

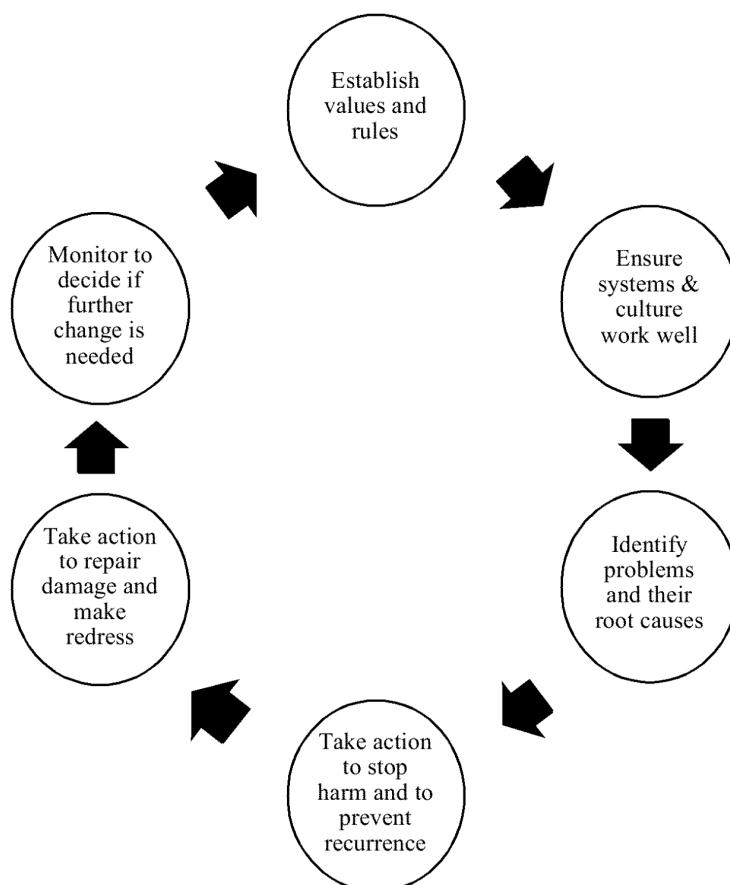
SOUND AND EFFECTIVE DELIVERY OF COMPENSATION

Horizon Compensation Advisory Board

This paper summarises a principled and more effective way for delivering redress in mass cases funded by HM Government. In almost all cases, redress/compensation schemes are created on an ad hoc basis and have not adopted the most effective models or procedures. However, other models can be used to design a considerably improved approach.

There are two keys to this. The first is not just to focus on a scheme that delivers money compensation, but to adopt a wider, holistic approach based on the sequence of essential *functions*: identifying harm swiftly, and responding by stopping it early, delivering redress, and importantly also ensuring that appropriate change then actually takes place to learn from the errors and reduce future risk. The second is to ask what mechanisms or institutions *deliver those functions*, and then make sure that they are in place and operate as part of a holistic system.

The essential functions can be illustrated thus: **THE PROBLEM-SOLVING MODEL**



ADVANTAGES OF THE NEW APPROACH

The advantages of this new approach would be the following:

- (a) Quicker and less stressful access to redress. Horizon compensation is taking years both from occurrence of harm (over 20 years) and from its discovery (and particularly from the date it should have been discovered). There are then several stages to go through, all of which take time (investigation of wrongdoing and triggering of obligations to provide compensation, establishment of a redress scheme, individual investigation of facts and loss, and evaluation of entitlement). The counter-factual is that the investigation of facts and decisions on what needs to be changed and on redress would take so much less time if there were to be an investigative authority instead of a Public Inquiry (even worse preceded by litigation or something else illogical).
- (b) Lower operational costs/fewer lawyers. This letter gives HSS admin costs as £83m against compensation of £180m.
- (c) Direct feedback to reduce chances of mistakes recurring. A global “just culture” and feedback regime has made aviation and nuclear accidents extremely rare.
- (d) Based on successful approaches in Scandinavia and New Zealand, as well as in UK.
- (e) Less controversy for Government about how redress is delivered. The personal injury schemes in Nordic and New Zealand attract barely any media attention, other than praise that people are cared for swiftly.
- (f) New redress schemes can start more quickly and build on past experience.
- (g) Redress principles would be standardised – but Government would still control them (and hence control the cost of redress).
- (h) Changes can be delivered incrementally – they can be tested in core areas and built out over time.

