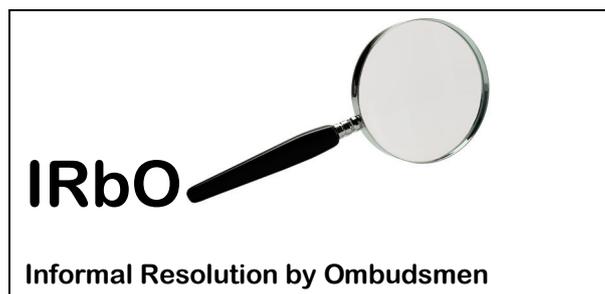


**The use of informal resolution approaches
by ombudsmen in the UK and Ireland:
A mapping study**

Margaret Doyle, Varda Bondy, Carolyn Hirst

October 2014



www.ombudsresearch.org.uk

'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'

'The question is,' said Alice, 'whether you can make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master— that's all.'

From *Through the Looking Glass, and What Alice Found There* by Lewis Carroll (1872)

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About the team

Varda Bondy is a Senior Research Fellow at De Montfort University Law School and at the University of Essex School of Law and former Research Director at the Public Law Project. She has published numerous empirical research projects in the field of public law and administrative justice, bringing her insights as a former legal aid practitioner into academic research.

Margaret Doyle is an independent consultant, researcher and mediator. She mediates in disputes involving special educational needs and disability discrimination and has published widely in the field of ADR. She is an associate member of the Ombudsman Association and serves on its Validation Committee. She is also a consultant trainer on the Queen Margaret University Certificate in Ombudsman and Complaint Handling Practice course.

Carolyn Hirst is an independent consultant, researcher and mediator. She also works as a part-time Lecturer in Ombudsman and Complaint Handling Practice at Queen Margaret University and is a member of Employment Tribunals and the Home Owners Housing Panel. She is a former Deputy Scottish Public Services Ombudsman and an associate member of the Ombudsman Association.

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1. Executive summary

This report presents findings of an empirical research project, funded by the Nuffield Foundation, designed to produce a descriptive mapping study on the use of informal resolution by ombudsmen. Its focus is on the use of informal resolution approaches as alternatives to investigation and determination/decision.

The use of informal and early resolution techniques by ombudsmen and other complaint handlers is an under-studied area but one which is gaining importance in light of several developments in the field of administrative justice generally, and the European Union ADR Directive, to be implemented by 2015. This directive looks set to overhaul complaint handling in the private sector by requiring the government to ensure that an ADR scheme is available in all contractual disputes between a consumer and a business (although neither consumer nor business will be obliged to use the service).

This report sets out the analysis of the responses received from 48 ombudsman and complaint-handling organisations in UK and Ireland that are (or were at the relevant time) members of the Ombudsman Association.

Summary of key findings:

- Of the 48 participating organisations, 36 (75%) reported that they use some form of informal resolution in handling complaints.
- One-quarter of all schemes reported that they *do not* use any form of informal resolution. The majority of these, namely nine out of 12 (75%), are public and statutory schemes. All but one have a role in overseeing or supervising standards and practices of the bodies within their jurisdictions.
- What is informal resolution? The most frequently used terms are 'early resolution', 'informal resolution' and 'resolution by mediation'. The term 'informal resolution' was used by the largest number of participants.
- Respondents use the term 'resolution' in different ways. For some, it is akin to 'disposal' – used to describe any method of dealing with a complaint other than by full investigation and published report. This can include forms of disposal such as withdrawal or dismissal. Others use it to describe an outcome that the ombudsman (or case handler) believes is fair and reasonable. Still others use it to describe outcomes mutually agreed by the parties.
- Seven respondents refer to their informal resolution process as 'mediation'. Others use the term in conjunction with other terms to describe their process. Five schemes appear to be using a process that allows the parties to speak or meet with each other.
- Whatever the terminology, most respondents appear to use a form of shuttle negotiation or brokering, with a focus on speed and the acceptability of the outcome to at least the complainant. For some, it is the ombudsman that determines the outcome.
- There are substantial variations in the rate of cases so resolved – from less than 1% to 99%. At one end of the spectrum are schemes that use informal resolution as the default mechanism. At the other end are those for whom informal resolution is the exception.

- The largest two groups of schemes (six in each) use informal resolution for 11–20% and 21–40% of complaints respectively. The next largest group (five) use informal resolution in more than 90% of complaints.
- There are numerous difficulties in ascertaining and understanding what the figures provided by the schemes for the rate of informally resolved cases actually mean. Are they a percentage of the total number of enquiries received, including cases rejected for being out of jurisdiction or entirely frivolous, or only of eligible complaints accepted and resolved?
- The majority of schemes use informal resolution early on in the process, soon after the complaint has been assessed for eligibility, though several others consider it appropriate at any stage. A small minority (two) use informal resolution only after a complaint has been decided and upheld, as a means of obtaining the parties' agreement on a remedy.
- The majority of organisations (25) did not have any written criteria to guide their investigators when deciding on whether or not to engage in informal resolution. Decisions were made on a case-by-case basis with the investigator applying their own discretion, based on their training and/or experience, on the basis of 'you know it when you see it'.
- Most respondents publish some information about the complaints they resolve informally, most commonly anonymised case summaries, but 13 schemes do not publish any such information. Among these is one using informal resolution for more than 90% of its complaints.
- Respondents vary in their view of 'success' of informal resolution – does it depend on satisfaction of the parties (and if so, which one? or need it be both?) or satisfaction of the ombudsman or complaint handler?
- The relationship between training provided to case-handlers/investigators and the form of informal resolution practised is not always apparent. Specific training and accreditation in the methods of informal resolution practised by many schemes is rarely provided.
- Three-quarters of respondents (27) do not have customer satisfaction measures related to informal resolution, although some obtain feedback on these processes in other ways. As a result, it is difficult to compare user satisfaction levels for different ombudsman schemes. It is also difficult to establish what aspects of user satisfaction are actually being measured within any particular scheme.

2. Introduction – background and aims

The use of informal and early resolution techniques by ombudsmen¹ in the UK and Ireland is an under-studied area but one gaining importance in light of several developments in the administrative justice and redress fields more generally. These include: recent work on principles of redress design;² the interest in ‘proportionate’ dispute resolution by courts and tribunals; the administrative justice work programme of the Ministry of Justice for England and Wales, which sets out an objective to promote early and proportionate dispute resolution across government and to support work on guidance and quality of dispute resolution provision. In Scotland an extensive review of administrative justice, including the work of ombudsmen, has been carried out, and legislation in 2010 changed the role of the public services ombudsman scheme.³ The Northern Ireland Ombudsman is in the process of producing a scoping study on the administrative justice landscape in Northern Ireland, and the jurisdiction of the Ombudsman in Ireland has recently been extended to cover public services provided by private bodies.⁴

More specifically within the ombudsman world, the European Union ADR Directive, to be implemented by 2015, will increase the number of areas in which independent dispute resolution (appropriate or alternative dispute resolution, or ADR) is required.⁵ It will require redress providers to be approved against a set of requirements that cover, among other factors, timeliness, accessibility and fairness. As a result of the directive, ombudsmen and other redress providers might find themselves in competition with one another and with other providers, a change likely to influence how ombudsmen and complaint handlers practice.

The ombudsman ‘landscape’

Ombudsmen and ‘second tier’ complaint handlers represent a broad spectrum: public and private sector, statutory and voluntary, each with its own culture and practices. Many ombudsmen have in common a dual role: to consider complaints about the bodies within jurisdiction, and to feed back to those bodies the learning from complaints with the aim of improving initial decision making. For ombudsmen and complaints handlers, the Ombudsman Association is the recognised representative body in UK and Ireland. The Ombudsman Association sets criteria against which it validates its membership, thus serving as a de facto self-regulatory body.

Like tribunals, the individual schemes are seen together as a system with a place within administrative justice, civil justice and ADR. It makes sense, therefore, to consider this landscape of ombudsmen and complaint handlers as a whole.

¹ We would have preferred to use a gender-neutral term such as ‘ombuds’ in this report, but know that this term is not in customary usage within the UK and Ireland.

² Bondy and Le Sueur (2012).

³ Consumer Focus Scotland (2009). In addition, the Public Services Reform (Scotland) Act 2010 gives the Scottish Public Services Ombudsman (SPSO) the power to publish standardised complaints handling procedures for listed authorities (including local authorities, the NHS, registered social landlords, colleges and universities, Scottish Government, Scottish Parliament and associated bodies) and requires the SPSO to monitor and promote best practice in complaints handling.

⁴ <https://www.ombudsman.gov.ie/en/News/Speeches-Articles/2014/Fairness-and-Transparency.html>

⁵ European Union ADR Directive (2013).

The need for research

The need for research in this area is clear. Before its demise in 2013, the Administrative Justice and Tribunals Council noted, among other priorities for study, the need to explore whether the appropriate balance exists between informal resolution and formal adjudication and/or investigation by ombudsmen. There have been few studies of how ombudsmen in Britain and Ireland carry out their work – what case handlers do, why, and what strategies they use to encourage resolution.⁶ Also, to date, there has been no in-depth research on their use of informal dispute resolution approaches such as ‘local settlement’ and mediation, despite the growth of such approaches that has accompanied the proliferation of ombudsman schemes. As a result, little is known about aspects such as:

- what ‘informal resolution’ consists of, and how it works;
- the selection criteria used in directing complaints to informal resolution;
- the drivers for process changes;
- the effectiveness of different approaches, and how it is measured; and
- the advantages and disadvantages of various informal processes.

The changing context of the dispute resolution landscape and the increasing overlaps among ombudsmen, tribunals, the courts and other complaint handlers indicate a pressing need to examine what sets ombudsmen apart and which types of dispute best lend themselves to an ombudsman approach.⁷ The development of new approaches has taken place largely without scrutiny, and it gives rise to the need to examine what the drivers are for change, how informal resolution is being used by ombudsmen and what the consequences of this are.

Aims

This study, in addition to the descriptive value it will have in its own right, is intended to provide a solid foundation for future research on the ways by which ombudsmen resolve disputes. Specifically it aims to:

- identify and map the informal resolution approaches used by ombudsmen and other complaint handlers in Britain and Ireland;
- ask what is, or might be, best practice in relation to this aspect of ombudsman work; and
- contribute to a greater understanding of the current ombudsman ‘brand’.

⁶ For example, Gilad (2008).

⁷ See, for example, the AJTC’s research agenda (AJTC 2013), which highlighted other gaps in current knowledge of dispute resolution in the light of a changing landscape for tribunals, courts and other complaint and dispute-handling bodies.

3. A brief overview of the issues

'Ombudsman: An official appointed to investigate individuals' complaints against a company or organisation, especially a public authority.'⁸

Most of us associate ombudsmen with complaint handling, but is an ombudsman's primary activity to investigate? How do ombudsmen and other complaint-handling bodies actually deal with the cases submitted to them, and what proportion of complaints are subject to investigation as opposed to some other form of case closure?

Ombudsmen were originally established to carry out investigations of complaints in a way that addressed the power imbalance between citizens and consumers and the government departments and commercial organisations about which complaints were made. Within the past ten years, however, there has been a noticeable shift towards the adoption of a resolution focus in the handling of complaints in the public and private sectors.

This shift, in England at least, has no doubt been encouraged by the emphasis in the White Paper 'Transforming Public Services'⁹ on speed and efficiency, and overall proportionality, as key characteristics of resolving disputes. This 'fits with the overall informal technique associated with the ombudsman enterprise and operates where a more detailed investigation is not needed to uncover the key facts underpinning the dispute.'¹⁰ A 'resolution model' has been identified¹¹ as one of four overarching models of redress mechanism that emphasises the policy drive to seek out 'alternative' and 'proportionate' dispute resolution.

In 2011 the Law Commission set out alternatives to ombudsman investigation:

'5.7 By alternative dispute resolution we mean using mechanisms other than formal investigations to dispose of complaint. This happens already, and the ombudsmen have developed sophisticated mechanisms allowing them to encourage 'local settlement', or similar, of complaint.'¹²

The use of such alternative mechanisms is not new. Indeed, the summaries of schemes included in the National Consumer Council's *A-Z of Ombudsmen* illustrate how widespread this use was in Britain and Ireland nearly twenty years ago.¹³ In other jurisdictions, notably Australia, ombudsmen have been using informal and consensual resolution for many years.¹⁴ The European Ombudsman, too, uses the language of informal resolution and has been noted for achieving informal resolution of complaints (known as 'friendly settlements').¹⁵

⁸ Oxford English Dictionary <http://www.oxforddictionaries.com/definition/english/ombudsman>

⁹ DCA (2004): 8. See also Buck, Kirkham and Thompson (2011): 8.

¹⁰ Buck, Kirkham and Thompson (2011): 113.

¹¹ Bondy and Le Sueur (2012): 13.

¹² Law Commission (2011).

¹³ National Consumer Council (1997).

¹⁴ Buck (2005).

¹⁵ European Ombudsman (2010): 8, 10.

According to the Ombudsman Association, informal resolution is integral to the ombudsman approach:

‘When dealing with complaints, ombudsman schemes seek to achieve a fair resolution at the earliest possible stage – rather than working towards an assumed future hearing

Ombudsman schemes use flexible and informal procedures – resolving cases by mediation, recommendation or decision as appropriate.’¹⁶

However, this area of ombudsman practice has developed relatively quietly, with little scrutiny. Looking back at the development of informal resolution, we see repeated calls for clarity on routes of redress, for consolidation of ombudsmen and other ADR, and for the filling of gaps in redress provision. Both the courts and the tribunals have undertaken pilots experimenting with the use of less formal processes (i.e. less formal than hearings), and these have been subject to independent evaluation and scrutiny.¹⁷ In one of its final publications, the Administrative Justice and Tribunals Council set out a number of ‘mapping factors’ for identifying the appropriate route to resolution. Academic studies, including *Designing Redress*,¹⁸ have sought to identify the underlying principles for establishing existing redress mechanisms. However, at no point has the ombudsman world attempted a coherent statement of practices, drivers, and classification of complaints.

This shift away from authoritative, formal investigations has developed on an ad hoc basis, with little apparent clarity about drivers for change and or coordination between schemes. Is this a cause for concern or, conversely, a facet of the ombudsman system to be celebrated for its flexibility and adaptability?

A brief history of informal resolution by ombudsmen

Initially, the statutory ombudsmen’s main method of dealing with complaints was to carry out a full investigation and publish their conclusions in a report. For example, the first Parliamentary Commissioner, Sir Edmond Compton, considered his primary function ‘to investigate [first hand] the action taken by a department and decide whether there has been maladministration by the department’.¹⁹ In the **early 1990s**, more than 90% of complaints to the Parliamentary Commissioner proceeded to ‘stage 2’ investigation, which often involved officials concerned and complainants. The time it took to conduct such thorough investigations gave rise to a perception of inefficiency – in **1997**, the average time to conclude an investigation was 93 weeks.²⁰ In any event, this process became unworkable as the number of complaints increased over the years. Other methods of dealing with complaints had to be developed.

Other ombudsmen were adopting alternatives to investigation. In **1997**, the Local Government Ombudsman closed nearly a quarter of its cases through an informal process called ‘local settlement’. Both the Northern Ireland Ombudsman and the Office of the

¹⁶ See <http://www.ombudsmanassociation.org/about-principle-features-of-an-ombudsman-scheme.php>

¹⁷ See, for example, Urwin et al (2010); Hay et al (2010); Genn et al (2007).

¹⁸ Bondy and Le Sueur (2012).

¹⁹ Gwyn (1982): 87, n.45.

²⁰ National Consumer Council (1997): 75.

Ombudsman (Ireland) closed 90% of their cases ‘informally’, with only 3% going to investigation.²¹

The legislation establishing many of the public ombudsmen constrained their ability to take this resolution approach (or was interpreted as doing so). This has been remedied in statutory frameworks applying to new ombudsmen as well as in changes to existing schemes. The Public Services Ombudsman (Wales) Act 2005, for example, embedded flexibility – and a resolution approach – into the Public Services Ombudsman for Wales:

‘One of the problems with the previous legislation was that it was inflexible and restrictive, and with an emphasis on formal investigation and published reports. The approach adopted in the new Act is more flexible, and recognises that current ombudsman practice is focused on finding resolutions to complaints, and using the most appropriate means to do so. The Act specifically provides for the alternative resolution of complaints, in addition to or instead of conducting an investigation.’²²

That Act is cited as ‘perhaps the most forthright recognition’ of the practice of informal techniques by ombudsmen.²³

Another legislative change, implemented in 2007,²⁴ provided the public-sector ombudsmen in England with:

‘...an express statutory basis for alternative methods for resolving complaints. Existing legislation only provides for the resolution of complaints by means of a formal investigation and report. It is argued in the [Cabinet Office’s] consultation paper that this is unduly burdensome, obliging ombudsmen to ‘conduct a formal investigation even though they might in a given case form the view that a less formal procedure would be a quicker and more cost effective way of resolving the issue’. The legislation would be amended to permit ombudsmen to resort to ‘mediation or other forms of alternative complaint resolution’ where appropriate.’²⁵

This legislation also introduced a new power (Reg. 12–14) that enables the Parliamentary Ombudsman, the Local Government Ombudsman, and the Health Service Ombudsman, for the first time, to appoint and pay a mediator to assist in dealing with the complaint.

The first private-sector ombudsmen were less constrained; they were developed to be ‘alternative’ routes for consumer redress. As early as **1997**, the Funeral Ombudsman (now defunct) closed 90% of its cases through a process it called ‘informal conciliation’. At the same time, the Ombudsman for Estate Agents closed 14% by what it called ‘mediation’. The Housing Ombudsman Service had mediation as an intrinsic part of its practices from its establishment in 1993. It closed 20% of cases by informal conciliation, 25% by mediation, 6% by arbitration and 15% by binding decision. Most of the schemes involved in complaints about banks and building societies used some process of informal conciliation, with some,

²¹ National Consumer Council (1997).

²² Seneviratne (2006).

²³ Buck, Kirkham and Thompson (2011): 113.

²⁴ Regulatory Reform Order 2007.

