

# Alternative legal remedy

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## The legislation

### Section 5 Parliamentary Commissioner Act 1967

" 5(2) - Except as hereinafter provided, the Commissioner shall not conduct an investigation under this Act in respect of any of the following matters, that is to say -

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

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

*Provided that the Commissioner may conduct an investigation notwithstanding that the person aggrieved has or had such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect him to resort or have resorted to it. "*

### Section 4 Health Service Commissioner Act 1993

4(1) - The Commissioner shall not conduct an investigation in respect of action in relation to which the person aggrieved has or had -

(a) a right of appeal, reference or review to or before a tribunal constituted by or under any enactment or by virtue of Her Majesty's prerogative, or

(b) a remedy by way of proceedings in any court of law,

*unless the Commissioner is satisfied that in the particular circumstances it is not reasonable to expect that person to resort or have resorted to it.*

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## Is there an alternative legal remedy?

I.e. could a court or a tribunal provide a substantially complete remedy for the matter complained about?

We need to look first at whether the complainant has a legal cause of action in relation to his claim, not whether he would necessarily succeed in such an action. A legal cause of action is basically the right to seek judicial redress or relief against another, for example in negligence, breach of confidence, debt or contract. (See Schedule in the attached Annex 1 for details of the most common causes of action).

Where the statutory/legal process cannot address the injustice or aspects of the injustice, we can investigate and where appropriate make recommendations to remedy that injustice, on the basis that there is/was no available alternative [legal] remedy for that injustice.

For example: A court action cannot be brought for most examples of so-called "classic" or "pure" maladministration such as lost files/information, rudeness, some delays etc.

The courts are limited in the sorts of redress they can offer. Most redress is financial,<sup>1</sup> although the courts can sometimes order persons/bodies to carry out certain actions or stop certain actions. The courts cannot order remedy in the form of apologies, changes in process or

procedure, or explanations (although they may occur incidentally as a by-product of a legal claim).

Some cases may be looked at individually but the injustice only emerges when a number of cases are looked at together; not something the courts can easily do. For example, a complainant wanted to complain about inconsistency in decision - making by a public body, over several years and a number of different cases. In each case he could have judicially reviewed the individual decision, but it would have been difficult for him to have taken legal action in judicial review or otherwise against the body purely on the basis of "overall inconsistency", and by the time the alleged inconsistency had emerged he was out of time to take proceedings in respect of the earlier cases.

Remember:

- a) By the time complainants come to us they are often out of time to take legal proceedings. This may well mean we can decide the complainant does not have an alternative legal remedy NOW, but does not mean (s)he did not have an alternative legal remedy **earlier** when (s)he was in time.
- b) The section only covers situations when the complainant can "resort" to that action, i.e. issue proceedings him/herself. We take the view that it does not cover situations when someone has no say in whether proceedings are initiated, e.g. an Inquest, defendant in civil or criminal proceedings. However, in these circumstances, we could exercise our general discretion not to accept a case for investigation (or to discontinue it) under s.5(5) PCA [s.3(2) HSCA] on the basis that the matter had been or could have been fully dealt with in those proceedings.

This section does not cover cases where an alternative (non-legal) remedy is available, e.g. access to the Information Commissioner, although for this we could again use s.5(5) PCA [s.3(2) HSCA], exercise of general discretion.

## **If there is an alternative legal remedy does the complainant have to use it?**

No, but we have to be "satisfied" that it is not reasonable to expect the complainant to use that legal remedy now or to have used it in the past.

Although it is a matter for us to decide in the exercise of our discretion whether we are so satisfied, that decision must be a reasonable one in case of challenge. Challenge is not a theoretical possibility; we have had to defend our decision-making on this point on a number of recent cases, and have to be able to demonstrate on each case that we have properly considered the matter.

The intention of the restriction in our legislation is to ensure that we do not encroach upon matters that are properly in the purview of the courts/Tribunals, or in the words of the Notes on Clauses to the PCA Bill; "the principle that the [Ombudsman] shall not usurp the functions of existing institutions which provide protection for the citizen in his dealings with the executive".

