

Reaching a decision

31. Our approach is to set out what should have happened. We then identify, through our investigation, what did happen. If there is a difference we then establish the difference between what should have happened and what did happen, and consider whether the shortcomings are so serious as to amount to maladministration or service failure.

32. We must consider and weigh up all of the evidence that is available, but ensure that the decision is based on all the relevant evidence, that it is consistent with the facts and ignores irrelevant information.

- Take account of any expert advice received, but remember that we make the decision; expert advice should only inform the decision. We should, however, record clearly the view we have taken on any such advice, including where we have decided not to follow it.
- Address any problems arising from contradictory evidence, the unavailability of important information or the reliability of oral evidence.

33. It is impossible to be prescriptive about the stage at which it is possible or appropriate to reach a decision on a complaint under investigation. However, having gathered appropriate evidence and responses from the relevant parties and considered that evidence are we able to answer the following (as far as is possible):

- What should have happened?
- What happened?
- Is there evidence of maladministration (or service failure or failure to provide a service)?
- Was there injustice in consequence of the maladministration?
- Is any injustice arising from the maladministration still unremedied?
- Can we identify an appropriate remedy for the injustice?
- If so, what recommendations is it appropriate for the Ombudsman to make?

34. If an investigation has found maladministration or poor service and if we have found that an unremedied injustice flowed from that, then we will need to consider what type and level of remedy it is appropriate to pursue. Be aware that there are some cases in which it can never be known (even on the balance of probabilities) if there is a link between the maladministration which took place and the claimed injustice (for example, some cases which revolve around the outcome of court proceedings had circumstances been different) and that there are other cases where we will find that the link between maladministration and the claimed injustice is not established. The **typology of injustice** contains a list of injustice types to help with the identification and description of injustice.

35. Where we have found that an unremedied injustice (or hardship) arose in consequence of maladministration or service failure then a complaint will be upheld (fully or partly as applicable). This includes circumstances where an injustice (or hardship) was remedied after the complaint was received by the Ombudsman but either before the start of or during an investigation. Where we have found that an injustice (or hardship) arose in consequence of maladministration or service failure but that it was fully remedied before the complaint was received by the Ombudsman then a complaint will not be upheld. If we find that there was maladministration or service failure but that an injustice did not flow from it, then the complaint will be partly upheld. A full list of investigation closure codes is available [here](#).

Remedy

36. The underlying principle, in line with the **Principles for Remedy** is to ensure that the organisation restores the complainant to the position they would have been in if the maladministration or poor service had not occurred. If that is not possible then the organisation should compensate them appropriately.

37. We should ensure that the remedy is proportionate to the injustice. We should make sure that the recommendations we make are appropriate to our role as an Ombudsman's service and pass to others the job of regulating, developing best practice guidelines and assessing the professional conduct and capability of individuals. We should not make recommendations in areas where we do not have the capacity or competence to judge whether they have been implemented or not. However, we can consider engaging regulatory organisations in order to take forward our recommendations

38. As well as considering a remedy for the individual aggrieved, we should also consider if others are similarly affected. If so we should carefully consider recommending a remedy for the others affected and/or to prevent the same injustice occurring in the future. These considerations will be most relevant when the maladministration has occurred as the result of a systemic issue.

39. Remember that both financial and non-financial remedies can be appropriate responses to injustice arising from maladministration and poor service.

Remedy for the individual and those similarly affected

40. Our general approach to remedy is that we seek to place people back in the position they would have been in had the maladministration or poor service not occurred. If we make a finding of maladministration then we should consider what unremedied injustice (if any) the complainant has suffered. This could include:

- loss through actual costs incurred, for example care fees, private healthcare, loss of benefits, etc;
- other financial loss, for example loss of a financial or physical asset (for example, loss or damage to possessions), reduction in an asset's value, loss of financial opportunity, etc;
- being denied an opportunity. For example, to make a choice in the light of the full facts or risks (such as an informed consent decision in relation to a surgical procedure);
- inconvenience and distress as a result of failures in service provision (for example, delay in receiving a benefit, worry over the effect of misinformation, cancelled operations, misdiagnosis) or where the handling of the complaint in itself has been prolonged or inadequate.