²⁵ Elliott (2006): 6-7.

such as the Insurance Bureau, recording 77% of cases resolved by 'case-handler mediation'.²⁶

When, in 2011, the Law Commission identified ADR as one of the three main methods of disposal of complaints by ombudsmen, it could be seen as describing a range of proportionate dispute resolution 'products'. This call for a broadening of the types of services offered by ombudsmen had been raised earlier. In 2002, the then Parliamentary Ombudsman Ann Abraham was asked by the Public Affairs Select Committee whether her service was 'a Rolls Royce one or a family saloon'. In response, she referred to the need to develop 'a more diverse product range...the serious, heavyweight, statutory investigation should not be the core product'.²⁷

In response to a huge increase in volume of complaints, in **2002** the Prisons and Probation Ombudsman extended its 'product range', increasing the number of cases closed by local resolution (defined as 'an agreement between the prisoner and the Prison Service on the redress to be made, brokered by [the ombudsman's] office') and establishing an expectation that cases would be resolved informally (or restoratively), 'thus emphasising that these methods are not an alternative to a formal report but that the formal report should be the exception, justified by circumstances'.²⁸

A **2003** survey²⁹ of members of the British and Irish Ombudsman Association (BIOA) found that nearly every ombudsman scheme offered some form of informal resolution, loosely called 'settlement'. The primary distinction was that in informal resolution the settlement was usually generated by the ombudsman service; it was the ombudsman who determined whether a settlement was appropriate, and if so what kind of settlement.

In **2005** the National Audit Office noted that ombudsmen 'primarily investigate cases and give authoritative rulings, but they may also use mediation techniques',³⁰ citing the Prisons and Probation Ombudsman's use of informal resolution.

The Police Ombudsman of Northern Ireland (PONI) is an interesting example illustrating the development of the informal resolution within an ombudsman context. PONI was allowed under its governing legislation to offer mediation at the conclusion of its investigation, but originally it had no powers to offer mediation at the start of the process. In **2005** the ombudsman recommended a legislative change that would allow for this. A pilot was launched in **2008**, offering mediation only in less serious complaints where, even if the allegation were proven, no criminal or disciplinary charges would be made. Take-up was very low – only one of the 26 cases identified as suitable for mediation was actually mediated. The evaluation report on the pilot notes that the context of complaints about police is 'fundamentally different' from other contexts in which mediation is used successfully'.³¹

²⁶ National Consumer Council (1997).

²⁷ Ann Abraham, evidence to PASC 2002-03:

<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmpubadm/506/3030601.htm>, para.70.

²⁸ Shaw (2002).

²⁹ Doyle (2003).

³⁰ National Audit Office (2005): 22.

³¹ Police Ombudsman for Northern Ireland (2009): 3.

Drivers

This shift away from authoritative formal investigation and from a decision based on findings to an emphasis on consensual settlement appears to be driven, at least in part, by increased pressure on resources due to rising complaint numbers, often combined with reduced budgets. The risk of ombudsmen using informal resolution inappropriately, as a way to speed up case-handling times or reduce costs, is noted in a benchmarking survey of the Legal Ombudsman and a recent review of the ombudsmen operating in the property and estate agents' field.³²

The shift may also have been influenced by user expectations and a desire to provide a more responsive, personal service. Responsive innovations represent a welcome element within the administrative justice system and are being explored by other mechanisms such as courts and tribunals. They can be an advantage when parties to a complaint have ongoing relationships, such as that between tenant and landlord or service provider and service user.

The quality of decision-making and complaints handling by government agencies, companies and others has a direct knock-on effect on the work of final-tier bodies such as ombudsmen; complainant/consumer behaviour also has an impact. As a result, some ombudsmen have reviewed their processes in light of a step-change increase in complaints and changes in the expectations of complainants. The Financial Ombudsman Service (UK) (FOS-UK), for example, decided it needed to consider how its processes 'matched' the experiences of consumers using instant financial services and products online and via smartphone apps. In 2013 a lead ombudsman at FOS-UK wrote:

'We wanted to give our people licence to engage with the parties and just 'sort it' – without all the usual administrative trappings. We also wanted to give people more freedom to tailor their approach to each individual case, and we had to re-think timescales.'³³

In addition, ombudsmen are now facing competition, particularly in the consumer redress arena, from other dispute resolution providers and even from the courts. The EU ADR Directive will pose challenges to timeliness for many ombudsmen, as it requires complaints to be concluded within 90 days. Reforms to the courts in some jurisdictions – including the expansion of telephone mediation for small claims, fee changes and the rise in the small claims limit – could lower the cost and increase the speed, and hence attraction, of taking a claim to court. While full investigations can take a matter of months or even years, ombudsman schemes become exposed to competitive pressure to produce cheaper and faster complaints-handling approaches.

Other challenges face ombudsmen who operate in the areas of public services. Recent changes to the role and remit of the Scottish Public Services Ombudsman as an oversight body (or 'design authority') might well indicate that bodies in that jurisdiction will be expected increasingly to use informal resolution mechanisms, such as mediation, to resolve complaints at an early stage. In addition, the Localism Act 2011 has changed the way complainants can access the Housing Ombudsman for England, envisioning a more active

³² Office of Fair Trading (2014).

³³ Hingston (2013): 27.

role in informal resolution by MPs, councillors and tenant panels. In both cases, the ombudsman will be expected to set and monitor best practice in complaints handling and may find the complaints that do come to them are the most complex, unresolvable ones.

A 2013 report examined the drivers for change among ombudsmen and proposed that in future ombudsmen would need to become more informal in their processes, with more timely resolution and more interaction with parties online and by telephone.³⁴ This study found that most ombudsmen schemes now appear to divide their processes into two distinct stages: resolution and investigation. The authors noted some concerns among interviewees that using quicker and more informal approaches might be perceived as at odds with expectations of the traditional ombudsman role, as well as concerns that if an ombudsman is not investigating, they cannot ensure that they have gained a clear insight into potentially problematic systemic issues. One respondent in that report described the possibility that in future ombudsmen might offer complainants a choice of a quick and basic service of ‘you tell us what the problem is and we’ll sort it out’ or a more sophisticated one that could take up to seven months to reach a conclusion.

Another 2013 report³⁵ highlighted the efforts by ombudsmen schemes to reduce the time taken to resolve complaints, arguing that while reducing time and stress for complainants is welcome, it is not always appropriate to force them down a path they do not wish to follow.

Benefits and risks of informal resolution

A number of academics have challenged what they consider to be a ‘troubling anti-adjudication rhetoric’,³⁶ noting that although civil justice has a private value in the termination of disputes, it also has a public function explicitly linked with the value of adjudication, which provides a framework or ‘shadow’ in which disputes can be settled. It has been argued that ‘the tendency to refer cases out of the litigation system is now so strong that it is time to turn to consider the equally important question of how we identify those cases which must get to trial if both the needs to individuals and the collective need for developing doctrine are to be served.’³⁷ Could the same questions be raised about ombudsman schemes and their decisions about what to resolve informally, what to investigate and what to report on in the public domain?

In relation to administrative justice, a recent House of Commons Select Committee noted concerns about the Local Government Ombudsman’s use of mediation and informal resolution and stated that the ombudsman: ‘needs to be completely clear how the distinct processes operate and differ as well as the criteria against which complaints are allocated to these resolution processes.’³⁸ Informal resolution was also highlighted by the Administrative Justice and Tribunals Council (AJTC), noting that in relation to public law disputes and complaints, it shared these concerns in relation to innovations by tribunals in the field of administrative justice:

³⁴ Gill et al. (2013).

³⁵ Brooker (2013): 20.

³⁶ Genn (2012).

³⁷ Mulcahy (2013).

³⁸ Communities and Local Government Select Committee 2012: paragraph. 62.

‘The AJTC is ready to be more positive about innovatory schemes, but understands these concerns and also fears that ad hoc approaches may be adopted or imposed which are driven solely for cost-cutting reasons, but which may have unintended consequences (including increased costs) with little or no regard to the delivery of justice or the needs of the parties.’³⁹

In addition, a report on redress design identified potential tensions arising from informal resolution, including the balance required between the resolution focus of informal redress and the need to capture and feedback systemic learning from individual complaints.⁴⁰

There are benefits to be had. A speedier resolution and a simplified process can be attractive to both the complainant and the complained of, for different reasons. For example:

- There are indications that complainants value a personal approach such as telephone contact with ombudsman staff.⁴¹
- The direct involvement of the parties in reaching resolution can help to restore trust and confidence in situations where there is likely to be an on-going relationship.
- There can be a lower ‘evidential hurdle’ than in investigation, reducing the burden of proof on the complainant, who may lack access to evidence.⁴²
- Bodies within the ombudsman’s jurisdiction may need to invest less time in cooperating with informal resolution than with investigation.

It has been noted that ‘a significant disadvantage of the investigatory technique is the risk that complainants experience a loss of ownership of the process’.⁴³ Potentially informal resolution processes provide more opportunity for engagement with complainants, and possibly ownership of the outcome.

There may also be benefits to the ombudsmen schemes themselves. Innovative approaches can lead to increased staff satisfaction and the possibility of introducing career development opportunities in what are usually flat organisational structures. Different approaches may offer the opportunity for staff to learn and use different skills.⁴⁴

There are also a number of risks, including the risk that achieving targets for resolving complaints and reducing backlogs might take precedence over adopting the most appropriate approach. Where the informal process is not well defined, it can lead to confusion among the parties and may result in complaints being unnecessarily prolonged. There is also the question of consistency. Ombudsmen consider each case on its merits, but it is expected there will be consistency of approach and, arguably, of outcome. How do the ombudsmen ensure consistency when adopting a variety of approaches to complaint-handling?

³⁹ Administrative Justice and Tribunals Council (2012): paragraphs 129–34.

⁴⁰ Bondy and Le Sueur (2012): 13.

⁴¹ Office of the Independent Adjudicator (2010).

⁴² Doyle (2001): 6.

⁴³ Buck, Kirkham and Thompson (2011): 229.

⁴⁴ See, e.g., Gilad (2008).

Greater reliance on early resolution raises concern about transparency, the lack of scrutiny and the lack of subsequent publicity given to any identified maladministration.⁴⁵

Transparency is an expectation set out in the Ombudsman Association's 'Guide to principles of good complaint handling':

'Schemes should develop standard processes for responding to complaint referrals. ... Complainants should be given a clear explanation of the criteria for accepting complaints and a step-by-step guide to the way they will be addressed...'⁴⁶

A recent publication examines issues of due process and fairness in ombudsman's decision-making, which are linked to openness and transparency:

'The uncertainty surrounding decision-making in the sector is made more marked by the trend over time towards resolving complaints at the pre-report stage, often by way of a letter rather than a formally completed report [Buck et al., 2011, Ch. 4]. The outcomes of such early redress have often not been published. ... But the strength of the connections between the benefits to be gained from transparency and the perceived weaknesses in the complaint-handling operation do provide strong grounds for believing that more openness about the decision-making process of complaint-handlers could significantly improve confidence in complaint-handling schemes.'⁴⁷

Informal resolution also raises interesting questions about who 'owns' the complaint and who decides whether they are satisfied with the proposed settlement – the ombudsman or the parties to the complaint? Who decides whether a complaint is to be resolved informally rather than investigated, and what could this mean for complaints that might be in the public interest to investigate?

It has been argued that the inquisitorial and principled methodology of ombudsmen is better suited to the types of complaints that arise in public law and administrative justice.⁴⁸ If so, what happens when that methodology changes?

In the context of changes to tribunal procedures, and specifically a shift away from oral hearings, it has been asked whether a resolution focus is appropriate in the context of challenges in the public sphere:

'When a citizen asserts an entitlement which a public agency denies, should the redress system seek to resolve the dispute through negotiation or mediation to the satisfaction of the parties, or should it restrict itself to upholding the entitlement when it is made out and to denying it when it is not?'⁴⁹

One commentator has noted that the procedural flexibility of informal resolution could be seen as being at odds with the ombudsman's primary function – to promote high administrative standards and best practice, which might be best served through statutory investigations rather than 'grievance-settlement'. The risk, however, may be overstated,

⁴⁵ Reid (2009): 6.

⁴⁶ Ombudsman Association (2007): 6.

⁴⁷ Kirkham and Wells (2014): 196.

⁴⁸ Buck, Kirkham and Thompson (2011): 8.

⁴⁹ Richardson and Genn (2007): 133.

and in the end ombudsmen should be free to determine how best to allocate the resources given to them:

‘...not all complaints are equally fruitful sources of the broader lessons about the administrative system: some will raise relatively straightforward isolated instances of maladministration which can best be dealt with by rapid resolution, and it is appropriate that ombudsmen should be free to decide how best to allocate their resources’.⁵⁰

Conclusion

It has been said that although the trend towards cheaper dispute resolution and the emphasis on cost-effectiveness, expedition and accessibility ‘have been factors in the adoption of alternative redress schemes, it should not be considered that the ombudsman institution is a form of “cheap justice”, but that, on the contrary, ombudsmen can provide ‘better justice’.⁵¹ On the other hand, in the opinion of one ombudsman, ombudsmen provide ‘rough and ready justice’.⁵² In relation to consumer redress, there is a view that ‘delivering some justice is better than no justice, and that if CADR [Consumer ADR] systems did not exist, very many small consumer claims would never be satisfied, since they are too costly or involve too much effort for consumers to resolve through most courts.’⁵³ Ombudsmen need to take these views into account when considering the approach, design and likely cost of their complaint-handling process.

If ombudsmen wish to be seen as the ideal model of dispute resolution, they will also need to embrace a degree of consistency and standardisation.⁵⁴ In order to be perceived as credible, they need to be able to counter criticisms that whereas court procedure and judicial decisions are governed by ‘well developed due process values’, ‘privatised dispute resolution processes ... do not have this commitment to process. On the contrary, a critical characteristic is precisely the lack of formal procedure, and its replacement by flexibility and party-determined processes.’⁵⁵

Finally, if ombudsmen seek to position themselves as viable alternatives to the courts in terms of speed and simplicity, this should not be ‘cosmetic gloss’:

‘Informality and flexibility can be discounted as euphemisms for incoherence and inconsistency, the pretensions of “individuated” justice and freedom from binding precedent as a recipe for subjective licence that is no sort of justice at all.’⁵⁶

⁵⁰ Elliott (2006): 88.

⁵¹ Buck, Kirkham and Thompson (2011) 8.

⁵² Adam Sampson, ‘The Legal Ombudsman – An affront to the rule of law’. Available at: https://www.northumbria.ac.uk/sd/academic/law/news/eldon_as?view=Standard&news=archive.

⁵³ Hodges et al (2012): 219.

⁵⁴ See, e.g., Shand Smith and Vivian (2014).

⁵⁵ Genn (2012).

⁵⁶ O’Brien (2002).

4. Methods – how we approached the project

This empirical research project adopted both quantitative and qualitative approaches and involved desk research, email correspondence and telephone interviews. The first step was to review relevant data available in the public domain in respect of each organisation and identify the areas in which data are missing. The researchers drew on data from the surveyed schemes' websites, their 'How to make complaints' leaflets, and annual reports. They also sought further information and clarification through telephone interviews and email queries.

The depth of the enquiry was limited by the fact that this was a scoping project designed to provide initial mapping and identify issues that would benefit from future in-depth enquiry.

Although figures are provided in respect of various aspects of practice, these need to be read as illustrative of models and trends rather than being set in stone: even during the relatively short duration of the project in the first half of 2014 there have been changes in the membership of the Ombudsman Association, new annual reports were published providing different figures as to volume and outcomes of cases from those initially recorded, and some schemes were in the process of changing their informal resolution processes.

The survey sample

A significant issue in designing this study was to decide on which organisations to include and on what basis. The ombudsman schemes in UK and Ireland are distinct organisations and, like tribunals, reflect both a 'system' and a wide range of practices, procedures and cultures.

Scoping this project required a decision as to whether to concentrate on ombudsman schemes alone or to include other bodies that perform similar roles in complaint handling. It was considered that membership of the Ombudsman Association (OA) was the most logical way to approach selection of schemes.⁵⁷ The OA is the representative body of ombudsmen and other complaint-handling bodies in the UK, Republic of Ireland, British Crown Dependencies and British Overseas Territories. Our study has included OA members in the UK and Ireland, as well as the Isle of Man Financial Services Ombudsman Scheme.

The decision only to survey members of the OA means that we did not survey a number of organisations who are not members of the OA but whose work is also relevant to the study of informal resolution. Any further study should consider their inclusion.⁵⁸

'Respondents' are the organisations surveyed, not the individual office holders.

⁵⁷ We included all ombudsmen and complaint-handling members of the OA that deal with complaints and that are in the UK or the Republic of Ireland. At the time the project started, in January 2014, this was a total of 53 schemes. One member subsequently closed and was taken over by another member; we therefore surveyed 52 member organisations. We note that OA membership has changed during the course of the project.

⁵⁸ For example, former OA member the Prisons Ombudsman (Northern Ireland) and the Property Redress Scheme, a new organisation approved by the regulator to provide ADR in property disputes.

Research methods

Mapping survey

We approached the mapping of the informal resolution practices in four steps:

1. Recording data, available in the public domain, in respect of the most recent complete year for each scheme.⁵⁹ We designed a template to record information about each organisation, including the nature and volume of complaints, its informal resolution practices, and any published criteria for assessing the suitability of informal resolution. Completing the templates enabled us to understand how the various schemes present their practices, and also had the benefit of saving time to those responding.
2. Piloting the template with seven organisations, and revising the template.
3. Sending out completed templates to each of the remaining organisations, asking them to confirm or improve the accuracy of the information recorded and to respond to questions about the informal resolution procedures used within their scheme.⁶⁰
4. Exploring in greater detail some aspects of responses by way of emails and interviews.

We were fortunate in having the support of the OA for this project, whose secretary agreed to distribute the completed templates to the relevant schemes, via email. Each template was accompanied by a personalised cover letter from the research team and a request that replies be made directly to the research team. This ensured that the templates reached the right people, while stressing that the research was entirely independent of the OA.

We approached 52 organisations and obtained completed templates from 48, a response rate of 92%. The analysis in this report is based upon those responses, as well as 19 follow-up emails and eight telephone interviews.

Database

A database was created containing the survey responses. It is intended to make these data available to other researchers, except for internal documentation (such as internal guidance for case handlers) that was provided on a confidential basis.

Initial findings and progress reports

Initial findings were presented at a conference in Oxford.⁶¹ In addition, a project website⁶² was set up to provide links to relevant papers and publish progress reports.

⁵⁹ For most schemes, we used published information for 2012/13. A small number of schemes had only published earlier annual reports at the relevant time, and some schemes had published their 2013/14 as the project progressed, but these variations were not thought to affect the actual analysis of practices.

⁶⁰ In the personalised cover letter, schemes were advised that the information they confirmed with us would form part of the published output of the research.

⁶¹ The Impact and Legitimacy of Ombudsman and ADR Schemes in the UK, Wolfson College, Oxford, 30 April 2014. Report available at:

<http://www.fljs.org/sites/www.fljs.org/files/The%20Impact%20and%20Legitimacy%20of%20Ombudsman%20and%20ADR%20Schemes%20in%20the%20UK.pdf>.

⁶² See www.ombudsresearch.org.uk.

