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## Towards Therapeutic Complaints Resolution

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JANE WILLIAMS, CHRIS GILL AND CAROLYN HIRST

### I. Introduction

The structure of this chapter is as follows. It starts by considering the role of UK public service ombuds and the extent and nature of problems with UK internal public service complaint systems. We then highlight research undertaken with public services employees, which illustrates the potentially dysfunctional impact that complaint systems can have on them and describe how we subsequently developed guidelines to help reduce these harms. Our research, which included learning from implementing the guidelines, has led us to consider the need for change in the design of complaint-handling systems, so that the act and process of complaining is more therapeutic and does not impact negatively on any complaint system actors.<sup>1</sup>

We move on to consider therapeutic jurisprudence and its application to complaint systems, and then explore the extent to which the current redress designer role of public services ombuds in the UK supports more therapeutic approaches. The chapter concludes by arguing that in the context of UK public services, where ongoing relationships are at the heart of many citizen–state interactions, ombuds play a key role as therapeutic actors in designing, encouraging and modelling an ethic of care for the well-being of everyone affected by complaint systems.

<sup>1</sup> C Gill, M Sapouna, C Hirst and J Williams, 'Dysfunctional Accountability in Complaint Systems: The Effects of Complaints on Public Service Employees' [2019] *PL* 644.

## II. The Ombud in the Modern State: ‘An Architect of Governance’

The evolution of ombud schemes has been described elsewhere,<sup>2</sup> not least in *A Manifesto for Ombudsman Reform*<sup>3</sup> and in the contributions made by others in the current volume. Gill et al have identified a significant development in the role and practice of ombuds in the UK, arguing that the New Public Management practices that have transformed public administration in the last 30 years have also led to a more ‘managerial’ approach to ombuds’ work.<sup>4</sup> There has long been a debate in ombudsman circles as to the best, or the best balance, of roles for an ombud.<sup>5</sup> For example, past debates have revolved around whether ombuds should concentrate resources on complaint handling (firefighting); conducting more in-depth investigations on the causes of systemic complaints and using these findings to focus efforts on remedying repeated maladministration (fire-watching); or being proactive and intervening even before complaints are received so as to prevent them occurring in the first place (fire prevention).<sup>6</sup>

A number of UK public service ombuds (UKPSOs) now have a redress designer role, with responsibility for the design of public service complaint systems. Following a critical review of complaint handling in Scotland,<sup>7</sup> the Scottish Public Services Ombudsman (SPSO) was the first to be given the role of simplifying complaints procedures.<sup>8</sup> The SPSO Complaints Standards Authority (CSA) subsequently developed standardised Model Complaints Handling Procedures for bodies within jurisdiction (BwJ).<sup>9</sup> The CSA model has been replicated in Northern Ireland, although at the time of writing the relevant provisions have yet to be brought into force.<sup>10</sup> The Public Service Ombudsman (Wales) Act 2019 also grants these powers to the Public Services Ombudsman for Wales (PSOW). The Parliamentary and Health Service Ombudsman (PHSO) has called for

<sup>2</sup> See, eg M Hertogh and R Kirkham, ‘The Ombudsman and Administrative Justice: From Promise to Performance’ in M Hertogh and R Kirkham (eds), *Research Handbook on the Ombudsman* (Edward Elgar, 2018) 1–16; R Kirkham, ‘The Ombudsman, Tribunals and Administrative Justice Section: A 2020 Vision for the Ombudsman Sector’ (2016) 38 *Journal of Social Welfare and Family Law* 103; D Wakem, ‘The Changing Role of the Ombudsman’ (2015) 63 *Administration* 15.

<sup>3</sup> R Kirkham and C Gill (eds) *A Manifesto for Ombudsman Reform* (Palgrave Macmillan, 2020).

<sup>4</sup> C Gill, T Mullen and N Vivian, ‘The Managerial Ombudsman’ (2020) 83 *MLR* 797.

<sup>5</sup> See, eg C Harlow, ‘Ombudsmen: “Hunting Lions” or “Swatting Flies”’ in Hertogh and Kirkham (n 2) 73–90; C Gill, ‘The Evolving Role of the Ombudsman: A Conceptual and Constitutional Analysis of the ‘Scottish Solution’ to Administrative Justice’ [2014] *PL* 662.

<sup>6</sup> R Snell, ‘Australian Ombudsman – A Continual Work in Progress’ in M Groves and HP Lee (eds), *Australian Administrative Law* (Cambridge University Press, 2007).

<sup>7</sup> L Crerar, *Independent Review of Regulation, Audit, Inspection, and Complaint Handling* (Scottish Government 2007).

<sup>8</sup> Design authority powers were translated into legislative provisions through s 119 of the Public Services Reform Act Scotland 2010, which amended the Scottish Public Services Ombudsman Act 2002.

<sup>9</sup> [www.spsso.org.uk/the-model-complaints-handling-procedures](http://www.spsso.org.uk/the-model-complaints-handling-procedures).

<sup>10</sup> Public Services Ombudsman (Northern Ireland) Act 2016, ss 34–42.

similar CSA powers,<sup>11</sup> and is currently (again at time of writing) consulting on a non-statutory Complaint Standards Framework for the English National Health Service.<sup>12</sup>

This design role can be related to the ombud's role in relation to good governance<sup>13</sup> and the concept of 'value-added ombudsmanry',<sup>14</sup> which elevates ombuds from having the basic mandate of providing redress to being an 'architect of better governance'. It also reflects a general tendency towards the adoption of a more systemic and preventative approach, with a modern emphasis among UK ombud schemes on managerial and design activities. In the context of this chapter, the move towards redress design presents an opportunity to (i) address problems in the current complaint systems at first tier (section III below) and (ii) do so in ways that foreground a change in paradigm from complaint-handling approaches being adversarial, consumerist and managerial to ones that are more relational, consensual and therapeutic (see section V below).

One of the implications of ombuds adopting a designer role is that they have a much greater influence on redress than before, leading to an opportunity to bring about more positive change in complaint systems and public administration in order to address the systemic and widespread problems of first-tier complaint handling.

However, we will also argue that the credibility of UK ombuds as designers of more therapeutic redress systems also depends on ombuds' own practices setting the tone for what is good practice elsewhere. If ombud processes themselves are anti-therapeutic, then we cannot expect the complaint systems, which they sit at the apex of, to be therapeutic. As architects of governance, the ombuds are not simply authorities that can issue statutory/non-statutory guidance and monitor its compliance, but they are also role models.

### III. Problems with Internal Complaint-Handling Systems in the UK

#### A. The Confusing and Complex Complaints Landscape in the UK

Current systems for public service complaint handling in the UK are based on the Citizen's Charter model.<sup>15</sup> Charter reforms were derived from managerial

<sup>11</sup> PHSO, *Making Complaints Count: Supporting Complaints Handling in the NHS and UK Government Departments* (2020) 51 [www.ombudsman.org.uk/publications/making-complaints-count-supporting-complaints-handling-nhs-and-uk-government](http://www.ombudsman.org.uk/publications/making-complaints-count-supporting-complaints-handling-nhs-and-uk-government).

<sup>12</sup> [www.ombudsman.org.uk/csf](http://www.ombudsman.org.uk/csf).

<sup>13</sup> British and Irish Ombudsman Association, *Guide to Principles of Good Governance* (BIOA, 2009). The British and Irish Ombudsman is now called the Ombudsman Association.

<sup>14</sup> G Paquet, 'The Judgment of Wider Courts: Ombuds as Producers of Governance' (2009) 20 [www.gouvernance.ca/publications/09-06.pdf](http://www.gouvernance.ca/publications/09-06.pdf).

