to district and London borough councils. The person intending to hold a temporary market and the owner of the land have to give one month's notice to the council for it to be authorised. This provision only applies where the council has resolved that this section of the Act will apply and given notice of it in the local newspaper.

A complaint by a market trader about the way a council decided to increase the number of stalls or the trades allowed is not a complaint about a market, but it is a complaint "relating to the grant ... of a licence" and is, therefore **IN**.

Street trading not in a market is **IN**. The public may refer to street trading as a market but this is not necessarily the case and the status of the 'market' should be checked.

Pleasure fairs (circuses, merry-go-rounds, coconut shies and hooplas) are **IN**. They may be authorised by local authority bye-laws made under the Public Health Act 1961 s 75.

Examples

- *Security Company G enters into a contract with the council to provide 24-hour security and surveillance over its market facilities. After 6 months, the council exercises its break clause which Company G says is in breach of the contract. **OUT** - this is a contract for the operation of markets and specifically excluded.*
- *Mrs B has been served with notice to end her licence to occupy a market stall because the authority says she has failed to pay the monthly fee. Mrs B says she has paid regularly by standing order but the authority has credited this to the wrong account. **IN** - market stall licences are specifically ruled **IN** by para 3(4).*

Transactions for or relating to the acquisition or disposal of land are specifically ruled **IN**.

Land includes buildings used for entertainment, markets etc.

Disposal of land is governed by s123 of the Local Government Act 1972. This permits local authorities to dispose of land "in any manner they wish". Therefore transactions relating to

disposal of land should be interpreted widely and as well as an option and a sale of land, leases/tenancies, easements, mortgages and licences would be **IN**. So, too is a licence to assign a lease on the basis that it is a transaction relating to a lease. Acquisition of land should also be interpreted widely.

A Department for the Environment Transport and the Regions (DETR) Circular and Guidance (06/93: Disposal of land for less than the best consideration that can reasonably be obtained - Guidance for Authorities; WO 19/93) give guidance to councils on when, exceptionally, they propose to dispose of land for less than the best consideration that can be reasonably obtained and must apply to the Secretary of State to do so. Reference should be made to this when considering complaints about disposals of land for less than the market value. Some of the guidance has been cancelled by "The Local Government Act 1972 General Disposal Consents 1998 by means of an unnumbered DETR Circular letter of 11 December 1998. See [Planning Portal](#) and [circular](#) for further information.

Example

- *Company X, a local amateur dramatic society, booked the authority's theatre for a public performance but the authority then advised it had double booked the date causing the company to have to cancel the performance at the last minute. **IN** because a transaction for the provision of a building is a transaction relating to the disposal of land*

Sch 5 para 4 Action taken in respect of appointments, removals, pay, discipline, superannuation or other personnel matters

This exclusion reflects the principle that the Ombudsman is intended to deal only with relationships between government and the governed, and not with the action of bodies in jurisdiction as employers.

To be excluded by this provision, the action must be in respect of the specific type of personnel matter mentioned in paragraph 4 of schedule 5, ie appointments, removals, pay, discipline and superannuation or some similar personnel matter.

The personnel connection must be with the authority, eg the actions of a social worker who helps a complainant at an employment tribunal in a case against the complainant's employer is not excluded from jurisdiction.

A complaint about the behaviour of a council officer is NOT a complaint about a personnel issue and is therefore **IN**. This applies even if the complainant may say they wish the council to sack the officer or take other disciplinary proceedings. There may be grounds in some cases to suspend consideration of the complaint to allow another procedure (police investigation, disciplinary action etc) to happen.

NOTE: *Complaints by foster carers are not excluded by this section: they are not employees.*

Are complaints by volunteers 'personnel matters'?

It is arguable that an authority's 'personnel' includes its volunteers. Volunteers are increasingly being used, directly or indirectly, to carry out council services. In general, complaints relating to the appointment, removal, discipline or similar personnel matters

relating to volunteers should therefore be rejected as **OUT** of jurisdiction, or alternatively not investigated in accordance with our general discretion under s24A(6) being so similar to something we do not have power to investigate. However, investigators should seek further advice from their manager if unsure about an individual case.

