

## Private Law for Public Law Practitioners

### Ombudsman remedies: creative hybrid or curate's egg?

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#### Overview

1. All the public sector ombudsmen have a power to make recommendations as to how the injustice arising out of any maladministration they identify may be remedied. In the case of the PHSO's NHS remit, injustice arising from 'service failure' may also be addressed.
2. 'Injustice' is inherently a far broader concept than 'damage' for the purposes of tort law - see below - so ombudsman remedies not dependent on establishing foreseeability, proximity or causation,<sup>1</sup> nor are the levels of compensation payments made in tortious claims a useful guide for redressing maladministration.<sup>2</sup>
3. As with the European Convention on Human Rights and Fundamental Freedoms concept of 'just satisfaction', the overarching principle for matching a remedy to an injustice is one with common law roots: *restitutio in integrum* ('restoration to original condition'). Thus, in so far as is possible, the complainant should be put back in the position they would have been in but for the maladministration having occurred. The ombudsmen will also occasionally make formal recommendations or 'suggestions' for the benefit of others who have suffered equivalent injustices (even where maladministration has not been shown to have caused the injustice in each of their cases). From 1 April 2008, the Local Government Ombudsman ('LGO') was given explicit powers to investigate to this end<sup>3</sup> and although she has no equivalent express power, the Parliamentary Ombudsman has done this in a number of cases involving maladministration in the construction of compensation schemes.
4. Although ombudsman reports have traditionally offered little, if any, reasoning for any recommended remedies, there is now relatively clear and well-established guidance on the principles deployed. In December 2009, the LGO published an updated version of *Guidance on Good Practice: Remedies*<sup>4</sup> which was originally issued in

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<sup>1</sup> *R v Commissioner for Local Administration ex parte S* (1999) 1 LGLR 633.

<sup>2</sup> *Bernard v London Borough of Enfield* [2002] EWHC 2282 (Admin) [2003] HLR 27.

<sup>3</sup> S.26D Local Government Act 1974

<sup>4</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADkAMgA0AHwAfABUAHIAdQBIAHwAfAAwAHwA0>

2004 and is intended to promote consistency in the way financial compensation and other forms of redress for maladministration are determined by local authorities.

5. In a similar vein, the February 2009 Parliamentary and Health Service Ombudsman ('PHSO') guidance *Principles for Remedy*<sup>5</sup> which begins:

"This document gives our views on the Principles that should guide how public bodies provide remedies for injustice or hardship resulting from their maladministration or poor service. It sets out for complainants and bodies within the Parliamentary and Health Service Ombudsman's jurisdiction how we think public bodies should put things right when they have gone wrong and our approach to recommending remedies..." (emphasis added)

6. It is clear from both documents that ombudsman recommendations typically take one or more of four forms:

(1) action or process-based remedies where it is recommended that a specific step is taken (because, on any reasonable view, that is what good administration requires in the circumstances) or that a new or necessary decision is taken in a proper and timely manner;

(2) direct redress remedies where it is proposed that the complainant is given or awarded something tangible in recognition of the unjust consequences of the maladministration. This can be directly linked to loss or the expense to which a complainant has been put, or the value of a service that ought to have been provided;

(3) indirect redress remedies, recommending a payment that acknowledges the effects on the complainant of the maladministration and injustice, such as stress and distress; and

(4) recommendations for systemic change for the benefit of others.

7. Each is discussed in more detail below. It should also be noted that, besides the tangible remedies of this kind, in almost all cases where maladministration is identified the Ombudsman will expect an acknowledgement of responsibility and an apology. The PHSO has observed:

"In many cases, an apology and explanation may be a sufficient and appropriate response. Public bodies should not underestimate the value of

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<sup>5</sup> [http://www.ombudsman.org.uk/\\_data/assets/pdf\\_file/0009/1035/0188-Principles-for-Remedy-bookletweb.pdf](http://www.ombudsman.org.uk/_data/assets/pdf_file/0009/1035/0188-Principles-for-Remedy-bookletweb.pdf)

this approach. A prompt acknowledgement and apology, where appropriate, will often prevent the complaint escalating. Apologising is not an invitation to litigate or a sign of organisational weakness" [p.6]

### What kind of 'injustice' can Ombudsmen recommendations address?

8. In the debate on the 1967 Bill that established the Parliamentary Ombudsman, Sir Richard Crossman said:

"We have not tried to define injustice by using such terms as 'loss or damage'. These may have legal overtones which could be held to exclude one thing which I am particularly anxious shall remain - the sense of outrage aroused by unfair or incompetent administration, even where the complainant has suffered no actual loss. We intend that the outraged citizen shall have the right to an investigation, even where he has suffered no loss or damage in the legal sense of those terms, but is simply a good citizen who has nothing to lose and wishes to clear up a sense of outrage and indignation at what he believes to be maladministration."