<sup>15</sup> Gill et al (n 1).

values associated with New Public Management and led to growth in accountability mechanisms.<sup>16</sup> This resulted in public service complaints systems providing a means by which service providers can be held to account for breaches of service standards. Internal complaint systems in the UK have mainly been a means of satisfying unhappy customers and providing management information to improve services.<sup>17</sup> Allsop and Jones refer to this as the managerial complaint-handling model, emphasising internal resolution, consumer satisfaction and service improvement.<sup>18</sup>

The public service complaint-handling landscape in the UK has been subject to significant criticism, being described as confusing, complex, costly and not serving the interests of complainants.<sup>19</sup> These views highlight the continuing complexity of the current redress landscape and the need for complaint systems to be more integrated, easier to navigate, addressing gaps and more consistent in complaint handling across ombuds and other complaint bodies. Data shows that UK citizens are much less likely to complain about public services than the private sector, with the main reason (52 per cent) for not complaining being that they did not think it would make any difference.<sup>20</sup> A Citizens Advice report stated that this meant that as many as 15 million people may not have followed up their poor experience with a formal complaint.<sup>21</sup> In addition, if citizens do complain, they are less likely to be satisfied than comparators in the private sector.<sup>22</sup> There have

<sup>16</sup> J Clarke, J Newman and M McDermond, 'Delivering Choice and Administering Justice: Contested Logics of Public Services' in M Adler (ed), *Administrative Justice in Context* (Hart Publishing, 2010) 25–46.

<sup>17</sup> P Birkinshaw, 'Grievances, Remedies and the State – Revisited and Reappraised' in Adler (n 16).

<sup>18</sup> J Allsop and K Jones, 'Withering the Citizen, Managing the Consumer: Complaints in Healthcare Settings' (2008) 7 *Social Policy and Society* 233.

<sup>19</sup> L Crerar, *Independent Review of Regulation, Audit, Inspection, and Complaint Handling* (Scottish Government, 2007); Citizens Advice, 'Learning from Mistakes' (2016) [www.citizensadvice.org.uk/Global/CitizensAdvice/Public%20services%20publications/Learning-from-mistakes.pdf](http://www.citizensadvice.org.uk/Global/CitizensAdvice/Public%20services%20publications/Learning-from-mistakes.pdf); P Dunleavy, S Bastow, J Tinkler, S Goldchuk and E Towers, 'Joining up Citizen Redress in UK Central Government' in Adler (n 16); National Audit Office, *Public Service Markets: Putting Things Right When They Go Wrong* (NAO, 2015) [www.nao.org.uk/wp-content/uploads/2015/06/Putting-things-right.pdf](http://www.nao.org.uk/wp-content/uploads/2015/06/Putting-things-right.pdf); Public Administration Select Committee, *More Complaints Please!* (House of Commons, 2014) [www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/229/229.pdf](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/229/229.pdf) HC229; UK Government, *Transforming Public Services: Complaints, Redress, and Tribunals* (2004); Which?, 'Make Complaints Count' (March 2015) [www.staticwhich.co.uk/documents/pdf/make-complaints-count-report---march-2015-397971.pdf](http://www.staticwhich.co.uk/documents/pdf/make-complaints-count-report---march-2015-397971.pdf).

<sup>20</sup> Citizens Advice (n 19) 3 and 15.

<sup>21</sup> *ibid* 10.

<sup>22</sup> NAO (n 19) 8; K Slater and G Higginson, *Understanding Consumer Experiences of Complaint Handling* (Citizens Advice, 2016) 50 [www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Understanding%20consumer%20experiences%20of%20complaint%20handling\\_DJS%20report%20final\\_June2016%20\(2\)%20\(1\).pdf](http://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Understanding%20consumer%20experiences%20of%20complaint%20handling_DJS%20report%20final_June2016%20(2)%20(1).pdf). For a summary of the management literature on this subject, see T Sourdin, J Carlson, M Watts, C Armstrong and T Carlyle-Ford, 'Return on Investment of Effective Complaints Management: Public Sector Organisations' (SOCAP, 2020) [www.socap.org.au/public/98/files/Documents/Research/ROI%20Report-Public%20Organisations%20-%20June%202020.pdf](http://www.socap.org.au/public/98/files/Documents/Research/ROI%20Report-Public%20Organisations%20-%20June%202020.pdf).

been several high-profile public inquiries which have highlighted the failure of complaint handling, particularly in the health service,<sup>23</sup> but in other sectors too.<sup>24</sup> In 2020, the PHSO noted that ‘what complaints staff tell me about their role and experience often provides a raw picture of a complaints system that is in urgent need of reform and investment’ and that this situation was likely to worsen as a result of the impact of the COVID-19 pandemic on public services.<sup>25</sup>

As described earlier, simplification, standardisation and efficiency in order to address some of these problems have been the top priorities of the CSA approach in Scotland and the other devolved administrations, as part of their ‘architect of governance’ approach. The PHSO, who is seeking similar powers, has pointed to the positive experience in Scotland, where the SPSO has been able to reduce complexity by introducing a unified framework for complaints across the sector.<sup>26</sup> However, despite the introduction of a common complaints standard, recent research from Citizens Advice Scotland suggests that knowledge on how to contact public services in Scotland with a complaint is still ‘quite poor’.<sup>27</sup> Research in general on the effectiveness of the CSA approach is limited, and it is noted that the development of these standards has been undertaken without any significant empirical work being available to inform it in order to show whether what people do not like about first-tier complaint handling is being addressed by the standards.

In terms of complaints about ombud schemes themselves, while satisfaction levels with ombuds are higher than public services,<sup>28</sup> they are still lower than satisfaction levels found in private sector schemes.<sup>29</sup> There is also evidence that, for a small minority of ombud users, significant levels of dissatisfaction are experienced with the ombud process.<sup>30</sup> While these ‘ombuds watchers’ may be in a minority, they are a persistent and vocal critical voice, with users left angry, wishing they had not bothered and feeling like the whole system is corrupt.<sup>31</sup>

<sup>23</sup> A Clwyd and P Hart, *A Review of the NHS Complaints System: Putting Patients Back in the Picture* (The Stationery Office, 2013); B Kirkup, *The Report of the Morecambe Bay Investigation* (The Stationery Office, 2015); Francis R, *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry* (The Stationery Office, 2013).

<sup>24</sup> Crerar (n 7); Public Administration Select Committee, *More Complaints Please!* (London, House of Commons, 2014) [www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/229/229.pdf](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/229/229.pdf).

<sup>25</sup> PHSO (n 11) 6.

<sup>26</sup> *ibid* 50.

<sup>27</sup> Citizens Advice Scotland, ‘Holding Public Services to Account in Scotland Open Government Partnership: Report on work by Citizens Advice Scotland’ (CAS, 2020) 16 [www.cas.org.uk/system/files/publications/holding\\_public\\_services\\_to\\_account\\_in\\_scotland\\_-\\_citizens\\_advice\\_scotland\\_research\\_report\\_1.pdf](http://www.cas.org.uk/system/files/publications/holding_public_services_to_account_in_scotland_-_citizens_advice_scotland_research_report_1.pdf).

<sup>28</sup> NAO (n 19).

<sup>29</sup> N Creutzfeldt, ‘Trusting the Middle-Man: Impact and Legitimacy of Ombudsmen in Europe’ (ESCR, 2015) 20 [http://westminsterresearch.wmin.ac.uk/17179/1/ombuds\\_project\\_report\\_NC.pdf](http://westminsterresearch.wmin.ac.uk/17179/1/ombuds_project_report_NC.pdf).

<sup>30</sup> C Gill and N Creutzfeldt, ‘The “Ombuds Watchers”: Collective Dissent and Legal Protest among Users of Public Services Ombuds’ (2017) 27 *Social & Legal Studies* 367; Patients Association, *PHSO: A Labyrinth of Bureaucracy* (2015).

<sup>31</sup> See, eg D Reynolds, *What’s the Point of the Ombudsman?* (PHSO The Facts, 2020).

## B. The Effects of Complaints on Staff: The Missing Dimension

There are three dimensions to complaint handling – providing redress for the complainant, using complaints to improve services and ensuring that staff members recover effectively from being complained about.<sup>32</sup> While the first two dimensions have been considered within UK complaint systems, Johnson and Michel note that the third dimension, which they term ‘employee recovery’, has been largely ignored in complaint systems.<sup>33</sup> In particular, we have found that little is known about the impact on complaint handlers.

