

ADMINISTRATIVE REDRESS: PUBLIC BODIES AND THE CITIZEN AJTC RESPONSE TO CONSULTATION PAPER

This is the response of the Administrative Justice and Tribunals Council (AJTC) to the Law Commission's consultation paper, 'Administrative Redress: Public Bodies and the Citizen'.

Part 4: Liability in Public and Private Law

The AJTC supports in principle the aim of clarifying the law in this area and welcomes the initiative taken by the Law Commission in initiating a debate. However, the AJTC believes that the notion of 'modified corrective justice' raises large and complex public policy questions about the appropriate balance to be struck in the relationship between the state and the individual. This is not a legal issue alone but also contains social, political and economic dimensions which require much wider and deeper exploration and analysis. While the Law Commission's paper provides an excellent analysis of the legal position any fundamental reform of the liability of public bodies would require a more extensive and wide ranging debate in which the AJTC would be keen to participate.

Part 5: Relationship between Ombudsmen and Court Based Options:

In the comments that follow, the phrase "the ombudsmen" refers to the Parliamentary and Health Service Ombudsman, the Local Government Ombudsman, and the Public Services Ombudsman for Wales.

Turning to each of the consultation questions of this Part in turn:

Paragraph 5.38: *Do consultees think a stay provision would be a useful tool in ensuring disputes are dealt with in the appropriate forum? What problems do consultees see with the operation of the stay as described?*

A stay provision would prove a useful tool to ensure that disputes are dealt with in the most appropriate forum, thereby promoting efficiency and accessibility in the delivery of administrative justice.

The AJTC thinks that the ombudsmen should retain their discretion to decide whether or not to accept a complaint for investigation. The complainant's willingness to engage with the ombudsmen may be an influential but not determinative factor in the exercise of that discretion. The ombudsmen's discretion is an important check on use of the stay because a claimant's choice of forum should not be usurped in circumstances where they consider that an investigation is inappropriate.

Paragraph 5.47: Do consultees think that the ombudsmen should have the power to make references to the court on points of law?

The AJTC strongly supports empowering the ombudsmen to make referrals on points of law, as this would serve to complement the ombudsmen's functions and utility without compromising their non-judicial role.

Complainants would not need to initiate separate proceedings specifically for the purpose of obtaining determination of unresolved or disputed points of law nor would they bear the cost of making referrals. This reform promotes the ombudsmen as a lower cost alternative for users, increases the number of cases which can be accepted for investigation and could facilitate expeditious resolution of legal issues which affect multiple claimants.

The AJTC considers that the ombudsmen's ability to make a referral could include referral to senior tribunals, where that may be appropriate. The flexibility to draw on such tribunals' expertise may be particularly useful where the tribunal is a superior court of record, such as the Employment Appeal Tribunal and the Upper Tribunal under the Tribunals, Courts and Enforcement Act 2007.

Paragraph 5.48: Do consultees think that references from the ombudsmen should bypass the permission stage before proceeding to the Administrative Court?

The AJTC believes that references from the ombudsmen should bypass the permission stage, in order to prevent permission proceedings delaying or impeding the administration of justice.

Paragraph 5.75: Do consultees agree that the statutory bar should be modified both in cases where legal proceedings have been commenced and where there is a potential remedy before the court? Do consultees agree that this should be done so that the default position is that ombudsmen have discretion to investigate regardless of the availability of a legal remedy?

The AJTC strongly favours modifying the statutory bar, so that in cases where legal proceedings have been commenced and where there is a potential remedy before the courts, the ombudsmen are not prevented from conducting an investigation. Removing the statutory bar would reinforce the distinct role, purpose and remedies of the courts and the ombudsmen, promote claimants' choice of forum and increase the nature and number of cases which may be investigated.

Paragraph 5.88: We invite the views of consultees on our provisional proposal to abolish the MP filter. Do consultees consider that the filter should be abolished outright, or that there should be a “dual system” which would allow complainants the option of making a complaint through an MP or of seeking direct access to the Parliamentary Ombudsman

The AJTC supports the removal of the MP filter, which inhibits access to the Parliamentary Ombudsman. The AJTC supports this reform to promote access to administrative redress, as removal of the councillor filter increased recourse to the Local Government Ombudsman. This reform would bring the Parliamentary Ombudsman into line with ombudsmen in most other parliamentary democracies.

The AJTC accepts that a ‘dual track’ approach may be an appropriate way to give due regard to the ‘special relationship’ between the Parliamentary Ombudsman and Members of Parliament. A dual track approach would mirror the manner in which the councillor filter was abolished for access to the Local Government Ombudsman.

The AJTC sees no reason why consideration of reforms in relation to ombudsmen and the courts should not proceed independently of other matters.

Part 6: Effect on Public Bodies

The Law Commission’s report provides a most valuable review of existing research into the impact of liability and other forms of ‘redress’ on the behaviour of public bodies and, on the basis of that research, it concludes that any impact is likely to be heavily context and organisation specific.

The AJTC, in its capacity to make recommendations for research into the administrative justice system, strongly supports further research into this important and difficult issue. Such research should move beyond the socio-legal and engage the expertise of other disciplines, including those concerned with the behaviour of organisations.

The AJTC suggests in particular the following areas for research:

- Further explore and quantify the nature and scope of the ‘remedial gap’ identified by the Law Commission, particularly between the ombudsmen and court based redress.
- A broad consideration of the various factors which influence bureaucratic behaviour so that any impact of redress, in whatever form, can be better understood in context.