

18 July 2018

*By email*

Sarah Norman  
Chief Executive  
Dudley Metropolitan Borough Council

Dear Sarah Norman,

### **Annual Review letter 2018**

I write to you with our annual summary of statistics on the complaints made to the Local Government and Social Care Ombudsman (LGSCO) about your authority for the year ended 31 March 2018. The enclosed tables present the number of complaints and enquiries received about your authority and the decisions we made during the period. I hope this information will prove helpful in assessing your authority's performance in handling complaints.

#### **Complaint statistics**

In providing these statistics, I would stress that the volume of complaints does not, in itself, indicate the quality of the council's performance. High volumes of complaints can be a sign of an open, learning organisation, as well as sometimes being an early warning of wider problems. Low complaint volumes can be a worrying sign that an organisation is not alive to user feedback, rather than always being an indicator that all is well. So, I would encourage you to use these figures as the start of a conversation, rather than an absolute measure of corporate health. One of the most significant statistics attached is the number of upheld complaints. This shows how frequently we find fault with the council when we investigate. Equally importantly, we also give a figure for the number of cases where we decided your authority had offered a satisfactory remedy during the local complaints process. Both figures provide important insights.

I want to emphasise the statistics in this letter reflect the data we hold, and may not necessarily align with the data your authority holds. For example, our numbers include enquiries from people we signpost back to the authority, some of whom may never contact you.

In line with usual practice, we are publishing our annual data for all authorities on our website, alongside an annual review of local government complaints. The aim of this is to be transparent and provide information that aids the scrutiny of local services.

Last year we issued one public report about your Council. It concerned the payment of 'top up fees' by the complainant towards the cost of her mother's residential care. We found there was fault by the Council because it did not act in accordance with statutory guidance. Councils may only charge a top up where the resident has explicitly chosen accommodation

which is more expensive than the Council would usually pay. There was no evidence a placement was offered here which did not require a top up and, as soon as she became aware that she was not permitted to pay the top up from her mother's savings, the complainant raised concerns that it was not affordable. The Council was also at fault because it had no evidence it provided information about top up fees (and certainly none was given in writing), it did not enter into a top up agreement with the complainant, and did not check the continued affordability of top ups or the complainant's ability and willingness to pay after she had raised concerns. We recommended the Council should apologise to the complainant, refund the top up payments and reassess the complainant's mother's needs. We also found there was potential injustice to others because of the systemic fault here and recommended the Council should review all those in a similar situation and who pay top ups to see whether refunds were due. The Council provided the remedy to the complainant and identified others similarly affected and said it would make the appropriate refunds where no choice of care home was offered. This action partly complied with the report's recommendations.

We also had concerns with the Council's ongoing practice. As the complainant was placed into accommodation before the Care Act 2014 came into force, the National Assistance Act 1948 applied. We had also asked the Council to review its procedures to ensure they were in line with the 2014 Act; that it enters into top up agreements with third parties (rather than the agreement being between the care home and the third party, as this is not in line with statutory guidance); and that it should consider ending the practice of allowing a third party to pay the top up directly to the care provider, as this is not recommended in the statutory guidance (or to give full reasons why not). In response, the Council resolved to continue with existing top-up fee arrangements which it acknowledged is not recommended by the current statutory guidance because, in summary, other councils adopt the same approach and the Council does not have the budget to underwrite the risk of contracting to pay the full costs of the care placement. This is not acceptable.

The law required councils to make payments for a private care home place although it could recover any top-up. The Council was concerned paying the full fee (and recovering any top up from the third party) would increase bad debt. But the statutory scheme envisages exactly this outcome and councils retain liability for payment in full. Further, the statutory guidance said a council must contract to pay the full cost. The High Court had considered the issue: "Even when such an arrangement is made [for the person to pay the top up to the care home], the liability for payment of the fees remains with the local authority and thus if the individual fails to pay, the responsibility is on the local authority to make such payment and recover it from the individual. In this way, the care home is afforded a measure of protection if the individual becomes unable or unwilling to pay". The High Court went on to consider practical issues if a council was not responsible for payment noting: "even if an arrangement is in place [for a top up fee], it is never intended that the individual is indebted to the service provider... The debt, if any, is owed by the individual or his estate to the local authority. This is the position even if the local authority has a right to recoupment of 100% of the costs. There is no unfairness in this."

The statutory guidance under the 2014 Act requires councils to enter into a written agreement with a third party if it is satisfied they are able to pay the top-up, and confirms that councils retain liability if the third party defaults. By requiring the top-up payer to contract with a care home direct we considered the Council would be failing to comply with the guidance. Departing from statutory guidance is unlawful unless there are cogent reasons to do so: the Council must "follow the path charted by the Secretary of State's guidance, with liberty to deviate from it [...] but without freedom to take a substantially different course". Accordingly, it was not open to the Council to adopt an approach which goes directly against statutory guidance, and lesser departures would only be acceptable if there are good reasons. The reasons the Council had given were irrelevant and a natural consequence of

the framework envisaged by Parliament (an increased financial burden in terms of potential debt). The statutory guidance requires the Council to seek the agreement of the top-up payer to a net payment arrangement which cannot be unilaterally imposed and the Council has no discretion about this and so cannot use resources as a reason to continue with the existing arrangements.