Empirical studies on the impact of complaints on staff have largely been limited to the healthcare sector. Wu published an editorial in the *British Medical Journal* in which he said that ‘although patients are the first and obvious victims of medical mistakes, doctors are wounded by the same errors: they are the second victims.’<sup>34</sup> Ullstrom et al found that professionals may be affected in two ways after an adverse event: first, by the incident itself, and second, by the manner in which the incident is handled.<sup>35</sup> Other studies suggest that receiving a complaint is associated with feelings of anxiety, depression and reduced job satisfaction, with the impact varying from moderate to severe.<sup>36</sup> There is also evidence that complaints can lead to defensive practices, such as offering a more limited service and practising by the rules.<sup>37</sup>

Complaints also have the potential to damage relationships, reducing both trust and a sense of goodwill towards patients.<sup>38</sup> As seen from the health sector research, complaint systems, processes and approaches can be traumatic for the person complained about. An event is thought to produce a traumatic response when the stress resulting from that event overwhelms the individual’s psychological ability to cope.<sup>39</sup> Complaints can also impact negatively on those complaining

<sup>32</sup> R Johnson and S Michel, ‘Three Outcomes of Service Recovery: Customer Recovery, Process Recovery and Employee Recovery’ (2008) 28 *International Journal of Operations & Production Management* 79.

<sup>33</sup> *ibid.*

<sup>34</sup> A Wu, ‘Medical Error: The Second Victim’ (2000) 320 *British Medical Journal* 726 [www.ncbi.nlm.nih.gov/pmc/articles/PMC1117748/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1117748/).

<sup>35</sup> S Ullstrom, A Sachs, J Hansson, J Øvretveit and M Brommels, ‘Suffering in Silence: A Qualitative Study of Second Victims of Adverse Events’ (2014) 23 *BMJ Quality & Safety* 325 <http://qualitysafety.bmj.com/content/qhc/23/4/325.full.pdf>.

<sup>36</sup> T Bourne, L Wynants and M Peters, ‘The Impact of Complaints Procedures on the Welfare, Health and Clinical Practise of 7,926 Doctors in the UK: A Cross-Sectional Survey’ (2015) 4 *BMJ Open* 1 <http://bmjopen.bmj.com/content/bmjopen/5/1/e006687.full.pdf>; J Bruers, B van Dam, R Gorter and M Eijkman, ‘The Impact of a Formal Complaint on Dutch Dentists’ Professional Practice: A Survey Study’ (2015) 16 *BMC Oral Health* 104.

<sup>37</sup> A Jain and J Ogden, ‘General Practitioners’ Experiences of Patients’ Complaints: Qualitative Study’ (1999) 318 *British Medical Journal* 1596. For a recent ombuds report highlighting defensive practices, see PHSO (n 11).

<sup>38</sup> W Cunningham, ‘The Immediate and Long-Term Impact on New Zealand Doctors Who Receive Patient Complaints’ (2004) 117 *The New Zealand Medical Journal* 1198.

<sup>39</sup> S Straussner and A Calnan, ‘Trauma through the Life Cycle: A Review of Current Literature’ (2014) 42 *Clinical Social Work Journal* 323.

(and could re-traumatise), and we consider that there is likely to be ongoing chronic stress/trauma for those who are constantly working with complaint and conflict.

## IV. Case Study: Being Complained About

### A. Research on the Impact of Being Complained About

Health sector research relating to being complained about has reported negative effects on both staff well-being and functionality. However, impact has been under-researched in other public services. We began to address this gap in our 2017 study, which examined the effects of being complained about in two Scottish public services. We chose local authority planning departments and housing associations because they represented contrasting areas of public service provision across the following dimensions: types of service users, the nature of the relationship, statutory function and context, and public/independent sector service provision. They also had relatively high levels of complaints to the SPSO.<sup>40</sup>

Our research project used a mixed methods sequential design.<sup>41</sup> An online survey – sent to all local authority and housing association chief executives in Scotland (with a cover letter from the SPSO encouraging participation) – aimed to obtain a quantitative sense of the nature and types of effects experienced in each sector.<sup>42</sup> The survey received 132 responses. This was followed by in-depth qualitative telephone interviews with 16 staff members who volunteered when completing the survey. Descriptive statistics were used to analyse the online survey. Interviews were analysed using thematic analysis.<sup>43</sup>

Most survey respondents reported that being subject to a complaint affected their work practice (71 per cent) and their well-being (67 per cent).<sup>44</sup> A significant minority (15 per cent) had been affected ‘a great deal’. Sixty-one per cent of respondents considered that being complained about made them more wary when dealing with certain service users: 29 per cent felt more distrustful, with 26 per cent starting to see service users as a risk. Fifty-seven per cent worried

<sup>40</sup> SPSO, *Cases Received by Sector* (2017) [www.spsso.org.uk/sites/spso/files/communications\\_material/statistics/201617/ReceivedbySubjectandAuthority2016-17.pdf](http://www.spsso.org.uk/sites/spso/files/communications_material/statistics/201617/ReceivedbySubjectandAuthority2016-17.pdf).

<sup>41</sup> J Creswell and V Plano Clark, *Designing and Conducting Mixed Methods Research* (Sage, 2011).

<sup>42</sup> There were 141 survey responses, with nine excluded due to missing/incorrect data, resulting in a sample of 132 respondents. Of these, 64.4% ( $n = 85$ ) were from housing associations and 35.6% ( $n = 47$ ) were from planning departments.

<sup>43</sup> V Braun, and V Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3 *Qualitative Research in Psychology* 77.

<sup>44</sup> Figures cited here are rounded to the nearest whole number and percentages relate to the proportion of respondents answering the particular question (rather than the proportion of survey participants as a whole).

about receiving other complaints in the future. There were positive and negative views on how the complaint affected their work:

- 48 per cent now tried to communicate better with service users;
- 40 per cent felt more secure as a result of good complaint handling by the organisation;
- 27 per cent were now less sure about their work practice; and
- 22 per cent saw the complaint as a wake-up call and opportunity to do things differently.

Most respondents (57 per cent) felt well supported by their organisations during the complaint process, although 22 per cent did not. The support found most useful in helping respondents through the complaint included:

- line manager support (41 per cent);
- support from colleagues (20 per cent);
- being involved in the complaint handling (19 per cent); and
- support from friends and family (15 per cent).

In terms of the qualitative data, most respondents reported some positive effects on their practice. This included improved communication, becoming more sensitive to service user needs and being better equipped to meet them. However, negative emotional effects resulting from being complained about were common. Planning interviewees quotes are referred to as P1, P2, etc and housing interviewees as H1, H2, etc. Interviewees reported feeling upset, hurt, angry, anxious and attacked: 'I was quite shocked, and a bit hurt by it ... And then I just felt a bit angry' (P8). For a minority, the experience was traumatic: 'It was dreadful, it was one of the worst things that's happened to me as an employee' (P5). The experience was described as dislocating and undermining interviewees' confidence in their work practice: 'I thought ... did I mess up, basically? So it does make you question your own judgement' (P3).

A strong theme amongst planning interviewees was that effects were particularly severe where complaints were perceived as an attack on professionalism: 'So when someone's obviously questioning your professional territory, it does concern you' (P3). The strong professional identity amongst planners was seen as raising the stakes when complaints were made. There were frequent references to the perceived motivation of complainants when describing negative effects. This was more prevalent among housing staff, whose view was that their organisation used a 'customer is always right' approach: 'I got told obviously that I had upset the [complainant] and because that's how the [complainant] felt, the complaint had to be upheld' (H1).

A range of issues were raised about the complaint process. Most staff wanted to have their say: 'I think the thing that worked the best was when we actually had to sit down, in a discussion ... There was opportunity to give my side of the story' (H5).



Being kept informed was important, but some interviewees felt that ‘[I was] not necessarily fully aware about what’s going on’ (P3). Similar to research where consumers emphasise the importance of receiving an explanation,<sup>45</sup> good explanations were key for helping staff accept decisions, especially if they were adverse. Several interviewees mentioned difficulties arising from colleagues being involved in investigating complaints: ‘The complaint was as much to do with [manager’s] attitude towards me as [the complaint itself]’ (P5). Interviewees focused less on the need for additional support and more on ensuring a fair complaint process. A number said that avoiding blame allocation and making the focus of complaints about organisational improvement was important.

While exploratory in nature, our study suggested that, as in the healthcare sector, complaints can have a significant effect on the well-being and work practices of staff working in public services. Context appeared to be a significant influence on the prevalence and types of effects resulting from being complained about, so we expected complaints to have different effects in different areas of public service delivery. We found that effects on staff were not wholly negative, and for most are likely to be mixed, which presents a more variegated picture than that suggested in the traditionally dichotomous discussion of accountability systems. Importantly, our findings included that the design and operation of complaints procedures appeared to be significant factors in helping to explain the likelihood of negative effects resulting from a complaint.