9. Notwithstanding this Parliamentary intention to create a second, open ended concept, it is perhaps surprising that the Courts have had very little to say on the meaning of 'injustice'. To date the only indications are that it plainly does include outrage<sup>6</sup> and loss of an opportunity,<sup>7</sup> is inherently a far broader concept than 'damage' for the purposes of tort,<sup>8</sup> does not depend on strict causation,<sup>9</sup> and much like maladministration, is primarily a matter for the ombudsmen to define for themselves.<sup>10</sup>
10. The clearest indication of the LGOs' own approach is in their internal *Investigator's Handbook*. It describes injustice as taking two main forms:

"In considering the effect of actions or inactions on a complainant, the Commission, therefore takes a broad view of injustice to include both objective loss or damage and subjective feelings.

Examples of objective injustices are:

- Financial loss
- Loss of a service
- Damage to property or amenity
- Loss of an opportunity

Examples of subjective injustices are:

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<sup>6</sup> *R v Parliamentary Commissioner for Administration ex p. Balchin No. 2* (2000) 79 P&CR 157

<sup>7</sup> *R v Commissioner for Local Administration ex part S* (1999) 1 LGLR 633

<sup>8</sup> *ibid.*

<sup>9</sup> *R v Parliamentary Commissioner for Administration ex parte Balchin No.1* [1997] JPL 917

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

- Distress
- Hurt feelings
- Outrage

We should consider both aspects in coming to a view about whether to pursue a complaint and whether to seek a remedy for a complainant.”

11. The *Handbook* then goes on to distinguish between the kind of injustice that might merit an investigation (assuming there is prima facie maladministration) and that which will not such as trivial matters or technical breaches of a procedure. The PCA takes a very similar approach, explained in these terms at page 334 of *Equitable Life: a decade of regulatory failure*<sup>11</sup>:

“In the more than 40 years since my Office was established, Ombudsmen have found that the concept of injustice is capable of covering:

- (i) financial loss caused by official acts or omissions;
- (ii) damage deriving from other causes but which has been exacerbated or prolonged by official acts or omissions;
- (iii) the loss of opportunities to take remedial action or to pursue a course of action that might benefit a citizen or protect his or her position;
- (iv) the frustration of such courses of action embarked upon by a citizen which prevent those courses of action from achieving the desired or another reasonable outcome;
- (v) inconvenience or distress;
- (vi) a sense of outrage;
- (vii) the frustration of legitimate expectations; and
- (viii) the expenditure of unnecessary effort or money in the pursuit of an appropriate outcome.”

**Action and process-based remedies for injustice resulting from maladministration**

12. The aim of these is broadly similar to mandatory or quashing orders. However, they do not compel anything, nor change the legal status of any decision made.
13. In relation to remedies of this kind, *Guidance on Good Practice: Remedies* states:

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<sup>11</sup> HC 815i (Session 2007-2008), PCA 2008.

#### “Remedial actions

Practical action may provide all or part of a suitable remedy. When the injustice stems from failure to take some specific action, taking that action as quickly as possible may be a straightforward remedy.

Other recommendations made may depend on specific action being taken first, such as an inspection or assessment. Our recommendations need to make clear that the body in jurisdiction should do this first. If the outcome is that no further services or actions are necessary, then the injustice is remedied. But if further services are needed there may be further injustice requiring a further remedy, for example acknowledgment of the delay in providing those services.

In other cases practical action may mitigate the injustice. The subject guidance gives examples for specific areas of complaint.

