

Parliamentary and Health Service Ombudsman (PHSO) Casework Policy and Guidance

Assessment: contents

Covers the preliminary and further assessment processes. Including information about the role of the PHSO Assessment Panel.

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Parliamentary and Health Service Ombudsman (PHSO) Casework Policy and Guidance

2.1 Carrying out assessments in line with the Principles of Good Administration

This section explains what conducting a good quality assessment in line with the Principles of Good Administration means.

Getting it right

Being customer focused

Being open and accountable

Acting fairly and proportionately

Putting things right

Seeking continuous improvement

2.1.1 Getting it right

- Acting within the Ombudsman's statutory powers and complying with the Ombudsman's statutory duties
- Assessing cases in accordance with our current policy and guidance
- Providing effective services
- Identifying and understanding the key issues early in the complaint
- Ensuring our assessment decisions are based on the evidence and are properly justified

2.1.2 When undertaking an assessment we must act in accordance with the Parliamentary Commissioner Act 1967 and the Health Service Commissioners Act 1993. We must be clear about whether the complaint falls within our remit (including both the body complained against and the matter complained about).

2.1.3 We should also ensure that we undertake assessments in line with PHSO's Casework Policy and Guidance and other PHSO policy and procedure. For example, we should ensure that the requirements of the PHSO delegation scheme are followed, that confidential information is handled properly, and that we act in accordance with our equality and diversity statement and our records management guidance.

2.1.4 We should use appropriately trained and competent staff to undertake assessments.

2.1.5 The assessment decisions that we make should be justifiable and flow clearly from the evidence. Our decisions should identify the facts of the case and assess them against what should have happened and the prevailing standard that applied in the particular case. There should also be a clear analysis which identifies whether or not there is an indication of maladministration or service failure. The analysis should also identify whether an injustice appears to have flowed from the maladministration or service failure and whether there is likely to be a worthwhile outcome to an investigation of the complaint. Cases being referred to the Assessment Panel to be discussed or with a

proposal to accept the case for investigation should contain a full explanation of the reason for referral to the Panel.

2.1.6 Being customer focused

- Establishing a clear definition of the complaint and the outcome the complainant seeks
- Managing complainants' expectations
- Keeping to commitments (meeting our customer service standards and targets and any specific commitments made to complainants)
- Keeping all parties regularly informed of progress
- Access to service
- Producing letters and other communications that are well structured, clear and in plain, understandable and appropriate language
- Working with other complaint handlers (for example, Local Government Ombudsman)
- Treating complainants with respect and courtesy

2.1.7 We should ensure that we fully understand the complaint and the outcome sought and confirm this understanding with the complainant. There is an expectation that complainants will be contacted by telephone in respect of any enquiry that reaches the further assessment stage.

2.1.8 Where we cannot meet the complainant's expectations or where aspects of the complaint are specifically excluded from our remit we should advise the complainant of this at an early stage.

2.1.9 We should organise and manage workloads efficiently and effectively. Delay should be avoided and we should ensure that we identify the key issues at the earliest opportunity so that the assessment progresses as quickly as possible and in accordance with our customer service standards. If we need to ask for information, then we should aim to ask everything we need to know in one request if we are certain of the key issues in the complaint.

2.1.10 During the assessment process we should aim to meet our published service standards. In particular the complainant, the body complained about and the MP or other third party (if one is involved) should receive acknowledgements and updates within the timescales set out in our guidance, or the timescales we have set on the individual case (as applicable).

2.1.11 We should consider and respond to the particular needs of the complainant, including providing assistance and identifying and meeting any special needs. We should be alert to the differing needs of our customers and respond flexibly to the circumstances of the case. If there are diversity considerations we should record on the assessment form, and elsewhere on Visualfiles if appropriate, any action we intend/do not intend to take to address them.

2.1.12 All communications relating to an assessment whether they are telephone calls, emails or letters should be clear.

2.1.13 We should identify connections between bodies complained about so we can deal with the complaint in a joined-up way. This may involve different government departments or health bodies, a mixture of the two or the remit of another Ombudsman.

2.1.14 Being open and accountable

- Completing an assessment that clearly sets out the complaint and our understanding of it as well as a recommended course of action
- Keeping a good audit trail of our decision making, including updating the assessment form and other relevant records
- Ensuring Visualfiles contains an accurate, complete and up-to-date record

2.1.15 The assessment form and other Visualfiles entries are the record of our view of the complaint and the actions we intend to take. These records should be comprehensive enough to enable anyone coming new to the case to identify the actions we have taken and our rationale for that.

2.1.16 Assessments should contain a clear recommendation, supported by analysis, as to whether the case should be declined or accepted for investigation. Cases that are being referred to the Assessment Panel for discussion should explain clearly the reasons for the referral and set out the various options on the case.

2.1.17 We should have a reliable electronic record to evidence what has happened during an assessment. The assessment form and other analysis, risk assessments and the complainant's details should be kept up to date on Visualfiles.

2.1.18 The comments that we receive from the complainant and the body complained about should be properly considered. There should be a record of what action we intend/do not intend to take in response to the comments we received and why we have decided that.

2.1.19 Acting fairly and proportionately

- Being consistent with other similar cases while considering the individual merits of the complaint
- Identifying whether there are any equality and diversity considerations that require a specific approach on a particular case
- Being proportionate to the circumstances complained about both in the process of the assessment, in our communication with the complainant, and in the decisions we make
- Treating complainants impartially

2.1.20 The assessment process should include consideration of any similar or related complaints, findings or remedies.

2.1.21 Complaints should be handled objectively and fairly, so that similar circumstances are dealt with in a similar manner; different decisions in two cases about the same sort of maladministration should be justified by the individual circumstances of the complaint or the complainant.

2.1.22 We should treat complainants without unlawful discrimination or prejudice and should identify any potential conflicts of interest and deal with them in line with our Conflict of Interest policy.

2.1.23 We should not do more than is necessary to address the complaint. When gathering evidence and undertaking the assessment more generally we should give consideration as to whether the actions we are taking are proportionate to the quantity and quality of the information we will obtain, and to the likely outcome.

2.1.24 Putting things right

- Is PHSO the correct or most appropriate body to consider the complaint?
- Remedying injustice and hardship in line with the Principles for Remedy
- Consider any complaint about our own decision or service in line with PHSO's complaints procedure

2.1.25 Normally assuming that, where there is a review tier in the body complained against and/or a second tier complaint handler able to consider the complaint (and which has not yet done so), the review tier/second tier complaint handler should consider the complaint in the first instance.

2.1.26 We should consider whether the remedy sought by the complainant should be more appropriately pursued by other means (e.g. legal action) or should be put to another body (for example, another Ombudsman or complaint handler).

2.1.27 We should consider whether there is a clear, simple and obtainable remedy (in line with the Principles for Remedy) that might make the case suitable for resolution through intervention [[link to section 2.6](#)].

2.1.28 Complaints about actions or decisions of PHSO should be dealt with thoroughly, promptly and impartially and in line with PHSO's Complaints about us policy .

2.1.29 Seeking continuous improvement

- Carefully considering the outcome of quality assurance and any lessons learned arising from PHSO's complaints process, making changes and improvements where appropriate
- Sharing knowledge and learning from assessments across the office regarding the handling of specific types of complaints and complaints against specific bodies

2.1.30 We should learn from feedback and use it to improve our current and future work.

2.1.31 By sharing knowledge about cases and common themes in complaints we can deal with cases in a better co-ordinated and more consistent way. The 'wider issues' section of the assessment form covering other information about the complainant, body complained against, themes, links with other cases and cross-cutting issues should be completed fully and accurately.

2.1.32 We should review our assessment process regularly to ensure it is fit for purpose.

Parliamentary and Health Service Ombudsman (PHSO) Casework Policy and Guidance

2.2: Assessment - Key Stages

Introduction

General requirements

Assessing enquiries - types of assessment and considering preliminary assessments

Communicating decisions (applicable to both preliminary and further assessments)

Assessing enquiries - further assessments

Resolution through intervention

The Assessment Panel and accepting a case for investigation

Introduction

2.2.1 The information contained in section 2 of this guidance covers the entire assessment process and includes information about statutory and policy requirements as well as offering best practice guidelines, advice and case examples. This section (2.2) is intended to distil, from that detailed guidance, the key stages of the process.

2.2.2 This section assumes that the reader is familiar with section 2.1 , which explains how we assess enquiries in line with the Principles for Good Administration and with the concepts of maladministration, injustice and worthwhile outcome set out in section 2.3 . The information in this section is linked to the more detailed supporting text held elsewhere in the guidance.

General requirements

2.2.3 Ensure that Visualfiles carries an appropriate audit trail to record and explain the actions and decisions taken on the case. It is essential that the assessment form is accurate and that the Visualfiles assessment screen accurately reflects the proposal made on the form. You should also ensure that any document you have relied upon in reaching your decision (or which influenced your decision) is retained on the hard copy file. (PHSO policy requirement).

2.2.4 Act in accordance with the law relating to Data Protection and Freedom of Information, including maintaining confidentiality of the parties to the complaint, and avoid sharing any information at a time or in a way that may influence or prejudice our assessment. (Statutory requirement¹)

¹ 1967 Act, section 11. 1993 Act, section 15. Data Protection Act 1998. Freedom of Information Act 2000.

2.2.5 Assess the case risk [[link to Risk Guidance in 'general guidance'](#)] at the preliminary and further assessment stages, and more often if the case is complex. (PHSO policy requirement).

2.2.6 Keep the complainant, the body complained about, MP or other relevant parties informed of progress on a regular basis. (PHSO policy requirement)

2.2.7 Refer any complaint about our service or a substantive decision to the Review Team [[link to CAU guidance section 4.2](#)]. (PHSO policy requirement).

2.2.8 It is essential that we identify any potential for joint working with other Ombudsmen at the earliest possible stage, so you need to be alert to this throughout the process. You must ensure that you are aware of all the potential areas for joint working, particularly with regard to the involvement of a local authority (within the remit of the Local Government Ombudsman - LGO), as joint working with the LGO is the most common. Where there is some evidence of the involvement of a local authority, or other body which falls within the jurisdiction of another Ombudsman, then the case must be discussed with a manager before deciding further action. Cases which might involve joint working between Ombudsmen will generally be prioritised in order to maximise the opportunity for the Ombudsmen to consider jointly the most effective and efficient way of dealing with these.

Assessing enquiries - types of assessment and considering preliminary assessments [[link to 2.4](#)]

2.2.9 An enquiry is a specific category of contact made to PHSO in which we are asked to investigate a complaint. An assessment is the process by which PHSO decides whether or not to accept an enquiry for investigation.

2.2.10 Preliminary assessments consider whether we **could** investigate the complaint (is it in remit and properly made?) and whether any complaints procedure has started and been completed satisfactorily. Further assessments consider whether we **should** investigate, taking into account the discretionary reasons why we might or might not accept an enquiry for investigation.

2.2.11 The order in which the elements of an enquiry at preliminary assessment should be considered are:

- Is the enquiry within remit? (If a complaint is out of remit then PHSO is unable to investigate it.)
- Is the enquiry properly made?
- Has any complaints procedure been completed satisfactorily? (This includes local resolution and any available 'second tier'.)

2.2.12 This represents the 'hierarchy' of the preliminary assessment process, in that if an enquiry fails to pass one of the earlier tests, then it will not normally be necessary to consider the later stages.

2.2.13 Enquiries can be determined as 'out of remit' for the following reasons (the following list matches that available on Visualfiles):

- Actions abroad other than consular functions (Parliamentary cases only)
- Administrative action taken on judicial authority (Parliamentary cases only)
- Alternative legal remedy achieved
- Body out of jurisdiction
- Commencement/conduct of civil/criminal proceedings (Parliamentary cases only)
- Commercial/contractual matters
- Criminal investigation or national security (Parliamentary cases only)
- Exercise of judicial/legislative functions (Parliamentary cases only)
- Ineligible complainant
- Ineligible complaint
- Pre-1996 clinical matters (Health cases only)
- Private healthcare (not NHS funded) (Health cases only)
- Public service personnel matters
- Three year rule (Health cases only)
- Out of remit - other

2.2.14 A Parliamentary complaint is '*Properly made*' if sent by an MP with a request that we investigate and with the aggrieved's consent.

2.2.15 A Health complaint is '*Properly made*' unless received by telephone.

2.2.16 As a general point of principle, a complainant bringing a complaint to PHSO should have given the body complained against the opportunity to respond formally to the complaint that they are seeking to bring to this Office. Local resolution should have been attempted before PHSO will consider taking any further action. If a complainant has not started or attempted local resolution then we will normally decline to investigate the complaint at that stage as being '*Pre local resolution*'. However, there could be exceptional circumstances in which we would consider waiving that requirement.

2.2.17 A number of bodies in jurisdiction have a second tier of complaint handling which complainants can contact after completing the body's own complaints procedure. Where a second tier complaint handler is available then we usually require the complainant to have taken their complaint there and the procedure to have been finished before we would look further into whether to investigate the case. We may decide to exercise our discretion to consider a complaint further even if the available second tier has not been attempted or completed. If the second tier has not been approached then our assessment at this stage is '*Pre Second Tier*'.

2.2.18 If we decide to exercise the Ombudsman's discretion not to require a complaint to have completed the complaints procedure, we would assess this as '*Not reasonable to pursue the complaints procedure*'.

2.2.19 If an enquiry is within remit, properly made and has completed (where appropriate) local and second tier complaints procedures, then the case can be passed for further assessment. If an enquiry fails any of these stages then it will normally be declined for investigation.

Communicating decisions (applicable to both preliminary [link to 2.4.94] and further assessments [link to 2.5.61])

2.2.20 If an enquiry is to be declined for investigation then we should issue a letter explaining that decision (statutory requirement²). The decision to decline an enquiry for investigation at the preliminary assessment stage should be approved in line with the PHSO Delegation Scheme. (PHSO policy requirement).

2.2.21 In Parliamentary cases the decision letter should be addressed to the referring MP (statutory requirement³) with a copy sent to the complainant under a brief covering letter (PHSO policy requirement).

2.2.22 In Health cases the decision letter should be addressed directly to the complainant (and a copy sent under a brief covering letter to any MP involved) (statutory requirement⁴).

2.2.23 Substantive decision letters on cases referred by the Speaker of the House of Commons, the Chairman and members of the Public Administration Select Committee, the Chairman of the Health Select Committee, the Chairman of the Public Accounts Committee and the three main party leaders **must** be signed by the Ombudsman. (PHSO policy requirement)

Assessing enquiries - further assessments [link to 2.5]

2.2.24 Further assessments take place after preliminary assessments and generally consider the exercise of both specific and general discretions in order to reach a decision on whether or not to accept an enquiry for investigation.

2.2.25 There is a presumption of the Assessor making contact with the complainant at the outset of the further assessment process in order to understand the matters complained of, the injustice claimed and the remedy sought. (PHSO policy requirement)

2.2.26 The order in which the elements of an enquiry at further assessment should be considered are:

- Direct referral by an NHS body.
- Specific discretion (suitability of complainant, time bar, alternative legal remedy).
- General discretion (indication of maladministration, evidence of unremedied injustice, probability of a worthwhile outcome, other dispute resolution forum appropriate, other discretionary reason to decline, link to lead investigation).

2.2.27 This represents the ‘hierarchy’ of the further assessment process. Even if a case is deemed to fail one of the earlier tests in the hierarchy it will still normally be necessary to consider some or all of the other categories.

2.2.28 The 1993 Act allows NHS bodies to directly refer complaints to the Ombudsman if they wish.

2.2.29 The following areas are considered in terms of the exercise of the Ombudsman’s specific discretion:

² 1967 Act, Section 10(1); 1993 Act, Section 14(2)

³ 1967 Act, Section 10(1)

⁴ 1993 Act, Section 14(2)

- Suitable complainant
- Time bar
- Reasonable to pursue alternative legal remedy

2.2.30 The following areas are considered in terms of the exercise of the Ombudsman's general discretion:

- Indication of maladministration?
- Evidence of unremedied injustice?
- Probability of a worthwhile outcome?

2.2.31 If the further assessment results in positive answers to the questions of maladministration, unremedied injustice and worthwhile outcome then the case should be referred to the PHSO Assessment Panel with a recommendation to accept it for investigation. Cases which have not received a positive answer to those three questions may also be referred to the Panel for discussion.