However, the Notes on Clauses also go on to acknowledge "the fact that the machinery of the law is sometimes too remote from his understanding, or forbidding, or costly, for the private citizen to invoke it in his defence".

It is for the Ombudsman to find the balance between these two positions.

## **What factors can we consider in determining whether it was reasonable for someone to resort to their legal remedy?**

We will generally expect complainants to use/have used the statutory process of appeal or legal process, if there is/was one available and if it can/could have addressed the injustice complained about.

When determining whether it is/was reasonable for a complainant not to resort to the available legal process, we will need to consider a number of factors. Some of those matters are:

- a) is the complaint a mixed one in that it contains complaints both about matters that could be addressed through court proceedings and matters that could not, or is seeking some remedies the court can provide and some the court cannot? If so, although we could ask the complainant to follow the available processes in respect of part of the injustice and only bring the remainder to us either simultaneously with their legal proceedings or subsequently, it may generally<sup>2</sup> be more customer focused (and practical) to allow the complainant to bring all of the complaint to us. We could exercise our discretion on the basis that it was not reasonable in these circumstances to expect the complainant to follow two processes simultaneously.
- b) If the legal remedy lies only in judicial review, is this a matter that properly falls within the remit of the Ombudsman? The courts have said that judicial review should be a remedy of last resort and that alternative non-legal remedies should be considered first, including the Ombudsman.<sup>3</sup>
- c) Even though there may be a theoretical cause of action available to a complainant, it may not be reasonable to expect him to use it if he could not possibly succeed because he simply does not have the evidence to support such a claim. It might be unreasonable to expect him to have such evidence (for example, because it is in the hands of the body complained about), but note that in ordinary civil proceedings (e.g. for negligence), parties can be ordered to provide relevant documents to the other party. We would have to assess the reasonableness of expecting someone to resort to this.
- d) Is a decision by a tribunal/court a pre-condition to any investigation by the Ombudsman? For example, a Tribunal may need to determine the complainant's entitlement to a benefit or a legal ruling from a court may be required on some aspect of the complaint before the Ombudsman can consider the matter further. In these circumstances, a complainant would be expected to follow the alternative route before making a complaint to us.
- e) Does the complaint revolve around the determination of legal issue on which only a court can make a binding determination? Such cases will generally be better placed in court. However, if those proceedings would be complex or expensive we might consider it unreasonable to expect a complainant to resort to them, and rather than decline a complaint on the basis of alternative legal remedy, we might choose to decline on the discretionary basis of no worthwhile outcome (from an investigation).
- f) Is the complainant seeking huge damages for, e.g. personal injury? If so, this may be better for the courts who are generally better placed for assessing complex personal injury claims (especially in any claim against an NHS trust where the NHSLA would be involved and there is a good chance of settlement).
- g) Would the cost of taking proceedings be disproportionate to the remedy sought, accepting that claimants rarely get all of their costs back even if costs are awarded in their favour?
- h) Where speed is of the essence, would it be speedier for us to look at the case than going to court? Note that courts can choose deal with matters expeditiously if such an application is made to them.

## NOTE

We should avoid relying on broad general propositions such as "The courts take too long", "legal proceedings are too expensive" or "we don't expect people to go to court in preference to coming to us". As always, cases must be considered on their individual merits.

The fact that a complainant has started by making a complaint under the NHS complaints system does not necessarily mean that it would be unreasonable to expect them to resort to an alternative legal remedy thereafter. The courts do not expect that the first a body will hear about a legal claim is when it receives a formal claim form issued by the courts: there are pre-action protocols under which a potential claimant is expected to write to the body setting out what they think went wrong, that they are thinking of claiming.

There may be some cases where it may be appropriate for the complainant to consider following the alternate legal remedy by commencing an appeal or other proceedings if there is a risk that recourse to that remedy will be time barred before the Ombudsman reaches a decision on the complaint.