Some key considerations are:

- How strong is the financial business case for the proposed changes? If the system had got to the bottom of Horizon near the start, very significant costs would have been saved, especially the costs of the High Court GLO case and the Inquiry (as well as the removal of several thousand sub-Postmasters and Mistresses from the labour market, with associated economic impact and fiscal impact in taxes forgone). Delivering redress would certainly have been cheaper to run this way than with the large numbers of lawyers who have appeared on each side – and especially on the Post Office side. The incentives on the wrongdoer are to invest in resistance rather than redress.
- Resistance to proposals which focus on creating new institutions or “moving deckchairs”. The fact is that if one wishes to deliver the *functions* (of investigation and redress) than new institutions are needed (or existing ones need to be reformed), and there will be significant savings on Courts and Inquiries.
- Claimants’ concerns if they are not allowed to use lawyers. One may anticipate objections from lawyers raising risks of people being short-changed if they are not legally represented, or that the rule of law is undermined. However, there has been very little complaint by consumers or consumer associations for the past several decades about the absence of lawyers in relation to complaints handled by Ombudsmen: the issues are essentially just about the speed and efficiency of some of the Ombudsmen. The same situation exists with the ‘no blame’ administrative compensation schemes in Nordic states, New Zealand, and elsewhere (including in the USA), and in many countries relating to vaccine and Covid damage schemes. The experience with consumer Ombudsmen systems is that although defendant companies can deploy their lawyers, the scope for doing this extensively, in order to gain an advantage of power, is limited, since the Ombudsman has its own legal resources.

BACKGROUND

In recent years, there has been a stream of compensation schemes created by Government in response to diverse public sector issues. The list of major redress schemes that have been needed in the public sector, and associated Reports on them by the NAO, is at Annex A.

All of these redress/compensation schemes were created on an *ad hoc* basis. They fell back on the traditional *adversarial* model of the courts, in which lawyers represent both claimants and the Government. However, it has long been recognised that that adversarial system is slow, expensive, and inherently divisive. It is also prone to concealing truth over the cause of harms, through settlement of cases. In contrast, various types of claims have migrated away from the courts (and lawyers) and are now resolved more quickly in *investigative* models, rather than adversarial models. There are two striking examples of where a fundamental shift has taken place, away from adversarial courts to investigative systems – consumer trader disputes involving Ombudsmen (in which the UK is a leading jurisdiction), and personal injury claims involving administrative authorities (where all Nordic States, and New Zealand are the leaders). The Ombudsmen system is designed to deliver transparency about the causes of problems, the opposite of covering things up quietly.

The conclusion is that the most effective models or procedures have not been adopted by HM Government for its *ad hoc* redress schemes, but should and could be adopted, if a different approach was facilitated. In order to facilitate such a shift, and given the unpredictable but suddenly urgent need for creation of any new redress scheme, it is necessary to provide appropriate expert planning and preparation in advance by creating a small but permanent independent oversight body.

OUTLINE OF THE NEW HOLISTIC APPROACH

What is needed is:

1. **A system that identifies problems.** The initial stage is identification of a problem, and admission of claims to the system, triggering an investigation. Good organisations will, of course, operate an internal complaints and whistleblowing system (PHSO and LGCSO have recently issued best practice models for public organisations). A data from an Ombudsman system can be a powerful mechanism here (as it should be open to anyone to make a complaint; this occurs in the private sector but barriers exist in the public sector, such as the traditional mechanism that referrals have had to go through MPs or others to the Public Ombudsmen). It should also be possible for whistleblowing to take place to a body that has a public regulatory remit.
2. **An authority for investigation of facts.** Having identified an issue, there then needs to be investigation of the facts - swiftly, objectively, independently, and fully. Under the current system, this typically involves a large court case (the GLO in the Post Office situation), which is slow and expensive, and may not focus on core issues, or a Public Inquiry, which is very slow and expensive, but usually comprehensive. In comparison with private regulated sectors, what is missing is an independent regulatory authority for public organisations that can act and investigate much more quickly. In the private sector, authorities such as the FCA, Ofgem, Ofcom, OPSS and many others have been highly effective in investigating the facts, and also in deploying powers to order, or agree, redress. No similar 'regulatory' authority exists in the public sector. Addressing private law consequences, such as compensation, is not the only need. The Post Office saga also shows the need for a streamlined ability to re-investigate and overturn historical convictions. This overarching investigative and restorative function does not exist for the public sector scandals, and the facility is needed – a new investigative authority.
3. **Investigative model for redress - not adversarial.** Many redress schemes adopt 'old technology' models. They are adversarial, like the courts, and involve lawyers for all parties. That model is inherently slow and costly. This inherent fault line in court processes has long been recognised, but

responses in court procedures have broadly failed to be effective. For this reason, key areas of disputes have moved *away* from courts and lawyers and into new *mechanisms*, which bring with them more modern and responsive dispute resolution *procedures*.¹ Two major precedents for this shift are:

a. The shift of consumer disputes from adversarial (court) procedures to investigative (Ombudsmen) institutions