2.2.32 We may also decide to decline enquiries for other reasons. For example, if a complainant fails to co-operate, if another complaint handler also has jurisdiction and we consider it more appropriate for them to deal with it, or if the complaint is withdrawn.

Resolution through intervention [[link to 2.6](#)]

2.2.33 We should, throughout the assessment process, consider whether any action could be agreed with the body in jurisdiction to secure a reasonable outcome for the complainant through an 'intervention'. The intention of such an intervention is to secure, through contact with both the body and the complainant, a timely and personal remedy for the complainant / aggrieved.

2.2.34 Attempted interventions should:

- Focus on obtaining a personal remedy for the complainant / aggrieved.
- Seek to obtain a specific response from the body that will provide what is, in our view, a reasonable remedy for the complainant/aggrieved.

2.2.35 A resolution by intervention is where a body takes action to resolve finally a complaint. This does not apply to cases where we ask bodies in jurisdiction to undertake consideration or rework of a complaint in order for complaints procedures to be completed satisfactorily. Those categories of cases will be treated as 'premature'.

2.2.36 A judgment on whether a reasonable remedy has been provided is one for PHSO, although we will take into account the complainant's views on the proposed remedy before deciding whether to close a case on the basis of a successful intervention. The assessment of any such views and the rationale for proceeding with the intervention in the light of any objections from the complainant should be recorded fully on Visualfiles.
(PHSO policy requirement)

2.2.37 We accept a body in jurisdiction's agreement to act to provide an agreed remedy as sufficient grounds upon which to decline a complaint for investigation on the basis that

a resolution through intervention has been achieved. If the body fails to act within a reasonable timescale (or at all) to provide the remedy then a decision will be made on a case by case basis as to how we proceed.

2.2.38 If the body accepts the proposed action, then we should obtain written confirmation (email is acceptable) from it of the exact action it has agreed to take (including a specific timescale within which it will implement the agreed remedy). (PHSO policy requirement)

2.2.39 If we are unable to secure a reasonable remedy by intervention (for example, if the body refuses to do so) then the enquiry should continue to be assessed as normal. Cases of this nature are likely to be referred to the Assessment Panel (as either a 'discuss' or 'accept').

2.2.40 Please remember that cases that are being treated as successful interventions are being declined for investigation and should be approved and signed off in line with the PHSO Delegation Scheme. (PHSO policy requirement)

2.2.41 Decision letters must explain the action that the body has agreed to take and that PHSO will monitor the body's compliance with any agreed remedy. (PHSO policy requirement)

The Assessment Panel and accepting a case for investigation [link to 2.7]

2.2.42 A decision, in principle, to accept a case for investigation will be discussed by the PHSO Assessment Panel and taken by one of the Panel members. Case owners are responsible for ensuring that all relevant information (for example, clinical advice, previous assessment forms, reports by other complaint handlers) is included with the assessment form sent to the Panel for consideration. Case owners are also responsible for noting Visualfiles with any relevant details of the Panel's discussion of their case. Case owners should also ensure that the hard copy of the Assessment Panel form containing the Panel member's signature authorising the Panel's decision is retained on the case file. (PHSO policy requirement)

2.2.43 Individual complaints can consist of a number of separate grievances, possibly made against several different bodies. Not all of those grievances may be suitable for investigation and the 'in principle' decision, to accept a case for investigation, will also take into account whether we should investigate all or only some of the specific grievances made. If, following a referral to the Panel a decision is taken not to accept an enquiry for investigation, then a letter explaining that decision should be sent as discussed in section 2.5 (link).

2.2.44 Once a decision has been taken, in principle, to accept a case for investigation, the decision needs to be communicated to the complainant and other relevant parties. The Assessor responsible for the case will normally draft and issue letters explaining the decision to accept the case, in principle, for investigation, setting out the broad scope of the investigation and any complaints specifically excluded from the investigation (and the reasons for their exclusion).

2.2.45 The recipients of those letters are:

- the complainant (PHSO policy requirement).
 - We should explain that the Ombudsman is proposing to investigate the case, that the body in jurisdiction has, in line with a statutory requirement, been given an initial opportunity to comment on the complaint and that the case will be allocated to an Investigator as soon as possible.
 - We should set out the broad scope of the proposed investigation and be clear about any elements of the complaint which are specifically excluded from the proposed investigation.
 - We should say that the Investigator will contact the complainant in due course to discuss how the case will be taken forward.
 - We should explain that the case will be held by the Allocation Team until an Investigator is available and that the complainant will be updated every four weeks (If the case is to be allocated immediately then we should say so and give the name of the Investigator).

- the body complained against (Statutory requirement⁵).
 - We should explain that the Ombudsman is proposing to investigate the complaint and that it will be allocated to an Investigator as soon as possible.
 - We should set out the broad scope of the proposed investigation and be clear about any elements of the complaint which are specifically excluded from the proposed investigation.
 - We should explain that the body has an initial opportunity to comment on the complaint and that, if it wishes to offer any comments at this stage, we would be pleased to receive them within normally two (maximum three) weeks. We should explain that the investigator will be responsible for considering any initial comments that it wishes to make.
 - We should also explain that the body will have the opportunity to respond in more detail at a later stage in the investigation, including commenting on a draft of the investigation report.
 - We should explain that the case will be held by the Allocation Team until an Investigator is available and that the body will be updated every four weeks (If the case is to be allocated immediately then we should say and give the name of the Investigator).

And, where relevant:

- the aggrieved (PHSO policy requirement).
- representative (PHSO policy requirement).
- Member of Parliament (PHSO policy requirement).
- any person specifically named in the complaint as having taken or authorised the actions complained of. (Statutory requirement⁶)

Please refer to the detailed guidance [link to 2.7] for additional requirements arising out of Parliamentary and Health cases.

⁵ 1967 Act, section 7(1); 1993 Act, section 11(1)

⁶ 1967 Act, section 7(1); 1993 Act, section 11(1)

Parliamentary and Health Service Ombudsman (PHSO) Casework Policy and Guidance

2.3: Maladministration, Injustice and Worthwhile outcome

Maladministration

Injustice

Worthwhile outcome

Maladministration

2.3.1 The Parliamentary Commissioner Act 1967 and the Health Service Commissioners Act 1993 say that the Ombudsman may investigate complaints about injustice or hardship in consequence of maladministration and, additionally for health complaints, injustice or hardship in consequence of a failure in service or a failure to provide a service¹. For the purposes of this guidance a reference to maladministration should also, for health complaints, be taken as a reference to service failure or failure to provide a service².

2.3.2 Many decisions or actions by bodies in jurisdiction are unpopular or unwelcome to an individual, but this in itself is not evidence of maladministration.

2.3.3 A decision to accept a case for investigation will be based upon there being some indication of maladministration.

2.3.4 What constitutes maladministration was not defined by the Acts; that is left to the Ombudsman to decide.

2.3.5 Our approach is to look at maladministration in terms of the Principles of Good Administration . The six Principles - getting it right, being customer focused, being open and accountable, acting fairly and proportionately, putting things right and seeking continuous improvement - are backed up by explanatory text. These are broad statements of what bodies within jurisdiction should be doing to demonstrate good administrative practice and good customer service. However, the Principles are not a checklist against which all bodies' actions should be compared and failure to act in accordance with a particular Principle will not automatically result in a finding of maladministration.

2.3.6 The scope of maladministration has been influenced by the Human Rights Act 1998, which made it unlawful for public bodies to violate the rights contained in the European Convention on Human Rights. It is not for PHSO to adjudicate on questions of human rights law. Possible breaches of the Human Rights Act, the European Convention on Human Rights or other international human rights instruments are matters for the courts. PHSO

¹ The 1993 Act also explicitly specifies that the Ombudsman may investigate the actions of family health service providers as well as actions taken in connection with services carried out by an employee of, person acting on behalf of or someone carrying out a delegated function of such a provider.

² The terms 'service failure' and 'failure to provide a service' are usually used in complaints relating to matters of clinical judgment which were added to the jurisdiction of the Health Service Ombudsman in 1996.

is, however, concerned to uphold basic human rights principles as part of the wider promotion of more general principles of good administration.

2.3.7 In taking any judgment on maladministration we should assess the actions taken in relation to the complaint in the round and not be bound by an over-rigid assessment of each individual grievance.

Injustice

2.3.8 When deciding whether to investigate a complaint we need to take into account whether an injustice appears to have resulted from the claimed maladministration and, if so, whether we would have a basis to pursue a remedy for that injustice. There does not have to be a particular degree or level of injustice for the Ombudsman to pursue a remedy but we may decide not to pursue a remedy in certain circumstances. For example, where the injustice has already been sufficiently remedied.

2.3.9 The Acts require that the complaint be made on or on behalf of the person who claims to have sustained the injustice. The Acts do not define injustice or hardship. The Ombudsman takes a broad view as to what might constitute injustice. Injustice could include quantifiable loss or damage - such as financial loss, loss or damage to a possession, loss of a service, or loss of opportunity - as well as 'subjective' injustice such as damage to feelings, outrage and inconvenience.

2.3.10 It is sometimes difficult to assess the injustice to an individual. This is particularly the case when considering subjective issues of distress or outrage which may result from the way a person has been treated and their individual circumstances. A careful assessment should be made of the circumstances of the individual complaint and we should take a flexible approach.

2.3.11 Any finding by PHSO that maladministration has led to an injustice can only be reached at the conclusion of an investigation. However, taking a judgment on the potential injustice flowing from any claimed maladministration is a key component of the assessment process.

Worthwhile outcome

2.3.12 In deciding whether or not to accept an enquiry for investigation we should also take a view on whether an investigation is likely to provide a worthwhile outcome.

2.3.13 We need to think about whether we can 'add value' by investigating the complaint. The prospect of a worthwhile outcome may be called into doubt for a number of reasons - such as the evidence in the case being unlikely to support a firm finding (perhaps due to a lack of contemporary evidence and time elapsing since the matters complained of) or other more appropriate remedies (for example, legal action) being available. We should also bear in mind that a worthwhile outcome could include a complaint not being upheld: in terms of providing assurance to the body in jurisdiction and/or the complainant that the body in jurisdiction acted properly or reasonably in the circumstances.

2.3.14 Recommendations for specific remedies can only be made at the conclusion of an investigation when we uphold a complaint. However, an awareness of the main

considerations underlying how PHSO addresses questions of remedy is an important part of the assessment process as we may decide to decline a case for investigation where the type or level of remedy sought by the complainant is unrealistic (for example, substantial damages or dismissal of named staff).

2.3.15 We should also consider, as part of the assessment process, whether a case is suitable for resolution by intervention [link to 2.7] at the assessment stage. This approach is most likely to be suited to cases where there is a clear indication of maladministration and an injustice to the complainant, and a clear and achievable remedy. As part of that process we may need to reach a view on the adequacy of a remedy offered in response to such an intervention.

2.3.16 PHSO also needs to consider how to prevent similar injustice occurring in future as well as remedying the injustice to the individual and others similarly affected. We should also look at such questions in terms of PHSO's Principles for Remedy .

2.3.17 The assessment process can also involve taking a view on whether a remedy previously offered by the body complained against is adequate to have already remedied the complaint made to PHSO.

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2.4 Assessing enquiries - types of assessment and considering preliminary assessments

What are contacts, enquiries and assessments?

Types of assessment - preliminary and further

Hierarchy of preliminary assessments

Joint working cases

Resolution by intervention

Preliminary assessments - out of remit

Preliminary assessments - properly made

MP referral (Parliamentary cases only)

Complaint made in writing (Health cases)

Complaints made by telephone

Equality and Diversity considerations

Preliminary assessments - local resolution

Preliminary assessments - second tier complaint handlers

Complaint withdrawn

Next steps

Communicating the decision

Decision letters signed by the Ombudsman

Communication issues

Writing to complainants who are prisoners

Sending important or sensitive documents

What are contacts, enquiries and assessments?

2.4.1 PHSO receives external contacts from organisations and individuals for a number of reasons. An enquiry is a specific category of contact made to PHSO in which we are asked to investigate a complaint.

2.4.2 An assessment is the process by which PHSO decides whether or not to accept an enquiry for investigation.

2.4.3 Contacts with PHSO will be analysed and subjected to cross-checking on Visualfiles to determine if they are a new enquiry, relate to a previous or current case or fall into another category (such as an Freedom of Information or Data Protection Act (FOI/DPA) request or a complaint about us). Those checks will normally take place in the Customer Services Teams within the Customer Services and Assessment Directorate (CS&A). But all staff receiving external contacts have a responsibility to ensure that they are passed to the relevant part of PHSO for action.

2.4.4 Once a contact has been identified as a new enquiry, a case will be created on Visualfiles. Basic details such as the parties to the complaint, relevant bodies in jurisdiction and theme (if applicable) will be added and the enquiry acknowledged. A check will also be made for previous contact from the complainant.

2.4.5 Once the Customer Services Teams have completed that process, the case is ready for assessment.

Types of assessment - preliminary and further

2.4.6 There are two types of assessment: preliminary and further.

2.4.7 Preliminary assessments consider whether we **could** investigate the complaint (is it in remit and properly made?) and whether any complaints procedure has started and been completed satisfactorily. If all of these are satisfied (or if there are complex issues surrounding consideration of those questions) then a further assessment will take place.

2.4.8 Preliminary assessments are generally carried out by Customer Services Officers.

2.4.9 Further assessments take place after preliminary assessments and consider whether we **should** investigate, taking into account the discretionary reasons why we might or might not accept an enquiry for investigation. This assessment can also include consideration of complex issues arising from the preliminary assessment.

2.4.10 Further assessments are generally carried out by Assessors.

2.4.11 This guidance should be read in conjunction with the other information and advice on completing assessments on Visualfiles . The options that are available on the Visualfiles assessment screen are shown in this text in *italics*.

2.4.12 It is essential that the assessment form is accurate and that the Visualfiles assessment screen accurately reflects the proposal made on the form. (PHSO policy requirement)

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2.4.13 The level at which decisions on both preliminary and further assessments have to be approved is set out in the PHSO delegation scheme and this guidance must be followed when undertaking assessments. (PHSO policy requirement)

2.4.14 The assessment process is based on both the 1993 Act and the 1967 Act .

2.4.15 This guidance is not intended to replace the Acts, and does not list every reason that we might use to decline an enquiry or to accept it for investigation, but should be used as a basic reference about what should be considered when assessing an enquiry.

2.4.16 Note that changes in workload, developments in the NHS and central government and in the strategic direction of PHSO will lead to changes in the way we assess enquiries. All queries about the assessment of enquiries should be raised with line management in the first instance.

Hierarchy of preliminary assessments

2.4.17 The order in which the elements of an enquiry at preliminary assessment should be considered are:

- Is the enquiry within remit?
- Is the enquiry properly made?
- Has any complaints procedure been completed satisfactorily? This includes local resolution and any available 'second tier'.

2.4.18 This represents the 'hierarchy' of the preliminary assessment process, in that if an enquiry fails to pass one of the earlier tests, then it will not normally be necessary to consider the later stages. For example, if a complaint falls outside the Ombudsman's remit then we have no basis to consider it and there is therefore no justification for looking at whether it was properly made or whether the complaints procedure has been attempted.

Joint working cases

2.4.19 It is essential that we identify any potential for joint working with other Ombudsmen at the earliest possible stage, so you need to be alert to this throughout the process. You must ensure that you are aware of all the potential areas for joint working, particularly with regard to the involvement of a local authority (within the remit of the Local Government Ombudsman - LGO), as joint working with the LGO is the most common. Where there is some evidence of the involvement of a local authority, or other body which falls within the jurisdiction of another Ombudsman, then the case must be discussed with a manager before deciding further action. Cases which might involve joint working between Ombudsmen will generally be prioritised in order to maximise the opportunity for the Ombudsmen to consider jointly the most effective and efficient way of dealing with these.

Resolution through intervention

2.4.20 We should consider (throughout the assessment process) whether any action could be agreed with the body in jurisdiction to secure a reasonable outcome for the complainant through an ‘intervention’. The intention of such an intervention is to secure, through contact with both the body and the complainant, a timely and personal remedy for the complainant/aggrieved.

Preliminary assessments - out of remit

2.4.21 The first consideration in a preliminary assessment is whether the case is in or out of remit.

2.4.22 If a complaint is out of remit then PHSO is unable to investigate it. The relevant ~~statutory requirements~~ are listed in the footnotes to the text covering each of the out of remit categories below.