Sometimes the complainant and the body in jurisdiction need to maintain an on-going working relationship – for example, if the complainant is an adult care services user – but this has been seriously damaged by the fault we identify. In such cases the remedy may include a recommendation for the body in jurisdiction to arrange independent mediation to repair the relationship.” [p.6]

The accompanying subject guidance gives examples of remedial action, including to:

- Review or amend care plans, to reflect an individual’s needs and explain in detail how those needs will be met [p.31]
- Take a homelessness application [p.38]
- Reinstate council-provided services if withdrawn appropriately [p.18]
- Review the level and suitability of off-site education provision [p.27]

Examples of practical action mitigating justice set out in the accompanying subject-specific guidance include:

- Installing double glazing for parts of a house affected by noise to mitigate the effects of a development near to the complainant’s home; [p.42] and
- Arranging extra provision to make up for a shortfall in the provision of speech and language therapy as specified in a child’s statement of special educational needs where there has been delay in the statementing process. [p.31]

14. The PHSO’s *Principles for Remedy*, also provides that:

“An appropriate range of remedies will include... remedial action, which may include reviewing or changing a decision on the service given to an individual complainant; revising published material; revising procedures to

prevent the same thing happening again; training or supervising staff; or any combination of these” [p.10]

### **Direct redress based remedies**

15. *Guidance on Good Practice: Remedies* explains:

“Our key principle is that the remedy should, as far as possible, put the complainant back in the position he or she would have been in but for the fault we have identified. If this is not possible, financial redress may be the only available remedy. Financial redress should always be linked clearly to the identified injustice.” [p.5 ]

16. *Principles for Remedy* states:

#### “5. Putting things right

Where maladministration or poor service has led to injustice or hardship, public bodies should try to offer a remedy that returns the complainant to the position they would have been in otherwise. If that is not possible, the remedy should compensate them appropriately. Remedies should also be offered, where appropriate, to others who have suffered injustice or hardship as a result of the same maladministration or poor service.

There are no automatic or routine remedies for injustice or hardship resulting from maladministration or poor service. Remedies may be financial or non-financial.

An appropriate range of remedies will include...

financial compensation for direct or indirect financial loss, loss of opportunity, inconvenience, distress, or any combination of these.” [p.10]

17. Reading this guidance together suggests that the ombudsmen will take the following approach where an action or process-based remedy will not address the injustice or all aspects of it.
18. First, the ombudsman asks whether a direct compensatory payment can be made to meet a quantifiable loss. The only case to consider LGO remedies in any detail, *Bernard v London Borough of Enfield* [2002] EWHC 2282 (Admin) [2003] HLR 27, contains a good example. Sullivan J mentions that:

“The highest recommended award (£16,350 at current values) included a significant element of pecuniary loss. The complainant had been unable to find a suitable job because of her care commitments, had sought medical treatment for depression, had exhausted her substantial savings and was

reduced to living on income support, her previous standard of living having disappeared.”

19. This refers to *Report 97/A/1305 against Kent County Council's* where the LGO considered a complaint by Ms Miller, the mother of a young man with learning difficulties who was left without a residential placement from October 1996 to June 1998 as a result of maladministration. During this period his needs could not be fully met. His mother was caused a great deal of anxiety and her life was disrupted. The LGO recommended that the Council should pay Ms Miller £15,000. This award may have included some element to reflect Ms Miller's assertion that she had not been able to return to full-time work during this period, although the report does not specify that. Higher awards have also been made since then.
  
20. Another example of a direct compensatory payment is *Complaint 11 000 195, 10 000 207 & 10 004 245 against London Borough of Southwark*<sup>12</sup> where the LGO considered a complaint brought by a woman who was registered blind with epilepsy. She and her two children were threatened with eviction so she approached the Council for housing. The LGO found that the Council acted with maladministration in failing to investigate her homelessness application, failing to provide her with adequate interim accommodation and failing to carry out an adequate community care assessment and subsequently to implement her care plan. As a result of the Council's failure to provide services, the complainant incurred the expense of paying for a private carer between 1 July 2008 and 11 August 2009. The LGO recommended that her quantifiable financial loss of £10,600 (calculated at a rate of £200 per week), be reimbursed by the Council. In addition, the Council undertook to review a number of its policies to make procedural improvements, in addition to providing financial compensation of £500 for her time and trouble in bringing her complaint.
  