## B. Being Complained About – Good Practice Principles and Guidelines

The research findings described above led to the development of the Being Complained About Good Practice Principles and Guidelines (the Guidelines). The Guidelines drew on both our research findings and from learning related to human factors and the use of the ‘Just Culture’ approach.<sup>46</sup> The Guidelines aim to mitigate the negative impact of complaints through the application of clear processes which both involve and support the person complained about. The SPSO was involved in developing the Guidelines from the start. Feedback on early drafts was sought and received from the Law Society of Scotland and the Scottish Legal Complaints Commission. The draft Guidelines were circulated by the Ombudsman Association to members, with 12 ombud organisations responding with positive and constructive comments.

<sup>45</sup> See, eg Slater and Higginson (n 22) 53; J Williams, C Gill, N Creutzfeldt and N Vivian, ‘Participation as a Framework for Analysing Consumers’ Experiences of Alternative Dispute Resolution (ADR)’ (2020) 47 *Journal of Law and Society* 271.

<sup>46</sup> NHS Improvement, ‘A Just Culture Guide’ (NHS, 2018) [www.england.nhs.uk/wp-content/uploads/2021/02/NHS\\_0932\\_JC\\_Poster\\_A3.pdf](http://www.england.nhs.uk/wp-content/uploads/2021/02/NHS_0932_JC_Poster_A3.pdf); for general information on Just Culture, including the guide, see [www.england.nhs.uk/patient-safety/a-just-culture-guide/#about-our-guide](http://www.england.nhs.uk/patient-safety/a-just-culture-guide/#about-our-guide).

The finalised version of the Guidelines<sup>47</sup> was launched in February 2019, with content organised under the following headings:

1. Introduction
  2. Guideline Principles
  3. Expected Behaviours
  4. Immediate Action Following Notification of a Complaint
  5. Complaint Resolution Discussions
  6. Complaint Investigation and Decision
  7. Review of a Complaint Decision
  8. Complaints and Professional Conduct
  9. Action Relating to a Complaint
- Appendix One – Action Relating to a Complaint

The underlying ethos of the Guidelines is that both the complainants and the staff complained about have a right to be heard, understood and respected. The Guideline principles are fairness, transparency, confidentiality and efficiency – which also reflect the principles promoted by the Ombudsman Association in relation to good complaint handling.<sup>48</sup> The Guidelines are available as a free resource for organisations to choose to adopt and use. They are not prescriptive and can be adapted by an organisation to suit their existing complaint-handling policy, processes, terminology and approaches.

Funding was subsequently received from the University of Glasgow's ESRC Impact Acceleration Account to implement the Guidelines and to test and refine the findings and insights from their implementation. Work included a pilot case study on the impact of implementing the Guidelines in a public service organisation – Castle Rock Edinvar Housing Association (CRE), which employs around 215 staff. A survey of CRE staff before the introduction of the Guidelines found that of those who had been subject to a complaint (35 staff member responses), 37 per cent reported their work practice being affected a great deal, while 57 per cent were affected to some extent. Seventeen per cent worried a great deal about being complained and 66 per cent worried about this to some extent. In relation to the complaints process design, a number of potential issues were identified:

- 49 per cent of respondents disagreed that they had been involved in deciding how the complaint would be dealt with;
- 40 per cent said that the potential consequences of complaint processes were not clear;
- 40 per cent had not been told the outcome at the same time as the complainant;
- 34 per cent had not been told immediately about a complaint;

<sup>47</sup> [www.gla.ac.uk/schools/law/research/groups/lawreform/beingcomplainedabout/](http://www.gla.ac.uk/schools/law/research/groups/lawreform/beingcomplainedabout/).

<sup>48</sup> BIOA, 'Guide to Principles of Good Complaint Handling' (2007) [www.ombudsmanassociation.org/sites/default/files/2021-03/BIOAGoodComplaintHandling.pdf](http://www.ombudsmanassociation.org/sites/default/files/2021-03/BIOAGoodComplaintHandling.pdf).

- 31 per cent were not provided with support;
- 23 per cent thought the process was not fair to staff;
- 23 per cent had not been involved in the learning process;
- 17 per cent disagreeing that the process was transparent; and
- 17 per cent did not have the opportunity to comment on the complaint.

Thirteen staff members, who had been named/involved in complaints where a staff member had been complained about, were interviewed to understand their experiences in more depth. Potential barriers to improvements for those complained about were identified and the Guidelines were adapted to suit the CRE context. Amendments included: involving Human Resources at an earlier stage in the process; requiring investigating managers to provide feedback to the line manager of the person complained about on recommendations and next steps; and removing references to professional conduct and instead referring to investigations normally being suspended where criminal conduct is alleged/police investigation is ongoing.

The amended guidance was adopted as a CRE policy and circulated to all staff. Feedback on the implementation process was obtained from nine of the staff members interviewed earlier. Seven considered that the new guidance had changed their practice. However, organisational barriers (such as lack of central ownership of complaints and a propensity not to deal with issues requiring resolution) remained problematic for some. In the light of this learning, CRE intends to:

- include dealing with complaints in all job descriptions;
- define required conflict behaviours – in particular for frontline roles – and recruit in relation to these;
- consider induction/initial training needed, as well as ongoing training/development; and
- produce a summary document about what a manager needs to do when a staff member is complained about, together with a version for staff members.

This case study added to the knowledge about the impact on those complained about. Insights also include that:

- organisations need to do more than just introduce the Guidelines to overcome barriers and implement more supportive approaches to staff. Other issues (workload, lack of training, lack of role clarity) also have the potential to result in negative effects for staff handling complaints and those complained about; and
- the way in which an organisation deals with challenge and dispute internally can also affect how staff members view and deal with external complaints. The successful implementation of change to minimise the impact of complaints on staff requires a more holistic review of both internal and external complaints processes and practices.

## V. Towards Therapeutic Complaint Resolution

### A. What Can We Learn from Therapeutic Jurisprudence?

Our findings that existing complaint systems were not producing optimal outcomes for those complained about led us to consider whether complaint systems should adopt a less harmful/more therapeutic approach for all and the potential significance of therapeutic jurisprudence for ombuds in relation to: (i) their design role and (ii) more generally in terms of improving their own complaint-handling practices.

Therapeutic jurisprudence (TJ) describes a field of inquiry, developed by Wexler and Winick,<sup>49</sup> which has been defined by the International Society for Therapeutic Jurisprudence as ‘an interdisciplinary field of philosophy and practice that examines the therapeutic and anti-therapeutic properties of laws and public policies, legal and dispute resolution systems, and legal institutions.’<sup>50</sup>

Wexler<sup>51</sup> used a wine bottle metaphor to explain therapeutic jurisprudence: the bottle represents structures, while the wine represents specific contextual practices. The focus of TJ literature is on the effects that rules, procedures and roles within legal and dispute resolution systems have on the people who come into contact with those systems<sup>52</sup> and which inevitably give rise to unintended consequences, which may be either beneficial (therapeutic) or harmful (anti-therapeutic). It draws attention to the effects of systems and seeks to build up an empirical body of knowledge about these in order to maximise the likelihood of therapeutic outcomes.<sup>53</sup>

The TJ literature does not advocate that therapeutic values should trump other values, such as due process or accountability. Instead, it argues for a consideration of the therapeutic effects of systems to the extent that such consideration is compatible with other values.<sup>54</sup> This has been referred to as using therapeutic practices within the interstitial spaces left open around legally shaped rules, procedures and roles.<sup>55</sup> For example, Campling<sup>56</sup> made the case for intelligent

<sup>49</sup> D Wexler and B Winick, *Essays in Therapeutic Jurisprudence* (Academic Press, 1991).

<sup>50</sup> <https://intl.tj.com/about/therapeutic-jurisprudence/>.

<sup>51</sup> D Wexler, ‘Guiding Court Conversation along Pathways Conducive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence’ (2016) 1 *International Journal of Therapeutic Jurisprudence* 367.

<sup>52</sup> M Herzog-Evans, ‘Release and Supervision: Relationships and Support from Classic and Holistic Attorneys’ (2016) 1 *International Journal of Therapeutic Jurisprudence* 23.

<sup>53</sup> P Spencer, ‘From Alternative to the New Normal: Therapeutic Jurisprudence in the Mainstream’ (2014) 39 *Alternative Law Journal* 222.