2.4.23 The Visualfiles categories by which such cases can be declined for investigation are listed below - each with a brief headline explanation. The footnotes highlight the main legislative reference(s). This guidance is not intended to cover all possible complaints within these categories, nor does it contain an authoritative commentary on the legislation: many of the sections and clauses of the Acts referred to have exceptions and conditional notes. For more information or advice, please refer to the 1993 and 1967 Acts or line management in the first instance and, if necessary, the PHSO Legal Team [[link to Legal pages](#)].

- Actions abroad other than consular functions¹ (Parliamentary cases only)

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

- Administrative action taken on judicial authority² (Parliamentary cases only)

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

- Alternative legal remedy achieved³

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

¹ Sections 6(5), Schedule 3 Paragraph 2, 1967 Act

² Schedule 3, Paragraphs 6A, 6B and 6C, 1967 Act

³ Section 5(2), 1967 Act; section 4, 1993 Act

2.4.27 Both the 1993 and 1967 Acts prevent PHSO investigating matters where the aggrieved has or had a right of appeal to a tribunal or court of law: except in circumstances where it was not reasonable for the person to have resorted to that remedy. PHSO policy deriving from these aspects of the legislation was developed and clarified in detail during 2007. In summary, if a full alternative legal remedy has already been achieved this takes the complaint out of our remit. If one has not been achieved then it could fall within our remit.

2.4.28 Please refer to the detailed guidance .

- Body out of jurisdiction⁴

2.4.29 Where the body complained against is not within PHSO's jurisdiction. Bodies which fall within PHSO's Parliamentary jurisdiction are largely listed in Schedule 2 to the 1967 Act. The types of Health bodies and other health providers subject to PHSO's Health jurisdiction are described in Section 2 of the 1993 Act. However, be aware that PHSO can investigate some actions taken by other parties on behalf of bodies in jurisdiction (for example, the actions of EAGA PLC who operate the Warm Front scheme on behalf of Defra, or a private hospital which carries out an operation under contract to an NHS Trust).

2.4.30 Please note that we will provide appropriate assistance to complainants in these circumstances by providing details of other relevant complaint handlers who may be able to assist with a complaint that falls outside PHSO's remit.

- Commencement/conduct of civil/criminal proceedings⁵ (Parliamentary cases only)

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

2.4.32 Any consideration of whether or not to investigate a decision to commence proceedings would therefore fall within the Ombudsman's discretion and be part of the further assessment process [link to section 2.5].

- Commercial/contractual matters⁶

2.4.33 In respect of Parliamentary cases the Ombudsman is prevented from investigating matters relating to commercial transactions or commercial contracts. For example, the decision of a body within jurisdiction to award a particular contract.

2.4.34

⁴ Schedule 2, 1967 Act; section 2, 1993 Act

⁵ Schedule 3, paragraph 6, 1967 Act

⁶ Schedule 3, paragraph 9, 1967 Act; section 7(2), 1993 Act

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2.4.35 In terms of Health cases the 1993 Act contains a similar restriction but it does allow investigation of matters relating to certain contractual arrangements (for example, where a Health Trust has contracted out service provision to an independent provider).

- Criminal investigation or national security⁷ (Parliamentary cases only)

2.4.36 The restrictions in this respect are narrowly focused and were intended to prevent the Ombudsman from investigating certain complaints about the investigation of serious crime or national security issues. This does not exclude the Ombudsman from investigating matters arising from the investigation of all criminal matters (for example, DWP's handling of a benefit fraud investigation could be subject to investigation).

- Exercise of judicial/legislative functions⁸ (Parliamentary cases only)

2.4.37 This category encompasses a number of different types of complaint. It is intended to record complaints about the actions of some bodies and individuals that are excluded from jurisdiction and also about the non-administrative functions of some bodies within the Ombudsman's jurisdiction.

2.4.38 For example, this category would include complaints about the actions or decisions of a judge. It would also include complaints about the actions or decisions of tribunal members (even though in such cases the actions of the administrative support to the tribunal or the judge might be investigable). Complaints who have been disadvantaged by a judicial administrative error may be able to have a claim for compensation considered by the Lord Chancellor (please refer to the specific guidance on 'judicial administrative errors' for more information).

2.4.39 Complaints against the Pensions Ombudsman are covered by this aspect of the legislation

- Ineligible complainant⁹

2.4.40 Complaints cannot be made by local authorities, certain public bodies and certain publicly funded bodies on their own behalf. However, under the 1993 Act a public body may complain on behalf of an individual.

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

⁷ Schedule 3 paragraph 5, 1967 Act

⁸Section 5(1), 1967 Act

⁹ Section 6, 1967 Act; sections 8, 9 and 10, 1993 Act

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- Ineligible complaint¹⁰

2.4.42 In order to be able to consider any complaint made, the Ombudsman must be satisfied that the complaint constitutes a claim that injustice/hardship has resulted to the person aggrieved from maladministration, service failure or failure to provide a service.

2.4.43 If no such claim is made (either because the complaint is about something other than maladministration, for example, the content of legislation) or because the complainant states clearly that there has been no injustice/hardship flowing from the alleged fault (for example, someone who wished to complain generally that a government department was not doing a good job), then we cannot consider it.

- Out of remit - other

2.4.44 Cases closed as out of remit for other reasons at the preliminary assessment stage.

- Pre-1996 clinical matters¹¹ (Health cases only)

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

- Private healthcare (not NHS funded)¹² (Health cases only)

2.4.46 The Ombudsman is only empowered to investigate the actions of those providing NHS care and treatment. However, be aware that NHS care and treatment can also extend to private healthcare providers carrying out functions or providing services on behalf of the NHS. Private healthcare in an NHS setting is also within the Ombudsman's remit, except for the actions of doctors.

In contrast it is also possible that services provided by, for example, a GP might be paid for privately (such as an occupational health assessment paid for by a complainant's employer) and fall outside PHSO's jurisdiction. However, it is not the case that all services for which a GP charges are automatically outside of remit. Advice should be sought on individual cases where necessary.

- Public service personnel matters¹³

2.4.47 PHSO is prevented from investigating complaints in relation to public service personnel matters. This has a fairly broad scope and was intended to prevent public sector employees (including civil servants and Health Service employees) from pursuing

¹⁰ Section 5(1)(a), 1967 Act; section 3(1), 1993 Act

¹¹ Health Service Commissioners Amendment Act 1996, section 14; Commencement Order SI 1996/970 Article 2

¹² Sections 2 and 3, 1993 Act

¹³ Section 10, 1967 Act; section 7(1), 1993 Act

grievances relating to their employment via this Office. However, NHS personnel can complain if their complaint arises from the investigation of a matter under the NHS complaints procedure.

- Three year rule¹⁴ (Health cases only)

2.4.48 The Ombudsman is prevented from investigating the actions of health providers (whether individuals or bodies) or independent providers (again whether individuals or bodies) providing an NHS service if the complaint is made more than three years after the last day on which the provider ceased to provide that service.

2.4.49 For example, we could not look at a complaint about a GP if it was made to the Ombudsman more than three years after the GP's retirement.

2.4.50 If an entire complaint falls within one (or more) of these reasons then the case should be declined for investigation. Each of the categories listed above is selectable on Visualfiles as an enquiry closure detail.

2.4.51 If the complaint is within remit then consideration can be given to whether it has been properly made.

Preliminary assessments - properly made

2.4.52 The second consideration in conducting a preliminary assessment is whether the complaint has been properly made. If a complaint has not been properly made then it cannot be accepted for investigation.

MP referral (Parliamentary cases only)

2.4.53 In Parliamentary cases a complaint (to be properly made) must be made in writing to a Member of Parliament and then referred to the Ombudsman by an MP, with the consent of the person aggrieved and a request from the MP that we investigate the complaint (Statutory requirement¹⁵). The complainant is required to make the complaint to the MP in writing, but there is no statutory requirement for the onward referral by the MP to be in writing. If a complaint is received without an MP referral and we are content that any complaints procedure has been completed then we should explain to the complainant that they have three months to obtain such a referral. During that time the enquiry is not closed but is given '*Refer back for MP referral*' status. A reminder should be sent to the complainant one month before the expiry of that three-month period.

2.4.54 We should provide appropriate assistance to complainants in those circumstances by, for example, providing the name and contact details for their constituency MP.

2.4.55 Where the complainant fails to obtain a referral by a MP within the three-month period then the case should be declined as '*Withdrawn - failed to obtain MP referral*'.

¹⁴ Section 9(4A and B), 1993 Act

¹⁵ Section 5(1)(A) 1967 Act

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2.4.56 If a complainant makes contact without an MP referral and it is also evident that the relevant complaints procedure has not been completed then they should be advised of the procedure to follow in order to make a complaint: including any requirements regarding local or second tier complaint resolution [links]. Such an enquiry would be declined as *'Not properly made - no MP referral'*.

2.4.57 A Parliamentary complaint is *'Properly made'* if sent by an MP with a request that we investigate, and with the aggrieved's consent.

Complaint made in writing (Health cases)

2.4.58 In Health cases a complaint must be made in writing to be properly made (Statutory requirement¹⁶). For these purposes we accept complaints made by email as having been made in writing.

2.4.59 If a complainant makes contact by other means (for example, by telephone) then they should be advised of the procedure to follow in order to make a complaint: including any requirements regarding local or second tier complaint resolution [links]. If we are satisfied that the complainant has completed the complaints procedure then we will refer back the enquiry.

2.4.60 A complainant should be given one month to submit their complaint in writing. During that time the enquiry is not closed but is given *'refer back for HC report'* status. A reminder should be sent one week before the expiry of the one-month period.

2.4.61 Where the complainant fails to submit a complaint in writing within the one-month period then it should be declined as *'Withdrawn - complainant failed to respond'*.

2.4.62 It follows that a Health complaint is *'Properly made'* unless received by telephone or made orally in person.

Complaints made by telephone

2.4.63 Any enquiry received over the telephone from a complainant that has not completed any complaints procedure in its entirety must be recorded as *'Not properly made'*: either, by virtue of having *'No MP referral'*; or, by not being in writing which is recorded on Visualfiles as *'Not properly made - not in writing'*.

Equality and Diversity considerations

2.4.64 Please be aware that we may need to make reasonable adjustments to the way we provide a service in the light of Equality and Diversity needs arising on individual cases [link to E&D guidance in 'general guidance'].

2.4.65 For example, if a complainant is unable to write then we could consider taking details of the complaint over the telephone and then sending them a written summary for confirmation that we have accurately recorded the complaint. Or we could consider putting the complainant in contact with an advocacy organisation.

¹⁶ Section 9(2), 1993 Act
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Preliminary assessments - local resolution

2.4.66 If the complaint has been properly made then consideration can be given to whether local complaint resolution has been attempted.

2.4.67 This is the term given to the complainant putting their complaint directly to the body complained against (be it government department, health trust etc.).

2.4.68 The 1993 Act prevents the Ombudsman from conducting an investigation unless she is satisfied that the complaints procedure of the health body/service provider has been invoked and exhausted, unless in her view it was not reasonable for the complaints procedure to have been invoked or exhausted (Statutory requirement¹⁷).

2.4.69 There is no requirement in the 1967 Act for previous consideration of the complaint by the body complained against.

2.4.70 Please note, therefore, that any decision to decline a case for investigation on the basis that local complaint resolution has not been completed is a discretionary one for PHSO.

2.4.71 As a general point of principle, a complainant bringing a complaint to PHSO should have given the body complained against the opportunity to respond formally to the complaint that they are seeking to bring to this Office. It is in the interests of natural justice for a body complained against to be made aware of and have the opportunity to respond to a complaint and, where possible, it is desirable for a complaint to be considered and resolved at a local level. (PHSO policy requirement)

2.4.72 Local resolution should have been attempted before PHSO will consider taking any further action. If a complainant has not started or attempted local resolution then we will normally decline to investigate the complaint at that stage as being '*pre-local resolution*'. However, there could be exceptional circumstances in which we would consider waiving that requirement so remember to consider each case on its merits and discuss with line management if necessary.

2.4.73 For example, we exercised our discretion to accept a complaint against the Child Support Agency prematurely because the female complainant was vulnerable. She had endured serious difficulties over the past ten years, including caring responsibilities, bereavement, the serious illness and disability of her child, depression and street homelessness. She still had a support worker. We felt it was important to address the potential injustice quickly in view of the already long delays by the Agency, in order that she did not experience unwarranted financial difficulties.

2.4.74 We might also consider exercising discretion if the complainant was suffering particular hardship or had a terminal illness.

2.4.75 We describe an enquiry as being '*Pre local resolution*' if it:

¹⁷ Section 4(4) and (5), 1993 Act
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- has not been made to the original body OR
- we consider that the complaints procedure at this body has **not** been completed and should be.

2.4.76 If a body has several tiers of internal complaint handling and these have not been completed we still describe the complaint as '*Pre local resolution*'.

Preliminary assessments - second tier complaint handlers

2.4.77 A number of bodies in jurisdiction have a second tier of complaint handling which complainants can contact after completing the body's own complaints procedure. Some examples of these are:

- The Adjudicator's Office, which looks into complaints about HM Revenue and Customs, the Valuation Office Agency, the Public Guardianship Office and the Insolvency Service.
- The Independent Case Examiner, which looks into complaints about the Child Support Agency, Debt Management, Disability and Carers Service, the Financial Assistance Scheme, Jobcentre Plus, the Pension Service and the Rent Service.
- The Independent Complaints Mediator, which looks into complaints about the Criminal Records Bureau.

2.4.78 Please note that we do not accept all discrete complaint handling functions as being second tier complaint handlers. For example, the independent complaints assessor function to which those complaining against the Driver Vehicle and Licensing Agency may refer a complaint. Whether or not to accept a complaint handler as second tier for assessment purposes is a policy decision for PHSO.

2.4.79 Where a second tier complaint handler is available then we usually require the complainant to have taken their complaint there and the process to have been finished before we would look further into whether to investigate the case. If a complainant has not completed that process then the case would generally be declined as '*pre-second tier*' (PHSO policy requirement).

2.4.80 If the second tier has not been exhausted, we assess an enquiry as '*pre-second tier*' and signpost the complainant or, with their agreement, directly refer the papers to the appropriate complaint handler. If a complaint has been fully considered by the second tier handler we assess the enquiry as '*Not pre-second tier*'. If we decide to exercise the Ombudsman's discretion not to require a complainant to have completed previous procedures, we would assess this as '*Not reasonable to exhaust the complaints procedure*'.

2.4.81 Exceptionally, where a complaint has not exhausted the procedure (it is premature), but where we also assess that if the complaint were to return to us it would be out of our remit, we may decline to investigate for that reason rather than refer it back into the complaints procedure. This will include cases where we can quickly and

clearly see that the subject matter of the complaint is, in fact, solely dissatisfaction with a decision for which there is a right of appeal to a statutory tribunal. In such cases we will, instead, advise the person that such a right of appeal exists/existed. We should exercise caution in doing so and should not be seen to suggest that we are advising someone to appeal. We are advising of the existence of the right of appeal, not indicating that they should appeal or that if they do they will obtain a resolution. This is a customer-focused approach aimed at preventing unnecessary referrals back into the local procedures. However, there are very few enquiries where we would propose to do this; almost all premature enquiries will be declined as such.

2.4.82 We may decide to exercise our discretion to consider a complaint further even if the available second tier has not been attempted or completed, for example, if there is some time critical element to the complaint such as the complainant suffering from a life-threatening condition or if the complainant is particularly vulnerable.

2.4.83 Visualfiles allows for the specific recording of cases declined as premature pre-second tier cases.

2.4.84 Where there is no established external second tier complaint handler and the complainant has completed local resolution or the external second tier has completed its consideration, then we would record an enquiry as '*Not premature*', that is it has completed all available stages of complaint handling prior to PHSO.

Complaint withdrawn

2.4.85 If a complainant asks to withdraw their complaint during any part of the assessment process then we will normally agree to that request. The enquiry will be recorded as '*Withdrawn - Withdrawn by complainant*'.

2.4.86 If a complainant fails to respond to a request for further information and that lack of information means we are unable to complete the assessment then the enquiry will be recorded as '*Withdrawn - Complainant failed to respond*'.

2.4.87 If an MP seeks to withdraw a Parliamentary complaint that they have referred, then we would consider the request. If the complainant supported the withdrawal then we would normally agree to that request. However, we would not be under any obligation to treat it as withdrawn as once an enquiry has been properly referred by an MP we are able to proceed with our consideration, without the need for their continued support for the complaint.