## What if the alternative remedy has been used?

**Note:** threats of legal proceedings by a complainant, correspondence from a complainant's solicitors and even letters before action or pre-action protocol letters from a complainant **do not** constitute "resorting" to a legal remedy, until proceedings have actually been issued.

### a) Legal proceedings concluded

Where complainants have followed an alternative legal route and there is still an outstanding injustice because the matter was never determined by a court/tribunal<sup>4</sup> (**NB:** a refusal of permission in judicial review proceedings is generally not a "determination" of the matter) and was not settled by agreement, we can accept the whole complaint for consideration.

Where complainants have followed an alternative legal route and the matter has been determined by a court or tribunal, or settled by agreement, but the complainant has still been left with unremedied injustice, if the court or tribunal could not have addressed the unremedied injustice (or where the unremedied injustice is the cost or expense involved in the process) we can again accept the complaint for investigation on the basis that there was no alternative legal remedy available for the injustice claimed by the complainant.

**NOTE:** When deciding whether to investigate a matter the substance of which has already been through the court process but has still left an unremedied injustice that could not have been addressed by the court/tribunal, we also need to consider whether it is fair to take the case on. Bodies are entitled to expect a complaint to end at some point, and the complainant will have made the decision to pursue a legal remedy rather than come to the Ombudsman. Even though such a complaint is not caught by the alternative legal remedy provisions as there is no legal remedy for it, we could still decline to investigate on the basis of our general discretion.

### b) Legal proceedings still ongoing at the time of assessment

Where complainants are still following an alternative legal route on the same facts as the complaint made to us, we may often take the view that it was reasonable for a complainant to have resorted to that remedy (as he has done so). However, we may still need to look at the nature and extent of the legal claim and whether it could offer a remedy for all aspects of the complaint made to us.

Although we could still, in theory, take on the whole complaint in these circumstances for one or more of the reasons set out above in "What factors can we consider in determining whether it was reasonable for someone to resort to their legal remedy?" we would only rarely do so for the following reasons:

- The complainant may not wish to proceed with a complaint if he obtains what he needs from the proceedings

- It is likely to be practically difficult and may be oppressive for a body to manage a complaint alongside legal proceedings (see below "What happens if the complainant starts proceedings after we have begun to investigate?" If the complainant has chosen to pursue legal proceedings he should generally be left to complete them.
- It is likely to be very difficult for us to investigate without treading on the toes (or "usurping the functions") of the court
- The court may make findings of facts which could be of relevance to the complaint

In these circumstances, we generally decline to investigate, but invite the complainant to return to us once the outcome of the legal proceedings is known.

Likewise, where there are aspects of the complaint to us which are not contained in the case before the court we could take on just those matters, although again we usually choose to defer our decision on whether (and to what extent) to investigate until the outcome of the legal proceedings is known.

## **What about costs?**

Courts generally have the power to award costs within proceedings (the complainant is entitled to ask for costs even if the court fails to consider it of its own volition). If the court does not award costs, we cannot take on a complaint seeking the payment of costs by the body as the complainant had at the time (and may still have) the means of achieving those costs through the legal process.

Tribunals often do not have the power, or only limited power, to award costs. Parliament made the decision not to allow costs in certain Tribunals or in certain cases and we should not generally second-guess that. However, we very occasionally accept "costs" cases for investigation where the tribunal had itself expressed some variation of the view that there had been maladministration in the original decision making and that the complainant should not have been forced through the appeal process, or where the body concerned accepts that the need for an appeal was due to their maladministration.

**NOTE:** the mere overturning of a decision on appeal is not of itself an indication of maladministration in the original decision-making.

## **What happens if the complainant starts proceedings after we have begun to investigate?**

Section 5(2) in the PCA and s.4(1) in the HSCA apply when we are assessing whether to investigate.

Once we have started an investigation, if the complainant thereafter resorts to a legal remedy, we may continue with the investigation although consideration should be given as to whether the investigation should be discontinued.