<sup>54</sup> A Campbell, ‘A Case Study for Applying Therapeutic Jurisprudence to Policymaking: Assembling a Policy Toolbox to Achieve a Trauma-Informed Early Care and Learning System’ (2019) 63 *International Journal of Law and Psychiatry* 45.

<sup>55</sup> Wexler and Winick (n 49).

<sup>56</sup> P Campling, ‘Reforming the Culture of Healthcare: The Case for Intelligent Kindness’ (2015) 39 *British Journal of Psychology Bulletin* 1.

kindness in reforming the healthcare culture and DiFonzo et al<sup>57</sup> used forgiveness theory to investigate the effects of organisational apology and restitution on eliciting forgiveness of a transgressing organisation after a transactional psychological contract breach. Forgiveness theory proposes that victims are more likely to forgive offenders when victims' positive offender-oriented emotions replace negative ones. It has been shown that emotion replacement is at the heart of the moral repair process and that apology and restitution bring about the emotional changes necessary for moral repair to occur.<sup>58</sup>

TJ can be considered as a subset of legal psychology: the scientific study of mind and behaviour as it affects or is affected by the law. Randall and Haskell<sup>59</sup> considered trauma-informed approaches to law and restorative justice. They make the point that the law regularly encounters and deals with people, both as victims and offenders, whose lives have been shaped and harmed by traumatic events. They also advance the general argument that more effective, fair, intelligent and just legal responses must work from a perspective which is trauma informed. It is our belief that this also applies to complaint handling, particularly in the public sector. TJ has yet to be deployed in the complaint-handling context, despite there being considerable potential to do so: there is significant congruence here with effects identified in the literature on healthcare complaints, which indicates that the TJ framework is likely to be of value in this context.

The value of applying the TJ framework to complaint handling – and, in doing so, introducing the concept of 'therapeutic complaint resolution' (TCR) – is that it provides a more sophisticated framework and language within which to discuss the positive and negative effects of accountability in public sector complaint systems. Using therapeutic jurisprudence as a lens through which to study complaint systems also calls attention to the real-world effects of dispute resolution systems, and seeks to complement existing values – such as due process or accountability – with a new emphasis on the lived experiences of actors in these systems. Indeed, Jones and Kawalec argue that therapeutic jurisprudence validates concerns about emotional well-being and draws attention to important issues that tend to be ignored in the traditional legal and bureaucratic emphasis on neutrality, impersonality and rationality.<sup>60</sup>

It is recognised that a limitation of TJ is that therapeutic practices tend to be context sensitive and not necessarily applicable across the board. So, in moving

<sup>57</sup> N DiFonzo, A Alongi and P Wiele, 'Apology, Restitution, and Forgiveness after Psychological Contract Breach' (2020) 161 *Journal of Business Ethics* 53.

<sup>58</sup> M Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press, 2006); N Cuguero-escofet, M Fortin and M Canela, 'Righting the Wrong for Third Parties: How Monetary Compensation, Procedure Changes and Apologies Can Restore Justice for Observers of Injustice' (2014) 122 *Journal of Business Ethics* 253.

<sup>59</sup> M Randall and L Haskell, 'Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping' (2013) 36 *Dalhousie Law Journal* 501.

<sup>60</sup> E Jones and A Kawalec, 'Dissolving the Stiff Upper Lip: Opportunities and Challenges for the Mainstreaming of Therapeutic Jurisprudence in the United Kingdom' (2018) 63 *International Journal of Law and Psychiatry* 76.

towards a focus on public service complaints and not seeking replicability to other disputing contexts, TCR is in some ways more limited, but also has more potential for theorising in this area. It is also considered that the field of disputation has spawned a range of theories and models that could be integrated into TCR. Generally, these theories and models have not been concerned centrally with well-being. However, to the extent that they enhance processes and outcomes, we might expect them to have a role in enhancing well-being.

## B. The Role of Ombuds in Encouraging Therapeutic Approaches to Complaint Handling

In light of the key roles of UKPSOs, first as the designer and architect of public service complaint systems and second as a role model in setting the tone for good practice elsewhere, what evidence is there that UKPSOs currently display and support a therapeutic approach to complaint handling?

The TJ literature highlights the importance of dispute processes which allow active participation, solution-focused approaches, systems providing parties with a voice in proceedings and decisions being taken in a manner that feels fair to the parties.<sup>61</sup> These aspects are likely to be equally relevant to both complainants and those who are complained about. There are, therefore, many aspects of UKPSO practices which lend themselves well to TCR practices, including their relative informality, an emphasis on righting individual injustice, an inquisitorial approach to investigating complaints and an emphasis on organisational learning and addressing systemic issues. In their design role, UKPSO guidance for BwJ on effective complaint-handling practice emphasises the importance of accessibility, fairness, dealing with complaints promptly and the need for effective communication, being proportionate and investigating appropriately.<sup>62</sup> The SPSO updated their Model Complaint Handling Procedures in January 2020 to take account of the Guidelines, and the updated procedure now includes references to supporting staff.<sup>63</sup>

<sup>61</sup> P O'Byrne, 'Therapeutic Jurisprudence and the Sentencing of Family Offenders: Does the Sentencing "Bottle" in Victoria Need to Change?' (2016) 1 *International Journal of Therapeutic Jurisprudence* 147.

<sup>62</sup> In addition to SPSO's Model Complaint Handling Standards, another good example of ombuds and patients' organisations collaborating on guidance is LGO/Healthwatch/PHSO, *My Expectations for Raising Concerns and Complaints: Vision Report* (2015) [www.ombudsman.org.uk/sites/default/files/Report\\_My\\_expectations\\_for\\_raising\\_concerns\\_and\\_complaints.pdf](http://www.ombudsman.org.uk/sites/default/files/Report_My_expectations_for_raising_concerns_and_complaints.pdf). See also Local Government and Social Care Ombudsman, *Effective Complaint Handling for Local Authorities* (2020) [www.lgo.org.uk/information-centre/news/2020/oct/new-complaints-handling-guide-offers-advice-to-local-authorities](http://www.lgo.org.uk/information-centre/news/2020/oct/new-complaints-handling-guide-offers-advice-to-local-authorities); PHSO, 'Principles of Good Administration' (2009) [www.ombudsman.org.uk/about-us/our-principles/principles-good-administration](http://www.ombudsman.org.uk/about-us/our-principles/principles-good-administration); PHSO, 'Principles of Good Complaint Handling' (2009) [www.ombudsman.org.uk/sites/default/files/page/0188-Principles-of-Good-Complaint-Handling-bookletweb.pdf](http://www.ombudsman.org.uk/sites/default/files/page/0188-Principles-of-Good-Complaint-Handling-bookletweb.pdf).

<sup>63</sup> See, eg paras 33, 48, 62 and 68 of the SPSO's 'Local Authority Model Complaints Handling Procedure' (2020) [www.spsso.org.uk/sites/spso/files/csa/LAMCHPPart3.pdf](http://www.spsso.org.uk/sites/spso/files/csa/LAMCHPPart3.pdf).

However, anti-therapeutic effects still continue to exist in the public services complaints landscape. In terms of the investigation process, research examining the effects of coronial investigation processes on professional actors finds that anti-therapeutic effects can be produced by various aspects of investigation procedures, including: delays, lack of communication, unclear decisions, lack of ability to comment on decisions and lack of emotional sensitivity.<sup>64</sup> We also know from our research that both complainants and those complained about can be harmed by delays, lack of communication, unclear decisions, the lack of ability to comment on decisions and a lack of emotional sensitivity. The 2020 PHSO review of complaint handling in the health service in England and in central government bodies also highlighted delays and poor communication as common themes.<sup>65</sup> Hogg et al found that the common focuses of patient complaints in the UK and other high-income countries are poor staff attitudes, behaviour and communication.<sup>66</sup>

A recent review of clinical advice in health complaints at the PHSO highlighted a number of aspects of complaint handling by the PHSO which potentially combine to act in a non-therapeutic manner.<sup>67</sup> The independent expert report commissioned by this review criticised the PHSO for being too procedurally driven and at times failing to take sufficient account of the 'rich and important insights' from complainants.<sup>68</sup> The final review report highlighted how families and patients felt that their views were not given proper weight and how they felt 'disbelieved by default'.<sup>69</sup> Recent qualitative research on impartiality for the PHSO highlights the perception by some complainants that there is a 'mismatch' between the complainants on the one hand and the organisation being complained about, and that insufficient account was taken of the human impact of the experience.<sup>70</sup> The research also highlighted the requirement for open communication and the need to treat complainants with compassion, empathy and understanding.<sup>71</sup>

<sup>64</sup> J Freckleton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence' (2007) 30 *Thomas Jefferson Law Review* 30.