2.4.88 In the unusual circumstances in which an MP sought to withdraw a complaint, but the complainant wanted us to continue, the Legal Team should be approached for advice.

2.4.89 Enquiries being treated as withdrawn at the preliminary assessment stage should be authorised by a Customer Services Manager.

2.4.90 Enquiries being treated as withdrawn at the further assessment stage should be authorised by an Assessment Manager.

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2.4.91 If an enquiry is within remit, properly made and has completed (where appropriate) local and second tier complaints procedures, then the case can be passed for further assessment .

2.4.92 A decision should be taken on a case-by-case basis as to when it is appropriate or necessary to request papers from the body in jurisdiction. We do not need specific consent from a complainant to obtain such information as we can use the information gathering powers contained within our legislation. However, as a point of good practice we should advise complainants, when a case moves from preliminary to further assessment, that we may need to obtain (and share) information about their complaint. (Note: this wording is contained in the standard acknowledgment letter used when a case moves to further assessment.) Complainants who complete a PHSO complaint form are also asked to provide consent for PHSO to obtain relevant information/papers (including, for health complaints, medical records).

2.4.93 If an enquiry is to be declined for investigation then we should issue a letter explaining that decision.

Communicating the decision

2.4.94 The decision to decline an enquiry for investigation at the preliminary assessment stage should be approved in line with the PHSO Delegation Scheme .

2.4.95 In Parliamentary cases the decision letter should be addressed to the referring MP (Statutory requirement¹⁸) with a copy sent to the complainant under a brief covering letter.

2.4.96 In Health cases the decision letter should be addressed directly to the complainant (and a copy sent under a brief covering letter to any MP involved) (Statutory requirement¹⁹).

2.4.97 If there is a separate aggrieved party who is not the complainant then we should consider on a case-by-case basis as to whether a separate copy of the decision letter should also be sent to them.

2.4.98 Professional representatives or advocates can also be sent copies of decision letters providing we have appropriate authorisation from the complainant/aggrieved for them to act on their behalf. (In cases where the representative or advocate is the complainant then the letter will have been addressed directly to them in any case.)

2.4.99 In writing to advise of a decision to decline an enquiry we should refer to it as a 'decision not to investigate'. Do not use terms such as 'decline' or 'rejection'.

2.4.100 If we are issuing a copy of a final decision letter by email then it should be sent in secure pdf format [link to Intranet guidance] (PHSO policy requirement).

¹⁸ Section 10(1), 1967 Act.

¹⁹ Section 14(2), 1993 Act.

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2.4.101 In some circumstances we will notify bodies in jurisdiction of decisions not to investigate. Please refer to the detailed guidance [link to 'Informing bodies within jurisdiction of decisions not to investigate']

Decision letters signed by the Ombudsman

2.4.102 Please remember that substantive decision letters on cases referred by the Speaker of the House of Commons, the Chairman and members of the Public Administration Select Committee, the Chairman of the Health Select Committee, the Chairman of the Public Accounts Committee and the three main party leaders **must** be signed by the Ombudsman or, in her absence, the Deputy Ombudsman. (PHSO policy requirement).

2.4.103 The file, with appropriate final drafts for the Ombudsman's signature, should be referred via the relevant Director to the Ombudsman's Casework Management Team.

2.4.104 In Parliamentary cases, where a covering letter is required for the complainant's copy of the final decision letter, it can be signed by the Ombudsman as well, or by the member of staff carrying out the assessment if so desired. Please include an appropriate draft covering letter if one is required.

2.4.105 Any queries regarding cases to be signed by the Ombudsman should be directed to the Ombudsman's Casework Management Team.

Communication issues

2.4.106 Please remember to take account of any communication issues relevant to the complaint. For example:

- If English is not the complainant's first language, should we have the decision letter translated? Please refer to the 'Adjustments for communications needs' guidance for more information on translation services.
- If the complainant is partially sighted, should we use a larger font or coloured paper?
- Has the complainant requested the decision in a particular format, for example, by email? Note: if we send a copy of a decision letter by email then it must be sent in a secure pdf format. (PHSO policy requirement).

2.4.107 Points to remember when drafting a decision letter:

- The letter should accurately reflect the decision that has been approved.
- Focus on presenting clear and logical arguments for the decision.
- Try to avoid long chronologies or wholesale inclusion of evidence unless these are really necessary.
- When material needs to be included that would detract from the clarity of the body of the decision consider using annexes. The kinds of material that might be placed in an annex include chronologies, details of financial calculations or payments and lengthy extracts from other evidence (for example, a direct quote from a body's

response to us) or photocopies of documents upon which we have relied in reaching our decision or which have influenced our decision.

- Try to avoid repetition.
- It is important to have a letter which flows logically and makes the arguments clear, rather than packing in too much information.
- Remember to explain acronyms and to use plain language.
- Use active language and short sentences.
- Have empathy with the reader and write in a way that will promote understanding.
- The decision may be addressed to a Member of Parliament or a professional representative but, in drafting it, we should have the needs of the complainant or the aggrieved party in mind.
- When referring to assessment decisions use the term 'we' rather than 'I'. For example, 'We have decided not to accept your complaint for investigation'.

Writing to complainants who are prisoners

2.4.108 Any correspondence between PHSO and a serving prisoner should have 'Prisoner's Confidential Access' marked on the envelope.

2.4.109 In addition the prisoner's unique prison number should be included next to their name in any correspondence and on the outside of envelopes. For example, 'Mr J Smith (xx1234)'. The unique number should also be included when the complainant is registered on Visualfiles.

2.4.110 Do not mark envelopes to prisoners with 'Rule 39': this marking is used for correspondence between prisoners and their legal advisers.

Sending important or sensitive documents

2.4.111 When sending (or returning) important or sensitive documents, PHSO's Security Committee have advised that Royal Mail's special/recorded delivery service and TNT courier both have a track and trace facility, and so can be regarded as reasonably secure. A decision should be taken on a case by case basis as to which service it is most appropriate to use. Please refer to Security bulletin July 2009 for more information.

Parliamentary and Health Service Ombudsman (PHSO) Casework Policy and Guidance

2.5 Assessing enquiries - further assessments

When is a further assessment carried out?

Human rights

Joint working cases

Resolution by intervention

Hierarchy of further assessments

Exercise of specific discretion

Suitable complainant

Time bar

Reasonable to pursue alternative legal remedy

Exercise of general discretion

Indication of maladministration?

Evidence of unremedied injustice?

Probability of a worthwhile outcome?

Other dispute resolution forum appropriate?

Other discretionary reason to decline

Court proceedings

‘Linked to lead’

Complaint withdrawn

Action codes

Next steps

Communicating the decision

Naming conventions - clinical advisers

Decision letters signed by the Ombudsman

Communication issues

Writing to complainants who are prisoners

Sending important or sensitive documents

When is a further assessment carried out?

2.5.1 An enquiry is suitable for further assessment if it is within remit, properly made and has, where appropriate, completed any complaints procedure (see Section 2.4 for details [\[link\]](#)). A further assessment may also be required if complex issues have arisen during the preliminary assessment which require more detailed consideration or perhaps a referral to the PHSO Assessment Panel [\[link\]](#). Further assessments are generally carried out by Assessors.

2.5.2 Further assessments take place after preliminary assessments and generally consider the exercise of both specific and general discretions in order to reach a decision on whether or not to accept an enquiry for investigation.

2.5.3 The level at which decisions on both preliminary and further assessments have to be approved is set out in the PHSO Delegation Scheme [\[link\]](#). (PHSO policy requirement).

2.5.4 There is a presumption of the Assessor making contact with the complainant at the outset of the further assessment process in order to understand the matters complained of, the injustice claimed and the remedy sought. (PHSO policy requirement)

Human rights issues

2.5.5 As part of the further assessment process, Assessors should identify whether the enquiry raises any relevant human rights issues. These should be recorded on the 'Cross-cutting issues' section of the assessment form and included in the wider analysis of the enquiry where appropriate. Please refer to section 2.3.6 [\[link\]](#) and to the PHSO Human Rights pages [\[link\]](#) for more information.

Joint working cases

2.5.6 It is essential that we identify any potential for joint working with other Ombudsmen at the earliest possible stage, so you need to be alert to this throughout the process. You must ensure that you are aware of all the potential areas for joint working, particularly with regard to the involvement of a local authority (within the remit of the Local Government Ombudsman - LGO), as joint working with the LGO is the most common. Where there is some evidence of the involvement of a local authority, or other body which falls within the jurisdiction of another Ombudsman, then the case must be discussed with a manager before deciding further action. Cases which might involve joint working between Ombudsmen will generally be prioritised in order to maximise the opportunity for the Ombudsmen to consider jointly the most effective and efficient way of dealing with these.

Resolution by intervention

2.5.7 We should consider (throughout the assessment process) whether any action could be agreed with the body in jurisdiction to secure a reasonable outcome for the complainant through an ‘intervention’. The intention of such an intervention is to secure, through contact with both the body and the complainant, a timely and personal remedy for the complainant/aggrieved. [add link to section 2.6]

Hierarchy of further assessments

2.5.8 The order in which the elements of an enquiry at further assessment should be considered are:

- Direct referral by an NHS body
- Specific discretion (suitability of complainant, time bar, alternative legal remedy)
- General discretion (indication of maladministration, evidence of unremedied injustice, probability of a worthwhile outcome, other dispute resolution forum appropriate, other discretionary reason to decline, link to lead investigation).

2.5.9 This represents the ‘hierarchy’ of the further assessment process. Even if a case is deemed to fail one of the earlier tests in the hierarchy it will still normally be necessary to consider some or all of the other categories (for example, if a complaint could be excluded by use of the statutory ‘time bar’, then we would still consider whether there were other compelling reasons to consider accepting the case for investigation). However, if a case does fail one of the earlier tests then the level of scrutiny required to be given to some of the later tests may be lessened (for example, if a complaint falls outside the statutory time bar and presents no indication of maladministration then we would be likely to decline the case and would not need to consider in depth the questions of unremedied injustice and worthwhile outcome).

2.5.10 In addition, the Visualfiles closure code for a decision not to investigate will generally be chosen to represent the highest level in the hierarchy leading to that decision (so a complaint that we have chosen not to investigate that fell outside the time bar and presented no indication of maladministration will be recorded as closed under ‘*specific discretion*’ with the ‘*out of time*’ closure detail rather than under ‘*general discretion*’ with the ‘*no indication of maladministration*’ closure detail).

Exercise of specific discretion

Suitable complainant

2.5.11 As discussed in section 2.4 [link] both the 1967 Act and 1993 Act place restrictions on the person (or body) who may make a complaint to PHSO¹. Questions regarding the **eligibility** of a complainant are considered as part of the preliminary assessment [link to 2.4].

2.5.12 While certain categories of complainant will always be excluded (for example, a Local Authority seeking to make a complaint on its own behalf), and hence out of remit ,we also need to undertake careful consideration of discretionary issues surrounding the

¹ 1967 Act, section 6; 1993 Act, sections 8, 9 and 10

suitability of complainants. In other words, even if the complainant is eligible are they also suitable?

2.5.13 We normally expect the aggrieved person to make the complaint themselves unless they are unable to act for themselves. Our Acts require that complaints are made to us by the 'person aggrieved', or by a personal representative, a member of their family or other individual suitable to represent them or by a person or body suitable to represent them (Statutory requirement²). It is very important that we give appropriate consideration to this question as once we accept a complaint made by a specific person it will result in them receiving (and in addition entitle them to access) evidence and other information obtained during the course of our consideration of the case.

2.5.14 Usually complaints are made to us by those who have been affected by the events (that is, they are an aggrieved person complaining on their own behalf) and so this would not be a concern³. However, we often receive complaints from family members, friends and representatives (such as solicitors, accountants, advice organisations or advocacy bodies). In all of these situations we need to consider whether the complainant is a suitable person to bring the complaint on the aggrieved's behalf. Some key considerations are:

- Whether the aggrieved is aware of the complaint being made on their behalf.
- Whether the aggrieved has given consent for the complaint to be made.
- The capacity of the aggrieved to make the complaint.

2.5.15 There are a number of different permutations to this question. Remember to treat each case on its merits. Any questions arising from this should be discussed with line management in the first instance and, if necessary after that, referred for legal advice and/or to the Assessment Panel.

2.5.16 In any case in which someone writes to complain on behalf of someone else then we need to consider if they are the complainant or a representative. We can draw a distinction between an aggrieved person who is able to act for themselves but chooses to have someone represent them during all or part of the complaints process (in that case the person aggrieved would probably still be treated as a complainant) and an aggrieved person who has someone else act as the complainant. Please note that under both the 1967 and 1993 Acts we have specific power to determine whether any person may be represented (by a lawyer or otherwise) in an investigation.)

2.5.17

2.5.18 The relevant Visualfiles entries are either '*Suitable complainant*' or '*Not suitable complainant*'.

Time bar

² 1967 Act, section 6(2); 1993 Act, section 9(3)

³ Although there may be cases when their obtaining access to even their own information may create a risk to themselves or to others, this is a consideration, not necessarily a bar to our accepting the case.

2.5.19 The 1993 and 1967 Acts limit the time which complainants have to raise their complaints (Statutory requirement⁴).

2.5.20 For Health complaints, the complainant has one year from the day on which they first became aware of the matters complained of to make the complaint to PHSO.

2.5.21 For Parliamentary complaints, the aggrieved has 12 months from the day on which they first had notice of the matters complained about to make the complaint to a Member of Parliament.

2.5.22 Both Acts allow for the time bar to be waived at the Ombudsman's discretion.

2.5.23 When assessing the question of whether the time bar applies we should consider the following:

- Was the complaint made within the time limit detailed above?
 - If so, then we record the complaint as being '*Not out of time*'.
 - If not, are there any special circumstances that might warrant the time bar being waived?

2.5.24 If the complaint is out of time, then we must consider whether it might be appropriate to exercise discretion to assess the enquiry further. Those circumstances could include the following (this is not an exhaustive list):

- Complainant's lack of awareness about who to complain to (especially if not told by the body being complained about).
- Ill health of the complainant or a close member of their family.
- The scale of the injustice.
- Wider public interest.
- Complainant's pursuit of the complaint through local and/or second tier complaint resolution took them past the statutory time bar.

In order to reach that decision we may need to ask the complainant to provide information or clarification about their reasons for delay in bringing the case to the Ombudsman (if not apparent from the original complaint).

2.5.25 A specific briefing from the PHSO Legal Team on the statutory 'time bars' is available [\[link\]](#).

2.5.26 An enquiry that is assessed as out of time, with no special reasons to waive the time bar, is recorded as '*Out of time - negative discretion exercised*'. Where we see reason to exercise discretion, we record the decision on Visualfiles as '*Out of time - positive discretion exercised*'.

2.5.27 Please note that even if a case meets the criteria of the statutory time bar it may be impractical to investigate distant events, particularly in the absence of contemporary evidence upon which to base an investigation. A decision to decline an enquiry for

⁴ Section 6(3), 1967 Act; section 9(4) 1993 Act

investigation on that basis would be considered under ‘probability of a worthwhile outcome’ [link].

Reasonable to pursue alternative legal remedy

2.5.28 As discussed in section 2.4 [link], both the 1993 and 1967 Acts prevent PHSO investigating matters where the aggrieved has or had a right of appeal to a tribunal or court of law, except in circumstances where it was not reasonable for the person to have resorted to that remedy (Statutory requirement⁵). PHSO policy deriving from these aspects of the legislation was developed and clarified in detail during 2007. In summary, if a full alternative legal remedy has already been achieved, this takes the complaint out of our remit, but there are a number of permutations to this. (PHSO policy requirement).

2.5.29 The consideration of this question at the further assessment stage relates to complaints where a full remedy has not been achieved: this includes circumstances where such a remedy is not available, where it has been pursued unsuccessfully; where the complainant has decided not to resort to it; or where the complainant did not know that one was available.

2.5.30 The assessment of this question is approached in two stages:

- Is there an alternative legal remedy available? A legal remedy is the opportunity to take a complaint to a court or tribunal which could provide the remedy or substantially the remedy that the complainant is seeking. If no such remedy is available we record an assessment of ‘*No alternative legal remedy available*’.
- Is it reasonable to resort to an alternative legal remedy? We must consider whether it is reasonable for the complainant to use this alternative remedy. Possible reasons for thinking it unreasonable would include cost, time and whether the whole or most of the remedy can be achieved. If we propose that an alternative legal remedy is the proper route for the complaint, this is declined as ‘*Reasonable to pursue an alternative legal remedy*’. If we are content that there is an alternative legal remedy available but that it would not be reasonable for the complainant to use it, then we record the assessment as ‘*Not reasonable to pursue alternative legal remedy*’.

