CEREBRA
Working wonders for children with brain conditions

UNIVERSITY OF LEEDS

Unacceptable delay:

Complaints procedures for disabled children and their families.

Authors
Luke Clements and Ana Laura Aiello

Student researchers:
Abby Broderick, Ailish White, Alexis Hargreaves, Alice Broome, Amelia Brown, Anna Hadjixenophontos, Arjun Saralaya, Awesah Abid, Chenxin You, Chloe McLaren, Chui Chu, Cillene O'Neal, Dearbhla Marnell-McKnight, Dee Tse, Edward Bowyer, Ejiroghene Obonobor, Ellen Hancock, Ellie Houston, Emily Hewitt, Emily Lee, Eskander Al Kadhem, Fawz Duwhy, Fintan Corkerry, Francesca Hodgson, Hafsah Jahan, Han Chew, Hannah Ray, Hau Lam, Heather Shillito, Henry Holloway, Hoi Chung, Humza Khan, Isabel Owen, James Alexander, Jessica Ward, Josephine Moreton, Khine Win, Leah Fong, Lucy Storey, Max Vincent-Brown, Molly Tinker, Nadja Jahnecke, Nayaab Shahid, Ning Yao, Niyati Korgaonkar, Robert Melka, Rosie Martin-Barton, Searlait McLaughlin, Shize Zhang, Sidon Redie, Tara Parry, Wen Jiang, Yonggon Yun, Yunze Xiao, Zhuoyuan Zhao and Zulqarnain Saddique

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Legal Entitlements & Problem-Solving (LEaP) Project

LEaP is an innovative problem-solving project that helps families of children with brain conditions cope with the legal barriers they face.
We listen to families and help them get the knowledge they need to access health, social care and other support services. We identify the common legal problems that prevent families getting access to services and we develop innovative ways of solving those problems. We aim to reach as many families as we can by sharing our solutions as widely as possible.

School of Law & community engagement

Community engagement is fundamental to the ethos of the School of Law at the University of Leeds. Students are given every encouragement and support to use their legal skills to benefit the local community. In doing this students develop these skills and deepen their understanding of the role of the law in the real world: the central role of the law in fostering social justice. In furtherance of this aim the School supports (among other initiatives) a number of law clinics and the Cerebra LEaP project.

Cerebra Legal Entitlements and Problem-Solving (LEaP):

Cerebra & the LEaP Project

In 2014 Cerebra, a national charity helping children with brain conditions and their families to discover a better life together, endowed a research Chair in Law to support disabled children and their families experiencing difficulties in accessing their statutory entitlements to care and support services. The project is now based at the School of Law, the University of Leeds and the research programme is titled the Legal Entitlements & Problem-Solving (LEaP) Project.[1]

Cerebra receives requests from families for advice and support. Where these requests come within the terms of the LEaP Project, they are assessed by the Cerebra in-house research unit and those cases which meet the LEaP eligibility criteria are referred to the Project Team for consideration. We listen to families and help them get the knowledge they need to access health, social care and other support services. We identify the common legal problems that prevent them from getting access to services and we develop innovative ways of solving those problems. Commissioning research, which benefits from the School of Law's student '*pro bono*' volunteers is a key element in this strategy. We aim to reach as many disabled people and their families as we can by sharing our solutions as widely as possible.

As well as helping individual disabled people and their families, the Project generates vital information for the wider programme. The research is aimed at improving our understanding of the difficulties faced by disabled people and their families in accessing support services and learning how these problems can be resolved effectively. The team uses the research data (which is held securely and anonymised) to study practical problem-solving techniques and identify which approaches work best, with a view to refining the way we provide advice and disseminate good practice findings for the wider public benefit.

One commonly occurring problem families encounter concerns difficulties and delay when using the local authority complaints process in both England and Wales. Such problems cause untold stress and distress for families, many of whom are barely coping: aptly described by one family as 'living on a cliff edge.'[2] Having to navigate a dysfunctional complaints system can be the final straw leading to family breakdown. So frequent were the referrals received by the Cerebra LEaP team, that it was decided that this topic should be the subject of a specific 'problem-solving' research. The student research team at the School of Law, the University of Leeds has undertaken this project.

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[1] Details of the programme and past research outputs can be accessed at: https://cerebra.org.uk/what-we-do/research/our-research-partners/university-of-leeds-school-of-law/

[2] L Clements and S McCormack *Disabled Children and the Cost Effectiveness of Home Adaptations & Disabled Facilities Grants* (Cerebra 2017).

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Key Messages

1. The research reveals serious (and systemic) failings in the way that a number of English councils investigate children's social service complaints (para 6.10). The research findings locate the problem squarely with those councils that operate defective complaints procedures and not (for example) with the Local Government and Social Care Ombudsman (LGSCO) (para 6.12).
2. Over 60 per cent of the cases included in the research (where the LGSCO found fault with the council's complaint handling) were remitted back to the council without a recommendation for compensation for the delay – despite the average time (from the initial complaint to the LGSCO's report) being 345 days (para 5.02). In the remainder of cases, where compensation was recommended, the average time amounted to 572 days and the average compensation amounted to 30p per day (para 5.07).
3. The current regime rewards councils that maintain dysfunctional complaints systems, as the penalties for such poor behaviour are either minimal or non-existent (paras 6.11 and 6.25).
4. Central Government and LGSCO guidance fail to give emphasis to the fact that delay, when it impacts on the life of a child, is to be treated as damaging and requiring a special response (para 6.09).
5. The current complaints system discriminates against children and families with low incomes and / or poor support networks (para 6.06).
6. Recommendations include:
    - Central Government and the LGSCO guidance should formally recognise that delay in relation to children's services complaints is a substantive harm, for which there is a presumption that appropriate compensation should be paid (paras 6.15 and 6.18).
    - The Secretary of State should demonstrate a willingness to use his default powers to require recalcitrant authorities to exercise their functions in a way that complies with the law (para 6.29).
    - Explicit reference to LGSCO findings should be made in Ofsted inspection reports to demonstrate that there are 'visible' regulatory consequences for councils that operate dysfunctional complaints systems (para 6.31).
    - A Parliamentary Committee should take responsibility for ensuring that councils comply with LGSCO findings and recommendations (para 6.34).
    - The LGSCO should develop a rational scale for compensating families with disabled children for delay in the complaints process (para 6.35).
    - The three stage complaints' process operating in England should be replaced by a two stage process – along the lines of the system operating in Wales (para 6.21).

1. Introduction

1.01 A commonly occurring problem that disabled children and their families encounter when trying to access their legal entitlements, concerns the failure of local authorities to address their complaints in a timely and effective way. It is a problem identified not only by the Cerebra in-house research team, but also by both the English Local Government Ombudsman (now known as the Local Government and Social Care Ombudsman (LGSCO)[3]) and the Public Services Ombudsman for Wales. They have each published thematic reports on this question.[4]

1.02 Defective complaints investigations inevitably lead to delay. Delay is generally harmful – as the legal maxim 'justice delayed is justice denied' acknowledges. Delay is however an especial problem for children: children don't get a second chance at childhood; children can't stop their needs changing while they hang around waiting for a public body to get its act together. Delay is insidious and pernicious: an ill that is almost impossible for a poorly networked parent to confront. The damage is sometimes invisible and unquantifiable – lost opportunities and experiences – for example not being able to leave a house or access a garden for a year or losing out on an educational, leisure or social opportunity. But it can also be very real – for parents it can be a mental and marriage breakdown due to the absence of a break from caring and / or the loss of paid employment. For all too many disabled children, the inability of their families to cope with the consequences of institutional failure, results in them becoming 'looked after' by the local authority.