<sup>65</sup> PHSO, *Making Complaints Count: Supporting Complaints Handling in the NHS and UK Government Departments* (HC 390, 15 July 2020) <https://www.ombudsman.org.uk/sites/default/files/%28HC%20390%29%20-%20Making%20Complaints%20Count-%20Supporting%20complaints%20handling%20in%20the%20NHS%20and%20UK%20Government%20Departments.pdf>.

<sup>66</sup> R Hogg, J Hanley and P Smith P, 'Learning Lessons from the Analysis of Patient Complaints Relating to Staff Attitudes, Behaviour and Communication, Using the Concept of Emotional Labour' (2018) 27 *Journal of Clinical Nursing* 004.

<sup>67</sup> PHSO, *Clinical Advice Review Final Report* (2019) [www.ombudsman.org.uk/sites/default/files/Final\\_Report\\_Clinical\\_Advice\\_Review.pdf](http://www.ombudsman.org.uk/sites/default/files/Final_Report_Clinical_Advice_Review.pdf).

<sup>68</sup> L Donaldson, *Report of the Independent Adviser to the Clinical Advice Review Commissioned by the Parliamentary and Health Service Ombudsman* (2018) 13 [www.ombudsman.org.uk/sites/default/files/PHSO\\_Clinical\\_Advice\\_Review\\_Report\\_of\\_Independent\\_Adviser.pdf](http://www.ombudsman.org.uk/sites/default/files/PHSO_Clinical_Advice_Review_Report_of_Independent_Adviser.pdf).

<sup>69</sup> PHSO, *Making Complaints Count* (n 65) 7.

<sup>70</sup> Parliamentary and Health Service Ombudsman (PHSO) *Complainant Feedback: Charter Commitment 10 Summary Report of Findings Opinion Research Services* (2020) [www.ombudsman.org.uk/sites/default/files/ORS\\_Summary\\_Report\\_on\\_Impartiality\\_March\\_2020.pdf](http://www.ombudsman.org.uk/sites/default/files/ORS_Summary_Report_on_Impartiality_March_2020.pdf).

<sup>71</sup> *ibid* paras 1.23, 1.25 and 1.26.

In Scotland, a small, qualitative review of 12 complaint files in relation to GPs, health boards and the SPSO highlighted how there was little account of feelings, only facts, and that ‘in the majority of responses there is no apparent understanding of the distress experienced by the complainant’.<sup>72</sup> In 2019, the PHSO pledged to change the culture of the organisation to be more attuned to the patient and family experience.<sup>73</sup> The Patients Association<sup>74</sup> recently noted that there had been improvements in how PHSO communicates and keeps patients updated (although it also noted that there had been a reduction in satisfaction with the PHSO explaining its decisions).

One of the drivers for complaining in relation to public services is said to be the desire to ensure that it does not happen again or to someone else.<sup>75</sup> In Australia, Spigelman, a former Chief Justice of New South Wales, has commented on how ongoing relationships are at the heart of citizen–state interactions.<sup>76</sup> The rebuilding of these relationships in the context of public services therefore has potential for significant therapeutic benefits. Ensuring that learning happens in practice is thought to be very challenging. The PSOW has highlighted how, ‘despite numerous reports’ outlining cultural weaknesses in public sector complaint handling, including defensiveness and a blame culture, these cultural issues continue and can mean that the user does not receive a fair, just and timely outcome to their complaint.<sup>77</sup>

The PHSO has also highlighted the existence of a defensive culture in relation to English health and UK government disputes. Learning from complaints does not always happen. Despite the fact that the Local Government and Social Care Ombudsman has previously reported twice on education, health and care plans, its recent focus report continues to highlight an uphold rate of 87 per cent compared to an overall average of 58 per cent.<sup>78</sup> In his review of existing research, Gill concluded it is difficult to draw any conclusions on how effective ombuds are

<sup>72</sup> CAS (n 27) 18.

<sup>73</sup> PHSO, ‘Our Response to the Clinical Advice Review’ (2019) 19 [www.ombudsman.org.uk/sites/default/files/Our\\_Response\\_to\\_the\\_Clinical\\_Advice\\_Review.pdf](http://www.ombudsman.org.uk/sites/default/files/Our_Response_to_the_Clinical_Advice_Review.pdf).

<sup>74</sup> Patients Association, ‘Position Statement: PHSO’ (2020) [www.patients-association.org.uk/Handlers/Download.ashx?IDMF=6592b5d6-ca60-49f0-9f1d-a6f739d28614](http://www.patients-association.org.uk/Handlers/Download.ashx?IDMF=6592b5d6-ca60-49f0-9f1d-a6f739d28614).

<sup>75</sup> M Bismark, T Brennan, R Paterson R, P Davis and D Studdert, ‘Relationship between Complaints and Quality of Care in New Zealand: A Descriptive Analysis of Complainants and Non-complainants Following Adverse Events’ (2006) 15 *Quality and Safety in Health Care* 17; Citizens Advice (n 19); R Friele and E Sluijs, ‘Patient Expectations of Fair Complaint Handling in Hospitals: Empirical Data’ (2006) 6 *BMC Health Services Research* 106.

<sup>76</sup> JJ Spigelman, ‘Foundations of Administrative Law: Toward General Principles of Institutional Law’ (1999) 58 *Australian Journal of Public Administration* 3.

<sup>77</sup> Public Services Ombudsman for Wales, ‘Ending Groundhog Day Lessons from Poor Complaint Handling’ (WPSO, 2018) 10 [www.ombudsman.wales/wp-content/uploads/2018/03/Ending-Groundhog-Day-Lessons-in-Poor-Complaint-Handling.pdf](http://www.ombudsman.wales/wp-content/uploads/2018/03/Ending-Groundhog-Day-Lessons-in-Poor-Complaint-Handling.pdf).

<sup>78</sup> Local Government and Social Care Ombudsman, ‘Not Going to Plan? – Education, Health and Care Plans Two Years on. Focus Report: Learning Lessons from Complaints’ (LGSCO, 2019) 1 [www.lgo.org.uk/information-centre/news/2019/oct/a-system-in-crisis-ombudsman-complaints-about-special-educational-needs-at-alarming-level](http://www.lgo.org.uk/information-centre/news/2019/oct/a-system-in-crisis-ombudsman-complaints-about-special-educational-needs-at-alarming-level).



at encouraging organisational learning as there is no significant evidence base to draw on.<sup>79</sup>

In practice, uphold rates vary significantly. For example, in 2019/2020, uphold rates varied from 20 per cent (PSOW) to 72 per cent (Office of the Northern Ireland Ombudsman).<sup>80</sup> The terminology of uphold/not uphold in itself has potential to operate in an anti-therapeutic manner: first, in driving win/lose behaviours, and second, because a simple uphold/not upheld fails to capture the complexity of decision-making in the public sector. Annual reports from the Housing Ombudsman and the PSOW appear to have moved away from that language. Creutzfeldt's research suggests that citizens' experiences of uphold and not uphold may not correspond with the way that schemes classify it.<sup>81</sup> Donaldson's review into the nature of clinical advice by the PHSO also highlighted the unhelpful nature of a system that requires ombudsman to either 'uphold' or not a complaint which fails to convey the 'nuanced nature' of many judgements on whether a health complaint is justified or not.<sup>82</sup> In the context of consumer alternative dispute resolution schemes, Williams et al found that dissatisfaction centred around the lack of effective participation by the parties in shaping outcomes, which led to strong feelings that schemes were 'placating' or 'isolating' them and failing to effectively engage with them.<sup>83</sup> It is noted that the SPSO is encouraging a resolution approach to complaints, with its 2020 Good Practice Guidance saying that the outcome of a complaint can now be resolved, upheld, partially upheld or not upheld.<sup>84</sup>

A significant gap in the literature is that we simply do not know enough about the impact complaint processes have on individual complaint handlers within the public service organisations or at ombuds themselves. The research that does exist is limited to the impact of querulous and unreasonable conduct

<sup>79</sup> C Gill, 'What Can Government Agencies Learn from the Ombudsman?' in Hertogh and Kirkham, *Research Handbook on the Ombudsman* (n 2) 298–318.