5. Findings

- a. Schemes at a glance
- b. Who is not using informal resolution, and why?
- c. Informal resolution: What's in a name?
- d. Frequency of use of informal resolution
- e. Reasons and criteria in the use of informal resolution
- f. Process of informal resolution
- g. Publishing information on informal resolution
- h. Role in ensuring compliance with informal resolution
- i. Training in informal resolution
- j. Customer satisfaction on informal resolution

a. Schemes at a glance

This section provides an overview of the 48 respondent organisations in terms of: geographical jurisdiction, statutory basis and whether public or private, Ombudsman Association membership status, caseload of organisation, and usage of informal resolution.

Use of informal resolution:

Not using informal resolution	12
Using informal resolution	36
Total	48

Statutory basis and private or public jurisdiction:

The 48 schemes provided 15 different descriptions with regard to their statutory basis and whether their jurisdiction is private sector or public sector. The table below sets out the responses as given.

Public and statutory	19
Statutory	4
Non statutory	2
Private, statutory and voluntary	1
Public and statutory; Also a private and voluntary jurisdiction	1
Public voluntary	1
Statutory and voluntary	1
Statutory; public and private	1
Private statutory	5
Private	5
Private, voluntary	4
Voluntary	1
Voluntary with statutory recognition	1
Independent body (appointed by Secretary of State and sponsored by government department)	1
Not-for-profit private company	1
Total	48

Geographical jurisdiction:

England	2
England and Wales	5
Ireland	10
Isle of Man	1
Northern Ireland	5
Scotland	6
UK	10
UK excluding Scotland	1
Wales	1
Multiple jurisdictions depending on nature of dispute	7
Total	48

Ombudsman Association membership:

The Ombudsman Association has three membership categories: ombudsmen, complaint-handlers and associate members. Ombudsman members are those:

“which meet the published criteria for recognition... (essentially: independence of the Ombudsman from those whom the Ombudsman has the power to investigate; effectiveness; fairness; openness and transparency and public accountability).”

Full ombudsman member	21
Complaint-handling member	27
Total	48

Caseload and use of informal resolution

The table below uses figures from the responses, which usually reflected the most recent annual report at the start of the project; in most cases this was 2012 or 2012/13. Since then, many respondents have published new annual reports. In some cases we have edited the responses for brevity. For percentage of informal resolution (IR) used, we have placed the schemes in bands; actual figures appear later in the report. Where the figure given in the column on % of IR is 0, this signifies that the scheme does not use informal resolution.

Scheme	Caseload	% IR
Adjudicator	16,365 enquiries 2,612 new cases for investigation 1,379 cases closed Source: 2013 Annual Report	21–40%
Advertising Standards Authority	29,823 complaints, resulted in 18,525 cases 13,835 cases no additional investigation, 3,514 informal investigation, 1,176 formal investigation Source: 2013 Annual Report	11–20%
Barristers Professional Conduct Tribunal (Ireland)	120 enquiries 50 complaints investigated Source: 2013 Annual Report	0
Commissioner for Public Appointments (UK)	16 complaints Source: 2012/13 Annual Report	0
Commissioner for Public Appointments for Northern Ireland	320 general enquiries 2 official complaints Source: Survey response	Not available
Commissioner for Ethical Standards in Public Life in Scotland	192 complaints received 120 investigations completed Source: 2012/13 Annual Report	0
Dispute Service Ltd	<i>Tenancy Deposit Scheme (England & Wales):</i> 1117,406 contacts 8,948 disputes adjudicated <i>SafeDeposits Scotland:</i> 600-800 contacts 2,136 disputes adjudicated <i>TDS Northern Ireland:</i> 39 disputes adjudicated Source: 2013 Annual Review	Not available
Financial Ombudsman Services (UK)	2,357,374 initial enquiries received 518,778 complaints closed (487,749 of these resolved through informal resolution 31,029 resolved through formal decisions by ombudsmen) Source: Survey response	90+%
Financial Services Ombudsman Scheme (Isle of Man)	490 contacts 277 complaints Source: 2013–14 Annual Report	21–40%
Financial Services Ombudsman (Ireland)	8,136 complaints received 7,871 cases concluded Source: 2012 Annual Report	<1%
Furniture Ombudsman	125,000 enquiries 1,817 cases opened Source: 2012/13 Annual Review	90+%
Garda Ombudsman	2,027 complaints received and processed 2,072 cases closed Source: Annual Report 2013	<1%
Housing Ombudsman Service	6,674 enquiries 6,108 complaints Source: Survey response	90+%
Independent Dispute Resolution Service Ltd (IDRS)	<i>CISAS:</i> - 6387 enquiries	0

	- 3129 'initially valid applications' - 1592 proceeded to adjudication <i>POSTRS:</i> - 493 enquiries - 232 out of scope - 516 proceeded to adjudication Source: Survey response	
Independent Adjudicator for Higher Education	Number of enquiries not reported 1,972 complaints Source: Survey response	6–10%
Independent Case Examiner	<i>Child Support Agency:</i> 1,457 complaints received 523 accepted 743 closed <i>Job Centre Plus:</i> 1,127 complaints received 263 accepted 371 closed <i>Pension Service:</i> 193 received 79 accepted 85 closed	<i>Disability and Carers Service:</i> 139 received 50 accepted 57 closed <i>Debt Management:</i> 22 received 5 accepted 14 closed <i>Private Sector Providers:</i> 316 received 55 accepted 37 closed Source: 2012/13 Annual Report
Independent Complaints Reviewer (for the Disclosure and Barring Service)	4 premature cases 3 out of scope complaints 1 report issued Source: 2013 Report	Not available
Independent Complaints Reviewer	Land Registry: 29 cases completed 45 cases closed after initial review National Archives: 1 Source: Survey response	1–5%
Information Commissioner's Office	Data Protection: 13,802 complaints received; 14,042 closed Freedom of Information/Environmental Regulations: 4,693 complaints received; 4,697 closed Privacy and Electronic Communications: 6,386 received; 6,473 closed Source: Annual Report 2012/13	11–20%
Irish Language Commissioner	701 new cases 11 new investigations Source: 2013 Annual Report	90+
Judicial Appointments and Conduct Ombudsman	810 complaints and written enquiries 256 cases Source: 2012 Annual Report	0
Judicial Complaints Reviewer (Scotland)	13 enquiries 30 review requests received 29 reviews completed (including those carried over) Source: Annual Report 2012/3	0
Law Society of Ireland	968 closed 1016 under investigation Source: Survey response	41–60%
Lay Observer for Northern	Complaints from 43 complainants investigated	0

Ireland	Source: Survey response	
Legal Ombudsman	71,195 contacts 8,430 complaints accepted for investigation 7,630 cases resolved Source: 2012/13 Annual Report	41–60%
Local Government Ombudsman	10,307 complaints looked at Source: 2012/13 Annual Report	0
Northern Ireland Judicial Appointments Ombudsman	In 2012, no complaints received relating to recruitment (three cases concerning the conduct of judicial office holders in England and Wales referred) Source: Survey response	0
Northern Ireland Ombudsman	1,133 enquiries 688 written complaints Source: Annual Report 2012/13	<1%
Office of the Immigration Services Commissioner	268 complaints received about OISC-regulated advisers 52 complaints about DPB-regulated advisers 144 complaints about unregulated advisers Source: 2013/14 Annual Report	0
Office of the Ombudsman (Ireland)	11,591 enquiries 3,190 complaints received 1,859 complaints completed Source: 2013 Annual Report	90+%
Ombudsman for Children	1,371 new complaints received 1,465 complaints dealt with 94 carried over from 2011 Source: Annual Report 2012	61–80%
Ombudsman for the Defence Forces (Ireland)	32 new cases 29 final reports issued Source: 2011 Annual Report	Not available
Ombudsman Services	171,699 new contacts 28,640 complaints resolved Source: 2013/14 Annual Report	41–60%
Parliamentary and Health Service Ombudsman	26,961 enquiries received 384 investigations completed 4,500 cases resolved without the need for an investigation Source: 2012/13 Annual report	1–5%
Pensions Ombudsman (UK)	3,350 enquiries 1,058 investigations Source: 2013/14 Annual Report	11–20%
Pensions Ombudsman (Ireland)	1,884 enquiries 655 completed 67 final determinations 82 mediation Source: Survey response	11–20%
Police Investigations & Review Commissioner (Scotland)	198 applications for complaint review received 174 applications for complaint review accepted 143 complaint handling reviews issued Source: 2012–13 Annual Accounts	0
Police Ombudsman for Northern Ireland	3,734 new complaints received 6,089 allegations received 3,452 complaints closed	61–80%

	Source: 2013/14 Annual Report	
Press Ombudsman (Ireland)	575 received 491 not considered 84 considered 40 formal decisions by Press Ombudsman 21 conciliated by Case Officer, 8 at conciliation at year end 1 referred to Press Council Source: 2012 Annual Report	1–5%
Prisons and Probation Ombudsman	5374 complaints received 3170 eligible 2815 investigations started 2062 completed Source: Survey response	21–40%
Property Ombudsman	16,378 complaint enquiries received 600 cases resolved via early resolution 1,551 cases resolved by formal review Source: Survey response	21–40%
Public Services Ombudsman for Wales	<i>Complaints of maladministration and service failure:</i> 3,234 enquiries received 1,932 new complaints <i>Code of conduct complaints:</i> 226 new complaints received 6 investigation reports referred to standards committee or Adjudication Panel for Wales 229 cases closed Source: Survey response	41–60%
Scottish Information Commissioner	1,816 enquiries received 594 Freedom of Information appeals received 564 cases closed Source: 2012/13 Annual Report	11–20%
Scottish Legal Complaints Commission	5,142 enquiries received 1,123 complaints received Source: 2012/13 Annual Report	11–20%
Scottish Public Services Ombudsman	531 enquiries 4,077 complaints (including premature complaints) 1,601 complaints passed from Advice to Review 939 complaints fully investigated Source: Survey response	1–5%
Service Complaints Commissioner for Armed Forces	725 contacts 581 potential service complaints 418 referred back to Service Source: Survey response	0
Waterways Ombudsman	61 enquiries 15 formal investigations with report 2 successful informal interventions without formal investigation or report Source: Survey response	6–10%
Welsh Language Commissioner	316 statutory complaints received Source: Survey response	Not available

b. Who is not using informal resolution, and why?

Of the 48 participating organisations, 36 reported that they use some form of informal resolution in handling complaints, and also, that there are substantial variations in the rate of cases so resolved.

Here we examine the nature of the 12 participating schemes, a quarter of all schemes, that reported that they *do not* use any form of informal resolution. They are:

- Barristers Professional Conduct Tribunal, Ireland
- Commissioner for Ethical Standards in Public Life, Scotland
- Commissioner for Public Appointments
- Independent Dispute Resolution Service
- Judicial Appointments and Conduct Ombudsman
- Judicial Complaints Reviewer Scotland
- Lay Observer for Northern Ireland
- Local Government Ombudsman
- Northern Ireland Judicial Appointments Ombudsman
- Office of the Immigration Services Commissioner
- Police Investigations and Review Commissioner, Scotland
- Service Complaints Commissioner for Armed Forces

These represent the following geographical jurisdictions:

- UK-wide 3
- England 1
- England and Wales 2
- Ireland 1
- Northern Ireland 2
- Scotland 3

Statutory basis

The majority of the schemes that do not use informal resolution, namely 9 out of 12 (75%), are public and statutory schemes. One of these, the Local Government Ombudsman, is both public and private because it deals with government agencies as well as private providers. Of the remaining three organisations:

- two are private and voluntary (Barristers Professional Conduct Tribunal Ireland and Independent Dispute Resolution Service), and
- one scheme is private and statutory (Lay Observer for Northern Ireland)

The basis of the scheme might influence the practices used, e.g. by way of legislative constraints or its public accountability obligations. However, these are not necessarily

defining factors, as many respondents that have a public and statutory basis do use informal resolution.⁶³

It is interesting to note that of this group, only three are ombudsmen in name; and five are commissioners. The others are a tribunal, an observer, a reviewer and a dispute resolution service. It is not possible to conclude that a commissioner is less likely to use informal resolution than an ombudsman, however, as several respondents with that title said that they do use informal resolution.

Subject matter of complaints

The nature and subject matter of complaints dealt with by these schemes vary considerably in several respects. The largest category (5 out of 12) are involved in complaints about conduct of the judiciary, of other public officials and about judicial or public appointments.

Subject matter of complaints	Scheme
Professional service and conduct complaints (3)	Bar Professional Conduct Tribunal Lay Observer Northern Ireland Office of the Immigration Services Commissioner
Judicial appointments and conduct / Public appointments / Conduct of public officials (5)	Commissioner for Public Appointments Commissioner for Ethical Standards in Public Life in Scotland Judicial Appointments and Conduct Ombudsman Judicial Complaints Reviewer (Scotland) Northern Ireland Judicial Appointments Ombudsman
Local government (1)	Local Government Ombudsman
Police (1)	Police Investigation and Review Commissioner Scotland
Consumer complaints (1)	Independent Dispute Resolution Service
Armed services (1)	Service Complaints Commissioner for Armed Forces

Again, the subject matter of complaints does not clearly indicate that the use of informal resolution is inherently unsuitable, because other respondents who deal with the same or similar subject matter do engage in informal resolution.

The Garda Ombudsman, for instance, uses mediation for some of the complaints it receives about police, for example complaints about discourtesy and neglect of duty. The Police Investigation and Review Commissioner Scotland does not use informal resolution. Similarly with professional service complaints: The Legal Ombudsman and the Scottish Legal Services Commission both use informal resolution, and the Law Society of Ireland is required, by statute, to attempt informal resolution for complaints about fees and services. The same is true for armed services and for consumer complaints about utilities; two schemes dealing with these do not use informal resolution, but others do.

Apart from the Local Government Ombudsman (LGO), organisations that deal with local government complaints (the public services ombudsmen for Wales, Scotland, Northern

⁶³ E.g. Housing Ombudsman Service; Police Ombudsman for Northern Ireland; Information Commissioner's Office; Garda Síochána Ombudsman Commission; Office of the Ombudsman, Ireland to name but a few

Ireland and Ireland, and the Housing Ombudsman Service) all say that they use informal resolution to some extent. Having said that, it may be a matter of definition whether or not the LGO exercises informal resolution; this is explored elsewhere in this report. This also may hold true of other schemes included in this section and may require more detailed exploration of the actual mechanics of handling complaints.

Schemes that deal with complaints about judicial or public appointments do not, on the whole, engage with informal resolution. The Commissioner for Public Appointments in Northern Ireland is the only one of the schemes of this nature to do so. At the beginning of the complaint process, use is made of ‘discussion with relevant parties to ascertain position’.

Role of scheme

The respondents vary as to whether or not complaints handling is their primary role. All deal with complaints to some extent, but one-third of this group (4) do not investigate complaints but instead review or oversee complaints handling.

It is interesting to consider these in light of the ‘control’ versus ‘redress’ descriptions sometimes used to classify ombudsmen.⁶⁴ Schemes classified as having a ‘control’ function supervise the public authority, regulated company or other institution in terms of regulating the way standards are created and performed, rather than resolve disputes. Those classified as having a ‘redress’ function, on the other hand, are concerned primarily with complaints and/or dispute resolution.

Note that these are considered to be ‘ideal’ types; in reality most ombudsmen and similar bodies often have elements of both control and redress. It has been noted that in the UK, ombudsmen are primarily in the redress model,⁶⁵ but even schemes that have primarily a redress function also have a role in improving first-tier complaints handling, usually through feedback resulting from complaints, for example the Local Government Ombudsman.

Of the 12 respondents that do not use informal resolution, the vast majority (11) can be said to be exercising a control function, in that they have supervision and oversight responsibilities. Of these, seven have a primarily control function: they deal with complaints about the way in which public appointments were made, how investigations into complaints about members of the judiciary are handled, the conduct of solicitors, the quality of advice given by immigration advisers, and the manner in which police organisations handle complaints about police officers and staff.

Four respondents can be said to exercise a control function but can also offer redress to complainants. These deal with the conduct of lawyers, judicial appointments and conduct, and local government. The forms of redress they can provide include:

- apologies
- return of fees paid

⁶⁴ Seneviratne (2002): 13, citing K Heede, European Ombudsman Redress and Control at Union Level 2000.

⁶⁵ Seneviratne (2002): 18–19.

- reconsideration of a decision
- compensation for loss suffered as a result of maladministration

Only one scheme in this group of 12 was identified as primarily focusing on redress as opposed to control. Its primary function is to consider consumer claims about communications and postal services.

Reasons for not using informal resolution

Respondents were asked why they do not use informal resolution. In some contexts, the reason can be self-evident due to the nature of the complaint and the investigating body. For example, complaints relating to breaches of a professional code of conduct or disciplinary code or to ethical standards in public life might be said to require a decision on whether or not a breach occurred and what the appropriate sanction might be. Redress is not the key concern, and determining a breach is not something that can be agreed by the parties. For example:

“Unlikely due to nature of complaints which demand a formal investigation; Not appropriate for an investigatory body.” (Commissioner for Ethical Standards in Public Life in Scotland)

The powers of those organisations include a power to suspend, censure, fine, disqualify, refer to tribunal or recommend banning from practice.

Within this group of respondents primarily exercising a control function are those that do not investigate complaints at all but instead oversee complaints handling. These include the Service Complaints Commissioner for the Armed Forces, which explained that it is ‘not an investigating body and doesn’t have a decision-making role.’⁶⁶

Other reasons related to the legislative or statutory constraints that limit the respondent’s ability to adopt informal resolution approaches. These include:

‘That is not within my remit. I cannot get involved in resolution. I am limited to retrospectively reviewing a process that has already been carried out.’ (Judicial Complaints Reviewer Scotland)

‘Statutory provision to provide report on any complaint investigated.’ (Northern Ireland Judicial Appointments Ombudsman)

‘While we encourage advisers to resolve complaints themselves, we do not have a formal mediation process. This is due to:

- The way our legislation has been framed; and
- The resources required’ (Office of the Immigration Services Commissioner)

Several respondents expressed the view that informal resolution is to be conducted at an earlier stage between the complainant and the body complained against, but is not the function of the body complained about. The Judicial Appointments and Conduct

⁶⁶ The Commissioner has for many years called for an ombudsman for this sector, with investigative powers, and this has now been accepted by the UK government.

Ombudsman explained that informal resolution was considered at the time the scheme was established, but was not taken forward because:

‘... by the time complaint gets to ombudsman, views are entrenched and the chance of resolving it informally is quite small. ... Note that [the] ombudsman doesn’t try to broker deals but does, where it finds maladministration, negotiate with first-tier bodies in the sense of giving them the opportunity to comment on (and accept) the actions recommended in draft report. Body can agree or can disagree and state reasons, in which case [the] ombudsman will consider those reasons. However, in any case it still goes to a final report.’