1.03 Families are entitled to use a number of statutory and non-statutory complaints procedures when they are dissatisfied with the actions of a local authority or NHS body. This study focuses on the statutory process for people who wish to complain about a failure by their local children's social services department. Chapter 3 of this report details the legal context for this process. 'Process' is, however, an inadequate word to describe the injustices faced by disabled children and their families when they encounter a system beset by delay. Delay is not simply an unfortunate procedural irregularity, it is a 'substantive' breach of fundamental human rights (discussed further at paras 1.04 and 6.17 below) – and particularly so for disabled children and their families.

[3] The Local Government Ombudsman changed its name to the 'Local Government and Social Care Ombudsman' (LGSCO) to reflect the full scope of its jurisdiction (which increased in 2010 - see para 4.02 below). In this report we refer to LGSCO throughout, although technically, before 2017 the references should simply be to the 'Local Government Ombudsman'.

[4] See Local Government Ombudsman *Are we getting the best from children's social care complaints?* Focus report: learning lessons from complaints (LGO March 2015) and the Public Services Ombudsman for Wales *Ending Groundhog Day Lessons from Poor Complaint Handling* (2016).

Delay and the right to an effective remedy

1.04 The Children Act 1989 section 1 acknowledges that, as a general principle, delay 'is likely to prejudice the welfare of the child'. The European Convention on Human Rights (ECHR) Article 6 requires that proceedings should be determined within a reasonable time. A number of judgments of the European Court of Human Rights concerning the rights of children have considered excessive delay and Article 6.[5]

1.05 In *Kudła v. Poland*[6] the Strasbourg Court held that Article 13 (the right to an effective remedy) placed on states, both proactive and reactive duties: to ensure that there are efficient well-resourced systems in place to avoid excessive delays that impair the enjoyment of convention rights, as well as the existence of effective remedies 'in practice as well as in law' for those who experience such delay. This report concludes that where there has been excessive delay in determining a complaint concerning a disabled child's needs - an effective remedy must not only be compensatory – it must also be 'dissuasive' (see para 6.32 below).

1.06 The Convention on the Rights of the Child Article 23 highlights the importance of disabled children having 'effective access' to appropriate support and the Convention on the Rights of Persons with Disabilities Article 13 makes clear that 'effective access' includes access to justice – and that to ensure this occurs states are required to (among other things) 'promote appropriate training for those working in the field of administration of justice.'

1.07 A 2018 report by the Equality and Human Rights Commission (EHRC) provides extensive citation for the proposition that access to effective remedies is an essential element of the rights enshrined in the International Covenant on Economic, Social and Cultural Rights.[7] The report notes 'that in practice access to justice is beyond reach for many people in Great Britain, especially children, disabled people and ethnic minorities' (at page 7).

[5] See, for example: *EO and VP v Slovakia* nos 56193/00 and 57581/00 27 July 2004; *Suss v Germany* no 40324/98 12 April 2006; *Karcheva and Shtarbova v Bulgaria* no 60939/00 28 December 2006.

[6] European Court of Human Rights no. 30210/96 26 October 2000 paras 155-56.

[7] EHRC *Progress on socio-economic rights in Great Britain: Update report on Great Britain's implementation of the International Covenant on Economic, Social and Cultural Rights* (March 2018) para 5.1.

2. Methods

2.01 The research involved analysis of 52 consecutive weekly digests[8] published by the Local Government and Social Care Ombudsman (LGSCO) summarising 1,574 complaint decisions made by his office concerning 'children and education'. Although, as noted above, there is significant evidence of failings in children's services complaints in Wales. England was chosen because of the LGSCO's impressive database – which contains details of every complaint decision it has made.[9] Problematically only a few of the Public Services Ombudsman for Wales' reports are published.

2.02 The digests considered were those published between the 23 November 2017 and 22 November 2018 (inclusive). These dates were chosen to ensure that they provided most recent sample for the research analysis.

2.03 56 *pro bono* students (both undergraduate and postgraduate) from the School of Law, the University of Leeds volunteered to assist with the research. They worked in nine teams – each comprising of six or more students. The student volunteers undertook the initial phase of the analysis, identifying all decisions in the digests that fell within the scope of the research. This phase of the project took place between the 31 October 2018 and 5 December 2018, with each team reviewing the reports of at least five weekly digests.

2.04 Training was provided for the students. This included an explanation of the relevant law that regulates the way that local authorities are obliged to investigate children's social services complaints (outlined at chapter 3 below), as well as the procedures that apply when complaints of this nature are referred to the LGSCO.

2.05 The research study is limited to complaints that fell within the ambit of the formal Children Act 1989 (Part 3) complaints procedures – for which there is a statutory process prescribed by regulations.[10] This segment of LGSCO complaints was chosen because: (a) it is the subject of specific statutory regulations – and so requires that every English social services have the same process; (b) the regulations stipulate specific timescales for each stage of the process; and (c) a significant proportion of the referrals received by the Cerebra in-house team fell within the ambit of these regulations. Complaints of this nature cover matters such as assessments concerning the needs of disabled children, care planning, reviews, support and services (including for example respite / short breaks support, adaptations, equipment, direct payments) for (among others) disabled children, parent carers and young carers. These procedures do not however cover complaints concerning court proceedings (i.e. care proceedings, contact and residence arrangements etc.), education disputes, including

[8] These published each week by the LGSCO as 'Weekly update on children and education complaint decisions'.
[9] Accessible at www.lgo.org.uk/decisions. On request the LGSCO will send weekly emails containing details of all decisions it has made in the previous week concerning specific topics – in the case of the present research, the topic being 'children and education'.
[10] Children Act 1989 Representations Procedure (England) Regulations 2006, SI No 1738.

those for which there is a pending Special Educational Needs and Disability Tribunal hearing, issues relating to a data protection breach, disputes concerning the provision of housing and so on.

2.06 Having identified complaints that fell within the ambit of the research project, the student volunteers were instructed to identify those within this category that involved a formal complaint (that was upheld) about a failure by the local authority to comply with the requirements of the social services complaints process (the 'core research sample').

2.07 In the second phase, each decision in the core research sample was independently checked and then analysed by the authors of this report. The analysis focused on: (a) the date the complaint was first made to the local authority; (b) the point at which the local authority failed to comply with the statutory complaint process (i.e. at Stage 1, 2 or 3); and (c) the date of the final report by the LGSCO.

2.08 In a number of cases the final LGSCO report did not provide the date when the original complaint was made to the local authority. In other cases the report only stated the month of the complaint – for example simply stating that in 'September 2017 a complaint was made'. In such cases the calculation of the 'delay' i.e. the time between the making of the original complaint and the date of the final LGSCO report, assumed that the complaint was made on the last day of the month quoted. It follows that in most cases the 'delay' calculation will be an under-estimate.

3. Statutory complaints process

3.01 This section provides a brief overview of the law and guidance that regulates complaints that fall within the ambit of the formal Children Act 1989 (Part 3) procedures in England.[11] A short note then follows outlining the process that applies in Wales.

England

3.02 2006 regulations[12] detail the processes that all English children's services departments must follow when dealing with complaints that concern Children Act 1989 (Part 3). The requirements in the regulations are fleshed out by 2006 statutory guidance:[13] generally referred to as the 'Getting the best from complaints' guidance.

3.03 Complaints must generally be made within one year of the act or the omission complained about, although authorities have a discretion to consider complaints beyond this time.

3.04 The complaints procedure includes three distinct stages that must be completed within specific timescales, although local authorities remain under a duty to act expeditiously throughout the procedure.