Most consumer complaints are now raised and resolved through sectoral Ombudsmen, with regulators as an oversight backstop for generic issues.² This is a striking example of a quiet revolution in dispute resolution procedures and institutions in UK. Most Ombudsmen offer procedures that are *investigative* rather than *adversarial*, involving no roles for lawyers. The systems are, therefore, inherently significantly more cost-effective and swifter. In addition, regulators may deploy redress powers (ordering or agreeing redress) or referring delivery through an Ombudsman scheme. Most Ombudsmen are now well advanced in using digital and AI technology to assist in claims processing.

The leading institutions, involving pairs of regulatory authorities and ombudsmen, covering almost all consumer-trader complaints, are:³

| <u>Regulatory Authority</u> | <u>Ombudsman</u> |
|--|---------------------------------------|
| Financial Conduct Authority | Financial Ombudsman Service |
| The Pensions Regulator | Pensions Ombudsman |
| Ofgem | Energy Ombudsman |
| Ofcom | Communications Ombudsman ⁴ |
| Office for Students | Office of the Independent Adjudicator |
| Various regulators of legal services | Legal Ombudsman |
| Regulator of Social Housing | The Housing Ombudsman ⁵ |
| Vehicle & Operator Services Agency | Motor Ombudsman |
| Office of Road & Rail | Railways Ombudsman |
| [Local Authorities' Trading Standards] | The Retail Ombudsman |

b. The shift in personal injury claims in Nordic and other countries to ‘no blame’ administrative schemes – called for but not yet implemented in the UK

The same shift has long been mooted, but never achieved, in relation to personal injury claims, especially for those against the NHS. All Nordic states and various others such as New Zealand, have long had ‘no blame’ administrative compensation schemes for medical and product injuries. The advantages of these schemes are not just that they are investigative and user-friendly, but also that they do not involve blame either in the process or as a criterion for entitlement to compensation. As a result, the presence of such schemes is an essential element in supporting a ‘no blame culture’ that enables sharing of information, learning and change in the actors involved, such as is needed in the NHS. The culture of psychological safety⁶ afforded by an ‘open and just’ culture is recognised as an essential element of a successful improvement culture, in highly effective operational systems such as aviation safety.⁷ Conversely, the

¹ C Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England & Wales* (Hart, 2019). C Hodges and S Voet, *Delivering Collective Redress: New Technologies* (Hart, 2018).

² C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012).

³ Other bodies include the Football Ombudsman. There are also a number of sectoral Redress Schemes, managed by CEDR.

⁴ There is one other remaining ADR scheme in this sector, which has around 10% of the disputes ‘market’.

⁵ Also in the private property sector, there are The Property Ombudsman, The New Homes Ombudsman, the PRS Scheme, a Government proposal for a Private Rented Sector Ombudsman, and, for tenancy deposits, The Disputes Service.

⁶ AC Edmondson, *The Fearless Organization* (John Wiley & Sons , Inc., 2019).

⁷ Other examples are in C Hodges, *Outcome-Based Cooperation: in Communities, Organisations, Regulation and Dispute Resolution* (Hart, 2022), Ch 11. C Hodges and R Steinholtz, *Ethical Business Practice and Regulation:*

continuation of medical negligence and litigation in the NHS constitutes a major barrier to changing the culture of the NHS and to its improved performance. Report after Report has urged this shift in UK,⁸ as have academics⁹ and Jeremy Hunt,¹⁰ but it has not been implemented.