Examples

- *A council care home worker was dismissed when he blew the whistle about poor practices at the home – **OUT***
- *A council officer was wrongly issued with a parking ticket and appealed. She complained about the parking enforcement officer's insulting behaviour towards her. Her appeal was eventually allowed, but in the meantime she was put under pressure by her manager to pay the ticket to avoid embarrassment. The actions of the line manager were **OUT**. The conduct of the enforcement officer was **IN***
- *A council care worker was assaulted by a service user and complained she received inadequate support from her employer – **OUT***
- *The PA was homeless following domestic violence. She complained the housing officer was rude and abusive and did not deal properly with her application. The council investigated but she believes did not impose a harsh enough disciplinary sanction. The complaint about the treatment from the officer would be **IN** but the disciplinary action and sanction is **OUT***

Sch 5 para 5 - Certain educational matters

Any action concerning:

- The giving of instruction, whether secular or religious; or
- Conduct, curriculum, internal organisation, management or discipline, in any school or other educational establishment maintained by the authority except so far as relating to special educational needs, whether in any school or other educational establishment maintained by the authority.

Action by the local authority in matters other than those above, or action which relates to the exercise of a separate statutory function may be within jurisdiction. Examples of matters in jurisdiction are school admissions and school transport.

This paragraph rules out investigation of complaints about how and what pupils and students are taught and about the rules and conduct of the institution including the imposition of sanctions such as exclusion. The wording of schedule 5, paragraph 5 is wide. Legal advice has confirmed that anything described in paragraph 5 also applies to adult education classes run by a local authority, therefore a complaint about these actions in relation to adult education classes would also be outside jurisdiction. The actions of a council dealing with a complaint about these matters is also **OUT** following the judgment of the High Court in *R (on the application of ER) v CLAE and London Borough of Hillingdon* [2014] EWCA Civ 1407 and *R (M) –v- CLAE* [2006] EWHC 2847. The Court in each of those cases rejected the submission that the LGO had jurisdiction to investigate the consequences of a decision if investigation of the decision itself was excluded by sch 5 or s26(6).

Complaints about Education Health and Care Plans (EHCP) or the previous Special Educational Needs Statements (SEN) may be within jurisdiction, depending upon the nature of the complaint. There are three vital tests which need to be applied to any action or lack of action in order to determine whether it is within jurisdiction. Failing any one test puts the action outside jurisdiction. The tests are:

- That the action relates to an administrative function of the council.
- That the action is taken by or on behalf of the council. We have no jurisdiction to consider a complaint against a school in relation to EHC Plans. But the council remains responsible for ensuring the content of the statement is being delivered, regardless of the status of the school.
- That the action is not excluded by this schedule or any other exclusion.

Note: *The jurisdiction of the First Tier Tribunal (Special Educational Needs and Disability) is explained in the chapter on alternative remedies.*

Education admissions [available to LGO staff] do not fall within the exclusion, because they are not about the internal management of a school or educational establishment. But we expect the person affected to appeal to the education admissions appeal panel first. Once they have done so, we can consider the actions of both the panel and the admissions authority.

We can consider complaints about admissions to nursery schools. But admissions to state run nursery schools are not subject to a statutory right of appeal (the School Standards and Framework Act 1998, Section 98(3)) and so independent appeal panels have no involvement.

Education exclusions [available to LGO staff]: the LGO cannot consider the actions of the Head teacher or governors who made the decision to exclude but CAN consider whether there was fault by the review panel convened by the Local Authority. Exclusions from academies and free schools are **OUT**.

The actions of headteachers of maintained schools are usually outside jurisdiction. But there may be some circumstances when the head teacher's actions fall within jurisdiction because they perform some administrative function of the authority, which is not excluded by the schedule. Specifically, they are in jurisdiction when dealing with admissions or the admission appeal process or performing an administrative function of the LA in SEN cases. The position is the same for heads of foundation or voluntary aided schools.