3.05 The three stages are as follows:

Stage 1 – Local Resolution

Local staff should seek to address the complaint within 10 working days – which can be extended by 10 working days for more complex decisions or if an advocate is required.

Stage 2 –Investigation

If the complainant is dissatisfied with the local stage, the authority must appoint an investigating officer (IO) and an independent person (IP). The IO will prepare a written report.

A senior manager acting as adjudicating officer should then consider the complaints, the IO and IP reports and prepare a response containing their decision and the action the authority will take (with timescales).

The time for this stage is specified as 25 working days – which can be extended to a maximum of 65 working days if there are several agencies involved or a key witness is unavailable. The complainant has the right to request (within 20 working days) a review panel, if dissatisfied with the response.

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[11] For further detail see S Broach, L Clements, and J Read *Disabled Children: A legal Handbook* (Legal Action 2016) chapter 11 accessible at https://councilfordisabledchildren.org.uk/help-resources/resources/disabled-children-legal-handbook-2nd-edition

[12] Children Act 1989 Representations Procedure (England) Regulations 2006, SI No 1738. Enabling powers: Children Act 1989, ss 24D, 26, 26A, 59, Sch 7.

[13] Department for Education and Skills, *Getting the best from complaints: social care complaints and representations from children, young people and others* (2006).

Stage 3 – Review Panel

The local authority must convene and hold the review panel within 30 working days of a request. The panel must issue a written report of its findings within five working days of its meeting and the authority must then notify the complainant within 15 working days, of its decision and of the right to refer the complaint to LGSCO.

Wales

3.06 The process is different in Wales, where the equivalent statutory provision is the Social Services and Well-being (Wales) Act 2014 and for which the relevant regulations[14] and guidance[15] provide for just 2 stages to the process: (1) a local resolution stage; and (2) a formal stage (involving an independent investigator).

3.07 The regulations provide for complainants to skip the informal resolution stage and go directly to the second independent stage. The guidance stipulates that this should be 'completed, and a full written response issued to the complainant, within 25 working days of the start date' (para 75). In 'exceptional circumstances', however – the guidance provides for additional time, provided that the authority writes to the complainant explaining the reason for the delay and that the response is then provided 'as soon as possible and no later than six months from the date on which the complaint was received' (para 76).

[14] The Social Services Complaints Procedure (Wales) Regulations 2014 SI 1794 (W. 187).
[15] Welsh Government *A guide to handling complaints and representations by local authority social services* (2014).

4. Local Government and Social Care Ombudsman (LGSCO)

4.01 The powers of the Commissioners for Local Administration in England (now generally known as the Local Government and Social Care Ombudsman – LGSCO) are defined by the Local Government Act 1974. The LGSCO may investigate complaints of maladministration or service failure causing injustice, once the local authority or provider has been given an opportunity to respond to the initial complaint.

4.02 Since 2009[16] the LGSCO has the additional responsibility of investigating complaints about adult social care providers: complaints made by (or on behalf of) people who arrange or fund their own social care. In 2018 it was estimated that there were 18,500 adult social care provider organisations.[17]

Workload

4.03 In 1994/95 the Local Government Ombudsman (at it was then generally called) received a total of 838 complaints concerning both adult and children's social services (representing 5.4 per cent of all complaints it received).[18] By 2018/19 this had risen to 5,751 complaints with the proportion of social services and education complaints rising to 34 per cent (of the total complaints that year – 16,899).[19] The LGSCO now receives more children's social services and education complaints than any other category of complaint (3,196 in 2018/19 – just under 20 per cent of all complaints).[20]

4.04 The substantial rise in complaints has been mirrored by increasingly severe restrictions on the availability of publically funded legal advice and support: indeed the legal aid cutbacks may have contributed to this increase.[21] At the same time the LGSCO's remit has been widened (see para 4.02 above) and, as Kirkham and Wells have noted, the continuing policy of austerity has caused ombudsmen schemes to form 'increasingly central figures in the provision of both civil and administrative justice.'[22] Such a collision of adverse forces might have been more manageable had the LGSCO's budget not also been cut severely.

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[16] The 1974 Act being amended (with the addition of a new Part 3A) by the Health Act 2009 Sch.5(1) para.2.

[17] Skills for Care *The size and structure of the adult social care sector and workforce in England* (2019) p.8.

[18] A Griffith 'The Local Government Ombudsmen: a review' Journal of Social Welfare and Family Law' 18(2) 1996: 233-242 at 234.

[19] LGSCO *Review of local government complaints 2018-19* (LGSCO 2019) p.7.

[20] LGSCO *Sharing the learning Annual report and accounts 2018-19* HC2241 (House of Commons 2019) p.10 and LGSCO *Data sheet complaints received (2018-19)* (2019).

[21] The available evidence indicates that the significant increase in the proportion of litigants in person, in the civil courts is linked to the enactment of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* – see G G Grimwood *Litigants in person: the rise of the self-represented litigant in civil and family cases in England and Wales* Commons Briefing papers SN07113 (House of Commons Library 2016) p.3.

[22] R Kirkham and P Wells, 'The Ombudsman, Tribunals and Administrative Justice Section: Evolving Standards in the Complaints Branch' 2014 36(2) Journal of Social Welfare & Family Law 190.

4.05 Central Government funding for the LGSCO over the past twenty years has changed markedly. The official literature published by the LGSCO (i.e. its annual reports and accounts) is reserved when it comes to the effect of the change in the funding situation. However, as Tables 1 and 2 below demonstrate, Central Government funding for the LGSCO is (when inflation adjusted[23]) half of what it was 8 years ago. In the last 10 years there has been, in consequence, a 20 per cent reduction in LGSCO staff (from 209 FTE staff in 2007/08 to 166 in 2017/18).

LGO / LGSCO funding

Financial Year	Grant (£000)	Total spend [1]	Grant (2018 index) [2]	Spend (2018 index [2]
97/98	7400	7453	12792	12883
98/99	7620	7701	12972	13110
99/00	7850	8058	12980	13324
00/01	8650	8618	14054	14002
01/02	9244	9334	14772	14916
02/03	11480	10434	17830	16205
03/04	10490	11079	15821	16710
04/05	11058	11059	16220	16221
05/06	11522	11848	16377	16840
06/07	13221	13812	18019	17966
07/08	12851	13191	16844	17289
08/09	13750	14064	18118	18531
09/10	16145	13793	20335	17373
10/11	15261	15882	18271	19015
11/12	14409	15840	16714	18374
12/13	13443	14178	15134	15961
13/14	12307	13153	13535	14465
14/15	16213	11983	17656	13049
15/16	12684	12622	13578	13511
16/17	10070	11993	10406	12394
17/18	10140	12734	10140	12734

Table 1

[1] Total comprehensive expenditure.
[2] Inflation adjusted to 2018.