This will depend on a number of factors, some of which are:

- The views of the complainant/body under investigation.
- Whether our continuing to investigate will encroach upon matters that are properly in the purview of the courts/Tribunals? (Although the section may not technically apply at this point, the reasoning behind the section may still be relevant).
- How far are we into the investigation? If we are near to the end it may be more appropriate to complete the investigation. If near the start, it may be more appropriate to discontinue.
- Is it fair on the body/individuals under investigation to continue with an investigation while legal proceedings are also on foot? It may be considered oppressive for a body or individual to have to cope with an Ombudsman investigation and legal proceedings at the same time. Note however that the 2009 NHS Complaints Procedure permits an

investigation to continue during legal proceedings, a police investigation or disciplinary proceedings. The DoH have said that "On receipt of a complaint in these circumstances, the Government will expect discussions to take place with the relevant authority (for example, legal advisors, the police, or the Crown Prosecution Service) to determine whether progressing the complaint might prejudice subsequent legal or judicial action".

- Can we continue to investigate properly in these circumstances? In one case a Trust asked us to postpone an investigation until the end of a phase of legal proceedings as they were finding it very difficult to comply with their lawyers' instructions on the legal case and our requirements simultaneously.

**NOTE:** Any decision to discontinue may only be taken by the Ombudsman or Deputy Ombudsman.

If we do decide to proceed, we may need to consider whether any recommendation by the Ombudsman could undermine or adversely affect any proceedings that started after the investigation began, or are in contemplation. In one complaint accepted for investigation, the complainant was intending to issue proceedings on a health case in which we had found serious service failure. After discussion with the complainant and his lawyer – who asked us not to make any financial recommendations – we made findings but no recommendations for remedy, stating instead that if the injustice to the complainant was not remedied as a result of the litigation we expected the Trust to consider an appropriate financial remedy at that stage.

## Summary

The Flowchart at Annex 2 neatly summarises whether or not we may accept a complaint involving alternative legal remedy for investigation.

a) In any case where there is an alternative remedy available to the complainant to **which he or she has not yet resorted**, we consider whether there is an available legal remedy and, if so, whether it could provide redress for all (or most) of the alleged injustice.

If it can provide substantially complete redress, we consider whether it is [was] reasonable to expect the complainant to use that remedy. If it is [was] so reasonable, we should decline the complaint in the usual way.

If the remedy cannot provide substantially complete redress, we then consider whether it is reasonable to expect the complainant to use that remedy for part of the injustice and complain to us for the remainder.

If we think it is reasonable for the complainant to use the remedy for part of the injustice, we may, subject to the usual other acceptance criteria, accept part of the complaint and ask the complainant to pursue the rest via the alternative process (or we may choose to defer a decision whether to investigate the balance of the complaint until after the outcome of the alternative process is known).

If we think it is not reasonable to expect them to split the complaint, we may accept all of the complaint.

b) In any case where there is an alternative legal remedy available to the complainant to **which he or she has already resorted**, we consider whether, at the end of the process, there is any outstanding injustice *which the legal process did not **and could not** have remedied*.

If yes, we may accept the complaint about that outstanding injustice.

Where the complainant is still in the process of following an alternative remedy but no decision has yet been given, although we may accept for investigation the matters not subject to court proceedings, we will usually choose to defer our decision on whether (and to what extent) to investigate until the outcome of the legal proceedings is known.

## Will there be any cases where we cannot take on a case?

Only two, i.e.:

- a) Where there is no unremedied injustice as the complainant, on the same facts, has used an alternative remedy and been successful in all aspects of the case and achieved his/her costs.
- b) Where there is some unremedied injustice but the court has determined a case on the same facts and has not remedied that injustice although it had the power to do so.

**NB:** In cases falling within (b) there may be some relatively rare cases where the alternative route has focused on the *legal issues* and has left injustice unremedied and maladministration causing that injustice unaddressed ([see the "Debt of Honour" Report on the Ombudsman's website](#) - [www link](#)). Where these two issues can reasonably be separated, we may still be able to investigate.