We were therefore concerned with the Council's approach. We also noted in the report to the Cabinet that the Council's standard rates may not be a fair reflection of the market cost, in light of the rise in care home costs as a result of the National Living Wage. The Council appeared to have accepted its standard rates do not properly reflect market costs, with the resulting insufficient capacity in the market without requiring top-ups. The law requires the Council to have regard to the need to ensure sufficient services are available to meet care needs. We were concerned the Council's rates do not properly reflect the market cost of care home accommodation and may result in a deficiency in care provision. In the circumstances, we were not satisfied with the Council's actions and asked the Council to confirm those people who pay top-ups now have a written agreement with the Council (and not the Care Provider); revisit the decision to adopt a net payment approach to top-ups and; address our concerns in respect of pricing.

In response to these concerns, the Council has recently accepted that where it is under a duty or is exercising a power to meet an individual's needs, it is required to and will now contract to meet any top up required. It does not have to enter into a contract with care home providers for the payment of top up fees in other circumstances (although these were not, of course, the subject of the public report). The Council continues to note there is no 'requirement' for it to pay the top up fees to care providers. This is true, but it must show lawful reasons why it is not doing so. The reasons currently given are inadequate. As for pricing of care home support, the Council now says its standard rate includes an annual uplift for inflation and that it is able to purchase the majority of places at this rate. This is encouraging, but we need to see how it will ensure an adequate level of care home accommodation is maintained when the Council's Cabinet has expressed concern that the rate is inadequate. We will be writing to officers separately to follow up our outstanding concerns.

### **Future development of annual review letters**

Last year, we highlighted our plans to move away from a simplistic focus on complaint volumes and instead turn focus onto the lessons that can be learned and the wider improvements we can achieve through our recommendations to improve services for the many. We have produced a new [corporate strategy](#) for 2018-21 which commits us to more comprehensively publish information about the outcomes of our investigations and the occasions our recommendations result in improvements to local services.

We will be providing this broader range of data for the first time in next year's letters, as well as creating an interactive map of local authority performance on our website. We believe this will lead to improved transparency of our work, as well as providing increased recognition to the improvements councils have agreed to make following our interventions. We will be seeking views from councils on the future format of our annual letters early next year.

### **Supporting local scrutiny**

One of the purposes of our annual letters to councils is to help ensure learning from complaints informs scrutiny at the local level. Sharing the learning from our investigations and supporting the democratic scrutiny of public services continues to be one of our key priorities. We have created a dedicated section of our website which contains a host of information to help scrutiny committees and councillors to hold their authority to account – complaints data, decision statements, public interest reports, focus reports and scrutiny

questions. This can be found at [www.lgo.org.uk/scrutiny](http://www.lgo.org.uk/scrutiny). I would be grateful if you could encourage your elected members and scrutiny committees to make use of these resources.

### **Learning from complaints to improve services**

We share the issues we see in our investigations to help councils learn from the issues others have experienced and avoid making the same mistakes. We do this through the [reports](#) and other resources we publish. Over the last year, we have seen examples of councils adopting a positive attitude towards complaints and working constructively with us to remedy injustices and take on board the learning from our cases. In one great example, a county council has seized the opportunity to entirely redesign how its occupational therapists work with all of its districts, to improve partnership working and increase transparency for the public. This originated from a single complaint. This is the sort of culture we all benefit from – one that takes the learning from complaints and uses it to improve services.

### **Complaint handling training**

We have a well-established and successful training programme supporting local authorities and independent care providers to help improve local complaint handling. In 2017-18 we delivered 58 courses, training more than 800 people. We also set up a network of council link officers to promote and share best practice in complaint handling, and hosted a series of seminars for that group. To find out more visit [www.lgo.org.uk/training](http://www.lgo.org.uk/training).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'M King', with a stylized flourish at the end.

Michael King  
Local Government and Social Care Ombudsman  
Chair, Commission for Local Administration in England

**Local Authority Report:** Dudley Metropolitan Borough Council  
**For the Period Ending:** 31/03/2018

For further information on how to interpret our statistics, please visit our website:  
<http://www.lgo.org.uk/information-centre/reports/annual-review-reports/interpreting-local-authority-statistics>

## Complaints and enquiries received

Adult Care Services	Benefits and Tax	Corporate and Other Services	Education and Children's Services	Environment Services	Highways and Transport	Housing	Planning and Development	Other	Total
18	11	6	14	7	3	12	4	1	76

## Decisions made

Decisions made				Detailed Investigations			
Incomplete or Invalid	Advice Given	Referred back for Local Resolution	Closed After Initial Enquiries	Not Upheld	Upheld	Uphold Rate	Total
3	4	48	10	4	6	60%	75

### Notes

Our uphold rate is calculated in relation to the total number of detailed investigations.  
 The number of remedied complaints may not equal the number of upheld complaints. This is because, while we may uphold a complaint because we find fault, we may not always find grounds to say that fault caused injustice that ought to be remedied.

### Complaints Remedied

by LGO	Satisfactorily by Authority before LGO Involvement
6	0