The Local Government Ombudsman suggested that the use of informal resolution at the ombudsman stage is a ‘clear sign of failure within first-tier complaints handling’:

‘If complaints come to us that are amenable to informal resolution we would refer the person back to their local authority (or other body in our jurisdiction) to do so, as they are best able to put things right “informally”. The complaints we look at are those that have moved past the stage where informal resolution is likely. ... We would consider large numbers of informal resolution activity by the Ombudsman as a clear sign of failure within the first tier complaints handling. We want to support excellent first tier complaint handling so would always refer such cases back to the body concerned.’

Both of the above can provide redress for the complainant, including compensation for loss suffered, and they both can also recommend changes in procedure.

The one respondent that is primarily a redress scheme but does not use informal resolution is Independent Dispute Resolution Service (IDRS). It did not explain its reasons, although it did note that it has a role in encouraging informal resolution in the form of settlement between the consumer/complainant and the company prior to adjudication. Once a claim is received, the company has ten working days to respond with its defence or to propose a settlement. Such settlement negotiations are private, between the company and the consumer; hence they would not be classified as informal resolution by IDRS.

Commentary

The only factor that appears to be shared by those respondents who say they do not use informal resolution is that, all but one have a role in overseeing or supervising standards and practice of the bodies within their jurisdictions (a control function). Some of these do not investigate individual complaints, but others do, and of these several also have the ability to provide redress for the complainant.

Otherwise, there is no common factor suggesting that a particular type of organisation is less likely to use informal resolution than others. Indeed, as shown in the following sections, many respondents that share characteristics of this group (by, for example, dealing with the same subject matter of complaints) do use informal resolution.

c. Informal resolution: what's in a name?

This section explores in more detail the 36 schemes that engage in informal resolution. We set out the terminology used to describe informal resolution and then go on to examine briefly what this may mean in practice. We explore the actual processes more fully in Section 5.f of this report.

We asked: "If [you use] informal resolution, what is it called?"

Informal resolution – what's in and what's out?

We understand 'informal resolution' to be that part of the overall work of complaints handling that does not involve investigation, adjudication and determination, the ombudsman's traditional role. But what does the term 'informal resolution' include? Responses suggest that some schemes consider that all complaints that are resolved without a formal investigation are informally resolved; others consider every complaint to be formally resolved provided the outcome is published, regardless of how it has been arrived at. This appears to be a question of terminology rather than process.

For example, the Financial Ombudsman Service (UK) says that everything is informal that does not go to an ombudsman decision, whereas the Local Government Ombudsman explained that they no longer engage in informal resolution; everything is formal because they issue a statement of reasons and/or report all complaints resolved. For the Local Government Ombudsman then, it is the fact of the statement and its publication that renders the resolution 'formal' as opposed to 'informal', i.e. it is not about the process of arriving at the resolution itself, but about formulating the conclusion and publishing it. Complaints that are clearly capable of being settled by the parties directly are 'referred back for local resolution'.

Different schemes have different uses of the term 'informal resolution'. The Office of the Ombudsman (Ireland) considers informal resolution (called variably 'persuasion', 'negotiations', 'settlement') to include everything that is not formal investigation (including withdrawn, discontinued cases, and rejected complaints). This scheme told us that 99% of their cases are resolved informally; 'if not investigated, everything by default is "resolved"'. However, a different approach to their figures would be to take out cases in which assistance was provided, which were not upheld, and which were discontinued and withdrawn; once these are excluded from the calculation, the figure for informally resolved cases, which they describe as 'resolved' or 'partially resolved', is 13%.

The response from the Pensions Ombudsman (UK) highlights other uncertainties about what informal resolution means and how its use is recorded. In their original response to the survey, they replied that the 'Exact percentage [of cases resolved informally] not known. But under 12%'. They explained that a figure of 14% refers to all those complaints resolved at an early stage, including withdrawals. When withdrawals are removed from the calculation, the figure is 12%. However, there was recognition of the ambiguity of the term and the possibility of interpreting it in a different way:

‘40% of the cases we investigated were concluded without an ombudsman determination (i.e. resolved, withdrawn and investigator’s decision/opinion) so if “informally resolved” means dealt with without an ombudsman decision then 40% is right.’

This response typifies the perplexity that surrounds the concept of informal resolution, and highlights the difficulties encountered in trying to assess, let alone quantify and compare, the rates and role played by informal resolution in the work of ombudsmen and complaint handlers. Also, in spite of the differences in terminology, it is not apparent from the information provided that the actual processes being used are materially different.

A multitude of terms

An indication of the variety of approaches manifested itself from the outset of this study, when a dozen or so different terms, or combinations of terms, were provided by schemes for their informal resolution practices. These are shown in the table below.

Terms used for informal resolution

Term for primary informal process	Number of schemes
conciliation	1
early resolution	4
informal resolution	9
local resolution	2
mediation	7
resolution	2
not answered, or no specific term	3

In addition to the primary terms set out above, eight schemes used a variety of multiple terms to describe their processes: early resolution/settlement, early settlement/informal resolution/quick fix/voluntary, settlement/intervention, informal resolution/mediation, persuasion/negotiated settlement, early resolution/mutually agreed settlement, resolution/conciliation and settled/mediation.

As set out below, when these different terms were examined more closely, we often found that identical terms represented a variety of different practices, and that different terms were often used for identical practices.

Informal resolution

The term ‘informal resolution’ was used by the largest number of schemes, with nine using it exclusively and another two in combination with other terms. As with the other terms used, ‘informal resolution’ was not defined and appears to be used in a variety of ways.

For some, this was used to describe efforts to help parties reach a mutually agreeable settlement:

‘Informal resolution is what we call using our experience to help you and your lawyer sort out your complaint in a way that you both agree to.’ (Legal Ombudsman)

For others it was about identifying the potential for a quick closure after accepting there is a case to answer:

‘a means of reaching a settlement more quickly than could be achieved by formal investigation, which would take time and resources.’ (Waterways Ombudsman)

A different angle is one in which the emphasis is on the preference of the scheme itself. The Information Commissioner’s Office said that explaining ‘informal resolution’ to the parties is left to the discretion of the individual case officer, but that ‘in initial letters to the parties it is made clear that where possible the Information Commissioner prefers complaints to be resolved informally and that we ask both parties to be open to compromise’. ‘Informal resolution’ in this case appears to relate to those complaints resolved without a formal decision notice being served.

The Irish Language Commissioner takes a similar approach in informing parties of the preference for informally resolving complaints. They said, ‘We would normally advise the complainant in writing that we are processing their complaint through the “informal complaints mechanism operated by our Office” as a first step.’ If there appears to be a basis for a complaint, the Office contacts the state organisation concerned and attempts to resolve informally.

Resolution

The schemes that use the term ‘resolution’ for their informal resolution process (two exclusively and one alongside the term ‘conciliation’) each have a somewhat different emphasis as to what the process is about. In the case of the Independent Case Examiner, ‘resolution’ is a default option and investigation is used only in:

‘cases in which the complainant is vehemently opposed to engaging in resolution or in which the team leader deems the complaint too complex or, on the face of it, without merit.’

For the other two bodies, ‘resolution’ is about brokering a remedy (presumably where fault had been identified). For example:

‘Getting the organisation complained about to take action that will provide an appropriate outcome for the complainant or getting an explanation of what happened to show why no further action is needed.’ (Parliamentary and Health Service Ombudsman)

‘Whether it appears likely that the organisation in jurisdiction will agree to take remedial action that the complainant will find acceptable.’ (Independent Complaints Reviewer)

Conciliation

Only one of the 36 schemes, the Furniture Ombudsman, told us that they use the term ‘conciliation’ to describe the process. It is the default option, i.e. attempted in every case, and is explained as follows: ‘Conciliation is “arm’s length” – some by email and some by letter – a sort of shuttle negotiation.’ The Furniture Ombudsman told us that 80% of cases are settled by agreement [conciliated] between the parties brokered by the investigator.

By contrast, in another scheme, the Press Ombudsman (Ireland), ‘conciliation’ is the term used for the formal part of their process, as opposed to mediation, which is considered to be informal. Conciliation in this context involves the ‘Case Officer acting as a facilitator between the complainant and the editor to see whether a mutually satisfactory resolution of the complaint can be achieved’. The primary distinction between this and the Press Ombudsman’s informal process, mediation, appears to be that conciliation is attempted in every case (unless mediation has successfully resolved the matter) and the parties do not have a choice about using it or not.

Other schemes, such as the Property Ombudsman, appear to use ‘conciliation’ interchangeably with other terms, using ‘early resolution’ to refer to ‘negotiating a resolution between parties’ or rejecting cases that are ‘clearly unmeritorious’. ‘Early resolution’ includes two categories: ‘conciliation’, to mean ‘complaints that are upheld’, and ‘early non-support’, to refer to cases that are ‘not upheld’.

The Scottish Legal Complaints Commission, which uses mediation as its primary method of informal resolution, refers in its Annual Report to complaints ‘resolved at investigation by ‘conciliation’, although that term is not explained.

Mediation

The term ‘mediation’ can be defined as a process where an independent third party (the mediator) helps parties with a dispute to try to reach an agreement. The parties in dispute, not the mediator, decide whether they can resolve things, and what the outcome should be.

Seven schemes answered that they use ‘mediation’ to resolve complaints informally. These are:

- Adjudicator
- Financial Services Ombudsman (Ireland)
- Financial Services Ombudsman Scheme (Isle of Man)
- Pensions Ombudsman (Ireland)
- Press Ombudsman (Ireland)
- Prisons and Probation Ombudsman
- Scottish Legal Complaints Commission

Others use the term ‘mediation’ but not as their primary process. In some schemes, for example the Independent Adjudicator for Higher Education and the Garda Ombudsman (who use the term alongside other terms for informal resolution), ‘mediation’ is a term for a distinct process, and for others it is used interchangeably with other terms in a more generic or colloquial sense, as shown below.

But what does mediation look like? In reply to our question ‘How do you define/explain the [informal resolution] process?’ various descriptions emerged from those who told us they use mediation, demonstrating a spectrum of formality and informality. At the more ‘orthodox’ end, of the responses (i.e. corresponding to the definition above) the Scottish Legal Complaints Commission described their practice as follows:

‘The mediation process is flexible and takes place at a mutually convenient location for the parties or by telephone or Skype. It can involve the parties meeting in the same room to talk through matters or in separate rooms, with the mediator acting as an intermediary. We provide independent, experienced mediators from a variety of backgrounds. They must meet the standards required by the Scottish Mediation Register.’

A face-to-face meeting of the parties is also what is meant by ‘mediation’ as used by the Press Ombudsman (Ireland): a ‘face-to-face meeting between editor and complainant, with Case Officer acting as facilitator’.

Other schemes use the term ‘mediation’ in a more flexible and colloquial sense, which we understand to describe shuttle negotiations conducted by the case officer/investigator after forming a view as to an appropriate outcome. This does not appear to involve any direct contact between the parties. For example, the Adjudicator explained:

‘An investigator will review the complaint and if there is scope to propose a mediated settlement they will work with the complainant and the department to achieve this on behalf of The Adjudicator. Brokering a resolution between the customer and the department based on the evidence from the investigation.’

In their 2012 Annual Report, the Pensions Ombudsman (Ireland) says: ‘Mediation: This is where we offer to mediate between the complainant and their pension scheme trustees or PRSA provider, in an effort to resolve the issue to everyone’s satisfaction.’

The Prisons and Probation Ombudsman (PPO) engages in ‘mediation’ (in specific types of complaints only) after forming a view as to the wrongdoing having occurred and an appropriate remedy:

‘a mediated settlement agreed by both the complainant and the organisation. If a complaint is upheld, in suitable cases the Investigator will try to mediate an agreed settlement between the complainant and the organisation concerned without the need for a formal report and recommendations. ... Once the PPO has concluded that the organisation is responsible for the loss or damage, the Investigator will reach a view on the amount of compensation considered appropriate and will approach a senior manager in the organisation concerned to agree the sum, with negotiation if necessary. The Investigator will also check that the complainant is happy with the sum in question.’

Early resolution

Identical approaches to the one described above as ‘mediation’, in the generic sense – i.e. that of forming a view and brokering an agreement – were described by other schemes as being ‘early resolution’.

For example, the Scottish Public Services Ombudsman ‘[a]ims to see if there is a resolution acceptable and agreeable to all parties; Explaining what might be able to achieve and how we would approach it. But note predominant approach is a decision making one.’

The emphasis with this term, however, appears to be on ‘early’ – e.g. resolution achieved soon after the complaint has been accepted, and often on the basis of the information available without any need for further enquiries. For example, Ombudsman Services describes ‘early resolution’ as follows on their website:

‘If we notice that a complaint can be resolved simply, without the need for a case file, and within five days, we will contact you by phone or email and let you know. If both parties agree to our resolution, this becomes the ombudsman’s decision and the proposed resolution will be binding. We will write to both parties to confirm what has been agreed.’

For the Ombudsman for the Defence Forces (Ireland), in contrast, ‘early resolution’ involves examination of the case file. It is ‘analogous to ‘mediation’, using the latter term in a non-technical sense:

‘From a Preliminary Examination of the file provided to the Ombudsman he may form a preliminary view as to what course of action by either or both of the parties might provide an outcome acceptable to both. By an informal consultation process with both parties, analogous to mediation, the Ombudsman may reach an acceptable level of agreement between the parties as to action(s) which would resolve the particular complaint.’

The Property Ombudsman seeks to reassure potential complaints that ‘early’ does not mean cursory. On its website it explains:

‘The Ombudsman will always consider and actively promote and support any opportunities to settle the dispute quickly and this will involve both parties. This is normally done by a member of the office staff. However, you can be assured that any complaint reaching this office will be examined thoroughly and fairly and the decision is based entirely on the merits of the case.’

Its ‘early resolution’ team deals with straightforward cases by ‘either negotiating a resolution between parties or identifying cases where it is clear the Ombudsman would not support at formal review stage.’

Commentary

The descriptions set out above demonstrate that the distinctions between formal and informal processes are not always clear-cut or straightforward. It is also apparent that similar terms are used to describe different processes, and conversely, a variety of terms are used to describe identical processes. It is unclear why these various terms have been chosen and why there is a need for this multiplicity.

The most frequently used terms are ‘informal resolution’ and ‘mediation’. Both can mean the same thing as ‘early resolution’, but not always – in at least two schemes, mediation takes place only after investigation has been carried out and the complaint upheld. For most who use the term ‘conciliation’, this is an informal process, but not for all; one scheme describes ‘conciliation’ as its formal process.

Examination of how complaints statistics are recorded in annual reports illustrates that even the term ‘resolution’ is applied in a variety of ways, often being akin to ‘disposal’ and

including complaints that are signposted elsewhere, rejected, or where a complainant is advised that an offer made already is reasonable and no further action is needed.

Why does terminology matter? In the first place, the lack of clarity about what the promised processes actually consist of can lead to misplaced expectations by complainants and a resulting sense of injustice. Those looking for the weight of authority behind a decision and a sense of vindication may be disappointed to find themselves in a brokered situation emphasising compromise. And there is the question of consistency of approach between redress schemes, especially in the context of possible greater rationalisation – is this desirable, and if so is there a need for common principles and practices?

d. Frequency of use of informal resolution

The frequency of use of informal resolution varies considerably, as shown in the table below. The responses to our question ‘What percentage of accepted complaints are closed by informal resolution?’ range from less than 1% to 99% of complaints dealt with by informal resolution, with six respondents using informal resolution for 11–20% and another six using it in 21–40% of complaints. The next largest group (5) use informal resolution in more than 90% of complaints.

Here we present the data as termed and provided by the schemes. On the following pages is a table setting out the frequency of use of informal resolution by each of the organisations surveyed.

Responses

Although 36 schemes reported using informal resolution, only 24 provided a figure for the rate of cases resolved in this manner. In follow-up queries we were able to identify a figure or clarify the calculation used. For five respondents either no figures were available or the response was unclear as to frequency of use; two of these were unable to provide figures as they had not used informal resolution for long enough at the time of the survey,

The issue of variations in terminology and process (see sections 5.c and 5.f of this report) was of relevance here in analysing these responses in that the distinction between ‘formal’ and ‘informal’ was not always clear-cut.

There are numerous difficulties in ascertaining what these figures mean. Indeed it is often difficult to identify the basis of the calculation for the figures. Are they a percentage of total number of complaints received, or of complaints accepted as eligible and resolved? Do they refer to cases in which an investigator engaged with both parties resulting in a remedy, or to all cases that were dispensed with regardless of the reason and process, including cases rejected for being out of jurisdiction or entirely frivolous?

For example:

- The Irish Language Commissioner reported that 98% of complaints were said to be resolved by informal resolution. They received 775 complaints; in 350 of these, advice was given, and 353 cases were resolved formally or investigated. Here, advice appears to be regarded as informal resolution, and then informal and investigated cases are combined.
- The Police Ombudsman for Northern Ireland told us that 80% of cases are closed by informal resolution. On further examination of their website, this figure appears to refer to the percentage of complaints in which informal resolution was attempted.
- The UK Pensions Ombudsman’s figure of 12% informally resolved cases does not include complaints where the investigator has set out their view, by decision letter or opinion, and this view is accepted. However, the figure for all complaints resolved without an ombudsman’s decision is 40%.

- The Independent Complaints Reviewer provided a figure of less than 5% as an estimate of the average over time, not for a particular year. No cases were closed as a result of informal resolution in 2012.

Frequency of use

Scheme	Percentage of informal resolution
<i><1%</i>	<i>3</i>
Financial Services Ombudsman (Ireland)	<1%
Garda Ombudsman	<1%
Northern Ireland Ombudsman	<1%
<i>1–5%</i>	<i>4</i>
Independent Complaints Reviewer	<5%
Parliamentary and Health Service Ombudsman	predicted 3–4%
Press Ombudsman (Ireland)	2%
Scottish Public Services Ombudsman	about 5%
<i>6–10%</i>	<i>2</i>
Independent Adjudicator for Higher Education	6%
Waterways Ombudsman	about 10%
<i>11–20%</i>	<i>6</i>
Advertising Standards Authority	19%
Information Commissioner's Office	16%
Pensions Ombudsman (Ireland)	12%
Pensions Ombudsman (UK)	12%
Scottish Information Commissioner	18%
Scottish Legal Complaints Commission	11%
<i>21–40%</i>	<i>5</i>
Adjudicator	23%
Financial Services Ombudsman Scheme (Isle of Man)	22%
Independent Case Examiner	31%
Prisons and Probation Ombudsman	33% of eligible property complaints
Property Ombudsman	28%
<i>41–60%</i>	<i>4</i>
Law Society of Ireland	52%
Legal Ombudsman	44%
Ombudsman Services	52%
Public Services Ombudsman for Wales	45%
<i>61–80%</i>	<i>2</i>
Ombudsman for Children	around 75%

Police Ombudsman for Northern Ireland	80%
<i>90 +%</i>	<i>5</i>
Financial Ombudsman Services (UK)	94%
Furniture Ombudsman	about 90%
Housing Ombudsman Service	94%
Irish Language Commissioner	approximately 98%
Office of the Ombudsman (Ireland)	99%
<i>Not available</i>	<i>5</i>
Commissioner for Public Appointments in Northern Ireland	not available
Dispute Service	not available
Independent Complaints Reviewer for the Disclosure and Barring Service	not available
Ombudsman for the Defence Forces (Ireland)	not available
Welsh Language Commissioner	not available
TOTAL	36

Commentary

There is clearly a wide range reflecting the frequency of use of informal resolution.