## When should I take legal advice?

Advice from the Legal team should be sought in the following cases:

- a) Where people have been successful at **judicial review** and then ask for compensation via us.
- b) Those rare cases where a complainant, on the same facts, has used an alternative remedy and lost on *legal* grounds but it seems that injustice remains unremedied and the maladministration causing that injustice remains unaddressed.
- c) Where complainants had followed an alternative legal route and been *successful* but had been left with unmet costs.

You may find the reference tool at Annex 3 to this Briefing Note helpful.

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## Footnotes

<sup>1</sup> Financial redress is not normally available within judicial review proceedings.

<sup>2</sup> There may be some cases where the alternative forum is obviously the correct one, e.g. parent seeking large damages for medical negligence concerning her child. In these cases, we would generally exercise the discretion not to investigate, at least until the outcome of the proceedings is known.

<sup>3</sup> See *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406: "Before giving permission to apply for judicial review, the Administrative Court judge should require the claimant to explain why it would not be more appropriate to use any available internal complaint procedure or proceed by making a claim to the PCA or LGO at least in the first instance."

<sup>4</sup> Because, for example, the papers were not served or the case was withdrawn, dismissed or otherwise not proceeded with.

## **Schedule of Common causes of action**

**NOTE:** This is only a very rough guide. If more detailed information is required, speak to a member of the Legal team.

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### **a) Judicial review**

Judicial Review ("JR") is a procedure by which a person can challenge the lawfulness of a decision or action (or failure to act) taken by a public body or a body exercising a public law function.

A JR normally looks at the way in which the decision was taken. It is not a form of appeal from a decision: it does not involve the Court deciding whether the body made the right decision and the Court's role is not to substitute its own decision for the decision taken by the public body.

Unlawful decisions may be divided roughly into three main areas: illegality (which can include breaches of European and Human Rights law), irrationality and procedural impropriety.

Remedies: the Court can quash (strike down) an unlawful decision and require it to be taken again. It can prohibit a body taking an unlawful action, it can order a body to take a particular action or it can declare the legal rights of the parties.

Damages are rarely awarded in JR claims (as they are not considered appropriate for a public law wrong) and the Court is very cautious about entertaining a JR which is solely designed as a vehicle for a monetary remedy.

Claims must be made as soon as possible after the act or omission complained about and in any event within three months of it. Although the Courts can extend the time period, they generally tend to adhere to it quite strictly.

See the Legal Briefing Note "Judicial review" for further information.

### **b) Negligence**

#### **(i) General**

Negligence may be described as any act or omission that falls short of a standard to be expected of a hypothetical "reasonable person".

To succeed in a claim for negligence, the claimant must prove that the body concerned owed him a legal duty of care, that it breached that duty, that the breach caused personal injury or damage and that damage was reasonably foreseeable.

A "duty of care" arises where "between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity ... such that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter ...". Even if this is found to be the case, the court will then look at whether there are any reasons to limit the scope of the duty.

On public policy grounds the courts have been very reluctant to allow claims against public authorities for negligence in the carrying out of their functions, and generally decline to accept that a duty of care arises in these circumstances. Although the position has started to ease a little in recent years, particularly in education cases, it is still unlikely that the courts would accept such a claim even where the loss is significant and directly attributable to the actions of the body. For example, in a recent case<sup>1</sup> the High Court decided that the DWP does not owe a duty of care to benefit claimants: a claimant could not sue for negligence where he had suffered losses due to DWP delays in assessing and paying his benefits.

The Court will award remedies for financial loss as a consequence of physical damage caused by a negligent act and for negligent misstatement, but not otherwise.

It will also not award damages for "distress" unless the claimant – who must be a direct victim - can demonstrate that the negligence has caused a recognised psychiatric injury. Secondary victims (a person who suffers psychiatric damage as a result of harm to others) are only entitled to damages in limited and extreme cases. In both cases, there are a number of additional hurdles for the claimant to cross.

Consequently, it will not generally be reasonable for us to expect a complainant to bring a claim for negligence when he is seeking damages for distress and/or pure financial loss.