Types of remedy

41. The types of remedy that we might seek to obtain will be tailored to the individual circumstances of the case (while taking account of similar cases).

Appropriate remedies can include:

- apologies, explanations or acknowledging responsibility;
- remedial action such as reviewing or changing a decision; revising published material or revising procedures to prevent a recurrence; or
- financial compensation.

42. Decide if redress is appropriate and, if so, identify a remedy which flows from and is proportionate to the injustice that has been identified.

43. Please note that an apology should always be by personal communication from a suitably senior person within the organisation in jurisdiction to the aggrieved or

his or her representatives. Expressions of regret and apology made through this Office rather than direct to the aggrieved are not an appropriate form of remedy.

Specific considerations in respect of financial remedy

44. Consider the following when looking at questions of financial remedy:

- Both the final amount that is paid and the way this amount is calculated should be proportionate to the injustice resulting from the maladministration.
- Calculations of financial loss incurred by an individual should be based on evidenced and quantified loss. We may need to obtain an appropriate independent opinion, for example, legal or financial advice to check our understanding of the loss.
- Any delay between when the financial loss was incurred and the compensation payment date should be recognised by the payment of appropriate interest.
- Compensation should be appropriately linked to other forms of redress - for example, an apology.
- Some organisations within jurisdiction may have their own compensation schemes by which they judge levels of financial remedy in respect of maladministration or poor service. In recommending a level of financial remedy we are not bound by the rules or limits of such schemes.
- When considering the level of financial redress, we should also consider factors such as the impact on the complainant (were they particularly vulnerable; was ill-health compounded, hardship aggravated or injustice prolonged?); the length of time taken to resolve the complaint and the trouble that the individual was put to in pursuing the complaint. When considering awards for distress or inconvenience we should also take into account the level of awards made to others who have suffered a similar injustice.
- Financial compensation may be appropriate, additionally, for injustice or hardship deriving from the pursuit of the complaint (as well as the original dispute). For example, costs in pursuing the complaint or additional inconvenience or distress caused.

45. The **typology of injustice** contains a searchable database of upheld or partly upheld investigations which have resulted in recommendations for financial remedy. This is intended to help caseworkers identify relevant precedent cases when thinking about recommendations for financial redress. Advice on proposed levels of recommendations for financial remedy should be sought from the Outcomes Officer.

Recommendations

46. Recommendations in a report are used normally to obtain a remedy for injustice arising from maladministration or poor service. The basis for our recommendations is normally the unremedied injustice arising as a consequence of maladministration or service failure. In those circumstances, recommendations must be relevant to the injustice found whether this is to the complainant concerned, to others who have been affected or to those who might be so affected in the future.

47. The remedy is to put right the injustice resulting from maladministration. It is not compensation for the maladministration.

48. All remedies must be SMART (specific, measurable, achievable and realistic, with a timescale).

49. Discuss the proposed or requested remedy with the complainant and manage their expectations if they are seeking a remedy that would be unachievable or disproportionate.

Recommendations and outcomes panel

50. Investigators might also want to refer to the outputs from the **Recommendations and Outcomes Panel** and consider whether their case is appropriate for referral to the Panel. The following criteria should be considered:

- where the recommendations set an underlying precedent for the handling of future cases, either in terms of the organisation complained about or in terms of the issues concerned;
- which make novel recommendations or are innovative in approach;
- where the judgment is finely balanced or where the case is high risk - this could include draft findings of no maladministration; or
- where difficult or contentious issues arise during the course of an investigation or where the future direction of the investigation is uncertain.

51. The purpose of the panel is to ensure that we make consistent and appropriate recommendations through open discussions of cases and ensuring that we capture and share the learning from those discussions to apply it more widely.

Compliance

52. When making recommendations we should also think about how the organisation under investigation will comply with them, what evidence we will need to see to satisfy ourselves that that has happened and how we will monitor that compliance. We take a risk-based approach to monitoring and securing compliance which will vary depending on the organisation involved.