LGO / LGSCO funding

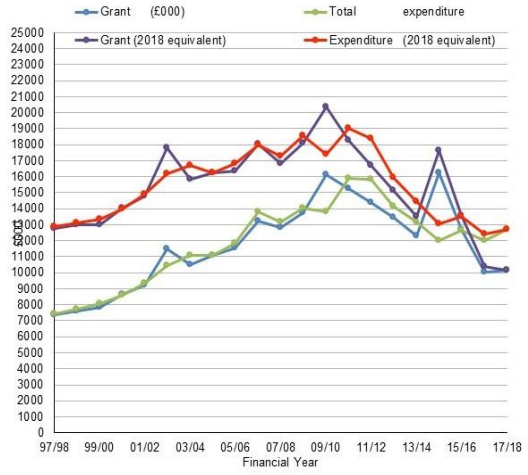

Table 2

Managing the LGSCO workload

4.06 As the above Tables demonstrate, in real terms the LGSCO's current funding is little different to that in 1997 – when (as noted at para 4.03) it received a fifth of the social services complaints it does today. Inevitably, therefore, the organisation has had to adjust the way it operates. This has happened at a time when there has been increased scrutiny of public bodies – in terms of performance indicators and targets,[24] and in the shadow of a report that suggested that a local ombudsman was unnecessary,[25] and a further report that suggested that the LGSCO's role be limited to ensuring that local authority and care providers operated effective complaints systems.[26]

[23] Bank of England www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator.
[24] G Bevan and C Hood 'What's measured is what matters: targets and gaming in the English Public Health Care System' Public Administration Vol. 84, No. 3, 2006 (517–538).
[25] G Chipperfield *Report of the Financial Management and Policy Review of the Commission for Local Administration in England* (Department of the Environment, 1995) and see also N O'Brien 'What Future for the Ombudsman?' The Political Quarterly, Vol. 86, No. 1, January–March 2015 pp.72-79.
[26] R Gordon *Governance Review of the Local Government Ombudsman Service A report for the Secretary of State for Communities and Local Government* (Department of Communities and Local Government 2013) para 28.

4.07 Faced with these pressures the LGSCO has adopted a number of mechanisms to enable it to sustain its core functions. These include: setting itself time targets for turning around complaints; rigour in returning complaints to local authorities which have not completed the prescribed three local stages; the issuing of thematic reports to address commonly occurring problems; and the running of training courses for local authorities on effective complaint handling.

4.08 All complaints are now subject to a formal 'initial check' which has resulted in half of all complaints being redirected to another organisation or referred back to the local authority / care provider (i.e. because the LGSCO considers that they have not completed the local authority / care providers complaints process).[27]

4.09 The LGSCO's (self-imposed) targets are timescales within which 'investigations' are to be completed: 65 per cent within 13 weeks; 85 per cent within 26 weeks; and 99 per cent within 52 weeks – all of which were met or exceeded in 2018-19.[28]

LGSCO rules for early acceptance of cases

4.10 Complainants, before approaching the LGSCO are required by the 1974 Act to give the local authority 'a reasonable opportunity' to investigate their complaint and respond unless, because of the particular circumstances, it is not reasonable to expect them to do this.[29]

4.11 LGSCO guidance[30] advises that even where the complainant 'urgently needs services' it will be expected that they show that they have exhausted such procedures before using the LGSCO service (p.27). The guidance provides a number of reasons why in practice this is of importance, not least that it provides authorities 'an opportunity to learn from mistakes and take remedial action as early as possible in response to a justifiable complaint' (p.28).

4.12 The guidance explains that although the LGSCO will be 'very cautious about starting an investigation where local resolution methods have not been exhausted' there are certain situations where this will not be the case. For the purposes of this research the material situations being (pp. 28-29) where a local authority has: (a) been notified of a complaint but failed to respond within a reasonable time frame; or (b) refused to consider the complaint, or progress it to the next stage in its procedure.[31]

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[27] Local Government and Social Care Ombudsman *Sharing the learning Annual report and accounts 2018-19* HC2241 (House of Commons 2019) p.9: in 2018-19 8,709 complaints were dealt with by 'initial check' of which 4,458 resulted in a more detailed investigation.

[28] Ibid p.11.

[29] Local Government Act 1974, s26(5).

[30] LGSCO *Guidance on Jurisdiction* (September 2019).

[31] In relation to children's social care complaints, the guidance notes (at p.29) that where: a complainant has requested a Stage 2 investigation of their complaint and 'the council is refusing or delaying to conduct such an investigation, and there appears to be no legitimate reason for this, we might make a swift decision on the complaint, recommending that the investigation is carried out by the Council as a matter of urgency'.

Remedies guidance

4.13 The LGSCO has published guidance on what is considered to be an appropriate remedy, where maladministration has been found. The most recent guidance was issued in 2018[32] (from which the following extracts are taken).

Quantifiable loses

4.14 In some cases remedial action may include reimbursing the complainant (in full or in part) for actual, quantifiable financial loss which has directly resulted from the fault – for example, benefits not paid and any avoidable, reasonable expenses. The guidance makes clear that the approach is compensating for out-of-pocket costs – so if the complainant is unable to procure the services privately (while complaining) – for example because of lack of money or skill in securing the support – then no compensation can be recommended under this head. In this context the guidance states (p.6) that the 'remedy for this depends on the level of injustice caused by not having these services, and should be assessed in line with our guidelines on distress and harm.'

4.15 The guidance advises that the LGSCO will, where it is 'not possible nor appropriate for remedial action to be taken' (p.3):

> consider asking for a payment to acknowledge the impact of the fault in terms of loss or harm. These payments usually fall into two categories:
>
> - acknowledgment of a loss of non-monetary benefit (such as education or amenity); or
> - acknowledgment of avoidable distress, harm, risk or other unfair impact of the fault. This can include uncertainty, raised expectations, lost opportunity and outrage.

4.16 In relation to payments for 'distress' the guidance states that this 'is often a moderate sum of between £100 and £300 but that where 'the distress was severe or prolonged, up to £1,000 may be justified. Exceptionally, we may recommend more than this' (p.9).

[32] Local Government and Social Care Ombudsman *Guidance on good practice: Remedies* (LGSCO May 2018).

5. Findings

5.01 The research project considered 1,574 complaints' decisions concerning 'children and education', the majority of which were not investigated by the LGSCO for one reason or another (see para 4.08 above). Of those that were investigated, 529 came within the criteria of the project (see para 2.05 above) and of these, 55 (just over 10 per cent) identified significant failings in the complaints process. The 55 complaints concerned 40 social services authorities (26 per cent of all such authorities). 10 of these authorities accounted for 25 of the 55 complaints[33] i.e. 45 per cent of all of the complaints identified in the core research sample.

Cases 'referred back' without a recommendation of compensation for the delay

5.02 In 33 cases the ombudsman referred the complaint back to the council - because it had failed to follow the correct process (i.e. refused a Stage 1 / 2 / 3 request). In these 33 cases no compensation was recommended. In only 26 of these cases was it possible to calculate with any degree of accuracy the time that elapsed between the making of the original complaint and the date of the final LGSCO report (see para 2.08 above). In these the average time from the initial complaint to the ombudsman's report was 345 days and the individual times for the 26 cases are shown diagrammatically in Table 3 below. What has to be appreciated is that these cases were not 'determined': they were returned to the local authority process – and so it could have been many more months before any resolution occurred. In addition to the case considered immediately below, two other 'pen sketches' of cases that fell into this category are provided at para 5.06 below.