21. Where the complainant has not suffered an easily quantifiable financial loss, the default approach for assessing financial compensation is to consider what the cost of acting without maladministration would have been to the authority. There is an obvious logic to this: the 'lost value' can be easily calculated and authorities should not profit from their own maladministration. A good recent example of such a recommendation is that made in *Report (12 007 311) against Shropshire Council*<sup>13</sup>, where the LGO considered a complaint by Mr and Mrs Ryan (as they are known in the report). Mrs Ryan has complex mental health needs requiring 24 hour care and lives at home where she is supported by her husband. The Council failed to carry out a

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<sup>12</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADUANQA3AHwAfABUAHIAdQBIAHwAfAAwAHwA0>

<sup>13</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADcAOAAyAHwAfABUAHIAdQBIAHwAfAAwAHwA0>

proper assessment of Mrs Ryan's needs and provided direct payments for only 50 hours per week of care to Mr Ryan, although it was accepted that Mrs Ryan required, and Mr Ryan was providing, 24 hour care. As a result of his caring responsibilities, Mr Ryan was forced to leave his job. The LGO rejected Mr Ryan's proposal that any financial remedy be calculated on the basis of his lost earnings, pension and career prospects. The LGO reasoned:

"67. I have however decided that it would be difficult to discover what Mr Ryan's losses were in relation to his employment. This is because due to his increased caring role Mr Ryan had to leave his job as a full time employee as a manager and was then paid on a sessional basis when he could undertake departmental tasks. His ability to take on this work decreased as Mrs Ryan's care needs increased. It also appears that he had to leave his job in order to care for Mrs Ryan. It is therefore difficult to get an accurate picture of how much work he could have done. In addition I would be unable to put a figure on Mr Ryan's lost pension contributions and the possibility that had he remained in employment he may have been promoted.

68. The remedy I therefore propose more accurately addresses Mr Ryan's loss, namely receiving a payment for what he would have been paid by Mrs Ryan had the Council provided services to meet Mrs Ryan's needs. I therefore recommend that the Council makes payment of £61,270 to Mr Ryan. This would be a payment in recognition of the care Mr Ryan provided which was not funded by the Council at the appropriate time, but is not a precise backdated calculation of wages"<sup>14</sup>

22. The lost value approach is not always followed and there may be reductions made to the figure it would produce: *Guidance on Good Practice: Remedies* emphasises that "other relevant factors" should be taken into account, such as "the mitigating or aggravating actions by the person affected or a third party which affected the injustice" [p.3]. The PHSO's *Principles for Remedy* similarly emphasises that, "when considering a remedy, it is reasonable for a public body to take into account any way in which the complainant has contributed to, or prolonged, the injustice or hardship" [p. 9]. This guidance emphasises that the responsibility for the injustice may not lie exclusively at the public authority's door.
23. On the other hand, the ombudsmen accept that complainants will often be put to expense in pursuing complaints that they would not have incurred but for the maladministration. This can include legal costs and other professional fees. *Guidance on Good Practice: Remedies* comments:

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<sup>14</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADcAOAAyAHwAfABUAHIAdQBIAHwAfAAwAHwA0>



“Complainants usually do not need a solicitor or other professional adviser to help them make a complaint to the LGO. So we are unlikely to recommend that fees for this purpose should be reimbursed unless there are exceptional circumstances.

There may be circumstances where it is reasonable for a complainant to have engaged legal help in a matter, particularly where it is highly complex. In such cases, we may consider recommending a remedy to reimburse costs which directly and necessarily flow from the fault identified. We will not do this where costs were wholly covered by the legal aid scheme and the complainant has no personal liability.