The position may also be the same in the case of appeals relating to exclusions, although schedule 5.5 "any action concerning discipline" is usually likely to rule this out.

Academies and free schools are outside jurisdiction. The only exception is where the action complained of was taken before the school became an academy and continued afterwards. Then, the actions of the academy can also be considered. However we cannot make recommendation to the academy. Any recommendation we might wish to make must go to the Education Funding Agency for consideration and implementation. Appeals against admission decisions and exclusions from an academy are heard by the Academy Trust which are also outside jurisdiction.

The following examples are OUT

- *A complainant said that his child had been bullied in school and that the school had not dealt adequately with his complaint – **OUT**. (He should complain to the school, which should be able to provide him with a copy of its written complaints procedure. If the school fails to do so, he should then contact the LA (if it is a maintained school) which has a role in ensuring that schools' complaints procedures operate effectively).*
- *The head teacher gave a parent misleading information. If this is general information about the school, curriculum, discipline etc, it would be **OUT**, but if it was in connection with an application for admission; an exclusion appeal; availability of school transport; or a statement of special educational needs then it may be in jurisdiction.*
- *A teacher was rude to a parent/child.*
- *The child was punished inappropriately (but not excluded).*
- *The complainant's daughter has an Individual Education Plan but the provision has not been made. She does not have a statement of special educational needs.*
- *The complainant's child has not been included in the school's provision for gifted and talented children.*
- *A complainant said that his child had not received suitable provision for his special educational needs. During the first year he was at school, he had not been statemented and the complainant felt the school had delayed unreasonably in recommending to the LEA that a statement should be considered. **OUT**, including the alleged delay in referring the child for statementing. The parents had the right to approach the LEA themselves and did not need to wait for the school.*

But these would be IN:

- *The council delayed in issuing a EHC Plan.*
- *The complainant says the council wrongly refused to fund transport to his school which is unreasonably far from home.*
- *The complainant says the transport provided to his daughter's school is unsuitable: children are allowed to misbehave on the bus and she is too frightened to use it.*
- *The council did not allocate the complainant's child to her preferred school and her appeal against the decision was mismanaged (we can look at the way the appeal was handled and at whether the council properly allocated school places).*
- *The school has permanently excluded the complainant's son and the appeal panel did not consider information which would have been in his favour. The council has not found him an alternative school place.*

Sch 5 para 5A/5B Actions taken by a local authority in respect of its capacity as a registered social housing provider

The majority of complaints about an authority's registered social housing function will be dealt with by the Housing Ombudsman. We can look at an authority's actions in relation to:

- Housing allocations under the Housing Act 1996 Part 6
- Homelessness under the Housing Act 1997 Part 7
- General housing advice
- Housing improvement grants
- Antisocial behaviour and noise nuisance
- The sale or disposal of land on housing estates
- Planning and building control at properties owned by a social landlord
- The delivery of adult social care services, including those carried out by a registered social landlord.

Further detail can be found in the [Memorandum of Understanding](#).

Other exclusions (less likely to feature in complaints) in sch 5

Para 6

Action taken by or on behalf of a development corporation established for the purposes of a new town, but not action relating to their housing functions.

Para 7

Action taken by or on behalf of an urban development corporation but not action relating to their town and country planning functions.

Para 8

Action taken by or on behalf of the Homes and Communities Agency which is not action relating to their town and country planning.

Part IIIA complaints Schedule 5A

Schedule 5A prohibits the LGO from investigating a complaint under part IIIA if

- The complaint could be investigated under Part III.
- The complaint could be the subject of an investigation by the [Health Service Commissioner under the HSCA 1993](#).
- The complaint relates to the commencement or conduct of civil or criminal proceedings before any court of law.
- The complaint is about action taken in respect of appointments or removals, pay, discipline, superannuation or other personnel matters.

Local Government Act 1974

The Local Government Act 1974 is reproduced in full elsewhere on the intranet.

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