#### (ii) Negligent misstatement

There may, in some circumstances, be a duty to take reasonable care in giving information. However, this will only arise when the claimant relied on the defendant's skill and judgment, the defendant knew or ought reasonably to have known that the claimant was relying on him and it was reasonable for the claimant to have relied on the defendant.

#### (iii) Clinical negligence

In general terms, the Courts accept that NHS bodies and employees owe a legal duty of care to patients.

The test the Courts apply to determine clinical negligence is the "*Bolam*" test from *Bolam v Friern Hospital Management Committee 1957*. As amended by later caselaw, the test now reads: "A doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though doctors adopt a different practice".

### c) **Defamation**

This includes slander (spoken) and libel (written or otherwise recorded in a permanent form).

The claimant must demonstrate that the statement complained about was:

- Untrue or not "honest comment" (previously called "fair comment").
- Shared with someone other than the person making the comment and the person complaining about it (this is known as "publishing" - nothing to do with putting it in the papers). A secretary seeing the defamation as she types it may be sufficient "publication".
- Likely to reduce the reputation of the complainant in the eyes of right thinking people; this will change over time e.g. saying someone was gay was a serious defamation sixty years ago while now it is not. Such an allegation does not now reduce a person's reputation in the eyes of right thinking people, but an allegation that someone is gay and is lying about it may be.

There are various defences to defamation claims, the most common being that the statement was "justified", that is true (an absolute defence) or honest comment or a privileged communication (very roughly a comment made by someone with a duty to make it to someone with a corresponding duty to receive it – the Ombudsman's final reports are so privileged).

Defamation cases are notoriously risky exercises as well as difficult to bring, and legal aid is not available. It will rarely be reasonable for us to expect someone to bring such a claim.

### d) **Human Rights Act claims**

Claims may only be brought under the Human Rights Act ("HRA") by someone who is or would be the victim of the human rights breach complained about. Claims can only be brought against a public authority, which includes government departments, local authorities and health trusts as well as some private organisations carrying out public functions, such as privately run prisons.

Claims can be brought in two ways, either as a free-standing action by way of judicial review in the appropriate Court or tribunal, or as part of any other legal proceedings.

Claims under the HRA must be brought within one year of the alleged breach human rights, although the Courts have a discretion to extend this period. However, claims are subject to other existing time periods - so, for example, a human rights judicial review claim must be brought within the three month period for judicial reviews.

The Courts can make damages awards in HRA cases where it is necessary to achieve "just satisfaction" (although damages in human rights cases are generally far more modest than in negligence cases). The Court can also order non pecuniary awards if just satisfaction can be achieved in another way (e.g. return of property).

#### e) **Breach of confidence**

The Legal Briefing Note on "Confidentiality" discusses the law of confidentiality in more detail. It is possible to bring an action for breach of confidence where confidential information is disclosed in breach of an obligation of confidentiality and there is no public interest in sharing the information which outweighs the public interest in maintaining confidentiality. The Courts can order injunctions to stop further breaches of confidence, order the payment of damages or the delivery up or destruction of infringing items.

#### f) **Remedies for breaches of the Data Protection Act**

Section 7(9) of the Data Protection Act 1998 ("DPA") gives the High Court or a county Court power to order a data controller to comply with a subject access request (a request by someone for their own personal data) if the Court is satisfied that the data controller has failed to do so.

Where an individual suffers damage by reason of any breach of the requirements of the DPA, he can claim compensation from the data controller under section 13 of the DPA.

Section 14 of the DPA provides a number of Court remedies. The High Court or a county Court can order a data controller to:

- rectify, block, erase or destroy inaccurate personal data and expressions of opinion based on the inaccurate data;
- notify third parties to whom the data were disclosed of the rectification, blocking, erasure or destruction;
- add a supplementary statement of the true facts to data which accurately record information received or obtained by the data controller from the data subject or a third party, instead of ordering the destruction or rectification of the inaccurate data;
- rectify, block, erase or destroy personal data where the individual has suffered damage for which he could claim compensation under the DPA, because of a breach by the data controller of the requirements of the DPA.