We may recommend a contribution to costs rather than a refund of all the expenses. If we consider the amount of professional advice commissioned was disproportionate, or not all the advice arose from the identified fault, our recommendation will reflect this.” [p.8]

24. Previously, in some instances, the LGO made recommendations for full reimbursement of solicitors’ costs at private rates, notwithstanding that a case had been run on a Legal Help basis (see *Complaint 03/A/15819 against the London Borough of Waltham Forest*<sup>15</sup> where the client was a vulnerable refugee who could not have been expected to pursue his complaint unassisted. The LGO reasons that it was inappropriate that the solicitors should have brought the matter to the LGO’s attention at a loss.
25. However, Mr Justice Bean explicitly rejected this approach in *R. (on the application of Adams) v Commission for Local Administration in England*.<sup>16</sup> The claimant sought judicial review of the LGO’s failure to recommend the payment of her solicitors’ costs by the Council. She had instructed her solicitors under the legal help scheme to bring her complaint, and was seeking repayment of her costs at legal aid inter partes rates. In the Administrative Court, she argued that the reimbursement of legal costs at the higher level would reduce the likelihood of future injustices by (a) creating a deterrent to maladministration by Councils and (b) assisting solicitors’ firms in continuing to take on such complaints (which are otherwise uneconomical to run). Mr Justice Bean rejected this interpretation of s.31(2B) Local Government Act 1974, the current recommendation-making power. Neither outcome had been contemplated by Parliament when framing the power to redress injustice. It was “far fetched” to suggest that, he said. In the light of this, it is likely that the maximum complainants can expect to recover by way of legal costs is what they have actually spent, or perhaps are liable to pay under a CFA, when the ombudsman adjudges instruction of a lawyer was necessary to investigate or progress a complaint.

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<sup>15</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAA3ADUAMQB8AHwAVABYAHUAZQB8AHwAMAB8AA2>

<sup>16</sup> *R. (on the application of Adams) v Commission for Local Administration in England* [2011] EWHC 2972 (Admin)

26. More recently, in *Complaint 09 011 045 against the London Borough of Bexley*<sup>17</sup>, the LGO found that the Council had acted with maladministration in its flawed conduct of a child protection investigation. In this case, following allegations of abuse against the complainant by her daughter, the local authority accommodated the complainant's daughter without her consent in unsuitable accommodation. The complainant incurred legal expenses in bringing a series of complaints before the Council's complaints panel. The LGO recommended that the Council reimburse the complainant to the sum of £7,741.08 for legal fees. However, the LGO made clear that such a recommendation would only be proposed in rare cases:

"It should be noted that the Ombudsman does not normally consider it necessary for complainants to have legal representation to bring a complaint and it is unusual for the Ombudsman to recommend that legal costs are reimbursed. However, the legal fees were not incurred in bringing a complaint to the Ombudsman, but rather for the complainant to obtain advice and representation before the Panel that considered the final stage of the Council's complaints procedure"[p.26-7]

27. In addition to the reimbursement of legal fees, the LGO recommended that the Council pay £5,000 in recognition of the complainant's distress, outrage, inconvenience, time and trouble, and funding for professional counselling and advice to facilitate family reunification.

### **Indirect redress remedies**

28. Aside from direct financial loss or the value of a lost service, the ombudsmen recognise that service failure maladministration may have other consequences that call for financial compensation. Sometimes this is recommended in addition to direct redress (as in *Complaint 09 011 045 against the London Borough of Bexley (above)* and *Trusting in the Pensions Promise*<sup>18</sup>, a report into maladministration in government publicity materials for occupational pensions schemes which had misled members about their security. Sometimes only one or the other type of payment is considered appropriate. The ombudsman reports consistently identify two consequences which call for particularly significant compensation: 'loss of childhood / proper family life' and 'distress'.
29. *Complaint 05/C/14043 against Birmingham City Council* is a good example of the former. The case concerned a child put in care subject to a Court Order to promote contact

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<sup>17</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADQAOAA0AHwAfABUAHIAdQBIAHwAfAAwAHwA0>

<sup>18</sup> [http://www.ombudsman.org.uk/\\_data/assets/pdf\\_file/0009/1107/Trusting-in-the-pensions-promise-report.pdf](http://www.ombudsman.org.uk/_data/assets/pdf_file/0009/1107/Trusting-in-the-pensions-promise-report.pdf)

with members of her family living abroad. The Council maladministratively failed to facilitate that contact. The ultimate redress agreed to by the Council was payment of £40,000 in recognition of the four 'lost years' she was deprived of a proper childhood, wellbeing and family life (in the sense of that which a child in care with living relatives could properly hope to enjoy) :

“Given that the Council had failed so completely to ensure the well-being of a child in its care, and in addition had acted in contempt of the Contact Order made in Court, I find the Council’s offer of £4000 compensation to Natasha derisory. By the Council’s own calculation Natasha was deprived of over three and a half years of her childhood as a result of the Council’s incompetence and complete failure to act in any way which promoted her welfare.