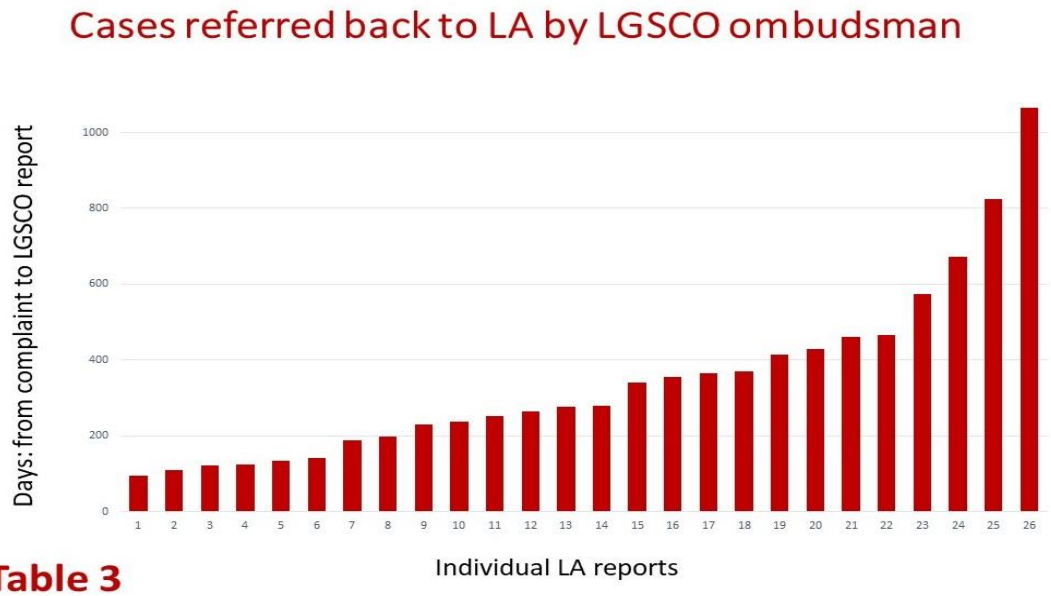

Table 3

[33] One had four complaints, three had three and six had two.

5.03 A 2018 LGSCO report[34] is illustrative of this problem. It concerned a complaint made by a mother in April 2016 about a council's decision to stop providing support for her disabled child. The council refused to alter its decision and refused to consider the complaint at Stage 2 of the complaints process – asserting (incorrectly) that it could not accept the complaint as it concerned 'professional opinion'. The mother contacted the LGSCO and in July 2017 it recommended that the council undertake a Stage 2 investigation of her complaint. The Stage 2 investigators report was issued in October 2017 and rejected the mother's complaint. She then requested that the complaint proceed to Stage 3. She had no response to her requests and so referred her complaint back to the LGSCO in April 2018. In May 2018 the council responded saying (incorrectly again) that her request did not 'meet the criteria' for it to proceed to Stage 3. In August 2018 the LGSCO issued its report, finding that the council was at fault. The remedy agreed with the council was that it would apologise and (despite the mother's objection) that the complaint would be referred back to the council to convene a Stage 3 review panel. By this time the complaint had taken 2 years and 3 months without reaching the third Stage. No compensation was recommended for the delay.

5.04 It is difficult to understand the LGSCO failure to recommend compensation in cases of this kind – even if it is considered appropriate for the complaint to be sent back to a council that has demonstrated an inability to adhere to the statutory complaints procedures. One possible explanation for this failure was provided in a 2018 LGSCO report[35] considered in the research. The case concerned the failure of a council to provide respite care for a disabled child. The report does not say when the original complaint was made – but states that it was rejected by the council on the 23 March 2017, but that the complainant was not informed of the right to request a Stage 2 investigation and that this was only agreed after he complained to the LGSCO. The ombudsman's office found fault and then referred the complainant back to the council for it to undertake a Stage 2 investigation (something it should have agreed to almost a year earlier). The report then states (para 15) that as the complainant:

> has not had his complaint dealt with properly by the Council. It is therefore not yet possible to say if there has been fault in the substantive matters causing injustice.

5.05 This statement is particularly troubling and considered further at para 6.16 - 6.18 below.

5.06 Other illustrative examples of cases 'referred back' with no recommendation of compensation:

[34] Complaint no 18 001 321 against Cornwall County Council, 3 August 2018.
[35] Complaint no 17 011 719 against Lancashire County Council, 23 February 2018.

Complaint no 17 000 486 against Bromley LBC 18, June 2018

A young person in the care of a local authority made a complaint through her representative on the 14 October 2016. The council responded and a Stage 2 request was made. The council delayed responding but eventually (almost four months later) refused to allow the complaint to go to Stage 2. The representative contacted the LGSCO who, in May 2017, asked the Council to undertake a Stage 2 investigation. Substantial further delay ensued and when the council failed to respond to requests by the representative, the LGSCO was again approached. The outcome, in its report of the 18 June 2018 was that the council would commission an independent Stage 2 investigation. No compensation was recommended. After 575 days the complainant was back in the position she should have been in after 20 working days (at most) see para 3.05 above.

Complaint no 17 008 432 against Cheshire East Council, 17 November 2017

In September 2016 a mother complained about the failure of the council to meet her son's care needs and to assess her needs as a parent carer. There was no response and she complained again in July 2017. This time the council did acknowledge the complaint but despite the mother's best endeavours no Stage 1 report was forthcoming. The LGSCO's report of the 17 November 2017 notes that in 'recognition for the faults identified' the council agreed to contact the mother to start the Stage 2 investigation. No compensation was recommended. After 413 days she was back in the position that she should have been in after 20 working days (at most) see para 3.05 above.

Cases 'referred back' with a recommendation of compensation for the delay

5.07 In 22 of the 55 cases that identified significant failings in the complaints process (see para 5.01 – 5.02 above) the LGSCO dealt with the complaint concerning the delay (albeit in some cases also referring other aspects of the complaint back for further investigation by the council). In 17 of these cases it was possible to link a recommended award to the delay. In almost all of these cases the recommended award was not expressed as exclusively linked to the delay (i.e. sometimes also linked to the distress and / or time and trouble in making the complaint). It follows that the actual component of the recommended compensation attributable to the delay alone will have been less. However in such cases the average award was 30p per day and for these 17 cases, the average time from the initial complaint to the ombudsman's report was 572 days.

5.08 Table 4 below lists the compensation payment recommendations made by the LGSCO in cases where: (a) the local authority had failed to comply with its Stage 2

responsibilities (i.e. had refused to allow the complaint to progress to Stage 2 or had failed to complete the Stage 2 process); (b) the LGSCO had made a final decision on the complaint (i.e. had not returned it to the local authority for further consideration); and (c) the LGSCO had made a recommendation for compensation for the delay that had resulted from the local authority's failure to comply with the statutory complaints process. Table 4 below, suggests that there is little or no correlation between the length of the delay and the compensation recommended. This is something that we consider further at para 6.35 below.

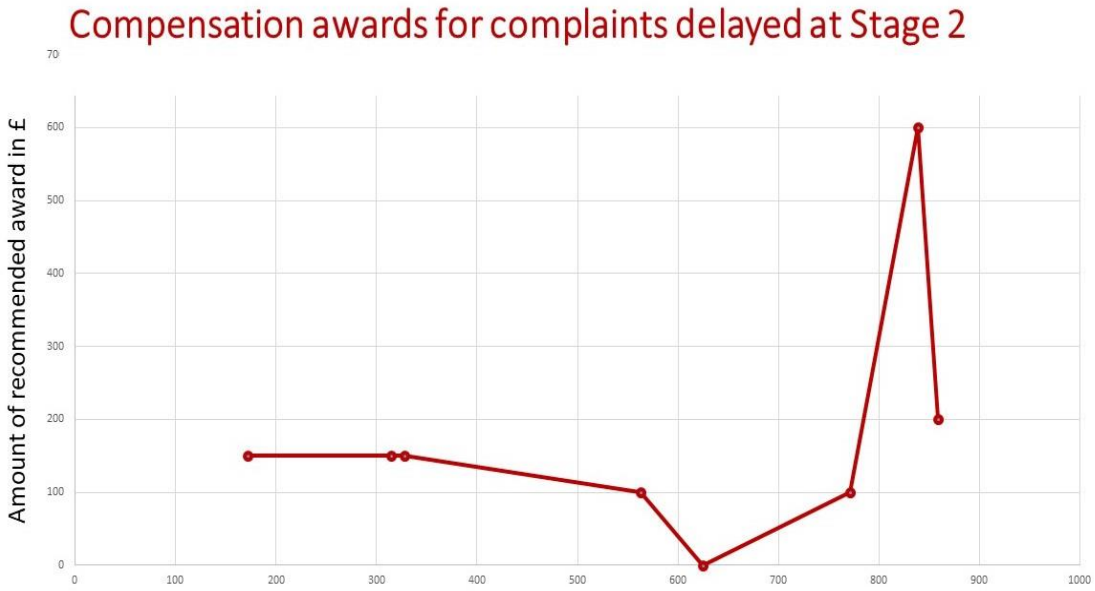

Table 4 Number of days between the making of the complaint and the LGSCO report

5.09 Four illustrative examples of cases referred back to a local authority with a recommendation of compensation for the delay – are as follows:

> ***Complaint no 17 010 520 against Warwickshire, 22 February 2018***
> The Council failed to respond to a complaint by a young person about aspects of her care for almost 10 months (i.e. at the initial stage), which the LGSCO found to be an unreasonable delay and to represent fault by the Council. The council paid her £100 and the report states (para 11) 'In my view, this represents a reasonable remedy for the injustice [she] has suffered as a result'. By the time of the complaint report, almost a year had passed from the date of initial complaint (the complaint was in 'February 2017' and report is dated 22 Feb 2018).

Complaint no 17 003 072 against Swindon, 21 October 2017

The complaint went through all stages of the complaints process. The complainant then referred it to the ombudsman because (among other things) the local authority process had failed to provide redress for the delay in the investigations. The ombudsman's report (para 25) notes that Stage 1 took 10 weeks (rather than the 10 working days generally appropriate) and Stage 2 took 34 weeks (rather than the 25 / 65 working days) – and then states '[t]he excessive time taken to complete the statutory process was fault.' At para 27, £150 is recommended to be paid for this fault.

Complaint no 15 019 585 against Westminster, 14 December 2017

A (1 month late) Stage 1 response to a complaint was not accepted by the complainant who requested a Stage 2 investigation. He heard nothing and so three months later approached the ombudsman. Four months later the ombudsman referred it back to the council recommending all stages of the complaint be completed within six months. Five months later, having heard nothing, the complainant again contacted the LGSCO. Two months later the council produced a report – but this lacked any investigation of the substantive issues: stating that it was intended that this would 'take place as soon as possible.' At the time of the ombudsman's report, ten months later this had still not occurred. The LGSCO recommended that a total of £600 be paid for the distress caused by the failure of the Stage 2 investigation (the case then returned to the local authority for further consideration). From the making of the complaint to the ombudsman's report over 2 years had elapsed and the council had still not completed Stage 2.

Complaint no 17 014 849 against Plymouth, 31 July 2017

The council refused to consider a complaint at Stage 2. The LGSCO found this to be fault and remitted it back to the council. In doing so, the LGSCO noted that in addition to the council apologising for its poor complaints handling that it would 'pay her £150 to recognise the avoidable delay and time and trouble she has been caused in having to complain to this office in order to have the matter resolved.' 172 days by then had elapsed since the complaint was made. This report was issued three months after a near identical LGSCO report concerning the same council[36] where the same fault was found and the same action taken (i.e. apology, compensation and remitted back) but in this case the delay amounted to 328 days – but the same compensation was recommended (i.e. £150).

[36] Complaint no 17012 87328 against Plymouth Council, April 2017.

6. Discussion and analysis

6.01 In this section we discuss the overall issues that arise from the data.

6.02 The research identified a significant number of LGSCO reports which document unreasonable refusals by local authorities to accept valid complaints or to progress them through the various statutory stages.

6.03 Dysfunctional complaints processes are a problem for everyone, but they are a particular problem for disabled children and their families. As we have noted in chapter 1, delay is particularly harmful for children: acute and irredeemable. Put simply, childhoods cannot be re-run.

6.04 Delay also causes disabled children and their families a disproportionate harm. The difficulties that parents of disabled children experience with statutory agencies don't come in single discrete packages but are multiple, interlinked and successional. No sooner has one problem been addressed than another is encountered. People in this position seldom have access to a dedicated legal advice team capable of dealing with these clusters of problems. At any one time a family may be struggling to obtain support services for the disabled child from a number of different statutory agencies – for example: an Education, Health and Care Plan, suitable school transport, a Personal Independence Payment, a home adaptation, respite care, appropriate continence care, a serviceable wheel chair – and so on. Accessing adequate support has always been a challenge but in a time of austerity economics these difficulties have increased.

6.05 It is well established that many people in disadvantaged situations display a reluctance to complain to statutory agencies: a hesitancy attributed to (among other things) a 'power imbalance'[37] and a 'fear of the consequences' (i.e. fear of retaliatory action).[38] Dysfunctional complaints processes must also deter people from making or continuing with their complaints – not least families exhausted by their caring roles and lacking the necessary skills and networks to hold obstructive authorities to account. In purely financial terms, unless there are serious penalties for such a state of affairs, it will be a significant advantage for councils to operate a dysfunctional complaints process. As many LGSCO reports considered in this research demonstrate, the current system rewards councils that fail to fund disabled children's statutory entitlements and then obstruct any consequent complaints – given that the adverse consequences for this behaviour are either non-existent or at most, paltry.

[37] Joint Committee on Human Rights *The human rights of older people in healthcare* HL Paper 156-I HC 378-I (2007) para 234 et seq.
[38] K Simons *I'm Not Complaining, but …* (Joseph Rowntree Foundation 1995).

Discrimination

6.06 Elements of the current complaints system would appear to be discriminatory (in terms of age and socio-economic status) in at least three respects.

6.07 (1) The LGSCO approach to financial redress discriminates against those complaining about a shortfall in their support who are unable – for reasons of poverty or otherwise[39] – to pay for substitute support pending the determination of their complaint. The guidance (considered at para 4.13 – 4.16 above) focuses on compensation for quantifiable (i.e. 'out of pocket') financial loss.[40] For those who have been unable to secure substitute support, the only recompense proposed by the LGSCO's Remedies Guidance is a payment for 'distress' which it considers should be 'modest' (i.e. between £100 and £300) and even in where the distress is severe or prolonged be less than £1,000 (unless exceptional). There is no recognition that this group have suffered the additional harm of being without necessary support. Unfortunately, as this research demonstrates, severe delay is not exceptional and although in many cases the local authority makes substantial savings (i.e. profits by not providing support) in the survey of reports, we have not identified a case where a payment for distress due to delay exceeded £600.

6.08 (2) Families who are poor and / or lack diverse well-connected social networks[41] are likely to find it more difficult to navigate the obstacles thrown up by a dysfunctional complaints system. Research suggests that families need support (emotional as well as practical) to persevere with complaints in the face of refusals by local authorities to comply with their statutory duties.[42]

6.09 (3) The central government 'Getting the best from complaints' guidance[43] and the LGSCO remedies guidance fail to give emphasis to the fact that delay, when it impacts on the life of a child, is to be treated as generally damaging and requiring a special response. Policies of this nature can unlawfully discriminate by treating different people in the same way: by failing to 'distinguish the different' (for example, by failing to treat differently children and adults).[44]

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[39] For example families who (though not poor) are unable to commission substitute support because they are unable to identify a suitable provider.