2.5.31 For more information, please refer to the detailed guidance in this respect.

Exercise of general discretion

Indication of maladministration, evidence of unremedied injustice and probability of a worthwhile outcome

2.5.32 These are the three key questions in determining whether PHSO should accept an enquiry for investigation. (PHSO policy requirements)

2.5.33 It is impossible to be prescriptive about how to assess these three questions as it requires a careful assessment of the individual circumstances of each enquiry as well as experience and knowledge of the types of complaint being referred to the Ombudsman.

⁵ 1967 Act, section 5(2); 1993 Act, section 4

Indication of maladministration?

2.5.34 A decision to accept an enquiry for investigation will generally be based in part upon there being some indication of maladministration. On a practical basis, PHSO needs something specific upon which to base an investigation other than the complainant's dissatisfaction with the action of the body concerned. However, do not expect the complainant to prove their case conclusively at the outset and bear in mind that they may have only limited access to information or papers relevant to their complaint. Depending on the circumstances of the case, a persuasive or cogent account by the complainant may be sufficient although some documentary evidence, where applicable, is preferable.

2.5.35 Taking a view, as part of the assessment process, on whether there is some indication of maladministration will also include referencing the general standard (the Ombudsman's Principles) and any specific standards relevant to the case (such as legislation, guidance and professional standards). In respect of health complaints, two new considerations were introduced during 2009: first, the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 which provides the legislative framework for the new unified health and social care complaints system; and secondly, the NHS Constitution. Both the Regulations and the Constitution will have relevance to health assessments and it is important that staff are familiar with their content and reference them as appropriate when undertaking assessment work.

2.5.36 The fact that a complainant is dissatisfied with or disagrees with the actions of a body in jurisdiction does not necessarily mean that the body has acted maladministratively. Nor does every mistake made by a body in jurisdiction necessarily equate with there having been maladministration. Where we assess that a body's actions (including the service provided by that body and its response to a complaint) are reasonable then an enquiry will normally be declined as 'no indication of maladministration'.

Evidence of unremedied injustice?

2.5.37 Again, there will need to be some evidence of unremedied injustice to the aggrieved. There may have been maladministration but PHSO's intervention can only be justified where that has, or is alleged to have, caused an injustice to the aggrieved; the 1967 and 1993 Acts say that there must be a complaint of injustice (or hardship) sustained **in consequence** of maladministration. In addition, even if an injustice has resulted from the maladministration it may already have been remedied by the body in jurisdiction and in those circumstances there would be unlikely to be a basis for PHSO to intervene.

2.5.38 Where there is some indication of maladministration in the actions of a body in jurisdiction (including the service provided by that body or its response to a complaint) then we should consider if any injustice or hardship has arisen in consequence. If there is not (or if the body has already acted to remedy any injustice or hardship), then an enquiry will normally be declined as 'no unremedied injustice'.

2.5.39 However, where injustice or hardship has not been remedied it may be possible for PHSO to take action to address those failings (for example, by providing further explanations or by asking a clinical adviser to comment). Depending on the extent of the failings identified and the work undertaken, the cases could be closed as either 'no

unremedied injustice' or 'no probability of a worthwhile outcome'. This type of outcome could involve obtaining further papers from the body to inform our decision, but would not normally extend as far as asking a body to undertake action itself.

Probability of a worthwhile outcome?

2.5.40 We need to think about whether we can 'add value' by investigating the complaint. If we uphold the complaint are we likely to be able to achieve the remedy sought by the complainant? Would the complainant be interested in a lesser remedy? Are we likely to be able to reach a finding (the availability of contemporary evidence and/or time elapsed since the matters complained may be valid considerations here)?

2.5.41 We should also bear in mind that a worthwhile outcome could include a complaint not being upheld: in terms of providing assurance to the body in jurisdiction and/or the complainant that the body in jurisdiction acted properly or reasonably in the circumstances.

2.5.42 If we are proposing to accept a case for investigation then all three of those questions (maladministration; injustice; worthwhile outcome) should receive a positive answer.

2.5.43 Please note that any proposal to accept an enquiry for investigation must be referred to the PHSO Assessment Panel. Please refer to section 2.7 for more information.

Other dispute resolution forum appropriate?

2.5.44 There are some complaints where, potentially, we and another complaint handler might both have a remit to investigate. Usually, we expect only one of us to investigate (with prior consultation of the other body); but it may be in the best interests of all concerned that we refer the complainant to the other complaint handler. We need to record where we might have investigated but have chosen not to. Examples of this may include complaints about access to medical records where both the Health Service Ombudsman and the Information Commissioner have jurisdiction; or Victims' Code complaints which could be considered by the Parliamentary Ombudsman and the Independent Police Complaints Commission. Again, there are only positive and negative answers to the '*other dispute resolution forum appropriate*' field on Visualfiles.

Other discretionary reason to decline

2.5.45 The 1993 and 1967 Acts allow the Ombudsman, even if all the answers to the above questions indicate that we could investigate, to reasonably exercise discretion to decline to investigate. There may be a number of reasons for this, such as where a complainant does not co-operate with our consideration of their complaint (for example, refusing to accept the proposed scope of the investigation or attempting to place restrictions on the proposed investigation).

2.5.46 We should only answer '*Yes - explained on the assessment form*' if there is no other specific reason to decline, but if we are proposing that the enquiry is declined at this stage. Other than Tax Credit - Section 18 cases these are quite rare; if this applies to an enquiry, it will need to be treated as a 'Discuss' case at the Assessment Panel.

Court proceedings

2.5.47 The preliminary assessment guidance explained that the commencement or conduct of civil/criminal proceedings fell outside the Ombudsman's remit, but that any consideration of whether or not to investigate a decision to commence proceedings is one for the Ombudsman's discretion. Complaints of this nature need to be considered on their individual merits. But if proceedings are issued and the matter goes to court then we might decide not to investigate on the basis that it would be more appropriate for the complainant to raise issues about those proceedings with the court as part of any ensuing proceedings. However, we might consider investigating a complaint where a department said that it was going to issue proceedings but then the matter never came to court (particularly if there was delay between the initial announcement and the decision not to proceed).

'Linked to lead'

2.5.48 In some types of complaint, especially where a large number of people have been affected by the same error and seek a similar remedy, the Ombudsman might choose to assess and (if the cases are accepted) then investigate a small number of 'lead' complaints that exemplify the issues complained about. Those enquiries not being treated as 'lead' cases will be declined as 'linked to lead' but with the details of the complaint retained to allow us to take action, as necessary, to contact the complainant once the lead enquiry or investigation is completed. If an enquiry is subsequently made to us about a matter already covered by a 'lead' investigation, then we will also close the enquiry as being linked to the lead investigation and retain the details of the complaint with the other linked cases.

2.5.49 In closing enquiries as 'linked to lead' we should distinguish between those that are '*Linked to lead - properly made*' and '*Linked to lead - not properly made*'. In practice, this only applies to Parliamentary enquiries and is intended to capture details of linked cases where, in the future, we may need to advise that an MP referral will be necessary for further action to be taken.

Complaint withdrawn

2.5.50 If a complainant asks to withdraw their complaint during any part of the assessment process then we will normally agree to that request. The enquiry will be recorded as '*Withdrawn - withdrawn by complainant*'.

2.5.51 If a complainant fails to respond to a request for further information and that lack of information means we are unable to complete the assessment then the enquiry will be recorded as '*Withdrawn - complainant failed to respond*'.

2.5.52 If an MP seeks to withdraw a Parliamentary complaint that they have referred, then we would consider the request. If the complainant supported the withdrawal then we would normally agree to that request. However, we would not be under any obligation to treat it as withdrawn as once an enquiry has been properly referred by an MP we are able to proceed with our consideration, without the need for their continued support for the complaint.

2.5.53 In the unusual circumstances in which an MP sought to withdraw a complaint, but the complainant wanted us to continue, the Legal Team should be approached for advice.

2.5.54 Enquiries being treated as withdrawn at the preliminary assessment stage should be authorised by a Customer Services Manager. (PHSO policy requirement)

2.5.55 Enquiries being treated as withdrawn at the further assessment stage should be authorised by an Assessment Manager. (PHSO policy requirement)

Action codes

2.5.56 As well as recording why we cannot or will not investigate a complaint, we also capture what we did with it. This will 'fit' our decision not to investigate. If we say a complaint is premature, then we would refer it to the body or a second tier complaint handler; if we say there is no indication of maladministration then we would say that we are declining to investigate, explaining this to the complainant, and taking no other action.

2.5.57 If there is more than one closure code for a complaint (applicable where there is more than one body to be assessed) then it is the action code that best matches the overall closure code that should be chosen.

Next steps

2.5.58 If the further assessment results in positive answers to the questions of maladministration, unremedied injustice and worthwhile outcome then the case should be referred to the PHSO Assessment Panel with a recommendation to accept it for investigation.

2.5.59 Cases which have not received a positive answer to those three questions may also be referred to the Panel for discussion, for example, cases where there is a finely balanced judgment to be taken; high risk cases; novel cases; cases which might set an important precedent; or cases that are part of a new theme or campaign complaint.

2.5.60 If the outcome of the further assessment is to decline the case for an investigation then a letter explaining the reasons for the decision needs to be prepared and issued.

Communicating the decision

2.5.61 The decision to decline an enquiry for investigation at the further assessment stage should be approved and signed off in line with the PHSO Delegation Scheme. (PHSO policy requirement)

2.5.62 In Parliamentary cases the decision letter should be addressed to the referring MP (Statutory requirement⁶) with a copy sent to the complainant under a brief covering letter.

2.5.63 In Health cases the decision letter should be addressed directly to the complainant (Statutory requirement⁷).

⁶ Section 10(1), 1967 Act.

2.5.64 If there is a separate aggrieved party who is not the complainant then we should consider on a case-by-case basis as to whether a separate copy of the decision letter should also be sent to them.

2.5.65 Professional representatives or advocates can also be sent copies of decision letters providing we have appropriate authorisation from the complainant/aggrieved for them to act on their behalf. (In cases where the representative or advocate is the complainant then the letter will have been addressed directly to them in any case.)

2.5.66 If we are issuing a final decision letter by email then it should be sent in secure pdf format .(PHSO policy requirement)

2.5.67 In some circumstances we will notify bodies in jurisdiction of decisions not to investigate. Please refer to the detailed guidance .

Naming conventions - clinical advisers

2.5.68 Where we take clinical advice as part of the assessment process we do not routinely name our Advisers in our decisions not to investigate. (PHSO policy requirement)

2.5.69 We should normally refer, where clinical advice has been taken, to ‘one of the Ombudsman’s clinical advisers’.

2.5.70 Please note that Visualfiles should be noted in all cases with an explanation of the suitability of the clinical Adviser who has been asked to provide advice. This information should normally be recorded on the clinical advice request pro-forma. (PHSO policy requirement)

2.5.71 Our general approach to responding to information requests relating to Advisers is set out below. However, if any member of staff is uncertain about whether information about any Adviser should be released then they should seek advice from their Manager and/or the FOI/DPA team.

2.5.72 If a complainant, or other party to the complaint, asks for information about an **internal Adviser** then we should normally respond as follows:

- **Requests for the identity and clinical discipline of the internal Adviser.** When such a request is made we should, as a courtesy, tell the adviser. These requests can normally be treated as a ‘course of business’ request and responded to by the case owner by providing the Adviser’s name and their area of expertise (for example, ‘General Practitioner’ or ‘Consultant Physician’). This information can be provided in response to any form of contact (written, email or telephone).
- **Requests for any additional information about the internal Adviser.** Requests made for information such as biographical details, qualifications, the specific

⁷ Section 14(2), 1993 Act.

location where the Adviser is employed in the NHS etc. should be noted and the case owner should then contact the FOI/DPA team for advice.

The FOI/DPA team will then provide advice on how to respond: they may advise that the information can be released and, if so, the case owner will be expected to respond to the enquiry. In other cases, it may be necessary for the FOI/DPA team to take ownership of the enquiry.

2.5.73 If an Assessor feels, at any stage of their consideration of the case, that there might be some associated risk in providing information about an Adviser to a complainant (or other party) then this should be noted in the assessment analysis, in the risk assessment on the case and flagged with the Adviser.

2.5.74 If an Adviser feels, as part of their consideration of a request for advice, that information about them should not be provided for any reason (in response to any future request) then they should ensure that this is flagged with the Assessor and the reasons noted on Visualfiles. If an information request is received then the Assessor should consult (as appropriate) with their Manager, the Adviser, relevant Lead Adviser and the FOI/DPA Team in order to reach a decision on how to respond to the request.

2.5.75 A request for **any information** about an **external Adviser** who has provided advice as part of the assessment process should be noted and the FOI/DPA team consulted for advice.

Decision letters signed by the Ombudsman

2.5.76 Please remember that substantive decision letters on cases referred by the Speaker of the House of Commons, the Chairman and members of the Public Administration Select Committee, the Chairman of the Health Select Committee, the Chairman of the Public Accounts Committee and the three main party leaders **must** be signed by the Ombudsman or, in her absence, the Deputy Ombudsman. (PHSO policy requirement).

2.5.77 The file, with appropriate final drafts for the Ombudsman's signature, should be referred via the relevant Director to the Ombudsman's Casework Management Team.

2.5.78 In Parliamentary cases, where a covering letter is required for the complainant's copy of the final decision letter, it can be signed by the Ombudsman as well, or by the member of staff carrying out the assessment if so desired. Please include an appropriate draft covering letter if one is required.

2.5.79 Any queries regarding cases to be signed by the Ombudsman should be directed to the Ombudsman's Casework Management Team.

Communication issues

2.5.80 Please remember to take account of any communication issues relevant to the complaint. For example:

- If English is not the complainant's first language, should we have the decision letter translated?

- If the complainant is partially sighted, should we use a larger font or coloured paper?
- Has the complainant requested the decision in a particular format, for example by email. **Note: if we send a copy of a decision letter by email then it must be sent in a secure pdf format.**

2.5.81 Points to remember when drafting a decision letter

- Focus on presenting clear and logical arguments for our decision.
- Try to avoid long chronologies or wholesale inclusion of evidence unless these are really necessary.
- When material needs to be included that would detract from the clarity of the body of the decision consider using annexes. The kinds of material that might be placed in an annex include chronologies, details of financial calculations or payments and lengthy extracts from other evidence (e.g. a direct quote from a body's response to us) or photocopies of documents upon which we have relied in reaching our decision or which have influenced our decision.
- Try to avoid repetition.
- It is important to have a letter which flows logically and makes the arguments clear, rather than packing in too much information.
- Remember to explain acronyms and to use plain language.
- Use active language and short sentences.
- Have empathy with the reader and write in a way that will promote understanding.
- The decision may be addressed to a Member of Parliament or a professional representative but, in drafting it, we should have the needs of the complainant or the aggrieved party in mind.
- When referring to Assessment decisions use the term 'we' rather than 'I'. For example, 'We have decided not to accept your complaint for investigation'.

Writing to complainants who are prisoners

2.5.82 Any correspondence between PHSO and a serving prisoner should have 'Prisoner's Confidential Access' marked on the envelope.

2.5.83 In addition the prisoner's unique prison number should be included next to their name in any correspondence and on the outside of envelopes. For example, Mr J Smith (xx1234). The unique number should also be included when the complainant is registered on Visualfiles.

2.5.84 Do not mark envelopes to prisoners with 'Rule 39': this marking is used for correspondence between prisoners and their legal advisers.

Sending important or sensitive documents

2.5.85 When sending (or returning) important or sensitive documents, PHSO's Security Committee have advised that Royal Mail's special/recorded delivery service and TNT courier both have a track and trace facility, and so can be regarded as reasonably secure. A decision should be taken on a case by case basis as to which service it is most appropriate to use.

Parliamentary and Health Service Ombudsman (PHSO) Casework Policy and Guidance

Section 2.7: The Assessment Panel and accepting a case for investigation

What is the Assessment Panel?