At one end of the spectrum are those for whom informal resolution is the exception. There are a number of reasons for this. Some schemes appear to have criteria identifying which complaints are suitable to be informally resolved, an issue discussed in the following section. For others, the subject matter of the complaints is a factor influencing the appropriateness or take-up of informal approaches.⁶⁷

At the other end of the spectrum are schemes that use informal resolution as the default process, and in the majority of complaints an attempt is made to resolve informally. Whether or not they are closed at that point depends on a number of factors, including whether the parties have a right to request a final determination, such as a decision by an ombudsman. Therefore even in schemes that use informal resolution as a default option, the percentage of complaints resolved in that way is less than 100%. While we considered the rate of *use* of informal resolution, the rate of *success* was not explored and is an area for further research.

⁶⁷ See, for example, Police Ombudsman for Northern Ireland (2009), the report of a mediation pilot, which notes that the context of complaints about police is 'fundamentally different' from other contexts in which mediation is used successfully. One of the stated difficulties is that the informality of the mediation approach does not fit well within the highly regulated and adversarial system of police complaints. During the pilot a number of reasons were put forward for officers declining mediation, including the preference for an adversarial system, which they felt would vindicate and protect them, and their concerns that in accepting mediation they would be admitting wrongdoing.

e. Reasons and criteria in the use of informal resolution

It was noted earlier that 36 of the schemes in this study (75%) told us that they use some form of informal resolution when dealing with complaints. This section considers the responses to the following questions:

- ‘What are your reasons for using [informal resolution]?’
- ‘Are there situations when you would never consider using [informal resolution]?’
- ‘What criteria, if any, are used to decide if [informal resolution] is appropriate to use/offer?’
- ‘Are the criteria written down?’

Reasons for using informal resolution

a. Statutory requirement

Six of the schemes pointed to their legislation as the reason for using informal resolution. For example, the Financial Services Ombudsman Scheme (Isle of Man) refers to section 1(3) of the Financial Services Act 2008, which requires them to:

‘... seek to mediate between the parties to a referred financial services dispute by —
 (a) inquiring into the circumstances and cause of the dispute; and
 (b) offering the parties to the dispute its assistance (which may be by way of mediation or arbitration or by any other means) with a view to bringing about a settlement.’

The UK Financial Services Ombudsman’s response was that: ‘The purpose of the ombudsman service, as set out in Section 225 of the Financial Services and Markets Act 2000, is to resolve disputes ‘quickly and with minimum formality’. They go on to say:

‘The service’s complaint-handling rules (at DISP 3.5.1R) elaborate on this and state: The ombudsman will attempt to resolve complaints at the earliest possible stage and by whatever means appear to him to be most appropriate, including mediation or investigation.’

The Garda Ombudsman refers to section 90 of the relevant Act (the Garda Siochana Act 2005), which provides for informal resolution:

‘We believe that it is a proportionate way of dealing with complaints at the lower end of the disciplinary scale, notably complaints of discourtesy, and encourage its use insofar as the restrictions of legislation permit, in such cases.’

The Scottish Legal Complaints Commission responded: ‘By virtue of S. 8(4) Legal Profession and Legal Aid (Scotland Act 2007 the SLCC is obliged, where it considers it appropriate to do so, offer mediation in relation to the complaint.’

The Ombudsman for Children refers to their legal obligation to consider the best interests of the child in complaint handling with the comment that: ‘Timeliness in complaint handling

when dealing with complaints for services for children is really important and informal resolution secures better and quicker outcomes for all involved.’

The reason given by the Northern Ireland Ombudsman was that: ‘The legislation allows for settlement and it provides the opportunity to build trust.’

Other statutory schemes, such as the Public Services Ombudsman for Wales, did not give their founding legislation as a reason, although their legislation explicitly allows them to resolve complaints other than by investigation.

b. Expediency for organisation and/or complainant

Reasons provided by public sector statutory schemes often related to expediency, including speed, cost and avoiding relationship damage between the parties. For example:

‘Simpler and quicker – we get through more cases. Have used it since the beginning; has interpreted our legislation this way. Formal investigation is quite a long process.’ (Office of the Ombudsman, Ireland)

‘Settling a complaint is often the best way to resolve the matter. Potentially it saves time and effort for the office but more importantly it provides a speedier remedy for the complainant.’ (Public Services Ombudsman for Wales)

‘The sooner we can solve a problem the better. If parties can agree then a long process is unnecessary.’ (Scottish Public Services Ombudsman)

Private-sector schemes gave similar reasons for using informal resolution, and there was often some mention of cost as well as time. The Dispute Service described a consensual outcome as being ‘more advantageous to the parties, but also reduces the cost to the scheme of adjudication and servicing complaints about decision outcomes.’

The Furniture Ombudsman described informal resolution as being ‘Quicker and cheaper’, saying that it ‘makes sense to sort out informally – often allows both parties to express emotion.’

A number of schemes included maintaining or retaining relationships as a reason for using informal resolution. The Independent Adjudicator for Higher Education said:

‘Informal resolution is considered in every case. Formal (external) mediation is considered where one or both party has already suggested or expressed a willingness to engage in mediation, and/or where fault has been accepted by the university and remedy is in issues, and/or where there is to be a continuing relationship between the student and the university.’

Ombudsman Services said that it:

‘receives a variety of disputes, some of which can clearly be resolved very quickly with little or no investigation’ and that ‘it is better for both sides to receive a simple and effective remedy quickly.

The customer has the dispute resolved quicker and the company has a better opportunity to retain the customer and goodwill of the complainant.’

Circumstances when informal resolution is not used

When asked ‘Are there situations when you would never consider using informal resolution?’ there were three broad categories of response:

1. It depends. Nearly two-thirds of schemes (23 of 36) indicated that the question of whether to use informal resolution was a matter for the complaints handler’s discretion, depending on the specific facts of individual cases. Examples given for circumstances which are unsuitable included:

- for complex cases
- where there is a pattern of breaches or poor compliance
- if the facts are in dispute
- where one/both of the parties did not agree to using it
- where one/both of the parties wanted a formal decision
- where it was not in the best interests of a child
- where informal resolution was unlikely to resolve the issue/concern
- for particularly serious incidents such as a potentially avoidable death
- for novel, high value and high profile cases
- for cases which might set a precedent
- where a case needed investigation
- where it would be in the wider public interest to publish a report

The remaining 13 schemes were divided almost equally between saying that there were circumstances in which they would never use informal resolution, and those saying that there were no such circumstances, i.e. informal resolution would be offered in every case.

2. Yes. Seven organisations said that there were situations when they would never consider using informal resolution.

Statutory provisions precluding this were one such reason. The Garda Ombudsman is precluded from using informal resolution in complaints involving, for example, misconduct resulting in actual bodily harm to a person, misconduct resulting in the member achieving some improper advantage or financial gain and abuse of office.

The Pensions Ombudsman (Ireland) is not using informal resolution because complainants have a statutory right of appeal to the government minister concerned.

Other reasons given for never using informal resolution include where the complaint relates to misconduct, breaches of statute, assaults or a criminal/disciplinary offence. For example, the Law Society of Ireland would not use informal resolution ‘Where there is clear prima facie evidence of serious misconduct’, and the Prisons and Probation Ombudsman (PPO) would not use it ‘in response to serious complaints (e.g. about alleged assaults) or any case

where the PPO considers it necessary to make formal recommendations which go beyond the specific complaint’.

The Public Services Ombudsman for Wales explained:

‘An early settlement should never be considered where it would be in the wider public interest to publish a report, because of, for example, evidence of systemic failure by the listed authority, or the subject of the complaint has wider ramifications for public services in Wales as a whole.’

However, by implication, these schemes would use informal resolution in other circumstances.

3. No. Six schemes responded with a definite ‘No’, in effect saying that they would always offer informal resolution. These are the Financial Ombudsman Service (UK) (FOS-UK), the Financial Services Ombudsman Scheme (Isle of Man), the Financial Services Ombudsman (Ireland) (FSO-I), the Housing Ombudsman Service, the Office of the Independent Adjudicator for Higher Education and the Property Ombudsman.

For these schemes, informal resolution is the default option. The FOS-UK described their statutory requirement to resolve complaints informally, saying ‘More formal approaches should only be used in the most entrenched cases’. The FSO-I said that ‘All parties offered mediation services once complaint has been accepted.’

Criteria for using informal resolution

The majority of organisations (25) did not have any written criteria to guide their investigators when deciding on whether or not to engage in informal resolution. Decisions were made on a case-by-case basis with the investigator applying their own discretion, based on their training and experience, which, as can be seen in the section on training, can vary considerably in quality and duration.

Where informal resolution was the default option, no criteria are needed, as in the case of the Ombudsman for Ireland, or the Financial Services Ombudsman Scheme (Isle of Man) (who offer all complainants mediation).

Others said about the absence of criteria:

‘[the criteria] are a matter for judgment by the Ombudsman in each case’ (Ombudsman for the Defence Forces, Ireland)

‘with property complaints, only experience provides this knowledge’. (Property Ombudsman)

Only 11 schemes said that they had written criteria relating to when informal resolution can be used, and of these, only three are published and available in the public domain. These are the Advertising Standards Authority (ASA), the Garda Ombudsman and the Police Ombudsman for Northern Ireland.

The ASA has a document on their website which sets out the complaint handling procedures to be followed and includes the following criteria relating to the use of informal resolution:

Section 24 – ASA Non Broadcast Complaint Handling Procedures⁶⁸

Reasons for offering/agreeing informal resolution may include, but are not limited to:

- if an apparent breach has been remedied by an advertiser taking relevant action after being contacted by us
- if the number and/or seriousness of the complaints does not provide good reason to investigate the case formally
- if there is no obvious pattern of unwillingness or inability of the advertiser to comply with the Code
- if there is no pressing need to investigate formally to, for example, establish a policy on the particular issue or to form a view of a particular advertiser's compliance to help inform CAP Copy Advice's or Compliance's work.

In relation to these written criteria, the ASA say:

'These are quite prescriptive and we are likely to update soon to make them less granular as we find sometimes people use the list of typical informal examples as a closed list where it is really intended on being for example.'

The Garda Ombudsman has an online leaflet⁶⁹ called 'Guidelines on Informal Resolution & Mediation', which sets out the categories of complaint that are excluded from resolution by informal resolution or mediation. This leaflet goes on to say 'The Garda Ombudsman will use the process of mediation to attempt to resolve those complaints where mediation appears as or more likely than an investigation to achieve a resolution. Each case must be considered on its own merits. Given the nature of the process not all cases are suitable for mediation.'

The Police Ombudsman for Northern Ireland has an online 'Informal Resolution Leaflet'⁷⁰ which explains that only less serious complaints can be informally resolved. These are usually complaints which, in the view of the Police Ombudsman, if proven would not constitute a criminal offence or warrant any form of disciplinary action being recommended.

Five organisations that use written criteria in their practices said that this was either an internal document or one that was contained within their internal procedures. For example, Dispute Services said that their criteria were contained within 'Internal Operating Procedures', and the Ombudsman for Children referred to criteria within complaints procedures documents. Ombudsman Services said that the information was available to

⁶⁸ <http://www.asa.org.uk/Industry-advertisers/~media/Files/ASA/Misc/Non-Broadcast%20Complaint%20Handling%20Procedures.ashx>

⁶⁹ <http://www.gardaombudsman.ie/docs/publications/GuidelinesMediationInformalResolution.pdf>

⁷⁰ <http://www.policeombudsman.org/About-Us/Publications/Leaflets-and-other-documents>

staff in the form of a handbook. Another two organisations referred to leaflets as providing criteria, but on examination did not contain any written criteria as such.

In one case, that of the Scottish Legal Complaints Commission (SLCC), no written criteria exist, but section 8 of the Legal Profession and Legal Aid (Scotland) Act 2007, specifies that informal resolution is to be used for service complaints. It usefully sets out procedural requirements for mediation, namely that it is voluntary for both parties (S.8(5)); that either party to the complaint can withdraw their consent to mediation at any time, and the SLCC itself can discontinue mediation in those and 'any other circumstances' (S.8(6)).

Commentary

The majority of organisations (25) did not have any written criteria to guide their investigators when deciding on whether or not to engage in informal resolution. Decisions were made on a case-by-case basis with the investigator applying their own discretion, based on their training and/or experience, on the basis of 'you know it when you see it'.

For many schemes, informal resolution appears to be the default approach to complaint handling, with a move to investigation if the complaint did not resolve at this stage of the process or if there was some reason to investigate. Given this, on reflection, a more informative and potentially productive question to have asked in our survey would have been, 'What are your criteria for deciding whether or not a complaint needs to be investigated?' rather than 'What are your criteria for using informal resolution?'

When the majority of schemes are using informal resolution, some of them for most of their complaints, it is striking that so few schemes have published criteria for assessing suitability.

f. Process of informal resolution

We asked respondents to explain how they describe the informal resolution process they use. We also asked about other aspects of this process, including at what stage it occurs/is used.

What processes are used?

Informal processes used by the respondents broadly fall into two categories:

- those involving a shuttle negotiation, or brokering a solution with the parties, usually by phone or email
- those involving a face-to-face mediation

In addition, two organisations described their process as encouraging an informal resolution approach directly between the complainant and the complained-about body (Housing Ombudsman Service and Ombudsman for Children). The ombudsman's role in such cases is as a facilitator rather than a dispute resolver.

A large number (14 out of 36) did not provide an explanation of the process but instead described the type of case they would deem suitable for informal resolution. For others, informal is the default process, although it was not always possible to establish this from the responses. For example, the Information Commissioner's Office said that explaining informal resolution to the parties is at the discretion of the individual case officer, but that 'in initial letters to the parties it is made clear that where possible the Information Commissioner prefers complaints to be resolved informally and that we ask both parties to be open to compromise'. The Irish Language Commissioner takes a similar approach in informing parties of the preference for informally resolving complaints:

'We would normally advise the complainant in writing that we are processing their complaint through the 'informal complaints mechanism operated by our Office' as a first step.

Brokering or shuttle negotiation

The largest group (16) described a process of brokering or negotiation, either by phone or email. Examples include:

'Brokering a resolution between the customer and the department based on the evidence from the investigation.' (Adjudicator)

'Discussion with relevant parties to ascertain position. Open and transparent dialogue resulting in favourable outcome.' (Commissioner for Public Appointments in Northern Ireland)

'We contact the parties by email when we are aware of a potential dispute and explain the advantages of trying to resolve the dispute themselves.' (Dispute Service)

'Conciliation is "arm's length" – some by email and some by letter – a sort of shuttle negotiation.' (Furniture Ombudsman)

‘They would then work with the complainant and the organisation involved to agree an appropriate resolution.’ (Parliamentary and Health Service Ombudsman)

Sometimes this process takes place initially between the complained-about party and the ombudsman, when an obvious and quick remedy has been identified. Only after the complained about party has agreed to this action is the complainant informed. For example: the Public Services Ombudsman for Wales said:

‘In some cases we may take the view that there is action that the organisation being complained about could take to quickly resolve a complaint. In these cases we will contact the organisation involved to explain what we think might be done and seek its agreement to take that forward.’

Similarly the Advertising Standards Authority (ASA) described its informal approach as identifying the appropriate outcome, such as changing or withdrawing an ad, and getting the advertiser’s agreement to take this action. Unlike with ombudsmen, with the ASA the complainant is

‘more akin to informants in many ways. ...we would not be negotiating with the complainant as to what steps the advertiser needs to do to remedy the issue. That would be a matter between us and the advertiser, having regard to [the] complaint and our broader expertise in understanding what consumers as a whole would take from the ad.’

For some schemes, the actual process is determined on a case-by-case basis. For example, the Property Ombudsman explained:

‘if the officer feels that a goodwill offer previously made was not high enough they would contact the agent, explain why a higher amount would be appropriate, negotiate and gain the agent's agreement to that amount and then put the proposal to the complainant. Alternatively if it was considered that the complainant's expectations were unrealistic, this would be explained to them and a realistic resolution sought between the parties. The channels used for conciliation would again be decided by the resolution officer as the most appropriate – email and/or telephone being the most common.’

And for the Financial Ombudsman Service (UK):

‘Each case is different and can lead to different forms of informal resolution, depending on the complainant’s requirements, what the complaint is about, how collaborative the business is, and ultimately how entrenched both parties may have become.’

Face-to-face meetings

Five schemes offer face-to-face meetings as part of their informal resolution ‘product’. These are:

- the Garda Ombudsman (which set out their process in detail) explained:

‘Each mediation process will be determined by the mediator on a case by case basis but will usually involve the following:

One to one meetings between the mediator and each party;

A joint session involving the parties and the mediator giving both Parties the opportunity to relate his/her side of the story; and

The mediator will then facilitate discussions between the parties as to how the complaint can best be resolved and, if consensus is reached, the mediator can conclude the proceedings with a final restatement and clarification of the terms of the resolution.'

The Press Ombudsman described their informal resolution process as:

'Face-to-face meeting between editor and complainant, with Case Officer acting as facilitator.'

The Financial Services Ombudsman (Ireland) also uses a mediation meeting as part of its process:

'Facilitated by a trained mediator who either finds an agreement between the parties or does not – could take up to a full day to close the mediation out.'

In addition to its own informal negotiation with parties, carried out by the case handler, the Office of the Independent Adjudicator (OIA) offers face-to-face meetings with an external mediator:

'In some cases the ... case handler might think that it would be in the best interest of both the student and the university to sit down together and try to reach their own agreement to settle the complaint. ...

The OIA will not refer a complaint to mediation unless both the student and university agree to it. The OIA case handler, usually after an initial review of the case file, will suggest to both the student and university that mediation might be useful in their particular case and will allow some time for them to consider this option.'

The Scottish Legal Complaints Commission also uses external mediators:

'The mediation process is flexible and takes place at a mutually convenient location for the parties or by telephone or Skype. It can involve the parties meeting in the same room to talk through matters or in separate rooms, with the mediator acting as an intermediary.'

When does it happen?

For the majority of organisations (22), informal resolution happens early in the complaint handling process. One did not reply to this question. Of the others:

- Eight reported that it takes place at any or all stages, even, for some, after a decision has been issued. For example:

'At all stages, including after a decision is issued where there may be scope for mediation or settlement on the remedy' (OIA)

- Three reported that it takes places at any stage up to when a decision is issued.