I think family life is worth considerably more than £4000 to a child who has lived in turmoil from the age of two. A more appropriate sum of compensation would be £10,000 a year for each year that Natasha was left without a proper family life. In recommending a total payment of £40,000 I have also taken into account the fact that the Council failed to pay for any of the annual contact visits which it was supposed to fund.” (emphasis added)

30. The Council also agreed to pay a recommended £10,000 to her grandparents in recognition that they were deprived of the opportunity to care for their granddaughter and in reimbursement of the expenses they incurred in fares and telephone calls.
31. Similarly, in *Complaint 07B04696 and 07B10996 against London Borough of Croydon*<sup>19</sup> the LGO recommended that the Council make an ex gratia payment of £20,000 in consideration of the Council’s maladministrative failure to consider the family’s needs when making provision for the care of a severely autistic boy with a history of aggression towards his sister. The LGO noted that “the failures here had significant consequences for the health, happiness and wellbeing of the whole family as well as for William’s and Alice’s development at this important stage of their lives”.
32. The case of *Complaint 05/B/10487 against Staffordshire County Council*<sup>20</sup> involved the failure to stop the bullying of a looked-after child in a residential unit and the mishandling of his complaints. As a result he suffered four months of verbal and physical bullying that left him afraid and isolated. He was assaulted, abused, and his possessions were taken. Compensation of £4000 (i.e. £1,000 for each month of ‘lost childhood’) was recommended as was the strengthening of procedures.

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<sup>19</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADAANwA1AHwAfABUAHIAdQBIAHwAfAAwAHwA0>

<sup>20</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAA2ADcAMQB8AHwAVABYAHUAZQB8AHwAMAB8AA2>

33. *Guidance on Good Practice: Remedies* provides the following guidance in relation to 'distress':

"Distress

Many, perhaps most, complainants that come to us describe the distress they have experienced because of their complaint. 'Distress' can include:

- uncertainty: if, even after taking a view on the balance of probabilities as to the likely outcome, there is still doubt about how the outcome might have been different;
- raised expectations: if the body in jurisdiction's actions led the complainant to (wrongly) believe that certain actions or benefits would follow;
- lost opportunity: where the complainant was deprived of an opportunity to take action or influence events, and it is likely the final outcome would have been different but for this omission;
- outrage: where the complainant has been treated significantly unfairly or the body in jurisdiction showed a disregard for proper procedures; and
- undue significant stress, inconvenience and frustration.

We must be clear that it is avoidable distress arising from fault by the body in jurisdiction which we are recognising with a remedy.

When we assess distress, we consider the complainant's individual circumstances (such as their state of health and age). In reaching a view on remedy we will consider the complainant's own assessment of the degree of distress or inconvenience they have suffered. But we also understand that some complainants may understate the degree of distress or inconvenience they have suffered, while others may overstate the position.

The same fault could lead to different remedy payments, depending on its consequences and the other circumstances of the case. Our recommendation for a remedy needs to reflect all the circumstances including:

- the severity of the distress;
  - the length of time involved;
  - the number of people affected (for example, members of the complainant's family as well as the complainant);
  - whether the person affected is vulnerable and affected by distress more severely than most people; and
  - any relevant professional opinion about the effects on any individual."
- [p.8]

34. With regard to the sums of money that might be recommended in respect of distress *Guidance on Good Practice: Remedies* provides that:

"A remedy payment for distress is often a moderate sum of between £100 and £300. In cases where the distress was severe or prolonged, up to £1,000 may

be justified. Exceptionally, we may recommend more than this. We do not generally recommend a payment to remedy outrage, if this is the only injustice arising from the fault.” [p.9]

35. Similarly, *Principles for Remedy* comments that an appropriate range of remedies will include “financial compensation for direct or indirect financial loss, loss of opportunity, inconvenience, distress, or any combination of these.” It gives the following guidance to public authorities:

“Factors to consider when deciding the level of financial compensation for inconvenience or distress should include:

- the impact on the individual – for example whether the events contributed to ill health, or led to prolonged or aggravated injustice or hardship
- the length of time taken to resolve a dispute or complaint
- the trouble the individual was put to in pursuing the dispute or complaint. “[p.10]

36. There are several further useful examples of significant distress payments in the LGO reports.

37. The first is the case of *Complaint 12 015 328 against Calderdale Council*<sup>21</sup>, which involved the local authority’s failure over a period of ten years to adequately assess and produce a care plan for a 14 year-old girl with severe physical and learning disabilities, and to assess her parents’ needs as carers. In addition to remedial action in relation to assessment and care planning, compensation of £5,000 was recommended to be paid to the complainants in recognition of the “significant distress, time and trouble” they had experienced, with the possibility of an additional payment at a level to be agreed with the Ombudsman if, the Council identified services the family were entitled to but have not received.

38. Then there is *Complaint 09R 004 363 against Worcestershire County Council*<sup>22</sup> in which the LGO found faults in the Council’s handling over several years of the care needs of a young man with cerebral palsy. By the time the LGO’s report was published, the Council had initiated direct payments to the family and agreed to pay the disabled man £4,000 “to reflect his suffering and inconvenience.” In addition, the LGO recommended an additional £9,000 in compensation be paid to his mother, a sum which “reflects the lost opportunity for her to articulate her needs as a carer, the

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<sup>21</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADkAMAA1AHwAfABUAHIAdOBIAHwAfAAwAHwA0>

<sup>22</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADgANAawAHwAfABUAHIAdOBIAHwAfAAwAHwA0>

uncertainty that she may have had the opportunity for greater support in caring for her son and the resulting distress since 2004, as well as her time and trouble.

39. Investigation into *Complaint 02/B/16976 against Cornwall County Council*<sup>23</sup> concerned removal of two boys from established foster carers in breach of policies and without a proper explanation. The Ombudsman found that the brothers had suffered “significant emotional distress” by not being able to live together as they wanted. He asked the Council to pay compensation to the carers and £10,000 each to them in recognition of this. Significant changes to procedures were also made.
40. At the very highest end of the spectrum, both the HSC and LGO have recommended compensation of £25,000 for serious maladministration that has had long term consequences for the complainants’ mental health.<sup>24</sup>
41. When a person has become mentally unwell, or an existing condition is exacerbated thanks to maladministration, counselling may also be recommended.
42. Time and trouble in pursuing a complaint can also be compensated for. *Guidance on Good Practice: Remedies* suggests that this element need not always be included (for instance where minor failings in the complaints process have occurred). The *Guidance* states:

“Time and Trouble

There is inevitably time and trouble involved in bringing a complaint. But this only generally requires a remedy when there has been a fault in the way the body in jurisdiction considered the complaint, which meant the complainant incurred time and trouble above what is considered usual. For example the:

- body in jurisdiction repeatedly refused to consider the complaint;
- complainant had to ask a councillor or MP to help, before the body in jurisdiction would consider the complaint;
- body in jurisdiction spent several months considering the complaint multiple times at the first stage of its complaints process, instead of progressing the complaint to a higher level; or
- body in jurisdiction did not consider the conclusions and recommendations of an independent investigation into the complaint.

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<sup>23</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAA4ADIAMgB8AHwAVABYAHUAZQB8AHwAMAB8AA2>

<sup>24</sup> Complaint against Medway Primary Care Trust (Medway) and West Kent Primary Care Trust (West Kent) p.15, Remedy in the NHS, HSC 2008.

In cases like these, if the body in jurisdiction had acted without fault it could have resolved the complaint without involving the LGO. So those circumstances justify a payment for time and trouble.

The remedy payment for time and trouble is unlikely to be less than £100 or more than £300. It should be adjusted to reflect the degree of extra difficulty experienced by the complainant, and any factors which make the complainant vulnerable. We do not recommend repayment of the actual costs (such as postage and phone calls) associated with making a complaint.” [p. 10]