[40] This approach is expressed in LGSCO report on complaint no 18 001 822 against Redbridge LBC, 8 July 2019 (at para 41) in the following way: 'When the Ombudsmen make recommendations to address an injustice caused by fault they aim to put the person back in the position they would have been had the fault not occurred. As such, financial recommendations are not based on what a service would have cost an organisation. Rather, remedies for financial loss should repay any unnecessary payments the person made …'.

[41] N Finney, D Kapadia, and S Peters *How are poverty, ethnicity and social networks related?* (Joseph Rowntree Foundation 2015).

[42] See for example, L Clements *Accessing Public Services Toolkit* (Cerebra 2017).

[43] Department for Education and Skills *Getting the best from complaints: social care complaints and representations from children, young people and others* (2006).

[44] Contrary to Article 14 of the European Convention on Human Rights (ECHR) – see for example *Thlimmenos v Greece* no. 34369/97 6 April 2000.

Locating the cause of the problem

6.10 The research has highlighted serious failings in the way that a number of English local authorities investigate children's social services complaints. These failings are basic and in some cases are repeat failings by the same authority. As noted above (para 5.01) the 55 complaints in the core research sample concerned failings by a quarter of all English social services authorities, although just ten of these authorities accounted for 45 per cent of all of these complaints.

6.11 The research findings locate the problem squarely with those authorities that are operating defective complaints procedures. It is clear that, for one reason or another, some local authority complaints sections do not understand their statutory obligations or are choosing to ignore them. The research has been unable to identify any seriously dissuasive penalties for such poor behaviour – indeed the evidence suggests that authorities that maintain a dysfunctional complaints system are likely to be at a significant financial advantage compared to those that value and invest in an efficient well trained complaints service.

6.12 Although this report expresses concern about aspects of the LGSCO process (some of which are beyond the ombudsman's control) it has to be stressed that: (1) the research would not have been possible but for the fact that the LGSCO has an excellent publication policy and; (2) the LGSCO is not the cause of the problem and objectively lacks the resources and powers to resolve the serious systems failure by a number of social services authorities.

6.13 The following section considers a range of steps that could be taken to address the problems highlighted in this report.

Recognising the harm caused by delay

6.14 In the course of this research we have been struck by the lack of recognition in official policy documents as to the harm children experience as a result of delay: the absence of powerful statements concerning the (often unseen) damage it inflicts on young lives.

6.15 The overarching central government 'Getting the best from complaints' guidance[45] contains no statement as to why delay is a problem. This needs to be rectified with an explicit and strongly worded statement to this effect: the damage caused by the loss of crucial childhood opportunities and experiences; young lives blighted by a malign 'drift' – symptomatic of organisational indifference and incredibly difficult for families to challenge. The guidance should also make clear that there is a presumption that delay is a substantive harm for which compensation should be paid. Unfortunately at present this is not the case. The guidance (at para 7.6.9) is poorly worded – giving the indication that significant delay is not *per se* an 'injustice'.

[45] Department for Education and Skills, *Getting the best from complaints: social care complaints and representations from children, young people and others* (2006).

6.16 In 2017 (in the context of a case concerning an adult with social care needs) the LGSCO stated that 'for those with care needs and their carers a single day of delay can be significant.'[46] This is a welcome (but rare) example but sadly it was undermined in a 2018 report.[47] The report (considered at para 5.04- 5.05 above) suggested that delay was not a substantive harm and compensation could not be considered until it was known if the original complaint succeeded.

6.17 As we note in para 1.04 above, delay in the administration of justice is a substantive violation of the ECHR, Article 6(1): that rights must be determined fairly, independently and within a 'reasonable time'. It is also simply irrational to suggest that delay is not a 'free standing' harm – just as it would be irrational to suggest that substantial delay in telling a student the outcome of their degree is not 'harm' if it transpires that the student failed or that delay in telling a patient their medical screening result is not harm if it transpires that it was negative. Not knowing what (or when) an outcome will be, puts lives on hold where people forgo options that they might otherwise have chosen. But childhood cannot be 'put on hold' and childhood opportunities and experiences are not there to be deferred to fit in with the convenience of a failed administrative system.

6.18 As with our recommendation concerning central government guidance (para 6.15 above), the LGSCO remedies guidance should make clear that there is a presumption that delay in relation to children's services complaints is a substantive harm, for which compensation should be paid.

6.19 Delay in the administration of justice may be inevitable in impoverished developing nations and states blighted by corruption but it is not inevitable (and it is certainly unacceptable) in a nation such as England. It is essential that those responsible for the operation and the administration of the complaints system do not allow themselves to ignore, underplay or treat delay as just 'one of those things.'

Reviewing the statutory complaints process

6.20 Structural delay is built into the three stage statutory process for children's social services complaints (described in chapter 3 above). The specified timescales assume that a complaint progressing through all stages will take a minimum of 17 weeks but allows for it to take 31 weeks. If the process fails – even if the failure is manifest – there is the additional (and inevitable) time taken by the LGSCO's consideration (see para 4.09 above). As this research makes clear – in practice local determinations are taking considerably longer: the average time from the complaints in the core research sample (from initial complaint to the ombudsman's report) was just under a year (see para 5.02 above) – but these of course were not 'determined' complaints as they were then referred back to the local authority for further consideration.

[46] Complaint no 16 009 854 against Surrey County Council, 9 June 2017, para 38.
[47] Complaint no 17 011 719 against Lancashire County Council, 23 February 2018.

6.21 A key problem with most of the complaints in the core research sample was the failure / refusal of local authorities to permit a complaint to move to the next stage of the process. There is therefore a powerful argument for reducing the number of stages from three to two. This would bring the English system into line with that operating in Wales (see para 3.06 above) – where additionally there is the option of proceeding directly to the second stage.

Training and education

6.22 Many LGSCO reports identified basic legal illiteracy as to the local authority complaints process: the failure of front line (and senior staff) to understand their legal responsibilities. It suggests that there is a need for continuing education as to the applicable law and formal policy. As the LGSCO has noted, nearly two thirds of the complaints its office receives are systemic failures and 'which appear to be driven by attempts to ration scarce resources.'[48]

6.23 We note above (para 1.06), international human rights treaties stress the importance of states promoting 'appropriate training for those working in the field of administration of justice.' There can be no doubt that – from the perspective of social justice - staff need to understand the regulations, guidance and good practice that directs the way they operate the complaints process. As we have noted however, from a financial perspective there is little evidence to suggest that investing in training and supporting a complaints' team is 'cost effective': indeed a good argument can be made that the opposite is the case.

6.24 The ombudsman has been active in promoting and providing training support, and in publishing thematic reports – including, in 2015,[49] a report concerning children's social services complaints. Although special reports of this kind are seen as a 'means to put pressure on the public authorities to … improve administrative practice'[50] and to 'facilitate systemic change'[51] we are not aware of any published research as to their effectiveness in bringing about change of this kind. In the context of this research, it is a sad fact that the authorities responsible for the 55 cases considered in the core sample do not appear to have learned a great deal from the 2015 report. It is also troubling that the officers of at least two of the councils[52] in the research core sample had undergone such training a short while prior to the poor practice

[48] LGSCO *Review of Adult Social Care Complaints 2018-2019* (Sept 2019) p.1 and see also LGSCO *Under Pressure – the impact of the changing environment on local government complaints* (December 2018).
[49] Local Government Ombudsman *Are we getting the best from children's social care complaints?* Focus report: learning lessons from complaints (LGO March 2015).
[50] R Kirkham, 'Auditing by stealth? Special Reports and the Ombudsman' [2005] Public Law 740 – 748 at 746.
[51] A Abraham 'The Ombudsman and "paths to justice": a just alternative or just an alternative?' Public Law, Spring 2008, pp. 1–10 at 4.
[52] Whose failures have resulted in seven of the cases.

occurring.[53] A failure to learn from LGSCO reports is not confined to those concerning children's services complaints, as a 2019 report (concerning school transport) demonstrates. In this case the LGSCO identified a systemic problem with the authority's procedures and spelt out precisely (on several occasions) what remedial action was required (including staff training) and yet the authority then proceeded to make the same mistake.[54]

Remedial action

6.25 One of the most significant findings of the research is that, at present, the adverse consequences for authorities that operate dysfunctional complaints' systems are minimal. Indeed the evidence suggests that in many cases spinning out / frustrating a family's complaint may be financially advantageous to a council.