- Two reported that it takes place only after a decision has been issued. For these two, informal resolution is used to reach agreement on the remedy.

Characteristics of informal resolution

When examining replies to the question ‘How do you define/explain the [informal resolution] process?’, various themes emerged relating to the essence of the informal process and the drivers for its use. Some of these themes describe an outcome – for example, informal resolution is about achieving a mutually agreed settlement between the parties, or it is about achieving a ‘favourable’ outcome. Others describe the drivers – for example, informal resolution is used to provide a speedy case closure compared to investigation or to give the parties the opportunity to have a say. Yet others appear to distinguish their informal resolution process from their formal one in the sense of whether or not a complaint is determined – for example, any case closed other than by ombudsman decision.

These themes are:

- agreement between the parties
- acceptable/favourable outcomes
- an offer to the parties – e.g., to allow them to have their say
- speed and expediency
- any complaint not determined/decided

These themes reflect common characteristics of informal resolution processes, such as consensual agreement, the voice of the parties, speed, and informality. Many schemes gave evidence of more than one theme or characteristic present in their process. Below each of these themes is discussed.

Agreement between the parties

The most commonly cited aspect was ‘an outcome acceptable to both parties arrived at through shuttle negotiations’. Examples of this include:

‘By an informal consultation process with both parties, analogous to mediation, the Ombudsman may reach an acceptable level of agreement between the parties as to action(s) which would resolve the particular complaint.’ (Ombudsman for the Defence Forces, Ireland)

‘Contact both parties by telephone, explain the aims of the informal resolution process, and seek both parties’ consent’ (Garda Ombudsman)

‘An expedient method of achieving a mutually acceptable solution to a complaint’ (Law Society of Ireland)

‘Using our experience to help you and your lawyer sort out your complaint in a way that you both agree to’ (Legal Ombudsman)

‘Mediate between the complainant and [complained about body] in an effort to resolve the issue to everyone’s satisfaction’ (Pensions Ombudsman, UK)

‘Aims to see if there is a resolution acceptable and agreeable to all parties; explaining what might be able to achieve and how we would approach’ (Scottish Public Services Ombudsman)

Acceptable/favourable outcomes

Some respondents focused on the ability to achieve favourable outcomes using an informal resolution process but, unlike those above, they did not specify whether the outcome was one considered favourable by the complainant, the respondent, both parties, or the ombudsman. Examples of these include:

‘Open and transparent dialogue resulting in favourable outcome.... When Commissioner decides that all appropriate action has been taken’ (Commissioner for Public Appointments in Northern Ireland)

‘Our determination will clearly explain why we think the offer resolves the dispute based on the particular circumstances of the complaint.’ (Housing Ombudsman Service)

‘At times we come to a resolution that the Ombudsman is happy with and the complainant isn’t. If the Ombudsman is happy then the complainant has to accept or reject.’ (Office of the Ombudsman, Ireland)

The Housing Ombudsman Service explains that although it aims to help the parties reach a resolution, the ombudsman will, in effect, have to agree to the resolution.

‘Through our intervention all parties have agreed a resolution. Our determination will clearly explain why we think the offer resolves the dispute based on the particular circumstances of the complaint. This is in accordance with the Ombudsman’s statutory duty to determine complaints by reference to what is, in his opinion, fair in all the circumstances of the case.’

The Scottish Public Services Ombudsman (SPSO) was unusual in explaining that it would be uncomfortable with a resolution that goes against the scheme’s sense of fairness, noting the power imbalance that exists between the parties. The SPSO ‘decides if an apology is appropriate and the redress offered is appropriate ...and [w]ill only put forward a body’s proposal if we think it’s fair.’

An offer to the parties

Several respondents presented informal resolution as an ‘offer’ to the parties, to allow them to have their say, control the outcome, etc. For example, the Police Ombudsman for Northern Ireland explains that informal resolution is a ‘non-disciplinary forum where a complainant has an opportunity to bring their concerns to the attention of the officer or officers concerned by a senior police officer’.

The Ombudsman for Children explained it offers informal resolution in response to ongoing concerns by a complainant where the complaint has not been accepted for investigation:

‘Although the Office has previously determined that we will not be examining your complaint, given the remaining and on-going concerns that you have and our understanding that your relationship with the (public body X) has been strained due to your past experiences, we have decided to write to the (public body X) to bring your concerns to their attention.’

Speed and expediency

For others, the emphasis appears to be on speed and expediency. For example, as noted earlier the Waterways Ombudsman explains that informal resolution is a ‘means of reaching a settlement more quickly than could be achieved by formal investigation, which would take time and resources.’

The Welsh Language Commissioner described their informal resolution as:

‘Collecting appropriate evidence and information – the purpose of this step is to try to obtain a swift solution to the complaint and enable the Commissioner to form an opinion on whether there is any need to conduct a full statutory investigation.’

The Independent Complaints Reviewer for the Disclosure and Barring Service (ICR DBS) also cited expediency:

‘It is an attempt to identify at an early stage whether there is an acceptable resolution which addresses the potential shortcomings without the need for a formal examination of the information.’

The ICR DBS says:

‘It is a quicker process which allows a complainant to articulate their complaint, indicate what is important to them in resolution and put it into practice without the inherent delay in investigating and finalising a report.’

Timescales

Interestingly in relation to this theme, we were informed by some schemes that there is a time limit to the informal resolution stage. The survey did not ask specifically about timescales for, so we cannot conclude that those who did not inform us of timescales for informal resolution do not in fact have them. Among those who mentioned this aspect are:

‘The state organisation is given 10 working days in order to achieve an informal resolution. ... If a complaint cannot be resolved informally, a formal investigation is initiated.’ (Irish Language Commissioner)

‘Mediation is limited to one hour per dispute.’ (Dispute Service)

‘When mediation is offered both parties to the dispute have 10 working days to respond. ... could take up to a full day to close the mediation out.’ (Financial Services Ombudsman, Ireland)

‘We usually time-limit our attempts at resolution to prevent protracted debate.’ (Independent Case Examiner)

‘We aim to resolve [early resolution] cases within 5 days of receipt of the complaint form.’
(Ombudsman Services)

Any complaint not determined

Another theme was that of informality referring not to a particular process but to any form of disposal short of an ombudsman determination (i.e. including signposting, referral back to internal complaints, and arriving at a remedy with parties’ consent). Examples of this include:

‘Everything before an ombudsman determination’ (Legal Ombudsman)

‘... informal resolution... implies that we have not completed a full investigation of the issues’
(Ombudsman Services)

‘Cases which we resolved without the need for a decision’ (Scottish Information Commissioner)

‘Try to obtain a swift solution to the complaint and enable the Commissioner to form an opinion on whether there is any need to conduct a full statutory investigation.’ (Welsh Language Commissioner)

One respondent explained that ‘informal resolution’ applies also to ombudsman decisions, but only those that result from an investigator’s view that is rejected by one of the parties. Although these are final and binding, as in formal decisions, they are not published.

‘Where the investigator’s “view” is not accepted by one of the parties it will be referred to an Ombudsman for determination. We refer to these as being determined informally. They are final and binding decisions, but are not published on our website. Formal determinations are published.’ (Pensions Ombudsman, UK)

All or none?

In addition to the above characteristics, others reflected a view that all their processes were informal, to varying degrees. For example:

‘All the service’s resolutions are informal to a greater or lesser degree. A decision by an ombudsman, if needed, is the most formal part of the process – but is still intended to be less formal than an equivalent decision in a court or tribunal....’ (Financial Ombudsman Service, UK)

Several schemes expressed the view that if a complaint or dispute can be resolved informally, then it ought to take place between the parties without the involvement of the ombudsman or complaints handler. Indeed, as noted elsewhere, some respondents cited the use of informal resolution as an indication of failure of the first tier complaints stage.

‘... contact the parties by email ... and explain the advantages of trying to resolve the dispute themselves’ [Dispute Service]

‘We will focus on helping the parties to reach resolution themselves through the available local procedures.’ (Housing Ombudsman Service)

‘If the complaint is suitable for IR [informal resolution] and the complainant consents to the process, the Police Ombudsman's Office will then refer the matter to the PSNI's [Police Service of Northern Ireland] Service Improvement Department (SID), which will then manage the informal resolution process.’ (Police Ombudsman for Northern Ireland)

The Ombudsman for Children described their use of informal resolution as a practice of encouraging local resolution, or resolution directly between the parties. Where it has declined to investigate a complaint, but the complainant remains dissatisfied, it tells the complainant:

‘We have written to the Y section in public body X in order to encourage that they initiate contact with you in order to establish if resolution may be possible, to ascertain what that may entail, to ensure that closure may be achieved and that, should your family require further (public body X) services, all parties can proceed in the best possible manner.’

Commentary

With regard to most participating schemes, it proved difficult to establish what exactly the process of informal resolution consisted of, and more research is required in this area. It was not always clear from responses whether this was due to lack of detail provided, the way the questions were posed, lack of clarity of the process itself, or reluctance to articulate it in detail. Having said that, most of the organisations that say they use informal resolution appear to be using a form of shuttle negotiation or brokering, with a focus on speed and expedition and a desire to reach an outcome that is either acceptable to the parties, to the ombudsman, or to all involved. For the majority, this happens early, soon after the complaint has been assessed for eligibility.

This relatively undefined process leads us to question how much of the process of informal resolution involves examining or uncovering evidence and to what extent outcomes reflect the view of the case-handler as to what the body complained against would be prepared to provide rather than an actual consideration of fairness and justice. How much of what is brokered by a case handler or investigator reflects previous judgements made on other complaints by the scheme? To what extent is there an internal knowledge base through which determined complaints can influence the outcomes of informal resolution?

It is interesting to note that two of the schemes use informal resolution *only* after a complaint has been decided and upheld, as a means of obtaining the parties' agreement on a remedy.

g. Publishing information on informal resolution

Earlier in this report we presented the wide range in the rates of use of informal resolution by various schemes, from less than 1% to 99% of the disputes they deal with. In light of concerns raised by academics and legal practitioners about the increasing use of informal resolution, we sought to establish what practices are adopted by complaints handlers in that respect, and asked: 'Is information on informally resolved cases published, and if so, what information is published and where?'

Responses

The majority of respondents (23 out of 36) publish some information about the complaints they resolve informally. Twelve schemes do not publish any information on informally resolved complaints.

Below we discuss first the responses from those who do not publish and then present the variations, in the extent and form of information published, among those that do publish.

No information published

The 13 organisations that replied that they do not publish information on informally resolved cases are:

- Commissioner for Public Appointments in Northern Ireland
- Ombudsman for the Defence Forces (Ireland)
- The Dispute Service
- Financial Services Ombudsman Scheme (Isle of Man)
- Financial Services Ombudsman (Ireland)
- Furniture Ombudsman
- Garda Ombudsman
- Independent Complaint Reviewer for the Disclosure and Barring Service⁷¹
- Law Society of Ireland
- Legal Ombudsman
- Parliamentary and Health Service Ombudsman
- Waterways Ombudsman
- Welsh Language Commissioner

However, two of these organisations (Garda Ombudsman and Parliamentary and Health Service Ombudsman) indicated that they plan to publish information about informally resolved cases in future. A third (Dispute Service) was in the process of piloting its mediation provision, and its intentions regarding publishing were not yet available at the time of conducting the survey.

⁷¹ The response from the Independent Complaints Reviewer for the Disclosure and Barring Service (ICR DBS) stated: 'It would be recorded in the Annual Report'; however, follow-up communication confirmed that this is not a publicly available document.

In addition, in the case of one respondent who answered no to this question (Legal Ombudsman), we did in fact find some published information on informally resolved complaints on their website.

Accordingly, at least three of the organisation that replied in the negative, either already do, or plan to soon publish information on informally resolved complaints.

The Furniture Ombudsman said that they only provide case studies to the industry press; participants are not named in these.

Information published

Of the 24 respondents that confirmed that they do publish information on informally resolved complaints, we identified four types of approach:

1. statistics only (4)
2. a list of all informally resolved complaints (1)
3. summaries of some informally resolved complaints (17)
4. summaries of all informally resolved complaints (1)

In one response we were unable to identify the type of information published (Independent Complaint Monitor – Disclosure and Barring Service).

As is shown, the majority (17) of these publish some summaries of informally resolved complaints. Of these, some publish summaries on a regular basis (as in the annual report or in regular case digests) and others publish summaries only occasionally.

Only two respondents appear to have a systematic approach to publishing informally resolved cases: the Advertising Standards Authority and the Public Services Ombudsman for Wales. These two represent opposite ends of the spectrum in terms of the format and level of detail of publication, as discussed below.

Publication format

We examined the websites and published reports of the responding organisations. The format in which information is published varies considerably, from statistics only, usually as part of annual reporting, to summaries of every informally resolved case.

Statistical information only

Four respondents appear to publish only statistics on the number or percentage of complaints they resolve informally.⁷² These are:

- The Scottish Information Commissioner told us that information is published on the website.

⁷² Many others publish statistics as well as other information, and they have been included in other categories.

- The Information Commissioner told us that it retains details (internally) of all informally resolved cases and the percentage of such cases are published in the annual report, but more detailed information on informally resolved cases is not published in the way that decision notices routinely are.
- The Press Ombudsman (Ireland) provided information about the mediation process, including an explanatory note for parties, explaining that the only formal recording of successfully mediated complaints appears in the annual statistics.
- The Scottish Public Services Ombudsman told us that for early resolution, only statistics are published, but resolved cases are sometimes mentioned in annual or sectoral reports.

List of complaints

The Advertising Standards Authority publishes a list of complaints it resolves informally, naming the organisation complained about and the sector but not providing any detailed information about the complaint.

Interestingly, the outcome in each of these complaints is identical – the withdrawal of the advertisement complained about, without the need for a formal investigation. The fact that the outcomes are identical might explain this form of publication, which suggests a degree of uniformity in the nature of the complaints received and the outcomes achieved. The ASA appears to resolve informally 30-50 complaints per week, representing approximately 19% of its overall caseload.

Selected summaries of complaints

The largest group of our respondents publish some information in the form of selected summaries of cases informally resolved. Many also identify the numbers of informally resolved complaints in their overall caseload statistics. The number of summaries, and the detail contained in those summaries, varies significantly among those schemes that publish some summaries of informally resolved complaints.

Some respondents do not publish summaries on a regular basis. For example, the Irish Language Commissioner published ‘an overview of a small number of the many cases’ resolved informally in its annual report in 2011, but has not done so in the subsequent two annual reports.

These informally resolved summaries are much shorter and lighter on detail than reports of investigated cases – for the Irish Language Commissioner, they are one-line summaries and give no information about the complaint itself. In comparison, its summaries of investigated complaints (and it publishes summaries of all investigated complaints in its annual report) often run to several pages.

The Adjudicator published only one case summary in its 2012–13 annual report and none in its 2013–14 annual report. We found only two informally resolved complaint summaries for

the Adjudicator: the one in the 2012–13 annual report and a second informally resolved case study published on its website.⁷³

The Ombudsman for Northern Ireland refers to four out of 180 complaints being ‘settled’, but no settled case is summarised in 2013–14 Annual Report. It told us that a selection of cases is published in annual reports and the quarterly Case Digests on its website, but we were unable to find any informally resolved examples among the summaries. In its response to us, however, it described very briefly those four cases: three cases concerned a housing authority and involved a small consolatory payment; the fourth case involved a complaint about a benefit payment where the agency reviewed its original decision following a finding of maladministration.

The Prisons and Probation Ombudsman, which uses mediation in some complaints about property, told us that it does not report separately on mediated cases. However, it has produced a themed report on property disputes and includes a number of case examples of mediated cases in that report.

The Scottish Legal Complaints Commission also uses mediation, and it publishes brief examples of mediated cases in its annual report.

The Pensions Ombudsman (UK) and the Pensions Ombudsman (Ireland) each publish occasional examples of informally resolved complaints.

Two schemes told us that they publish case summaries of informally resolved complaints, but further analysis of their websites and annual reports indicates that they do not distinguish between those complaints that are informally resolved and those closed through investigation or other means. The Financial Ombudsman Service (UK) (FOS-UK) told us that they publish case studies in the service’s publication *Ombudsman News*. In our follow-up interview with FOS-UK, and after examining their published case studies, it became apparent that although complaints resolved informally are included among the case summaries, there is no evident distinction between these and cases resolved through other means. FOS-UK publishes data about its caseload – including who and what the complaints were about, who made them, how they were resolved and the key themes from them. The service also publishes information about the approach it takes to certain complaints in the ‘online technical resource’ on its website, where individual ombudsman decisions are also published.

The Independent Case Examiner (ICE) told us that it publishes information on informally resolved cases. Its 2012–13 Annual Report includes statistics on the percentage of complaints dealt with through informal resolution, and it presents cases studies. As with FOS-UK, however, it is not evident which of the ICE case studies were resolved informally and which were closed by other means.

⁷³ <http://www.adjudicatorsoffice.gov.uk/casestud.htm>, case study 8.

Summaries of all complaints

Only one respondent (Public Services Ombudsman for Wales) told us that it publishes all informally resolved complaints. Included in its 'Ombudsman Casebook', published on its website, are case summaries of investigated complaints as well as of complaints resolved by 'quick fix and voluntary settlement'. These are organised by subject (for example housing, health, planning, etc.) and summaries are provided of complaints and outcomes, including any action agreed by the body complained about.

Commentary

The majority of respondents, 19 schemes, publish at least some information about complaints resolved informally. Thirteen schemes replied that they do not publish such information, and in the case of four schemes it was unclear whether they do or not.

We considered the responses to the publication question in light of how frequently informal resolution is used by each scheme. Those who publish selected case summaries (the largest group) range in their use of informal resolution from more than ninety percent (3) to the '<1%-10%' band (3), with the majority (9) in the '11%-60%' band. Four schemes publish only statistics. Among those who publish nothing on informally resolved complaints is one scheme using informal resolution in 90% of its complaints.

To some extent the format in which information on informally resolved complaints is published depends on the type of complaint-handling body involved and its caseload volume. The Financial Ombudsman Service (UK), for example, is the largest ombudsman scheme in terms of caseload. According to the definition of informal resolution adopted by that scheme, 94% of its caseload, or approximately 500,000 complaints each year, are resolved by that method. It would be unrealistic to publish summaries of each and every case. Instead, they use actual case examples, regardless of their method of resolution, to illustrate themes and patterns in the complaints.

The Advertising Standards Authority is a form of regulator, and it could be argued that for that reason, naming the organisation complained about is an important part of their oversight role. It deals with a relatively large number of complaints. Furthermore, if, for the most part, complaints that are resolved informally follow a similar pattern, and achieve similar outcomes, then summarising each of the complaints is probably unnecessary.