43. Where existing maladministration is compounded by serious failures in a statutory complaints procedure, separate and significant awards can be made under this head. In this context, the LGO has highlighted the powers of local authorities under s. 92 of the Local Government Act 2000 to take remedial action, including paying compensation: see *Guidance on Good Practice: Guidance on running a complaints system*, March 2009.
44. The Ombudsman has also expressed irritation with authorities who did not, in appropriate cases, offer to pay complainants compensation (or some other appropriate recompense) as part of their settlement.<sup>25</sup>
45. Appropriate redress is particularly important when recommended by a complaint panel, most of all in service failure cases: see Local Government Ombudsman, *Annual Report 1998/99* p.11 and *Complaint 00/B/09315 against Hertfordshire County Council*. *Complaint 96/C/4315 against Liverpool City Council* is a good example of an award at the higher end of the range specifically concerned with mishandling of a complaint. The Council’s actions had caused “extreme stress” to the service user’s daughter. Amongst the remedies recommended was a £10,000 payment to her in recognition of this.

### **Systemic change**

46. *Guidance on Good Practice: Remedies* comments:

“Contextual Circumstances

Others may have been affected by the body in jurisdiction’s fault. If there is evidence to suggest this, we usually recommend the body in jurisdiction identifies those similarly affected by its fault and offers an appropriate remedy for the injustice this has caused. We may also ask the body in jurisdiction to tell us what action it has taken. But in some cases it may be in

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<sup>25</sup> Local Government Ombudsman, *Annual Report 1996/97*, p. 11

the best interests of those affected for the LGO to investigate the impact and recommend a remedy.” [p.11]

47. Remedies can now be recommended for those who have not complained but are similarly placed thanks to section 26D of the Local Government Act 1974.

48. *Principles for Remedy* states:

“6. Seeking continuous improvement

Part of a remedy may be to ensure that changes are made to policies, procedures, systems, staff training or all of these, to ensure that the maladministration or poor service is not repeated. It is important to ensure that lessons learned are put into practice.

It is a false economy and poor administrative practice to deal with complaints only as they arise and to fail to correct the cause of the problem. Learning from complaints, and offering timely and effective remedies, gives the best outcome in terms of cost effectiveness and customer service – benefiting the service provider, the complainant and the taxpayer.

The public body should ensure that the complainant receives:

- an assurance that lessons have been learned
- an explanation of changes made to prevent maladministration or poor service being repeated.

Quality of service is an important measure of the effectiveness of public bodies. Learning from complaints is a powerful way of helping to develop the public body and increasing trust among the people who use its services. So systems should exist to:

- record, analyse and report on the outcomes of complaints and remedies
- apply the information to improving customer service.”

49. The approach of the Ombudsman to recommendations for systemic change is best illustrated by three examples.

50. The first is in Complaint No. 12 006 209 Liverpool City Council<sup>26</sup> in which the LGO, during the course of its investigation, discovered that the Council had been routinely miscalculating the appropriate level of Special Guardianship Allowance. In addition to providing a remedy to the complainant, who had been paid too little for the period her nephew was in her care, the LGO recommended that back payments be awarded to 146 other people in receipt of Special Guardianship Allowance and appropriate levels of Fostering Allowance in a further 194 cases.

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<sup>26</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADgAMwA0AHwAfABUAHIAdQBIAHwAfAAwAHwA0>



51. *Complaint 10 020 600 against Warrington Borough Council and NHS Warrington*<sup>27</sup>, was a joint investigation by the LGO and PHSO into a complaint that a boy with autistic spectrum disorder had not been provided with speech and language therapy as specified in his statement of special educational needs over a period of three years. In the course of the investigation, the LGO identified a further 15 secondary school pupils who had been affected by the Council's failure to fulfil its statutory duty and recommended that the Council apply the remedy in this case to any other child who had been affected.
52. Last, in *Trusting in the Pensions Promise*<sup>28</sup>, the PCA was considering maladministration that may have impacted on over 125,000 people. She accepted over 200 complaints and identified four representative 'lead' cases. Her findings were made in respect of the cases actually investigated, but the recommendations were for redress for the class as a whole.

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**25 February 2014**

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<sup>27</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADkAMAAyAHwAfABUAHIAdQBIAHwAfAAwAHwA0>

<sup>28</sup> [http://www.ombudsman.org.uk/\\_data/assets/pdf\\_file/0009/1107/Trusting-in-the-pensions-promise-report.pdf](http://www.ombudsman.org.uk/_data/assets/pdf_file/0009/1107/Trusting-in-the-pensions-promise-report.pdf)