Accepting a case for investigation

Communicating the decision

Writing to the body: Parliamentary cases

Writing to the body: Health cases

Writing to any person specifically named in the complaint

Writing to the body: second tier complaint handlers

Cases awaiting allocation

Failure to respond

What is the Assessment Panel?

2.7.1 The PHSO Assessment Panel considers all cases which are being proposed to be accepted for investigation. It also considers cases referred for discussion before a decision is taken on whether to propose to investigate a case (for example, high risk cases, novel cases, cases where there is a fine judgment to be taken on the balance of the evidence).

2.7.2 The Assessment Panel normally consists of at least three members: the Ombudsman or Deputy Ombudsman as Chair; the Director (or one of the Deputy Directors) of Customer Services and Assessment; and an Operations Director.

2.7.3 Full details of the dates of Assessment Panels and the agendas are available to staff.

Accepting a case for investigation

2.7.4 A decision, in principle, to accept a case for investigation will be discussed by the PHSO Assessment Panel and taken by one of the Panel members. Each case is considered on its individual merits but any such decision will take into account the questions of maladministration, injustice and outcome/remedy discussed in sections 2.3 and 2.5 .

2.7.5 Please note that the decision can only be taken 'in principle' at this stage because the 1993 and 1967 Acts require the Ombudsman (where she 'proposes' to conduct an investigation) to offer the body in jurisdiction the opportunity to comment on the complaint). (Statutory requirement¹)

¹ 1993 Act, section 11(1); 1967 Act, section 7(1)

2.7.6 Case owners are responsible for ensuring that all relevant information (for example, clinical advice, previous assessment forms, reports by other complaint handlers) is included with the assessment form sent to the Panel for consideration. Case owners should attend the Panel when their cases are due to be discussed (or arrange for a colleague to attend in their absence). They are also responsible for noting Visualfiles with any relevant details of the Panel's discussion of their case (such as what elements of a case should or should not be investigated and any other specific issues that the Panel discusses in relation to the case) in order to maintain a proper audit trail of our decision making. Case owners should also ensure that the hard copy of the Assessment Panel form containing the Panel member's signature authorising the Panel's decision is retained on the case file. (PHSO policy requirements)

2.7.7 Individual complaints can consist of a number of separate grievances, possibly made against several different bodies. Not all of those grievances may be suitable for investigation and the decision, in principle, to accept a case for investigation will also take into account whether to investigate all or only some of the specific grievances made.

2.7.8 If, following a referral to the Panel a decision is taken not to accept an enquiry for investigation, then a letter explaining that decision should be sent as discussed in section 2.5 .

2.7.9 A decision on the scope of an investigation rests with PHSO, but we have to make the decision reasonably and in full knowledge of and after consideration of the complainant's wishes and the complaint as submitted. The decision at the Assessment Panel stage will focus on setting out the broad scope of the proposed investigation (that is, the broad areas that we are to investigate and any matters specifically excluded). Any further detailed clarification of the scope of an investigation will be carried out in the Investigation Directorate. If a case is accepted, in principle, for investigation, then the case will take on an investigation prefix (PA or HS) at that stage as the assessment part of our consideration has come to an end.

Communicating the decision

2.7.10 Once a decision has been taken, in principle, to accept a case for investigation, the decision needs to be communicated to the complainant and other relevant parties.

2.7.11 The Assessor responsible for the case will normally draft and issue letters explaining the decision to accept the case, in principle, for investigation, setting out the broad scope of the investigation and any complaints specifically excluded from the investigation (and the reasons for their exclusion).

2.7.12 The recipients of those letters are:

- the complainant (PHSO policy requirement).
 - We should explain that the Ombudsman is proposing to investigate the case, that the body in jurisdiction has, in line with a statutory requirement, been given an initial opportunity to comment on the complaint and that the case will be allocated to an Investigator as soon as possible.

- We should set out the broad scope of the proposed investigation and be clear about any elements of the complaint which are specifically excluded from the proposed investigation.
 - We should say that the Investigator will contact the complainant in due course to discuss how the case will be taken forward.
 - We should explain that the case will be held by the Allocation Team until an Investigator is available and that the complainant will be updated every four weeks (if the case is to be allocated immediately then we should say so and give the name of the Investigator).
- the body complained against (Statutory requirement²).
 - We should explain that the Ombudsman is proposing to investigate the complaint and that it will be allocated to an Investigator as soon as possible.
 - We should set out the broad scope of the proposed investigation and be clear about any elements of the complaint which are specifically excluded from the proposed investigation.
 - We should explain that the body has an initial opportunity to comment on the complaint and that, if it wishes to offer any comments at this stage, we would be pleased to receive them within normally two (maximum three) weeks. We should explain that the Investigator will be responsible for considering any initial comments that it wishes to make.
 - We should also explain that the body will have the opportunity to respond in more detail at a later stage in the investigation, including commenting on a draft of the investigation report.
 - We should explain that the case will be held by the Allocation Team until an Investigator is available and that the body will be updated every four weeks (if the case is to be allocated immediately then we should say and give the name of the Investigator).

And, where relevant:

- the aggrieved (PHSO policy requirement)
- representative (PHSO policy requirement)
- Member of Parliament (PHSO policy requirement)
- any person specifically named in the complaint as having taken or authorised the actions complained of. (Statutory requirement³)

Writing to the body: Parliamentary cases

2.7.13 We are required to give the 'Principal Officer' of the body complained against the opportunity to comment on the complaint (Statutory requirement⁴). Where complaints are made against government departments, we should write to the Permanent Secretary (or equivalent). In the case of other bodies, we should write to the Chief Executive (or equivalent). Where a complaint is made against an executive agency, the letter should

² 1967 Act, Section 7(1); 1993 Act, Section 11(1)

³ 1967 Act, Section 7(1); 1993 Act, Section 11(1)

⁴ 1967 Act, section 7(1)

normally be addressed to the Chief Executive⁵. Where a body to be investigated has a specific liaison or focal point for PHSO work then we should also copy the letter to them. (PHSO policy requirements)

Writing to the body: Health cases

2.7.14 We are required to offer the health service body, family health service provider or independent provider the opportunity to comment on the complaint (Statutory requirement⁶). Where a complaint is made against a health service body we should normally write to the Chief Executive; in respect of a family health service provider we should write direct to that body (for example a GP practice) and to the NHS body with whom they are contracted. Where an independent provider is to be investigated, we should write to the Chief Executive (or equivalent) of the provider and to the health service body for whom the independent provider was acting. (PHSO policy requirements)

Writing to any person specifically named in the complaint

2.7.15 We are required to offer any person specifically named in the complaint as having taken or authorised the actions complained of the opportunity to comment on the complaint. (Statutory requirement⁷) A person specifically named in the complaint is entitled to a separate opportunity to comment on the proposed investigation from that offered to the body / provider complained against. In circumstances where we are unable to trace or contact a named person and are consequently unable to carry out our statutory duty to afford them the opportunity to comment, then our policy is to make all reasonable efforts to trace the named person but that if we cannot do so, or cannot do so within a reasonable time, we may proceed without affording that opportunity. A decision on whether to proceed without affording that opportunity should be taken on case by case basis and taking into account all relevant circumstances, including the seriousness of the allegations made against the named person. Further information about recording details of 'named persons' is available in the General Guidance section [link to 'Named person' field on Visualfiles guidance].

2.7.16 In writing to that individual we should provide the same details of the complaint that we are proposing to investigate that we gave to the body and give them the opportunity to comment. We should also advise that they may be asked for further information or be interviewed as part of the investigation. We should also make it clear that they will have the opportunity to comment on any draft investigation report.

2.7.17 This letter should normally be sent via the Principal Officer and/or Chief Executive (or equivalent) and the named individual should be asked to confirm, within two weeks, that they have received details of the complaint (even if they do not wish to comment at that stage). (PHSO policy requirements) In any case where we do not have direct contact details for the named individual then it is acceptable to send them to the body for whom they work and ask them to be forwarded to that individual.

⁵ In some complaints against Executive Agencies we may decide to write direct to, or copy in, the Permanent Secretary of the parent department if the circumstances of the case seem to merit it. A decision on whether or not to involve the Permanent Secretary would normally be taken at the Assessment Panel.

⁶ 1993 Act, section 11

⁷ 1967 Act, section 7(1); 1993 Act, section 11(1)

2.7.18 In respect of Health complaints made against family health service providers or independent providers, you may need to take account of these additional factors:

- If a complaint is made against a sole practitioner then they should be recorded as a '*named person*' on Visualfiles. In writing to that practitioner to give them the opportunity to comment on the complaint we should make clear that this notification meets the requirements to notify both the provider and the person specifically named in the complaint.
- In all other cases (for example, where a Practice has more than Practitioner) then the opportunity to comment on the complaint should be sent separately to both the body / provider and to the person specifically named in the complaint.

Writing to the body: second tier complaint handlers

2.7.19 In cases where we are proposing to investigate **only** the handling by a second tier complaint handler we may be required by statute to provide the original body with details of the complaint that we are investigating against the second tier complaint handler and to give them the opportunity to comment:

- Where a second tier complaint handler is a separate body within our remit or otherwise in remit but an entirely separate entity from the original body, then we are not required to provide it with details of the complaint and to give it the opportunity to comment. However, in those circumstances we should give consideration to whether we should notify the original body of the investigation. In those circumstances we should only notify an original body or person complained about of an investigation against a second tier complaint handler if doing so is for the purposes of the investigation or the report. Examples of this would be where we are concerned that original documents may be lost or destroyed if they are not notified, or where we need comments from the original body/person complained about on any aspect of the investigation against the second tier complaint handler or on any recommendations or findings.
- Where the second tier complaint handler is not a separate body within remit but is acting as a complaint handler on behalf of the original body (for example, the Adjudicator, Independent Case Examiner and Independent Complaints Reviewer) then we are required to provide them with details of the complaint and give them the opportunity to comment as if we were investigating the complaint directly against the original body⁸.

Cases awaiting allocation

⁸ This is because any second tier complaint handler who is handling complaints on behalf of a department or body in remit as opposed to acting in a separate (legislative) capacity is taking administrative action on behalf of the body in remit. Any complaint that we propose to investigate about the administrative action involved in complaint handling triggers the normal legislative provisions relating to a fresh complaint against the original body (or someone acting on its behalf).

through contact with both the body and the complainant, a timely and personal remedy for the complainant/aggrieved.

Hierarchy of further assessments

2.5.8 The order in which the elements of an enquiry at further assessment should be considered are:

- Direct referral by an NHS body
- Specific discretion (suitability of complainant, time bar, alternative legal remedy)
- General discretion (indication of maladministration, evidence of unremedied injustice, probability of a worthwhile outcome, other dispute resolution forum appropriate, other discretionary reason to decline, link to lead investigation).

2.5.9 This represents the ‘hierarchy’ of the further assessment process. Even if a case is deemed to fail one of the earlier tests in the hierarchy it will still normally be necessary to consider some or all of the other categories (for example, if a complaint could be excluded by use of the statutory ‘time bar’, then we would still consider whether there were other compelling reasons to consider accepting the case for investigation). However, if a case does fail one of the earlier tests then the level of scrutiny required to be given to some of the later tests may be lessened (for example, if a complaint falls outside the statutory time bar and presents no indication of maladministration then we would be likely to decline the case and would not need to consider in depth the questions of unremedied injustice and worthwhile outcome).

2.5.10 In addition, the Visualfiles closure code for a decision not to investigate will generally be chosen to represent the highest level in the hierarchy leading to that decision (so a complaint that we have chosen not to investigate that fell outside the time bar and presented no indication of maladministration will be recorded as closed under ‘*specific discretion*’ with the ‘*out of time*’ closure detail rather than under ‘*general discretion*’ with the ‘*no indication of maladministration*’ closure detail).

Exercise of specific discretion

Suitable complainant

2.5.11 As discussed in section 2.4 both the 1967 Act and 1993 Act place restrictions on the person (or body) who may make a complaint to PHSO¹. Questions regarding the **eligibility** of a complainant are considered as part of the preliminary assessment .

2.5.12 While certain categories of complainant will always be excluded (for example, a Local Authority seeking to make a complaint on its own behalf), and hence out of remit we also need to undertake careful consideration of discretionary issues surrounding the suitability of complainants. In other words, even if the complainant is eligible are they also suitable?

2.5.13 We normally expect the aggrieved person to make the complaint themselves unless they are unable to act for themselves. Our Acts require that complaints are made to us by the ‘person aggrieved’, or by a personal representative, a member of their family or other

¹ 1967 Act, section 6; 1993 Act, sections 8, 9 and 10

2.5.21 For Parliamentary complaints, the aggrieved has 12 months from the day on which they first had notice of the matters complained about to make the complaint to a Member of Parliament.

2.5.22 Both Acts allow for the time bar to be waived at the Ombudsman's discretion.

2.5.23 When assessing the question of whether the time bar applies we should consider the following:

- Was the complaint made within the time limit detailed above?
 - If so, then we record the complaint as being '*Not out of time*'.
 - If not, are there any special circumstances that might warrant the time bar being waived?

2.5.24 If the complaint is out of time, then we must consider whether it might be appropriate to exercise discretion to assess the enquiry further. Those circumstances could include the following (this is not an exhaustive list):

- Complainant's lack of awareness about who to complain to (especially if not told by the body being complained about).
- Ill health of the complainant or a close member of their family.
- The scale of the injustice.
- Wider public interest.
- Complainant's pursuit of the complaint through local and/or second tier complaint resolution took them past the statutory time bar.

In order to reach that decision we may need to ask the complainant to provide information or clarification about their reasons for delay in bringing the case to the Ombudsman (if not apparent from the original complaint).

2.5.25 [...]

2.5.26 An enquiry that is assessed as out of time, with no special reasons to waive the time bar, is recorded as '*Out of time - negative discretion exercised*'. Where we see reason to exercise discretion, we record the decision on Visualfiles as '*Out of time - positive discretion exercised*'.

2.5.27 Please note that even if a case meets the criteria of the statutory time bar it may be impractical to investigate distant events, particularly in the absence of contemporary evidence upon which to base an investigation. A decision to decline an enquiry for investigation on that basis would be considered under 'probability of a worthwhile outcome'.

Reasonable to pursue alternative legal remedy

2.5.28 As discussed in section 2.4, both the 1993 and 1967 Acts prevent PHSO investigating matters where the aggrieved has or had a right of appeal to a tribunal or court of law, except in circumstances where it was not reasonable for the person to have

individual suitable to represent them or by a person or body suitable to represent them (Statutory requirement²). It is very important that we give appropriate consideration to this question as once we accept a complaint made by a specific person it will result in them receiving (and in addition entitle them to access) evidence and other information obtained during the course of our consideration of the case.

2.5.14 Usually complaints are made to us by those who have been affected by the events (that is, they are an aggrieved person complaining on their own behalf) and so this would not be a concern³. However, we often receive complaints from family members, friends and representatives (such as solicitors, accountants, advice organisations or advocacy bodies). In all of these situations we need to consider whether the complainant is a suitable person to bring the complaint on the aggrieved's behalf. Some key considerations are:

- Whether the aggrieved is aware of the complaint being made on their behalf.
- Whether the aggrieved has given consent for the complaint to be made.
- The capacity of the aggrieved to make the complaint.

2.5.15 There are a number of different permutations to this question. Remember to treat each case on its merits. Any questions arising from this should be discussed with line management in the first instance and, if necessary after that, referred for legal advice and/or to the Assessment Panel.

2.5.16 In any case in which someone writes to complain on behalf of someone else then we need to consider if they are the complainant or a representative. We can draw a distinction between an aggrieved person who is able to act for themselves but chooses to have someone represent them during all or part of the complaints process (in that case the person aggrieved would probably still be treated as a complainant) and an aggrieved person who has someone else act as the complainant. Please note that under both the 1967 and 1993 Acts we have specific power to determine whether any person may be represented (by a lawyer or otherwise) in an investigation.)

2.5.17 [...]

2.5.18 The relevant Visualfiles entries are either '*Suitable complainant*' or '*Not suitable complainant*'.

Time bar

2.5.19 The 1993 and 1967 Acts limit the time which complainants have to raise their complaints (Statutory requirement⁴).

2.5.20 For Health complaints, the complainant has one year from the day on which they first became aware of the matters complained of to make the complaint to PHSO.

² 1967 Act, section 6(2); 1993 Act, section 9(3)

³ Although there may be cases when their obtaining access to even their own information may create a risk to themselves or to others, this is a consideration, not necessarily a bar to our accepting the case.