The study sought data about publication because a key concern arising from the increasing use of informal resolution is lack of transparency. Decisions (or determinations or rulings) are often made public, but complaints resolved informally are not. If only decisions are published, and these become the minority method of closing complaints, there is less opportunity for ombudsmen to give feedback and to set standards for good complaints handling for the bodies in their jurisdiction. It also makes it difficult for complainants, and those complained about, to assess a proposed resolution against decided outcomes.

h. Role in ensuring compliance with informal resolution

Understanding who decides that informal resolution has concluded and what happens to an unresolved complaint are key factors for understanding the distinctions between the practices of various ombudsman schemes and complaints handlers.

We asked:

- ‘How is it decided that the informal resolution process has been concluded?’
- ‘What is the role of [your organisation] in ensuring compliance and/or/enforcing agreements reached informally?’
- ‘If a case does not resolve through informal resolution, how does it proceed from there?’

The responses

Who decides?

A third of those who say that they use informal resolution (12 organisations), told us that it is the parties to the complaint (i.e. the complainant and the complained-about body) who decide whether a complaint has been resolved or not through informal processes. For example:

‘When an outcome that is acceptable to both parties has been achieved or when it becomes clear that such an outcome will not be achieved. We usually time-limit our attempts at resolution to prevent protracted debate.’ (Independent Case Examiner)

Another third told us that the ombudsman or complaint-handler decides. For example:

‘At times we come to a resolution that the Ombudsman is happy with and the complainant isn’t. If the Ombudsman is happy then the complainant has to accept or reject.’ (Office of the Ombudsman, Ireland)

A smaller number (7) told us that it is the complainant who decides – in other words, a case concludes if the complainant is satisfied with a proposed outcome. For example:

‘When the complainant has indicated acceptance of whatever solution has been brokered in the process.’ (Pensions Ombudsman, UK)

In the case of the remaining five respondents we were unable to gauge from their response who exactly makes the decision that a case had reached a conclusion and is to be closed.

Progression to investigation/decision

As to what happens to cases that fail to conclude by way of informal resolution, in the majority of schemes (26, or 72%) such a complaint would progress to investigation and/or final decision by the ombudsman. Some described it being a ‘right to refer’ or to request an

investigation. However, it is not always clear whether this is a right or it is subject to discretion of the scheme.

A much smaller number of respondents (10) explained that the complaint *might* progress to investigation and decision, but this was a matter of discretion for the complaint handler, who could decide to close the case instead, despite the wishes of the parties.

Among the explanations provided by this group of respondents were:

‘Where mediation hasn’t yielded a result, it is usually clear that there is no chance of complaint succeeding’ (Pensions Ombudsman, Ireland)

‘The Commissioner may initiate a formal investigation’ (Irish Language Commissioner)

‘If appropriate the case would be reviewed and the [ombudsman would] advise on reasonable redress... If we feel we could add value a decision could be made formally’ (Housing Ombudsman Service)

‘It would go to investigation if suitable, unless there were other reasons not to take it forward – e.g., might say to complainant, that even if we investigate the result likely to be the same; that’s all we can do.’ (Scottish Public Services Ombudsman)

The Press Ombudsman (Ireland) explained that if mediation (its informal process) does not result in a satisfactory outcome for the complainant, the complaint reverts to the more formal conciliation process and, if necessary, to the Ombudsman for a decision.

The Public Services Ombudsman for Wales explained that its process is one in which the ombudsman decides the outcome:

‘While the complainant’s views about a proposed settlement are important, those views cannot veto a proposal which is acceptable to the Ombudsman. Ultimately it is up to the Ombudsman to decide what is reasonable.’

Once that has been achieved, ‘or the officer is content that the relevant listed authority will carry out the action it has agreed to take to settle the complaint, the case can be closed.’

The Garda Ombudsman explained that the conclusion of mediation requires a written record from both parties. If mediation fails to achieve an agreement, then its progression depends to some extent on the reason for that. The Ombudsman explained that:

‘[If] mediation fails due to the failure of the complainant to provide reasonable assistance for the purpose of conducting the mediation process, the Garda Ombudsman retains the discretion to either close the case or to have it investigated.’

If, however, it fails due to a Garda member failing to provide reasonable assistance, or if either party decides to disengage from the mediation process, the case is referred to investigation.

The Waterways Ombudsman decides whether informal resolution is appropriate and when it has concluded or is unlikely to succeed.

The Furniture Ombudsman explained that a complaint could proceed to an adjudicator decision but this was not the default position:

‘Would close if consumer did not accept the resolution. Used to move to adjudication if “failed” at conciliation, but now no longer a two-stage process. If after conciliation there still appears to be a serious problem, then for the Adjudicator to decide whether to go to investigation and obtain an independent report.’

Compliance and enforcement

With regard to the role of schemes in ensuring compliance with or enforcing agreements reached informally, we grouped the responses into three categories. In addition to these three categories, we found that nine responses were ambiguous in that it was unclear whether they were referring specifically to informal resolution or to their role in ensuring compliance with all outcomes including recommendations and decisions.

We grouped the remaining responses into three categories:

- those who take a proactive role in enforcing informal resolution outcomes and/or ensuring compliance (13)
- those who take a reactive role in this (11)
- those who told us they have no role in this (3)

Proactive role

Thirteen respondents describe what appears to be a proactive role in ensuring compliance with and/or enforcing informally resolved outcomes – i.e. it is the organisation that undertakes to confirm that any agreed actions are carried out.

A proactive role is also indicated when an organisation keeps a complaint open until confirmation is received from the parties that the actions have been implemented.

Examples of this include:

- The Press Ombudsman (Ireland) explained that the case officer is responsible for ensuring ‘that agreements arrived at via mediation are implemented. If they are not implemented (and it has never happened that they haven’t been) the complaint will revert to the conciliation process’ (which the Press Ombudsman describes as its formal resolution process).
- The Waterways Ombudsman’s role in ensuring compliance is ‘that of checking that the complainant is satisfied with the outcome and has indicated that the matter has been closed.’
- The Northern Ireland Ombudsman explained that the public body is requested to confirm in writing implementation of the resolution.

- The Ombudsman for the Defence Forces (Ireland) does not close a complaint until ‘the resolution agreed has been acknowledged in writing by the parties as having been delivered.’
- The Prisons and Probation Ombudsman treats mediated outcomes in the same way as more formal recommendations: ‘This means we expect implementation to happen within four weeks, unless otherwise agreed, and to receive confirmation of this from the organisation concerned.’
- The Scottish Legal Complaints Commission told us that if a case investigator resolves a complaint informally, he or she will check that settlement has been fulfilled before closing a complaint. They also noted that it would be open to the complainant to submit a further complaint about the conduct of the practitioner if they believe the practitioner breached the terms of the agreement.
- The Welsh Language Commissioner explained that before a case can be closed, a form needs to be completed ‘outlining the measures taken by the public body to resolve the complaint and the actions for improvement identified to ensure that the failure is not repeated’. In addition, ‘[t]he implementation of improvement action is reviewed as part of the Commissioner’s regular compliance work.’

Reactive role

Eleven respondents describe what appears to be a reactive role in ensuring compliance with and/or enforcing informally resolved outcomes. By this we mean that it is the organisation does not take the initiative to follow up on agreements/resolutions, and it is the parties who must confirm that any actions agreed informally are carried out.

Often, the complaint will be closed when agreement is reached, but with the understanding that a complainant can return if the agreement is not implemented. The organisation then either puts the complaint through investigation or review process, or intervenes to ensure the informally resolved agreements are carried out. Examples of this include:

- The Public Services Ombudsman for Wales (PSOW) makes it clear to complainants that they should go back to The scheme if actions agreed with the public service provider have not materialised. ‘The PSOW will then treat this as a new complaint with the matter taken forward to investigation stage; the body concerned will not get a second chance at informal resolution.’
- The Independent Complaints Reviewer said that ‘If a complainant reported that an organisation had not fulfilled an agreement we would contact the organisation to seek explanation/action.’
- The Law Society of Ireland explained that if agreement is reached, they close their file, but on the understanding that a file can be reopened if necessary.
- The Parliamentary and Health Service Ombudsman explained that it does not ensure compliance but if the complainant felt that the organisation had not delivered the agreed resolution then they could return.

No role

Three respondents stated that they have no role in ensuring compliance with and/or enforcing informally resolved outcomes.

The Financial Services Ombudsman (Ireland), the Garda Ombudsman, and the Financial Services Ombudsman Scheme (Isle of Man) (FSOS) all said that they had no role in enforcement. FSOS also said '[We do not] have authority to enforce an agreement reached informally. We rely on the agreement being met in the way of a "gentleman's agreement".'

Interestingly, this contrasts sharply with the position of the Financial Ombudsman Service (UK), who has detailed provisions for enforcement:

'In case of ongoing disagreement or non-compliance, both parties have the right to refer the complaint to an ombudsman for final decision.'

Commentary

Ombudsmen and complaint handlers have limited powers to enforce compliance with outcomes achieved through informal resolution. A small number have no role in compliance of such outcomes. For the largest group, the main 'sanction' is keeping the complaint open until compliance has been confirmed, and if necessary, the complaint can be 'escalated' to formal investigation, decision or determination, and in some cases a published report.

The study found that among those schemes that do have a role, about half are proactive in this (monitoring implementation, for example, or obtaining confirmation of compliance from the complainant, the body complained against or both parties). An equal number of respondents take a reactive role in the sense of leaving it to the complainant to inform the complaints handler if there is a problem. Many participants, however, did not specify what happens after cases conclude.

Identifying whether the scheme takes a reactive or proactive role in ensuring compliance with informally resolved outcomes gives a clue as to whether, and to what extent, the complaint remains under the umbrella of the organisation when it is closed by informal resolution. To some extent these issues reflect ownership –of both the complaint and its outcome.

Occasions of non-compliance appear to be rare, although it is not always clear that this reassurance applies to informal as well as formal outcomes. Detailed data as to the incidence of non-compliance and methods of monitoring compliance are insufficient at this point. In addition, greater clarity on the means of monitoring and uniformity of approach is likely to improve public confidence in the process.

Finally, it may be noted here that the absence of enforcement powers combined with patchy follow up on cases and paucity of complainants' satisfaction measures, suggest a likely weakness in the process of informal resolution that ought to be further explored and addressed.

i. Training in informal resolution

This section of the report considers the responses of participating schemes to the question ‘What training in informal resolution, if any, do caseworkers receive?’ Of the 36 respondents using informal resolution, all but five said that they had some form of related training in place for those handling the complaints.

No training programme

Five organisations do not have a training programme. They are:

- Adjudicator
- Parliamentary and Health Service Ombudsman
- Independent Complaints Monitor for the Disclosure and Barring Service
- Scottish Public Services Ombudsman
- Waterways Ombudsman

Of these five, the first three were in the process of auditing their training needs and/or developing their informal resolution training when surveyed. The Scottish Public Services Ombudsman has identified the type of skills it believes are needed for its staff to carry out informal resolution – ‘What are required are mediation-like skills – good listening skills, managing difficult conversations’.

The remaining two of the five above explained that they each consist of a single staff member, who was recruited to the post for their particular skills and/or experience in relation to informal resolution.

It is not intended here to comment on the strengths and weaknesses of the various training programmes for the 31 respondents who do have them, or to compare their effectiveness. Instead, the primary aim is to map the approaches reported as a starting point for more detailed future inquiry. Based on the responses received, we have broadly divided training provided into five categories, as set out below. Not all fitted neatly into one category, there being duplication and overlap.

Training provided

Training Practices	Schemes
Not clear if training is informal resolution specific	Advertising Standards Authority Commissioner for Public Appointments in Northern Ireland Financial Services Ombudsman Scheme (Isle of Man) Independent Case Examiner Ombudsman for the Defence Forces (Ireland) Pensions Ombudsman (UK) Pensions Ombudsman (Ireland) Welsh Language Commissioner
‘On the job’ learning	Furniture Ombudsman Prisons and Probation Ombudsman Property Ombudsman

	Ombudsman for Children
In-house courses at induction, often followed up by mentoring and/or by in-house training	Financial Ombudsman Service (UK) Housing Ombudsman Service Independent Complaints Reviewer Information Commissioner's Office Legal Ombudsman Northern Ireland Ombudsman Ombudsman Services Police Ombudsman for Northern Ireland Public Services Ombudsman for Wales Scottish Information Commissioner
A combination of in-house training and training provided by external providers	Irish Language Commissioner Law Society of Ireland Office of the Ombudsman (Ireland) Press Ombudsman (Ireland) Independent Adjudicator for Higher Education
Use already trained internal or external mediators	Dispute Services Financial Services Ombudsman (Ireland) Garda Ombudsman Scottish Legal Complaints Commission

1. Not clear if training is informal resolution specific.

For these eight organisations it was not always clear whether the respondents were referring to general training, or specifically to training in informal resolution approaches.

2. 'On the job' learning.

This applied to four schemes. We understand this to mean that no training is provided specifically in relation to informal resolution, but the investigators acquire expertise from their own experience as well as from colleagues.

The Property Ombudsman described it as 'six month probation period where all of their proposed resolutions are assessed by their senior case officer line managers. It is the senior case officers' role to provide training'. The Furniture Ombudsman said that they have 'a monthly 'know how' workshop. Tend to train each other'.

3. In-house courses at induction, often followed up by mentoring and/or by in-house training.

This took place in ten schemes. For example, the Housing Ombudsman Service said:

'Our recruitment process is rigorous, using a strengths based approach to make sure we recruit for local resolution needs. This is designed together with our induction and ongoing coaching and mentoring approach, to make sure caseworkers are empowered to assess the best approach based on the individual facts presented to them.'

The Northern Ireland Ombudsman said ‘The topic is covered on induction training for new staff to the office.’ The Financial Ombudsman Service (UK) has: ‘an extensive training system in place for its case-handling staff. Adjudicators spend three months in an ‘Academy’, developing their skills both as informal dispute-resolvers and as subject matter experts, leading to accreditation for the case-handling roles they will eventually perform.’ For investigators at the Ombudsman for the Defence Forces (Ireland): ‘In-house training is provided by the Ombudsman who is a CEDR accredited mediator.’

4. A combination of in-house training and training provided by external providers.

Five schemes use a combination of generalist and specialist training. For example, the Independent Adjudicator for Higher Education explained that ‘Training on settlement techniques and approaches is provided by an external trainer every two years’. The Scottish Information Commissioner provides ‘Mediation training in addition to a range of seminars and training sessions on communication skills generally.’

5. Use already trained internal or external mediators.

In the case of the four schemes that described this approach, there appears to be a direct correlation with having a distinct mediation stage or option in their complaint-handling process. It is understood that a fifth scheme, the Independent Adjudicator for Higher Education, also uses external trained mediators for its mediation provision, although their response in relation to training related only to its internal case handlers (see above).

Commentary

The relationship between the training provided and the form of informal resolution practiced, was not always apparent. For example, nine respondents told us that they used mediation, either as the only or one of their informal resolution processes. However, only four of those mentioned mediation training provided or qualification required:

- Financial Services Ombudsman (Ireland): The mediator is an employee who is a trained and accredited mediator
- Garda Ombudsman: external accredited mediation training is provided
- Press Ombudsman Ireland: training from external mediation expert
- Scottish Legal Complaints Commission: external training in informal resolution; uses registered external mediators

As we have seen in the section on criteria applied in using informal resolution, only 11 schemes said that they had written criteria relating to when informal resolution could be used. Of these, only three are published and available in the public domain. One of these three, the Garda Ombudsman, is a rare example describing specific external training and accreditation of staff as well as some identification of criteria for suitability.

j. Customer satisfaction on informal resolution

We asked respondents ‘Do you have any customer satisfaction measures relating to your use of informal resolution? And if so, what are these?’ We were interested to learn whether ombudsmen seek feedback from service users specifically about informally resolved complaints.

No measures specifically for informal resolution

The majority (27 organisations, 75% of those who use informal resolution) replied that they do not have specific measures in place. Of these, 13 answered simply ‘no’ or added that they had some form of surveying customer satisfaction but not specifically in relation to informal resolution. The remaining 14 provided an explanation as to why they do not have specific customer satisfaction measures relating to informal resolution. These explanations include:

a) Feedback is received from complainants (three organisations)

Although they do not proactively seek customer feedback specifically on informal resolution through their surveys, they do receive such feedback. For example:

‘complainants generally acknowledge their appreciation after cases are resolved to their satisfaction. Even if they do not achieve what they sought the independence, fairness and impartiality of the Office is often recognised and acknowledged.’ (Ombudsman for the Defence Forces, Ireland)

‘often receives favourable feedback and appreciation from both parties in individual cases where informal resolution has been successful.’ (Information Commissioner’s Office)

b) The number of cases resolved informally is too small (three organisations)

The Garda Ombudsman explained that in the past they linked the survey to case number, so they could extrapolate the data to get an indication of satisfaction in relation to informal resolution. It gave anecdotal evidence of high satisfaction levels. Given the low numbers (they use informal resolution in less than 1% of their complaints), and also because of data protection concerns, they no longer link the surveys to case numbers.

The Prisons and Probation Ombudsman said that there are currently not enough data to enable a comparison between cases that were mediated and those that were not. Similarly, the Waterways Ombudsman told us that the numbers dealt with were too small and would not be statistically significant.

c) No need for a specific measure as resolution by consent is indicative of satisfaction (five organisations)

The explanations given by these respondents were particularly intriguing, as they appeared to link the fact of resolution (and in some cases informal resolution) with satisfaction. Among these comments were, for example:

‘...customer satisfaction is a key criterion in whether a settlement is feasible’.

‘Part of the conclusion of early resolution is to confirm the complainant’s agreement with the proposal.’

‘We find that those who got what they want are happy with the service.’

‘If conciliation or mediation proves successful, it follows that the customer was satisfied, since he/she would have to agree to the satisfactory outcome to have the complaint closed at that stage.’

‘Customers are always given the option of changing their mind about accepting a resolution by mediation. Very few customers change from mediation to recommendation each year.’

d) In the process of introducing some measures (three organisations)

These organisations indicated that they will or might introduce customer satisfaction research on informal resolution in future. These are:

- the Parliamentary and Health Service Ombudsman, which is developing its informal resolution approach;
- the Legal Ombudsman, who told us that from next year they will be breaking down customer satisfaction measures based on informal resolution or ombudsman decision data; and
- the Property Ombudsman, who replied ‘not yet’, signaling the possibility of doing so in future.

Those answering ‘yes’ to measures for informal resolution

In four responses (11%) it was unclear whether or not they have such measures in place. Although the respondents confirmed that they carry out customer satisfaction surveys, it was not evident from their response that this included specific measures on informal resolution.

We looked more closely at the five respondents who told us they do have customer satisfaction measures related to informal resolution. Specifically, we searched their websites for information about their customer satisfaction surveys, in order to identify what aspects of satisfaction with the informal resolution process are measured.