<sup>80</sup> Public Services Ombudsman for Wales, *Annual Report 2019/2020* (2020) 6, [www.ombudsman.wales/wp-content/uploads/2020/07/PSOW-Annual-Report-and-Accounts-2019-20.pdf](http://www.ombudsman.wales/wp-content/uploads/2020/07/PSOW-Annual-Report-and-Accounts-2019-20.pdf); NIPSO, *Ombudsman's Report 2019–2020* (2020) 22, <https://nipso.org.uk/site/wp-content/uploads/2020/11/Ombudsmans-Report-2019-20.pdf>.

<sup>81</sup> In Creutzfeldt's research, the outcome was in favour or partial favour of the complainant in 19.7% of cases in the public sector compared to 60.8% in the private sector: Creutzfeldt (n 29) 32. The PHSO annual report at the time indicated an uphold rate in full or part of 37%: *ibid* 15. The uphold rate for the LGO was not included in its annual report that year. All decisions are however published. See Creutzfeldt (n 29) 20; PHSO, *Annual Report and Accounts 2014/2015* (2015) 15, [www.ombudsman.org.uk/sites/default/files/2016-10/Annual%20Report%202014-15\\_0.pdf](http://www.ombudsman.org.uk/sites/default/files/2016-10/Annual%20Report%202014-15_0.pdf); LGO, *Annual Report 2014/15* (2015) [www.lgo.org.uk/information-centre/about-us/our-performance/lgo-annual-reports](http://www.lgo.org.uk/information-centre/about-us/our-performance/lgo-annual-reports).

<sup>82</sup> Donaldson (n 68) 23. A recent Healthwatch report also argued that this distinction is unhelpful since upholding a complaint can drive defensive behaviours and a blame culture while not upholding a complaint can result in missed opportunities for learning: Healthwatch, 'Shifting the Mindset: A Closer Look at NHS Complaints' (2020) 11 [www.healthwatch.co.uk/sites/healthwatch.co.uk/files/20191126%20-%20Shifting%20the%20mindset%20-%20NHS%20complaints%20.pdf](http://www.healthwatch.co.uk/sites/healthwatch.co.uk/files/20191126%20-%20Shifting%20the%20mindset%20-%20NHS%20complaints%20.pdf).

<sup>83</sup> Williams et al (n 45).

<sup>84</sup> SPSO, 'Good Practice Guidance: Alternative Complaint Resolution Approaches' (2020) [www.spsso.org.uk/sites/spsso/files/csa/Alternative%20Complaint%20Resolution%20Approaches.pdf](http://www.spsso.org.uk/sites/spsso/files/csa/Alternative%20Complaint%20Resolution%20Approaches.pdf).

on complaint handlers.<sup>85</sup> While this research is important and had a significant impact on practice, this emphasis on inappropriate and potentially dysfunctional behaviour fails to address the wider potentially anti-therapeutic elements of complaint handling, as it tends to treat the symptoms rather than the cause of these behaviours. A recent report on complaint handling in the public sector in Australia highlighted the often-challenging work of complaint handling and the need to recruit staff with the right skills, including excellent communication skills, empathy, evidence-based investigation skills and peer support.<sup>86</sup> It is noted that a recent research study with complaint handlers in the financial sector highlighted the active role that group support and dialogue plays in supporting individual complaint handlers' fair decision-making.<sup>87</sup>

### C. Suggestions for Enhancing Therapeutic Complaint Handling Practices

Returning to Wexler's metaphor,<sup>88</sup> a pragmatic response to our research findings would be for ombuds to move towards the approach of 'new wine in an old bottle'. While not changing the current design paradigm, they could introduce or enhance practices which have been found to be more therapeutic and so make complaint handling less traumatic for all – in effect, to retain the adversarial character of complaint systems, but with attempts to soften their edges. However, it is acknowledged that the 'bottle' or structure within which complaint handling takes place may impose limits on these more therapeutic practices.

Relevant to our proposals here for the incremental reform of complaint systems are that observations from participants in our original and case study research concentrated in the main on procedural fairness and communication. This included being given an opportunity to respond to a complaint and state one's case, being heard and being provided with information and updates throughout the complaints process. Such recognition could be complemented

<sup>85</sup> New South Wales Ombudsman, *Managing Unreasonable Complainant Conduct Practice Manual*, 1st edn (NSWO, 2009); G Lester, B Wilson, L Griffin and P Mullen, 'Unusually Persistent Complainants' (2004) 184 *British Journal of Psychiatry* 352; P Mullen and G Lester, 'Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour' (2006) 24 *Behavioural Sciences and the Law* 333; G Skilling, M Øfstegaard, S Brodie and L Thomson, 'Unusually Persistent Complainants against the Police in Scotland' (2012) [www.sipr.ac.uk/Plugin/Publications/assets/files/PCCS\\_querulous\\_complainers.pdf](http://www.sipr.ac.uk/Plugin/Publications/assets/files/PCCS_querulous_complainers.pdf); G Skilling, 'Querulous Complainants' (2017) [www.spsso.org.uk/sites/spso/files/csa/Querulous%20Complainants%20WEB.pdf](http://www.spsso.org.uk/sites/spso/files/csa/Querulous%20Complainants%20WEB.pdf).

<sup>86</sup> Sourdin et al (n 22).

<sup>87</sup> J Williams, C Gill and G McBurnie, "It's the Most Ethical Job I Have Ever Had": Complaint Handling and Fair Decision-Making' [2020] *International Journal of Business Governance and Ethics*, DOI: 10.1504/IJBGE.2021.10035729.

<sup>88</sup> Wexler (n 51).

by a range of emotionally intelligent and empathetic communication practices.<sup>89</sup> Other aspects involved better support for all and a stronger learning focus. It is known that where procedures are perceived to be fair and the outcomes of complaint resolution are seen as more legitimate, the well-being of system actors will be enhanced (see, eg Lind and Tyler<sup>90</sup> and Thibault and Walker,<sup>91</sup> and the significant body of academic work derived therefrom). For staff, the benefits of such a system might include the development of more positive and trusting relationships with service users, enhanced well-being at work, and a more human and sensitive means through which issues of public concern can be aired. In this respect, what staff and complainants want from therapeutic justice is the same.

These suggestions fit well with countering the anti-therapeutic practices identified by Freckelton in his exploration of the experiences in coronial investigation processes.<sup>92</sup> There are also therapeutic effects where dispute resolution processes allow active participation and a solution-focused approach, providing parties with a voice in proceedings and allowing decisions to be taken in a manner that feels fair to the parties.<sup>93</sup> Doyle and O'Brien<sup>94</sup> consider the role of an ombud as a storyteller, helping to restore trust by using narrative interpretation, so that reports also interpret and convey what an ombud sees and hears, and in doing this acts as a 'bridge-builder' between the citizen and the state.

These shifts in communication and procedural fairness in complaint handling are fairly uncontroversial and, in fact, conform to aspects of good practice already recognised in the complaint-handling literature. Indeed, suggestions about enhanced procedural fairness and interpersonal treatment fit strongly with prescriptions for improving satisfaction levels among complainants.<sup>95</sup> The novelty of these suggested approaches lies in applying them to staff as well as to complainants, with implications for ombuds here relating to their own staff recruitment, required competencies and training.

Our view is that there is much that ombuds can learn from being more trauma aware in their own work – and from using this awareness to better design

<sup>89</sup> M King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096. For a discussion of the importance of exchanging perspectives, engaging in dialogue and the need for judges to establish some kind of relationship with the parties in the Dutch administrative courts, see A Verbung and B Shueler, 'Procedural Justice in Dutch Administrative Court Proceedings' (2014) 10 *Utrecht Law Review* 56. All of these elements resonate with a therapeutic complaint resolution approach.

<sup>90</sup> E Lind and T Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988).

<sup>91</sup> J Thibault and L Walker, *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum, 1975).

<sup>92</sup> I Freckelton, 'Death Investigation, the Coroner and Therapeutic Jurisprudence' (2007) 15 *Journal of Law and Medicine* 242.