⁴ Section 6(3), 1967 Act; section 9(4) 1993 Act

resorted to that remedy (Statutory requirement⁵). PHSO policy deriving from these aspects of the legislation was developed and clarified in detail during 2007. In summary, if a full alternative legal remedy has already been achieved, this takes the complaint out of our remit, but there are a number of permutations to this. (PHSO policy requirement).

2.5.29 The consideration of this question at the further assessment stage relates to complaints where a full remedy has not been achieved: this includes circumstances where such a remedy is not available, where it has been pursued unsuccessfully; where the complainant has decided not to resort to it; or where the complainant did not know that one was available.

2.5.30 The assessment of this question is approached in two stages:

- Is there an alternative legal remedy available? A legal remedy is the opportunity to take a complaint to a court or tribunal which could provide the remedy or substantially the remedy that the complainant is seeking. If no such remedy is available we record an assessment of '*No alternative legal remedy available*'.
- Is it reasonable to resort to an alternative legal remedy? We must consider whether it is reasonable for the complainant to use this alternative remedy. Possible reasons for thinking it unreasonable would include cost, time and whether the whole or most of the remedy can be achieved. If we propose that an alternative legal remedy is the proper route for the complaint, this is declined as '*Reasonable to pursue an alternative legal remedy*'. If we are content that there is an alternative legal remedy available but that it would not be reasonable for the complainant to use it, then we record the assessment as '*Not reasonable to pursue alternative legal remedy*'.

2.5.31 [...]

Exercise of general discretion

Indication of maladministration, evidence of unremedied injustice and probability of a worthwhile outcome

2.5.32 These are the three key questions in determining whether PHSO should accept an enquiry for investigation. (PHSO policy requirements)

2.5.33 It is impossible to be prescriptive about how to assess these three questions as it requires a careful assessment of the individual circumstances of each enquiry as well as experience and knowledge of the types of complaint being referred to the Ombudsman.

Indication of maladministration?

2.5.34 A decision to accept an enquiry for investigation will generally be based in part upon there being some indication of maladministration. On a practical basis, PHSO needs something specific upon which to base an investigation other than the complainant's dissatisfaction with the action of the body concerned. However, do not expect the complainant to prove their case conclusively at the outset and bear in mind that they may

⁵ 1967 Act, section 5(2); 1993 Act, section 4

have only limited access to information or papers relevant to their complaint. Depending on the circumstances of the case, a persuasive or cogent account by the complainant may be sufficient although some documentary evidence, where applicable, is preferable.

2.5.35 The fact that a complainant is dissatisfied with or disagrees with the actions of a body in jurisdiction does not necessarily mean that the body has acted maladministratively. Nor does every mistake made by a body in jurisdiction necessarily equate with there having been maladministration.

2.5.36 Where we assess that a body's actions (including the service provided by that body and its response to a complaint) are reasonable then an enquiry will normally be declined as 'no indication of maladministration'.

Evidence of unremedied injustice?

2.5.37 Again, there will need to be some evidence of unremedied injustice to the aggrieved. There may have been maladministration but PHSO's intervention can only be justified where that has, or is alleged to have, caused an injustice to the aggrieved; the 1967 and 1993 Acts say that there must be a complaint of injustice (or hardship) sustained **in consequence** of maladministration. In addition, even if an injustice has resulted from the maladministration it may already have been remedied by the body in jurisdiction and in those circumstances there would be unlikely to be a basis for PHSO to intervene.

2.5.38 Where there is some indication of maladministration in the actions of a body in jurisdiction (including the service provided by that body or its response to a complaint) then we should consider if any injustice or hardship has arisen in consequence. If there is not (or if the body has already acted to remedy any injustice or hardship), then an enquiry will normally be declined as 'no unremedied injustice'.

2.5.39 However, where injustice or hardship has not been remedied it may be possible for PHSO to take action to address those failings (for example, by providing further explanations or by asking a clinical adviser to comment). Depending on the extent of the failings identified and the work undertaken, the cases could be closed as either 'no unremedied injustice' or 'no probability of a worthwhile outcome'. This type of outcome could involve obtaining further papers from the body to inform our decision, but would not normally extend as far as asking a body to undertake action itself.

Probability of a worthwhile outcome?

2.5.40 We need to think about whether we can 'add value' by investigating the complaint. If we uphold the complaint are we likely to be able to achieve the remedy sought by the complainant? Would the complainant be interested in a lesser remedy? Are we likely to be able to reach a finding (the availability of contemporary evidence and/or time elapsed since the matters complained may be valid considerations here)?

2.5.41 We should also bear in mind that a worthwhile outcome could include a complaint not being upheld: in terms of providing assurance to the body in jurisdiction and/or the complainant that the body in jurisdiction acted properly or reasonably in the circumstances.

2.5.42 If we are proposing to accept a case for investigation then all three of those questions (maladministration; injustice; worthwhile outcome) should receive a positive answer.

2.5.43 Please note that any proposal to accept an enquiry for investigation must be referred to the PHSO Assessment Panel. Please refer to section 2.7 for more information.

Other dispute resolution forum appropriate?

2.5.44 There are some complaints where, potentially, we and another complaint handler might both have a remit to investigate. Usually, we expect only one of us to investigate (with prior consultation of the other body); but it may be in the best interests of all concerned that we refer the complainant to the other complaint handler. We need to record where we might have investigated but have chosen not to. Examples of this may include complaints about access to medical records where both the Health Service Ombudsman and the Information Commissioner have jurisdiction; or Victims' Code complaints which could be considered by the Parliamentary Ombudsman and the Independent Police Complaints Commission. Again, there are only positive and negative answers to the '*other dispute resolution forum appropriate*' field on Visualfiles.

Other discretionary reason to decline

2.5.45 The 1993 and 1967 Acts allow the Ombudsman, even if all the answers to the above questions indicate that we could investigate, to reasonably exercise discretion to decline to investigate. There may be a number of reasons for this, such as where a complainant does not co-operate with our consideration of their complaint (for example, refusing to accept the proposed scope of the investigation or attempting to place restrictions on the proposed investigation).

2.5.46 We should only answer '*Yes - explained on the assessment form*' if there is no other specific reason to decline, but if we are proposing that the enquiry is declined at this stage. Other than Tax Credit - Section 18 cases these are quite rare; if this applies to an enquiry, it will need to be treated as a 'Discuss' case at the Assessment Panel.

Court proceedings

2.5.47 The preliminary assessment guidance [link to 2.4] explained that the commencement or conduct of civil/criminal proceedings fell outside the Ombudsman's remit, but that any consideration of whether or not to investigate a decision to commence proceedings is one for the Ombudsman's discretion. Complaints of this nature need to be considered on their individual merits. But if proceedings are issued and the matter goes to court then we might decide not to investigate on the basis that it would be more appropriate for the complainant to raise issues about those proceedings with the court as part of any ensuing proceedings. However, we might consider investigating a complaint where a department said that it was going to issue proceedings but then the matter never came to court (particularly if there was delay between the initial announcement and the decision not to proceed).

'Linked to lead'

2.5.48 In some types of complaint, especially where a large number of people have been affected by the same error and seek a similar remedy, the Ombudsman might choose to investigate a small number of complaints that exemplify the issues complained about. If an enquiry is made to us about such a matter already covered by 'lead' investigations, we close the enquiry as being linked to the lead investigation but keep the details of the complaint: allowing us to take action, if necessary, to contact the complainant once the lead investigation is completed.

2.5.49 In closing enquiries as 'linked to lead' we should distinguish between those that are '*Linked to lead - properly made*' and '*Linked to lead - not properly made*'. In practice, this only applies to Parliamentary enquiries and is intended to capture details of linked cases where, in the future, we may need to advise that an MP referral will be necessary for further action to be taken.

Complaint withdrawn

2.5.50 If a complainant asks to withdraw their complaint during any part of the assessment process then we will normally agree to that request. The enquiry will be recorded as '*Withdrawn - withdrawn by complainant*'.

2.5.51 If a complainant fails to respond to a request for further information and that lack of information means we are unable to complete the assessment then the enquiry will be recorded as '*Withdrawn - complainant failed to respond*'.

2.5.52 If an MP seeks to withdraw a Parliamentary complaint that they have referred, then we would consider the request. If the complainant supported the withdrawal then we would normally agree to that request. However, we would not be under any obligation to treat it as withdrawn as once an enquiry has been properly referred by an MP we are able to proceed with our consideration, without the need for their continued support for the complaint.

2.5.53 In the unusual circumstances in which an MP sought to withdraw a complaint, but the complainant wanted us to continue, the Legal Team should be approached for advice.

2.5.54 Enquiries being treated as withdrawn at the preliminary assessment stage should be authorised by a Customer Services Manager. (PHSO policy requirement)

2.5.55 Enquiries being treated as withdrawn at the further assessment stage should be authorised by an Assessment Manager. (PHSO policy requirement)

Action codes

2.5.56 As well as recording why we cannot or will not investigate a complaint, we also capture what we did with it. This will 'fit' our decision not to investigate. If we say a complaint is premature, then we would refer it to the body or a second tier complaint handler; if we say there is no indication of maladministration then we would say that we are declining to investigate, explaining this to the complainant, and taking no other action.

2.5.57 If there is more than one closure code for a complaint (applicable where there is more than one body to be assessed) then it is the action code that best matches the overall closure code that should be chosen.

Next steps

2.5.58 If the further assessment results in positive answers to the questions of maladministration, unremedied injustice and worthwhile outcome then the case should be referred to the PHSO Assessment Panel with a recommendation to accept it for investigation.

2.5.59 Cases which have not received a positive answer to those three questions may also be referred to the Panel for discussion, for example, cases where there is a finely balanced judgment to be taken; high risk cases; novel cases; cases which might set an important precedent; or cases that are part of a new theme or campaign complaint.

2.5.60 If the outcome of the further assessment is to decline the case for an investigation then a letter explaining the reasons for the decision needs to be prepared and issued.

Communicating the decision

2.5.61 The decision to decline an enquiry for investigation at the further assessment stage should be approved and signed off in line with the PHSO Delegation Scheme. (PHSO policy requirement)

2.5.62 In Parliamentary cases the decision letter should be addressed to the referring MP (Statutory requirement⁶) with a copy sent to the complainant under a brief covering letter.

2.5.63 In Health cases the decision letter should be addressed directly to the complainant (Statutory requirement⁷).

2.5.64 If there is a separate aggrieved party who is not the complainant then we should consider on a case-by-case basis as to whether a separate copy of the decision letter should also be sent to them.

2.5.65 Professional representatives or advocates can also be sent copies of decision letters providing we have appropriate authorisation from the complainant/aggrieved for them to act on their behalf. (In cases where the representative or advocate is the complainant then the letter will have been addressed directly to them in any case.)

2.5.66 If we are issuing a final decision letter by email then it should be sent in secure pdf format. (PHSO policy requirement)

⁶ Section 10(1), 1967 Act.

⁷ Section 14(2), 1993 Act.

2.5.67 In some circumstances we will notify bodies in jurisdiction of decisions not to investigate. Please refer to the detailed guidance [link to 'Informing bodies within jurisdiction of decisions not to investigate'].

Naming conventions - clinical advisers

2.5.68 Where we take clinical advice as part of the assessment process we do not routinely name our Advisers in our decisions not to investigate. (PHSO policy requirement)

2.5.69 We should normally refer, where clinical advice has been taken, to 'one of the Ombudsman's clinical advisers'.

2.5.70 Please note that Visualfiles should be noted in all cases with an explanation of the suitability of the clinical Adviser who has been asked to provide advice. This information should normally be recorded on the clinical advice request pro-forma. (PHSO policy requirement)

2.5.71 Our general approach to responding to information requests relating to Advisers is set out below. However, if any member of staff is uncertain about whether information about any Adviser should be released then they should seek advice from their Manager and/or the FOI/DPA team.

2.5.72 If a complainant, or other party to the complaint, asks for information about an **internal Adviser** then we should normally respond as follows:

- **Requests for the identity and clinical discipline of the internal Adviser.** When such a request is made we should, as a courtesy, tell the adviser. These requests can normally be treated as a 'course of business' request and responded to by the case owner by providing the Adviser's name and their area of expertise (for example, 'General Practitioner' or 'Consultant Physician'). This information can be provided in response to any form of contact (written, email or telephone).
- **Requests for any additional information about the internal Adviser.** Requests made for information such as biographical details, qualifications, the specific location where the Adviser is employed in the NHS etc. should be noted and the case owner should then contact the FOI/DPA team for advice.

The FOI/DPA team will then provide advice on how to respond: they may advise that the information can be released and, if so, the case owner will be expected to respond to the enquiry. In other cases, it may be necessary for the FOI/DPA team to take ownership of the enquiry.

2.5.73 If an Assessor feels, at any stage of their consideration of the case, that there might be some associated risk in providing information about an Adviser to a complainant (or other party) then this should be noted in the assessment analysis, in the risk assessment on the case and flagged with the Adviser.

2.5.74 If an Adviser feels, as part of their consideration of a request for advice, that information about them should not be provided for any reason (in response to any future request) then they should ensure that this is flagged with the Assessor and the reasons

noted on Visualfiles. If an information request is received then the Assessor should consult (as appropriate) with their Manager, the Adviser, relevant Lead Adviser and the FOI/DPA Team in order to reach a decision on how to respond to the request.

2.5.75 A request for **any information** about an **external Adviser** who has provided advice as part of the assessment process should be noted and the FOI/DPA team consulted for advice.

Decision letters signed by the Ombudsman

2.5.76 Please remember that substantive decision letters on cases referred by the Speaker of the House of Commons, the Chairman and members of the Public Administration Select Committee, the Chairman of the Health Select Committee, the Chairman of the Public Accounts Committee and the three main party leaders **must** be signed by the Ombudsman or, in her absence, the Deputy Ombudsman. (PHSO policy requirement).

2.5.77 The file, with appropriate final drafts for the Ombudsman's signature, should be referred via the relevant Director to the Ombudsman's Casework Management Team.

2.5.78 In Parliamentary cases, where a covering letter is required for the complainant's copy of the final decision letter, it can be signed by the Ombudsman as well, or by the member of staff carrying out the assessment if so desired. Please include an appropriate draft covering letter if one is required.

2.5.79 Any queries regarding cases to be signed by the Ombudsman should be directed to the Ombudsman's Casework Management Team.

Communication issues

2.5.80 Please remember to take account of any communication issues relevant to the complaint. For example:

- If English is not the complainant's first language, should we have the decision letter translated?
- If the complainant is partially sighted, should we use a larger font or coloured paper?
- Has the complainant requested the decision in a particular format, for example by email. **Note: if we send a copy of a decision letter by email then it must be sent in a secure pdf format.**

2.5.81 Points to remember when drafting a decision letter

- Focus on presenting clear and logical arguments for our decision.
- Try to avoid long chronologies or wholesale inclusion of evidence unless these are really necessary.
- When material needs to be included that would detract from the clarity of the body of the decision consider using annexes. The kinds of material that might be placed in an annex include chronologies, details of financial calculations or payments and lengthy extracts from other evidence (e.g. a direct quote from a body's response to

us) or photocopies of documents upon which we have relied in reaching our decision or which have influenced our decision.

- Try to avoid repetition.
- It is important to have a letter which flows logically and makes the arguments clear, rather than packing in too much information.
- Remember to explain acronyms and to use plain language.
- Use active language and short sentences.
- Have empathy with the reader and write in a way that will promote understanding.
- The decision may be addressed to a Member of Parliament or a professional representative but, in drafting it, we should have the needs of the complainant or the aggrieved party in mind.
- When referring to Assessment decisions use the term 'we' rather than 'I'. For example, 'We have decided not to accept your complaint for investigation'.

Writing to complainants who are prisoners

2.5.82 Any correspondence between PHSO and a serving prisoner should have 'Prisoner's Confidential Access' marked on the envelope.

2.5.83 In addition the prisoner's unique prison number should be included next to their name in any correspondence and on the outside of envelopes. For example, Mr J Smith (xx1234). The unique number should also be included when the complainant is registered on Visualfiles.

2.5.84 Do not mark envelopes to prisoners with 'Rule 39': this marking is used for correspondence between prisoners and their legal advisers.

Parliamentary and Health Service Ombudsman (PHSO) Casework Policy and Guidance

Section 2.6: Resolution through intervention

When to consider a resolution through intervention

What types of case are suitable for attempted resolution through intervention?