6.26 Faced with an unresponsive and perverse complaints process, many families will simply abandon their complaint – for well-established reasons: exhaustion, fear of the consequences, ignorance of what the correct process dictates and so on.[55] Those that do persevere and take their complaint to the LGSCO are likely either to be referred back to an earlier stage of the complaints process or at best to receive compensation that in quantum terms is significantly less than the savings made by the local authority through their process of procrastination.

6.27 It would appear to follow that there is a need for seriously dissuasive measures to be available which are capable of counteracting behaviour of this kind.

The role of the Secretary of State

6.28 The Children Act 1989 provides the Secretary of State with the ultimate power to require recalcitrant authorities to exercise their functions in a way that complies with the law. Where the Secretary of State is satisfied that an authority has failed in this respect he or she can give the authority notice that, unless there is a material change in behaviour, directions will be issued mandating compliance (see section 84 of the 1989 Act).

6.29 Although in the 12 month period, the core research sample revealed that at least 26 per cent of all English authorities materially failed to comply with their obligations in relation to the complaint's regulations and statutory guidance. 10 authorities accounted for almost half of all of the complaints investigations identified as defective[56] (see para 5.01 above). Given the seriousness of these failings and the harm being caused to disabled children and their families, there must come a point

[53] Where training of this kind has been delivered, it is noted in the LGSCO's Annual Review letter to the council - accessible at www.lgo.org.uk/your-councils-performance.
[54] Complaint nos 19 003 689, 19 004 764, 19 004 765 against Bexley LBC, 2 October 2019.
[55] See for example K Simons *I'm Not Complaining, but …* (Joseph Rowntree Foundation 1995) and para 6.05 above.
[56] One had four complaints, three had three and six had two.

when the Secretary of State makes clear that the use of this power is being contemplated – or put another way – a point at which a failure to make this clear becomes amenable to a *Wednesbury*[57] challenge.

The role of Ofsted

6.30 The LGSCO has an 'Information sharing protocol' with the Office for Standards in Education, Children's Services and Skills (Ofsted).[58] This commits both organisations to the sharing of appropriate information in order to (among other things) 'assist with effective regulation and complaint handling … [and] to promote safe and high quality children's services and remedy injustice where it is identified'. The protocol notes that Ofsted uses information provided by the LGSCO to 'inform its regulatory and inspection processes' and 'to provide intelligence and information to its inspectors'.

6.31 None of the most recent Ofsted 'Inspection of children's social care services' reports relating to the 10 local authorities who had more than one LGSCO report in the core research sample referenced any relevant LGSCO reports. This does not mean that LGSCO action was not taken into account by Ofsted inspectors, but the lack of explicit reference to critical LGSCO reports is something that should be reconsidered. It is generally accepted that local authority senior officers and members are considerably more concerned about the risk of an adverse Ofsted report than by the publication of a critical LGSCO report. Explicit reference to such LGSCO findings in Ofsted inspection reports would: (a) bring home to local authorities that findings of maladministration can have significant and 'visible' regulatory consequences; and (b) provide complainants with tangible evidence that local authorities are being held to account (and required to learn from their failings).

Additional possible sanctions that are seriously dissuasive

6.32 An essential requirement for a fair and efficient system of justice is the ready availability of effective remedies: remedies that properly compensate those who suffer injustice and are seriously dissuasive of behaviour that causes it.[59]

6.33 There are legal and practical limits on the scope of the powers available to the LGSCO when recommending a remedy for maladministration. In practical terms a material constraint is the fact that compliance with recommendations is not mandatory and authorities can – and do – refuse to comply when they so choose. In

[57] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 where it was held that the actions (and omissions) of public bodies (which include Secretaries of State) could be judicially reviewed on several grounds including 'irrationally'.
[58] The Office for Standards in Education, Children's Services and Skills (Ofsted) and the Local Government Ombudsman *Information sharing protocol* (July 2016).
[59] See for example, EU Council Directive 2000/43/EC *Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* Preamble para 26.

the year 2018-19 the LGSCO was not satisfied with 8 per cent of local authority responses to his recommendations to remedy complaints and this failure included nine children's social services authorities.[60]

6.34 There would appear, nevertheless, to be steps that could be taken[61] to increase local authorities' compliance with LGSCO recommendations. Although discussion of the various options is outside the ambit of this report, one relatively simple option would be for a Parliamentary Committee to take responsibility for overseeing the work of the LGSCO – to the extent of calling to account local authorities that fail to comply with recommendations - for example 'inviting' the senior officers and members to explain themselves before the relevant committee. In this respect, Kirkham has argued persuasively that the time has come when 'Parliament should take a much stronger interest in the work of the [LGSCO]' not least when 'recommendations go unheeded'.[62]

6.35 As we have noted above (see para 6.15) there needs to be an explicit acknowledgment in central government and LGSCO guidance that delay in addressing complaints involving the needs of disabled children is a substantive harm for which compensation should be paid. Allied to this measure, consideration should be given to materially increasing the range of compensation that is recommended for delay in such cases. The above analysis suggests that little thought has been given to this question (see para 5.08 and Table 4 above) and if this is the case, it needs to be remedied. The LGSCO approach to delay in relation to the processing of Disabled Facilities Grants could serve as a useful model:[63] where an average payment of about £124 per month has been suggested. This is in marked contrast to the figures considered in this research – namely that in general no award is made – but that where one is, it averages £9 per month (see para 5.07 above).

6.36 Additionally there is scope for greater use of the many imaginative remedies the LGSCO has already developed. These include the creation of trusts into which payments can be made to fund future needs; ring fenced accounts being set up and administered by a council that complainant's can draw on when needed;[64] the

[60] See LGSCO *Review of local government complaints 2018-19* (2019) p14 and LGSCO *Data Sheet: Remedy and compliance outcomes 2018-19* (2019). The authorities being: Halton BC; Hampshire CC; Kirklees MBC; Lambeth LBC; Norfolk CC; Nottinghamshire CC; Somerset CC; Staffordshire CC; and Wirral MBC.

[61] Short of amending the relevant legislation to provide the LGSCO with power to make mandatory awards. For discussion about the merits of such an approach – see R Kirkham 'Explaining the lack of enforcement power possessed by the ombudsman' Journal of Social Welfare & Family Law Vol. 30, No. 3, September 2008, 253–263.

[62] R Kirkham 'Explaining the lack of enforcement power possessed by the ombudsman' Journal of Social Welfare & Family Law Vol. 30, No. 3, September 2008, 253–263 at 262.

[63] See for example LGSCO report on complaint no 18 010 988 against Enfield LBC, 15 May 2019 para 125.

[64] Complaint no 08 020 110 against Bradford Metropolitan District Council, 27 July 2012 para 42.

payment of sums to provide compensatory leisure or educational activities and so on.[65]

[65] See for example complaint no 07C03887 against Bury MBC, 14 October 2009, para 49 and complaint no 04/C/16622 against Leeds CC, 4 May 2006, para 38.