4. **A standing compensation authority.** Various compensation schemes have been established over time for a succession of public sector disasters. Each one of them has had to be created by officials on an ad hoc basis, and the results have been unimaginative and have involved traditional adversarial and operational design features. There does need to be some flexibility in design, so as to be able to respond to the particular circumstances of a situation. However, the repetition of reactive approaches have failed to enable the adoption of more appropriate models. We keep falling back on old and ineffective models, which are heavily dependent on lawyers.
5. **Therapy not money.** Traditional redress is based around providing money as compensation. Yet many victims are suffering from serious psychological harm, which can be made worse by involvement in a long, impersonal, confusing or legalistic process. What they need is *care, therapy* and support – and quickly. Neither the legalistic redress system (which is inherently adversarial and aggressive, hence making psychological equilibrium worse rather than better) nor the NHS are geared to deliver this currency of response. Examples have arisen in many cases, including small business owners vs banks, many NHS disasters, and Post Office victims. In the Post Office situation, we have tried to open a conversation with a small charity that delivers therapy quickly and speedily for military personnel who suffer from PTSD: we have not had time to scope this properly, but redesigning the system to deliver this outcome would be of fundamental importance. It would address immediate harm, restore people swiftly, and reduce overall costs of ongoing care and harm.
6. **Overseeing change.** Report after Report by Inquiries, Coroners, judges, PHSO/LGSCO, and Select Committees calls for changes, especially in organisational cultures. But does change happen? There is no effective oversight mechanism for assisting and advising on such change, or ensuring that it occurs.¹¹ This contrasts with the work of most regulators in private sectors. This is not to say that regulatory authorities have yet achieved their maximum potential in addressing operational and organisational changes, especially in relation to the challenges of culture, but the almost complete absence of such influence in the public sector (and flawed design of multiple bodies overseeing the NHS, and especially schools) only highlights the gap for public sector bodies. In regulated private markets, change is typically achieved through a *combination* of interventions by the regulator and the Ombudsman.

In short, we need a standing **investigative authority** and a linked but independent **response authority**. Part of the latter function might be constructed from PHSO/LGSCO but with significant changes. PHSO is partly too large (NHS should be separated out and linked with social care as an integrated offer) and partly does not currently have the right *modus operandi* or resource to act as a speedy redress provider: it essentially only investigates significant generic issues.

As a matter of good **governance**, there is considerable evidence that the involvement of stakeholders in the design and oversight of arrangements, as well as of trusted independent people, is highly beneficial.

A Behavioural and Values-Based Approach to Compliance and Enforcement (Hart, 2017). S Dekker, *Just Culture. Balancing Safety and Accountability* (Ashgate Publishing, 2007).

⁸ Recently: Baroness J Cumberlege, *First Do No Harm: The report of the Independent Medicines and Medical Devices Safety Review* (2020). *The Hughes Report* (Patient Safety Commissioner, 2024).

⁹ S Macleod and C Hodges, *Redress Schemes for Personal Injuries* (Hart, 2017). S Macleod and C Hodges, *No-Fault Approaches in the NHS: Raising Concerns and Raising Standards* (Hart, 2022).

¹⁰ J Hunt *Zero. Eliminating unnecessary deaths in a post-pandemic NHS* (Swift, 2022).

¹¹ C Hodges, *Outcome-Based Cooperation: in Communities, Organisations, Regulation and Dispute Resolution* (Hart, 2022). C Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England & Wales* (Hart, 2019).

No doubt cost-benefit analyses of this model should be undertaken, and we do not attempt that here. However, we consider that the policy arguments for making the changes outlined here are strong in their own terms, and that the costs will prove to be justified in terms of achieving the outcomes of a fairer society that identifies problems far more swiftly and now and resolves them fairly and efficiently.

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20.5.24

ANNEX A:

MAJOR PUBLIC SECTOR COMPENSATION SCHEMES AND NAO REPORTS

2007 VFM report: [Compensation scheme for former Icelandic water Trawlermen](#)
2007 VFM report: [Coal Health Compensation Schemes](#)
2008 Briefing: [Administration of time-limited compensation schemes.](#)
2010 VFM report: [The Pension Protection Fund](#)
2013 VFM report: [Administering the Equitable Life Payment Scheme](#)
2015 Overview: [Financial services: regulation redress and advice overview 2014](#)
2016 VFM report: [Financial services mis-selling: regulation and redress](#)
2021 Investigation: [The Windrush Compensation Scheme](#)
2022 Investigation: [the British Steel pension scheme](#)

Recent schemes:

Infected blood
LGBT veterans
Post Office:

2019 PO HSS scheme
2019 PO OC scheme
2023 DBT GLO scheme
2024 DBT HSS2 scheme
2024 DBT OC2 scheme