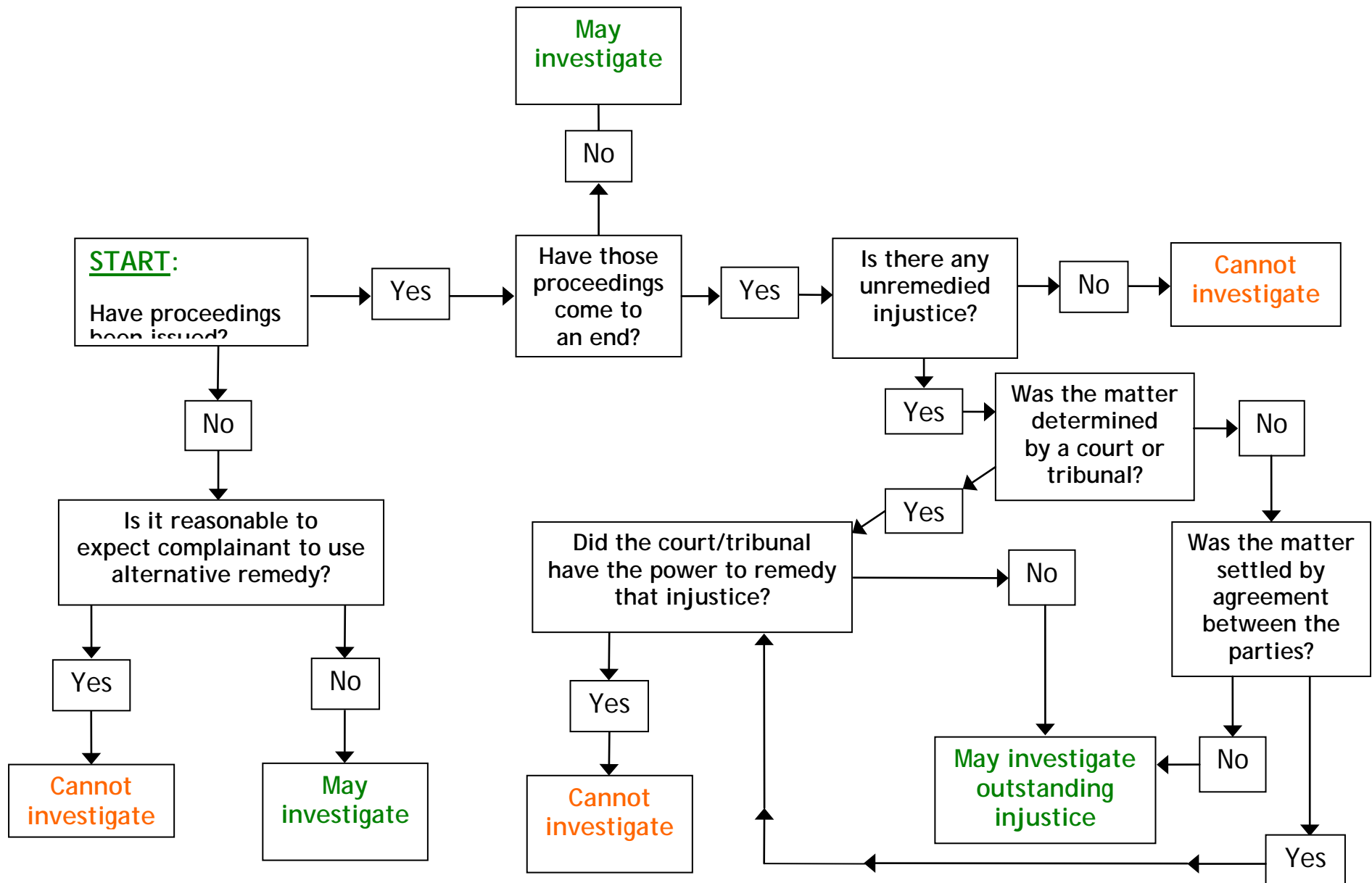
#### g) **Breach of contract**

The Legal Briefing note on "What is a contract?" discusses in more depth the nature of a contract and the remedies for breach.