The Advertising Standards Authority (which uses informal resolution in 19% of its complaints) told us that ‘it is complex, but we tend to find [informal resolution] generates higher than average levels of customer satisfaction than standard formal investigations.’ Customer satisfaction research and measures are cited in the Annual Report and elsewhere on the website. However, we were unable to locate a customer satisfaction survey report among the documents published on the website. A report in 2010–11 found that ‘customer satisfaction research consistently shows [that] Informal Investigations are the most popular type of investigation both with complainants and advertisers.’

The Dispute Service (TDS) (whose frequency of use of informal resolution was unclear from their reply) started a quarterly survey of everyone who has had a dispute adjudicated by TDS. The only relevant information that we could locate was in the most recent Annual Report, which provided figures from the customer satisfaction research showing the responses from tenants, agents and landlords to the question: ‘On a scale of 1–5 where 5 is excellent how do you rate the services of the TDS customer contact centre?’⁷⁴ We were unable to identify anything specific on informal resolution.

Ombudsman Services (which uses informal resolution in 52% of its complaints) presents the most detailed model. Their website explains the purpose and approach of its customer satisfaction research, which is carried out by an independent market research agency every quarter by telephone.⁷⁵ The survey appears to include specific mention of those whose complaint was resolved using informal resolution. Ombudsman Services explained that 66% of respondents who experienced early resolution and/or mutually acceptable settlement agreed that the mediation was handled fairly (a figure published in their Annual Report 2012–13).

In its 2013–14 Annual Report, Ombudsman Services explains:

‘those experiencing mutually acceptable settlement more commonly express satisfaction at headline indicators and in relation to specific elements of service delivery than those who experience a full investigation. Feedback on early resolution and the mutually acceptable settlement process is generally positive, although some polarity is seen among customers about whether this does or does not treat the participating company too softly. It should be noted that outcome satisfaction is higher among those experiencing mutually acceptable settlement.’⁷⁶

The Police Ombudsman of Northern Ireland (PONI) (which told us it uses informal resolution in 80% of its cases) explained that each complainant receives a satisfaction survey form that includes a section relating to their experience of informal resolution. PONI surveys both complainants and police officers. There were no figures in its 2013–14 Annual Report related specifically to its use of informal resolution.

PONI also described complaints made against it during the year, one of which appears to relate to the informal resolution process as providing useful feedback:

‘Some of the complaints also prompted us to reflect on how we investigate matters and how some complaints are dealt with or closed and at what stage. The Customer Complaints process has also provided us with feedback on the working of the informal resolution process which the Office operates in conjunction with police.’

The Scottish Legal Complaints Commission (which uses informal resolution, specifically mediation, in 11% of its cases) told us that they send parties feedback forms after a mediation, and they also get feedback from mediators in general correspondence and by

⁷⁴ <https://www.tds.gb.com/resources/files/TDS%20Annual%20Review%202013%20web.pdf>.

⁷⁵ <http://www.ombudsman-services.org/research-os.html>.

⁷⁶ http://www.ombudsman-services.org/downloads/OS_annualreport_core_1314.pdf.

telephone.⁷⁷ Nothing could be found on their website or in the Annual Report about customer satisfaction measures, surveys, or statistics.

Commentary

It is striking that three-quarters of respondents who use informal resolution do not have specific customer satisfaction measures for this part of the process.

As can be seen above, only five of the 36 schemes were able to provide some information as to their approach, but even among these, actual detail and easily identifiable publications are often scarce. As a result, it is difficult to compare satisfaction levels of different ombudsmen and processes and to identify what exactly is being measured even within a particular ombudsman scheme.

With some ombudsmen using informal processes to close as many as 80% or more of their complaints, it is important to understand the parties' experiences of these processes.

Interestingly, the EU ADR Directive does not appear to contain any specific requirement to introduce customer satisfaction surveys or to gather feedback on resolution procedures. However, there has been an increasing call for greater consistency in customer satisfaction reporting among UK ombudsmen recently. For example, in a report benchmarking the Legal Ombudsman against other ombudsman services, the Legal Services Consumer Panel argued for full publication of customer satisfaction surveys, "as otherwise a perception could arise that schemes are only disclosing those results which show their performance in a positive light".⁷⁸ In addition, the Communities and Local Government Select Committee, in its enquiry on the Local Government Ombudsman, recommended a common terminology be developed for customer satisfaction surveys by ombudsmen.⁷⁹

⁷⁷ No further details were found on the website or in the Annual Report for 2012–13.

⁷⁸ LSCP 2013.

⁷⁹ Communities and Local Government Select Committee (2012).

6. Conclusions and discussion points

Ombudsmen are themselves a type of informal resolution mechanism when seen in the context of ADR, being alternatives to judicial determination in court or tribunals, as pointed out by several of those responding to the survey. This study explored the informal processes that make up part of the overall ombudsman complaint-handling work. These are primarily the processes that do not involve investigation, adjudication and determination, the ombudsman's traditional role. For some respondents this presented some confusion, used as they are to describing their overall process and approach as 'informal'.

This was a scoping project designed to produce a descriptive mapping study, identifying the schemes that use informal resolution and those that do not, the reasons for doing so and the nature of those processes. Where possible, figures are provided in respect of various aspects of practice, but these need to be read as illustrative of models and trends rather than as a definitive representation of each individual scheme; even during the relatively short duration of the project in the first half of 2014 there were changes in the membership of the Ombudsman Association, new annual reports were published, and some schemes were in the process of changing their informal resolution processes.

The focus of this report is naturally on the 36 of 48 participating schemes that use some form of informal process, but in order to understand the nature of this aspect, it is necessary also to investigate the schemes that do not. In respect of some such schemes, for example those of a regulatory nature, it may appear obvious at first blush that informal resolution is inappropriate. Yet bodies of similar functions presented a variety of different approaches.

Main themes

The main themes to emerge from this survey are:

Terminology

It is apparent that some of the common terms used by ombudsmen mean different things, and conversely, similar terms are used to describe quite different processes. For example, does 'mediation' mean a full process conducted by a qualified mediator, or a settlement brokered by way of shuttle negotiations by a case officer on the basis of their assessment of what is a fair or expedient outcome? We came across both of these understandings of mediation.

We also found that mediation was not necessarily synonymous with early or even informal resolution. In at least one scheme, mediation takes place only after an investigation has been carried out and the complaint upheld. Similarly, one scheme refers to 'conciliation' as the informal part of the process, whereas another describes it as a formal process.

Does terminology matter? We think it does. The proliferation of terminology, at times contradictory, can be confusing for complainants as well as to complaint handlers as the terms used can also impact on how they exercise their function.

It is possible that consistent use of dispute resolution terms can lead to better matching of complaint to process, resulting in better outcomes – a point made by the National Alternative Dispute Resolution Advisory Council of Australia (NADRAC). NADRAC also suggests that common terminology contributes to consistent and comparable standards and provides a basis for programme development, data collection and evaluation.⁸⁰ Carrying out any comparative analysis of ombudsmen and complaint handlers is difficult when, as we have found, they each report using different terminology and different understandings of the same terms.

Criteria

What principles guide investigators in deciding whether to use informal resolution? What criteria, if any, are applied? We established that only a minority of schemes have some form of written criteria setting out when informal resolution can be used, and of these, only three are published and available in the public domain. Guidelines adopted informally by schemes include numerous references to case handlers' judgements based on experience or knowledge, but little of what might be considered criteria.

On the whole, it appears that this is often a matter for individual caseworkers to decide. Is it a matter of, as one former ombudsman has said, 'Like the elephant or the rhinoceros, you know one when you see one.'⁸¹

Process

In addition to the difficulties of navigating the terminology applied, arriving at a common understanding of the machinations of specific process terms (mediation, conciliation, etc.) proved problematic. In other words, it was hard to tell what happens in practice. We believe that the majority of schemes employ shuttle negotiations by telephone and in writing, but only a handful of participants described the process in detail.

Publication of outcomes

Transparency and accountability are principles that all ombudsmen subscribe to. Indeed, the vast majority of schemes publish annual reports containing a variety of aspects of their work. Invariably, these include figures about the volume of complaints received and how they are addressed and concluded. However, there are nearly as many ways of presenting those (and other) facts as there are schemes, with the result that meaningful comparisons are almost impossible.

Discussion points and further research

This report is intended to raise questions for discussion and to identify areas for further research. Below are key discussion points arising from the study, as well as suggestions for issues arising from the study that require further research.

⁸⁰ National Alternative Dispute Resolution Advisory Council (2003): 1.

⁸¹ Jefferies (2001).

Describing, not defining

Should we move away from the problems of terminology and instead of *defining* the processes used by ombudsmen and other complaint handlers, should we attempt to *describe* them? This is the approach of the NADRAC⁸² and of the EU ADR Directive. Both identify three types of ADR process: for NADRAC, these are advisory, facilitative, and determinative; for the ADR Directive, they are advisory, proposing, and imposing. Into these three fall the specific ADR process terms such as mediation, conciliation, early neutral evaluation, adjudication, arbitration, etc.

It may well be, as NADRAC believes, that it is impossible, and indeed inappropriate, to *prescribe* how such descriptions should be used by ADR providers. However, it seems sensible to require at the very least (and NADRAC supports this) that ‘descriptions of the actual process used by any provider should be available in forms that are easily understood by the users of the service’.⁸³

In 2010, the Office of Fair Trading, in a summary guide to dispute resolution systems for consumer redress in the United Kingdom, stated that:

‘A useful distinction can be drawn between procedures in which a neutral third party proposes or makes a decision (ombudsmen, adjudicators, arbitrators) and those where the neutral party seeks to bring the parties together and assist them in finding an agreement by common consent (conciliation, mediation). Which of the above procedures is most appropriate will depend on the nature of the dispute to be resolved.’⁸⁴

Such a distinction suggests a binary framework – the procedure is either one in which a decision is proposed or imposed by the scheme or one in which the parties reach an agreement by consent. It is a familiar framework. Applying it to ombudsman procedures, however, presents some difficulties as it does not reflect the actual practice of most ombudsmen, most of whom appear to be practising what the Administrative Justice and Tribunals Council, in its 2012 report ‘Putting It Right’, defined as

‘an independent person assessing the claims made by each side and giving an opinion on a) the likely outcome in court or tribunal [or, it could be added, likely ombudsman decision], b) a fair outcome, and/or c) a technical legal point. It is non-binding, and the parties decide how to use the opinion.’

Consensual agreements are different in an ombudsman context than they are in other areas, such as civil mediation generally. In this context, consensual agreements are not only of interest to the parties involved in the complaint, but potentially have wider significance. They are not made in a vacuum but in the ‘shadow’ of the ombudsman’s authority.

Ombudsmen have a place in the wider ADR sphere, but perhaps as an ADR process in itself (‘ombudsing’?) alongside mediation, conciliation, arbitration, etc. Unless we understand a

⁸² See, for example, National Alternative Dispute Resolution Advisory Council (2000): 6.

⁸³ National Alternative Dispute Resolution Advisory Council (2000).

⁸⁴ Office of Fair Trading (2010).

process of ‘ombudsing’ as a distinct and defined process to sit alongside mediation and arbitration, for example, we have a confusing lack of clarity about what it is that ombudsmen are actually offering process-wise. What is missing, and appears to be needed, is a classification of the processes used by ombudsmen and their complaint-handling cousins.

Suggested framework of processes used by ombudsmen

In 2011 the Law Commission⁸⁵ identified three ways in which ombudsmen dispose of complaints: ADR, investigation and report, and dismissal. The latter ties in with one of the ‘resolution’ methods identified by some respondents to our mapping survey: rejection of the complaint. However, for the Law Commission ‘ADR’ included, in the majority of cases, the ombudsmen informing the public body of the complaint made and encouraging the public body to resolve the matter. This might be described as a ‘referral back’.

In our mapping survey, we have identified a further ‘resolution’ process used by ombudsmen and complaint-handlers: advice to the complainant, possibly including signposting to another organisation.

It is possible to set out, in the ombudsman context, a spectrum of ‘resolution responses’ being used:

- rejection
- referral back
- advice and signposting
- bringing the parties together to facilitate an agreement by consent
- hearing from the parties and proposing a solution
- investigating and making (imposing?) a determination

Given the important role that ombudsmen have in improving service provision and complaint handling by the bodies they investigate, one could add, on the top and bottom of the above list, prevention and lesson learning.

But once a complaint has been accepted and is being looked at by the scheme, what are the key processes used to ‘resolve’ them? They appear to fall under the three broad headings in the final bullet points of the list above:

- bringing the parties together (process) to facilitate an agreement by consent (outcome)
- hearing from the parties and negotiating (process) and proposing a solution (outcome)
- investigating (process) and making, or imposing, a decision (outcome)

This echoes both the NADRAC descriptions and those in the EU ADR Directive.

⁸⁵ Law Commission 2011.

Training and skill set required

A question for ombudsman and complaint-handling schemes is whether caseworkers have the appropriate skills needed if they want to increase the number of complaints resolved through informal processes and improve the quality of the process. The use of quicker and less formal methods of complaint determination, in addition to the more traditional method of adjudication, is broadening the skills set that complaint handlers need to possess. And different skill sets need to be valued by the organisation as a whole:

‘Getting our managers to think more about coaching and shifting that behaviour away from the legalistic kind of checking... and that has an impact on our board as well because it means that our board would need to recognise behaviours that normally they don’t see... the organisation would... in the past... probably value people with that... legalistic bent whereas in the future the real value comes from people who are good at talking and fixing things and that’s quite a change.’⁸⁶

What skill set is needed for a resolution focus, and is it different from that needed for investigation and determination? If so, what specific training might be needed to ensure a consistent approach to informal resolution?

Is it desirable, and possible, to develop agreed best practice (in process, training, data recording)?

An earlier study of ombudsmen’s use of ADR⁸⁷ concluded with a number of suggested principles – including clarity about the processes, transparency about the criteria for using different processes, and informed consent by the parties – and suggested actions, including staff training and assessment and evaluation of outcomes achieved through informal resolution processes. Is it time to revive interest in the development of best practice guidance?

Is informal resolution a necessary form of filtering in an age of austerity?

To some extent, is informal resolution is a form of ‘filtering’ – identified in a recent report as ‘a major part of the work of complaint handlers’?⁸⁸ Filtering can involve any or all of the functions of resolving, signposting (directing a complaint to an alternative appropriate route of redress) and rejecting.

Is informal resolution a sign of failure?

Two schemes that have a low rate of informal resolution, and one scheme that is said not to be using informal resolution at all, told us that a low rate reflects good complaint handling practice on part of body complained against. Conversely, a high rate of informal resolution by ombudsmen suggests a failure in the system, in that complaints capable of being

⁸⁶ Gill et al (2013).

⁸⁷ Doyle (2003).

⁸⁸ Bondy and Le Sueur (2012): 55.

resolved informally should be resolved at an earlier stage. Is this an indication of a mood change among ombudsmen in their attitude to informal resolution?

Does greater use of informal resolution pose a threat to 'justice'?

Can it be said that the methods of informal resolution of complaints provide the information that ombudsmen need in order to fulfil their role in promoting service standards, first-tier decision making and good administration? And for ombudsmen dealing with private-sector providers and services, does informal resolution put them at risk of being assembly lines of mass case processing, a sort of 'Complaints 'R Us'?

Future research

This mapping study has shined a light on the informal processes used by ombudsmen and other complaint handlers in the UK and Ireland. It is a limited light, and there is more to learn and study.

First, we have noted that many organisations with a significant role in complaints handling – whether as part of administrative justice or consumer redress – were not included in this mapping survey. Broadening out the mapping work to include these other relevant organisations would be helpful.

Although we have focused on the ombudsman community, we are sensitive to the overlaps between ombudsman and other routes to redress for complainants. There is much opportunity to share learning between courts, tribunals and ombudsmen, for example. It would be useful to explore the extent to which ombudsmen might adopt the 'mapping' factors for identifying the appropriate dispute resolution route for tribunal claims.⁸⁹

Specific aspects covered in this research require closer examination, including:

Process: There is a need for in-depth research on how the process actually works and to identify the appropriate realistic methodology for studying the journey of a complaint from initial acceptance, through resolution and outcome.

Outcomes: How is 'success' defined in informal resolution context? We have examined the use of informal resolution, but its success is an area for further exploration. There is also a need to examine the views held by users of ombudsmen services (both complainants and those in the departments and organisations that are the subject of complaints).

Criteria: For many schemes, informal resolution appears to be the default approach to complaint handling, with a move to investigation if the complaint did not resolve at this stage of the process or if there was some reason to investigate. On reflection, a more informative and potentially productive question to have asked in our survey would have been 'What are your criteria for deciding whether or not a complaint needs to be investigated?'

⁸⁹ Administrative Justice and Tribunals Council (2012): 36–37.

Timescales/speed: This survey did not ask specifically about timescales of informal resolution processes, but what we were told was intriguing and worth further study. Only a handful schemes told us they have a timescale (time limit) for attempts to informally resolve a complaint (ranging from one hour to one day mediations, to ten working days).

Classification of disputes

One further question arising is whether some processes are more suitable for some types of complaint, and whether there is scope to developing classifications that can be used across the range of schemes. There is also a need to explore whether the same category of complaint is dealt with differently by ombudsmen in different jurisdictions. Such classification could help in developing guidance on what disputes and complaints, and in what circumstances, are best suited to particular resolution approaches.

In the ombudsman context this differs from guidance on the suitability of mediation and other forms of ADR because ombudsmen have a wider, authoritative role. They are not simply dispute resolvers but have the additional (and some would say more important) responsibility to influence good practice by bodies in jurisdiction. They do this through their determinations as well as through their 'good offices' – persuasion, guidance, and feedback.

The classification of disputes may be needed in order to identify a comprehensive approach for influencing how cases should be allocated to a route to redress – what forum for which fuss. This might involve categories of complaints – e.g. fundamental rights cases, in which adjudication is necessary, and, at the other extreme, 'cases where the claimed entitlements could not themselves satisfy the claimants and where the interests of all parties might be better served by a negotiated resolution'.⁹⁰ Endorsing the view that a proportionate and appropriate system must involve a range of dispute resolution techniques, the AJTC identified a number of principles and mapping factors to help identify the suitability of a specific dispute resolution process, such as early neutral evaluation, mediation, and traditional hearing.⁹¹

Finally

These are only some of the aspects considered in this report. Our aim has been to present a nuanced snapshot of the ethos and practices of informal resolution by ombudsmen at the time of conducting the research. We hope this will further the understanding of current issues and research needs in this field, and lead to greater consistency in the use of terminology and processes in future.

⁹⁰ Richardson and Genn (2007): 141.

⁹¹ Administrative Justice and Tribunals Council (2012).

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