How do we define an intervention?

Process for attempting a resolution through intervention

Communicating the decision

Visualfiles

Post-intervention action

When to consider a resolution through intervention

2.6.1 We should consider (throughout the assessment process) whether any action could be agreed with the body in jurisdiction to secure a reasonable outcome for the complainant through an 'intervention'. The intention of such an intervention is to secure, through contact with both the body and the complainant, a timely and personal remedy for the complainant/aggrieved.

What types of case are suitable for attempted resolution through intervention?

2.6.2 An intervention would normally be considered only where we have assessed that a case is in remit, has been properly made and where we have some indication of maladministration and an injustice in consequence to the complainant. However, there may be circumstances in which interventions can be attempted at an earlier stage (providing a complaint is within remit).

2.6.3 Cases suitable for intervention are also most likely to present a clear, simple and achievable remedy. Examples of such remedies include: obtaining compensation for clear or admitted errors; getting apologies and/or explanations sent to the complainant; or getting a delayed claim, appeal or application progressed.

2.6.4 Please note that a number of cases will not be suitable for attempted resolution (for example those which are complex, high risk or where the subject matter of the complaint is particularly serious) and these should be referred to the Assessment Panel with either a proposal to either accept for investigation or to discuss whether to investigate.

How do we define an intervention?

2.6.5 Attempted interventions should (PHSO policy requirement):

- Focus on obtaining a personal remedy for the complainant/aggrieved.

- Seek to obtain a specific response from the body that will provide what is, in our view, a reasonable remedy for the complainant/aggrieved.

2.6.6 A resolution by intervention is where a body takes action to resolve finally a complaint. This does not apply to cases where we ask bodies in jurisdiction to undertake consideration or rework of a complaint in order for complaints procedures to be completed satisfactorily. Those categories of cases will be treated as ‘premature’.

2.6.7 Please note that the judgment on whether a reasonably remedy has been provided is one for PHSO. It follows that we may decide to decline a complaint for investigation on the basis that a resolution through intervention has been achieved even in the face of objections from the complainant. Although we will take into account the complainant’s views on the proposed remedy before deciding whether to close a case on the basis of a successful intervention.

2.6.8 Please note that we accept a body in jurisdiction’s agreement to act to provide an agreed remedy as sufficient grounds upon which to decline a complaint for investigation on the basis that a resolution through intervention has been achieved. If the body fails to act within a reasonable timescale (or at all) to provide the remedy then a decision will be taken on a case by case basis as to how to proceed. If a complainant is dissatisfied with a remedy which we consider to be reasonable then the matter should be referred to the Review Team as a potential complaint about us.

Process for attempting a resolution through intervention

2.6.9 Once it has been decided to attempt an intervention, then the body in jurisdiction should be approached (it may also be necessary to contact the complainant first in order to assist with our understanding of the complaint, what outcome they are seeking etc.). The amount of information that it is necessary to supply the body should be determined on a case-by-case basis but we should generally:

- Set out sufficient background to the complaint and summarise our assessment of it, highlighting the perceived maladministration and unremedied injustice.
- Ask the body to consider the complaint as set out.
- Ask the body to issue a written apology to the complainant/aggrieved.
- Explain to the body what specific actions (other than the apology) we would like it to take to address/remedy the injustice.
- Offer to discuss any elements of the case.
- Set a specific date for the body to let us have a substantive response (up to a maximum of two weeks).

2.6.10 Initial contacts in order to achieve resolution can be made with bodies in jurisdiction by telephone (for example, with complaints managers or liaison points). But it may also be necessary to put some requests in writing (including by email).

2.6.11 In most cases the intervention attempt should be ‘one time only’. In that we will give the body in jurisdiction one opportunity to provide the apology and, where appropriate, take any other specific actions. (Although if we make initial contact with a body by telephone and it asks us to formalise the request and/or provide more information in writing, then we should consider such requests on a case-by-case basis).

2.6.12 If the body accepts the proposed action, then we should obtain written confirmation (email is acceptable) from it of the exact action it has agreed to take. This confirmation should include a specific timescale within which the body will implement the agreed remedy (we would usually expect that timescale to be within four weeks; although this may need to be varied depending on the nature of the agreed remedy). (PHSO policy requirement)

2.6.13 We should then contact the complainant (normally by telephone) to say that we agree that there is some indication of maladministration on the part of the body complained about and to explain what action the body has agreed to take. We should also explain that we will confirm our decision in writing and will monitor the body's compliance with the agreed remedy. If the complainant expresses strong objections to the adequacy of the proposed remedy then we should consider whether it is appropriate to proceed with closing the case as an intervention. The assessment of any such objections and the rationale for proceeding with the intervention in those circumstances should be recorded fully on Visualfiles. (PHSO policy requirement)

2.6.14 If we are unable to secure a reasonable remedy by intervention (for example, if the body refuses to do so) then the enquiry should be reconsidered by the Assessor and a decision taken on whether it should be referred to the Assessment Panel (as either a 'discuss' or 'accept') or whether it should be declined. (PHSO policy requirement)

Communicating the decision

2.6.15 Please remember that cases that are being treated as successful interventions are being declined for investigation and should be approved and signed off in line with the PHSO Delegation Scheme. (PHSO policy requirement)

2.6.16 You should follow the detailed guidance set out in section 2.5 on communicating the decision . Please remember that the decision letter must explain the action that the body has agreed to take and that PHSO will monitor the body's compliance with any agreed remedy. (PHSO policy requirement)

Visualfiles

2.6.17 Intervention cases which result in the case being declined will use the relevant closure codes for declined enquiries. Most successful interventions are likely to be declined as '*no unremedied injustice*'. However, some may be declined as '*no worthwhile outcome*'. The action code '*intervention short of an investigation*' must be entered on Visualfiles for all attempted interventions. (PHSO policy requirement)

2.6.18 Where a case is being recorded as an '*intervention short of an investigation*' a 'compliance plan' for each action proposed to resolve a complaint should also be added to Visualfiles, including on cases where the body rejects the proposed remedy (PHSO policy requirement).

Post-intervention action

2.6.19 If the complainant is dissatisfied with our decision to close the case on the basis of the remedy promised (for example, if they believe the actions we have asked the body to

undertake do not offer a sufficient remedy) then the contact would normally be referred to the Review Team as a potential complaint about us . A decision on whether or not to accept a complaint for review before the body has had the opportunity to implement the proposed review will be taken by the Review Team on a case-by-case basis.

2.6.20 A body's compliance with an agreed resolution through intervention will be monitored by the Assessment Outcomes Officer in Customer Services and Assessment. If a body fails to implement the agreed remedy (for example, if it has done something different) or if it does not act within the promised timescale then a decision will be taken on a case by case basis on how to proceed.

Parliamentary and Health Service Ombudsman (PHSO) Casework Policy and Guidance

Section 2.7: The Assessment Panel and accepting a case for investigation

What is the Assessment Panel?

Accepting a case for investigation

Communicating the decision

Writing to the body: Parliamentary cases

Writing to the body: Health cases

Writing to any person specifically named in the complaint

Writing to the body: second tier complaint handlers

Cases awaiting allocation

Failure to respond

What is the Assessment Panel?

2.7.1 The PHSO Assessment Panel considers all cases which are being proposed to be accepted for investigation. It also considers cases referred for discussion before a decision is taken on whether to propose to investigate a case (for example, high risk cases, novel cases, cases where there is a fine judgment to be taken on the balance of the evidence).

2.7.2 The Assessment Panel normally consists of at least three members: the Ombudsman or Deputy Ombudsman as Chair; the Director (or one of the Deputy Directors) of Customer Services and Assessment; and an Operations Director.

2.7.3 Full details of the dates of Assessment Panels and the agendas are available to staff.

Accepting a case for investigation

2.7.4 A decision, in principle, to accept a case for investigation will be discussed by the PHSO Assessment Panel and taken by one of the Panel members. Each case is considered on its individual merits but any such decision will take into account the questions of maladministration, injustice and outcome/remedy discussed in sections 2.3 and 2.5 .

2.7.5 Please note that the decision can only be taken ‘in principle’ at this stage because the 1993 and 1967 Acts require the Ombudsman (where she ‘proposes’ to conduct an investigation) to offer the body in jurisdiction the opportunity to comment on the complaint). (Statutory requirement¹)

¹ 1993 Act, section 11(1); 1967 Act, section 7(1)

2.7.6 Case owners are responsible for ensuring that all relevant information (for example, clinical advice, previous assessment forms, reports by other complaint handlers) is included with the assessment form sent to the Panel for consideration. Case owners should attend the Panel when their cases are due to be discussed (or arrange for a colleague to attend in their absence). They are also responsible for noting Visualfiles with any relevant details of the Panel's discussion of their case (such as what elements of a case should or should not be investigated and any other specific issues that the Panel discusses in relation to the case) in order to maintain a proper audit trail of our decision making. Case owners should also ensure that the hard copy of the Assessment Panel form containing the Panel member's signature authorising the Panel's decision is retained on the case file. (PHSO policy requirements)

2.7.7 Individual complaints can consist of a number of separate grievances, possibly made against several different bodies. Not all of those grievances may be suitable for investigation and the decision, in principle, to accept a case for investigation will also take into account whether to investigate all or only some of the specific grievances made.

2.7.8 If, following a referral to the Panel a decision is taken not to accept an enquiry for investigation, then a letter explaining that decision should be sent as discussed in section 2.5 .

2.7.9 A decision on the scope of an investigation rests with PHSO, but we have to make the decision reasonably and in full knowledge of and after consideration of the complainant's wishes and the complaint as submitted. The decision at the Assessment Panel stage will focus on setting out the broad scope of the proposed investigation (that is, the broad areas that we are to investigate and any matters specifically excluded). Any further detailed clarification of the scope of an investigation will be carried out in the Investigation Directorate. If a case is accepted, in principle, for investigation, then the case will take on an investigation prefix (PA or HS) at that stage as the assessment part of our consideration has come to an end.

Communicating the decision

2.7.10 Once a decision has been taken, in principle, to accept a case for investigation, the decision needs to be communicated to the complainant and other relevant parties.

2.7.11 The Assessor responsible for the case will normally draft and issue letters explaining the decision to accept the case, in principle, for investigation, setting out the broad scope of the investigation and any complaints specifically excluded from the investigation (and the reasons for their exclusion).

2.7.12 The recipients of those letters are:

- the complainant (PHSO policy requirement).
 - We should explain that the Ombudsman is proposing to investigate the case, that the body in jurisdiction has, in line with a statutory requirement, been given an initial opportunity to comment on the complaint and that the case will be allocated to an Investigator as soon as possible.

- We should set out the broad scope of the proposed investigation and be clear about any elements of the complaint which are specifically excluded from the proposed investigation.
 - We should say that the Investigator will contact the complainant in due course to discuss how the case will be taken forward.
 - We should explain that the case will be held by the Allocation Team until an Investigator is available and that the complainant will be updated every four weeks (if the case is to be allocated immediately then we should say so and give the name of the Investigator).
- the body complained against (Statutory requirement²).
 - We should explain that the Ombudsman is proposing to investigate the complaint and that it will be allocated to an Investigator as soon as possible.
 - We should set out the broad scope of the proposed investigation and be clear about any elements of the complaint which are specifically excluded from the proposed investigation.
 - We should explain that the body has an initial opportunity to comment on the complaint and that, if it wishes to offer any comments at this stage, we would be pleased to receive them within normally two (maximum three) weeks. We should explain that the Investigator will be responsible for considering any initial comments that it wishes to make.
 - We should also explain that the body will have the opportunity to respond in more detail at a later stage in the investigation, including commenting on a draft of the investigation report.
 - We should explain that the case will be held by the Allocation Team until an Investigator is available and that the body will be updated every four weeks (if the case is to be allocated immediately then we should say and give the name of the Investigator).

And, where relevant:

- the aggrieved (PHSO policy requirement)
- representative (PHSO policy requirement)
- Member of Parliament (PHSO policy requirement)
- any person specifically named in the complaint as having taken or authorised the actions complained of. (Statutory requirement³)

Writing to the body: Parliamentary cases

2.7.13 We are required to give the 'Principal Officer' of the body complained against the opportunity to comment on the complaint (Statutory requirement⁴). Where complaints are made against government departments, we should write to the Permanent Secretary (or equivalent). In the case of other bodies, we should write to the Chief Executive (or equivalent). Where a complaint is made against an executive agency, the letter should

² 1967 Act, Section 7(1); 1993 Act, Section 11(1)

³ 1967 Act, Section 7(1); 1993 Act, Section 11(1)

⁴ 1967 Act, section 7(1)

normally be addressed to the Chief Executive⁵. Where a body to be investigated has a specific liaison or focal point for PHSO work then we should also copy the letter to them. (PHSO policy requirements)

Writing to the body: Health cases

2.7.14 We are required to offer the health service body, family health service provider or independent provider the opportunity to comment on the complaint (Statutory requirement⁶). Where a complaint is made against a health service body we should normally write to the Chief Executive; in respect of a family health service provider we should write direct to that body (for example a GP practice) and to the NHS body with whom they are contracted. Where an independent provider is to be investigated, we should write to the Chief Executive (or equivalent) of the provider and to the health service body for whom the independent provider was acting. (PHSO policy requirements)

Writing to any person specifically named in the complaint

2.7.15 We are required to offer any person specifically named in the complaint as having taken or authorised the actions complained of the opportunity to comment on the complaint. (Statutory requirement⁷) A person specifically named in the complaint is entitled to a separate opportunity to comment on the proposed investigation from that offered to the body / provider complained against. In circumstances where we are unable to trace or contact a named person and are consequently unable to carry out our statutory duty to afford them the opportunity to comment, then our policy is to make all reasonable efforts to trace the named person but that if we cannot do so, or cannot do so within a reasonable time, we may proceed without affording that opportunity. A decision on whether to proceed without affording that opportunity should be taken on case by case basis and taking into account all relevant circumstances, including the seriousness of the allegations made against the named person. Further information about recording details of 'named persons' is available in the General Guidance section [link to 'Named person' field on Visualfiles guidance].

2.7.16 In writing to that individual we should provide the same details of the complaint that we are proposing to investigate that we gave to the body and give them the opportunity to comment. We should also advise that they may be asked for further information or be interviewed as part of the investigation. We should also make it clear that they will have the opportunity to comment on any draft investigation report.

2.7.17 This letter should normally be sent via the Principal Officer and/or Chief Executive (or equivalent) and the named individual should be asked to confirm, within two weeks, that they have received details of the complaint (even if they do not wish to comment at that stage). (PHSO policy requirements) In any case where we do not have direct contact details for the named individual then it is acceptable to send them to the body for whom they work and ask them to be forwarded to that individual.

⁵ In some complaints against Executive Agencies we may decide to write direct to, or copy in, the Permanent Secretary of the parent department if the circumstances of the case seem to merit it. A decision on whether or not to involve the Permanent Secretary would normally be taken at the Assessment Panel.

⁶ 1993 Act, section 11

⁷ 1967 Act, section 7(1); 1993 Act, section 11(1)

2.7.20 If an investigation has to await allocation to an Investigator then the case will be held by the Allocation Team in CS&A. The Allocation Team have responsibility for holding the case file and issuing updates to the relevant parties.

2.7.21 The Allocation Team will also be responsible for managing interim contact from the complainant and the body complained against. Be aware that responses to a proposed investigation or contact about cases awaiting allocation may need to be referred to the Review Team as possible complaints about us .

2.7.22 Cases awaiting allocation to an Investigator should have interim letters issued to the relevant parties every four weeks (PHSO policy requirement). Those updates should:

- apologise for the delay;
- explain that the case is still awaiting allocation to an Investigator;
- explain (where appropriate) any case-specific reasons for the delay;
- provide information about the estimated time, based on current workload, for allocating the investigation;
- set the timescale for the next update; and
- provide a named contact for the complainant.

Failure to respond

2.7.23 If the body in jurisdiction fails to respond, by the date set, to the notification of the proposed investigation then we should chase progress by telephone. Depending on the body's response it may be acceptable to agree a new date. In cases of prolonged delay or potential non-co-operation, the case should be escalated appropriately and the risk assessment of the case reviewed.

2.7.24 Even if a body does not wish to comment on the complaint at this stage, then we would still expect it to respond to advise us of that.

2.7.25 The agreed length of extensions to response times will depend on the individual circumstances of the case.