<sup>93</sup> O'Byrne (n 61).

<sup>94</sup> M Doyle and N O'Brien, *Reimagining Administrative Justice: Human Rights in Small Places* (Springer Nature, 2019).

<sup>95</sup> C Orsingher, S Valentini and M de Angelis, 'A Meta-analysis of Satisfaction with Complaint Handling in Services' (2010) 38 *Journal of the Academy of Marketing Science* 169; K Van den Bos, L Van der Velden and E Lind, 'On the Role of Perceived Procedural Justice in Citizens' Reactions to Government Decisions and the Handling of Conflicts' (2014) 10 *Utrecht Law Review* 1.

complaint systems and approaches relating to both internal and external conflict. Trauma-informed practice was developed in the USA in the early 2000s.<sup>96</sup> Menschner and Maul's<sup>97</sup> trauma-informed model of care is now widely used in human services. Trauma-informed care has also been introduced in the UK in the criminal justice system, the homelessness sector, schools, and children and family services. This has resulted in a positive shift to providing a trauma-informed approach – moving from thinking ‘What is wrong with you?’ to considering ‘What happened to you?’<sup>98</sup> Ombuds could both promote a greater awareness of trauma-informed practice and model these approaches in their own ways of working. In the service recovery literature, Hibbert et al point out that ‘dysfunctional’ behaviour, particularly in the case of vulnerable consumers, can relate to consumers genuinely trying to cope with factors beyond their control.<sup>99</sup> Their work highlights how the organisations can drive dysfunctional behaviour and how vulnerable consumers in particular may be acting unintentionally as they lack clarity over the rules and how they are supposed to act or simply do not have the resources to comply with those expectations.

We know that there may be increased costs in terms of time, effort and complexity resulting from greater engagement of employees and enhanced communication. In particular, offering enhanced procedural protections – such as formal rights to reply or automatic rights to discuss a complaint – could slow complaint processes down, leading to increased administrative costs and dissatisfaction among complainants.

#### D. Towards a Model of Therapeutic Complaint Resolution?

As we have also argued elsewhere,<sup>100</sup> a longer-term approach to creating a more therapeutic complaints system would be to reform the bottle itself. To the extent that it is possible, the therapeutic effects relating to complaint handling could be maximised in this TCR model and anti-therapeutic effects minimised. It is envisaged that ombuds could use their statutory CSA powers/non-statutory influence on design/redesigning positive therapeutic effects into complaint handling systems. Our view is that the application of therapeutic jurisprudence is likely to be broadly similar in its effect for complainants and the person complained about, whose experiences of the current complaints systems can be equally negative.

<sup>96</sup> E Alessi and S Kahn, ‘Using Psychodynamic Interventions to Engage in Trauma-Informed Practice’ (2019) 33 *Journal of Social Work Practice* 27.

<sup>97</sup> C Menschner, and A Maul, *Key Ingredients for Successful Trauma-Informed Care Implementation* (Center for Health Care Strategies, 2016).

<sup>98</sup> A Sweeney, B Filson, A Kennedy, L Collinson and S Gillard, ‘A Paradigm Shift: Relationships in Trauma-Informed Mental Health Services’ (2018) 24 *BJPsych Advances* 319.

<sup>99</sup> S Hibbert, M Piacentini and M Hogg, ‘Service Recovery following Dysfunctional Consumer Participation’ (2012) 11 *Journal of Consumer Behaviour* 329.

<sup>100</sup> Gill (n 1).

A key therapeutic change is for ombuds and complaint handlers to become more aware of their potential role as ‘therapeutic actors’<sup>101</sup> and to approach both complainants and those complained about with an ‘ethic of care’ for their well-being. There is also merit in moving away from assigning a ‘rightness’ and a ‘wrongness’ in complaint outcomes (which can lead to feelings of winning or losing) and moving towards an outcome of resolution. Relational rights would be substantive in this approach, with compassion becoming a central component of complaint-handling procedures.<sup>102</sup> We know that complainants often have ongoing relationships with their public service providers and that conflicts can be deeply rooted and enduring, going beyond just satisfying interests and involving needs which are non-negotiable (to do with identity, justice, self-esteem, respect and fairness). There is value in having a therapeutic approach which also serves to repair harm and restore relationships. An approach which recognises the value of reconciliation similar to the approach taken by the Reconciliation Commission of South Africa may be particularly relevant for the long-standing complex disputes dating back many years. Currently legislation limits the abilities of ombuds to adopt such practices.

This therapeutic approach could draw on human-centred design (HCD) principles for putting the user’s voice at the centre of the dispute system design process and, in doing so, to counter much of the asymmetrical and systemic power which can permeate public service complaint systems.<sup>103</sup> Miller points out that ‘users’ are not a homogeneous group and that the type of justice a system user is seeking will be integral to shaping the design process, as will their unique needs and behaviours. She also questions whether HCD is appropriate for all types of dispute system design. A design-centred approach should also ensure that the voice of BwJ are also taken into account since they will bear the responsibility of ensuring that these systems work in practice. In recent years, UKPSOs have engaged in significant outreach work with BwJ and the introduction of model complaint-handling procedures have been widely consulted upon. More research evaluating the impact of these standards for complainants, staff and BwJ could, however, usefully be undertaken to provide an empirical base for future work.

A TCR model could also move away from the concept of public services being ‘goods to be delivered’ to seeing them more as relationships to be nurtured and sustained. It would emphasise co-production and delivery, with common interests so that all parties have a stake in and a responsibility for services. This model would also shift perceptions of the citizen as a selfish actor with narrow

<sup>101</sup> O’Byrne (n 61).

<sup>102</sup> J Herring, *Caring and the Law* (Bloomsbury, 2013); J Herring, ‘Compassion, Ethics of Care and Legal Rights’ (2017) 13 *International Journal of Law in Context* 158.

<sup>103</sup> A Miller, ‘What Human-Centered Design Can Tell Us about the State of Dispute Systems Design’ (MA thesis, University of Victoria, 2019) [http://dspace.library.uvic.ca/bitstream/handle/1828/10882/Miller\\_Alyson\\_MADR\\_2019.pdf?sequence=1&isAllowed=y](http://dspace.library.uvic.ca/bitstream/handle/1828/10882/Miller_Alyson_MADR_2019.pdf?sequence=1&isAllowed=y).

consumer interests<sup>104</sup> towards a broader notion of co-production and delivery, with complaining being active participation in public governance.<sup>105</sup>

Concepts from the therapeutic jurisprudence literature such as mediation, which are solution-focused and oriented towards positive future outcomes,<sup>106</sup> could be used to shift complaint handling towards this non-adversarial paradigm. The TCR model could also draw on insights relating to the importance of participation as both a process value and in shaping outcomes in consumer experiences of alternative dispute resolution.<sup>107</sup>

However, it is recognised that this TCR model requires a significant reconceptualisation of the relationship between citizens and the administration and, on that basis alone, it could be rejected as unrealistic. There are also practical objections to applying this approach – for example, in areas of complaints involving fundamental rights where mediation may not be appropriate, or where the issues being complained about are transactional and a more discursive process for resolving concerns would be disproportionate. More fundamentally, the approach could be seen as undermining the accountability function of complaint systems by moving them away from objectively evaluating whether standards have been delivered to a more nebulous and subjective process of deliberation.

To conclude, we propose that empirical enquiries into TCR be developed further with reference to a set of hypotheses derived from the disputing literature. The ultimate aim will be to address the current shortfalls of TJ by developing theoretically sound propositions with regard to therapeutic practices, developed and refined in the context of empirical enquiry. More research is needed to better understand the effects (good and bad) of ombud design processes on the well-being and emotions of system actors: complainants, those complained about and complaint handlers. There is the potential to build up a significant body of empirical knowledge that can shape future complaint-handling practice and be used as evidence to inform the role of ombuds as ‘architects of governance’.

<sup>104</sup> B Brewer, ‘Citizen or Customer? Complaints Handling in the Public Sector’ (2007) 73 *International Review of Administrative Sciences*, 549.

<sup>105</sup> N O’Brien, ‘Administrative Justice in the Wake of I, Daniel Blake’ (2018) 1 *The Political Quarterly* 82.

<sup>106</sup> King (n 89).

<sup>107</sup> Williams et al (n 45).