A contract is simply an exchange of promises or an agreement between legally competent parties that the law will enforce. There needs to be an offer (with intention to enter into a legal relationship), acceptance of the offer, and "consideration" (normally a promise or payment in return by the other party). Where a party does not comply with its obligations under the contract, the other party can sue (in the county court or High Court) for breach of contract. The remedies for breach of contract are damages and the discretionary remedies of "specific performance" (i.e. an order that the party perform their duties under the contract) and injunction to prevent a party breaching its obligations.

#### **Footnote**

<sup>1</sup> [Murdoch v Department for Work and Pensions \[2010\] EWHC 1988](#) (www link)



## Reference tool

Type of complaint	Outcome sought	Legal Action possible?	Factors to consider/Notes
Health/Parliamentary	Apologies	No	May be a by-product of legal action, but cannot take legal action with this purpose.
Health/Parliamentary	Acknowledgements of mistakes	No	May be a by-product of legal action, but cannot take legal action with this purpose.
Health/Parliamentary	Changes to procedures/systems	No	May be a by-product of legal action, but cannot take legal action with this purpose. Consider also whether referral to other body is appropriate, e.g. Information Commissioner, Equality and Human Rights Commission.
Health/Parliamentary	Financial remedy for distress/upset etc	No	May be a by-product of legal action, but cannot normally take legal action with this purpose. Civil Action under the Equality Act 2010 may be possible in cases involving alleged discrimination.
Health	Changes to medical records	Yes	If a complainant wants records changed or expunged they can do this through the county courts using the DPA - however this would not cover the expression of opinion.
Health/Parliamentary	Lessons to be learnt	No	May be a by-product of legal action, but cannot take legal action with this purpose.

Type of complaint	Outcome sought	Legal Action possible?	Factors to consider/Notes
Health	Compensation for clinical negligence	Yes	<p>Cost vs. amount sought (although if clear negligence may settle out of court and avoid costs). The Chief Medical Officer's June 2003 report <i>Making Amends: A consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS</i> stated that: "the legal and administrative costs of settling claims exceeded the money paid to the claimant in the majority of claims under £45,000 and took up an even higher proportion of the total amount paid out in the smaller claims" (See paragraph 55 on page 70 of the <a href="#">CMO's 2003 report</a>).</p> <p>Similar evidence was reported more recently to the <a href="#">Jackson Review on Civil Litigation Costs</a>.</p> <p>See in particular appendix 2 data from the NHS LA, and Chapter 2, s.6. Indications of maladministration (e.g. if no obvious mal, consider whether it would be more customer focused to say this than ALR). Seriousness of illness (e.g. if terminal illness would it be quicker for us to consider the complaint than the courts?) Financial remedy through courts not possible if aggrieved is deceased, unless the person pursuing the claim was financially dependent on the aggrieved (Fatal Accidents Act 1976).</p>
Health/Parliamentary	Things to be made public	No	May be a by-product of legal action but cannot take legal action with this purpose. However, a public enquiry might achieve that.
Health/Parliamentary	Better co-ordination between bodies	No	
Health/Parliamentary	Knowledge that same thing will not happen to others	No	(We cannot guarantee that something will not happen again.)

Type of complaint	Outcome sought	Legal Action possible?	Factors to consider/Notes
Health/Parliamentary	Disciplinary action	No	We do not recommend disciplinary action as such. Consider also referral to other bodies such as GMC, NMC, etc.
Health/Parliamentary	Information	Yes	Referral to Information Commissioner. A Court can order that information is released under the Data Protection Act 1998. The Freedom of Information Act 2000 also provides for an appeal of the Information Commissioner's decisions on the disclosure of non-personal information.
Parliamentary	Overturn a decision	Tribunal/ Judicial review	Where no statutory Tribunal exists, ensure that review mechanism for decision and/or second/third tier complaint handling completed.
Health/Parliamentary	Changes to legislation/policy	Not generally, although judicial review can strike down unlawful legislation	Even if legislation is struck down, legislative change only then possible through elected representatives.